Court File No.: T-347-22

FEDERAL COURT

BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

Application for Judicial Review under Sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

APPLICANT'S RECORD

VOLUME 3

TAB 1

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APPLICANT'S MEMORANDUM OF FACT AND LAW

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OVERVIEW

1. Invoking the *Emergencies Act* creates a *de facto* constitutional amendment that hands the federal Cabinet the most expansive executive powers known to Canadian law.[1] Under the *Emergencies Act*, Cabinet is empowered to unilaterally proclaim a public order emergency. Once Cabinet does so, vast legislative authority is delegated to the Cabinet itself, including the power to create new criminal offences and police powers, without recourse to Parliament, advance notice, or public debate. Under a public order emergency, Cabinet can also exercise legislative power in core areas of provincial jurisdiction, such as property and civil rights, without any requirement for provincial consultation or consent.

2. The *Emergencies Act* creates powers that collide with basic features of Canada's federal constitutional democracy. Canada's past teaches us that these powers should never be used except as a last resort. The *War Measures Act* was used to intern Japanese Canadians during World War II. In 1970, the *War Measures Act* was invoked again, to make mass arrests during the FLQ crisis in Quebec in response to a purported apprehended insurrection that the security services had concluded did not exist. The *Emergencies Act* was itself enacted in 1988 to replace the *War Measures Act* and to ensure these types of abuses never happened again.

3. In the decades since 1988, Canada has weathered terrorist attacks, economic hardship, and an unprecedented global health pandemic, all without ever resorting to the incredible powers contained in the *Emergencies Act*. These years of restraint ended on February 14, 2022, when the federal government declared a public order emergency not in response to a natural disaster or the outbreak of war, but to a series of disruptive but largely peaceful protests, consisting of blockades that crudely used parked cars and trucks to clog public roadways.[2] The protests had been underway for a few weeks when the *Emergencies Act* was invoked. There had been no rioting and no significant property damage. Not a single person had been seriously injured.

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[1] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.).

[2] *Proclamation Declaring a Public Order Emergency*, S.O.R./2022-20 (**"*Emergency Proclamation*"**); *Emergency Measures Regulations*, P.C. 2022-107, S.O.R./2022-21 (**"*Regulations*"**) and the *Emergency Economic Measures Order*, P.C. 2022-108, S.O.R./2022-22 (**"*Economic Measures*"**).

4. The decision to invoke the *Emergencies Act* was unlawful, and the powers created under the legislation were a drastic and illegal overreach and unconstitutional. Although the protests in Ottawa and elsewhere were frustrating and disruptive, they fell far short of the situation required by *Emergencies Act*'s legislative thresholds before the *Act* can be invoked. The Applicant Canadian Constitution Foundation (**"CCF"**) submits that the public order emergency was a dramatic overreaction that was both unlawful and violated the *Charter*, for the following reasons:

i. The *Emergencies Act* defines a public order emergency as a situation arising from *threats to Canada's national security*. Here, Cabinet did not have reasonable grounds to conclude there was such a threat. It reached the conclusion such a threat existed without sufficient evidence, since CSIS itself had concluded and reported that the protests *did not pose a threat to national security,* and no alternative threat assessment was ever prepared.

ii. Section 3 of the *Emergencies Act* stipulates that the *Act* can only be invoked to address a situation that cannot be "effectively dealt with under any other law of Canada." This requirement was not met because existing legal tools under the federal *Criminal Code*, provincial highway traffic and emergency legislation, and municipal bylaws, gave law enforcement and government officials the means they needed to clear out the blockades, and in fact by the time the *Emergencies Act* was invoked, these existing powers had been used to resolve most of the protests.

iii. After invoking the *Emergencies Act*, Cabinet created the *Regulations* and the *Economic Measures*. These legal instruments contained sweeping provisions that violated a number of core constitutional rights.

   a. The *Regulations* made it a criminal offence to participate in, attend, or travel to any public assembly where a breach of the peace *might* reasonably be expected to occur, and deemed every single person there guilty of an offence, no matter what their role had been or their purpose for attending. These provisions amounted to a severe violation of the rights to freedom of expression and assembly under sections 2(b) and (c) of the *Charter*, and the violations cannot be saved under section 1.

   b. The *Economic Measures* required banks and other financial institutions to disclose vast amounts of financial information about their clients to police and CSIS, without any system of prior judicial authorization or safeguards for privacy. This violated the protection in section 8 of the *Charter* against unreasonable search and seizure.

PART I – FACTS

A. The protests in Ottawa and elsewhere

5. On January 28, 2022, the "Freedom Convoy 2022" (**"Convoy"**) arrived in Ottawa. The Convoy was comprised of people from across Canada who intended to protest Canada's public health response to the COVID-19 pandemic and the new vaccination requirements for cross-border truckers. The Convoy's arrival in Ottawa was not a surprise. Its route to Ottawa was widely publicized.[3]

6. Protests took place elsewhere in Canada as well. They included blockades at the Ambassador Bridge in Windsor, Ontario, in Coutts, Alberta, at the Sarnia Blue Water Bridge in Ontario, in Emerson, Manitoba, at the Peace Bridge in Fort Erie, Ontario and in Surrey, Ontario.[4]

B. The invocation of the Emergencies Act, the new powers, and the revocation

7. Cabinet issued the *Emergency Proclamation* pursuant to section 17(1) of the *Emergencies Act* on February 14, 2022. It proclaimed there was a public order emergency throughout Canada, and the justification for that conclusion articulated within the proclamation primarily rests on the existence of the blockades:

> And We do specify the emergency as constituted of:
>
> **(a)** the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,
>
> **(b)** the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,
>
> **(c)** the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,
>
> **(d)** the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

[3] Notice of Application, para. 10, Applicants' Application Record [**"AR"**], Vol. 1 (**"Notice"**), p. 7.
[4] Notice, **AR**, Vol. 1, paras. 11 – 35, pp. 7 to 12.

> **(e)** the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians;

8. The *Regulations* and the *Economic Measures* were promulgated on February 15, 2022. The *Regulations* created four criminal prohibitions that carried the potential of five years imprisonment upon conviction. Section 2(1) of the *Regulations* prohibited participation in a public assembly that may reasonably be expected to lead to a breach of the peace:

> **2(1)** A person must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace by:
>
> **(a)** the serious disruption of the movement of persons or goods or the serious interference with trade;
>
> **(b)** the interference with the functioning of critical infrastructure; or
>
> **(c)** the support of the threat or use of acts of serious violence against persons or property.

9. Section 3 of the *Regulations* prohibited foreign nationals from entering Canada with the intent to participate in or facilitate an assembly as defined in section 2. Section 4(1) prohibited everyone from travelling "to or within an area where" a section 2(1) assembly was taking place. Section 5 prohibited anyone from providing any property, directly or indirectly, to facilitate or participate in a section 2 assembly, or for the purpose of benefitting any person who is facilitating or participating in such an assembly. Section 10(2) set out that contravention of the prohibitions could result in a maximum punishment of five years imprisonment.

10. The *Economic Measures* sought to gather financial information about those participating in the unlawful assemblies and to freeze their finances. Section 2(1) required banks, credit unions, insurance companies, and crowd funding platforms, among others, to "freeze the assets and accounts" of "designated persons". Section 1 defined a designated person as "any individual or entity" that was engaged "directly or indirectly" in an activity prohibited by sections 2 to 5 of the *Regulations* (set out above). Section 3 created a positive obligation on these entities to determine, on a continuing basis, whether they were in possession or control of property owned, held or controlled by a designated person. Section 4 required all of these financial organizations to register with the Financial Transactions

and Reporting Analysis Centre of Canada (**"FINTRAC"**).[5] Lastly, section 5 of the *Economic Measures* required these entities to disclose, without delay, to the RCMP and CSIS:

> (a) the existence of property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a designated person; and
>
> (b) any information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

11. The *Emergency Proclamation* was revoked on February 23, 2022, and pursuant to section 26(2) of the *Emergencies Act*, the *Regulations* and the *Economic Measures* expired that day as a direct consequence of the revocation.

