

S.C.C. Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**CANADIAN FRONTLINE NURSES
and KRISTEN NAGLE**

APPLICANTS
(Appellants)

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE)
(Pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c S-26)

VOLUME - III

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TAB 2

APPLICANTS' MEMORANDUM OF ARGUMENT**PART I – OVERVIEW AND STATEMENT OF FACTS****A. Overview**

1. This application raises two general issues of public importance arising from the first invocation of the *Emergencies Act*.
2. The first issue concerns standing: what does it mean for a person to be “directly affected,” when is a litigant sufficiently affected by state action to be able to challenge that action, and in what circumstances may directly affected litigants later be excluded from participation in litigation challenging state action on discretionary grounds said to arise from the way they or their counsel conducted the litigation? The decisions below adopted a narrow view of direct standing and, ultimately, declined to consider the application of Canadian Frontline Nurses (“CFN”) and Kristen Nagle (“Nagle”).
3. These issues relating to standing extend beyond this case. They concern whether a litigant is directly affected only when the formal consequence set out in the impugned measure has actually been imposed, or whether a live threat of sanction, and the coercive effects it can produce in practice, may themselves be sufficient to permit access to the court.
4. The issue of direct standing is of public importance because courts ordinarily prefer litigants who are themselves potentially subject to the impugned state action and who can provide a concrete factual record, a genuine adversarial context, and first-hand evidence of how the challenged measure operated in practice. A narrow reading of direct standing also ignores the coercive force of threatened liability. Where the state identifies a target class, threatens its members with penal consequences, property restraints, and exclusion from the financial system, and demonstrates that those consequences may in fact be imposed, the intimidating effects of the unlawful measures may achieve their purpose without actual enforcement. If standing is denied unless the formal consequence set out in the impugned measure are actually imposed on persons, courts risk ignoring the significant coercive effects that the unlawful measures may produce on those members of the target class that don’t actually have the sanction visited on them.
5. Public interest standing is not a sufficient answer to that problem. At the time that CFN and Nagle initiated their application, no other applications for judicial review had been brought. Public interest standing may permit a challenge to proceed as it ultimately did in this case, but it does not

replace the participation of directly affected litigants whose own evidence, interests, and perspective may be central to understanding how the impugned state action operated in practice. Confidence in the administration of justice depends in part on the availability of the courts to those with a genuine and practical stake in the legality of the state action in question. Similar concerns arise where litigants who claim to be directly affected are later excluded from participation in judicial review on discretionary grounds, because the legality of state action may then be determined without hearing from those who say it was directed at them and operated on them in practice.

6. The second issue concerns the continuing role of the *Canadian Bill of Rights*. Parliament expressly preserved its application to emergency measures. Yet the courts below gave little guidance as to what that requires, including with respect to the protection of property under s. 1(a). This issue is of public importance not only because it arises in the context of the first use of the *Emergencies Act*, but because it concerns the continuing force of a federal quasi-constitutional instrument in relation to executive measures carrying property consequences. This Court's guidance is needed on the role the *Canadian Bill of Rights* continues to play in that context.

B. Facts

The Emergencies Act

7. Parliament enacted the *Emergencies Act* in 1988. It did so against the background of the *War Measures Act* and the criticism that followed its use during the October Crisis.¹ The *Emergencies Act* is more confined and more detailed. It imposes legal thresholds before emergency powers may be used.

8. The *Emergencies Act* does not give Cabinet a free hand. It creates four kinds of national emergency. This case concerns only one of them: a public order emergency.

9. The *Emergencies Act* also sets the tone in its preamble. It contemplates that special temporary measures may sometimes be required. The preamble makes clear that those measures remain subject to the *Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.²

10. The statute also imposes thresholds for a proclamation. Cabinet must believe, on reasonable grounds, that a public order emergency exists and that special temporary measures are necessary

¹ *Canada (Attorney General) v. Canadian Civil Liberties Association*, 2026 FCA 6 at para 145. [Federal Court of Appeal Decision].

² *Emergencies Act*, RSC 1985, c 22.

to deal with it. A public order emergency is not left undefined. The Act provides that it must arise from threats to the security of Canada and be serious enough to amount to a national emergency.³

11. “National emergency” is also defined. The situation must be urgent, critical, and temporary. It must also exceed provincial capacity or authority, or seriously threaten the sovereignty, security, or territorial integrity of Canada. It must also be a situation that cannot be dealt with effectively under any other law of Canada.⁴

12. The *Emergencies Act* was not invoked in the time period between its enactment in 1988 and the events of February 2022. This case arose from the first use of the emergency powers Parliament created in that statute.

The Freedom Convoy 2022 Protest in Ottawa and the Applicants’ Participation in It

13. Nagle was a registered nurse. She was also a director and member of CFN.⁵

14. CFN is a federal not-for-profit corporation. It advocates for what it describes as medical freedom.⁶

15. In late January 2022, Nagle and other members of CFN travelled to Ottawa to participate in the Freedom Convoy protest. They arrived on January 28, 2022 and remained there until February 19, 2022.⁷

16. The protest in Ottawa was large and prolonged. It was directed against COVID-19 mandates and restrictions. It involved trucks, other vehicles, and protesters gathered in the downtown core over a period of weeks.⁸

17. Nagle and CFN were active participants in that protest. They did not attend as observers. They went to Ottawa to express opposition to COVID-19 mandates and restrictions, to show

³ *Ibid*, at s. 16.

⁴ *Ibid*, at s. 3.

⁵ Affidavit of Kristen Nagle, sworn March 4, 2022 (Exhibits Excluded) [**Nagle Affidavit, March 4, 2022**] [**Applicants’ Leave to Appeal “LTA”, Tab 3A**].

⁶ *Ibid*, at para 3.

⁷ *Ibid*, at para 5.

⁸ *Ibid*, at para 8.

solidarity with the truckers, and to support the protest. They were also publicly recognized as participants in the protest and as part of the movement supporting it.⁹

18. Nagle participated in the protest in Ottawa on a daily basis from January 29 to February 19, 2022.¹⁰ She made public speeches. She posted videos and livestreams from the protest on social media.¹¹

19. CFN and Nagle also supported protest participants in Ottawa. They solicited contributions to support the protest and the truckers participating in it. Those contributions were not sought for a commercial purpose. They were sought to sustain the continued protest against the government's COVID-19 measures. CFN distributed contributions to truckers participating in the protest and livestreamed that distribution on social media. It also provided other material support, including access to its hotel room so truckers could shower, rest, and drop off clothes for laundering.¹²

The Declaration of the Public Order Emergency, the Emergency Measures Regulations, and the Emergency Economic Measures Order

20. On February 14, 2022, the Governor in Council declared a public order emergency under the *Emergencies Act*.¹³

21. On February 15, 2022, the Governor in Council made the Emergency Measures Regulations¹⁴ (the “Regulations”) and the Emergency Economic Measures Order¹⁵ (the “Order”).

22. The Regulations prohibited participation in certain public assemblies, travel to or within an area where such an assembly was taking place, and the direct or indirect use, collection, provision, or making available of property to facilitate participation in such an assembly or to benefit a person participating in it. Contravention exposed a person to fines and imprisonment.¹⁶

⁹ *Ibid*, at paras 6-8.

¹⁰ *Ibid*, at para 14.

¹¹ *Ibid*, at paras 16-18.

¹² *Ibid*, at paras 19-23.

¹³ Proclamation Declaring a Public Order Emergency, SOR/2022-20.

¹⁴ Emergency Measures Regulations, SOR/2022-21.

¹⁵ Emergency Economic Measures Order, SOR/2022-22.

¹⁶ Emergency Measures Regulations at s.2, s. 5, s.10(2).

23. The Order operated with the Regulations. It defined a “designated person” as an individual or entity engaged, directly or indirectly, in activity prohibited by the Regulations.¹⁷

24. The Order required banks, credit unions, insurers, securities dealers, payment processors, crowdfunding platforms, and other listed entities to determine on a continuing basis whether they were in possession or control of property of a designated person. If so, they were required to cease dealing in that property, to cease making property available to designated persons, and to cease providing financial or related services for their benefit. For designated persons, the practical consequence was the exposure to the freezing of accounts and the loss of access to funds or other property held through financial institutions and related entities.¹⁸

25. Both prior to and subsequent to the Regulations and the Order being made, Nagle and CFN were in Ottawa participating in the protest and supporting those participating in it. They were engaged in public advocacy, fundraising, distribution of contributions, and other material support for protest participants.¹⁹ There can be and there was no question that they were “designated persons.”

The Applicants Bring Their Application for Judicial Review

26. On February 18, 2022, four days after the proclamation of a public order emergency and three days after the Regulations and the Order were made, Nagle and CFN brought the first application for judicial review arising from the invocation of the *Emergencies Act*.²⁰

27. They moved quickly because the proclamation of the public order emergency, the Regulations, and the Order had immediate significance to them as designated persons. They remained active participants in the Ottawa protest. They were publicly associated with it. They were engaged in the very forms of participation and support addressed by the Regulations and the Order.²¹

28. Their application challenged the proclamation of the public order emergency, the Regulations, and the Order. They alleged that the proclamation was unreasonable, ultra vires the

¹⁷ Emergency Economic Measures Order at s. 1.

¹⁸ Emergency Economic Measures Order at ss 3-5.

¹⁹ Nagle Affidavit, March 4, 2022, *supra* note 5, at para 25.

²⁰ Excerpts of Transcript of the Motion before Justice Mosely, Federal Court, February 25, 2022 at p 5, lines 22-27 [**Motion Transcript**] [**LTA, Tab 3B**].

²¹ Nagle Affidavit, March 4, 2022, *supra* note 5, at paras 29-28.

Emergencies Act, and improperly motivated. They also alleged that the Regulations and the Order were contrary to the *Charter* and the *Canadian Bill of Rights*.

29. Their position was that the proclamation did not respond to a lawful emergency within the meaning of the statute. They alleged, *inter alia*, that it responded to a political problem, and that the emergency powers were used for an improper purpose.

30. Their record included public statements by senior government officials threatening immediate financial consequences for those associated with the protest, including frozen accounts and other restrictions on access to the financial system.²² Their record also included public statements by the Prime Minister describing those opposed to vaccination as a “small fringe minority” with “unacceptable views,”²³ asking whether “we tolerate these people,”²⁴ and equating opposition to the invocation of the *Emergencies Act* with support for people who wave swastikas and Confederate flags.²⁵ It also included polling and related materials relied on to support the position that the protest had become a political problem for the government rather than a threat to the security of Canada within the meaning of the Act. The protest had seemingly been very influential in moving Canadians against federal government measures restricting freedoms relating to COVID-19.²⁶

31. Nagle maintained that she and CFN were peaceful participants in the protest. She rejected the suggestion that their participation, or the protest as they experienced it, could fairly be equated with violence or extremist activity.²⁷ That position remained unchanged when she was later cross-examined on her affidavit.

32. In the days that followed, three additional applications for judicial review were commenced challenging the same measures. Those applications were brought by other groups of applicants and raised overlapping issues. The Federal Court directed that the four applications proceed together.²⁸

²² Affidavit of Simon Sigler, sworn February 18, 2022 (Exhibits Excluded) at paras 2-4 [**Sigler Affidavit**] [LTA, Tab 3C].

²³ *Ibid*, at paras 8-9.

²⁴ *Ibid*, at paras 10-12.

²⁵ *Ibid*, at para 19.

²⁶ *Ibid*, at para 17.

²⁷ Nagle Affidavit, March 4, 2022, *supra* note 5, at paras 12-13.

²⁸ *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 9 [**Federal Court Decision**]

The Applicants Alone Bring a Motion for an Emergency Stay of the Proclamation, The Emergency Measures Regulations, and the Order

33. On February 18, 2022, the same day they commenced the application, Nagle and CFN also brought a motion for an interlocutory injunction or stay of the Proclamation, the Regulations, and the Order.²⁹

34. They did so because as designated persons, the Proclamation, Regulations and the Order had immediate potential consequences for them. CFN required access to funds held at financial institutions to carry out its mission, and Nagle required access to her own bank accounts and credit cards for necessities for herself and her family.³⁰

35. The motion was treated as urgent and case managed. At the February 22, 2022 case conference, counsel for the Applicants sought an undertaking that their assets would not be frozen. No such undertaking was provided.³¹

36. The proclamation was revoked on February 23, 2022.³² The motion nevertheless proceeded on February 25, 2022. The Applicants maintained that it was not moot because they remained at risk of prosecution and of having their accounts or credit cards restrained for conduct during the period when the Regulations and Order were in force. CFN and Nagle again repeated their requests for an undertaking that Nagle's bank accounts would not be frozen, and this request was again denied.³³

37. During the hearing of the motion, Nagle, who was not an experienced litigant, took a photograph of the Zoom proceedings and shared it on her social media profile. The matter was dealt with by the Court at the time.³⁴ However, the issue would resurface nearly two years later in Justice Mosley's reasons as part of the basis for denying CFN and Nagle standing.³⁵

The Federal Court Hearing

38. The four applications for judicial review were heard together by Mosley J. in April 2023.

²⁹ *Canadian Frontline Nurses v. Canada (Attorney General)*, 2022 FC 284, at para 6.

³⁰ Affidavit of Kristen Nagle, sworn February 18, 2022 at paras 9-14 [**Nagle Affidavit, February 18, 2022**] [LTA, Tab 3D].

³¹ Motion Transcript, *supra* note 20, p 8, lines 20-27.

³² Proclamation Revoking the Declaration of a Public Order Emergency, SOR/2022-26.

³³ Motion Transcript, *supra* note 20, at p 9, lines 27-28; p 10, lines 1-9; p 11, line 28; pp 12-13.

³⁴ *Ibid*, p 6-8.

³⁵ Federal Court Decision, *supra* note 28, at para 185.

39. Standing was addressed at the outset of the hearing. Justice Mosley first heard the Attorney General’s submissions on standing. He then indicated, for each set of applicants, whether further submissions on standing were required.³⁶

40. As to CFN and Nagle, Justice Mosley advised their counsel that he did not need to hear from him on standing at that stage. He stated that he was not removing CFN and Nagle from the case. He said he would hear them on the merits.³⁷ He then directed that the hearing proceed with their submissions because the CFN and Nagle application had been filed first.³⁸

41. Counsel for CFN and Nagle did not make any submissions on standing and instead moved immediately to make submissions on the merits. Those submissions tracked their application and record. They challenged the legality of the proclamation and the factual basis on which it rested. They also addressed the political and factual context in which the measures were adopted, including the Applicants’ position that the situation had become a political problem for the government rather than a lawful public order emergency within the meaning of the statute. It was this fact that CFN and Nagle submitted should be considered as part of the context for the Court’s reasonableness analysis with respect to the decision to invoke the *Emergencies Act*.³⁹

42. During those submissions, Justice Mosley expressed some irritation with aspects of the way the argument was framed and directed counsel to move away from the broader factual and political context and to focus more narrowly on what Justice Mosley described as the “legal issues before the Court.”⁴⁰ Those contextual submissions, however, formed part of the Applicants’ position on vires, unreasonableness, and improper purpose. These submissions were made in the context of the Respondent characterizing members of the protest as ideologically motivated violent extremists.⁴¹ The hearing nevertheless continued with CFN and Nagle continued participation as applicants and them making submissions on other aspects of their argument, including with respect to the *Charter* and *Bill of Rights*.

³⁶ Excerpts of Transcript of the Hearing before Justice Mosley, Federal Court, April 3, 2023 at p 9, lines 4-6. [“**FC Hearing Transcript**”] [**LTA, Tab 3E**].

³⁷ *Ibid*, p 46-47

³⁸ *Ibid*, at p 50, lines 10-15.

³⁹ *Ibid*, at p 50-105.

⁴⁰ *Ibid*, at p 51, lines 19–21; p 56, lines 18–19; p 58, lines 7–11; p 59, lines 17–21; p 61, lines 10–21; p 62, lines 3–10.

⁴¹ Excerpts from Memorandum of Fact & Law of the Respondent, Attorney General of Canada, dated March 13, 2023 at paras 7-16 [**LTA, Tab 3F**].

The Federal Court's Decision on Standing and the Canadian Bill of Rights

43. In his reasons, Justice Mosley held that CFN and Nagle lacked direct standing. He treated the question by reference to whether the consequences of the regime had actually been imposed on them. He noted that none of their accounts had been frozen and treated any prospect of future prosecution as of the date of his decision as speculative. However, this approach does not account for the circumstances at the time the Application was brought, when the Applicants remained subject to potential prosecution and no undertaking to the contrary had been provided by the Attorney General. On that basis, he concluded that they had not shown that they were directly affected for the purposes of s. 18.1 of the *Federal Courts Act*.⁴² This reasoning emphasizes the absence of enforcement at the time of decision, without addressing the coercive effects of the Proclamation, Regulations and the Order while they were in force or their impact on those, including CFN and Nagle, that were subject to them at the time the Application was initiated.

44. Justice Mosley also held that Nagle had not come to the Court with clean hands. He referred to the photograph taken during the February 2022 virtual hearing, to what he characterized as a lack of candour in her cross-examination, and to what he described as inappropriate and offensive political statements made by lead counsel during the April 2023 hearing.⁴³ He did not identify in his reasons what he meant by the alleged lack of candour or which statements he considered inappropriate and offensive. He also concluded that CFN and Nagle brought nothing of value to the proceedings. On that basis, he dismissed their application and stated that it would not be considered further in his reasons.⁴⁴

45. Justice Mosley held that the *Canadian Bill of Rights* applied to the *Emergencies Act*, the Regulations, and the Order. He identified s. 1(a) and s. 2(e) as the relevant protections. His substantive discussion of the *Canadian Bill of Rights* did not address the arguments advanced by CFN and Nagle, because he had already determined that they lacked standing and stated that their application would not be considered further in his reasons. He nevertheless concluded that the case did not squarely address the enjoyment of property guarantee in s. 1(a), and he accepted the respondent's position that due process did not require the special measures to be put on hold while counsel and courts were engaged and hearings conducted.⁴⁵ However, Justice Mosley remarked in so finding that he "had and continue[s] to have considerable sympathy for those in government

⁴² Federal Court Decision, *supra* note 28, at paras 178-181; *Federal Courts Act*, RSC 1985, c F-7 at s. 18(1).

⁴³ *Ibid*, at paras 182-184.

⁴⁴ *Ibid*, at para 185.

⁴⁵ *Ibid*, at paras 360-369.

who were confronted with this situation. Had [he] been at their tables at that time, [he] may have agreed that it was necessary to invoke the Act.”⁴⁶

46. On the Proclamation, Justice Mosley found that the decision to issue the Proclamation did “not bear the hallmarks of reasonableness – justification, transparency and intelligibility – and was not justified in relation to the relevant factual and legal constraints that were required to be taken into consideration.”⁴⁷

The Federal Court of Appeal’s Decision on Standing and the Canadian Bill of Rights

47. The Federal Court of Appeal upheld the result as against CFN and Nagle.⁴⁸

48. On direct standing, the Federal Court of Appeal endorsed the same basic approach. It emphasized that CFN and Nagle had not had any of their accounts frozen, and that no sanctions had actually been imposed on them under the *Emergencies Act*, notwithstanding that the actions of both the CFN and Nagle clearly brought them within the definition of “designated persons.” It also treated any future prosecution as inconceivable and held that financial considerations alone were insufficient to support standing.⁴⁹

49. On clean hands and litigation conduct, the Federal Court of Appeal held that the Federal Court had made no reversible error. It upheld the treatment of Nagle’s conduct and the discretionary finding that lead counsel had crossed the line in making what the Federal Court had described as inappropriate and offensive political statements, without describing what comments had caused the Applicants to lose standing. It also rejected the fairness argument arising from the way standing had been handled at the hearing.⁵⁰

50. As to the *Canadian Bill of Rights*, the Federal Court of Appeal held that the arguments advanced by CFN and Nagle were not properly before it. On the same basis, it also declined to address the intervener Saskatchewan’s arguments on the *Canadian Bill of Rights*.⁵¹

⁴⁶ *Ibid*, at para 370.

⁴⁷ *Ibid*, at para 372.

⁴⁸ Federal Court of Appeal Decision, *supra* note 1, paras 108-114.

⁴⁹ *Ibid*, at paras 111-113.

⁵⁰ *Ibid*, at paras 115-116.

⁵¹ *Ibid*, at paras 475-480.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

51. This application raises the following questions of public importance:

(a) What is the meaning of “directly affected” and, more broadly, when does state action that targets a person or places them under a threatened sanction, restraint, or liability become sufficiently concrete to give that person direct standing?

(b) When may a court deny litigants standing on discretionary grounds said to arise from the way they or their counsel conducted the litigation, what opportunity to be heard is owed before doing so, and where should the line be drawn so that robust advocacy is not chilled?

(c) What legal force does s. 1(a) of the *Canadian Bill of Rights* continue to have in relation to executive measures carrying property consequences, including measures made under the *Emergencies Act*?

PART III – STATEMENT OF ARGUMENT

A. Direct Standing – What Does “Directly Affected” Mean?

52. When state action targets a person or group with threatened sanctions, restraints, or liabilities, but the ultimate consequence is imposed selectively, or not at all, when is that enough to permit that person or group to come to court? This issue warrants this Court’s attention because the law of standing has developed in stages, through different doctrinal settings, and without recent comprehensive guidance on a recurring problem. The answer matters here under s. 18.1(1) of the *Federal Courts Act*. But the issue is broader. Courts are regularly called on to decide whether a person may challenge coercive state action before the state has actually imposed the threatened consequence, and the law offers no clear and principled framework for resolving that question.

53. The older jurisprudence began from a restrictive rule. In *Smith v. Attorney General of Ontario*, this Court held that a private citizen could not maintain a declaratory action merely to test legislation in the abstract.⁵² The Court rejected the idea that an ordinary citizen, absent a sufficiently personal stake, could ask the courts for what would amount to an advisory opinion. That was the starting point: standing depended on a special personal interest, injury, or prejudice, and legality could not ordinarily be litigated by a citizen at large.⁵³

⁵² *Smith v Ontario (Attorney General)*, 1924 CanLII 3 (SCC) at 333-334.

⁵³ *Ibid* at 334 and 337.

54. This Court then relaxed that approach in constitutional litigation where serious legality issues might otherwise escape review. In *Thorson v. Attorney General of Canada*, the Court recognized that a strict insistence on special damage could insulate federal legislation from challenge where no one was uniquely affected enough to satisfy the old rule.⁵⁴ In *Nova Scotia Board of Censors v McNeil* and *Borowski v Canada (Attorney General)*, the Court continued that evolution, treating standing as a discretionary doctrine shaped by the seriousness of the issue, the challenger's genuine interest, and the practical availability of some other effective challenger.⁵⁵ In *Finlay v Canada (Minister of Finance)*, the Court extended that framework beyond purely constitutional review and emphasized that standing should not be used to collapse a threshold question into a premature merits determination.⁵⁶ The doctrine therefore evolved away from the narrow rule in *Smith* toward a broader concern with access to legality review where serious issues are raised and effective review would otherwise be unavailable.

55. This Court's later standing cases largely developed the law of public interest standing, not direct standing. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* and *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, the question before the court was a determination of when a claimant, without standing as of right, might nevertheless be permitted to proceed in the public interest.⁵⁷ Those cases are important, but they answer a different question from the one raised here. The issue in this case is not whether someone could be permitted to challenge the Proclamation, Regulations, and the Order. It is whether persons who were themselves within its intended reach had direct standing to do so in their own right.

56. Once the focus shifts from public interest standing to direct standing, the authorities are less settled. This is reflected in the Federal Court of Appeal authorities. In *Friends of the Canadian Wheat Board v Canada (Attorney General)*, the Federal Court of Appeal held that the motions judge had taken too narrow a view of "directly affected." It held that the appellants did not have to wait until the challenged directive caused them actual loss, and that rights associated with the underlying right at issue could suffice. Relying on *Moresby Explorers Ltd. v. Canada (Attorney*

⁵⁴ *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC) at 145–146 [*Thorson*].

