

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.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at 180 Queen Street West, Toronto, Ontario, M5V 3L6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

February 23, 2022

Issued by:
Imrana Ahmed, Registry Officer

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: ATTORNEY GENERAL OF CANADA
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto, Ontario M5H 1T1

APPLICATION

This is an Application pursuant to section 18.1 of the *Federal Courts Act*, RSC c F-7 for judicial review of: (a) the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (“*Emergency Proclamation*”), made pursuant to section 17(1) of the *Emergencies Act*, RSC 1985, c 22 4th Supp (“the *Emergencies Act*”); (b) the *Emergency Measures Regulations*, P.C. 2022-107, SOR/2022-21 (“*Emergency Measures*”), made pursuant to section 19(1) of the *Emergencies Act*; and (c) the *Emergency Economic Measures Order*, P.C. 2022-108, SOR/2022-22 (“*Economic Measures*”), made pursuant to section 19(1) of the *Emergencies Act*.

THE APPLICANT MAKES APPLICATION FOR:

1. An order declaring unlawful and quashing the *Emergency Proclamation*.
2. An order declaring unlawful and quashing the *Emergency Measures*.
3. An order declaring unlawful and quashing the *Economic Measures*.
4. An order pursuant to section 52(1) of the *Constitution Act, 1982*, declaring the *Emergency Measures* to be unconstitutional and of no force or effect.
5. An order pursuant to section 52(1) of the *Constitution Act, 1982*, declaring the *Economic Measures* to be unconstitutional and of no force or effect.
6. An order pursuant to Rule 383 of the *Federal Courts Rules*, SOR/98-106 assigning this proceeding to case management.
7. An order pursuant to Rule 306 of the *Federal Courts Rules* to admit the affidavit of Madeleine Ross.
8. An order pursuant to Rule 105 of the *Federal Court Rules* that this proceeding be joined with *Canadian Civil Liberties Association v. Attorney General of Canada*, Court File No. T-316-2.
9. An order directing the Respondent to deliver the Record to the Applicant on an urgent basis pursuant to Rule 317 of the *Federal Courts Rules*, because of the inherently time limited nature of a public order emergency.

10. An order directing the Respondent to deliver those portions of the record to the Applicant over which it asserts any privileges under Rule 318, including pursuant to sections 38 (national security) and 39 (cabinet confidences) of the *Canada Evidence Act*, RSC 1985, c C-5, on an urgent, counsel-only basis pursuant to a confidentiality undertaking, because of the inherently time limited nature of a public order emergency.
11. The hearing of this matter on an expedited basis, because of the inherently time limited nature of a public order emergency.
12. An order that there be no costs of this proceeding.
13. Such further and other relief as counsel may advise and as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Overview

1. This is an urgent Application for Judicial Review of the federal cabinet's decision to trigger and exercise the extraordinary powers contained in the *Emergencies Act* on February 14 and 15, 2022.
2. The *Emergencies Act* has a dark and troubled history in Canada. The *Emergencies Act* was originally enacted in 1988 to replace the *War Measures Act* ("WMA"), which was used during the Second World War to intern Japanese Canadians and Italian Canadians, and which was abused during the FLQ Crisis in Quebec in 1970. In direct response to this history, the *Emergencies Act* sets out a carefully crafted and demanding set of legally binding conditions that must be satisfied before it may be triggered, to ensure that it is used only as an absolute last resort, and for not a moment longer than necessary.
3. The *Emergencies Act* has never been invoked before. Over the decades since it was passed, Canada has weathered terrorist attacks, economic hardship, and an unprecedented global health pandemic without ever needing to resort to the incredible powers contained in the *Emergencies Act*.
4. The question on this Application is whether the strict legal requirements of the *Emergencies Act* were met before the federal cabinet issued the *Emergency Proclamation*, the

Emergency Measures, and the *Economic Measures*, in response to protests in Ottawa and border blockades.

5. We submit that the answer to that question is that those legal requirements were not met.

6. The *Emergencies Act* vests the federal cabinet with the extraordinary power to unilaterally proclaim a public order emergency. Such a proclamation serves *de facto* as a temporary constitutional amendment. Under the *Emergencies Act*, after the federal cabinet proclaims a public order emergency, vast legislative authority is delegated to the cabinet. This authority encompasses the power to create new criminal offences and police powers, without recourse to Parliament, advance notice or public debate. The *Emergencies Act* also grants the federal cabinet legislative power in core areas of provincial jurisdiction, such as property and civil rights, without any requirement for provincial consultation or consent.