PART II – POINTS IN ISSUE

12. This Honourable Court must address the following *three* issues:

i. Issue 1: Did Cabinet have reasonable grounds to conclude that that the protests were threats to the national security of Canada?

ii. Issue 2: Did Cabinet have reasonable grounds to conclude that the protests could not be effectively dealt with under existing law?

iii. Issue 3: Did the powers created by the *Regulations* and *Economic Measures* violate sections 2(b), (c) and/or 8 of the *Charter*? If so, can any of the violations be saved under section 1?

PART III – LAW & ARGUMENT

A. Issue 1: Did Cabinet have reasonable grounds to conclude that the protests were threats to the national security of Canada?

13. Under section 17 of the *Emergencies Act*, Cabinet must have reasonable grounds to believe a public order emergency exists before it can declare an emergency. Section 16 of the *Emergencies Act* defines a "public order emergency" as "an emergency that arises from

[5] Many of the financial institutions listed in section 3 of the *Economic Measures* were already required to register with FINTRAC, but the effect of section 4 was to add a number of new entities to those who are required to report, including crowd funding platforms. After the *Economic Measures* were revoked, amendments were made to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2007-292 to make section 4 permanent: *Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations and the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2022-76 (April 5, 2022).

threats to the security of Canada and that is so serious as to be a national emergency". Section 16 also provides that the phrase "threats to the security of Canada" has the "meaning assigned by section 2 of the *Canadian Security Intelligence Act*."[6]

14. Cabinet did not have reasonable grounds to conclude that the protests were a threat to national security, because CSIS *itself* concluded that the protests did not pose such a threat. CSIS is the specialized, expert agency created by the *CSIS Act*, and CSIS Director David Vigneault testified before the Public Order Emergency Commission that "at no point did the Service assess that the protests in Ottawa or elsewhere (the "Freedom Convoy") constituted a threat to the security of Canada under section 2 of the *CSIS Act*." Moreover, when Director Vigneault learned that the government was considering invoking the *Emergencies Act*, and that the *Act* "referenced the threat definition set out in section 2 of the *CSIS Act*", "[h]e felt *an obligation to clearly convey the Service's position that there did not exist a threat to the security of Canada as defined by the Service's legal mandate*".[7]

15. The CCF anticipates the Attorney General of Canada (**"AGC"**) will respond to this submission by claiming that the threat assessment by CSIS is not dispositive, and arguing that Cabinet had reasonable grounds to invoke the *Act* because: i) although the *Emergencies Act* directly incorporates the *CSIS Act* definition of threats to national security, that term has different meanings under the two statutes, and ii) Cabinet did have reasonable grounds to believe a threat to national security existed under some alternative definition of this term. Both of these arguments are legally incorrect.

i) Contrary to the AGC's claim, the term "threats to the security of Canada" under the Emergencies Act and the CSIS Act bear exactly the same meaning

16. There are three reasons the definition of "threat to the security of Canada" must be the same under both the *Emergencies Act* and the *CSIS Act*. *First*, section 16 of the *Emergencies Act* provides that "threats to the security of Canada has the meaning assigned by section 2 of the *Canadian Security Intelligence Service Act*". The CCF's simple point

[6] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].
[7] CSIS Interview Panel Summary (Unclassified extracts) (August 29, 2022), Exhibit H, Affidavit of Cara Zwibel, **AR** Vol. 1, p. 527; Summary of Commission *in camera* hearing with CSIS (extracts) (November 5, 2022), Exhibit I, Affidavit of Cara Zwibel, **AR** Vol. 1, pp. 530 to 531 (emphasis added).

here is that if a term in one law "has the meaning assigned" to it in another law, that term must have the *same meaning* in both statutes. Had Parliament intended to adopt a different or broader definition of "threats to the security of Canada" under the *Emergencies Act* it could have defined that term *without* reference to the *CSIS Act.* It could have even used the identical language to define a threat found in the *CSIS Act*, but without providing that the term "has the meaning assigned" by the *CSIS Act.* It could also have left the term undefined altogether — as it has done in the *International Transfer of Offenders Act*.[8] Parliament did none of these things.

17. Severing the *Emergencies Act* definition of "threats to the security of Canada" from its meaning under the *CSIS Act* would have absurd consequences, because in principle it would apply to every other federal statute that also incorporates the section 2 *CSIS Act* definition through the phrase "has the meaning assigned" (or similar language): the *Access to Information Act*, *Citizenship Act*, *Corrections and Conditional Release Act*, *Excise Tax Act*, *Income Tax Act*, *Privacy Act*, and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.[9] On the contrary, the use of the phrase "threats to the security of Canada" in many statutes, specifically incorporating the *CSIS Act* definition, supports the conclusion that it has the same meaning in all of them, as well as in the *Emergencies Act*.

18. *Second*, the legislative history of the *Emergencies Act* supports this conclusion. The Honourable Perrin Beatty, the sponsor of the *Emergencies Act*, stated in the House of Commons on November 16, 1987:

> Likewise, it has been said that probably the most contentious clause in this Bill is the one that deals with public order emergencies. This is the type of situation which gave rise to the use of the *War Measures Act* in 1970. This clause takes its definition of threat from the *Canadian Security and Intelligence Service Act*. This fact alone should make us very cautious because of the difficulties already encountered with CSIS in determining what is subversion and what is legitimate dissent. That was one view of the legislation.
>
> I would remind Members of this House that the definition of "threats to the security of Canada" received exhaustive scrutiny by Parliament in 1983 during deliberations on the

[8] *International Transfer of Offenders Act*, SC 2004, c 21, section 10(1)(a).
[9] *Access to Information Act*, RSC 1985, c A-1, section 16(1)(a)(iii); *Citizenship Act*, RSC 1985, c C-29, section 19(1); *Corrections and Conditional Release Act*, SC 1992, c 20, section 183(2)(a)(iii); *Excise Tax Act*, RSC 1985, c E-15, section 295(5.05)(a)(i); *Income Tax Act*, RSC 1985, c 1, sections 241(9)(b)(i) and (9.1)(b); *Privacy Act*, RSC 1985, c P-21, section 22(1)(a)(iii); *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, section 2(1).

CSIS Act. The language in this definition has, therefore, already received Parliament's blessing.[10]

19. Parliament's decision to incorporate the *CSIS Act* definition of "threats to the security of Canada" in the *Emergencies Act* was a deliberate choice to rely on a definition that had been exhaustively scrutinized by Parliament in the recent past. That definition, in turn, was a direct response to the report of the Royal Commission of Inquiry into Certain Activities of the RCMP (the McDonald Commission), which documented widespread abuses of power by the RCMP Security Service.

20. *Third*, this conclusion is supported by the fact that the *Emergencies Act* poses a greater threat to individual liberty than the *CSIS Act*. The *CSIS Act* adopts "threats to the security of Canada" as the threshold for taking measures to reduce such threats under section 12.1(1) and for issuing warrants under section 21.1(3). Section 12.1(1) measures expressly *exclude* law enforcement powers (section 12.1(4)) and the power to detain people (section 12.2(1)(e)). Section 21.1(3) authorizes the surveillance of individuals. By contrast, in a public order emergency Cabinet can restrict public assembly and travel and create criminal offences (section 19(1) *Emergencies Act*). The *Regulations* and *Economic Measures* did just that. The greater threat to individual liberty posed by the *Emergencies Act* means that its definition of "threats to the security of Canada" should be *at least* as stringent as under the *CSIS Act.*

ii) Cabinet did not have reasonable grounds to conclude there were "threats to the security of Canada" because it lacked sufficient evidence

21. The CCF also submits that, whatever definition is given to "threats to the security of Canada," Cabinet could not have had reasonable grounds to conclude this standard was met because it was acting on entirely inadequate evidence. Cabinet could only have reasonable grounds to conclude there were threats to Canada's national security with *sufficient evidence* to make such a finding. This requirement flows from the legislative history of the *Emergencies Act* and the principles of administrative law judicial review.