⁵⁵ *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14 (SCC) at 266–267; [*McNeil*]; *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC) at 598–600 [*Borowski*].

⁵⁶ *Finlay v Canada (Minister of Finance)*, 1986 CanLII 6 (SCC) at 618–623 [*Finlay*].

⁵⁷ *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC) [*Canadian Council of Churches*]; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].

General), the Court accepted that persons within the intendment of an impugned policy could challenge it before it had yet been applied against them adversely.⁵⁸ Those cases recognize the proposition that a person need not always wait until the threatened consequence is actually imposed before seeking review.

57. Other Federal Court of Appeal decisions continue to describe “directly affected” as contextual and flexible, but without resolving the precise point now raised. In *Irving Shipbuilding Inc. v. Canada (Attorney General)*, the Court stressed that direct effect cannot be answered in the abstract. The inquiry depends on the legal right said to be affected and on the relationship between the prejudice alleged and the impugned state action.⁵⁹ In *Laurentian Pilotage Authority v. Corporation des Pilotes de Saint-Laurent Central Inc*, the Court said the requirement has been interpreted flexibly and should be applied with regard to the objects of the *Federal Courts Act*, including justice, fairness, practicality, order, efficiency, and the minimization of cost, delay, and waste.⁶⁰ These cases do not establish any clear guidance for targeted but only selectively enforced state action. They instead illustrate that the doctrine remains open-textured and highly contextual.

58. The decisions below push in a narrower direction. Justice Mosley treated direct standing by reference to whether the consequences threatened by the Regulations and the Order had actually been imposed on CFN and Nagle and whether they likely would be imposed in the future. He emphasized that none of their accounts had been frozen and treated any prosecution as speculative.

59. His decision and that of the Federal Court of Appeal raise the question of at what point in time is it appropriate to consider standing and whether an applicant is directly affected. Is it at the time of the application or when the decision is being made? At what point in time is that analysis to be done?

60. Justice Mosley’s approach looked to the absence of actual restraint or prosecution. It did not address the position of CFN and Nagle when they commenced their application, shortly after the proclamation, the Regulations, and the Order had been made. At that time, the threatened sanctions were live, the Court was prepared to hear an urgent motion for interim relief, and there was evidence that the measures were already having coercive effects on how CFN and Nagle

⁵⁸ *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FCA 101 at paras 27-32 [***Friends of the Canadian Wheat Board***]; *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 at paras 16, 19 and 21 [***Moresby***].

⁵⁹ *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at paras 28-32.

⁶⁰ *Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc*, 2019 FCA 83 at paras 31-32 [***Laurentian Pilotage***].

fundraised, expressed themselves publicly, and participated in the protest. It should be self-evident that had CFN and Nagle not fit the statutory definition of designated persons and been subject to sanction, that they would not have brought their application nor brought the interim motion which they did. The implication of the decisions below would suggest that they either never had standing or somehow lost standing because the sanctions that they were subject to never actually befell them.

61. That reasoning effectively treats the actual imposition of the threatened consequence as the gateway to direct standing. Yet other authorities, like *Friends of the Canadian Wheat Board* and *Moresby*, discussed above, recognize that persons within the intended reach of a coercive legal scheme need not always wait until the threatened consequence is actually imposed before seeking review. The result is a tension in the law between a narrower approach grounded in imposed sanction and a broader approach that recognizes the legal significance of threatened coercion.

62. The issue is a legal one. The question is not whether the evidence in this case was sufficient to prove some particular degree of harm. It is whether, as a matter of law, direct standing depends on the actual imposition of the formal consequence set out in the impugned measure, or whether a live threat of sanction, together with the coercive effects it produces in practice, may itself be sufficient. That is a question of general application that warrants this Court's guidance.

63. That is why this application is not merely a complaint that the lower courts got one case wrong. It raises a broader uncertainty in the law. One line of authority recognizes that a person within the intended reach of an impugned legal scheme need not always wait until the threatened consequence is actually imposed before seeking review. Another, as applied below, points toward a narrower rule grounded in the actual imposition of the threatened consequence. This Court's public-interest standing jurisprudence does not resolve that tension, because it addresses a different question: when someone without standing as of right may nevertheless be permitted to access the court in the public interest. The present question is anterior to that. It is when the law should recognize that a person already subject to a threatened legal constraint is sufficiently affected to come to court in their own name.

64. The implications extend beyond judicial review under s. 18.1(1) of the *Federal Courts Act*. If direct standing is narrowed to cases in which the threatened consequence has actually been imposed, the same logic threatens to spill into other settings where a person seeks to challenge coercive state action before the threat has been carried out. That includes claims under s. 24(1) of the *Charter*, where the question may be whether the claimant is sufficiently subject to the

impugned state action to seek a remedy. The law should not drift toward a position in which the state may identify a target class, threaten sanctions, alter behaviour, and achieve compliance, while those subject to the threat are denied access to the court unless and until the state acts on it. The issue therefore concerns not only s. 18.1(1), but the broader legal threshold for when threatened state action becomes sufficiently concrete to justify judicial oversight and support review and remedy.

65. Public interest standing is not a sufficient answer to the narrowing of direct standing in cases of threatened state action. This Court has repeatedly recognized the value of a concrete factual record and a genuine adversarial context. Those are ordinarily supplied best by the people most directly affected by the impugned state action. If direct standing is narrowed to cases in which the threatened consequence has to have actually been imposed, the voices and perspectives of those most directly targeted may be lost. Their interests may be filtered through other litigants with different priorities, evidence, and objectives. Nor should persons whose own interests are under threat be left hoping that someone else can satisfy the public-interest standing test, choose to bring the challenge, and choose to frame it in a way that truly reflects their position. Public interest standing is an important backstop. It is not a complete substitute for directly affected litigants seeking review while the threatened consequences remain live.

66. This case is an appropriate vehicle for clarification. It arose from the first invocation of the *Emergencies Act*. The proclamation, the Regulations, and the Order attached penal and financial consequences to broadly defined conduct, including participation in, travel to or within, and direct or indirect support for the assemblies in issue. CFN and Nagle were not bystanders. On their evidence, they were active and visible participants in the Ottawa protest, engaged in the very forms of participation and support addressed by the Regulations and the Order. They were the first to bring a judicial review. They immediately sought urgent relief. They sought an undertaking that their assets would not be frozen. None was given. If those circumstances are insufficient to permit review at the instance of those within the intended reach of the challenged measures, this Court should say why. If they are sufficient, this Court should clarify the governing standard.

67. The issue is therefore one of public importance. It concerns whether direct standing turns only on whether the threatened consequence has actually been imposed, or whether the law recognizes that threatened and targeted state action can itself be sufficiently concrete to support review. It also concerns whether the doctrine this Court has developed from *Smith* through *Thorson*, *McNeil*, *Borowski*, *Finlay*, *Canadian Council of Churches*, and *Downtown Eastside*, now requires further clarification in the face of modern coercive state action.

B. Loss of Standing – When May a Court Exclude Litigants from Participation in Judicial Review?

68. This application raises a further question of public importance: when may a court deny directly affected litigants participation in judicial review proceedings on discretionary grounds said to arise from the way they or their counsel conducted the litigation, and what opportunity to be heard is owed before that occurs.

69. Courts possess authority to control their own processes and, in appropriate circumstances, to refuse relief on equitable or discretionary grounds. In *Laurentian Pilotage*, the Federal Court of Appeal recognized that misconduct by a litigant may be relevant in judicial review.⁶¹ While this Court has recognized that standing may in some circumstances be revisited later in a proceeding, it has treated that power as a structured and limited one, tied to whether there has been a material change calling into question the existence of a sufficiently concrete and well-developed factual setting, and whether other litigation-management tools are inadequate.⁶² This jurisprudence does not address the distinct question raised here: when should concerns of the kind relied on below justify excluding litigants from participation in the proceeding itself.

70. The standards expected of litigants and the considerations governing their application should be clearly articulated so that Courts apply this discretion in a principled and reviewable way. This is an issue of public importance on which this Court's guidance is needed, including on what forms of conduct are capable of justifying a denial of standing and what considerations must govern the exercise of a judge's discretion.

71. This question also raises a fairness issue of broader importance. Where a court relies on alleged lack of candour, exaggeration in evidence, or improper advocacy as a basis to exclude a litigant from participation in judicial review, what notice and meaningful opportunity to respond must be afforded before that occurs? Basic fairness would seem to require that the affected party know the case to be met before those matters are relied upon to limit their participation in the proceeding. Is it a requirement to provide litigants with that opportunity?

72. The Federal Court's reasons illustrate the difficulty. Justice Mosley relied on what he described as a lack of candour in Nagle's cross-examination and on what he characterized as inappropriate and offensive political submissions by counsel. Yet the reasons did not identify what

⁶¹ *Laurentian Pilotage*, *supra* note 60 at paras 41-42.

⁶² *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at paras 74-76.

evidence was said to be inaccurate or exaggerated, nor what submissions crossed the relevant line. The Applicants' participation was thus curtailed on the basis of concerns that were not only not clearly articulated in advance nor clearly identified in the reasons.

73. This question is also important because of its implications for advocacy. In *Groia v. Law Society of Upper Canada*, this Court recognized that resolute advocacy is a core professional duty and warned that vague or overbroad restraints may chill the willingness of counsel to advance controversial arguments fearlessly, including in the face of judicial disapproval.⁶³ In *Canada (Attorney General) v. Federation of Law Societies of Canada*, this Court likewise underscored the constitutional and institutional significance of the lawyer's duty of commitment to the client's cause.⁶⁴ Those principles do not immunize improper conduct, but they do require care before forceful advocacy is treated as a basis for excluding the client from participation in public law litigation.

74. The question is whether, and in what circumstances, dissatisfaction with the manner in which counsel advances an arguable public law position may be used to exclude the client from participation in judicial review. That question arises acutely here because the submissions criticized below were made in support of a reasonableness and improper-purpose challenge to the exercise of statutory power. The proposition that exercises of public power might be motivated by an improper political purpose is a familiar one in Canadian law. *Roncarelli v. Duplessis* remains the classic illustration.⁶⁵

75. The implications extend beyond this case. Public law litigation frequently arises in politically charged contexts. It often involves unpopular litigants, contested facts, and allegations of improper state purpose. If litigants may be excluded from participation in judicial review on the basis of ill-defined concerns about their evidence or advocacy, confidence in judicial review as an even-handed mechanism for supervising public power may be weakened. The rule of law requires that legality review not appear to be more available to institutional or conventionally sympathetic litigants than to those whose views, associations, or manner of expression are unpopular.

76. Clarification from this Court would therefore be of assistance. The question is not whether courts possess authority to control their own proceedings. They plainly do. The issue is what

⁶³ *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 72-75 and 120.

⁶⁴ *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at paras 83-84.

⁶⁵ *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC).

standards and safeguards must govern the exercise of that authority before a directly affected litigant may be excluded from participation in judicial review on the basis of alleged litigation misconduct.

C. The Canadian Bill of Rights

77. This application also raises an issue concerning the continued role of the *Canadian Bill of Rights* in the modern administrative state. The invocation of the *Emergencies Act* — the first in Canadian history — brings renewed attention to a statutory instrument that remains in force but whose practical operation in contemporary public law has rarely been considered by this Court.

78. Despite its continuing force, the Canadian Bill of Rights has rarely been applied to modern regulatory or emergency executive action, leaving uncertainty about the protection it affords to property interests in the contemporary administrative state.

79. Section 1(a) of the *Canadian Bill of Rights* guarantees “the right of the individual to life, liberty, security of the person and **enjoyment of property**, and the right not to be deprived thereof except by due process of law” [emphasis added].⁶⁶ Unlike the *Charter*, which does not constitutionalize property rights, the *Canadian Bill of Rights* expressly protects them. Parliament also made clear in the *Emergencies Act* that the exercise of emergency powers remains subject to the *Canadian Bill of Rights*.⁶⁷

80. The measures challenged in this case engaged property interests in a distinctive way. The Regulations defined classes of prohibited activity, while the Order required financial institutions and other entities to cease dealing with the property of persons who fell within those definitions. The combined effect was to authorize targeted restraints on the practical use and enjoyment of property, including funds held through financial institutions.

81. CFN and Nagle advanced a *Canadian Bill of Rights* argument based on that designation framework and its impact on access to property. Because they were removed from the proceeding on standing and discretionary grounds, that argument was not addressed on its merits in the Federal Court. The Federal Court of Appeal likewise did not provide guidance on the issue.

82. As a result, important questions concerning the operation of s. 1(a) remain unresolved. Existing authority from this Court, including *Authorson v. Canada (Attorney General)*, considered

⁶⁶ *Canadian Bill of Rights*, SC 1960, c 44, s 1 and 2(e).

⁶⁷ *Emergencies Act*, supra note 2, Preamble.

the *Canadian Bill of Rights* primarily in the context of primary legislation enacted by Parliament.⁶⁸ It did not address the situation presented here: executive or delegated measures that impose targeted restraints on property through regulatory mechanisms.

83. The case therefore presents an opportunity for this Court to clarify several questions that remain uncertain in Canadian law:

(a) whether, and in what circumstances, targeted restraints imposed by federal delegated authority that prevent the practical use or access to property amount to a “deprivation” of the enjoyment of property within the meaning of s. 1(a);

(b) what constitutes “due process of law” for the purposes of s. 1(a) where federal executive action interferes with property interests; and

(c) how the *Canadian Bill of Rights* operates in circumstances of emergency governance where measures are designed to take immediate effect but nevertheless remain subject to statutory rights protections.

84. These questions have broader significance beyond this case. Federal delegated authority increasingly operates through regulatory schemes that affect property interests indirectly — including through financial compliance obligations imposed on regulated entities. The scope of the *Canadian Bill of Rights* in that context has not been clearly articulated.

85. The first invocation of the *Emergencies Act* provides an appropriate setting in which to clarify the relationship between emergency executive authority and the protections preserved by the *Canadian Bill of Rights*. Without such guidance, uncertainty will persist about the extent to which federal executive action affecting property must comply with the statutory guarantee of due process.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS

86. This application for leave to appeal raises issues of public importance within the meaning of s. 40(1) of the *Supreme Court Act*. If leave to appeal is granted, Nagle and CFN seek their costs of this application in the cause.

⁶⁸ *Authorson v Canada (Attorney General)*, 2003 SCC 39, at para 62.

PART V – ORDERS SOUGHT

87. Nagle and CFN seek an order granting leave to appeal from the judgment of the Federal Court of Appeal, and costs of this application in the cause if leave is granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March 2026.



Alexander Boissonneau-Lehner

PART VI – TABLE OF AUTHORITIES

APPLICANTS’ CASE LAW	Cited at paragraph no.
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<i>Canada (Attorney General) v Federation of Law Societies of Canada</i> , <u>2015 SCC 7</u> <i>Canada (Procureur général) c Fédération des ordres professionnels de juristes du Canada</i> , <u>2015 CSC 7</u>	73
<i>Canadian Council of Churches v Canada (Minister of Employment and Immigration)</i> , <u>1992 CanLII 116</u> (SCC)	55

<i>Conseil canadien des Églises c Canada (Ministre de l'Emploi et de l'Immigration)</i> , <u>1992 CanLII 116 (CSC)</u> .	
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<i>Friends of the Canadian Wheat Board v Canada (Attorney General)</i> , <u>2011 FCA 101</u> <i>Amis de la Commission canadienne du blé c Canada (Procureur général)</i> , <u>2011 CAF 101</u>	56
<i>Groia v Law Society of Upper Canada</i> , <u>2018 SCC 27</u> <i>Groia c Barreau du Haut Canada</i> , <u>2018 CSC 27</u>	73
<i>Irving Shipbuilding Inc v Canada (Attorney General)</i> , <u>2009 FCA 116</u> <i>Irving Shipbuilding Inc v Canada (Attorney General)</i> , <u>2009 FCA 116</u>	57
<i>Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc</i> , <u>2019 FCA 83</u> <i>Administration de pilotage des Laurentides c Corporation des pilotes du Saint-Laurent Central Inc</i> , <u>2019 CAF 83</u>	57, 69
<i>Moresby Explorers Ltd v Canada (Attorney General)</i> , <u>2006 FCA 144</u> <i>Moresby Explorers Ltd c Canada (Procureur général)</i> , <u>2006 CAF 144</u>	56
<i>Nova Scotia Board of Censors v McNeil</i> , <u>1975 CanLII 14 (SCC)</u>	54

<i>Nova Scotia Board of Censors c McNeil</i> , <u>1975 CanLII 14</u> (CSC)		
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<i>Emergencies Act</i> , <u>RSC 1985, c 22 (4th Supp)</u> <i>Loi sur les mesures d'urgence</i> , <u>LRC 1985, c 22 (4e suppl)</u>	<u>Preamble, 16, 3</u> <u>Préambule, 16, 3</u>	9, 10, 11, 79
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<i>Loi sur la Cour suprême</i> , <u>LRC 1985, c S-26</u>	<u>40(1)</u>	

TAB 3

A

Court File No.: T-306-22

FEDERAL COURT

BETWEEN:

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF KRISTEN NAGLE

I, Kristen Nagle, Registered Nurse and director and member of Canadian Frontline Nurses, of the City of London, Ontario SWEAR THAT:

1. I am an Applicant in these proceedings and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where same are stated to be based upon information or belief, and where so stated, I verily believe the same to be true.
2. The co-Applicant, Canadian Frontline Nurses, is a registered not-for-profit corporation.
3. Canadian Frontline Nurses is a proud advocate of medical freedom. Its mission is to unite nurses across Canada, educate the public and ensure that Canadian healthcare reflects the highest ethical standards.
4. Attached and marked as Exhibit "A" is a copy of the Certificate of Incorporation for Canadian Frontline Nurses.

Canadian Frontline Nurses and My Participation in the Freedom Convoy 2022 protests

5. I, together with other members of Canadian Frontline Nurses, arrived in Ottawa on January 28, 2022 to peacefully participate in the Freedom Convoy 2022 protests. We continued to participate in the Freedom Convoy 2022 protest in Ottawa until February 19, 2022.

6. Canadian Frontline Nurses is recognized as a participating group in the Freedom Convoy 2022 movement. Canadian Frontline Nurses was listed as a participating group on the main page of the Freedom Convoy 2022 website, which was accessible at www.freedomconvoycanada.com before the website was taken down. A printout of main Freedom Convoy 2022 website page, as it existed on February 22, 2022, is attached hereto and marked as Exhibit “B”.

7. On February 21, 2022, my Member of Parliament, Arielle Kayabaga of the Liberal Party of Canada, identified me as one of the key people involved in the Freedom Convoy 2022 protest in Ottawa.

8. My and Canadian Frontline Nurses’ participation in the Freedom Convoy 2022 protest was motivated by our desire to express solidarity with and provide support to the truckers who had travelled to Ottawa. We wished to join the truckers and other participants in the Freedom Convoy 2022 protest in Ottawa to engage in the peaceful expression of our opposition to unreasonable COVID-19 mandates and restrictions imposed by various levels of government.

9. It was my hope and the hope of Canadian Frontline Nurses that our assembly with likeminded individuals at the Freedom Convoy 2022 protest in Ottawa and our engagement in peaceful expressions of dissent would bring more awareness to, and engender more dialogue about, government-imposed COVID-19 mandates and restrictions.
10. The participants in the Freedom Convoy 2022 protest in Ottawa, including Canadian Frontline Nurses and me, do not believe that many of the COVID-19 mandates and restrictions that are in place are warranted. We believe that many of these mandates and restrictions are not supported by the science and that they do more harm than good.
11. We further hoped that our peaceful expressions of dissent and the increased public awareness of the issues that the Freedom Convoy 2022 movement was designed to spark would ultimately lead politicians in favour of the mandates and restrictions to reconsider their position.
12. Canadian Frontline Nurses and I wished to bring about the revocation of COVID-19 mandates and restrictions through our *peaceful* expression of dissent. I unequivocally do not support violence. Neither does Canadian Frontline Nurses. We denounce violence and do not view violence as a legitimate means of expression or as a means of achieving one's political ends.
13. I have not witnessed nor am I aware of any violence committed by the protestors in the Freedom Convoy 2022 assembly in Ottawa. I did however witness acts of serious violence committed by the police on February 18, 2022 and February 19, 2022 against the protestors

who had assembled in Ottawa. I was also assaulted by a woman who threw eggs at me and my family from the sixth story of an apartment building on February 20, 2022.

14. From January 29, 2022 to February 19, 2022, I assembled in the area where the Freedom Convoy 2022 protest was taking place in Ottawa every day except February 1, 2022. During this January 29, 2022 to February 19, 2022 period neither I nor anyone else from Canadian Frontline Nurses impeded the movement of any person or goods.
15. Neither I nor Canadian Frontline Nurses own or operate a truck. Nor did we park a truck in Ottawa.
16. During the Freedom Convoy 2022 protests in Ottawa, I made several speeches to voice my opposition to COVID-19 mandates and restrictions and in favour of freedom. A video of one of the speeches I made can be accessed from the following URL: <https://www.facebook.com/CanadianFrontlineNurses/videos/306993618075698>. A hyperlink to a downloadable version of this video is attached hereto and marked as Exhibit “C”.
17. To bring awareness of the Freedom Convoy 2022 protests in Ottawa participants’ peaceful expression of dissent, I routinely posted videos and made livestreams of the Freedom Convoy 2022 protest on my social media profiles, particularly Instagram.
18. My Instagram handle is kristen_nagle. As of the time of swearing this affidavit, I have over 40,000 followers. Many of the videos I have shared through my Instagram profile have been viewed tens of thousands of times.

19. Throughout my and Canadian Frontline Nurses' participation in the Freedom Convoy Protest in Ottawa, we solicited donations and distributed funds to truckers who were participating in the protest in Ottawa. We also provided material support in forms other than funds to these truckers including access to our hotel room at the Sheraton so that they could shower, rest, or drop off clothes to be laundered.
20. Some of the support we provided to truckers in Ottawa is documented in videos that are on my Instagram profile. The following is a list of videos which show myself on behalf of Canadian Frontline Nurses providing support to truckers participating in the peaceful Freedom Convoy 2022 protests in Ottawa:
- a. On January 31, 2022, I made a livestream video that is 10 minutes and 14 seconds in length. I spoke with a trucker who was sitting in his truck. Starting at the 4:17 mark of this video, I provided the trucker with my contact information and advised him that we would be happy to let him use our shower at our hotel room. Starting at the 9:31 mark of this video, I encouraged my viewers to help by providing truckers access to rooms and showers. This video is accessible on my Instagram at the following URL:
https://www.instagram.com/tv/CZYD4Teqw9b/?utm_medium=copy_link.
 - b. On February 8, 2022, I made a number of livestream videos showing me distributing funds that were given to Canadian Frontline Nurses to distribute to the truckers:
 - i. One video made on February 8, 2022 is 14 minutes and 17 seconds in length. In the first portion of this video, I spoke with a female trucker. At

the 12:39 mark of the video, I met with an individual named Austin. I provided him with funds that were given to Canadian Frontline Nurses to distribute to the truckers. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZudIfplYMz/?utm_medium=copy_link.

- ii. One video made on February 8, 2022 is 14 minutes and 17 seconds in length. In the Instagram caption for this video, I stated “Spreading love today! Ottawa Feb 8th Can donate to Canadian Frontline Nurses Cfln@protonmail.com To help keep this going! Thank you everyone so much!” The video consists of me speaking to fellow peaceful protestors and walking around the protest site distributing funds to truckers participating in the Freedom Convoy 2022 protest in Ottawa that were donated to Canadian Frontline Nurses for this purpose. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZue2jZFCto/?utm_medium=copy_link.