7. Because of its profound effects on Canada's federal democracy, the grave risk of executive overreach, and the government's past abuse of emergency powers that this legislation was specifically intended to prevent, the courts should regard the *Emergencies Act* as a quasi-constitutional statute and interpret it strictly.

8. The federal cabinet did not have reasonable grounds for concluding there was a public order emergency that justified invoking the *Emergencies Act*, no matter how challenging and difficult it perceived the ongoing protests to be. Invoking the *Emergencies Act* was not absolutely necessary, as the law requires. Federal, provincial and municipal law enforcement already had all of the legal tools and authorities they needed to respond to the protests. Their perceived failure to respond effectively does not in itself authorize the government to invoke the *Emergencies Act*. The stringent conditions set by the *Emergencies Act* for declaring a public order emergency, and thus triggering the vast powers contemplated by the *Emergencies Act*, were not met.

9. In addition, the *Emergency Measures* and the *Economic Measures* violate the *Charter*. First, the prohibitions created by the *Emergency Measures* impose the threat of fine or imprisonment on a broad range of conduct, and, in so doing, risk a chilling effect on otherwise legitimate forms of expression. Second, the *Economic Measures* require banks to disclose otherwise private banking information to the police. Under the law, this amounts to a warrantless and unreasonable search of the private banking information of Canadian citizens. Both the

Emergency Measures and the *Economic Measures* create clear violations of sections 2, 7 and 8 of the *Charter*, and do not constitute reasonable limits that can be demonstrably justified in a free and democratic society.

B. Chronology of Key Events Leading up to the invocation of the *Emergencies Act*

i) Ottawa Protests: Before the Emergency Proclamation

10. 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.¹ The Convoy’s arrival in Ottawa was not a surprise. Its route to Ottawa was widely publicized.²

11. Over the ensuing days, the protests in Ottawa grew. The blocking of public roadways by protestors violated both the *Criminal Code* and the *Highway Traffic Act*, RSO 1990 c H.8. Mischief under section 430 of the *Criminal Code*, for example, makes it a criminal offence for someone to obstruct, interrupt or interfere with the lawful use, enjoyment, or operation of property.

12. On January 31, 2022, Prime Minister Trudeau spoke with Ottawa Mayor Jim Watson about the Convoy and its illegal occupation of the downtown core.

13. By February 5, 2022, the Royal Canadian Mounted Police (“RCMP”) had provided “fresh reinforcements” to the Ottawa Police Service (“OPS”) at its request, in the form of 257 officers, from its detachment in Ottawa.³ The RCMP National Headquarters is also located in Ottawa.

14. The next day, on February 6, 2022, the City of Ottawa declared a state of emergency. Ontario Premier Doug Ford told the press that the provincial government was supporting Ottawa in whatever way it could, but that Ottawa had not asked the province to request military aid from the federal government.⁴

¹ Exhibit A, Affidavit of Madeleine Ross.

² Exhibit B, Affidavit of Madeleine Ross.

³ Exhibit C, Affidavit of Madeleine Ross.

⁴ Exhibit D, Affidavit of Madeleine Ross.

15. On February 7, 2022, the first of several trilateral meetings took place between the federal government, Mayor Watson, and the Ottawa Police Chief.⁵ Mayor Watson also wrote to the federal government asking for an additional 1800 RCMP and Ontario Provincial Police (“OPP”) officers.⁶

16. On February 12, 2022, the OPS announced the establishment of an enhanced “Integrated Command Centre” (ICC) that brought together the OPS, OPP and RCMP in response to the protests in Ottawa, “to coordinate enforcement” and “to make the most effective use of the additional resources our policing partners have provided us”, which “will result in a significantly enhanced ability of our police service to respond to the current situation in our city.”⁷

17. On February 15, 2022, Justice McWatt of the Ontario Superior Court of Justice issued an interlocutory injunction pursuant to s. 440 of the *Municipal Act*, RSO 1990, c M.45, in response to an application brought by the City of Ottawa, enjoining individuals from breaching the following By-laws of the City of Ottawa: 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 2007-266.⁸

18. Following the establishment of the ICC, and with the help of the additional resources provided by the OPP and the RCMP, the OPS began charging protestors. The charges include:

- (a) Tyson Billings: charged under the *Criminal Code* with mischief (section 430), counselling to commit the offence of mischief (section 464), counselling to commit the offence of disobey court order (section 464), obstruct police (section 129) and counselling to commit the offence of obstruct police (section 464).⁹
- (b) Patrick King: charged under the *Criminal Code* with mischief (section 430), counselling to commit the offence of mischief (section 464), counselling to commit the offence of disobey court order (section 464) and counselling to commit the offence of obstruct police (section 464).¹⁰
- (c) Tamara Lich: charged under the *Criminal Code* with counselling to commit the offence of mischief (section 464).¹¹

⁵ Exhibit E, Affidavit of Madeleine Ross.