[10] *House of Commons Debates*, 2nd Session 33rd Parl. Vol. 9 (1987), November 16, 1987, p. 10810.

22. In Parliament, Bill C-77 (the *Emergencies Act*) was amended to change the power of Cabinet to declare a public order emergency, away from the loose requirement that Cabinet only needed to be "of the opinion" that an emergency existed, in favour of the more stringent requirement that it could only declare an emergency if it "believe[d] on reasonable grounds" that there was a public order emergency. As explained by Minister Beatty, the express purpose of the adoption of the "reasonable grounds" standard was to empower courts to judicially review emergency proclamations:[11]

> … this will give someone who wants to contest the government's decision to invoke a declaration of a national emergency the ability to take us to court, if they believe it has been frivolously done. It will guarantee Canadians the ability that the courts could rule on whether the government had reasonable grounds to believe that a national emergency existed. … the government could, under a changed formulation, be required to explain to the courts the reasoning by which it concluded that a declaration of national emergency was the appropriate action and that the measures taken pursuant to the declaration were reasonably necessary in order to provide for the safety and security of Canadians and of Canada.

23. Whereas the "of the opinion'' standard was subjective, the "reasonable grounds" standard requires courts to assess whether Cabinet's determination that the "grounds" for declaring an emergency – including the existence of "threats to the security of Canada" – were "reasonable".

24. *Vavilov* defines a "reasonable decision" as one that is "justified in relation to the constellation of law and facts that are relevant to the decision". It follows that "[t]he decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account", and "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it".[12]

25. *Vavilov* does not squarely address the *sufficiency* of evidence that is required for a decision to be reasonable. The CCF suggests the following framework. In relation to a mixed question of law and fact before Cabinet — such as the determination of whether threats to Canada's national security exist — reasonableness requires that the *most relevant*

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[11] Bill C-77, *An act to authorize the taking of special temporary measures to ensure safety during national emergencies and to amend other Acts in consequence thereof* (First Reading) (June 26, 1987) [*Bill C-77 First Reading*]; *Minutes of Proceedings and Evidence of the Legislative Committee*, 33rd Parl., 2nd Sess., Vol. 1, No. 1 (February 23, 1988), pp. 15 to 16.

[12] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 105, 126.

available evidence be provided to Cabinet as an input. If there is evidence that "Cabinet did not consider" this input, this is "evidence of a lack of evidence" for the decision.[13] For Cabinet to overcome such a "lack of evidence", reasonableness requires that it must rely on a *substantively equivalent* input.

26. Cabinet did not have reasonable grounds to declare a public order emergency, because it did not have sufficient evidence of threats to Canada's national security. CSIS concluded that there were no threats to national security, in the form of the CSIS Threat Assessment. However, the CSIS Threat Assessment was never shared, in writing or verbally, with Cabinet. Director Vigneault discussed a draft version of the CSIS Threat Assessment at the February 12 meeting of the Incident Response Group (**"IRG"**). A written version was provided to the IRG for its February 13 meeting, where Director Vigneault discussed it. But the Record does not establish whether the CSIS Threat Assessment was distributed to Cabinet for its February 13 meeting. Moreover, Director Vigneault was not asked to verbally provide the CSIS Threat Assessment at the Cabinet meeting.[14] Since the AGC issued two section 39 *Canada Evidence Act* certificates in relation to portions of the minutes of the February 13 Cabinet meeting over the CCF's "constant and firm objection", this Court should draw the adverse inference that those minutes confirm the CSIS Threat Assessment was *not* shared verbally or in writing with Cabinet.[15]

27. Finally, Cabinet did not overcome the lack of evidence by relying on a substantively equivalent input, because an alternative threat assessment was never prepared. Cabinet

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[13] *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118, paras. 42, 30.

[14] Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022), Exhibit J, Affidavit of Cara Zwibel dated December 11, 2022 [**"Zwibel Affidavit"**], **AR** Vol. 1, Tab 5, pp. 542 to 544; Commission Testimony of Deputy Minister Robert Stewart (excerpt) (November 18, 2022), Exhibit K, Zwibel Affidavit, **AR** Vol. 1, Tab 5, p. 558.

[15] Certificate issued pursuant to section 39 of the *Canada Evidence Act* dated March 31, 2022, **AR** Vol. 2, Tab 2, pp. 598 to 602; Certificate issued pursuant to section 39 of the *Canada Evidence Act* dated August 4, 2022, **AR** Vol. 2, Tab 3, pp. 606 to 610; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, para. 111, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, paras. 165 to 166 [*RJR-MacDonald*]. The CCF's "constant and firm" objection took the form of a motion for counsel only access to materials subject the Section 39 Certificates, which was dismissed by this Honourable Court: *Canadian Constitution Foundation v. Canada (Attorney General)*, 2022 FC 1233.

delegated to the Prime Minister the decision to invoke the *Emergencies Act*.[16] Late on the afternoon of February 14, the Clerk provided the Prime Minister with the *Invocation Memorandum* in which she concluded that there were "threats to the security of Canada". To support this conclusion, the Clerk stated "[a] more detailed threat assessment is being provided under separate cover".[17] Earlier that day, the Clerk had asked National Security and Intelligence Advisor (**"NSIA"**) Jody Thomas to prepare an alternative threat assessment. In turn, NSIA Thomas sent an email to a small group of recipients with the subject line, "threat of these blockades", stated that the Clerk had asked her for a threat assessment, and asked "[c]ould I get an assessment please. David is this you? It's a very short fuse."[18] David was likely Director Vigneault. The Clerk testified that "there was no written detailed threat assessment provided under separate cover" to the Prime Minister, and they could not locate any threat assessment.[19] As a consequence, the Prime Minister, exercising power delegated from Cabinet, declared the public order emergency without having had the opportunity to review and consider an alternative threat assessment.

28. In sum, it is impossible to find that requirement for Cabinet to have reasonable grounds to believe there was a threat to the security of Canada was met in this case. The *Emergencies Act* expressly adopts the definition from the *CSIS Act*, and the Director of CSIS went out of his way to make it known that CSIS did not believe the protests were a threat to the security of Canada as defined under its enabling legislation. This assessment was never provided to Cabinet, nor was any alternative threat assessment that reached a different conclusion ever conducted or produced. How could Cabinet in the face of these facts be said to have had reasonable grounds for concluding there was a threat to the security of Canada? The simple answer is that it did not, and section 16 of the *Emergencies Act* was not met when the emergency was declared.

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[16] Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022), Exhibit D, Zwibel Affidavit, **AR** Vol. 1, Tab 5, p. 494; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118, para. 37.

[17] Memorandum from Clerk Janice Charette to the Prime Minister dated February 14, 2022 (**"*Invocation Memorandum*"**), Exhibit B, Zwibel Affidavit, **AR** Vol. 1, Tab 5, pp. 463 and 458.

[18] Email from NSIA Jody Thomas to Mike MacDonald and others dated February 14, 2022, Exhibit L, Zwibel Affidavit, **AR** Vol. 1, Tab 5, pp. 560 to 561.

[19] Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022), Exhibit D, Zwibel Affidavit, **AR** Vol. 1, Tab 5, p. 492.