- iii. One video made on February 8, 2022, is 7 minutes and 56 seconds in length. The video consists of me speaking to fellow protestors and walking around the protest site distributing funds to truckers participating in the Freedom Convoy 2022 protest in Ottawa that were donated to Canadian Frontline Nurses for this purpose. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZugz60lFJy/?utm_medium=copy_link.

iv. One video made on February 8, 2022 is 44 minutes and 39 seconds in length. In this video, I speak with fellow protestors and document the protest site, while distributing funds to trucker in the Freedom Convoy 2022 protest in Ottawa that were donated to Canadian Frontline Nurses for this purpose. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZu8AZVq1Rp/?utm_medium=copy_link

c. On February 10, 2022, I made a livestream video that is 9 minutes and 17 seconds in length to update and provide transparency to those who had entrusted Canadian Frontline Nurses with their donations to distribute to truckers. I shared screen time in my livestream with Michelle Kloet who was also fundraising in support for the truckers and arranging for their access to shower facilities at the Sheraton. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZzZRDsKBV8/?utm_medium=copy_link

d. On February 10, 2022, I made another livestream video that was 8 minutes and 41 seconds in length. In this video, I spoke with Brian Jordan who explained that the funds helped towards the purchase of a generator and to help fix the vehicle door of a participant in the Freedom Convoy 2022 protest in Ottawa. I also explained starting at the 7:10 mark of this video that the funds were applied to helping finance Canadian Frontline Nurses' stay at the Sheraton which enabled me to provide updates regarding the Freedom Convoy 2022 protest and offer showers, a place for rest, and a place to collect laundry for the truckers. I explained that we were also using our room that day to help nurse a trucker who had fallen ill to

health. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZ0cyk0qO-b/?utm_medium=copy_link

- e. On February 14, 2022, I made a livestream video that was 3 minutes and 59 seconds in length. In this video I shared stories regarding how the funds that were being donated to Canadian Frontline Nurses were being used to support the truckers. I explained that we were using our room at the Sheraton to offer food, hot coffee, and showers to the truckers. I also advised my viewers that we were going to spend Valentine's Day distributing donations to participants in the Freedom Convoy 2022 protests in Ottawa. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZ9hA16KH5m/?utm_medium=copy_link

- f. On February 14, 2022, I made another livestream video that is 17 minutes and 23 seconds in length. The video featured a trucker who expressed he was participating in the Freedom Convoy 2022 protests in Ottawa because he cannot work because of the federal vaccine mandate. Starting at the 11:45 mark of the video, the trucker explained the purpose of the donations, and how the donated funds are distributed. A copy of this video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZ9pjJ6KeXM/?utm_medium=copy_link

- g. On February 14, 2022, I made another livestream video that is 8 minutes and 14 seconds in length. The video featured my conversation with Shawn Jason Laponte, the founder of Druthers, who advised that he was intending to distribute funds to Truckers who were in dire need of funds, but that he discovered that his account with the Bank of Montreal was frozen. In this video, I also speak with

Shawn Jason Laponte and Shaun Zimmer, another participant in the Freedom Convoy 2022 protest in Ottawa, about strategies we could employ to continue to distribute donated funds to truckers. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZ-MwVsF5R6/?utm_medium=copy_link.

- h. On February 14, 2022, I made another livestream video that is 35 minutes and 34 seconds in length. The video shows me distributing funds to truckers. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CZ-E-FCIm1w/?utm_medium=copy_link

- i. On February 16, 2022, I made a livestream video that is 44 minutes and 54 seconds in length. This video shows me documenting the site of the Freedom Convoy 2022 protests. As I was walking through the protest site, I was distributing funds to truckers that were given to Canadian Frontline Nurses for this purpose, but I was careful not to show or mention this in my livestream in light of the *Emergencies Measures Regulations* that were enacted on February 15, 2022. This video is accessible on my Instagram profile at the following URL:

https://www.instagram.com/tv/CaDEp5KKeTi/?utm_medium=copy_link

21. A hyperlink to a downloadable version of the videos referenced in paragraph 20 above is attached hereto and marked as Exhibit “D”.
22. Other individuals present at the Freedom Convoy 2022 protest in Ottawa were also taking and sharing photographs and video on social media. On February 14, 2022, an individual named Caryma Sa’d (Twitter handle @CarymaRules) posted a video and photographs of

showing me providing funds to a Freedom Convoy 2022 Ground Coordinator. I provided funds to the Ground Coordinator in order to assist with the distribution of funds and the obtaining of supplies to support the truckers who were participating in the Freedom Convoy 2022 protest in Ottawa. A screenshot Ms. Sa'd's February 14, 2022 posts which feature the aforementioned video and photographs is attached hereto and marked as Exhibit "E."

23. I continued to accept and distribute funds to truckers and continued to provide them with access to the amenities available at our room at the Sheraton on and after February 15, 2022.
24. On February 16, 2022, I was temporarily unable to access my online banking with the Royal Bank of Canada. I initially feared that this was as a result of the *Emergency Economic Measures Order*, but I later learned that Royal Bank of Canada was experiencing a temporary outage with their online banking services.
25. On February 16, 2022, the Ottawa Police Service distributed a "Notice to Demonstration Participants." It stated in part: "[t]he people of Ottawa are being denied the lawful use, enjoyment and operation of their property and you are causing businesses to close. That is mischief under the Criminal Code." The notice further stated that the "Federal Emergencies Act allows for the regulation or prohibition of travel to, from or within any specified area. This means that anyone coming to Ottawa for the purpose of joining the ongoing demonstration is breaking the law." A photograph of the Notice to Demonstration Participants that was distributed by the Ottawa Police Service on February 16, 2022 is attached hereto and marked as Exhibit "F".

Canadian Frontline Nurses and Me are “designated persons” under the *Emergency Economic Measures Order*

26. I have been advised by several peaceful participants in the Freedom Convoy 2022 protests who did not operate or park a truck in Ottawa that they had their bank accounts frozen after the *Emergencies Act* was invoked.
27. Tom Marazzo is one of the individuals who advised me that his financial accounts had been frozen.
28. I have reviewed the *Emergency Economic Measures Order* and the *Emergency Measures Regulations*.
29. I understand from my review of section 4 of the *Emergency Measures Regulation* that a person must not travel to or within an area where an assembly that may reasonably be expected to lead to a breach of the peace is taking place nor bring a minor within 500 metres where such an assembly is taken place, unless the exemptions set out in subsection 4(3) apply.
30. I travelled to, and brought a minor to, the Freedom Convoy Protest 2022 assembly in Ottawa on and after February 15, 2022. None of the exemptions set out in subsection 4(3) of the *Emergency Measures Regulation* apply to me.
31. I understand that section 5 of the *Emergency Measures Regulation* prohibit individuals from directly or indirectly using, collecting, providing, making available, or inviting a

person to provide property to facilitate or participate in an assembly that may reasonably be expected to lead to a breach of the peace or to benefit a person who is facilitating or participating in such an assembly.

32. Canadian Frontline Nurses collected funds to facilitate its and my participation in the Freedom Convoy 2022 assembly in Ottawa after February 15, 2022.
33. Canadian Frontline Nurses and I also collected funds, provided funds, made funds available, and invited others to provide funds to truckers to facilitate their participation in the Freedom Convoy 2022 assembly in Ottawa on and after February 15, 2022.
34. I understand from my review of section 1 of the *Emergency Economic Measures Order* that a “designated person” means any individual or entity that is engaged, directly or indirectly, in an activity prohibited by section 2 to 5 of the *Emergency Measures Regulations*. I further understand from my review of the balance of the *Emergency Economic Measures Order*, that this Order in effect prevents financial institutions from dealing in any property, including funds, or providing any financial or related services to a “designated person”.
35. I verily believe that I am a designated person under the *Emergency Economic Measures Order*. I verily believe Canadian Frontline Nurses is a designated person under the *Emergency Economic Measures Order*. I further verily believe that any individual who provided funds to me or Canadian Frontline Nurses on or after February 15, 2022 are designated persons.

36. Canadian Frontline Nurses has funds stored with financial institutions. Canadian Frontline Nurses needs access to funds stored at financial institutions to support its mission.
37. Canadian Frontline Nurses was also distributing donated funds to truckers who were participating in the peaceful assembly and expression of dissent in the Freedom Convoy 2022 Protest in Ottawa.
38. I, in my personal capacity, have money stored in financial institutions. I also have credit cards.

The Impact of the Invocation of the Emergencies Act and the Measures that passed in its wake on Canadian Frontline Nurses and Me.

39. Neither I nor any members of Canadian Frontline Nurses engaged in any criminal activity during our participation in Freedom Convoy 2022 protests in Ottawa. None of Canadian Frontline Nurses' members, including myself, charged with an offence under the *Emergency Measures Regulations* or the *Criminal Code*. However, the invocation *Emergencies Act* and the enactment of the *Emergency Measures Regulations* did leave me with the fear that I and other members of Canadian Frontline Nurses could be charged for our peaceful expression of dissent and financial support of others participating in the Freedom Convoy 2022 protests in Ottawa. This fear remains given many of the statements made by politicians and police that they will continue to investigate and charge people who have breached the provisions made pursuant to the *Emergencies Act*.
40. To my knowledge, neither my financial accounts nor the financial accounts of Canadian Frontline Nurses were frozen as a result of the Emergencies Measures Regulations. However, I was constantly in fear that my accounts and Canadian Frontline Nurses'

accounts could be frozen at any time. I do not believe this concern was irrational, in light of the federal government's messaging and the fact that I was aware that several fellow protestors' accounts were frozen for participating in the same activities as Canadian Frontline Nurses and I did.

41. After February 14, 2022, we were not able to distribute funds and support as openly as we had before, for fear that our accounts would be frozen or that we would be charged under the *Emergency Measures Regulations*.
42. The threat of our accounts being frozen caused me and Canadian Frontline Nurses to be more cautious in how we solicited and distributed support to truckers participating in the Freedom Convoy 2022 protests in Ottawa. After February 14, 2022, I was careful to no longer broadcast the donations we were making to truckers in my social media posts and live feeds. I verily believe that showing the distribution of funds in support of the truckers in our broadcasts were important to those who had donated to Canadian Frontline Nurses, as our donors who supported the objectives of the Freedom Convoy 2022 movement wanted to see that the funds they donated were being put to good use.
43. After February 14, 2022, I was advised by many Canadian Frontline Workers' supporters that they were hesitant to donate funds to Canadian Frontline Workers as they were concerned that their financial accounts would be frozen.
44. After February 14, 2022, the volume of donations to Canadian Frontline Nurses declined.

45. I observed that the number of participants in the Freedom Convoy 2022 protests in Ottawa dwindled after the *Emergencies Act* was invoked.
46. I verily believe as a result of conversations I had with other participants and supporters of the Freedom Convoy 2022 protest in Ottawa, that many were hesitant to continue to assemble and express their dissent after the *Emergencies Act* was invoked. These individuals expressed fear that their financial accounts could be frozen and that they could be prosecuted for supporting or participating in the Freedom Convoy 2022 protest in Ottawa.
47. Several parents advised me that they were concerned that their children could be taken away from them as a result of their support and participation in the Freedom Convoy 2022 protest in Ottawa.
48. Some truckers advised me that they were stopping their participation in the Freedom Convoy 2022 protest in Ottawa due to concerns that the insurance for their trucks would be cancelled as a result of the invocation of the *Emergencies Act*.
49. I am the mother of two minor children who I love very much. My children were present with me in Ottawa, and they had attended the Freedom Convoy 2022 assembly in Ottawa. However, on February 18, 2022 and February 19, 2022, I left my children at the hotel and did not bring them to the protest. I was aware that by bringing my children with me to the protest site in Ottawa I could be charged under the *Emergency Measures Regulations* which not only prohibits a person from participating in an assembly, but prohibited bringing a minor within 500 metres of an assembly that may reasonably be expected to lead to a breach

of the peace. While I did not believe that the assembly could be reasonably expected to lead to a breach of the peace (given that the protests I observed in Ottawa were peaceful) I was not confident that the authorities interpreting the *Emergency Measures Regulations* would not charge me, particularly in light of the rhetoric I had heard from various Ministers of the Federal Cabinet, the pamphlets that the Ottawa Police distributed on February 16, 2022, and notices that were posted at the Sheraton advising of the potential penalties that could be imposed for bringing children to the protest site.

50. I was concerned that by continuing to peacefully assemble and express my opinions, beliefs, and values in the Freedom Convoy 2022 protests in Ottawa after February 14, 2022, that not only my financial accounts were subject to be frozen, but that anyone who directly or indirectly supported me or Canadian Frontline Nurses could have their accounts frozen as well.

51. At present, I do not have a job that pays me an income and my husband is on an unpaid leave of absence from his work. Accordingly, my family and I need to rely on the funds I have stored at the bank and access to credit to support ourselves.

52. By February 19, 2022, I decided as a result of the chilling impact of the invocation of the *Emergencies Act* on the Freedom Convoy 2022 protest in Ottawa that Canadian Frontline Nurses and I would no longer participate in this protest.

53. On February 23, 2022, Canadian Frontline Nurses opened a separate account to segregate funds donated towards the legal fees associated with this Application from the funds Canadian Frontline Nurses receives for the community work it does in accordance with its

not-for-profit mission. Despite taking this step, several individuals advised me that they are reluctant to donate to our legal fundraising account out of fear that their own financial accounts could be frozen. Some of these concerns are reflected in the comments made in response to my February 23, 2022 post on the Canadian Frontline Nurses Facebook page. A printout of a screenshot of my February 23, 2022 post and the comments is attached hereto and marked as Exhibit "G".

Sworn before me remotely by Kristen Nagle, of London, Ontario before me in the City of Toronto, Ontario on March 4, 2022.



Alexander Boissonneau-Lehner
Commissioner for Taking Affidavits
(or as the case may be)



KRISTEN NAGLE

B

File No. T-306-22, T-316-22
T-347-22, T-382-22

FEDERAL COURT

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

* * * * *

PROCEEDINGS HELD AT

By Videoconference

Friday, February 25, 2022

* * * * *

BEFORE :

The Honourable Justice Mosely

APPEARANCES :

Mr. David Cowling for the Applicant
Mr. Alex Boissoneault-Lehner
Mr. Simon Sigler

Mr. John Provart for the Respondent
Ms. Aisha Walden
Mr. Shane Whittifield

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(ii)

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1 By videoconference
2 --- Upon commencing on Friday, February 25, 2022 at unknown
3 time.

4 THE REGISTRAR: Please be advised that this
5 hearing is being recorded.

6 This motion hearing of the Federal Court
7 heard by videoconference is open.

8 Presiding is the Honourable Justice Mosely,
9 Case Management Judge.

10 And before the Court, the Federal Court file
11 number is T-306-22, between *Canadian Frontline Nurses and*
12 *others v The Attorney General of Canada.*

13 Appearing on behalf of the Applicants,
14 Alexander Boissonneau-Lehner, Simon Sigler, and David G.
15 Cowling.

16 And appearing on behalf of the Respondent,
17 John Provart, Aisha Walden (phonetic), and Shane
18 Whittifield (phonetic).

19 JUSTICE MOSELY: All right. Thank you, Mr.
20 Registrar, and good morning, Counsel.

21 MR. COWLING: Good morning.

22 MR. PROVART: Good morning, Justice Mosely.

23 JUSTICE MOSELY: By way of introduction, I
24 thought I would just review the legal context of why we are
25 here.

26 As you all know, on February 14th, the
27 Governor in Council issued PC number 2022-0106, a public
28 order emergency proclamation pursuant to subsection 17(1)

1 of the *Emergencies Act*, and the following day, the Governor
2 in Council issued the Emergency Measures Regulations and
3 the Emergency Economic Measures Order.

4 On February 18th -- that's last Friday -- the
5 Applicants filed their Application for Judicial Review,
6 seeking declaratory and other relief in respect of the
7 proclamation, the regulations, and the Economic Measures
8 Order, and any other regulations, orders, or measures
9 issued or implemented pursuant to the proclamation.

10 The same day, the Applicants filed the
11 Notice of Motion, which is what we're here to discuss,
12 seeking a temporary interlocutory order staying the
13 originating Order in Council until the Judicial Review
14 Application was heard on -- is heard on its merits.

15 They also sought, under procedural orders
16 from Court and cost of the motion on a substantial or full
17 indemnity basis.

18 In support of the motion, the Applicants
19 filed a motion record that included the affidavit of
20 Kristen Nagle, the individual Applicant, and the affidavit
21 of one of the solicitors we have here today, attaching a
22 number of documents as exhibits.

23 At the same time, the Applicants submitted
24 an informal request by letter pursuant to Rule 35(2) of the
25 Federal Court Rules seeking the appointment of a special
26 time and place of motion to be heard, other than at the
27 general sittings of the Court and for the convening of an
28 urgent case conference.

1 In support of that request, the Applicants
2 submitted a document, added urgency description asserting
3 that they would suffer irreparable harm if the orders were
4 allowed to continue in effect.

5 In response, on the same date, an order was
6 issued by the Chief Justice that the matter should continue
7 as a specially-managed proceeding and appointing myself and
8 Prothonotary Milczynski as Case Management Judges.

9 A direction was then issued convening the
10 case management conference with counsel for Tuesday,
11 February 22nd.

12 At that case management conference, the
13 motion was set down for hearing this morning, Friday,
14 February 25th, 2022.

15 On February 23rd, 2022, the Governor in
16 Council issued the proclamation revoking the declaration of
17 a Public Order Emergency, which revoked the declaration of
18 a state of emergency and all pursuant to subsection 15(2)
19 of the Act, all orders and regulations made pursuant to the
20 prior proclamation were revoked upon revocation of the
21 declaration.

22 At first impression, the effect of the
23 revoking proclamation was therefore to immediately render
24 moot the motion for an interlocutory injunction or the stay
25 motion, as we commonly refer to them.

26 As a result, yesterday, I asked the registry
27 to contact counsel for the parties to determine whether
28 they agreed that the motion was moot and that the hearings

1 should be cancelled.

2 In response to that, the Respondent advised
3 that they agreed that the matter is moot.

4 Counsel for the Applicants sent in a one-
5 line response that the motion was not moot and asked that
6 the hearing proceed.

7 And that, frankly, Mr. Cowling and your
8 colleagues, was simply not good enough, and prompted the
9 further inquiries from the Court through the registry with
10 regard to whether there was any substantive explanation for
11 the position that you had taken on behalf of your clients.

12 Mr. -- your associate or colleague -- I
13 don't see him on the screen -- but I take it he is -- here
14 he is, Mr. Boissonneau-Lehner, responded just shortly
15 thereafter with what I would describe it as a plea, asking
16 that the matter proceed and arguing that there remained a
17 live controversy between the parties with regard to the
18 question of mootness and also with regard to costs.

19 So it's on that basis that I agreed that the
20 matter should proceed, although with some considerable
21 misgivings.

22 I have received the Respondent's written
23 representations, which I believe were also served on you,
24 Mr. Cowling on behalf of your clients; and I have received
25 this morning your bill of costs.

26 So the questions for me at this time are
27 whether the motion is moot and should not proceed to a
28 decision, and secondly, whether at this point in time,

1 there should be an award of costs.

2 So I'll hear you, and as we normally proceed
3 in these matters, you'll have an opportunity to make your
4 submissions.

5 I take it Mr. Cowling, you will lead, or am
6 I incorrect in that?

7 MR. COWLING: Yes, Justice Mosely, I'll
8 lead.

9 JUSTICE MOSELY: Right. So Mr. Cowley, I'll
10 hear you, then, on behalf of the Applicants. I then will
11 turn to Mr. Provart for the Respondent. And then you will,
12 of course, have an opportunity to reply to Mr. Provart's
13 submission. All right?

14 MR. COWLING: Thank you.

15 JUSTICE MOSELY: You have the floor.

16 --- SUBMISSIONS BY MR. COWLING:

17 MR. COWLING: Thank you, Justice Mosely.

18 So let me first state that my clients are
19 pleased on behalf of all Canadians that in the context of
20 our motion, government has revoked the Public Order
21 Emergency Proclamation.

22 Our client first brought the -- were the
23 first Applicants to challenge the Proclamation Order in
24 Council PC 2022-0106, and the Order and the Regulations
25 made thereunder, and they claimed that it was *ultra vires*,
26 because the prerequisite condition of there being a
27 national emergency so clearly had not been met.

28 We also claim that there was a clear

1 contravention of the Bill of Rights and the Charter of
2 Rights and Freedoms.

3 We brought a motion, as you know, Your
4 Honour, on Friday, February 18th, for amongst other things,
5 a stay of the proclamation, the Order, and the Regulations,
6 as well as our costs for the motion.

7 We appeared, as you know, on Tuesday in
8 front of your ---

9 MR. PROVART: Justice Mosely, I hate to
10 interrupt my friend.

11 MR. COWLING: I'm sure my friend will have
12 an opportunity to reply.

13 JUSTICE MOSELY: Okay. Well, just a second,
14 please.

15 Mr. Provart, why are you interrupting?

16 MR. PROVART: Justice Mosely, I wanted to
17 advise the Court that Ms. Nagle has posted an Instagram
18 screenshot of this proceeding on Instagram, and I believe
19 that is contrary to Court policy, and I wanted to advise
20 the Court of that right away.

21 JUSTICE MOSELY: Mr. Cowling, were you aware
22 of this?

23 MR. COWLING: I was not, Your Honour, and
24 obviously, I -- and I don't know -- I have no awareness of
25 it. I -- certainly, my client should not be posting any
26 pictures or information of -- with respect to this
27 proceeding. So ---

28 JUSTICE MOSELY: Can you reach her? Can you

1 reach your client?

2 MR. COWLING: I'm not sure. I'll have my
3 associate just text to confirm that she's aware that that's
4 not to be done.

5 JUSTICE MOSELY: All right. We'll take a
6 few minutes.

7 THE REGISTRAR: If you wish, Justice Mosely,
8 I can remove her from the webinar, if you wish.

9 JUSTICE MOSELY: Yes, let's do that.

10 THE REGISTRAR: Okay. It is done.

11 JUSTICE MOSELY: All right. Has every other
12 webinar observer been advised that they are not to record
13 or transmit any images from this proceeding?

14 THE REGISTRAR: Yes.

15 JUSTICE MOSELY: Very well.

16 Mr. -- thank you for that intervention, Mr.
17 Provart, and we will proceed.

18 But should there be any other persons
19 observing this proceeding who are not familiar with the
20 Court's policy, you are not to take any -- make any
21 recording or to disseminate any images from this hearing.

22 That is an order of the Court, and should
23 you contravene it, you will be subject to contempt of court
24 proceedings. I want that to be understood to anybody who's
25 watching or observing this proceeding. This is a Court
26 hearing, and it's not to be recorded other than by the
27 Court.

28 All right.

1 MR. PROVART: Justice Mosely, I hate to
2 interrupt again, but if I'm not -- I'm not sure if it could
3 be explicitly indicated to Ms. Nagle that she must take
4 that down immediately.

5 MR. COWLING: It has been deleted. I've --
6 we've confirmed that, so she's confirmed that that has been
7 -- that it has been deleted, and certainly, on behalf of my
8 client, my apologies, Your Honour, and I think your
9 admonition -- I was -- I'm not aware of who's in the -- the
10 public that are here, but I think that was very sound to
11 let them know the rules of the Court. Some are maybe
12 perhaps not fully familiar with this that are witnessing
13 this proceeding.

14 JUSTICE MOSELY: Very well. Thank you, Mr.
15 Cowling. Please proceed.

16 MR. COWLING: Thank you.

17 So as I've said, we are pleased, obviously,
18 that the government has revoked the Public Order Emergency
19 Proclamation.

20 As you know, Your Honour, we appeared on
21 February 22nd on Tuesday, and we were prepared at that time
22 to dispense with this motion with respect to obtaining a
23 simple undertaking that my clients would not have their --
24 effectively, have their financial property frozen.

25 As you know, that was denied, and had been
26 previously denied on Friday, February 18th. Our motion was
27 then scheduled on an urgent basis for this morning.