⁶ Exhibit F, Affidavit of Madeleine Ross.

⁷ Exhibit H, Affidavit of Madeleine Ross.

⁸ Exhibit Z, Affidavit of Madeleine Ross.

⁹ Exhibit G, Affidavit of Madeleine Ross.

¹⁰ Exhibit I, Affidavit of Madeleine Ross.

¹¹ Exhibit J, Affidavit of Madeleine Ross.

(d) John Barber: charged under the *Criminal Code* with counselling to commit the offence of mischief (section 464), counselling to commit the offence of disobey court order (section 464) and counselling to commit the offence of obstruct police (section 464).¹²

19. 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.¹³ It is unclear whether even a single protester in Ottawa was charged with any offences created by the *Emergency Measures*.

ii) *Blockade of the Ambassador Bridge in Windsor, Ontario*

20. On February 7, 2022, protestors began a blockade at the Ambassador Bridge in Windsor. The bridge is Canada's busiest border crossing with the United States. Windsor Police responded immediately with a large police presence to monitor the demonstrations.

21. The next day, on February 8, 2022, Windsor Police issued a press release warning protesters that those "found committing crimes and acts of violence will be investigated and charges will be laid" and that steps taken would include "enforcement of traffic related offences and investigating any criminal acts."¹⁴

22. Two days later, the Windsor Police issued a press release explicitly outlining the various criminal offences that the protestors were potentially committing:

The Windsor Police Service wants to make demonstrators clearly aware that it is a criminal offence to obstruct, interrupt or interfere with the lawful use, enjoyment, or operation of property. The offence itself is known as mischief to property. The unlawful act of blocking streets at and near the Ambassador Bridge is resulting in people being denied the lawful use, enjoyment and operation of their property and causing businesses to close down. We are providing notice that anyone blocking streets or assisting others in the blocking of streets may be committing a criminal offence and must immediately cease further unlawful activity or you may face charges. You could be arrested if you are a party to the offence or assisting others in the direct or indirect commission of this offence. Vehicles or other property related to an offence may be seized. Once a vehicle is seized, it may be detained and, following a conviction, possibly forfeited.¹⁵

23. On February 10, 2022, Prime Minister Trudeau spoke with the Mayor of the City of Windsor and had another call with the Premier of Ontario Doug Ford. It is unclear what if any

¹² Exhibit K, Affidavit of Madeleine Ross.

¹³ Exhibit L, Affidavit of Madeleine Ross.

¹⁴ Exhibit M, Affidavit of Madeleine Ross.

¹⁵ Exhibit N, Affidavit of Madeleine Ross.

assistance Windsor sought from the federal government, and what the federal government's response was. That same day, auto industry groups with the support of the City of Windsor sought an injunction from the Ontario Superior Court of Justice to end the blockade.

24. On February 11, 2022, Chief Justice Morawetz granted the injunction, and ordered that the "Police or designated agents shall have authorization to remove any vehicles, personal property, equipment, structures, or other objects that impede or block access to the Ambassador Bridge and approaching roadways."¹⁶

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

26. 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 is facing a *Highway Traffic Act* charge for failing to remain (section 200(1)(a)).¹⁷

iii) *Blockade in Coutts, Alberta*

27. On January 29, 2022, a blockade began in Coutts, Alberta at the United States-Canada border. The Coutts protest was widely publicized. Alberta RCMP were aware of the planned blockade and had some time to plan their own response, which included having RCMP officers at the border for the duration of the blockade.¹⁸

28. On February 5, 2022, the Alberta Minister of Municipal Affairs, the Honourable Ric McIver, wrote a letter to the federal Minister of Public Safety, Marco Mendicino, and federal Minister of Emergency Preparedness, William Blair. Mr. McIver explained that Alberta's plan going forward was for the RCMP and partner law enforcement agencies to remove demonstrators and bystanders, which would allow for the removal of the vehicles and equipment obstructing the

¹⁶ Exhibit O, Affidavit of Madeleine Ross.

¹⁷ Exhibit FF, Affidavit of Madeleine Ross.

¹⁸ Exhibit P, Affidavit of Madeleine Ross.

highway. The only support that Mr. McIver sought from federal authorities was “provisions” in the form of equipment and personnel: “To support this approach, I am requesting federal assistance that includes the provision of equipment and personnel to move approximately 70 semi-tractor trailers and approximately 75 personal and recreational vehicles from the area.”¹⁹ It is unclear whether and how the federal government responded to Mr. McIver’s request.

