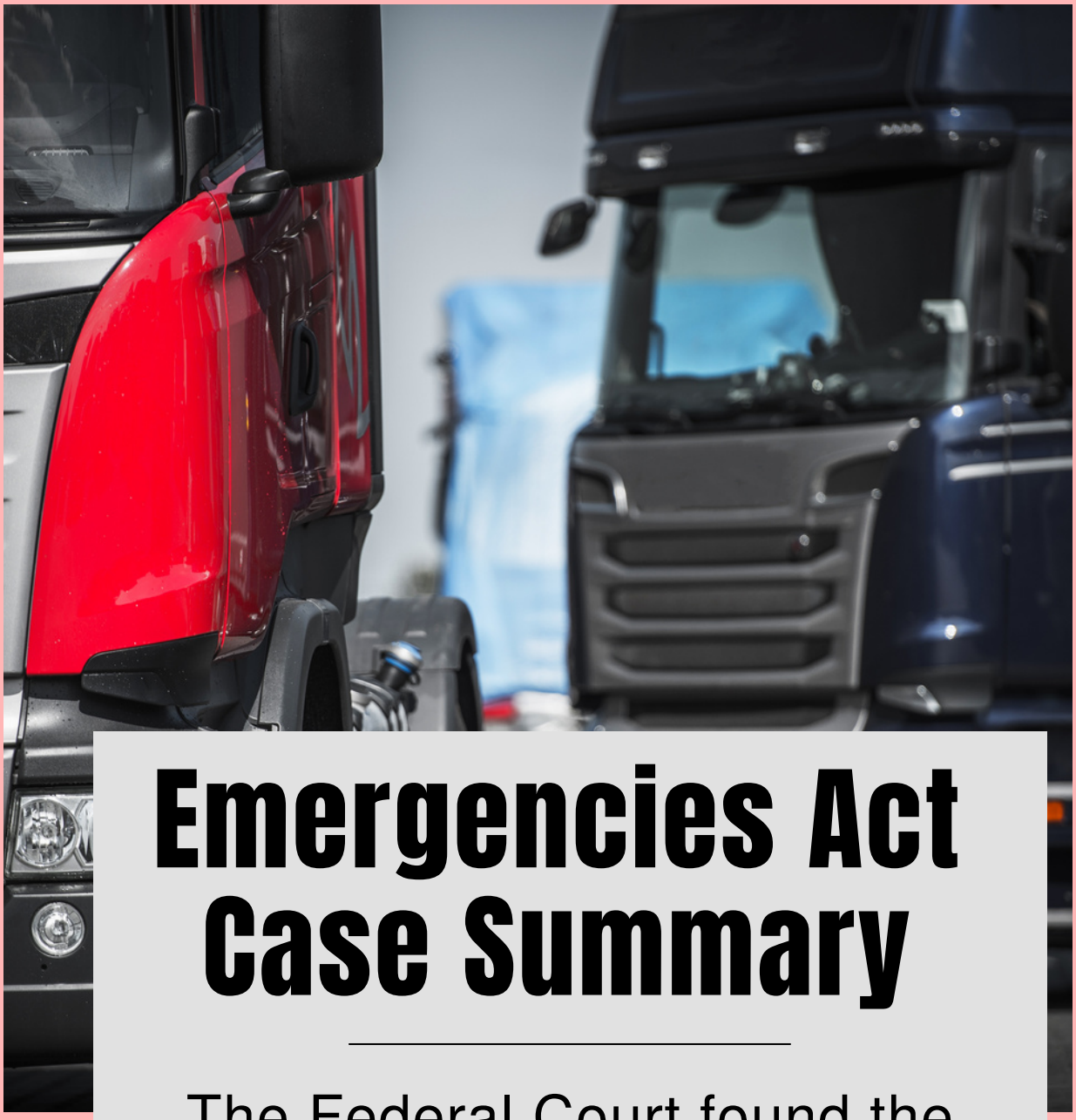

Emergencies Act Case Summary

The Federal Court found the Trudeau government's use of the Emergencies Act illegal and unconstitutional.