B. Issue 2: Did Cabinet have reasonable grounds to conclude that the protests could not be effectively dealt with under existing law?

i) The history of the "last resort" clause

29. Cabinet's invocation of the *Emergencies Act* can only be justified if existing laws at the federal, provincial, and municipal levels in Canada were not sufficient to "effectively deal with" the protests that were taking place. Section 16 of the *Emergencies Act* defines a "public order emergency" as a situation that arises when threats to the security of Canada are so serious they amount to a "national emergency". The term national emergency is itself defined as an "urgent and critical situation of a temporary nature" that "cannot be effectively dealt with under any other law of Canada". The CCF terms this last requirement the "last resort" clause.

30. When proposed, Bill C-77 did not contain the last resort clause. Moreover, it did not define a "national emergency" in an operative provision. Rather, "national emergency" was defined in the preamble as follows, which did not include the resort clause:[20]

> … national emergency, that is to say, an urgent and critical situation of a temporary nature that imperils the wellbeing of Canada as a whole or that is of such proportions or nature as to exceed the capacity or authority of a province to deal with it and thus can be effectively dealt with only by Parliament in the exercise of the powers conferred on it by the Constitution.

31. At the Committee stage, Bill C-77 came under attack for lacking a statutory definition of a "national emergency", thus creating the risk that it did not include adequate safeguards to prevent the declaration of an emergency. The federal government responded to this criticism by proposing to move the definition of "national emergency" from the preamble to an operative provision, and to define it as follows (in a new section 3):[21]

> an urgent and critical situation of a temporary nature that imperils the well-being of Canada as a whole or that is of such proportions or nature as to exceed the capacity or authority of a province to deal with it and thus can be effectively dealt with only by Parliament in the exercise of the powers conferred on it by the Constitution.

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[20] Bill C-77 *First Reading*, preamble.
[21] *Minutes of Proceedings and Evidence of the Legislative Committee*, 33rd Parl., 2nd Sess., Vol. 1, No. 1 (March 8, 1988), p. 22.

However, Committee members and witnesses said this proposed amendment still did not go far enough.

32. Mr. Bud Bradley (Parliamentary Secretary to Minister Beatty) moved to add what became section 3, including the last resort clause. The amendment was supported by the NDP. The Chair of the Committee, Mr. Derek Blackburn (NDP), had the following exchange about the proposed amendment with a federal witness, Mr. Bill Snarr, Executive Director, Emergency Preparedness Canada (emphasis added):[22]

> Mr. Blackburn (Brant): It says: and that cannot be effectively dealt with under any other law of Canada.
>
> *Does that mean the government, when contemplating proclaiming an emergency, would have to make absolutely clear that the Criminal Code, for example, could not handle the situation*; in other words, if we had a riot or a series of riots in a city and it was not felt that, by "reading the Riot Act" and imposing or using the Criminal Code, the regular law enforcement agencies could cope with that situation?
>
> Mr. Snarr: *That is exactly right.*

Mr. Bradley explained the last resort clause on Third Reading (emphasis added):[23]

> The definition of "national emergency" as now formulated captures the four elements common to all the proposals put to the committee. It represents the distilled consensus of the collective wisdom of the highly qualified people whose advice we were fortunate to receive. The four elements incorporated in a new definition of national emergency are; first, the notion of urgency; second, the temporary character of the abnormal situation; *third, the inadequacy of the normal legal framework*; and finally, the presence of a serious threat, either to the security of the country as a whole, or to public safety in circumstances which exceed provincial capabilities.

ii) The "last resort" clause was not met here

33. By defining a "national emergency" as a situation that cannot be dealt with effectively under any other law of Canada, section 3 creates a straightforward requirement. Parliament cannot use the *Emergencies Act* as a tool of convenience. A "national emergency" only exists when there are no other laws at the federal, provincial, and/or municipal levels which can address the situation.

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[22] *Minutes of Proceedings and Evidence of the Legislative Committee*, 33rd Parl., 2nd Sess., Vol. 1, No. 1 (March 29, 1988), p. 23.
[23] Canada. *House of Commons Debates*, 2nd Session 33rd Parl. Vol. 12 (1988), April 25, 1988, p. 14765.

34. This standard was not met in this case. Existing law was sufficient to deal with the protests and invoking the *Emergencies Act* simply was not necessary. The *Criminal Code* gave the police the power to arrest and charge protestors for a host of illegal behaviour for many offences, as set out in the following chart:

Assault Peace of Public Officer (s. 270) Assault Peace/Public Officer with a weapon or causing bodily harm (s. 270.01) Assault (s. 266) Assault with Weapon/Imitation Weapon (s. 267) Breach of Probation (s. 733.1) Carry weapon etc. to public meeting (s. 90) Cause a disturbance by fighting/shouting/swearing (s. 175) Cause a disturbance by impeding/molesting persons (s. 175) Counsel to commit indictable offence (s. 464) Dangerous operation (s. 320.13) Disobey lawful order of court (s. 127) Disturb occupants of a dwelling in apt. complex (s. 175) Fail to comply with release order (s. 145) Flight from peace officer (s. 320) Fraudulent concealment of property (s. 341) Incite hatred in public place (s. 319) Intimidation by blocking or obstructing highway (s. 423)	Intimidation by threats of violence (s. 423) Mischief (s. 430) Obstruct/resist peace officer (s. 129) Obstruct/resist person aiding public/peace officer (s. 129) Operation of a conveyance while prohibited (320.18) Possess firearm etc. while prohibited (s. 117.01) Possess proceeds of property/or thing obtained by crime, exceeding $5000 (s. 354) Possess restricted or prohibited firearm without holding a license and registration certificate (s. 95) Possess weapon etc./dangerous to public peace (s. 88) Possess weapon etc./for committing an offence (s. 88) Take weapon of peace officer in execution of duty (s. 270.1) Unauthorized possession of a prohibited or restricted weapon (s. 91(2) Uttering threats/death or bodily harm (s. 264.1) Uttering threats property damage (s. 264.1)

35. Police could also use tools under provincial law. For instance, on January 28, 2022, Nova Scotia issued *Direction 22-003 (Road Blockade Ban)* pursuant to the Nova Scotia *Emergency Management Act*, prohibiting protests from blockading a highway near the Nova Scotia-New Brunswick border. Failure to comply with the *Direction* could result in a summary conviction with fines between $3000 and $10 000 for individuals.[24] Similarly,

[24] *Emergency Management Act*, SNS 1990, c 8, section 14; *Direction 22-003 (Road Blockade Ban)*, Exhibit BB, Affidavit of Madeline Ross dated February 22, 2022, **AR** Vol. 1, Tab 2, pp. 53 to 55.

on February 12, 2022, Ontario confirmed a state of emergency under the Ontario *Emergency Management and Civil Protection Act* and promulgated a regulation making it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure.[25] In addition, municipal bylaws already empowered the police to ticket the protestors and clear out the vehicles causing the blockade. In Ottawa, for example, police had at their disposal the following by-laws: *Open Air Fire By-law 2004-163*, *Fireworks By-law 2003-237*, *Noise By-law 2017-255*, *Use and Care of Roads By-law 2003-498*, and the *Idling Control By-law 2007-266*.[26]

36. The *Emergencies Act* did not add anything *necessary* to the equation, the best evidence for which is the fact that existing criminal law powers were the tools that were ultimately *actually* used to effectively clear out the blockades and end the "emergency". The *Emergencies Act* was invoked on February 14 and its powers came into effect on February 15. However, protestors were arrested, and the blockades were already cleared or being cleared under existing law *before* these dates:[27]

- By February 13, 2022, without any resort to the *Emergencies Act*, the Ambassador Bridge in Windsor was fully reopened.