29. 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.

iv) Blockade at Sarnia Blue Water Bridge, Ontario

30. On February 8, 2022, two groups of protests blocked the provincial highway leading to and from the Sarnia Blue Water Bridge, a border crossing. However, ten hours later, the OPP was able to clear the blockade and restore access to the border.

31. 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.

v) Blockade at Emerson, Manitoba

32. On February 10, 2022, protesters began blocking the Canada-United States border at the port of entry at Emerson, Manitoba. The next day, Manitoba Premier Heather Stefanson wrote to Prime Minister Trudeau seeking immediate and effective federal action regarding the blockade. Premier Stefanson did not specify what the federal action should look like, but she did welcome discussion on potential “federal-provincial collaborative action”.²⁰

33. 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. The press release also

¹⁹ Exhibit Q, Affidavit of Madeleine Ross.

²⁰ Exhibit S, Affidavit of Madeleine Ross.

noted that in successfully clearing the blockade, the Manitoba RCMP worked collaboratively with the CBSA, US Customs and Border Protection, and Manitoba Transportation and Infrastructure.²¹

vi) *Blockade at the Peace Bridge at Fort Erie, Ontario*

34. 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.²²

vii) *Blockade in Surrey, British Columbia*

35. 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”.²³ By February 19, 2022, the border had reopened.²⁴

viii) *Ontario Measures in Response to the Protests and Blockades*

36. On February 11, 2022, the Province of Ontario declared a state of emergency pursuant to O.Reg. 69/22 under the *Emergency Management and Civil Protection Act*, RSO 1990, c E9.²⁵ At a press conference, Premier Ford said that he would convene cabinet and “urgently enact orders that will make crystal clear it is illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure.”²⁶ On February 12, 2022, the Ontario government confirmed the state of emergency (O. Reg. 70/22)²⁷ and promulgated O.Reg. 71/22, making it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure.²⁸

²¹ Exhibit R, Affidavit of Madeleine Ross.

²² Exhibit A at p. 8, Affidavit of Madeleine Ross.

²³ Exhibit T, Affidavit of Madeleine Ross.

²⁴ Exhibit U, Affidavit of Madeleine Ross.

²⁵ Exhibit AA, Affidavit of Madeleine Ross.

²⁶ Exhibit V, Affidavit of Madeleine Ross.

²⁷ Exhibit DD, Affidavit of Madeleine Ross.

²⁸ Exhibit EE, Affidavit of Madeleine Ross.

37. On February 20, 2022, the Province of Ontario brought an application in the Superior Court of Justice for an order pursuant to section 490.8 of the *Criminal Code*. The Court issued the order, which prohibited people from disposing, or otherwise dealing with, donations made through the Freedom Convoy and Adopt-a-Trucker campaign pages on the “GiveSendGo” online fundraising platform.²⁹

ix) Nova Scotia Measures in Response to the Blockades

38. On January 28, 2022, the Nova Scotia Minister of Municipal Affairs and Housing issued Direction 22-003 (road blockade ban) pursuant to section 14 of the *Emergency Management Act*, SNS 1990, c 8, 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.³⁰

39. On February 4, 2022, the Nova Scotia Attorney General and Minister of Justice promulgated N.S. Reg. 16/2022, pursuant to section 8 of the *Summary Proceedings Act*, RNS, c 450, to make the prohibitions in Direction 22-003 (road blockade ban) summary conviction offences.³¹

x) The Deputy Director of FINTRAC Testifies at the House of Commons Regarding the Protests and Blockades

40. On February 10, 2022, Barry McKillop, the Deputy Director of Intelligence of the Financial Transactions and Reports Analysis Centre (“FINTRAC”), testified at the House of Commons Public Safety and National Security Committee about the protests taking place across the country, and the concerns about how these protests were being funded.

41. Mr. McKillop explained that while crowdfunding sites are not a regulated money service business (“MSB”) under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, when those sites transact with or through businesses that are MSBs, e.g., payment processing platforms such as Stripe or PayPal, those MSBs would be able to submit reports identifying transactions that are suspicious and would submit such reports to FINTRAC.³² Mr.

²⁹Exhibit W, Affidavit of Madeleine Ross. See also Exhibit GG, Affidavit of Madeleine Ross.

³⁰ Exhibit BB, Affidavit of Madeleine Ross.

³¹ Exhibit CC, Affidavit of Madeleine Ross.

³² Exhibit X, Affidavit of Madeleine Ross, at 13:43:18 to 13:43:50.