We'll explain why

10 KEY PASSAGES FROM THE CASE

Introduction
Christine Van Geyn and Josh Dehaas

1. **Cabinet was NOT owed extraordinary deference when interpreting the Act**
2. **There was no "national emergency" within the meaning of the Act**
3. **The Emergencies Act is a tool of last resort**
4. **No "threats to the security of Canada" within the meaning of the Act**
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10 KEY PASSAGES FROM THE CASE

6. Banning mere attendance at the protests violated freedom of expression

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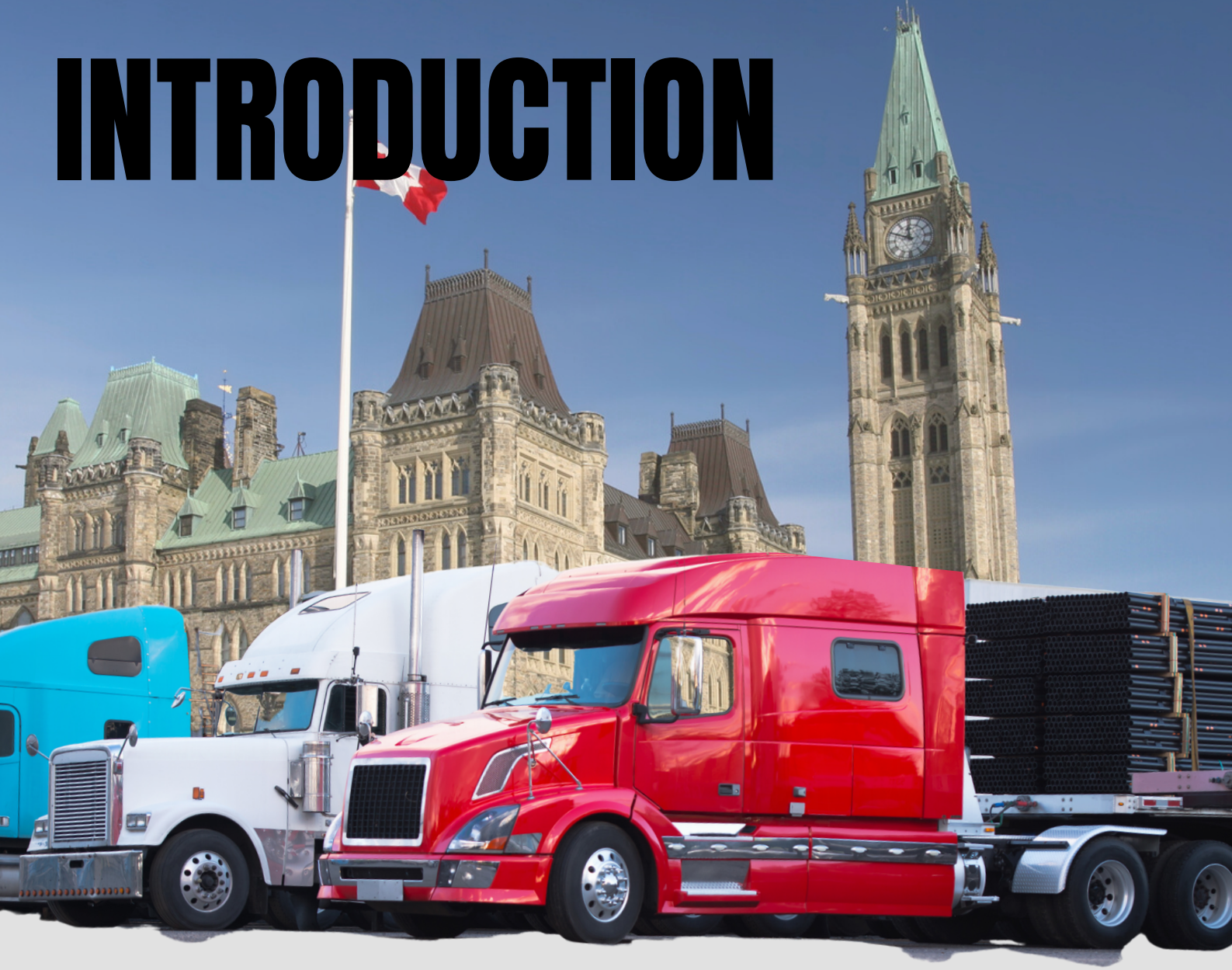
8. Freezing bank accounts violated the right to be free of unreasonable search/seizure

9. The search/seizure violation could not be justified under section 1 of the Charter

10. The Court may not have reached these conclusions without the CCF

INTRODUCTION



What Canadians need to know about the Emergencies Act decision at Federal Court

Christine van Geyn and Josh Dehaas, Canadian Constitution Foundation

On January 23, 2024, the Federal Court of Canada released its historic decision in the judicial review of the Trudeau government's invocation of the Emergencies Act and the regulations made under it in response to the 2022 Freedom Convoy protests.