28 We appeared also in front of Prothonotary

1 Milczynski on Wednesday morning with my friends from the
2 Attorney General, and there was actually no indication at
3 that time, nor mention that there would be a revocation on
4 that date. In fact, the timetable was set for our
5 application at that appearance, and it was only later in
6 the day, late in the afternoon that we were made aware that
7 that the government had revoked the proclamation.

8 And so -- and we're not aware of any
9 circumstances as to what, frankly, has changed or what
10 changed, and there's nothing set out in the representations
11 of my friend as to what changed from Sunday, when I
12 understand all of the protestors effectively got cleared
13 out, to Wednesday, and why this could not have been -- why
14 that undertaking could have been made or why that
15 revocation couldn't have just happened earlier.

16 It's simply -- it is a small victory for the
17 rule of law that this so-called national emergency, after
18 over a week, has now been acknowledged through the
19 revocations, in my submission, for the farce that it always
20 was.

21 So we shouldn't be here. I concede that,
22 Your Honour. It's unfortunate that we're here. We're here
23 because of the actions of the government.

24 And I just take it -- and my friend has
25 suggested that the matter is now moot, and I'm not entirely
26 sure of that, and I'll explain why.

27 I don't know whether he's now prepared to
28 give the undertaking that he refused to make on Tuesday to

1 my clients that they won't be subject to having their
2 financial assets effectively frozen as a result of the
3 Emergency Measures Order. I'm not sure whether he would.
4 That would obviously impact a little bit on the mootness
5 issue and the proceeding, whether we need to proceed with
6 this motion.

7 And so if that's the undertaking -- and I
8 raise that out of concern because of the *Interpretation*
9 *Act*, Your Honour.

10 And it's -- we have sent -- and I don't know
11 if you received it -- a supplementary Brief of Authorities
12 to you.

13 JUSTICE MOSELY: I have not, no.

14 Mr. Registrar, has that -- can you see if
15 that has been filed in Toronto, and if so, we'll make sure
16 that it's sent.

17 THE REGISTRAR: Okay. I will take a look.
18 Just a moment.

19 As far as I can tell, the most recent
20 electronic filing submission to Toronto was on the 21st, and
21 it was a letter, and it was not accepted for filing.
22 Therefore, I'm not sure how counsel provided that document
23 to the Court.

24 JUSTICE MOSELY: All right. Well, we'll
25 look into that, Mr. Cowling. I'd make note of the fact
26 you're citing the *Interpretation Act* ---

27 MR. COWLING: Yeah, and ---

28 JUSTICE MOSELY: --- and that there are ---

1 MR. COWLING: --- and the issue there, Your
2 Honour, is that it's not clear what the effect of the
3 revocation is. So it's -- we asked, as you know, for a
4 stay, based on the Proclamation and the regulations and
5 order thereunder as being *ultra vires*. That would have a
6 different effect than a revocation because of the
7 *Interpretations Act*. The penalty for this would
8 effectively, of that Act, remain in effect.

9 And that kind of makes sense, Your Honour.
10 Imagine if there was a true emergency -- which we say there
11 wasn't, in this case -- you would want to still be able to
12 prosecute people for having breached the regulations or
13 orders under the Act after the revocation of the
14 proclamations.

15 So it obviously makes sense if you had, you
16 know, a real emergency, say in wartime and someone didn't
17 comply with the *Emergencies Act*, the fact that the
18 *Emergencies Act* would be revoked doesn't mean you wouldn't
19 want to still be able to prosecute and penalize those
20 people that had breached the Act during the time that it
21 was in effect.

22 And so that's eminently sensible, in my
23 view, that the *Interpretation Act* would do that.

24 It is unclear, certainly in my mind, about
25 the effect of that on the Emergency Economic Measures Order
26 as it relates to the financial institutions and the
27 freezing of assets.

28 So as I say, if my friend is prepared to

1 give the undertaking that he refused to give with respect
2 to my clients -- or frankly, he should be able to give it
3 to all Canadians, if that's his position he takes, and that
4 would certainly, in my view, allow this matter -- change in
5 (inaudible) how I would proceed, in terms of pursuing this
6 motion.

7 JUSTICE MOSELY: Do I understand you to say
8 that should Mr. Provart, on behalf of his clients, be
9 prepared to give an undertaking that they would not proceed
10 against your client?

11 MR. COWLING: That's -- so this -- the
12 Emergency Economic Measures Order -- and I appreciate the
13 proclamation has been revoked. It's not entirely clear to
14 me, given the provisions of the *Interpretations Act*, that
15 if -- if, let's say, my client had either donated funds to
16 those that were in the protest or actively participated in
17 the protest at the time that the *Emergency Measures Act* was
18 in place, that she couldn't -- and their former client --
19 couldn't still be caught in that requirement on behalf of
20 financial institutions to freeze their assets.

21 And it's not clear to me that the revocation
22 -- so that was the purpose behind our stay, as you recall,
23 Your Honour -- and it's not clear to me because of section
24 43(1) of the -- 43 of the *Interpretations Act*, that that
25 has also been repealed.

26 Effectively, if my friend is prepared to
27 concede or accept that there will be no pursuit of that,
28 then obviously, that does -- with respect to the Economic

1 Measures, then that would alter the landscape, certainly,
2 with respect to the motion, as I said. But that's not
3 entirely clear.

4 What I can say for sure, though, Your
5 Honour, is that the enforcement provisions -- because as if
6 you -- and I'm sure you have looked at it in terms of the
7 regulations, there's the ability to pursue prosecutions as
8 a result of the contravention, it is clear to me, at least,
9 that the *Interpretations Act* doesn't mean that someone
10 subsequently couldn't be subject to prosecution as a result
11 of the breach of the regulations during that time.

12 And as I say, that makes eminent sense
13 because you wouldn't want to have an Emergency Proclamation
14 Declaration and then be unable to pursue the prosecutions
15 if someone had, in fact, breached, given what these
16 emergencies or Act was supposed to be dealing with for
17 things like national emergencies, which obviously, we don't
18 accept that it was.

19 So that's the concern from my clients, and
20 from frankly, all Canadians, is that the measures,
21 including that Emergency Economic Measures, could still be
22 enforced.

23 And so for my friend to be cavalier and say
24 the matter is moot simply because the revocation
25 proclamation has been issued, it doesn't provide the answer
26 or the assurances that my clients were seeking in terms of
27 this stay.

28 JUSTICE MOSELY: But what exactly is there

1 for this Court to stay?

2 MR. COWLING: Well, we would ask -- the stay
3 is the effect of those orders, including any residual or
4 remaining aspects of them that haven't been -- because if
5 you look at the *Interpretation Act*, the repeal doesn't
6 affect any offence committed, so we would ask that you
7 would stay that as well. You would effectively stay any
8 application of those regulations or orders, going forward.

9 That was the motion that we brought. And if
10 we're right that this matter was *ultra vires*, that would
11 be, in my view, an appropriate relief to move forward. It
12 would also ---

13 JUSTICE MOSELY: Well, but the Court's not
14 going to determine that question on a motion, on a stay
15 motion. The only issue in relation to the legal basis for
16 your application in this regard, the motion, is whether
17 there is a serious issue to be tried in the underlying
18 application for judicial review.

19 So ---

20 MR. COWLING: Yeah. I concede my friend,
21 Your Honour -- just to know that I concede my friend's
22 position that it might be even a higher test, I think,
23 because it would effectively determine the action I think
24 my friend suggested, and I concede this -- there's probably
25 the significant chance of success that that would be the
26 test I think I would likely have to meet in order to be
27 successful on the motion, because effectively, what I'm
28 asking for, what we ask for is a stay, and in order to

C

Court File No.: T-306-22

FEDERAL COURT

BETWEEN:

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF SIMON SIGLER

I, Simon Sigler, a barrister and solicitor at the firm of Johnstone & Cowling LLP, of the City of Toronto, Ontario **SWEAR THAT:**

1. I am a lawyer at Johnstone & Cowling LLP and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where same are stated to be based upon information or belief and where so stated I verily believe the same to be true.

Deputy Prime Minister Chrystia Freeland Describes Implications of the Emergency Measures Regulations and Emergency Economic Measures Order

2. On February 18, 2022, I watched a recording of a news conference held on February 17, 2022, featuring Deputy Prime Minister Chrystia Freeland, Minister of Public Safety Marco Mendicino, and Minister of Emergency Preparedness Bill Blair.

3. At the time of swearing this Affidavit, the video is accessible on CPAC's website at the following URL:

<https://www.cpac.ca/episode?id=f0a535d7-568f-47c5-9653-bd7755732811>.

4. I am informed by my review of the video that Deputy Prime Minister Chrystia Freeland made the following remarks on February 17, 2022:

- (a) I have spoken directly with the heads of our major banks and with the director of FINTRAC. My Cabinet colleagues and I are meeting regularly, very regularly, including with the commissioner of the RCMP to discuss next steps. Our absolute priority is ending these illegal blockades and occupation.
- (b) The measures we enacted include broadening the scope of Canadian rules to fight money laundering and terrorism financing so that it includes social financing platforms and various financial transaction institutions. It will also enable them to report suspicious and other activities to FINTRAC and it will help put an end to this it will request require rather that financial institutions we assess reassess their links with all persons involved in blockades and inform our national security organizations. They will also allow our institutions of the federal government, provincial and territorial governments as well to communicate information to banks and financial services providers. This will enable them to put an end to funding and financing to unlawful blockades.
- (c) So let me repeat what I said on Monday. If your truck is being used in these protests, your corporate accounts will be frozen. The insurance on your vehicle will be suspended. The consequences are real. And they will bite. It is time for you to go home. And let me also be clear that we will have the zero tolerance for the establishment of new blockades or occupations. We now have the tools to follow the money. We can see what is happening and what is being planned in real time. And we are absolutely determined that this must end now and for good.
- (d) I have those numbers [accounts either personal or corporate that are being targeted] here in front of me, and they were reviewed just last night by me and Minister Mendicino, Minister Blair, the Prime Minister and Minister Lametti .But I'm not

going to share them with you right now because operational actions are being taken. And we want to be very, very careful not to jeopardize those operational actions. But I do want to assure you and through you, all Canadians, that action is being taken we are seeing it, and that action is going to increase in the coming days.

- (e) [In response to the following question from a reporter: *Okay, so my follow up is in two parts then so you're confirming that accounts have been frozen, both personal and corporate, but you're not releasing the information and the actual follow up is I'm just wondering whether the bank accounts will be targeted of individuals who donated to the GiveSendGo and the GoFundMe campaigns are being considered designated pull under the Emergencies Act, meaning that their credit cards could be cut and financial services are targeting them as well.*]

Okay, so names of both individuals and entities, as well as crypto wallets have been shared by the RCMP with financial institutions, and accounts have been frozen and more accounts will be frozen, a crowdfunding platforms and payment service providers have started the registration process with FINTRAC. In terms of the specifics on whose accounts are being frozen, you now have the regulations, the financial service providers have those regulations as well, and they working with law enforcement will be making the operational decisions. But I do want to say really clearly to Canadians, we have now outlined with great clarity that these blockades and occupations are illegal. It is now time for people to go home to take their trucks home and to stop funding illegal blockades and occupations.

- (f) The *Emergencies Act* has compelled financial service providers to take these actions and we have provided them with immunity for actions undertaken in good faith under these measures those are two important facts. The financial service providers have a stake in Canada and the Canadian economy and they are a really important institutional pillar of Canada. They are as they are legally obliged to do. Collaborating properly and effectively with the RCMP with laws and with law enforcement. In terms of disclosing specifics all of us had a conversation yesterday with law enforcement about out and there was a clear view that it's important right now, not to in any way jeopardize the very important work law enforcement is taking. And that's why I'm not disclosing the specifics. Let me assure you, those details will be disclosed in due course and soon. And I want you to know it is happening. I do have the numbers in front of me. And I do particularly want people who are participating in illegal blockades and an illegal occupation to know these measures are real. They are being used, they will have an impact. And there is a

real easy way to avoid being affected by these measures. And that is just go home. Go back to work.

Prime Minister Trudeau and Deputy Prime Minister Freeland Discuss Their Justification for Revoking the Emergencies Act Measures

5. On February 23, 2022, I watched a video entitled “PM Trudeau Announces That Use of Emergencies Act Will End – February 23, 2022”, which at the time of swearing this Affidavit is available at the following URL:

<https://www.cpac.ca/episode?id=671b6cad-2c9f-45cc-b8c2-15ba5f948c70>

6. I am informed by my review of the video, that Prime Minister Trudeau made the followings remarks on February 23, 2022:

- (a) I'm going to talk about the barricades at the blockades and our response to dangerous and unlawful activities in our capital city and many border crossings across the country. The federal government invoked the *Emergencies Act*. It was the responsible and necessary thing to do. We did it with three principles top of mind. First, restoring peace and order. Second, doing it the right way. And third, making sure that it was time limited.

The first point restoring peace and order in our streets and restoring confidence in our institutions was top of mind. Public safety as well as jobs in the economy. Were at risk. People were being harassed. Small businesses were closing. Factories were shutting down and trade was halted at our borders. Here in Ottawa, and in other places in the country, there was evidence of individuals wanting to undermine and even harm Canada's democracy. Their participation was believed to increase the potential for unrest and violence. We worked closely to support provinces and municipalities to get the situation under control. But as the weeks went by, it became obvious that provincial and local authorities needed more tools in order to enforce the law and protect Canadians. And that's exactly what the *Emergencies Act* provided to them.

- (b) Today, after having carefully examined the situation. We see that we are no longer in an emergency situation, and this is why the federal government is putting an end to the *Emergencies Act*. We feel that the legislation in place is sufficient to guarantee the public's safety. Obviously, we're going to continue to support local

authorities, but I want to reassure Canadians authorities are ready to intervene against anyone who is undertaking illegal dangerous activities. The police will continue to protect our streets, our neighborhoods, and our country.

- (c) The blockades and illegal occupation was solidly entrenched in the streets of Ottawa, our border crossings and there was need more tools to deal with these. And this is what we gave the various police forces with emergencies over the weekend we observed once activity here in Ottawa adults were and we saw that they had succeeded in restoring order and respect for law. Since Monday, as I said, we assess and every step we assessed the emergency and threats that existed in the country...

And this morning, we concluded in consultation with the various police services and security experts that the tools that our various police forces had in normal times are sufficient to continue to maintain law and order in the country once it had been restored. So as was promised, we did not want to keep this legislation and police in place one minute longer than necessary and this is why we are announcing that it has been ended...

It is the conversations we've had with experts, security experts with our police services with ministers in order to make sure that we have the tools we need to deal with this threat which remains even if there's no longer an emergency or threat. The threat of illegal protests of unlawful blockades, that threat remains but we know that the police and existing legislation will be sufficient to prevent other occupations.

- (d) We needed to give time limited proportional, reasonable, charter compliant extra tools to our authorities to be able to remove those barricades and those occupations...

And ensuring that even as we recognize that the emergency looked like it was ending, the threat remained. But they have the tools. The Canada has the tools in normal times, not in under an emergency sack to deal with the potential threat return. And we got a high level of confidence that the existing tools that police forces have across the country will be sufficient to deal with further disruptions.

- (e) Well, the emergency measures will be revoked. As soon as the governor general signs the proclamation, which should happen in the coming hours. Then with respect to any and other measures, yes, those measures will no longer be in effect. But they were in effect for 10 days. And any violations of the law that happened

during those 10 days will continue to be followed up in our courts and our justice system...

- (f) ...the invocation of the *Emergencies Act* I think, encouraged some people to leave and also allowed police forces achieve put an end to the occupations. We were assured that police forces could use existing powers to prevent the interrupt the entrenchment of occupations as we saw in the protests in Toronto, Quebec City.
- (g) Well, when you invoke an act like the *Emergencies Act*, you are duty bound to consider all options. But I can tell you that we were always very far from the point where we would have seriously considered calling on the military as we saw during the weekend here or not a while the police forces that were there in great numbers showed extraordinary capability and impressive professionalism. We were very pleased to know that we hadn't even begun to get near considering calling in the military because our police forces did a really good job.

7. I am informed by my review of the video, that Deputy Prime Minister Freeland made the followings remarks:

- (a) Between the period of the Declaration and the revocation. Any offenses committed are still offenses. That will be treated as any other offenses in our justice system... Concerning bank accounts, the process of unfreezing these accounts has already begun as the RCMP announced the RCMP has already asked banks to begin unfreezing these accounts because these count these accounts, bank accounts or frozen to convince people who took part in the occupation and the illegal blockades to listen to reason, after this, we asked the banks to unfreeze these bank accounts. So the process had already begun. But as the prime minister said, after the Governor General's signature of the proclamation of revocation, the situation will end I just like to stress that there are bank accounts that will remain frozen but not because of the emergency measures. There will be other orders, court orders and others. And because of these orders, the bank accounts may be frozen.

Prime Minister Trudeau Characterizes Individuals on Their Way to Protest in Ottawa as a “Small Fringe Minority” with “Unacceptable Views”

8. On March 2, 2022, I watched a video entitled “PM Trudeau on Expanded Military Support to Ukraine, Trucker Convoy Protests” dated January 26, 2022, which, at the time of swearing this Affidavit, is available on CPAC’s website at the following URL:

<https://www.cpac.ca/episode?id=b23f9bf5-008e-4c79-8a3a-7cf82b3e9a65>

9. I am informed by my review of the video that Prime Minister Trudeau made the following remarks on January 26, 2022:

We know that the way through this pandemic is by getting everyone vaccinated and the overwhelming majority close to ninety percent of Canadians have done exactly that. The small fringe minority of people who are on their way to Ottawa, or who are holding unacceptable views that they’re expressing, do not represent the views of Canadians who have been there for each other who know that following the science and stepping up to protect each other is the best way to continue to ensure our freedoms, our rights, our values as a country.

Prime Minister Questions Whether People Opposed to Vaccination Who Take Up Space Should Be Tolerated

10. On March 2, 2022, I watched a video entitled “Interview par Julie Snyder de Justin Trudeau / Semaine des 4 Julie / Campagne électorale Canada 2021” which at the time of swearing this Affidavit, is available on YouTube.com at the following URL:

<https://www.youtube.com/watch?v=SrHt4U-t5Vk>

11. I am informed by my review of the video that Justin Trudeau had the following exchange with Julie Snyder:

Trudeau: Il y’a aussi des gens qui sont farouchement opposés à la vaccination.

Snyder: Ils sont extrémistes

Trudeau: Qui croient pas dans la science, qui sont souviens misogyne, qui sont souviens raciste aussi. C'est un petit groupe mais qui prend la place. Et la il faut faire un choix autant que un leader, entant que un pays: est-ce que on tolère ces gens là?

12. I am informed by knowledge of the French language and the English language that the English translation of the remarks made in the previous paragraph is as follows:

Trudeau: There are also people who are fiercely opposed to vaccination.

Snyder: They're extremists.

Trudeau: That do not believe in science, that are often misogynists, that are often racist as well. It's a small group but they take up space. There is the need to make a choice as a leader and as a country: do we tolerate these people?

Justice Minister David Lametti States That Individuals Who Provided Funds to Freedom Convoy 2022 Movement Should Be Worried About Whether The Bank Can Freeze their Accounts

13. On March 2, 2022, I watched an excerpt of a video interview between Evan Solomon of CTV and Justice Minister David Lametti dated February 16, 2022. At the time of swearing this Affidavit, the video excerpt is available at the following URL:

https://twitter.com/Breaking911/status/1494123825876897797?ref_src=twsrc%5Etfw|twcamp%5Etweetembed|twterm%5E1494123825876897797|twgr%5E|twcon%5Es1_c10&ref_url=https%3A%2F%2Fsecurykid.com%2Fcanadian-justice-minister-threatens-to-seize-pro-trump-convoy-donor-bank-accounts%2F

14. I am informed by my review of the excerpt of the video interview that Justice Minister David Lametti made the following remark regarding whether individuals who donated to the Freedom Convoy 2022 movement should be worried about whether the bank can freeze their accounts:

I think if you are a member of a, you know, a pro-Trump movement who is donating hundreds of dollars and millions of dollars to this kind of thing, then you ought to be worried.

News Reports and Prominent Commentators Around the World Mock the Undemocratic Steps the Trudeau Government has Taken to Punish Canadians who Hold Views Contrary to Those of the Prime Minister

15. On March 4, 2022, I reviewed the following videos:

(a) A video entitled “Tucker: Trudeau has declared Canada a dictatorship” which consists of a segment from the Tucker Carlson Tonight show which aired February 14, 2022. At the time of swearing this Affidavit, this video is accessible at the following URL:

<https://www.youtube.com/watch?v=nZzJPXojtWs>

(b) A video entitled “‘This is terrifying’: What Justin Trudeau is doing in Canada is ‘insane’” which was posted to YouTube on February 19, 2022 and consists of a segment from Rowan Dean of the Sky News Australia program Outsiders. At the time of swearing this Affidavit, this video is accessible at the following URL:

https://www.youtube.com/watch?v=inPEY_PS4kU

(c) A video entitled “The Catastrophe of Canada | Rex Murphy and Jordan B Peterson” which was recorded February 19, 2022 and consists of a discussion between Rex Murphy and Dr. Jordan Peterson regarding the Trudeau Government’s actions including the arresting of protestors, the freezing of bank accounts of Canadians suspected of participating in the protests, and the long-term consequences of these extreme measures. At the time of swearing this Affidavit, this video is accessible at the following URL:

<https://www.youtube.com/watch?v=5efyUt5YDU0>

(d) A video entitled “World-famous liberal commentator Bill Maher calls out Trudeau” which is an excerpt from the Real Time with Bill Maher program on HBO. At the time of swearing this Affidavit, this video is accessible at the following URL:

<https://www.youtube.com/watch?v=6i72czkSUsM>

(e) A video entitled “Trudeau Freezes Protestors’ Bank Accounts In Authoritarian Crackdown On Truckers” which consists of a segment of a discussion between Jimmy Dore and comedian Kurt Metzger regarding the measures invoked to bring an end to the peaceful protests in Ottawa. At the time of swearing this Affidavit, this video is accessible at the following URL:

https://www.youtube.com/watch?v=8AK1b9Cx_QY

(f) A video entitled “Trudeau – Is This Your Liberal Hero?” which features Russell Brand’s analysis of the Trudeau government’s invocation of emergency powers to deal with the Freedom Convoy movement. At the time of swearing this Affidavit, this video is accessible at the following URL:

https://www.youtube.com/watch?v=S_GnClytz34

16. I believe from my review of the videos referenced in the previous paragraph, and from other videos that I have viewed since January, that news reports and prominent commentators around the world have mocked the Trudeau Government for the steps it has taken with respect to those who do not hold his views.

Angus Reid Poll

17. Attached hereto and marked as Exhibit “A” is a report from the Angus Reid Institute dated January 31, 2022. On page 10 of 12 of this report, the following is stated “The public sentiment appears to be moving in the direction of opening up communities. Indeed, in the past two weeks the number of Canadians saying they would like to see restrictions ended has risen by 15 percentage points, to a majority (54%).”

Maru Public Opinion Report

18. I have reviewed a report of key findings from a national survey conducted by Maru Public Opinion dated February 14, 2022. The report is entitled “Trudeau’s troubles”. I have attached a true copy of the report to this Affidavit as Exhibit “B”.

Hansard from House of Commons Debates of February 16, 2022

19. Attached hereto and marked as Exhibit “C” is a true copy of the Official Report (*Hansard*) of the House of Commons Debates of February 16, 2022, from the 44th Parliament, 1st session, (Volume 151, No. 232). I have reviewed the *Hansard*, and at page no. 2309 the following is set out:

Right Hon. Justin Trudeau (Prime Minister, Lib.): Mr. Speaker, Conservative Party members can stand with people who wave swastikas. They can stand with people who wave the Confederate flag. We will choose to stand with Canadians who deserve to be able to get to their jobs, to be able to get their lives back. These illegal protests need to stop, and they will.