McKillop testified that to date, FINTRAC had not seen a spike in suspicious transaction reporting in relation to the Ottawa protests.³³

C. The History of the *Emergencies Act*

42. The exercise of emergency powers by the federal cabinet has been deeply troubled throughout Canada's history. The *War Measures Act* was the direct predecessor to the *Emergencies Act* and was in force between 1914 and 1988.³⁴ During that time, Canada spent close to two decades under federal emergency legislation.

43. Professor Patricia Peppin of Queen's University's Faculty of Law describes that the *War Measures Act* "superseded all existing laws, provided overarching powers for cabinet to govern through regulation, and permitted overriding the normal operation of the federal system." Ultimately, the act was used to support censorship and to permit internment:

The *War Measures Act* was used to impose censorship, to outlaw socially unacceptable organizations, to legalize retroactively the actions taken by the military during the Quebec City conscription riots, to impose preventive detention, to allow the deportation of Canadian-born people of Japanese ancestry, to permit the internment of thousands of Japanese Canadians, to authorize the confiscation of Japanese Canadians' property under the guise of expropriation for compensation, the registration and internment of alien enemies in both World Wars, and the detention of persons who belonged to 'unlawful associations' like the Communist Party.³⁵

44. The *Emergencies Act* was drafted to ensure these abuses never happened again by protecting parliamentary democracy, federalism, and individual rights. The overarching principle behind the specific provisions of the *Emergencies Act* is proportionality. Every provision of the Act is designed with the intent of limiting the federal cabinet's power to declare an emergency to only those situations where it is absolutely necessary, to grant to the cabinet only the powers it needs to deal with the particular emergency, and for the powers to exist for only as long as the emergency exists.

³³ Exhibit X, Affidavit of Madeleine Ross, at 13:54:00 to 13:54:36.

³⁴ The *War Measures Act* was in fact a series of statutes – the *War Measures Act, 1914*, SC 1915; *War Measures Act*, R.S.C. 1927, c 206; *National Emergency Transitional Powers Act, 1945*, SC 1945; *National Emergency Transitional Powers Act, 1945*, SC 1945; *Emergency Powers Act*, SC 1951, c 5 and SC 1952-53, c 33; *War Measures Act*, RSC 1970, c W-2; and the *Public Order (Temporary Measures) Act 1970*, SC 1970-72, c 2.

³⁵ Exhibit Y, Affidavit of Madeleine Ross.

45. The Act defines a “national emergency” as “an urgent and critical situation of a temporary nature that”:

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it; or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada”; and
- (c) “cannot be effectively dealt with under any other law of Canada”.

46. The Act creates four different kinds of national emergencies: public welfare emergencies, public order emergencies, international emergencies, and war emergencies. Each type of emergency must satisfy additional conditions before the federal cabinet can proclaim it. Each type of emergency confers different powers on the federal cabinet.

47. In this case, federal cabinet has proclaimed a public order emergency. A public order emergency is “an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency” (section 16). “Threats to the security of Canada”, in turn, are defined by the *Canadian Security Intelligence Security Act*, RSC 1985, c C-23, section 2 as:

- (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage;
- (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
- (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
- (d) activities directed toward undermining by covert unlawful acts or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

48. The federal cabinet may declare a public order emergency if it “believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency” (section 17).

49. When a declaration of public order emergency is in effect, the federal cabinet may make “orders or regulations” on the following matters if it “believes, on reasonable grounds” that such measures “are necessary for dealing with the emergency” (section 19(1)):

- (a) the regulation or prohibition of:

- (i) any public assembly that may reasonably be expected to lead to a breach of the peace,
 - (ii) travel to, from or within any specified area, or
 - (iii) the use of specified property;
- (b) the designation and securing of protected places;
- (c) the assumption of the control, and the restoration and maintenance, of public utilities and services;
- (d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and
- (e) the imposition:
- (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,
- for contravention of any order or regulation made under this section.

D. The *Emergency Proclamation, Emergency Measures, and Economic Measures*

50. The federal government issued the *Emergency Proclamation* on February 14, 2022. The Proclamation declared that a public order emergency exists “throughout Canada” and “necessitates” the taking of special temporary measures for dealing with the emergency.

51. The *Emergency Proclamation* describes the “emergency” as consisting of five elements:

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

52. The *Emergency Proclamation* goes on to describe the special temporary measures as consisting of:

- (a) measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure;
- (b) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and the provision of reasonable compensation in respect of services so rendered;
- (c) measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade;
- (d) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference;
- (e) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*; and
- (f) other temporary measures authorized under section 19 of the *Emergencies Act* that are not yet known.