The Emergencies Act is extraordinary legislation that upends our normal constitutional order and grants sweeping powers to the Prime Minister and Cabinet including the power to create new criminal laws at the stroke of a pen. The Emergencies Act had never been invoked before February 14, 2022. Its use against mostly non-violent protesters concerned about federal COVID-19 policies was disturbing.

The Canadian Constitution Foundation believed all along that the decision was illegal. We believed that the high threshold to invoke the Act, which is a tool of last resort, was not met. We believed that the new criminal laws created by Cabinet under the Act – which prohibited attending convoy protests and froze bank accounts without even reason to suspect a crime had been committed – were unconstitutional.

Justice Mosley agreed. He found that the high threshold to invoke the Act was not met because there was no "national emergency," there was no "threat to the security of Canada" as defined by the legislation, and the regulations violated the Charter rights to freedom of expression and security against unreasonable search and seizure, and that those limits were not justified. The judgment is 190 pages long. We know most Canadians are too busy to sit down and read the decision, so here's a list of 10 key passages that we believe all busy but freedom-loving Canadians should read.

We'd love to hear your thoughts on the case for reform. You can contact Christine personally by email: cvangeyn@theccf.ca

1. CABINET WAS NOT OWED EXTRAORDINARY DEFERENCE WHEN INTERPRETING THE ACT

One of the more galling claims made by the government was that Cabinet is owed near-total deference about whether an emergency exists. Justice Mosley rejected the government's proposition, finding that while Cabinet is owed deference because it needs to respond to a fluid situation quicky, there is no untrammeled discretion and Cabinet is nonetheless constrained by the objective thresholds written into the statute.

[208] The CCF submits that while Cabinet may be the ultimate decision making authority, it only has the powers conferred on it by the Constitution, statute and the common law. *Vavilov*, citing *Roncarelli v Duplessis*, [1959] SCR 121 at p 140, affirmed that there is no such thing as absolute and untrammelled discretion and any exercise of discretion must accord with the purposes for which it was given: *Vavilov* at para 108.

[210] I agree with the CCLA and the CCF that the question of whether a Cabinet decision is unconstrained in the way urged by the Respondent turns on the statutory text and context of the provisions at issue. The *Emergencies Act* contains objective legal thresholds that must be satisfied before a Proclamation may issue. And these thresholds are "more akin to the legal determinations courts make, governed by legal authorities, not policy": *Entertainment Software* at para 34. Thus, while the ultimate decision of whether to invoke the Act is highly discretionary, the determination of whether the objective legal thresholds were met is not and attracts no special deference beyond that set out in *Vavilov*.

2. THERE WAS NO "NATIONAL EMERGENCY" WITHIN THE MEANING OF THE ACT

To invoke the Act, there must be a "national emergency." If the effects of the emergency do not extend to the whole of Canada, the area to which they do extend must be specified. The Trudeau government claimed the emergency existed "throughout Canada." Justice Mosley called this an "overstatement" and found that the provinces were able to deal with the situation using existing laws, such as the Criminal Code.

[248] Section 17(2)(c) of the Act requires that if the effects of the emergency did not extend to the whole of Canada, the area of Canada to which it did extend shall be specified. While the word "area" in the legislative text is singular, per section 33(2) of the *Interpretation Act* that includes the plural. Thus, it was open to the GIC to specify several or many areas that were affected by the emergency excluding others where the situation had not arisen or was under control. However, the Proclamation stated that it "exists throughout Canada". This was, in my view, an overstatement of the situation known to the Government at that time. Moreover, in the first reason provided for the proclamation, which referenced the risk of threats or use of serious violence, language taken from section 2 of the *CSIS Act*, the emergency was vaguely described as happening at "various locations throughout Canada".