Tweet from President of El Salvador

20. I have reviewed a “tweet” posted on the twitter account of the President of El Salvador, Nayib Bukele, on February 14, 2022. I sourced the “tweet” from the following URL:

<https://twitter.com/nayibbukele/status/1493377382245441537>

A printout of the “tweet” is attached hereto and marked as as Exhibit “D” to this Affidavit.

Hansard: Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-77

21. Attached and marked as Exhibit “E” to this Affidavit is a hyperlink to a 728 PDF document which consists of a true copy of the Hansard of the Minutes of Proceedings and Evidence of the Legislative Committee on Bill-C77 – An Act to authorize the taking of special temporary measure to ensure safety and security during national emergencies and to amend other Acts in consequence thereof (Canada, Parliament, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-77*, 33rd Parl, 2nd Sess, No 1 (15 December 1987 and 23 February 1988)). The PDF document itself could not be attached due to size constraints.

SWORN BEFORE ME at the City of Toronto, Ontario, on February 18, 2022.



Alexander Boissonneau-Lehner
Commissioner for Taking Affidavits, etc.



SIMON SIGLER

D

Court File No.: T-306-22

FEDERAL COURT

BETWEEN:

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF KRISTEN NAGLE

I, Kristen Nagle, Registered Nurse and director and member of Canadian Frontline Nurses, of the City of London, Ontario SWEAR THAT:

1. I am an Applicant in these proceedings and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where same are stated to be based upon information or belief and where so stated I verily believe the same to be true.
2. The co-Applicant, Canadian Frontline Nurses, is a registered not-for-profit corporation. Canadian Frontline Nurses is a proud advocate of medical freedom and its mission is to unite nurses across Canada, educate the public and ensure that Canadian healthcare reflects the highest ethical standards.
3. Attached and marked as Exhibit "A" is a copy of the Certificate of Incorporation for Canadian Frontline Nurses.

4. I personally support the peaceful Freedom Convoy 2022 protests in Ottawa and its objectives. So does Canadian Frontline Nurses as an organization.
5. I am opposed to unreasonable COVID-19 related mandates and restrictions that have been implemented by various levels of Canadian governments.
6. I unequivocally do not support violence. Neither does Canadian Frontline Nurses. We denounce violence and do not view violence as a legitimate means of expression or as a means of achieving one's political ends.
7. I have not witnessed nor am I aware of any violence in connection with the Freedom Convoy 2022 protests in Ottawa.
8. As of the time of my swearing this affidavit, Canadian Frontline Nurses is a peaceful participating group in the Freedom Convoy 2022 protests.
9. As of the time of my swearing this affidavit, I am personally peacefully participating, in the Freedom Convoy 2022 protests in Ottawa. Over the course of the Freedom Convoy 2022 protest in Ottawa, I have made speeches and other peaceful expressions of my opinions, beliefs, and values.
10. On February 17, 2022, I was advised by several peaceful participants in the Freedom Convoy 2022 protests in Ottawa that their bank accounts were frozen after the *Emergencies Act* was invoked.

11. Canadian Frontline Nurses has property stored at financial institutions. Canadian Frontline Nurses needs access to funds stored at financial institutions to support its mission.
12. I personally have money stored at financial institutions. I also have credit cards.
13. I need access to funds to secure necessities of life for myself and my family.
14. I wish and intend to continue to peacefully express my opinions, beliefs, and values in the Freedom Convoy 2022 protests in Ottawa, but cannot conceive how I will be physically able to do so if I am prevented from receiving or indirectly receiving support and access funds, or directly or indirectly receive support, that are necessary to maintain life.

Sworn before me remotely by Kristen Nagle, who is in the City of Ottawa, Ontario before me in the City of Toronto, Ontario on February 18, 2022.



Alexander Boissonneau-Lehner
Commissioner for Taking Affidavits
(or as the case may be)



KRISTEN NAGLE

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Court File No. T-306-22

FEDERAL COURT

B E T W E E N:

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. T-316-22

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

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Court File No. T-347-22

B E T W E E N:

CANADIAN CONSTITUTION FOUNDATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. T-382-22

B E T W E E N:

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS, and
HAROLD RISTAU

Applicants

- and -

GOVERNOR IN COUNCIL, HIS MAJESTY THE KING IN RIGHT OF
CANADA, ATTORNEY GENERAL OF CANADA, and MINISTER OF
PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

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TRANSCRIPT OF PROCEEDINGS BEFORE JUSTICE MOSLEY

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held at the Federal Court in Ottawa, Ontario, and

4

virtually over Zoom teleconference

5

on Monday, April 3, 2023, at 9:30 a.m.

6

7

APPEARANCES:

8

David G. Cowling for the Applicant in file T-306-22

9

Alexander Boissonneau-Lehner

10

11

Brandon Chung for the Applicant in file T-316-22

12

Ewa Krajewska

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14

Sujit Choudhry for the Applicant in file T-347-22

15

Janani Shanmuganathan

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Blair D. Ector for the Applicant in file T-382-22

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Bath-Sheba van den Berg

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Christopher Rupar for the Respondents

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John Provart

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David Aaron

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Kathleen Kohlman

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Mandy England for the Intervener AG of Alberta

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Shaheer Meenai

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1 Ottawa, Ontario, and virtually
2 --- Upon commencing on Monday, April 3, 2023, at 9:30 a.m.

3 THE REGISTRAR: This special sitting of
4 the Federal Court is now open. The Honorable Justice
5 Mosley is presiding.

6 Before the court are file numbers
7 T-306-22, Canadian Frontline Nurses and Kristen Nagel
8 versus Attorney General of Canada;

9 T-316-22, Canadian Civil Liberties
10 Association versus Attorney General of Canada;

11 T-347-22, Canadian Constitution
12 Foundation versus Attorney General of Canada and
13 Attorney General of Alberta;

14 and T-382-22, Jeremiah Jost, Edward
15 Cornell, Vincent Gircys, Harold Ristau versus Governor
16 in Council, His Majesty the King in Right of Canada,
17 Attorney General of Canada Minister of Public Safety
18 and Emergency Preparedness.

19 Appearing for the Applicants in file
20 T-306-22 is Mr. David G. Cowling and Mr. Alexander
21 Boissonneau-Lehner.

22 Appearing for the Applicants in file
23 T-316-22 Mr. Brendan Chung, Ms. Ewa Krajewska.

24 Appearing for the Applicants in file
25 T-347-22, Mr. Sujit Choudhry and Ms. Janani
26 Shanmuganathan.

27 Appearing for the Applicants in file
28 T-382-22, Mr. Blair Ector and Ms. Bath-Sheba van den

1 Berg.

2 Appearing for the Respondents, Mr.
3 Christopher Rupar, Mr. John Provart, Mr. David Aaron,
4 Ms. Kathleen Kohlman.

5 Appearing for the Intervener Attorney
6 General of Alberta, Ms. Mandy England, Ms. Shaheer
7 Meenai.

8 Counsel is reminded to avoid mentioning
9 any confidential information. Should counsel want to
10 draw the Court's attention to confidential information,
11 they should simply refer to the paragraph or line
12 number in the reading materials where the confidential
13 information is in the file. The Court is now in
14 session.

15 JUSTICE MOSLEY: Good morning, counsel.
16 Are there any preliminary matters that you wish to
17 raise? Mr. Rupar?

18 MR. RUPAR: Before we get started,
19 Justice Mosley, I would ask permission for one of our
20 paralegals to join us at the table. She knows how to
21 run the electronics, we don't. And I'll turn it over to
22 Mr. Aaron for the first matter.

23 JUSTICE MOSLEY: Very good

24 MS. KRAJEWSKA: Two preliminary
25 matters. The first is the Court would have received a
26 Joint Brief of Authorities electronically. There are a
27 few cases missing from the Joint Brief of authorities,
28 so our law clerk is working on fixing that issue and we

1 will be providing an updated one probably tomorrow
2 electronically.

3 And the second issue is I'd just
4 request leave of the Court on Tuesday, which is
5 tomorrow, to leave the hearing after the lunch hour. My
6 partner, Christine (inaudible), has been appointed to
7 the bench and her swearing in ceremony is that
8 afternoon. And she and I clerked together in this
9 building 15 years ago and so I feel a bit emotional
10 about the situation because this hearing is very
11 important to me and so is my friendship to her. So I'd
12 request to be absent on Tuesday.

13 JUSTICE MOSLEY: It's a happy occasion
14 and a good excuse. I don't have a problem with that.

15 MS. KRAJEWSKA: Thank you.

16 JUSTICE MOSLEY: All right, with that,
17 are we ready to proceed? It was indicated last week in
18 my direction that the Attorney General will have the
19 opportunity to argue the two motions which were filed
20 in April of last year, April 11th. And it was agreed at
21 that time and continued to be that they would not be
22 dealt with in writing with the rule 369 but at the
23 hearing, so there's no issue about that.

24 And just by way of -- before you get
25 started, I understand that the CCLA and CFC are content
26 to rely on their written materials. I also understand
27 that Ms. Nagle and the CFN argue that there continues
28 to be a live controversy and, hence, their application

1 is not moot. So I expect you to be addressing that, and
2 in particular the argument that they have raised in
3 their written representations, the Memorandum of Fact
4 and Law on the Responding Motion and the record about
5 their potential liability as one case designated person
6 and in the other an entity and through the operation
7 of -- all right, through the application of the
8 Interpretation Act, section 43, I believe. And I didn't
9 see anything in your written materials. I understand
10 that the timing of filings is on that, an intentional
11 oversight, so I will expect you to address that. But in
12 any event, they are also arguing in the alternative
13 that the Court should exercise its discretion. They do
14 not claim public interest.

15 The other parties, as I understand
16 their materials, accept that the applications are moot,
17 the word technically is usually appended, but argue
18 that they shouldn't be heard. I'm particularly
19 interested in your remarks with regard to the two of
20 the Jost Applicants, and so I expect you to address
21 that. I understand that you already conceded that two
22 of the Jost Applicants have direct standing, and the
23 case would proceed whether or not the other two would
24 continue.

25 So I don't want to spend all day on
26 these preliminary matters. As I indicated in my
27 direction on Thursday, we have a lot of cover, a lot of
28 substantive material to cover, and the Attorney General

1 had surmised correctly that I'd likely reserve on the
2 question of mootness. That remains -- that is entirely
3 accurate. That is a prescient view of the matter.

4 I'm not so sure about standing, so I do
5 want to hear from you on that, and then I'll decide
6 which parties I wish to hear from on that question.

7 All right, does that help?

8 MR. AARON: Thank you, Justice Mosley.
9 My name is David Aaron, I'm counsel for the Respondent.
10 I just wanted to mention two preliminary matters. The
11 first is, I have a hearing impairment and I'm receiving
12 accommodation via captioning, so if I'm looking at the
13 screen at times to see the captions, it's not a slight
14 to the Court, it's just I need to see the captions.

15 JUSTICE MOSLEY: Understood, not to
16 worry.

17 MR. AARON: Thank you.

18 The other matter is, given the matters
19 to cover and the time constraints that we have, I won't
20 be taking the Court many of the authorities that I
21 cite. I'll give reference, and if the Court would like
22 to go to details, I'm happy to do so.

23 JUSTICE MOSLEY: Is the law not clear
24 in this area?

25 MR. AARON: The law is quite clear in
26 this area, which is why I don't think we'll be spending
27 a lot of time with the specific jurisprudence.

28 JUSTICE MOSLEY: Thank you.

1 SUBMISSIONS BY MR. AARON:

2 And so I submit, Justice Mosley, that
3 there are two bases on which the Court can refuse to
4 hear these applications. The first is they are moot and
5 the Court should exercise its discretion anyway.

6 As you noted, Justice Mosley, with the
7 exception of Mr. Cornell and Ms. Gircys, we submit the
8 remaining Applicants lack standing.

9 So I'll begin with mootness.

10 As you well know, Justice Mosley, the
11 test for mootness involves a two-stage analysis. First
12 of all, is there a live controversy between the
13 parties? If there is not, then the question becomes
14 should the Court exercise its discretion to hear the
15 matter anyway?

16 Before proceeding to apply this test to
17 the facts before the Court, I'd like to provide the
18 Court with an overview of some of the cases that have
19 been decided on the issue of mootness in the last year
20 in which this Court or the Federal Court of Appeal have
21 refused to exercise their discretion to hear moot
22 applications.

23 I raise them at the outset because, in
24 my submission, there are similarities between these
25 cases and the one before the Court. In my submission,
26 in most, if not all, of these cases the key factor that
27 motivated the Court not to exercise discretion was that
28 the absence of a live controversy between the parties

1 meant that the declaration sought would have had no
2 practical, utility and would have had no effect on the
3 Applicant's rights. This method would not be an
4 effective allocation of scarce judicial resources to
5 provide abstract declarations that would have no
6 meaningful effect.

7 The first case I'd like to review is
8 Ben Naoum, N-A-O-U-M. That's found at Tab 9 of our
9 compendium. And I have handed up a hard copy of the
10 compendium, Justice Mosley, that you should have before
11 you, and I have also provided a copy to my friends.

12 So Ben Naoum was decided in October of
13 2022. In that case Associate Chief Justice Gagné struck
14 four moot applications for judicial review challenging
15 revoked vaccine mandates because the declarations
16 sought would have no practical effect on the
17 applicant's rights and stated at paragraph of 28 of
18 that decision, Associate Chief Justice Gagné said:

19 "Yet, it is well-known that Courts
20 should refrain from expressing opinions on questions of
21 law in a vacuum or where it is unnecessary to dispose
22 of a case. Any legal or constitutional pronouncement
23 could prejudice future cases and should be avoided"

24 Also in October of 2022 this Court
25 decided a case called Lavergne-Poitras which is found
26 at Tab 10 of our compendium. In that case Justice Pamel
27 struck an application for judicial review challenging
28 revoked vaccine mandates because again the declaration

1 has no practical utility or impact on the applicant's
2 rights. The Court stated at paragraph 38 that:

3 "Courts should avoid expressing
4 opinions on questions of law where it is not necessary
5 to do so to dispose of a case, particularly when the
6 question is constitutional in nature"

7 And less than a month ago in a case
8 called Yates --

9 JUSTICE MOSLEY: I don't mean to
10 interrupt you, but I prefer to work from the screen. I
11 just want to check whether your paper compendium was
12 any different? I don't believe you pinpointed
13 paragraph 38 of that decision? You pinpointed 32 and 35
14 to 50. I don't actually have that paragraph.

15 MR. AARON: We'll see if we can screen
16 share and pull that up --

17 JUSTICE MOSLEY: Well, the point is --
18 I mean, I don't think it's a controversial point, I
19 just wanted to make that observation. So at some stage
20 if you could give me a revised version of your
21 compendium, that would be helpful.

22 MR. AARON: Certainly, and I apologize
23 to the Court for that.

24 JUSTICE MOSLEY: No, it happens.

25 MR. AARON: So less than a month ago in
26 a case called Yates (ph), which is found at Tab 8 of
27 our compendium, Associate Judge Horne struck two
28 applications challenging revoked COVID border measures

1 because there was no practical utility in rendering a
2 decision since the border measures no longer existed.

3 In January of this year in Spencer,
4 which is found at Tab 4 of our supplemental
5 authorities, the Federal Court of Appeal refused to
6 hear a moot appeal regarding COVID quarantine measures
7 that had been revoked because declaratory relief sought
8 by the appellants would not settle a live controversy
9 between the parties.

10 In December of 2022 in the Right to
11 Life Association, which is found at Tab 5 of our
12 supplemental authorities, the Federal Court of Appeal
13 refused to hear a moot appeal regarding the
14 constitutionality of a human rights attestation
15 requirement in a government summer jobs funding program
16 which had since been repealed. In refusing to exercise
17 its discretion to hear the moot appeal, the Court of
18 Appeal said at paragraph 22:

19 "The mere fact that the same issue may
20 arise again and there is no suggestion it will, does
21 not justify hearing a moot appeal. We should not hear a
22 case on mere speculation that the same issue may arise"

23 In July of 2022 in a case called
24 Fibrogen v. Akebia Therapeutics, found at Tab 6 of our
25 supplemental authorities, again the Court of Appeal
26 refused to hear a moot appeal regarding confidentiality
27 designations in witness statements and other documents
28 in an action that had been discontinued because, as the

1 Court said at paragraph 43 of the Fibrogen decision:

2 "A court should not hear a proceeding
3 based on speculation as to circumstances that might
4 arise so as to move the issues from the theoretical to
5 the practical."

6 In July 2022 in *Ermineskin Cree*, which
7 is found at Tab 6 of our supplemental authorities, the
8 Federal Court of Appeal refused to hear an appeal
9 challenging the validity of a ministerial order under
10 environmental protection legislation because it had
11 been overtaken by a new order. As a result, the appeal
12 would have had no practical effect on the parties'
13 rights.

14 Lastly, in (inaudible), which is found
15 at -- apologies, I have it listed as Tab 6 of our
16 Supplemental Authorities, but I will confirm if that's
17 correct -- the Federal Court of Appeal refused to hear
18 an appeal on vaccine mandate issues because they were
19 revoked and no longer applied.

20 So these cases, I present them at the
21 outset, Justice Mosley, because, in my submission, they
22 reiterate a clear theme, which is that where an issue
23 will not affect the rights of the parties before the
24 Court, the Court should not exercise its discretion to
25 opine on it. The Emergencies Act was revoked more than
26 a year ago and, in my submission, this is precisely the
27 kind of case where the Court should not exercise
28 discretion because the matters raised are -- will not

1 have a direct impact and will not have practical
2 utility.

3 JUSTICE MOSLEY: The Applicants argue
4 that if the Court does accept to hear the matter that,
5 moving forward, these provisions will be the basis of
6 review.

7 MR. AARON: Yes, Justice Mosley, in my
8 submission that's incorrect for a number of reasons,
9 and let me just address those, if I may.

10 In my submission, the argument on
11 evasiveness of review is misguided for, respectfully, a
12 couple of reasons.

13 First of all, it's based on
14 speculation. Concerns about evasiveness of review tend
15 to apply where there's a recurring event that can never
16 get before the Court because it is superseded by
17 another event of a short duration.

18 So to give you an example, Justice
19 Mosley, this was the situation in the Saskatchewan and
20 Canada case that's found at Tab 45 of our original
21 mootness submissions. And that case dealt with egg
22 quotas in a regulated scheme that were renewed
23 annually, and so by their nature they became moot as
24 they were superseded by another quota.

25 Similarly, you might have an example of
26 an immigration detention review where ongoing reviews
27 make each previous review moot. But, in my submission,
28 that's not the case before the Court.

1 The CCLA Applicants, for example,
2 describe the Emergencies Act as a once in a generation
3 event. I should have said, pardon me, Emergencies Act
4 invocation of a once in a generation event.

5 Given the extreme rarity, in my
6 submission, of the Emergencies Act use, we have no idea
7 what a subsequent invocation of the Emergencies Act
8 will look like. We don't know when it will be declared
9 and we certainly hope it won't be needed. But if it is,
10 we don't know when that might occur and we have no idea
11 what the circumstances will look like. But one thing
12 that seems fair to say is that it is highly unlikely
13 that the circumstances that might occur hypothetically
14 in the future will mirror the events that give rise to
15 the case that is before the Court.

16 JUSTICE MOSLEY: Let's just take these
17 circumstances. Would you -- are you suggesting that
18 this matter would have been right for judicial review
19 in the immediate -- during the short lifespan of the
20 application of the Emergencies Act?

21 MR. AARON: Well, with respect, even if
22 similar types of circumstances gave rise to the
23 invocation of the Emergencies Act in the future,
24 there's no -- we have no way of knowing the duration of
25 that invocation. Emergencies are temporary --

26 JUSTICE MOSLEY: Hypothetically it
27 could be, what, as short as 24 hours or 48?

28 MR. AARON: It could be, Justice

1 Mosley, but by the same token --

2 JUSTICE MOSLEY: And during that 24 or
3 48 hours the -- a party that is affected under 18.1 of
4 the Federal Courts Act could bring an application for
5 judicial review and have it heard by the Federal Court.

6 Do you think that's realistic?

7 MR. AARON: Perhaps not in a 24-hour
8 period, but I mean --

9 JUSTICE MOSLEY: I hear there was nine
10 days, right?

11 MR. AARON: This was nine days,
12 correct, but --

13 JUSTICE MOSLEY: And during that period
14 of time how much evidence was available to any person
15 who would be affected by the invocation of the Act and
16 the proclamation of a public order emergency to bring
17 an application for judicial review?

18 MR. AARON: Well, within a relatively
19 short period of time the parties were before the Court
20 in this matter because --

21 JUSTICE MOSLEY: That was a stay
22 motion.

23 MR. AARON: Correct, but the matter was
24 brought before the Court expeditiously.

25 JUSTICE MOSLEY: And solely to enjoin
26 the government from continuing to proceed with the --
27 the application of the Act. And it was, as I found,
28 clearly moot at that point in time. But that case

1 didn't decide that they had no right to continue to
2 seek judicial review of the invocation of the Act.

3 MR. AARON: But I think the point,
4 Justice Mosley, is that we're engaging in a
5 hypothetical here about what might occur.

6 JUSTICE MOSLEY: Well, we have real
7 facts here. We have a nine-day application of the Act
8 during which certain -- the Emergency Measures -- the
9 regulation of the Order were -- the regulation of the
10 Order were brought to bear. And putting aside the
11 question of the effectiveness of that -- we'll hear a
12 great deal more on that subject, I'm sure -- but it was
13 in effect and things started to happen, accounts were
14 frozen. Some people believed -- in fact, I think there
15 were, what, 200 charges laid, albeit under the other
16 statutes. Things were happening during that period of
17 time.

18 But what evidence would have been
19 available on the reasonableness of the decision to any
20 person affected who might seek to challenge the
21 decision?

22 MR. AARON: But the question --
23 admittedly at the very outset of the invocation of the
24 Emergencies Act there would have been a minimal amount
25 of evidence for the Applicants to bring within, say, a
26 24-hour period, but the --

27 JUSTICE MOSLEY: And thereafter there
28 was the Section 58 Explanation.

1 MR. AARON: Correct, but, in my
2 submission, the question that the Court needs to
3 consider on this issue, on the exercise of its
4 discretion, is: What would be the utility of
5 pronouncing on a situation that no longer exists and
6 has not existed for more than a year? Would --

7 JUSTICE MOSLEY: Which brings us back
8 to the point that the Applicants have made. If a case
9 like this can't go ahead, when will any case be able to
10 go ahead?

11 MR. AARON: So on that point, Justice
12 Mosley, the fact that an emergency is temporary does
13 not necessarily mean that it is short-lived,
14 unfortunately. I mean, it's not an enjoyable exercise,
15 but one can imagine emergencies hypothetically that
16 face the country in which a potential invocation of the
17 Emergencies Act may be required for a far more extended
18 period of time. Again, it's a hypothetical, but there's
19 nothing to say that if and when another invocation of
20 the Emergencies Act occurs, that it may not occur for a
21 far longer time than nine days at issue in this case.
22 Of course we had all that that's not the case but
23 hypothetically that's possible and it -- so, in my
24 submission, that would be a case in which the matter
25 could be brought before the Court.

26 And for this Court to pronounce on
27 constitutional matters and provide the declarations
28 that the Applicants are asking for in the abstract now

1 may potentially tie the hands of a future Court dealing
2 with a very different factual scenario involving the
3 use of the Emergencies Act, we hope some far time in
4 the future.

5 So to answer your question, again,
6 Justice Mosley, the engaging in hypotheticals is an
7 exercise that this Court and the Court of Appeal have
8 said are not appropriate when assessing the issue of
9 discretion in the Borowski test.

10 But that being said, if we do engage in
11 a hypothetical, as I have said, it's quite possible
12 that a future invocation of the Emergencies Act would
13 be lengthier and allow the matter to come before the
14 Court.

15 In my submission we should -- the Court
16 should allow for that possibility rather than engaging
17 in an analysis based on facts that are, as I have said,
18 no longer in effect.