53. The House of Commons confirmed the *Emergency Proclamation* on February 21, 2022.

54. The *Emergency Measures* and the *Economic Measures* were promulgated on February 15, 2022. Together, they set out the prohibitions and powers created by the invocation of the *Emergencies Act*.

55. The *Emergency Measures* creates four prohibitions:

- (a) A person must not participate in a public assembly that may reasonably lead to a breach of peace or causing a person under the age of 18 to participate in such an assembly, by the serious disruption of the movement of persons or goods or the serious interference with trade the interference with the functioning of critical infrastructure, or the support of the threat or use of acts of serious violence against persons or property (section 2);
- (b) A foreign national must not enter Canada with the intent to participate in or facilitate such an assembly (section 3);
- (c) A person must not travel to or within an area where such an assembly is taking place, or causing a person under the age of 18 to travel to, or within 500 metres of such an assembly (section 4); and
- (d) A person must not, directly or indirectly, use collect, provide, make available or invite a person to provide property to facilitate or participate in such an assembly, or for the purpose of benefiting any person who is facilitating or participating in such an assembly (sections 5).

56. The *Emergency Measures* also direct people, in exchange for fair compensation, to assist the Minister of Public Safety and Emergency Preparedness, the Commissioner of the RCMP, or anyone acting on their behalf, with removing, towing and storing any objects that are part of a blockade (sections 7, 8 and 9).

57. A failure to comply with the *Emergency Measures* allows for prosecution on summary conviction or by indictment. Summary prosecution carries a possible punishment of a fine not exceeding \$5,000 or imprisonment not exceeding 6 months. Prosecution by indictment carries a possible punishment of a fine not exceeding \$5000 or a term of imprisonment not exceeding 5 years (section 10(2)).

58. The *Economic Measures* require financial “entities” listed therein (section 3) to cease dealing in any property that is owned, held or controlled, directly or indirectly, by a designated person or by a person acting on behalf of or at the direction of a “designated person”; cease facilitating any related transactions; cease making available property (including funds or virtual currency); and cease providing any financial or related services to or for the benefit of a designated person (section 2). A designated person is someone who is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures* (section 1).

59. The *Economic Measures* also require entities to determine on a continuing basis whether they are in possession or control of property that is owned, held or controlled by or on behalf of a

“designated person” (section 3). Entities are required to register with FINTRAC and to report every suspicious financial transaction (section 4), and to disclose to the Commissioner of the RCMP 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 any information about a transaction or proposed transaction in relation to this property (section 5). The *Economic Measures* offer no guidance on how the entities should interpret the phrase “reason to believe”. They immunize the entities from civil liability when complying with the *Economic Measures*.

E. The *Emergency Proclamation*, *Emergencies Measures*, and *Economic Measures* are unlawful

60. The *Emergency Proclamation* and *Emergencies Measures* are unlawful because they do not meet the key requirement of necessity in the *Emergencies Act*. It simply cannot be established that the situation that the invocation of the *Emergencies Act* was intended to address could not have been handled effectively under existing Canadian law.

61. One of the key justifications for invoking the *Emergencies Act* was the impact that border blockades were having on international trade and international relations. But in reality, the border blockades at the Ambassador Bridge, Coutts, Emerson, the Peace Bridge, Sarnia, and Surrey were cleared by police using existing provisions under the *Criminal Code* and provincial laws, including *Highway Traffic Act* legislation. The blockades were all effectively resolved without recourse to the powers granted by the *Emergencies Measures*, and there are currently no border blockades.

62. In clearing the border blockades, every single charge the police have laid thus far has been under the *Criminal Code* and existing provincial legislation, and not a single charge has been laid using the allegedly indispensable new offences created under the *Emergencies Act*.

63. Future border blockades can be effectively addressed in the same way, through the use of existing legislation and the exercise of existing federal and provincial authority. Recourse to the extraordinary powers granted by the *Emergencies Measures* is simply not necessary.

64. Similarly, to address the protests in Ottawa, the federal government already had the power to provide officers to the Ottawa Police Service and to establish a joint command with the OPS and OPP in Ottawa, and it in fact did exercise these powers prior to the *Emergency Proclamation*. In addition, section 129(b) of the *Criminal Code* makes it an offence for a person, without

reasonable excuse, to refuse to assist a police officer in the execution of their duty. This could apply to tow truck drivers who refuse to assist police by making their vehicles available as needed to preserve the peace.

65. Again, the efficacy of existing legislation and authority in addressing the protests in Ottawa is made clear by the fact that every single charge that was laid when the police moved in to end the blockades was laid under existing *Criminal Code* provisions. Not a single charge has been laid pursuant to the *Emergency Measures*.