[253] Due to its nature and to the broad powers it grants the Federal Executive, the *Emergencies Act* is a tool of last resort. The GIC cannot invoke the *Emergencies Act* because it is convenient, or because it may work better than other tools at their disposal or available to the provinces. This does not mean that every tool has to be used and tried to determine that the situation exceeded the capacity or authority of the provinces. And in this instance, the evidence is clear that the majority of the provinces were able to deal with the situation using other federal law, such as the *Criminal Code*, and their own legislation.

3. THE EMERGENCIES ACT IS A TOOL OF LAST RESORT

Justice Mosley affirmed in the Federal Court decision what the CCF had been arguing: that the Emergencies Act is a tool of last resort

> [253] Due to its nature and to the broad powers it grants the Federal Executive, the *Emergencies Act* is a tool of last resort. The GIC cannot invoke the *Emergencies Act* because it is convenient, or because it may work better than other tools at their disposal or available to the provinces. This does not mean that every tool has to be used and tried to determine that the situation exceeded the capacity or authority of the provinces. And in this instance, the evidence is clear that the majority of the provinces were able to deal with the situation using other federal law, such as the *Criminal Code*, and their own legislation.

This aligns with the testimony of several officials during the Public Order Emergencies Commission, who suggested that although the Act created useful tools, the situation could have been dealt with using existing laws. This included:

- OPP Superintendent Carson Pardy's testimony that "in my humble opinion, we would have reached the same solution with the plan that we had."
- Ontario Deputy Solicitor General Mario Di Tommaso stating it was not necessary.
- Superintendent Robert Bernier, who oversaw a command centre, stated that the powers to compel towing were helpful but that they were not strictly necessary.
- Ottawa Interim Police Chief Steve Bell's claim that the legislation helped police to create an exclusion zone but that police already had a plan to clear the protests.
- Ottawa Acting Deputy Chief Trish Ferguson stated that it "greased the wheels."
- RCMP Commissioner Brenda Lucki's shocking testimony testified that she did not believe the existing tools had been exhausted at the time.

4. NO "THREATS TO THE SECURITY OF CANADA" WITHIN THE MEANING OF THE ACT

Justice Mosley found that there was no threat to the security of Canada within the meaning of the Act. The Act says those words have the same meaning as in the CSIS Act, which includes the threat of "serious violence against persons or property." Justice Mosley noted that the head of CSIS did not believe that definition was met. The only specific example of threats of serious violence provided were weapons uncovered at Coutts, Alberta, but that situation was already dealt with by the RCMP using the Criminal Code before any of the extraordinary regulations were created.

[259] A broad and flexible interpretation of the words "threats to the security of Canada" could encompass the concerns which led the GIC to issue the Public Order Emergency Declaration. Had the meaning of those words not been limited by reference to another statute, and applying a deferential standard of review, I would have found that the threshold was satisfied. However, the words "threats to the security of Canada" do not stand alone in the Act and must be interpreted with reference to the meaning of that term as it is defined in section 2 of the *CSIS Act* and incorporated in section 16 of the EA.

[287] This Court may share the views of those who think that a definition designed to constrain the investigative actions of the security service is ill-suited to serve as a threshold for the invocation of emergency powers by the GIC. Particularly when there may be other valid reasons for declaring an emergency such as those set out in the Proclamation and Section 58 Explanation. But the Court cannot rewrite the statute and has to take the definition as it reads.

[288] Cabinet was in the same position when it was considering how to deal with the situation it was facing in February 2022. It had to consider whether the statutory test was met. Were there reasonable grounds to believe that the people protesting in Ottawa and elsewhere across Canada had engaged in activities directed toward or in support of the threat or use of acts of serious violence against persons or property? This is, as discussed above, an objective standard "more akin to the legal determinations courts make, governed by legal authorities, not policy": *Entertainment Software* at para 34. And while the ultimate decision of whether to invoke the Act is highly discretionary, the determination of whether the objective legal thresholds were met is not and attracts no special deference. There is only room for a single reasonable interpretation of the statutory provision: *Mason* at para 71.