19 Going back to the Borowski test, as you
20 noted at the outset, Justice Mosley, there is no live
21 controversy -- pardon me, all Applicants except
22 Canadian Frontline Nurses and Ms. Nagle have conceded
23 that there's no live controversy and that the matter is
24 moot.

25 As I have noted, the Emergencies Act
26 was revoked more than a year ago. CFN, Canadian
27 Frontline Nurses, and Ms. Nagle argue that there
28 remains a live controversy because hypothetically they

1 could be prosecuted at some future date for violating
2 the regulations, even though the regulations have not
3 been in effect for more than a year.

4 In my submission, there a number of
5 factors that undermine this argument. Again, the
6 argument is based entirely on speculation. There's no
7 evidence that Ms. Nagle or --

8 JUSTICE MOSLEY: I agree with you to
9 the extent that it is an extremely remote possibility
10 that Ms. Nagle would be charged with participation.

11 In your written material you suggested
12 that she is not, in fact, a -- was not a designated
13 person. I have difficulty -- a problem with that, and
14 I'll explain. I'd like to hear from you on this.

15 As I understand the instruments that
16 were enacted after the declaration, being a designated
17 person is a matter -- it arises by operation of law.

18 There was no process -- correct me if
19 I'm wrong about this -- no process to say that Ms.
20 Nagle was hereby designated under -- I forget the
21 section number of the Economic Measures Regulation. By
22 definition, however, the definition would appear to
23 apply to her.

24 CFN, which, as far as I can tell had
25 very little to do with anything other than being the
26 conduit for the money to flow to Ms. Nagle, is a
27 corporation and, as a corporation, is an entity. And
28 they have raised this argument about section 43 of the

1 Interpretation Act. You must address that.

2 MR. AARON: The response to that,
3 Justice Mosley, is that, again, the argument is
4 entirely hypothetical. I take the Court's point that --

5 JUSTICE MOSLEY: No, no, hang on a
6 second. They're saying that it's not hypothetical
7 because 43 applies, which means that we could be
8 charged even though the particular statute under which
9 the charge would be laid has been revoked. And
10 "revoked" is broadly defined in the Interpretation Act.

11 I understand it's not going to happen,
12 it is remote, it is totally hypothetical -- well, not
13 totally.

14 While it is an extremely remote
15 possibility, is it, in fact, a real legal possibility?
16 Because if it is, then they are persons affected as
17 under 18.1.

18 Do you have anything to say on that?

19 MR. AARON: Well, in response to that,
20 the first thing I'd say is that the Courts have
21 actually looked at that issue and have suggested that
22 it does not militate in favour of exercising the
23 Court's discretion.

24 JUSTICE MOSLEY: Are you talking about
25 mootness or standing now?

26 MR. AARON: I'm talking about mootness.

27 JUSTICE MOSLEY: All right.

28 MR. AARON: Solely on mootness at this

1 point, Justice Mosley. The case that I'm referring to
2 is the Yates case which was decided just last month. In
3 that case the Applicants argue that the Court should
4 decide the matter because its decision would impact the
5 prosecution of the applicant's failure to comply with
6 border measures.

7 At paragraph 31 of the Yates decision
8 the Court said:

9 "Particularly in respect of any ongoing
10 prosecution, I agree with the Respondent the Applicants
11 are free to seek a determination on the
12 constitutionality of the impugned provisions in those
13 prosecutions if they so choose. Having duplicative
14 proceedings addressing the same issue would be a waste
15 of judicial resources and militates against the Court
16 exercising its discretion to hear these moot
17 applications." (As read)

18 Similarly, in Spencer -- that was the
19 Federal Court of Appeal case that I mentioned earlier
20 at Tab 4 of our Supplemental Authorities -- in that
21 case the appellants encouraged the Court of Appeal to
22 exercise its discretion to hear a moot case because the
23 decision would impact the legal rights of some of the
24 appellants and many other Canadians who could face
25 fines, prosecution and penal consequences as a result
26 of the alleged non-compliance with the Order in Council
27 that implemented the border restrictions in that case.
28 The Federal Court of Appeal dismissed the appeal as

1 moot despite these concerns.

2 So in my submission the jurisprudence
3 on this issue demonstrates that even if there is this
4 remote possibility of a prosecution, that does not tip
5 the balance in favour of exercising the Court's
6 discretion in this case.

7 And, again, Justice Mosley, I think
8 it's also important to note that the Courts have said
9 we should not be engaging in hypotheticals when
10 assessing whether to exercise discretion.

11 And all of the evidence that is before
12 the Court indicates that neither Ms. Nagle nor CFN had
13 their bank accounts frozen, were arrested or charged or
14 threatened with prosecution. In fact, at paragraph 16
15 of their factum they note that:

16 "Nagle and CFN did not engage in any
17 criminal activities during their participation in the
18 Freedom Convoy 2022 protests in Ottawa, and none of
19 them were charged with an offence under either the
20 Emergency Measures Regulations or the Criminal Code.

21 JUSTICE MOSLEY: So that's criminal
22 offences. But they do not concede that they contravened
23 the Emergency Measures, that Ms. Nagle continued to
24 dispense funds --

25 MR. AARON: That's correct.

26 But moving back if I may, to my
27 previous submissions, even if that's the case, there's
28 no evidence before the Court that the Emergencies Act

1 in any way impeded Ms. Nagle's ability to do so and --

2 I'm sorry, my friend has something to
3 say.

4 MR. COWLING: Your Honour, that's not
5 correct. Ms. Nagle's sworn affidavit indicates that her
6 ability to secure funds, distribute funds were impacted
7 by the Emergencies Orders that took place.

8 MR. AARON: Justice Mosley, even if, as
9 my friend says, Ms. Nagle subjectively felt that she
10 was less able to distribute funds or collect them, the
11 evidence indicates, though, that that continued.

12 We're moving away, to some extent, from
13 the more important point, which is, as I say, that the
14 jurisprudence is clear that the threat of possible
15 prosecution is not a factor that militates -- should
16 militate in favour of exercising the Court's
17 discretion.

18 And I certainly apologize to the Court
19 if I misstated Ms. Nagle's evidence; that certainly
20 wasn't my intention, it was inadvertent.

21 So if we move to the --

22 JUSTICE MOSLEY: Well, just for the
23 record, at paragraph 20 of her affidavit she says that
24 she videotaped herself dispersing funds on
25 February 16th. I was careful not to show this because
26 of the regulations, and acted on February -- so she's
27 conceded that she breached the measures.

28 MR. AARON: There's no evidence that

1 this somehow put her in contact with the implications
2 of the Emergencies Act, I didn't state that
3 particularly, I apologize.

4 But there's no evidence that, as a
5 result her conduct, any state action occurred. There
6 were no bank accounts frozen, there were no other
7 implications for, in my submission, Ms. Nagle and
8 certainly for CFN in that regard.

9 So, Justice Mosley, I'd like to move to
10 the second part of the Borowski test for mootness:
11 Whether the Court should exercise its discretion. And I
12 have already given you some submissions on that but to
13 be a bit more fulsome now.

14 The first question is: Is there an
15 adversarial context?

16 Secondly, would hearing a moot matter
17 be effective use of scarce judicial resources?

18 And, thirdly, the Court's appropriate
19 role.

20 I'll be brief on the adversarial
21 context. I'll simply note that in Borowski the Supreme
22 Court described an adversarial context as one in which
23 collateral consequences arise in related proceedings.
24 In my submission, no such collateral consequences arise
25 here. The Emergency Measures are no longer in effect.
26 Speculation about hypothetical future events is
27 insufficient and, in my submission, the Court should be
28 wary of exercising its discretion to hear a moot matter

1 where its decision would have no collateral
2 consequences and no legal impact on the Applicant's
3 rights in related proceedings or otherwise.

4 Moving to the second factor, efficient
5 use of judicial resources. In the Amgen case, which is
6 found at -- in our original motion materials at Tab 44
7 of the authorities, the Court stated that where a
8 decision will not have a practical effect upon the
9 right of the parties it has lost its primary purpose
10 and the Court should no longer devote scarce resources
11 to it.

12 I submit that this is the key
13 consideration that has guided this Court and the Court
14 of Appeal in most of the mootness cases that I took you
15 to over the last year. And in my submission, it should
16 guide this Court as well. The Applicants have already
17 obtained the relief that they are seeking. The
18 Emergency Measures are revoked. The Court's decision
19 could not deliver any other remedy that would affect
20 their rights.

21 Returning to the Ben Naoum case that I
22 mentioned earlier, Associate Chief Justice Gagné
23 cautioned that the Court should not hear moot matters
24 where, as here, the only practical remedy has already
25 been obtained and declaratory relief would have no
26 practical effect on the parties' rights.

27 The Court also cautions against making
28 abstract declarations and held that a request for

1 declaratory relief cannot sustain an otherwise moot
2 application.

3 The references for these statements are
4 paragraphs 32 and 41 of the Ben Naoum case.

5 In Lavergne-Poitras Justice Pamel
6 refused to exercise his discretion to hear the moot
7 application, stating at paragraph 16 that to decide
8 questions abstracted from their factual context when
9 their determination would serve no useful purpose
10 beyond precedent setting would be an entirely academic
11 exercise.

12 In Rebel News, which is found in our
13 compendium at Tab 1, Justice Roussel found paragraph 64
14 that:

15 "...it is not the role of this Court to
16 decide purely abstract and academic questions when
17 there is no obvious, useful purpose to be served by
18 granting the declaratory relief sought"

19 That is at paragraphs 58 and 64 of the
20 Rebel News case.

21 In Phillips v. Nova Scotia (Commission
22 of Inquiry into the Westray Mine Tragedy), which is in
23 our original mootness submissions Tab 33, the Supreme
24 Court, citing its decision in Tremblay v. Daigle, said
25 that in the context of mootness the jurisprudence of
26 this Court indicates that unnecessary constitutional
27 pronouncement should be avoided.

28 In my submission, this is not a case

1 where the law is unsettled. This is a case where
2 established administrative law, constitutional
3 principles are simply being applied to a specific
4 factual scenario. And as I mentioned earlier, the case,
5 in my submission, is not evasive of review.

6 Before moving to the third
7 consideration, the proper role of the Court, there are
8 two final points that I wanted to address on efficient
9 use and effective use of judicial resources.

10 The CCLA Applicant argues in its Reply
11 Submissions the Court has an obligation to declare a
12 Charter infringement even if those infringements are
13 found to be justified under section 1. As noted
14 earlier, the Court has repeatedly refused to exercise
15 its discretion to determine abstract issues.

16 But also, the CCLA seeks a declaration
17 of invalidity under section 52(1) of Charter, which can
18 only be issued against a law that is inconsistent with
19 the provisions of the Constitution. This means that the
20 law cannot be demonstrably justified under section 1.
21 It doesn't mean the Court should issue a declaration
22 irrespective of its section 1 analysis.

23 The final point on effective use of
24 judicial resources. It would be a mistake for the
25 Court to exercise its discretion to hear the matter
26 because we've come this far and because we're about to
27 embark on a three-day hearing.

28 JUSTICE MOSLEY: Well, we have come a

1 long way, Mr. Aaron. We've spent about a year on
2 multiple case management conferences, orders, motions,
3 extensive reasons relating to those motions. There has
4 been a lot invested in this thus far.

5 MR. AARON: And that's absolutely the
6 case, Justice Mosley, and I definitely don't take issue
7 with that. But in the Phillips case the Supreme Court
8 said at paragraph 13 that:

9 "In Borowski, although the appeal was
10 fully argued on the merits in the Court of Appeal and
11 in the Supreme Court, it was dismissed on the ground of
12 mootness. I cannot, therefore, agree with my colleague
13 that the fact that the case was fully argued in the
14 Nova Scotia Court of Appeal and in this Court is
15 sufficient to warrant deciding difficult Charter issues
16 and laying down guidelines with respect to future
17 public inquiries simply because to do so might be
18 'helpful'." (As read)

19 And so, again, Justice Mosley, it's
20 agreed that significant resources have already been
21 devoted. But as the Supreme Court has said, that in and
22 of itself is not a reason for this Court to exercise
23 its discretion in favour of hearing a moot matter.

24 On the third point, Justice Mosley, the
25 Court should heed its role, in my submission, relative
26 to the legislative and executive branches. In the
27 absence of a live controversy what remains, in my
28 submission, is primarily a policy-based dispute

1 regarding the appropriateness of invoking the
2 Emergencies Act. The Supreme Court in Borowski
3 cautioned that the Court must be sensitive to its role
4 as the adjudicative branch in our political framework.
5 Pronouncing judgments in the absence of a dispute
6 affecting the rights, the parties may be viewed as
7 intruding into the role of the legislative branch.

8 And that's Borowski, page 362.

9 JUSTICE MOSLEY: But this is more than
10 just a policy dispute, is it not? There seems to be a
11 great deal said about the lawfulness of having invoked
12 the Act in the particular fact situation that arose
13 last year. It is a legal controversy, is it not?

14 MR. AARON: I apologize, I didn't mean
15 to speak over you, Justice Mosley. Yes, correct, that's
16 a legal question, but again it goes back to the fact
17 that it's a legal question without a live factual
18 foundation. And so I won't repeat --

19 JUSTICE MOSLEY: Your argument is, in
20 effect, that there's no merit to trying to clarify the
21 law in relation to this because of the revocation?

22 MR. AARON: Could I -- I apologize,
23 Justice Mosley, could I ask you to repeat your
24 question?

25 JUSTICE MOSLEY: Do I understand your
26 argument to be that there is no merit in deciding this
27 matter because of the revocation? Merit in clarifying
28 the law in relation to this matter?

1 MR. AARON: That's correct, that the
2 Court should not exercise its discretion purely to
3 issue an abstract pronouncement on legal principles in
4 the absence of a factual foundation because the
5 Emergencies Act has been revoked, that is correct.

6 JUSTICE MOSLEY: Even in the context
7 that this particular Act has never been judicially
8 interpreted?

9 MR. AARON: Yes, because, as I said
10 earlier, we don't know what, if any, utility that
11 analysis would have in the event of a future
12 invocation. This isn't, as I said earlier, an instance
13 of repeated invocations of the Emergencies Act that
14 continue to render previous ones moot.

15 As I mentioned, CCLA has defined this
16 as a generational event and so, in my submission, the
17 Court should not pronounce on abstract constitutional
18 principles when we don't know what future fact
19 scenarios may be brought to bear before this Court in
20 the future.

21 JUSTICE MOSLEY: All right, here's a
22 concrete question: What about the interpretation and
23 meaning of the definition in section 2 of the CSIS Act
24 and how that should be applied in the context of the
25 Emergencies Act? Is that a totally abstract question?

26 MR. AARON: Well, it's an abstract
27 question in the sense that, again, we don't know
28 precisely whether those provisions may even be the same

1 in a future invocation of the Emergencies Act. It's all
2 hypothetical.

3 JUSTICE MOSLEY: It's all engaging in
4 speculation about what Parliament may or may not do.

5 MR. AARON: Sorry, Justice Mosley,
6 could you say that again?

7 JUSTICE MOSLEY: That's in the realm of
8 speculation about what Parliament might do.

9 MR. AARON: That's correct. And so
10 that's right, it's all, as I submitted earlier, in the
11 realm of speculation. And speculation is not something
12 that the Court should be engaging in, in the absence of
13 a live controversy.

14 JUSTICE MOSLEY: Well, but that's not
15 the question I put to you. Here we have a situation
16 where wording out of one statute enacted in the
17 mid-1980s was applied by the drafters to another
18 statute. And there's a lot that has been argued in the
19 materials about that.

20 Is there not some value in attempting
21 to clarify how that definition should be employed in
22 this context?

23 MR. AARON: In my submission, there
24 isn't the value -- the value in that is undermined by
25 the fact that we don't know if the interaction between
26 these two provisions will even be necessarily relevant
27 in a future invocation of the Emergencies Act. As you
28 said, Justice Mosley, it's all speculative about what

1 may or may not happen. But that's precisely the reason
2 why the Court should defer to a future fact scenario
3 and assess the legislation as it exists at that time
4 based on the facts before it.

5 And, finally, on the point of the
6 Court's role, in our submission Parliament has
7 established accountability within the Act. There's a
8 legislated requirement, as the Court well knows, for a
9 public inquiry. Public Order Emergency Commission
10 reviewed this matter extensively and produced five
11 volumes on the same issues that are before this Court
12 based on a far more extensive evidentiary record than
13 is available to a Court on judicial review. A Special
14 Joint Committee of both Houses of Parliament is also
15 reviewing this matter, and met as recently as March
16 21st. The House of Commons voted in favour of the
17 Emergency Declaration and it was revoked before a vote
18 occurred in the Senate.

19 I concede that there has not been a
20 judicial decision on this issue, but this should give
21 the Court pause to consider its role and the need to
22 respect the other branches of government in light of
23 these other measures that have been put in place to
24 provide accountability.

25 Some final points on mootness. The CCLA
26 points to legislative history. In our submission
27 legislative history is an interpretive guide but it is
28 not determinative. It is up to this Court to weigh the

1 various factors that we reviewed as identified in the
2 Supreme Court in Borowski and reach its own
3 determination in how to exercise its discretion.
4 Legislative history may be a relative consideration but
5 it is not determinative in the way the Applicants
6 suggest.

7 To conclude on mootness, in my
8 submission the Court should decline to exercise its
9 discretion to hear these moot applications for the
10 reasons we've cited.

11 I would like to move on now to the
12 issue of standing, beginning with direct standing. To
13 establish direct standing an applicant must show that
14 the impugned decision directly affects their rights,
15 imposes legal obligations on them and prejudicially
16 affects them. And that comes from the League for Human
17 Rights of B'nai Brith, the Federal Court of Appeal
18 decision that's found in our original motion
19 authorities at Tab 53.

20 When assessing direct standing the
21 Court must assess a party's status relative to the rest
22 of the population. A Court must ask: Did the Emergency
23 Measures prejudice or affect an applicant in a way that
24 is qualitatively different from the general public? If
25 they do not, their direct standing is not warranted. An
26 applicant must adduce evidence to show that they are
27 more directly affected by the impugned measure than is
28 public generally. The fact that an individual has

1 stronger feelings about the Emergency Measures or feel
2 that they have been more inconvenienced by them is
3 insufficient.

4 Support for that proposition is the
5 Kulchyski case from the Ontario Court of Appeal that is
6 noted in our record. I'm sorry, I don't have the
7 specific cite, I'll get that for you.

8 As you noted at the outset, Justice
9 Mosley, two Applicants have direct standing. You can
10 see that Mr. Cornell and Mr. Gircys were directly
11 impacted by the Emergency Measures, particularly by the
12 Economic Order, because their accounts were frozen. And
13 there's evidence of that.

14 I'll review why the remaining
15 Applicants do not. In my submission, to begin with, Ms.
16 Nagle is no more directly affected by the Emergency
17 Measures than anyone else. After the Emergency Measures
18 came into effect, Ms. Nagle's bank account was never
19 frozen. She confirms this at paragraph 40 of her
20 affidavit.

21 As you noted earlier, Justice Mosley,
22 she continued to solicit donations in support of the
23 convoy. That's admitted in her affidavit at paragraphs
24 19, 32 and 33.

25 She continued to distribute funds and
26 other materials to support the convoy members, as noted
27 in her affidavit at paragraphs 19, 20, 23, 32 and 33.

28 Ms. Nagle continued to engage in

1 prohibited activities in downtown Ottawa after the
2 Emergencies Act was in effect. That's in her affidavit
3 at paragraph 30.

4 Despite invocation of the Emergencies
5 Act, she brought minors into the blockade zone,
6 contrary to the Emergency Measures. That's confirmed at
7 her affidavit at paragraphs 30 and 49.

8 She was never forcibly removed. She
9 left the convoy and downtown Ottawa on her own. That's
10 confirmed in her affidavit at paragraph 52.

11 Ms. Nagle's ability to participate in
12 the convoy was unimpeded and without consequences. She
13 continued to have the ability to oppose public health
14 measures and express her views, the same freedoms as
15 anyone else, and the evidence before the Court is that
16 she did so. She was not directly affected by the
17 Emergency Measures.

18 Earlier I addressed the issue of
19 section 43 of the Interpretation Act --

20 JUSTICE MOSLEY: But was she not at
21 risk of being directly affected by the Emergency
22 Measures?

23 MR. AARON: She was no more at risk of
24 being directly affected than any of the other tens of
25 thousands of people who were in downtown Ottawa.

26 Now, earlier I addressed the --

27 JUSTICE MOSLEY: Well, she'd gone
28 beyond mere presence on the scene. She was collecting

1 donations and dispensing funds, according to her own
2 evidence.

3 MR. AARON: But there's no evidence of
4 her suffering any implications, any impact as a result
5 of having done so. She did not come into contact with
6 the provisions in a practical sense. The only potential
7 contact, as she argues, is the argument under section
8 43 of the Interpretation Act.

9 And the submissions that I provided
10 earlier about the hypothetical nature of that argument
11 apply equally here. I won't repeat them, but Ms. Nagle,
12 as I say, was no more impacted in fact. There's no
13 evidence of any more direct impact on Ms. Nagle than
14 anyone else.

15 JUSTICE MOSLEY: She says that the
16 contributions to her -- to the CFN, her organization,
17 began to dry up after the bringing into effect of the
18 measures.

19 MR. AARON: In my submission, the --
20 the hypothetical -- I mean, the funds continued,
21 according to her evidence, to come in, she says they
22 came in at a different rate. This financial
23 consideration, in my submission, is not sufficient to
24 establish a direct standing.

25 JUSTICE MOSLEY: But it would have been
26 sufficient to have her as one of the two directors of
27 that organization charged, in addition to her own
28 evidence about having dispensed those funds directly to

1 facilitate the ongoing protests in Ottawa, would it
2 not? Is that not clear, she could have been charged?

3 MR. AARON: But she wasn't.

4 JUSTICE MOSLEY: That's not the
5 question. She could have been, right? Do you accept
6 that?

7 MR. AARON: She could have been.
8 Similarly, any of the thousands of people who were
9 engaging in the prohibited activities under the
10 Emergencies Act could have in theory. But the reality
11 is that Ms. Nagle was not. The bank account was not
12 frozen. She -- it's a hypothetical that didn't exist,
13 that didn't happen. And the Court has suggested that
14 hypotheticals should not -- should not persuade. You
15 should look at what the evidence is before the Court,
16 and the evidence, in my submission, is that there was
17 no factual basis to support direct standing.

18 With respect to Canadian Frontline
19 Nurses, CFN is a federally incorporated not for profit
20 corporation. There's no evidence that anyone other than
21 Ms. Nagle acted on CFN's behalf. So, in my submission,
22 there's no evidence that CFN was directly affected. To
23 the extent --

24 Just to go back to your question,
25 Justice Mosley, about the financial contributions. In
26 the case of Island Timberlands, which is found in our
27 motion to strike authorities at Tab 56, the Federal
28 Court of Appeal said at paragraph 7 that a party should

1 not be given standing to protect purely commercial
2 interests. And so to the extent that monetary donations
3 to CFN were altered by the invocation of the
4 Emergencies Act, the Island Timberlands case from the
5 Court of Appeal suggests that that is not an
6 appropriate basis on which to grant standing.

7 JUSTICE MOSLEY: Are these purely
8 commercial activities? From her evidence -- and I don't
9 want to leave any impression that I am sympathetic to
10 the views expressed in her affidavit or on
11 cross-examination -- but she purports to subscribe to
12 a -- to beliefs and to hold them quite fervently. And
13 she says that those donations, those contributions are
14 necessary for her to carry on her activities in favour
15 or support of those beliefs, is that not correct?