- According to the Windsor Police, from February 7 to 13, 2022, 90 people were arrested and charged. The charges were laid under existing *Criminal Code* offences and included: 43 people charged with breaching a court order (section 127); 43 people charged with mischief over $5,000 (section 430); one person charged with obstructing justice (section 139); one person charged with failing to attend court (section 145); and one person charged with dangerous driving (section 320.13). One person faced a *Highway Traffic Act* charge for failing to remain (section 200(1)(a)).

- On February 14, 2022, the Alberta RCMP executed search warrants and arrested several people involved in the Coutts protest. The arrests all appear to have taken place under the authority of the *Criminal Code* or provincial legislation. That day, the Alberta RCMP cleared the blockade and restored the border crossing.

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[25] *Emergency Management Civil Protection Act*, RSO 1990, c E9; *Confirmation of Declaration of Emergency*, O Reg 70/22; *Critical Infrastructure and Highways*, O Reg 71/22.
[26] *City of Ottawa v. Persons Unknown*, Interlocutory Injunction dated February 15, 2022, Court File No. CV-22-88569 ("***Ottawa Injunction***"), Exhibit Z, Affidavit of Madeleine Ross dated February 22, 2022, **AR** Vol. 1, Tab 2, pp. 240 to 244.
[27] Notice, **AR** Vol. 1, paras. 10 to 35, pp. 8 to 13.

- On February 9, 2022, a group created a highway blockade approximately 30 kilometres east of Sarnia on the provincial highway. Five days later, on February 14, 2022, the blockade was stopped and access to the highway was restored.

- On February 10, 2022, protesters began blocking the Canada-United States border at the port of entry at Emerson, Manitoba. By February 16, 2022, the blockade was completely cleared. In a press release, the RCMP explained that throughout the previous six days, officers used "open communication, and a measured approach to find a peaceful resolution to [the] situation" and said that because of these efforts, it had been able to coordinate and escort vehicles out of the area.

- On February 12, 2022, a protest targeted the Peace Bridge port entry at Fort Erie, Ontario. The protest disrupted inbound traffic at the border for part of that day, and then outbound traffic until February 14, 2022, by which date the Niagara Police cleared the blockade and restored access to the border.

- On February 12, 2022, several vehicles broke through an RCMP barricade in Surrey, British Columbia on their way to the Pacific Highway port of entry. Protesters forced the highway to close at the Canada-United States border in Surrey. On February 13, 2022, the Surrey RCMP arrested four protesters for "mischief". By February 19, 2022, the border had reopened.

- As of February 21, 2022, Ottawa police had arrested and charged 196 people pursuant to offences under the *Criminal Code* and had towed 115 trucks. It is unclear whether even a single protester in Ottawa was charged with any offences created by the *Emergency Measures*.

37. Even after Cabinet invoked the *Emergencies Act*, there is no evidence that even a *single* criminal charge was laid under the newly created offences under the *Emergencies Act* in response to and in order to quell the protests, rather than under existing offences in the *Criminal Code* and provincial highway traffic legislation. This is a fatal problem at the heart of Cabinet's decision to invoke the *Emergencies Act*. The *Act* cannot be invoked if it is just helpful or expedient. Doing so must be *necessary* because existing laws cannot effectively address the situation. Here, that was manifestly not the case. The blockades were being cleared out successfully before the *Emergencies Act* was invoked. Municipal, provincial and federal law already created offences that prohibited the blockades that gave rise to the "emergency", and these provisions were ultimately used, or could have been used, to effectively end the protests.

iii) The solution to the "policing failure" in Ottawa was the deployment of additional RCMP officers, not resort to the Emergencies Act

38. The AGC will likely point to Ottawa Police Service's (**"OPS"**) initial failure to effectively control the protestors in Ottawa as the main justification for its claim that there were no existing laws that could effectively deal with the emergency. The Section 58 Explanation states: "the Ottawa Police Service has been unable to enforce the rule of law in the downtown core due to the overwhelming volume of protesters and the Police's ability to respond to other emergencies has been hampered by the flooding of Ottawa's 911 hotline, including by individuals from outside Canada" and "[t]he inability of municipal and provincial authorities to enforce the law or control the protests may lead to further reduction in public confidence in police and other Canadian institutions".[28]

39. The problem with these assertions is that they do not establish that existing laws could not effectively have dealt with the protest. If the OPS was overwhelmed and ineffective in their response, this does not establish that new laws and powers were needed to address the situation. It shows only that a municipal police force was struggling to effectively *enforce* existing laws. The most that can be said is that the OPS simply needed help, through boots on the ground and an enforcement plan.

40. This enforcement problem does not justify invoking the *Emergencies Act*. The reality is that existing laws were sufficient both to deal with the protests themselves, *and* to get the OPS the help it needed to enforce the law as it already existed on the books. In particular, the solution to the OPS enforcement problem was not resort to the *Emergencies Act*, but rather the deployment of additional RCMP officers to Ottawa under existing law.

41. Section 18(a) of the *RCMP Act*[29] sets out the powers of RCMP officers, and states:

> 18 It is the duty of members who are peace officers, subject to the orders of the Commissioner,
>
> to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody [emphasis added];

Under section 18 of the *RCMP Act*, RCMP officers possess the power to enforce the *Criminal Code* throughout Canada, without a prior request from a provincial or municipal

[28] Exhibit A, Affidavit of Madeleine Ross dated February 22, 2022, **AR** Vol. 1, Tab 2, p. 45.
[29] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10.

police force. An RCMP officer who sees a person on Wellington Street in Ottawa committing a *Criminal Code* offence can make an arrest. The RCMP's longstanding practice is to *not* exercise these powers, and instead to leave the enforcement of the *Criminal Code* to municipal and provincial police, except where the RCMP is the police force of jurisdiction under contract. However, there is no legal barrier to the RCMP stepping in unilaterally – to be sure, a step that should only be taken exceedingly rarely.

42. The RCMP even had the power to enforce municipal bylaws in Ottawa to respond to the Ottawa protests, because of the *Ottawa Injunction* issued on February 15, 2022, which prohibited anyone from violating Ottawa's noise and road encumbrance bylaws.[30] Section 127(1) of the *Criminal Code* makes it a criminal offence to "without lawful excuse, disobey a lawful order made by a court of justice". The effect of the *Ottawa Injunction* was to transform breaches of municipal bylaws into *Criminal Code* offences that the RCMP had the legal power to enforce.

43. The direct deployment of RCMP officers to enforce the *Criminal Code* was an option the government should have pursued prior to invoking the *Emergencies Act*. The AGC cannot establish that existing laws could not have effectively addressed the Ottawa protests.

C. Issue 3: Did the Regulations and Economic Measures violate sections 2(b), (c) and/or 8 of the Charter? If so, could any of these violations have been saved under section 1?

i) The Regulations and Economic Measures violated the rights to freedom of expression (s. 2(b)) and freedom of assembly (s. 2(c)) protected by the Charter

a) Section 2(b) of the Charter

44. A section 2(b) *Charter* analysis proceeds in two stages. The court first asks whether the activity in question is *Charter*-protected expression. If it is, the court asks whether the purpose or the effect of the impugned law is to limit such expression. If it is, the analysis shifts to section 1.[31]

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[30] *Ottawa Injunction*, **AR** Vol. 1, Tab 2, pp. 240 to 244.
[31] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, pp. 967 to 73 [*Irwin Toy*]; *R. v. Zundel*, [1992] 2 SCR 731, p. 772 [*Zundel*].

