

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on the following page.

THIS APPEAL 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 Appellant. The Appellant requests that this appeal be heard in Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor, or where the Appellant is self-represented, on the Appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Dated: February 21, 2024

Issued by: _____
(Registry Officer)

Address of local office:

Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario
K1A 0H9

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal pursuant to sections 27(1)(a) and 52(b) of the *Federal Courts Act*, RSC 1985, c F-7, and Rules 335(a) and 337 of the *Federal Courts Rules*, SOR/98-106, from the judgments of the Honourable Mr Justice Mosley of the Federal Court issued on January 23, 2024 in Federal Court files T-316-22 (*Canadian Civil Liberties Association v Attorney General of Canada*), T-347-22 (*Canadian Constitution Foundation v Attorney General of Canada*), and T-382-22 (*Jost et al v Attorney General of Canada et al*).

THE APPELLANT ASKS FOR:

1. An order setting aside the Federal Court's judgments and dismissing the underlying applications for judicial review;
2. In the alternative, an order referring the matters back to the Federal Court for a new determination with such directions as this Court may deem appropriate; and
3. An order for costs in this appeal.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. The Federal Court erred in law in declaring that the decision to issue the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (*Proclamation*), made pursuant to subsection 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp) (*Emergencies Act*), and the associated *Emergency Measures Regulations*, PC 2022-

107, SOR/2022-21 (*Regulations*) and the *Emergency Economic Measures Order*, PC 2022-108, SOR/2022-22 (*Order*), was unreasonable and *ultra vires* the *Emergencies Act*, by applying the reasonableness standard of review in an incorrect manner, including by:

- a. Failing to afford any deference to the Governor in Council (GIC)'s decision to issue the *Proclamation* and the associated *Regulations* and *Order*, and in finding there to be only one reasonable interpretation of sections 3 and 17 of the *Emergencies Act* and paragraph 2(c) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23;
- b. Re-weighting the evidence and substituting its own opinion as to the decision the GIC should have made rather than assessing whether it was reasonable for the GIC to decide that it had reasonable grounds to believe that a public order emergency existed which necessitated the taking of special temporary measures to deal with it, as required by subsection 17(1) of the *Emergencies Act*;
- c. Reviewing the GIC's decision with the benefit of hindsight and based on information that was not available to the GIC at the time it made its decision to issue the *Proclamation*, *Regulations* and *Order*; and
- d. Finding the *Emergencies Act*'s requirements of a "national emergency," a "threat to the security of Canada" and, specifically, "threats or use of acts of serious violence", had not been met.

3. The Federal Court erred in fact and law in declaring that the *Regulations* infringed subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*) (*Charter*) and that the infringement was not justified under section 1, including by:

a. Adopting an overly narrow articulation of the objective of the *Regulations*, which failed to recognize that the objective was not limited to prohibiting the conduct of “those who behaved in a manner that could reasonably be expected to lead to a breach of the peace” but included the prevention of inflows into specific areas that could amplify the disruption and make the work of law enforcement in entering and breaking up the occupations more difficult; and

b. Concluding that any infringement of freedom of expression under subsection 2(b) of the *Charter* was not minimally impairing or otherwise reasonable and demonstrably justified, based on a hindsight-driven analysis and misapplication of Canada’s burden of proof under section 1 of the *Charter*, which failed to apply the reasoned apprehension of harm standard.

4. The Federal Court erred in fact and law in declaring that the *Regulations* infringed section 8 of the *Charter* and that the infringement was not justified under section 1, including by:

a. Failing to interpret section 8 of the *Charter* in accordance with the Supreme Court of Canada’s determination that section 8 does not protect mere property rights, and that the taking or restraint of property is not a “seizure” in

the meaning of section 8 where it is done for a purpose other than to further an administrative or criminal investigation;

b. Determining that the *Order* was unreasonable within the meaning of section 8 based on an untenable interpretation of the *Order* and without applying the relevant jurisprudence or factors for assessing reasonableness outside the criminal context; and

c. Concluding that any impairment of *Charter* rights was not minimally impairing or otherwise reasonable and demonstrably justified.

5. The Federal Court erred in law by determining that Cabinet made the decisions to issue the *Proclamation, Regulations* and *Order*, and by identifying Cabinet as the *de facto* decision-maker and the GIC as the *de jure* decision-maker, for the purposes of identifying the federal board, commission, or tribunal whose decision is at issue for the purposes of section 18.1 of the *Federal Courts Act*, despite Parliament specifying the GIC as the sole decision-maker under the *Emergencies Act*.

6. The Appellant will rely on the following statutory provisions:

a) *Federal Courts Act*, sections 2, 18.1, 27(1), 52(b);

b) *Federal Courts Rules*, Rules 3(a), 312, 317, 335, 337, and 400;

c) *Emergencies Act*, sections 17 and 19, and associated regulations and orders thereto, including the *Proclamation, Regulations* and *Order*.

7. Such further and other grounds as the Appellant may advise and this Court may permit.

The Attorney General of Canada proposes that this appeal be heard in Ottawa.

Ottawa, February 22, 2024

 for

ATTORNEY GENERAL OF CANADA

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