16 MR. AARON: Well, Justice Mosley, I
17 don't think I have much more to add beyond what the
18 Island Timberlands case said because in my submission,
19 yes, still regardless of Ms. Nagle's subjective beliefs
20 with respect to funding, the fact remains that we're
21 talking about money and the issue of whether there was
22 less money or more money as a result of the invocation
23 of the Emergencies Act. And so to answer your question,
24 yes, in our submission that's a purely financial
25 interest, regardless of Ms. Nagle's subjective view on
26 that matter.

27 JUSTICE MOSLEY: All right.

28 MR. AARON: Moving on to Mr. Jeremiah

1 Jost. Mr. Jost confirmed in his affidavit and in
2 cross-examination that his accounts were not frozen. He
3 confirmed that in his cross-examination transcript at
4 page 61, line 5.

5 He confirmed that he was not arrested
6 at page 61, line 8.

7 He confirmed that the Emergency
8 Measures did not impede his ability to attend and
9 participate in the protests at page 61, line 19 of his
10 cross-examination.

11 He continued to receive and distribute
12 money to protesters, including large amounts of cash
13 after the Emergencies Act was invoked. He admits that
14 at page 203, line 1 of his cross-examination
15 transcript.

16 His right to assemble and engage in
17 peaceful protest outside downtown Ottawa was unaffected
18 at page 63 of the transcript, line 7.

19 His ability to engage in the democratic
20 process by voting and writing letters to elected
21 representatives and running for elected office was
22 unaffected by the Emergencies Act. He admits that at
23 page 64, line 18 of his cross-examination transcript.

24 And he says that he attended the convoy
25 blockade primarily as an observer, not as a protester.
26 And that's found in the transcript at page 22, line 21,
27 through to page 25, line 3. In my submission, there's
28 no evidence that Mr. Jost was directly affected by the

1 Emergency Measures.

2 The next applicant, Harold Ristau. To
3 establish direct standing a party must demonstrate a
4 causal relationship between the impugned provision and
5 the prejudice that resulted that is not speculative,
6 indirect or remote. Support for that can be found in
7 the Findlay case from the Supreme Court of Canada at
8 paragraph 1721 and 22. Findlay is found in our original
9 motion materials at Tab 51.

10 Mr. Ristau's accounts were not frozen.
11 He participated in the convoy for one day before the
12 Emergencies Act was invoked. He says that in his
13 affidavit at paragraph 10.

14 He confirms that the Emergency Measures
15 did not impede his participation in the convoy. That's
16 in his affidavit at paragraphs 8 to 27.

17 He speculates without any evidence that
18 the Emergencies Act caused him to suffer harm in his
19 seminary, in his employment relationship, to his
20 reputation, and he says it caused him threats to his
21 personal safety. The relationship between the Emergency
22 Measures and these alleged harms is completely
23 speculative and unsubstantiated. For example, Mr.
24 Ristau says that the Emergency Measures led a veteran
25 to threaten him by "labeling anyone who supported the
26 protests as an enemy of the state and an
27 insurrectionist". That's a paragraph 37 of his
28 affidavit. In my submission that's completely

1 speculative and, frankly, it's factually incorrect; the
2 Emergencies Act does not say that.

3 Edward Cornell and Vincent Gircys were
4 directly affected by the Emergency Measures. Their
5 accounts were frozen. Mr. Jost and Mr. Ristau, CFN,
6 Canadian Frontline Nurses, and Ms. Nagle were not
7 directly affected for the reasons stated. In my
8 submission, they should not be recognized as having
9 direct standing.

10 Moving to public interest standing.
11 The guiding principles set out by the Supreme Court in
12 the Downtown Eastside case, paragraph 37, state that
13 the Court should consider whether there's a serious
14 justiciable issue raised, whether the applicant has a
15 real stake or a genuine interest, and whether in all
16 the circumstances the proposed suit is a reasonable and
17 effective way to bring the issues before the Court.

18 The Supreme Court said in Findlay at
19 paragraph 35 that public interest standing should
20 generally be denied where another reasonable effective
21 means exists to bring the matter before the Court.

22 Downtown Eastside at paragraph 37 the
23 Supreme Court said that all the other relevant
24 considerations being equal, a party with standing as of
25 right would generally be preferred.

26 It's acknowledged that the CCLA and the
27 CCF both have a genuine interest in this matter but
28 they fail, in my submission, to satisfy the other two

1 factors. They don't raise a serious justiciable issue
2 because the issues that they to raise are moot. Their
3 participation as parties is not necessary because they
4 are raising the same legal issues as the two directly
5 affected Applicants, Mr. Cornell and Mr. Gircys, both
6 of whom are represented by able counsel. In my
7 submission --

8 JUSTICE MOSLEY: But neither of those
9 two individuals have a particular public interest
10 stance to put forward on these proceedings. They have,
11 as you acknowledge, direct interest.

12 MR. AARON: Correct, Justice Mosley,
13 but they raise the same or similar arguments with
14 respect to Charter violations, with respect to the
15 reasonableness of the invocation of the Emergencies
16 Act. In my submission, the appropriate way for the CCLA
17 and CCF Applicants to put before the Court the concerns
18 about public interest or considerations about public
19 interest would have been to seek intervener status as
20 the Government of Alberta has done. In my submission,
21 the jurisprudence doesn't --

22 JUSTICE MOSLEY: But on the test that
23 you have just enunciated, they may not be granted
24 intervener status. The Attorney General of Alberta
25 brings a different perspective to this matter. You've
26 just told me that they add little to what the two
27 individuals, Cornell and Gircys, have to say.

28 MR. AARON: Well, to the extent that

1 they say that they do, to the extent that some of their
2 arguments engage or raise issues that Cornell and
3 Gircys do not -- and I don't purport to agree that they
4 do, I don't -- in my submission, if they do, then
5 intervener status is the appropriate mechanism by which
6 these two Applicants could have put those issues before
7 the Court. In my submission, it's not an economical use
8 of judicial resources to grant discretionary public
9 standing to parties whose applications are moot and
10 which duplicate the submissions of parties with direct
11 standing.

12 In Downtown Eastside the Supreme Court
13 said at paragraph 29 that concrete adverseness sharpens
14 the debate of the issues, and the parties' personal
15 stake in the outcome helps ensure that the arguments
16 are presented thoroughly and diligently.

17 In my submission, the CCLA and CCF
18 Applicants, their request for public interest standing
19 not strike a proper balance between submissions in the
20 public interest and conserving scarce judicial
21 resources.

22 Last ly, Justice Mosley, you'll have
23 seen in our written supplemental submissions on
24 mootness and standing that we set out arguments and
25 supporting evidence regarding the clean hands doctrine.
26 In the interest of time and efficiency, I don't intend
27 to repeat them here, subject to any questions from the
28 Court, and I'll rely on --

1 JUSTICE MOSLEY: I'm grateful for that
2 and I thank you.

3 MR. AARON: Pardon me?

4 JUSTICE MOSLEY: I'm grateful for that
5 and I thank you.

6 MR. AARON: Thank you, Justice Mosley.

7 So to summarize on standing, the
8 Applicants, Mr. Cornell and Mr. Gircys, have direct
9 standing. In my submission, the remaining Applicants do
10 not. We ask the Court to dismiss the applications on
11 the basis of mootness and standing.

12 Subject to any questions, those are my
13 submissions.

14 JUSTICE MOSLEY: Thank you, Mr. Aaron.

15 MR. AARON: Thank you.

16 JUSTICE MOSLEY: All right, I have
17 signalled already that I'm likely to reserve on the
18 question of -- certainly on the question of mootness
19 and will render a decision in due course.

20 On standing I have mixed views. I'm --
21 I don't think I need to hear from you -- pardon me --
22 Mr. Cowling. Sorry, you have not been as present in
23 the -- over the course of the past year as some of the
24 other counsel, so forgive me for -- yes, I have seen
25 much more of him. I don't think I need to hear from you
26 with regard to standing. I do have reservations about
27 the standing of your client, Ms. Nagle, and CFN, as far
28 as I can see it had nothing to do with anything other

1 than serving as a channel for donations to get into Ms.
2 Nagle's hands. And I know you may dispute that but I'm
3 not going to kick you out of this case on that basis.
4 We'll hear your arguments upon the merits with regards
5 to these proceedings but I don't need to hear from you.

6 With regard to the Jost Applicants,
7 sorry, who is the lead counsel now for the Jost
8 Applicants? Mr. Ector?

9 Mr. Ector, as far as I can see, Mr.
10 Ristau has no standing in these proceedings. He's been
11 along for the ride. I have read his affidavit and I
12 have read the other information pertaining to him. He
13 just isn't -- he wasn't affected in any way. I know he
14 has these problems which he associates with his beliefs
15 but they seem to have had absolutely nothing to do with
16 the invocation of the Public Order Emergency and I
17 think it would be a waste of my time for you to argue
18 otherwise. But if you are insistent on being heard, I'm
19 prepared to hear you. You do have two clients who
20 clearly have direct standing.

21 As for Mr. Jost, I agree with the
22 Attorney General that Mr. Jost's interests in these
23 proceedings are also remote. I have difficulty
24 understanding how he is a person who is affected by
25 the -- and you haven't -- you're not seeking public
26 interest standing for any of these before.

27 So what I would say to you is, I'd
28 rather not hear from you on either Mr. Jost or Mr.

1 Ristau, but that won't stop you from being heard on the
2 merits of the applications in general because you have
3 two clients who are -- pardon the expression -- still
4 in the game.

5 Do you wish to be heard on the question
6 of standing? You will have a mountain to climb, Mr.
7 Ector.

8 And you'll have to come to the podium
9 because I --

10 SUBMISSIONS BY MR. ECTOR:

11 I do wish to make a couple of point,
12 sir. I will be succinct. I do recognize your view on
13 this and I will not get into Cornell and Gircys.

14 With respect to Reverend Ristau, his
15 freedom of religion was impacted by this in a unique
16 way in the sense that he was a padre or a chaplain in
17 the Canadian military.

18 JUSTICE MOSLEY: What's that got to do
19 with anything?

20 MR. ECTOR: His freedom of worship was
21 impacted, sir.

22 JUSTICE MOSLEY: I read that evidence
23 about the war memorial --

24 MR. ECTOR: Yes, sir.

25 JUSTICE MOSLEY: I'm afraid I just
26 don't buy that.

27 MR. ECTOR: In the interest of brevity,
28 sir, I would like use the time for the merits. When

1 the opportunity comes I will be succinct with this as
2 well.

3 With Jost, his freedom of movement was
4 impacted, his section 2 rights were impacted as well
5 his section 7 Charter rights as well were impacted. But
6 for the regulations and the economic orders taking
7 place, he could not protest where he wanted.

8 In my friend's submission he made the
9 point that Mr. Jost could protest wherever he wanted to
10 except downtown Ottawa, but downtown Ottawa is where he
11 wanted to protest. So his rights were affected in that
12 regard. He was at the protest from the outset, he was
13 pretty much there the entire time. His rights to
14 freedom of assembly, freedom of movement, freedom to
15 express his constitutional right to protest were
16 impacted.

17 And I do believe we put an alternative
18 argument for public interest standing in the event the
19 Court does not find direct standing as well. So on
20 that, I think his rights certainly were impacted.

21 By my friend's own concession he can
22 protest wherever he wants except downtown Ottawa, but
23 that's precisely where Mr. Jost wanted to protest. His
24 rights are engaged and are impacted.

25 JUSTICE MOSLEY: Are all right,
26 anything else on that?

27 MR. ECTOR: No, sir.

28 JUSTICE MOSLEY: Thank you.

1 I am satisfied that both the CCLA and
2 the CCF have public interest standing in this matter. I
3 don't need to hear from either organization.

4 Mr. Aaron, do you have anything in
5 reply to what you've just heard from Mr. Ector?

6 MR. AARON: Nothing, thank you.

7 JUSTICE MOSLEY: All right, well, I
8 will reserve on these matters, but you understand where
9 I'm likely to come down with regard to your clients.

10 It's now 11:11. Let's break for the
11 morning recess and return in let's say at 11:30 to
12 begin, at least. We'll get in half an hour on the
13 argument with regard to the arguments on the merits,
14 beginning in the order in which these applications were
15 filed, so beginning with you, Mr. Cowling, all right?

16 Very good, we'll rise.

17 THE REGISTRAR: This Court is in
18 recess.

19 --- Recess taken at 11:11 a.m.

20 --- On resuming at 11:30 a.m.

21 THE REGISTRAR: The Court is now
22 resumed.

23 JUSTICE MOSLEY: Okay, Mr. Cowling,
24 I'll hear you.

25 SUBMISSIONS BY MR. COWLING:

26 Thank you, Your Honour.

27 I may have some reference to our
28 compendium. I believe my colleague, Mr.

1 Boissonneau-Lehner, forwarded it earlier this morning.
2 I don't know, if I can confirm Your Honour has received
3 that?

4 JUSTICE MOSLEY: I think we did but
5 I'll have to pull that up because it's -- let's just
6 see, -why don't you get started and I'll look for that?

7 MR. COWLING: That's fine, Your Honour,
8 i don't expect to be referring to it for at least a
9 little while in my submissions.

10 Our clients, Canadian Frontline Nurses
11 or CFN as I may refer to them at various stages in my
12 submissions, are a not for profit corporation. Ms.
13 Kristen Nagle is a now former nurse who, like so many
14 Canadians, was forced to make a choice between her job
15 and her ethics and ultimately lost the profession she
16 loved as a result.

17 CFN and Kristen Nagle are proud
18 advocates of medical freedom and their goals involve --

19 JUSTICE MOSLEY: I don't need the --
20 Mr. Cowling, I have read that, I don't need a speech.
21 Just move on, please, to the matters at hand.

22 MR. COWLING: I think it's -- Your
23 Honour, I will.

24 CFN -- now, you asked about CFN's
25 participation. They were a lead participating
26 organization in the Freedom Convoy 2022 in Ottawa. I
27 think it's also important that when we come to the
28 context of --

1 JUSTICE MOSLEY: What was that again?

2 They were --

3 MR. COWLING: They were a lead
4 participating organization.

5 JUSTICE MOSLEY: Give me -- perhaps in
6 Ms. Nagle's mind. In your evidence there is virtually
7 nothing to support that other than her own declarations
8 of how she was received as she wandered about
9 dispensing funds. I know that she decamped from
10 wherever her home is in Ontario into a room or a suite
11 at the Sheraton. She had her children and her husband
12 in tow, and she offered it to random protesters to come
13 and have showers or eat meals.

14 All she has offered in evidence of her
15 supposed key role is a statement by her Member of
16 Parliament to a third party, but there's no evidence of
17 that statement other than on cross-examination. She
18 said it was in an email from that MP to her friend. And
19 the fact -- well, there's three things.

20 One is that the logo for CFN appears on
21 the website for the protest put up there by the
22 organizers.

23 Third, she says that there's a video of
24 her handing money out to a ground organizer, I think,
25 the term was used. That video was used by some folks --
26 or made some folks who were entirely unsympathetic to
27 your client's views, and they identified her as being
28 there and doing that.

1 Is that not about the size of it?

2 MR. COWLING: I think you've fairly
3 summarized what's in our affidavit, Your Honour.

4 JUSTICE MOSLEY: Thank you.

5 MR. COWLING: And I think what's also
6 important, Your Honour, is that CFN and Ms. Nagle had
7 no affiliation or involvement with any of the protests
8 that occurred near the Canadian border crossings.

9 We're here on a judicial review of
10 Cabinet's decision to declare a Public Order Emergency
11 on February 14, 2022, under the Emergencies Act.

12 Its predecessor, as you know, Your
13 Honour, the War Measures Act, had been used three
14 times in our nation's history. Once during World War I,
15 in part to intern in concentration camps Ukrainian
16 citizens.

17 During World War II it was used to
18 intern in concentration camps Japanese Canadians.

19 And in 1970 during the FLQ crisis it
20 was used to suspend habeas corpus.

21 In short, the Act has been a source of
22 unconscionable breaches of basic civil rights.

23 In 1988, as a result of pressure,
24 including from Japanese Canadians who had been
25 interned, a new piece of legislation, legislation that
26 you are being asked to interpret, was introduced. It
27 was to have a multilayered series of preconditions that
28 needed to be met in order to be invoked. And it was

1 made explicitly subject to both the Charter of Rights
2 and Freedoms and the Canadian Bill of Rights. And I
3 dare say, Your Honour, it's our submission that no one
4 in 1988 could imagine the way in which our current
5 government cynically invoked it in February 2022, the
6 first time it had been used in over 35 years since its
7 passing in 1986 -- 1988, sorry. And that's despite the
8 fact that we've had numerous situations, in my
9 submission to you, that were far more characteristic of
10 emergencies, including the situation at Oka, where
11 police officers were killed, lasted 78 days, the
12 Mercier Bridge was closed; 9/11; and the 2010 G7 Summit
13 in Toronto where a thousand people were arrested amidst
14 significant violence and damage to property for far
15 greater harm than occurred in Ottawa.

16 What many of the documents, in my
17 submission, and evidence reveal is that the Cabinet has
18 ignored the views of CSIS, senior police leaders, and
19 decided on its own interpretation of the definition of
20 what is a threat to security in Canada. In our
21 submission it's truly an Orwellian interpretation that
22 defies common sense and is obviously aimed, we submit
23 -- and that's why the background is somewhat important
24 -- that the government's political opposition rather
25 than what any sensible individual would consider an
26 actual threat to the security of Canada.

27 I agree with my friend's submissions,
28 the Attorney General, that you need to put the events

1 of January and February 2022 in full context to assess
2 the reasonableness of Cabinet's decision. Our most
3 basic democratic rights, including our ability to
4 freely express ourselves and to assemble to protest
5 government actions are at stake. In a vibrant,
6 functional democracy we should tolerate and even
7 welcome such protests, and until recently many people
8 around the world viewed Canada as such a place. The
9 Freedom Convoy 2022 and the protest in Ottawa in late
10 January and early February arose in the context of
11 Canada having some of the most draconian COVID
12 restrictions in the world. As a result --

13 JUSTICE MOSLEY: Mr. Cowling, there's
14 another case before the Court which is dealing with the
15 merits of those measures. We're not -- I'm not here to
16 decide that. I'm not dealing with --

17 MR. COWLING: You're not, and that's
18 clear, Your Honour. But what's clear is that the
19 people who supported the revocation of those measures,
20 that was the context in which this protest occurred --

21 JUSTICE MOSLEY: That's a fair point.

22 MR. COWLING: And they were
23 effectively, in my submission, they were political
24 opponents of this government. And your assessment of
25 the reasonableness of Cabinet's decision has to be
26 viewed realistically through that lens, both when you
27 look at the reasons that are offered, and the context
28 in which this arose. The people that were protesting in

1 Ottawa, although they were not part of a political
2 party, they were a grass roots movement, they opposed
3 the federal government's policies. And we had some of
4 the most -- and I'm not asking you to adjudge this, but
5 we effectively had some of the most draconian policies.
6 You couldn't travel in the second largest country in
7 the world. You couldn't get on a plane or a train to
8 travel in this country unless you were vaccinated.
9 People were effectively precluded from seeing dying
10 relatives in other parts of Canada. They were precluded
11 from leaving the country as a result of these
12 policies --

13 JUSTICE MOSLEY: Mr. Cowling, again,
14 I'm not --

15 MR. COWLING: You're not asked to
16 adjudge that but it's the context in which the protest
17 came together and the way in which we should assess --

18 JUSTICE MOSLEY: You made the point and
19 the disagreement with those policies, please move on.

20 MR. COWLING: Yes, and we knew by that
21 time, because the mandates were also critically
22 important to why these people galvanized, and we knew
23 that the misinformation that had been spread that these
24 vaccines were going to be 94 percent effective -- by
25 then, by January 2022 we knew that was not the case and
26 that the effectiveness of infection transmission was
27 minimal. The idea that vaccinations kept others safe,
28 which was this government's statement, was being

1 significantly eroded by the real world experience and
2 data. The pharmaceutical and media induced hysteria
3 around COVID was fading, and yet this government
4 persisted at that time in mandates based on these false
5 premises that vaccines stopped the spread of COVID and
6 natural immunity was ineffective.

7 The federal government and many
8 provincial governments had introduced mandatory
9 vaccination requirements and many private sector
10 employers adopted similar policies. And by January 2022
11 tens of thousands of Canadians had lost their jobs as a
12 result. And that was for simply wanting to preserve
13 their bodily autonomy and right to make their own
14 medical decisions. Our national --

15 JUSTICE MOSLEY: I don't really want to
16 know the answer to this, but is there any evidence in
17 your record to support that number?

18 MR. COWLING: I think certainly this
19 Court could take judicial notice --

20 JUSTICE MOSLEY: No, no, I can't.

21 MR. COWLING: I'm in your hands, Your
22 Honour. No, there is not. It is clear that those
23 policies were widespread. Certainly amongst the federal
24 government there was a requirement --

25 JUSTICE MOSLEY: I understand the point
26 about there was opposition, okay, I have got that.

27 MR. COWLING: And our national approach
28 to mandatory COVID-19 vaccine policy, in our

1 submission, needlessly fomented social polarization,
2 eroded democratic principles, hardened scientific
3 integrity and damaged public trust. We didn't follow
4 what happened in other countries, like Nordic
5 countries, for example, and the UK, who refused to
6 implement such mandates. If we didn't --

7 JUSTICE MOSLEY: Mr. Cowling, again,
8 I'm not here to rule on --

9 MR. COWLING: We're not asking you to.

10 JUSTICE MOSLEY: It seems to me that
11 you're trying to do so.

12 MR. COWLING: I'm putting this protest
13 in context, Your Honour, where it was a massive
14 groundswell of opposition as a result of these policies
15 that the federal government had put into place. And in
16 our submission to you, that was the true -- that was
17 the true direction that this government wanted to go
18 after. They were political opponents. And that's an
19 improper process and it goes to the reasonableness of
20 their approach.

21 And you can see that, Your Honour, and
22 I'll take you through why I say that, because of the
23 paucity of evidence of actually having a serious threat
24 to Canada, which is a requirement under the
25 legislation.

26 JUSTICE MOSLEY: I will hear you on
27 that.

28 MR. COWLING: You have to understand

1 and accept there is a context to which this political
2 opposition was there, and that included the statements,
3 which are in our materials, by the Prime Minister that
4 said at least in early January 2021 that he was opposed
5 to the idea of mandating vaccines. Then in May of 2021
6 he indicated that Canada was not a country that would
7 make vaccines mandatory. And yet by the summer when
8 there was a wedge issue that he'd found around
9 vaccines, in August he implemented those very travel
10 mandates I spoke of. And by September he went in an
11 interview that is at page 132 and 133 of our compendium
12 -- I don't think you need to turn it up, Your Honour, I
13 think it's notorious -- he called those that opposed
14 COVID vaccines "misogynistic, racist and science
15 deniers". And this was from a Prime Minister who wore
16 black face more times than he can recall --

17 JUSTICE MOSLEY: Mr. Cowling, now, I'm
18 not going to permit you to make political statements.
19 If that's all you've got to offer, then you might as
20 well sit down. Get on to the law relating to this
21 application.

22 MR. COWLING: I'm getting there, Your
23 Honour.

24 Again, this is -- so on January 15th
25 there was yet another new mandate that was coming into
26 place. This is the very galvanization of this protest,
27 which these measures were designed to thwart. And it's
28 January 15th that a new mandate was put in place

1 effectively preventing unvaccinated truckers from
2 returning to Canada.

3 So instead, after almost two years of
4 devastation, we have this government putting another
5 new mandate. And it's that -- just when that, in our
6 submission to you, this unscientific vaccine mandate
7 lunacy had reached a nadir, when for so many people a
8 miracle, in fact, happened, and this is the Freedom
9 Convoy. And those that had held what was determined to
10 be unacceptable views, who had been told not to attend
11 Christmas 2021 functions by members of their vaccinated
12 families, who had lost their jobs, who couldn't attend
13 or participate in sporting events or go to restaurants,
14 who couldn't travel in their own country finally had a
15 voice. They were not alone. Peaceful, orderly,
16 compliant Canadians were finally prepared to stand up
17 for individual freedoms against corporate government
18 tyranny.