45. Activity is expressive "if it attempts to convey meaning."[32] At this stage of the analysis, the content of the expression is irrelevant, because section 2(b) of the *Charter* is "content-neutral".[33] Only violent expression is excluded from protection.[34] In every other case, the "evaluation of the worthiness of the expression" is "relevant only to the section 1 inquiry."[35]

46. In this case, although the *Emergency Proclamation* relied heavily on the existence of *blockades* as the justification for invoking the *Emergencies Act*, the *Regulations* and *Economic Measures* took aim at the ongoing protests as a whole. The *Regulations* did not simply prohibit participating in the creation of blockades. They instead prohibited *anyone* from participating in or travelling to a public assembly where a blockade *might reasonably be expected* to occur. Similarly, they prohibited anyone from providing property to anyone for the purpose of facilitating or participating in an assembly where a breach of the peace might reasonably occur.

47. Clearly, the ongoing protests in downtown Ottawa were an assembly where a breach of the peace as defined by the *Regulations* was occurring, and the effect of these provisions was to criminalize attendance by *anyone*, no matter if they participated in the actual conduct that created the breach of the peace. They also deemed *all of these* people to be "designated persons" and forced banks (and others) to disclose their finances to the police and to freeze all of their assets.

48. The *Regulations* clearly limited the right to freedom of expression. Creating a blockade as part of a political protest is expressive conduct — it is intended to and does convey a message. Similarly, providing a donation to someone who intends to create a blockade is an expressive action that shows support for the demonstration.

49. The *Regulations*' infringement of section 2(b) goes much deeper than this most direct infringement. By essentially criminalizing the entire protest, with the threat of immediate arrest and the freezing of assets, followed by prosecution and potentially years

[32] *Irwin Toy*, p. 968.
[33] *R. v. Keegstra*, [1990] 3 SCR 697, p. 764.
[34] *R. v. Big M Drug Mart Ltd.*, [1985] 2 SCR 295, p. 346.
[35] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (supplemented) (Toronto: Thomson Reuters) (electronic loose-leaf, updated 2018), para. 43.5(d).

in jail, the *Regulations* limited the right to expression of protestors who wanted to convey dissatisfaction with government policies, but who had no intention of participating in the blockades. Anyone who wanted to join the protest by standing on Parliament Hill, for example, would be just as subject to arrest as someone who had parked their truck on Wellington.

50. Because protesting is clearly an expressive activity, there can be no doubt that the *Regulations* violated section 2(b) of the *Charter*. The critical question, addressed below, is whether that violation can be saved under section 1.

b) Section 2(c) of the Charter

51. Section 2(c) protects the freedom of "peaceful assembly." This section has generated surprisingly little jurisprudence. Cases involving freedom of peaceful assembly are often analyzed under the lens of freedom of expression.[36]

52. Section 2(c) is, however, a distinct right that protects a uniquely important democratic right — the right to gather *together with others* in protest. Centuries of human experience shows that public protests have been indispensable instruments of change. These protests are intended to bring the voice of thousands of people together, to deliver a message far more powerfully than could be accomplished individually. Such protests are *inherently* disruptive to some extent, as "flooding the streets" and "causing a scene" is often a key part of attracting attention and getting the message across.

53. In the last decade, civil society's reliance on public assembly as a key vehicle for effecting change has not abated. Instead, we have seen public assemblies and protests used repeatedly as essential and effective tools. To take just one example, George Floyd's death at the hands of Minneapolis police officers in 2020 sparked *global* protests and demonstrations that have had a profound impact in the United States, Canada, and Europe.

54. The *Regulations* created a direct limitation on the right to peaceful assembly and the infringement should also be analyzed under section 2(c) of the *Charter*. Section 2(c)

[36] See Basil S. Alexander, *"Exploring a More Independent Freedom of Peaceful Assembly in Canada"*, (2018) 8:1 *Western Journal of Legal Studies* 1, p. 2; *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, para. 78; *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn*, 2009 BCCA 39, para. 39.

must be given the same liberal and purposive reading as the other fundamental freedoms in section 2 of the *Charter*. Moreover, it should be interpreted consistently with the jurisprudence on section 2(b), as a *content neutral* protection that does not judge the worthiness of the assembly but asks only whether the purpose or effect of a government action has been to limit the public's right to peacefully assemble.

55. As with freedom of expression, and consistent with the section's explicit protection of all "peaceful" assemblies, the only internal limit that should be placed on the freedom is where an assembly is *violent*. Rioting and looting are not protected by section 2(c). For peaceful assembly, the question should simply be whether the government's action has, in purpose or effect, infringed the right.

56. In this case, the *Regulations* are a clear example of a violation of section 2(c) of the *Charter*. The *Regulations* were directly aimed at ongoing public assemblies, prohibiting any participation by the public, backed up by freezing financial assets followed by the threat of up to five years in prison.

57. While it is true that the *Regulations* only prohibited participation in an assembly where a "breach of the peace" could reasonably be expected to occur, this does not mean there was no violation of section 2(c). Breach of the peace was specifically defined expansively, to include interference with movement and economic harm. The constitutional right to assemble is not limited to situations where the assembly does not shut down a city or create a risk of economic loss. It is a protection afforded to any assembly that is peaceful. In this case, the AGC will undoubtedly argue that the use of blockades by the protestors was unreasonable, because of their economic effects and inconvenience for the residents of cities where they took place. But the alleged unreasonableness of the methods chosen by the protestors does not mean there was no violation of the right to peaceful assembly. This becomes an issue that goes to the section 1 analysis, where the AGC bears the burden of proving that the *particular limitations* on the fundamental right to peaceful assembly are rationally connected to its goal of ending the blockades, minimally impairing of everyone's right to peaceful assembly, and a *proportionate* response to the problem.

ii) The Economic Measures violated section 8 of the Charter

a) The section 8 framework

58. Section 8 of the *Charter* protects everyone against unreasonable searches and seizures. An inquiry into whether section 8 of the *Charter* is infringed requires answering these questions:

i. Is there a reasonable expectation of privacy in what was searched or seized?
ii. Was the search or seizure reasonable?

59. It is well-established law that when government authorities like the police or CSIS *request private electronic data from non-state entities*, that request can constitute a search by the state under section 8 of the *Charter*.[37]

60. In this case, section 5(a) of the *Economic Measures* required banks, crowdfunding websites, and other financial entities to disclose "without delay" to the RCMP and CSIS the existence of property in their possession or control that they "have reason to believe" is held on behalf of someone who is a "designated person." A "designated person" is defined as, among other things, any person participating in an "unlawful assembly". Section 5(b) went further and required those same financial institutions to disclose *any* information they had about *any* transactions that "relate[d]" to the property of designated persons.

61. These provisions of the *Economic Measures* amounted to a search by the state of the financial records of financial institutions and their customers. By statutorily requiring financial institutions to disclose this information, the state mandated that financial institutions conduct searches on its behalf. The effect is no different than a continuous and ongoing production order.

b) Is there an expectation of privacy in the subject matter of the search?

62. The burden of establishing a reasonable expectation of privacy is on the party who seeks to show a violation of section 8 of the *Charter*. The existence or absence of a reasonable expectation of privacy is determined by considering the "totality of circumstances." This test includes a wide variety of factors that can be grouped under four main headings, namely:

[37] *R. v. Spencer*, 2014 SCC 43, para. 6 [*Spencer*]; *R. v. Marakah*, 2017 SCC 59, para. 19 [*Marakah*].

i. The subject matter of the alleged search;
ii. The claimant's interest in the subject matter of the search;
iii. The claimant's subjective expectation of privacy in the subject matter;
iv. Whether this subjective expectation is objectively reasonable, having regard to the totality of the circumstances.[38]

63. In this case, there is a clear reasonable expectation of privacy in the *subject matter of the search*: the private financial and transactional records of all "designated persons." Under the *Economic Measures*, any bank that "had reason to believe" one of its customers participated in the protests in Ottawa would have had to contact the RCMP and disclose that they held property on that person's behalf, and also disclose *any information* regarding "transactions" relating to that property.