66. The federal and provincial government also already had the ability to take steps to limit the financing of future illegal protests. The existing authority of FINTRAC over payment processing platforms already requires these platforms to report suspicious transfers to and from crowdfunding sites. In addition, the Attorney General already has the power to make an application for a restraint order under section 490.8 of the *Criminal Code*, which would prevent a person from disposing of, or otherwise dealing with, any interest in offence-related property.

67. When Parliament passed the *Emergencies Act* in 1988, it did so in full recognition of this country's dark history of abuse under the *War Measures Act*. It specifically sought to make sure the *Emergencies Act* would not be used unless it was absolutely necessary, and it stipulated that the powers under the *Emergencies Act* should never be invoked unless existing law was truly incapable of dealing with the problem. There is simply no evidence that this standard was met in this case. In fact, the way in which the protests were actually dealt with and resolved gives us every reason to believe that resort to the *Emergencies Act* was unnecessary.

F. The *Emergency Proclamation*, *Emergencies Measures*, and *Economic Measures* Violate the *Charter*

68. One of the reasons why emergency powers ought to be invoked only in extraordinarily rare circumstances is that emergency powers often lead to abuses of individual rights. Canada's history under the *War Measures Act* provides ample evidence of that. In this case, the reasonableness of the Government's invocation of the *Emergencies Act* must take into account whether the *Emergency Measures* and the *Economic Measures* violate the *Charter*. Both sets of measures create serious violations of core democratic rights and other freedoms, under sections 2, 7, and 8 of the *Charter*.

i) *Section 2 of the Charter*

69. Sections 2, 4 and 5 of the *Emergency Measures*, and section 2 of the *Economic Measures*, all violate the core democratic rights to freedom of expression, association, and assembly guaranteed by sections 2(b), (c), and (d) of the *Charter*.

70. The rights to expression, assembly, and association created by section 2 of the *Charter* have been interpreted purposively, in the broadest possible terms. The *Emergency Measures*' prohibitions on attending assemblies and engaging in fundraising — as either a donor or a solicitor of donations — amount to clear cut violations of these rights. Similarly, section 2 of the *Economic Measures* is designed to discourage and prevent participation in these constitutionally protected activities, which also amounts to a violation of these rights. It will therefore fall to the government to justify these violations under section 1 of the *Charter*.

71. Under section 1, these prohibitions will fail because they are not minimally impairing, and their deleterious effects outweigh their salutary benefits. Section 2 of the *Emergency Measures* criminalizes participation in a demonstration that *might* — in the future — “reasonably be expected to lead to a breach of the peace.” The *Emergency Measures* provide no guidance on how to determine whether a breach of the peace can be “reasonably expected.”

72. It is clear that these measures have been invoked in response to protests against government measures taken in response to the COVID-19 pandemic — and in particular the use of illegal blockades during these protests. Going forward, however, it is entirely unclear how the government will enforce the *Emergency Measures* and *Economic Measures*, and what evidence or intelligence will be used to satisfy a reasonable belief that a breach of the peace might occur. For example, if protests were organized in response to the government's invocation of the *Emergencies Act*, would it be possible for the government and the police to conclude there is a reasonable expectation that a breach of the peace might occur at these protests, given what has just taken place in the previous protests? Reasoning along these lines is not far-fetched, and it risks chilling legitimate speech and demonstration by instilling fear in those who might otherwise wish to participate in lawful demonstrations against government actions.

73. It also seems clear from the wording of the *Emergency Measures* that someone could be charged and convicted of an offence under this section for participating in a demonstration that

never actually resulted in a breach of the peace. This is because the provision does not merely criminalize or prohibit participation in a demonstration where a breach of the peace actually occurs, . Rather, it targets situations where it is reasonably believed such a breach might occur.

74. Similarly, the section draws no distinction between those protestors who actually participate in a breach of the peace, and those who do not. The only intent required by the prohibition is an intention to participate in the public assembly as a whole — and not the actual breach of the peace that *might* possibly occur. In other words, if someone attends a public demonstration with the sole intention of standing on the front lawn of Parliament holding up a sign expressing their opinion, they would be guilty of a criminal offence if other protestors decided to block the roads in a way that offended the prohibition. Similarly, they would be guilty of an offence if it could simply be reasonably expected that an event might occur, even if it does not actually occur, and even if they had no intention of participating in such an event did it occur.

75. This prohibition is not minimally impairing because it goes further than necessary. Instead of targeting actually unlawful conduct that constitutes a breach of the peace, it prohibits any participation — even peaceful participation — in a protest where state officials “reasonably believe” a breach of the peace might occur.