5. "ECONOMIC HARM" IS NOT A PART OF THE THRESHOLD TO INVOKE THE ACT

The government claimed during the Commission, during the Federal Court hearing, and in a press conference following their loss that a "threat o the security of Canada" can include economic harm like damage to supply chains. This would mean the Emergencies Act could theoretically be invoked to address labour strikes, an obviously troubling thought. Justice Mosley found that the harm being caused to Canada's economy, trade, and commerce was concerning but it did not constitute threats or the use of serious violence to persons or property as required by the CSIS Act definition.

[296] This is not to say that the other grounds for invoking the Act specified in the Proclamation were not valid concerns. Indeed, in my view, they would have been sufficient to meet a test of "threats to the security of Canada" had those words remained undefined in the statute. As discussed in *Suresh* and *Arar*, the words are capable of a broad and flexible interpretation that may have encompassed the type of harms caused to Canada by the actions o the blockaders. But the test for declaring a public order emergency under the EA requires that each element be satisfied including the definition imported from the *CSIS Act*. The harm being caused to Canada's economy, trade and commerce, was very real and concerning but it did not constitute threats or the use of serious violence to persons or property.

6. BANNING MERE ATTENDANCE AT THE PROTESTS VIOLATED FREEDOM OF EXPRESSION

Justice Mosley agreed with the CCF's arguments that the regulations limited the right to freedom of expression guaranteed by 2(b) of the Charter . by banning anyone attending an assembly that may be "reasonably expected to lead to a breach of the peace," rather than simply prohibiting conduct like blockades and excessive honking.

[308] I agree with the Applicants that the scope of the Regulations was overbroad in so far as it captured people who simply wanted to join in the protest by standing on Parliament Hill carrying a placard. It is not suggested that they would have been the focus of enforcement efforts by the police. However, under the terms of the Regulations, they could have been subject to enforcement actions as much as someone who had parked their truck on Wellington Street and otherwise behaved in a manner that could reasonably be expected to lead to a breach of the peace.

[345] Political speech is granted the highest level of protection because of its essential role in democratic life: See *R v Guignard*, 2022 SCC 14 at para 20; *Harper-2004* at para 66; *Harper v Canada*, 2000 SCC 57 at para 20. Since the Regulations directly target a political demonstration and the right to free expression of the protestors, the Applicants submit that the highest level of protection is warranted in this case. While parked trucks obstructing the roads and blaring horns are not "high value" speech, the Regulations did not simply prohibit this conduct, which was already illegal under provincial and municipal law, but criminalized the attendance of every single person at those protests regardless of their actions.

7. THE VIOLATION OF FREEDOM OF EXPRESSION WAS NOT A REASONABLE LIMIT

JoJustice Mosley agreed with the CCF that the measures that infringed sections 2(b) could not be upheld under section 1 of the Charter, which allows for reasonable limits where they are demonstrably justified in a free and democratic society. He found the measures were not minimally impairing in two ways. First, they were applied throughout Canada when they could have been limited to Ontario, and possibly Alberta. Second, there were less impairing alternatives available that the government was constitutionally required to select over the measures they chose.

[346] By applying throughout Canada, the Applicants submit, the Regulations exposed everyone in the country to their reach: the fact that they were not enforced in particular areas is inconsequential because they still applied everywhere. The Regulations impaired the right to free expression more than was necessary. They captured bystanders who did not agree with the blockades, did not create them and protested in a non-disruptive way. The Regulations also criminalized travelling to a protest where there might have been a blockade, no matter the person's purpose for being there and whether an actual breach of the peace had occurred or not. This, the Applicants argue, is not minimally impairing.

[353] Minimal impairment requires that the measures affect the rights as little as reasonably possible, they must be "carefully tailored": *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 66. The Regulations and Economic Order fail the minimal impairment test for two reasons: 1) they were applied throughout Canada; and 2) there were less impairing alternatives available.

8. FREEZING BANK ACCOUNTS VIOLATED THE RIGHT TO BE FREE OF UNREASONABLE SEARCH/SEIZURE

Justice Mosley agreed with the CCF that the measures ordering banks to disclose banking information of persons designated by the RCMP and freeze their accounts violated the right to be secure against unreasonable searches and seizures. The searches of bank records were not reasonable because they required banks to inform the RCMP if they had "any reason" to believe someone was materially assisting the protests, when a search normally requires that police prove to a third-party on an objective standard like reasonable suspicion or reasonable grounds to believe that a crime has been committed before the search takes place.