64. The *claimant's interest in the subject matter of a search* directs courts to inquire into the relationship the person claiming the section 8 violation has with the thing that was searched. In most section 8 cases, the claimant is an accused person who was personally subject to some form of a search. Here, the focus is on persons whose financial information would have been disclosed under the *Economic Measures*, and who have a direct interest in the subject matter of a search that relates to their own bank accounts and financial information.

65. The *subjective expectation of privacy* asks whether the subject of the search actually expected that the information obtained in the search would remain private. It is a low threshold that can often be presumed or inferred in the absence of direct evidence.[39] This Court can readily infer that people subjectively expect that their banking and financial information will generally be kept private.

66. Whether the expectation of privacy is *objectively reasonable* depends on considering a number of factors, including the place of the search, control over the information, and the nature of the information that could be revealed. In this case, the location of the search was private internal records held by banks and other financial institutions about their customers. Although "designated persons" lacked direct control over these records, the same is true of records held by Internet Service Providers and many

[38] *R. v. Tessling*, 2004 SCC 67, para. 32 [*Tessling*].
[39] *R. v. Jones*, 2017 SCC 60, paras. 20 to 21.

other institutions, where people have been found to have reasonable expectations of privacy in those records.[40]

67. When looking at the nature of the information that is revealed by a search, what matters is the *potential* that a given search will reveal details about the choices and lifestyle of an individual.[41] Here, the plain wording of the *Economic Measures* essentially required banks to disclose everything about a "designated person's" finances and how they used their money. This sort of information — about how much money people have, in which types of accounts, and how they are spending that money in everyday life — has the potential to reveal a tremendous amount about the most intimate details of someone's life.

68. The protection of informational privacy is premised on the assumption that "all information about a person is in a fundamental way [their] own, for [them] to communicate or retain for [themselves] as [they] see fit."[42] There can be no doubt that there is a reasonable expectation of privacy in the information subject to search under section 5 of the *Economic Measures*.

c) Is the search or seizure reasonable?

69. A search is reasonable under section 8 if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner. Here, the issue is whether the law that purported to authorize the search was itself reasonable.

70. The seminal decision from the Supreme Court that sets out guidance for assessing whether a search power is reasonable is *Hunter v. Southam*. In that case, the Court considered a constitutional challenge to provisions of the *Combines Investigation Act*, which purported to authorize representatives of the Combines Investigation Branch to enter premises and conduct searches on the strength of an authorizing certificate issued by another member of the very same institution.[43]

71. The Supreme Court held that the search powers created by the *Combines Investigation Act* violated section 8 of the *Charter* and were of no force or effect. The Court

[40] See *Spencer*.
[41] *Marakah*, paras. 31 to 32; *R. v. Patrick*, 2009 SCC 17, para. 32.
[42] *R. v. Dyment*, [1988] 2 SCR 417; *Tessling*, para. 23.
[43] *Hunter v. Southam*, [1984] 2 SCR 145, pp. 148 to 151.

held that a *reasonable* provision authorizing a search must create a system of: i) prior authorization, ii) determined by a neutral third party who is not involved in the investigation, iii) on the standard of "reasonable and probable grounds to believe" an offence has been committed and evidence of the offence will be found in the place to be searched.[44]

72. The search provision in the *Economic Measures* missed the constitutional mark on every measure. Section 5 deliberately sidestepped the requirement of prior authorization by a neutral third party. There was no warrant requirement and no application before a judge (or anyone else). There was no involvement of a neutral third party, as the *Economic Measures* provided that the financial institution must *themselves* make the decision of whether someone was a "designated person" and, if it decided that they were, must tell the RCMP that it possessed their property, and provide any information it had about any transactions involving that property.

73. The *Economic Measures* also failed to require reasonable and probable grounds before the search is conducted. Instead, the *Economic Measures* amorphously informed financial institutions they were compelled to disclose information "without delay" any time they had "reason to believe" that someone was a designated person. The *Economic Measures* did not define or provide any guidance on what this standard required or how a financial institution was supposed to assess it. What information could be relied upon to develop a "reason to believe"? What level of confidence was required? The *Economic Measures* told us nothing, while seemingly implying that *any reason at all* for the belief was enough to require disclosure to the police and CSIS.

74. While *some* search powers can be authorized on less than the "reasonable and probable grounds" threshold — such as a production order granted by a court where there are "reasonable grounds to suspect" an offence has been committed and evidence of the offence will be afforded by the search — reasonable suspicion searches are usually justified where the intrusion on privacy is more limited,[45] which is not the case here. In any event, *no* search power can be predicated entirely on someone merely having a "reason to believe"

[44] *Hunter v. Southam*, pp. 160 to 168.
[45] See, for example, *R. v. Kang-Brown*, 2008 SCC 18.

something. Such a standard is impossible to distinguish from hunches or mere suspicion, which the Supreme Court has always held are an insufficient basis to intrude upon an expectation of privacy.[46]

75. Section 5 of the *Economic Measures* were also markedly different from the other financial reporting provisions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*[47] Section 7 of the *PCMLTFA* requires financial institutions to report financial transactions to FINTRAC, but only where there are "reasonable grounds to suspect" that the transaction relates to a money laundering or terrorism offence. It specifically requires reasonable suspicion, and it does not then demand potentially wholesale disclosure of transaction information relating to every account held by a "designated person." Once disclosure to FINTRAC is made, the *PCMLTFA* also stipulates that FINTRAC itself must assess the material, and can only provide the report to law enforcement if it also believes there are reasonable grounds to suspect the transaction relates to a money laundering or terrorism offence.[48] FINTRAC is set up as a middle layer *between* the financial institutions and the police, which must conduct its own assessment of whether disclosure is warranted.

76. Section 5 of the *Economic Measures*, by contrast, did not require reasonable suspicion, and demanded that banks and other financial institutions directly disclose potentially vast amounts of information straight to the police and CSIS. The *Economic Measures* required more disclosure, on a lesser and poorly defined standard, as determined solely by the financial institution. The law itself was unreasonable as a result and violated section 8 of the *Charter*.

iii) The violations of the Charter were not saved under section 1

77. Section 1 of the *Charter* requires the government to show that: "(1) the law creating the [limit] has a pressing and substantial objective; and (2) the means chosen are proportionate in that: (a) they are rationally connected to the law's objective; (b) they limit the *Charter* right in question as little as reasonably possible in order to achieve the law's

[46] *R. v. MacKenzie*, 2013 SCC 50, para. 41.
[47] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [*PCMLTFA*].
[48] *PCMLTFA*, section 55(3).

objective; and (c) the law's salutary effects are proportionate to its deleterious effects."[49] Throughout, the burden rests on the government to present "cogent and persuasive" evidence."[50]

a) The rights limited by the Regulations target expression entitled to the highest level of protection

78. In considering whether violations of section 2(b) can be saved under section 1 of the *Charter*, the court must assess the level of protection which the targeted expression is entitled to.[51] The closer the expression sits to the core values underpinning section 2(b) — *i.e.*, participation in social and political decision making, individual self-fulfillment, and the search for, and attainment of, truth[52] — the more difficult it will be to justify limiting it.[53] The CCF submits that the same assessment should be conducted for violations of section 2(c).

79. Because it plays an essential role in democratic life, political speech is granted the highest level of protection. Political speech "lie[s] at the very heart of freedom of expression"[54] and "at the core of the guarantee",[55] and is "invaluable, given its significance in our democratic process".[56] The state "must tread carefully in limiting political speech" and must "be loathe to interfere with it …"[57] The same must be true of the right to peaceful assembly.