76. Sections 4 and 5 of the *Emergency Measures*, and section 2 of the *Economic Measures*, rely on the same definition of unlawful assembly, and similarly fail to minimally impair *Charter* rights as a result.

ii) *Section 7 of the Charter*

77. Sections 2, 4 and 5 of the *Emergency Measures* violate section 7 of the *Charter*. These prohibitions are deprivations of the right to liberty because they carry with them the threat of significant jail sentences. These deprivations are not in accordance with the principles of fundamental justice, because they are overbroad and/or have effects that are grossly disproportionate to the objectives of the prohibition.

iii) *Section 8 of the Charter*

78. Sections 4 and 5 of the *Economic Measures* violate section 8 of the *Charter*. Section 4 requires financial institutions to register with FINTRAC if they are in possession of property that

is owned by or held on behalf of a person who has participated in an unlawful assembly (i.e. a “designated person” under the *Economic Measures*) and to report to FINTRAC if they have reasonable grounds to suspect that a transaction has been conducted relating to the commission of a money laundering or terrorism related offence. Section 5 requires financial institutions to report to the RCMP and to CSIS “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 person who is participating in an unlawful assembly.

79. Canadian citizens and permanent residents enjoy a reasonable expectation of privacy over the information that banks hold about them, including the details of the accounts that they hold, the funds they possess, and the ways they spend their money. By requiring financial institutions to provide such information to CSIS and to the RCMP, these provisions of the *Economic Measures* constitute a search.

80. These search provisions violate section 8 of the *Charter* because they do not comply with the Supreme Court’s decision in *Hunter v. Southam*, [1984] 2 SCR 145. *Hunter v. Southam* held that for a statutory provision authorizing a search to be reasonable under the *Charter*, it must require prior judicial authorization based on reasonable grounds. Sections 4 and 5 of the *Economic Measures* do not make any provision for prior judicial authorization before the search takes place, nor do they define the standard upon which a financial institution must satisfy itself that it is dealing with a “designated person” before turning that person’s financial information over to CSIS and the RCMP.

G. The Canadian Constitution Foundation Meets the Test for Public Interest Standing

81. The Canadian Constitution Foundation (CCF) brings this application on the basis of public interest standing. The federal government’s invocation of the *Emergencies Act* has a serious effect on the constitutional rights and freedoms of Canadians across the country.

82. Founded in 2002, the CCF is an independent, national, and non-partisan registered charity whose mission is to protect constitutional freedoms. The CCF furthers this mission through education, communication, and litigation.

83. In keeping with its mandate, the CCF has accumulated significant public interest litigation experience. The CCF has appeared before all levels of court in Ontario and Canada and has made

significant contributions to constitutional law jurisprudence. The CCF has been granted intervener status by the Supreme Court of Canada in 13 cases.

84. The CCF has also been granted standing to litigate issues in its own right as a public interest litigant. Just last year, the CCF was the applicant on a successful constitutional challenge to various provisions of the *Elections Act*, in *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 1224.

85. The CCF has a genuine interest in this Application because it is directly connected to the organization's protective mandate. The CCF also has the experience and expertise needed to efficiently and effectively conduct the litigation surrounding this judicial review. The CCF has started similar actions before, knows what will be involved, and has the resources to pursue this Application.

86. The invocation of the *Emergencies Act* and its impact on the constitutional rights of all Canadians creates an urgent need for this Application and a consideration of the legality of the underlying decision. The CCF will use its expertise and experience to ensure the issues are raised and resolved through expeditious proceedings.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL

70. Affidavit of Joanna Baron dated February 22, 2022;

71. Affidavit of Madeleine Ross dated February 22, 2022;

72. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

Rule 317 Request: The Applicant requests that the Respondent send certified copies of the following materials that are not in the possession of the Applicant, but are in the possession of the Respondent, to the Applicant and the Registry:

1. The record of materials before the Governor in Council in respect of the *Emergency Proclamation*.
2. The record of materials before the Governor in Council in respect of the *Emergency Measures*.

3. The record of materials before the Governor in Council respect of the *Economic Measures*.

February 22, 2022



Sujit Choudhry LSO#: 45011E
choudhry.law

1 King Street W., Suite 4800

Toronto ON M5H 1A1

Tel: (416) 436-3679

Email: suj@choudhry.law

Janani Shanmuganathan LSO#: 62369I

Goddard & Shanmuganathan LLP

116-100 Simcoe St.

Toronto, ON

M5H 4E2

Tel: (416) 649-5061

Email: janani@gslp.ca

Counsel for the Applicant