[337] On the evidentiary record, the names were provided to the financial institutions by the RCMP and that was considered sufficient to require disclosure to the police. The absence of any objective standard was confirmed by Superintendent Beaudoin, who oversaw the implementation of the Economic Order. He acknowledged in cross-examination that the RCMP did not apply a standard of either reasonable grounds or a standard of reasonable suspicion, and all they required was "bare belief".

[341] I find that the failure to require that some objective standard be satisfied before the accounts were frozen breached s. 8. Whether that could be justified in the circumstances depends on a section 1 analysis.

9. THE SEARCH/SEIZURE VIOLATION COULD NOT BE JUSTIFIED UNDER SECTION 1 OF THE CHARTER

Justice Mosley found that there was no threat to the security of Canada within the meaning of the Act. The Act says those words have the same meaning as in the CSIS Act, which includes the threat of "serious violence against persons or property." Justice Mosley noted that the head of CSIS did not believe that definition was met. The only specific example of threats of serious violence provided were weapons uncovered at Coutts, Alberta, but that situation was already dealt with by the RCMP using the Criminal Code before any of the extraordinary regulations were created.

[357] The Respondent acknowledges that the suspension of bank accounts and credit cards affected joint account holders and credit cards issued on the accounts to other family members and suggests that it was unavoidable. Indeed the Jost Applicants submitted evidence of that happening to one of them. Thus someone who had nothing to do with the protests could find themselves without the means to access necessaries for household and other family purposes while the accounts were suspended. There appears to have been no effort made to find a solution to that problem while the measures were in effect.

[358] Of particular concern from a section 1 justification perspective is that there was no standard applied to determine whether someone should be the target of the measures or process to allow them to question that determination. As described by Superintendent Beaudoin in cross-examination, it was all informal and *ad hoc*.

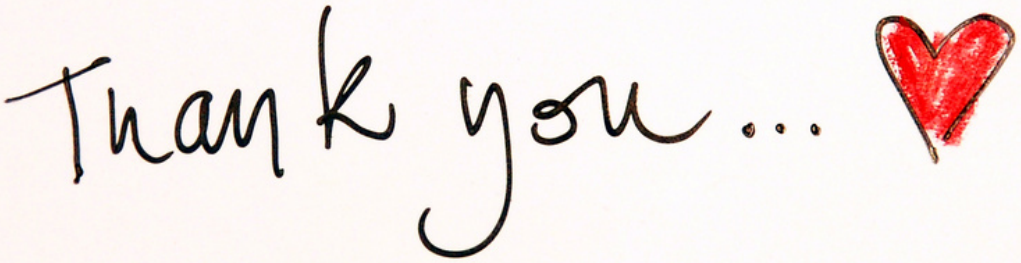
10. THE COURT MAY NOT HAVE REACHED THESE CONCLUSIONS WITHOUT THE CCF

Justice Mosley noted the value of public interest litigants like the CCF in making submissions and offering informed legal arguments.

Justice Mosley said he was initially leaning toward the view that the decision to invoke the Act was reasonable but that he came to the conclusion that it was not after hearing the CCF's arguments. Our donors and staff made a difference! Effective public interest advocacy matters.

[370] At the outset of these proceedings, while I had not reached a decision on any of the fo
applications, I was leaning to the view that the decision to invoke the EA was reasonable
considered the events that occurred in Ottawa and other lo in Jan
went beyond legiti

[371] My preliminary view of the reasonableness of the decision may have prevailed following the hearing due to excellent advocacy on the part of counsel for the Attorney General of Canada had I not taken the time to carefully deliberate about the evidence and submissions, particularly those of the CCLA and CCF. Their participation in these proceedings has demonstrated again the value of public interest litigants. Especially in presenting informed legal argument. This case may not have turned out the way it has without their involvement, as the private interest litigants were not as capable of marshalling the evidence and argument in support of their applications.



The Canadian Constitution Foundation is all of our supporters who donated to make this case possible.

We are especially grateful to the lawyers who represented us in this case, Sujit Choudhry and Janani Shanmuganathan