80. In this case, the highest level of protection is warranted. The *Regulations* directly targeted a political demonstration and curtailed the right to free expression and assembly of the protestors. This goes to the very core of the rights to free expression, peaceful assembly, and Canada's democratic process as a whole.

81. Although one could argue that parking trucks in the road and honking horns are not examples of "high value" speech or demonstration, it is not as though the *Regulations*

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[49] *R. v. Morrison*, 2019 SCC 15, para. 63. See also: *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*].
[50] *Oakes*, p. 138.
[51] *R. v. Lucas*, [1998] 1 SCR 439, para. 34 [*Lucas*].
[52] *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, pp. 765 to 66; *Irwin Toy*, p. 976; *Zundel*, p. 772.
[53] *Lucas*, para. 34; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, para. 91.
[54] *R. v. Guignard*, 2002 SCC 14, para. 20.
[55] *Harper v. Canada (Attorney General)*, 2004 SCC 33, para. 66.
[56] *Harper v. Canada (Attorney General)*, 2000 SCC 57, para. 20 [*Harper 2004*].
[57] *Harper 2004*, para. 20.

simply prohibited this conduct (which was, as argued above, were already illegal). Instead, the *Regulations* defined what *some of the protestors* were doing in Ottawa and at the border crossings as a breach of the peace and an unlawful assembly, and then criminalized the attendance of *every single person* at those protests, no matter their goals or actions at these protests. The *Regulations* were a simple attempt to shut down the demonstrations as a whole and, to put it simply, when the government steps in to shut down a political protest, the courts must subject that decision and the means used to exacting scrutiny.

b) The Regulations failed the Oakes proportionality test

82. The CCF does not dispute that the government had a pressing and substantial objective when it passed the *Regulations* and *Economic Measures*. That objective, however, must be kept in sharp focus. This is not a concession that the statutory requirements for invoking the *Emergencies Act* were met. It is simply an acknowledgment that it was a legitimate government objective *to clear out the blockades* that had formed as part of the protest. In assessing the methods used by the government in achieving this end, it must also be kept in mind that, aside from the difficulties caused by the blockades, these were peaceful protests, where nobody was physically harmed, no property was damaged, and there was no threat to national security.

83. The CCF also acknowledges that the *Regulations* and *Economic Measures* were, as a matter of logic, rationally connected to the goal of ending the blockades. However, the *Regulations* and the *Economic Measures* were not minimally impairing and therefore are unconstitutional.

1) The *Regulations* failed minimal impairment

84. To justify a limit on a *Charter* right under section 1, the government must establish that the impugned law impairs constitutionally protected rights and freedoms "as little as reasonably possible" and that the law is "carefully tailored so that rights are impaired no more than necessary."[58] The essential question is "whether there is an alternative, less drastic means of achieving the [legislature's] objective in a real and substantial manner."[59]

[58] *RJR MacDonald*, para. 160.
[59] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 55.

85. The *Regulations* were not minimally impairing. They impaired both the right to free expression and public assembly more than was necessary to achieve the government's goals. If the government's goal was to remove the blockades while being respectful of fundamental democratic rights, it needed to use a legislative scalpel in order to create regulations specifically aimed at that goal. Instead, the *Regulations* were a sledgehammer. By prohibiting attendance at a public assembly where a breach of the peace "may reasonably be expected to occur", the *Regulations* criminalized attending a public assembly *even if a blockade was never actually created*. Instead, one became liable to prosecution if it could be said that there *reasonably could have* been a blockade. It was not clear who determined what could reasonably be expected at any given public assembly or what the standard was for making that determination.

86. The *Regulations* also failed to criminalize *only the conduct of individuals who actually participated in causing the problem the Government is attempting to address*. The *Regulations* did not simply criminalize participation in creating a blockade. They criminalized the attendance of every single person at the assembly, even if a person did not agree with the blockades, did not participate in creating blockades, and protested in an entirely non-disruptive way on the sidewalk. The *Regulations* also criminalized *travelling* to a protest where there *might* have been a blockade, no matter their purpose for being there, and irrespective of whether a breach of the peace as defined under the *Regulations* ever actually occurred.

87. This is not what minimally impairing legislation looks like. This was an overreaction and a drastic overstep of government authority that sought to completely stamp out a demonstration by criminalizing the conduct of all protestors, lawful and unlawful alike. Law enforcement already had extensive tools available to it to address the situation under the *Criminal Code*, provincial laws and municipal bylaws, and the government has failed to show that these less restrictive alternatives would have been cumulatively insufficient to achieve the objective.

2) The *Economic Measures* failed minimal impairment

88. Unlike freedom of expression, which includes no internal limitations and saves the entire limitation analysis for section 1, section 8 of the *Charter* contains a robust and

carefully tailored internal balancing. A finding that a search power is unreasonable under section 8 leaves little room for upholding the law under section 1. How could a law found to be *unreasonable* under section 8 be upheld as a *reasonable limit* under section 1?

89. In any event, the *Economic Measures* could not have been upheld under section 1. The search power in section 5 was not minimally impairing of the right against unreasonable search and seizure. The CCF cannot envision any scenario where the government can justify creating a search power that requires *wholesale financial disclosure* to the police and RCMP, predicated on an unconstitutional "any reason to believe" standard, subject to no system of prior authorization. In the end, the government bears the burden under section 1, and the CCF will reply to the AGC's submissions on this point, either in writing or oral argument.

PART IV – ORDER REQUESTED

90. The CCF seeks the following orders:

i. A declaration that the *Emergency Proclamation* was illegal.

ii. A declaration that the *Regulations* were illegal.

iii. A declaration that the *Economic Measures* were illegal.

iv. A declaration that the *Regulations* were unconstitutional under the *Charter*.

v. A declaration that the *Economic Measures* were unconstitutional under the *Charter*.

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Sujit Choudhry LSO#: 45011E
Hāki Chambers Global
319 Sunnyside Avenue
Toronto ON M6R 2R3
Tel: (416) 436-3679
Email: sujit.choudhry@hakichambers.com
Counsel for the Applicant

Janani Shanmuganathan LSO#:62369I
Goddard & Shanmuganathan LLP
116-100 Simcoe St.
Toronto, ON M5H 4E2
Tel: (416) 649-5061
Email: janani@gsllp.ca
Counsel for the Applicant

PART V: LIST OF AUTHORITIES

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37

British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn, 2009 BCCA 39

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

Canadian Constitution Foundation v. Canada (Attorney General), 2022 FC 1233

Canadian Civil Liberties Association v. Canada (Attorney General), 2023 FC 118

Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 72

Ford v. Quebec (Attorney General), [1988] 2 SCR 712

Figueiras v. Toronto Police Services Board, 2015 ONCA 208

Harper v. Canada (Attorney General), 2004 SCC 33

Harper v. Canada (Attorney General), 2000 SCC 57

Hunter v. Southam, [1984] 2 SCR 145

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927

R. v. Big M Drug Mart Ltd., [1985] 2 SCR 295

R. v. Dyment, [1988] 2 SCR 417

R. v. Guignard, 2002 SCC 14

R. v. Jones, 2017 SCC 60

R. v. Kang-Brown, 2008 SCC 18

R. v. Keegstra, [1990] 3 SCR 697

R. v. Lucas, [1998] 1 SCR 439

R. v. MacKenzie, 2013 SCC 50

R. v. Marakah, 2017 SCC 59

R. v. Morrison, 2019 SCC 15

R. v. Oakes, [1986] 1 SCR 103

R. v. Patrick, 2009 SCC 17

R. v. Spencer, 2014 SCC 43

R. v. Tessling, 2004 SCC 67

R. v. Zundel, [1992] 2 SCR 731

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 SCR 199

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 SCR 877