19 And in fact this was not a fringe
20 minority, Your Honour. There were at the time far more
21 unvaccinated people in Canada that had voted for the
22 federal liberals, and they supported these unvaccinated
23 rights, including many who were vaccinated. And this
24 gave rise to a worldwide movement, which is referenced
25 even in the government's materials, about the concern
26 for this expansion. The ability for Canadians to make
27 their own medical conditions -- choose their own
28 medical decisions was galvanizing support. We have got

1 evidence that in fact there had been significant
2 changes in the support. And that's at page 136 of our
3 compendium where the Angus Reid poll showed that in
4 just that two-week time that there was now a majority
5 of Canadians that would like to see COVID restrictions
6 and mandates lifted.

7 And so this is the context, Your
8 Honour. Agreed you have to have a contextual
9 analysis --

10 JUSTICE MOSLEY: You have belaboured
11 the point beyond any sensible argument, Mr. Cowling.
12 Move on, please.

13 MR. COWLING: Thank you, Your Honour.

14 And when the protesters arrived in
15 Ottawa, this government refused to engage in dialogue
16 and they refused to reconsider their mandates. They
17 refused and instead adopted a position that if you --

18 JUSTICE MOSLEY: I'm now seriously
19 regretting my decision to allow you to be heard, Mr.
20 Cowling. If that's all you're going to present, then
21 it's absolutely of no assistance to the Court.

22 MR. COWLING: So, Your Honour, again,
23 this is the context in which this decision was made.
24 You had a -- in Canada -- it was a worldwide
25 recognition. In fact, you had in Europe and Latin
26 America people having flags of their own national
27 country and Canada doing the parades to also protest
28 against COVID restrictions. And, in fact, this is part

1 of what the government's message even was, and I'll
2 come to that.

3 JUSTICE MOSLEY: Mr. Cowling, I'm here
4 to consider whether it was reasonable --

5 MR. COWLING: Yes.

6 JUSTICE MOSLEY: -- to invoke the
7 Emergencies Act and to enact those measures, reasonable
8 and lawful. You have pushed the contextual argument far
9 beyond any level. You have tried my patience, Mr.
10 Cowling. Get on to the law.

11 MR. COWLING: Thank you.

12 The Emergencies Act, Your Honour,
13 constrains Cabinet's power to declare a Public Order
14 Emergency. Reasonableness is in Vavilov, Your Honour,
15 which is in our compendium, Document 1, pages 5 and 6.

16 JUSTICE MOSLEY: I have pulled up your
17 compendium.

18 MR. COWLING: Thank you.

19 It's clear that it does not give
20 Cabinet free rein interpreting statute. There's no such
21 thing as absolute and untrammelled discretion. Cabinet
22 is not free to disregard the constraints imposed by the
23 Act. Cabinet's decision to proclaim a Public Order
24 Emergency is constrained by the rationale, purview and
25 purposes of the Act.

26 JUSTICE MOSLEY: Which paragraph are
27 you in?

28 MR. COWLING: Paragraphs 65, 68 and

1 100.

2 I submit to you that Cabinet was
3 required to comply with the definitions, principles and
4 formulas of the Act before exercising its discretion to
5 proclaim a Public Order Emergency.

6 A Public Order Emergency, Your Honour,
7 is defined in section 16 of the Act. We've outlined
8 that in our compendium. I don't know at what tab, Your
9 Honour, I have it at Document 2 of the Emergencies Act
10 at page 12.

11 JUSTICE MOSLEY: I have got it.

12 MR. COWLING: The Public Order
13 Emergency, Your Honour, requires two criteria to be
14 met. You need to have a threat to the security of
15 Canada, and those threats -- that threat needs to be so
16 serious as to be a national emergency.

17 I think you alluded to earlier with my
18 friend from the Attorney General's submissions that
19 that threat to the security of Canada has the meaning
20 assigned by section 2 of the Canadian Securities
21 Intelligence Services Act, and that's outlined at
22 Document 3 or Tab 3 of our compendium.

23 There are a number of potential threats
24 to Canadian security. They are outlined in four
25 aspects: Espionage or sabotage as against Canada or is
26 detrimental to the interests of Canada, or activities
27 directed towards or in support of such espionage or
28 sabotage. I don't understand my friends from the

1 Attorney General to be suggesting that.

2 I do understand -- I'll focus -- is
3 that my friends suggest that the activities which
4 occurred in the Freedom Convoy and the protests in
5 Ottawa were captured by (c), which is activities within
6 or relating to Canada directed toward or in support of
7 a threat or use of acts of serious violence against
8 persons or property for the purpose of achieving a
9 political, religious or ideological objective in Canada
10 for a foreign state.

11 And so obviously, Your Honour, given my
12 earlier submissions, I concede that that was a purpose
13 for the protest. I concede that it was a purpose for
14 the protest to achieve a political objective.

15 What I don't concede, Your Honour, and
16 I don't think it can be made out in a reasonable way on
17 the facts that you have in front of you that there
18 were, in order to achieve those objectives, a support
19 of a threat or use of acts of serious violence against
20 persons in order to do so. So in my submission it was
21 absolutely clear there was a political basis for this
22 massive protest that had the support of many Canadians,
23 but that it was not a threat or use of acts of serious
24 violence.

25 And you can see the Prime Minister
26 deposed during his testimony that Public Order
27 Emergency Commission Inquiry, and this is in our
28 compendium at Document 4, the excerpts of Prime

1 Minister Trudeau's testimony in-chief. That's at page
2 20, Your Honour, of our compendium.

3 So what we had determined was, does the
4 situation go across the country constitute a threat to
5 the security of Canada? And then we looked particularly
6 at (c). I think my friends don't take issue that we're
7 dealing with that aspect of the CSIS Act in terms of
8 the asserted threat to the security of Canada.

9 A "national emergency" is defined in
10 section 2 of the Act. That goes back to Document 2,
11 page 10 of our compendium. And a national emergency is
12 defined as "an urgent and critical situation of a
13 temporary nature that seriously endangers the lives,
14 health or safety of Canadians and has such proportions
15 or nature as to exceed the capacity or authority of a
16 province to deal with it".

17 It imposes more than one criteria, that
18 it has to seriously endanger the lives, health or
19 safety of Canadians, has to exceed the capacity or
20 authority of a province to deal with, and then further,
21 that it cannot be effectively dealt with under any
22 other law of Canada.

23 And in my submission to you -- and I'll
24 come to it in more detail later -- it's not that it is
25 the most effective; it's that it cannot be dealt with
26 under existing legislation in Canada in order to
27 actually deal with this potential serious endangerment
28 of Canadians' lives, health or safety. So simply

1 because it's easier to take potentially a sledgehammer
2 to a problem than a hammer to a nail doesn't mean --
3 and it may be more efficient even -- it's not about
4 being more efficient, Your Honour, it's about whether
5 the other measures can be effective.

6 When one looks at what was the evidence
7 of threats or acts of serious violence that seriously
8 endangered the lives, health and safety of Canadians,
9 in our submission to you it's simply not -- there isn't
10 any.

11 You can go to the Section 58
12 Explanation which is at Tab 5 of our compendium, page
13 21, they talk about the blockades. Again, it's our
14 submission to you that CFN and Ms. Nagle were not
15 affiliated in any way with the blockades. They were
16 affiliated with the protest that was taking place in
17 Ottawa.

18 Notwithstanding this, on February 14th
19 when the invocation of the Act took place, there were
20 no blockades at the border taking place. The Ambassador
21 Bridge had been fully resolved and there were no
22 evidence of threats of serious violence.

23 Sarnia had been resolved. There had
24 been no evidence of threats of serious violence.

25 And I might also suggest to you, Your
26 Honour --

27 JUSTICE MOSLEY: Can you pinpoint a
28 specific portion of that Section 58 Explanation that

1 you're referring to?

2 MR. COWLING: It's hard to prove a
3 negative, but if you look through the -- I'll
4 specifically refer to when you talk about Sarnia or --
5 the Ambassador Bridge is a page 27 to the extent that
6 it's discussed. And at 28 is Sarnia.

7 Let's say it's Ms. Nagle makes clear in
8 her affidavit and her evidence when she was
9 cross-examined that they abhor violence and that she
10 wouldn't support it and that she didn't participate in
11 it.

12 And the Courts and this Court, in my
13 submission to you, should have serious concern about
14 painting a large group of protesters -- in this case
15 tens of thousands of people, if you accept what the
16 Attorney General said -- all with the same brush,
17 again, in a vibrant democracy just because there's
18 simply one person who may be a card carrying member of
19 a political party who's committed some crime or
20 threatened to commit some crime, that not all people
21 should be painted with that same brush. In the same way
22 a protest group in a vibrant democracy -- even, if --
23 and we say there wasn't -- but even if there was such
24 evidence, the net shouldn't be cast that broadly, Your
25 Honour. And when look specifically at Ottawa --

26 JUSTICE MOSLEY: Are you referring to
27 the images of people waving swastikas around and that
28 sort of thing?

1 MR. COWLING: No -- well, in part yes.
2 I'm more specifically referring to the other
3 protesters. I understand my friends in their
4 submissions will make a great deal of the cache of
5 weapons that was discovered in Coutts, Alberta, and
6 somehow I --

7 JUSTICE MOSLEY: I expect they will.

8 MR. COWLING: -- expect they will seek
9 to link that to the protests that took place in Ottawa.
10 And in my submission, again, the Court should have
11 great caution about looking at that piece of evidence
12 and then applying it broadly because otherwise, Your
13 Honour, it would be simplistic as it was here to paint
14 all of these --

15 JUSTICE MOSLEY: Who was the fellow who
16 was alleged to have been the founder of an
17 organization, Diagonal (ph), I think it's called?

18 MR. COWLING: I don't know that
19 organization, Your Honour.

20 JUSTICE MOSLEY: Are you not aware of
21 the evidence that was put into the record in this
22 proceeding about him having been at the Ottawa protest
23 and him having been the subject of an arrest for
24 possession of unlawful weapons at his home somewhere in
25 Ontario?

26 MR. COWLING: I'm not aware of him
27 creating any serious threat to the safety and security
28 of Canadians.

1 JUSTICE MOSLEY: You are not
2 questioning that evidence --

3 MR. COWLING: I can't dispute that
4 evidence, Your Honour, but again, I think, again, in
5 interpreting what constitutes an emergency simply
6 because -- again, we're dealing with what should be a
7 vibrant democracy which should withstand protest. It
8 would be simple -- and let's pose it as a hypothetical,
9 Your Honour -- it would be simple if the government
10 didn't like the politics of protesters --

11 JUSTICE MOSLEY: You made your point.

12 The evidence of the Attorney General
13 was put and includes the expressions of concern by the
14 Minister of Public Safety, that evidence was also
15 presented in the -- that Minister's testimony before
16 the Public Order Emergency Commission to the effect
17 that that Minister, the Incident Review Group, they
18 were apprised of that information prior to the decision
19 being made.

20 MR. COWLING: And, Your Honour, I have
21 read that. It's a far cry, Your Honour, in our
22 submission, that that constituted a threat to the
23 security of Canada.

24 JUSTICE MOSLEY: Well, that's, I
25 guess --

26 MR. COWLING: That's just -- it just
27 defies, in my submission, credulity to suggest that a
28 single individual who was not a public spokesman

1 certainly for this protest movement, which was built on
2 very simple messages, which were to get rid of the
3 COVID restrictions and the mandates, that somehow that
4 individual could taint the whole process and cause that
5 process to be viewed as a threat to the security of
6 Canada, a single individual.

7 JUSTICE MOSLEY: All right.

8 MR. COWLING: And that's what -- if
9 that's the case, Your Honour, of the government, I'd
10 say it defies credulity, that that would constitute a
11 threat to the security of Canada, which is the
12 prerequisite for the invocation of the Emergencies Act.

13 I think it's of some significance, Your
14 Honour, is -- and I appreciate they are not the
15 determinator of the question. It's Cabinet that gets to
16 make the decision about whether they proceed --

17 JUSTICE MOSLEY: Who is the "they"?

18 MR. COWLING: I'm now talking about
19 CSIS.

20 JUSTICE MOSLEY: Yes?

21 MR. COWLING: And so I think it's,
22 again, highly informative in terms of your analysis of
23 the reasonableness of Cabinet's decision what their
24 analysis was and what they sought, given that this is
25 effectively their statute.

26 Don't get me wrong, Your Honour, it's
27 not my submission that Cabinet is bound to follow that
28 analysis, but it is highly informative, with respect,

1 to how you'd analyze the reasonableness of Cabinet's
2 decision.

3 And if you could turn about Tab 21, I
4 guess, you can see the heading "Advice to Cabinet by
5 CSIS Director, Mr. Vigneault. Both he and/or Ms.
6 Tessier attended both meetings of Cabinet on
7 February 13th and the meetings of the IRG, which I
8 understand to be the response group. And he recalls
9 having discussed at the February 12th IRG and later
10 provided a paper document at the February 13th IRG, and
11 that it was shared with Cabinet on February 13th. Mr.
12 Vigneault confirmed a statement from the conditions
13 interview with CSIS to the effect that at no point did
14 the service assess the protests in Ottawa or
15 elsewhere -- over at page 132 of our compendium --
16 constituted a threat to the security of Canada under
17 section 2 of the CSIS Act, and that CSIS cannot
18 investigate activity constituting lawful protests
19 unless conducted in conjunction with a threat-related
20 activity. And Mr. Vigneault confirmed that, to the
21 extent he was able to give input on this topic,
22 Cabinet, that he had expressed those views. So that
23 concludes the situation of Coutts, Your Honour, and
24 that's confirmed in Ms. Tessier's, I guess, recitation
25 of her statement. But you can see where Ms. Tessier
26 states that what occurred there did not lead the
27 service at the time to conclude that there had been a
28 -- or what constitutes a threat to the security of

1 Canada as defined in the CSIS Act.

2 JUSTICE MOSLEY: Where is that?

3 MR. COWLING: There's a heading, Your
4 Honour, at page 131, "Intelligence about Coutts
5 arrests".

6 JUSTICE MOSLEY: Yes, I have that,
7 thanks.

8 MR. COWLING: So both the Deputy
9 Director of CSIS, Michelle Tessier, and the Director of
10 CSIS, I'd say more adamantly, if you can take this as
11 confirming their statements, did not consider what was
12 occurring in Ottawa, as it was ongoing, nor what had
13 occurred elsewhere as constituting a threat to the
14 security of Canada.

15 It's my submission to you that much of
16 what occurred was effectively a fantasy
17 misrepresentation of the protesters. They were not
18 anti-vaxxers, Trump supporters, white supremacists,
19 Nazi sympathizers, notwithstanding I think you've seen
20 the flag -- there was a picture of a flag of -- a
21 swastika, if I recall, a flag -- these were not the
22 people. They weren't the people that came together as a
23 result of the government's, we say, overreaching
24 restrictions. They were not far right groups with
25 foreign money going to violently overthrow the Trudeau
26 government and re-enact the January 6th storming of the
27 US Capitol. They were ordinary Canadians who were fed
28 up. And you can disagree with them, Your Honour, you

1 can disagree with their perspectives, that's fine, we
2 should be allowed to have disagreement. They were fed
3 up with the federal government and the other
4 governments vaccine mandates and COVID restrictions.
5 They were not violent insurrectionists, they were not a
6 threat to the security of Canada. There were absolutely
7 no serious acts that I'm aware of, overt violence by
8 protesters. Yes, there was significant annoyance, I
9 suspect, to many of the citizens of Ottawa, but this
10 wasn't a threat to democracy, but a test of democracy.
11 And in my submission, this government failed.

12 There was no Montreal vaccine riot. I
13 don't know if you know your history, Your Honour, where
14 the Montreal Public Health Authority instituted
15 mandatory smallpox vaccines in the midst of an outbreak
16 and Montreal effectively rioted and destroyed
17 buildings, pharmacies and homes. The Public Health
18 Officer, the Chief of Police was stabbed and stoned.
19 There were gunfights between rioters. This was not
20 that. This was not that. This way by and large a
21 peaceful demonstration, certainly that which occurred
22 in Ottawa.

23 Again, I accept that there were crimes
24 and mischief and nuisance that were committed. What I
25 don't accept is that those crimes and what occurred was
26 a serious threat to the security of Canada. The lesson
27 that was learned at the Montreal vaccine riot that
28 wasn't learned by this government was that the power of

1 personal health decisions, that lesson was forgotten.

2 We've got now, Your Honour, this
3 idea -- and I have to address is somewhat
4 reluctantly -- it's the Memorandum of Understanding. I
5 don't know if you are familiar with, Your Honour?

6 JUSTICE MOSLEY: I think so.

7 MR. COWLING: That somehow that
8 certainly -- it's set out at Tab 6 of our compendium --
9 it certainly, I would say, has seeming -- does
10 seemingly call for a very different form of government
11 than the one Canadians are accustomed to. But it wasn't
12 supported by the frontline nurses or certainly the
13 leaders of the Freedom Convoy who very carefully
14 crafted their message to be restricted to being opposed
15 to removing mandates and COVID restrictions. But truly
16 because it calls for a different form of governance,
17 that doesn't mean that it's threatening an
18 insurrection. One can easily envision a situation in
19 this country and posit a scenario where there's a
20 strong movement for, say, abolition of the monarchy.
21 You can have protests all over the country and
22 hypothetically let's say the governing party had just
23 squeezed in a minority government as a pro-monarchist
24 platform, and let's say those protests were changing
25 public opinion. Just because they had proposed what
26 would be a fundamental change to potentially our
27 democratic institutions doesn't mean that we shouldn't
28 countenance that debate in our society, it doesn't mean

1 that that constitutes a serious threat to Canada, even
2 if there was a significant minority of people that
3 supported that change as long as there weren't issues
4 that people were trying to achieve those objectives
5 through either serious violence or serious threats of
6 violence.

7 Your Honour, I'm in your hand in terms
8 of a break. You suggested half an hour -- I'll continue
9 my submissions until Your Honour directs --

10 JUSTICE MOSLEY: Well, if you're
11 suggesting we break for lunch at this point in time,
12 I'm prepared to do that. I had said we'd break at noon.
13 That was the-- what the parties had agreed to.

14 But this memorandum, I am at a bit of a
15 loss as to what on earth it has to do with this case.

16 MR. COWLING: I agree.

17 JUSTICE MOSLEY: So why is it in your
18 record?

19 MR. COWLING: No, I understand the
20 Attorney General to be relying on it as part of their
21 case to suggest that there was some sort of idea of
22 insurrection and changing the form of government --

23 JUSTICE MOSLEY: I must have missed
24 that.

25 MR. COWLING: So I agree, it's
26 irrelevant. As I say, I'm not sure what it is, Your
27 Honour. It's obviously a different form of governance,
28 one that I don't know -- I don't even understand it, to

1 be candid.

2 JUSTICE MOSLEY: The only thing it
3 demonstrates, Mr. Cowling, is that we have utterly
4 failed in educating our public about our Constitution
5 and our system of government.

6 MR. COWLING: I couldn't agree with you
7 more, Your Honour.

8 JUSTICE MOSLEY: Anyway, we'll break
9 now for lunch and we'll resume at 1:15 and continue
10 with your argument at that point in time.

11 MR. COWLING: Thank you.

12 JUSTICE MOSLEY: Thank you.

13 THE REGISTRAR: The Court is on recess.

14 --- Recess taken at 12:14 p.m.

15 --- On resuming at 1:16 p.m.

16 THE REGISTRAR: The Court is resumed.

17 JUSTICE MOSLEY: Mr. Cowling?

18 MR. COWLING: Thank you, Your Honour.

19 MR. JOST: During the break I did just
20 -- you had a question about Diagolon. It was Mr.
21 McKenzie, I guess, who was arrested. His arrest was
22 prior to the Freedom Convoy. He was arrested for
23 weapons offences, Your Honour, but he was released and
24 he then attended the Freedom Convoy. Obviously if he
25 was such a serious threat to Canada, one wonders why he
26 was released, and he remained so well after the Freedom
27 Convoy was over. Our understanding is that he is
28 certainly not incarcerated today, he's out on bail.

1 And in terms of these threats, it's our
2 submission that CSIS would be in the best position to
3 know and understand the threats to Canada. It's
4 unequivocal that their clear view was that on the day
5 of the invocation of the Emergencies Act, February 14,
6 2022, there were no such threats. And so, as I say, I
7 took some time to find out what the Diagon issues
8 were, one of the reasons -- one of the things that
9 obviously my friends from the Attorney General point
10 to.

11 You also asked about, and I think we
12 both agree, Your Honour, is this ridiculous document
13 that was in my friend's factum and was part of the
14 government's compendium. It was the subject matter of
15 quite extensive cross-examination by the Attorney
16 General, but I agree with Your Honour that it's -- it's
17 relevance is little. It doesn't -- although it calls
18 for a significant change in our democratic
19 institutions, what it doesn't do is call for serious
20 violence against persons or property. And in my
21 submission, people are entitled to have views and
22 express those views and proffer up changes, however
23 ridiculous they may be, about how our country and
24 government should conduct itself. And that shouldn't be
25 although it was part of the rationale for the
26 invocation, and you can see that in subsection 58(1) of
27 the Emergencies Act, at Tab 5, at page 25, I think,
28 Your Honour, if I could ask you to call it up.

1 By the (inaudible) fantasy,
2 misrepresentation of protest continues. They are under
3 the small paragraphs and by some it's asserted that the
4 protests have become a rallying point for
5 anti-government, anti-authority, anti-vaccination
6 conspiracy theory and white supremacy groups throughout
7 Canada. Protestors have very ideological grievances
8 which demand (inaudible) and all public health
9 restrictions to the overthrow of (inaudible).

10 And they use this document, which was
11 in my friend's compendium, as supportive and they
12 suggest that this appears to be an evolution of a
13 previous proposal from the widely circulated Memorandum
14 of Understanding. And so it's, again, only addressed by
15 us, Your Honour, because it seems to be a significant
16 part of the Attorney General's case and the
17 government's case as to why the invocation was
18 reasonable. But certainly my submission to you is it's
19 preposterous.

20 The explanation goes on and they talk
21 about the tactics adopted by protestors. They talk
22 about the slow roll activity, traffic jams, bringing
23 children to protests, in part impeding importing and
24 exporting goods. None of these, Your Honour, constitute
25 serious violence. To the extent that trucks parked on
26 Wellington Street obstructed daily life in Ontario,
27 this is also not violence.

28 We have some suggestion in the

1 explanation at the top of page 26 and a concern
2 expressed that ideologically motivated violent
3 extremism -- and I heard for the first time in the
4 course of this proceeding, Your Honour, "Indies" I
5 guess is the acronym -- may feel empowered by the level
6 of disorder resulting from the protests. Yet no Indies
7 have been identified. Who are these Indies? Who are
8 these people that may feel empowered? What specific
9 serious threats of violence did they make? What
10 evidence was there of violence at the protests in
11 Ottawa? We have none of those.

12 My friends' submissions from the
13 Attorney General seem to reside in a fictional world
14 where Jerry cans constituting a fire hazard such that
15 those could amount to serious violence. Horn honking,
16 singing of Oh Canada, waving flags, equating Trudeau
17 and his government to Nazis, although they may be
18 objectionable and offensive to some, they are certainly
19 not serious threats of violence.

20 There seemed to be a focus not on a
21 question of what is, but what ifs in the Cabinet's
22 consideration of whether there were -- the threat or
23 use of acts of serious violence. And I agree the what
24 if can be part of that consideration, but there needs
25 to be the actual serious threats of violence. It can't
26 be a what if, as we talked about a great deal this
27 morning, purely on a subjective speculative exercise
28 that different things could happen and that somehow

1 because -- imagine -- imagine the -- imagine the
2 justification if the fact that people that are Indies
3 may feel empowered by the disorder from the protest,
4 that that justified the invocation of the Emergencies
5 Act. Imagine the harm that would cause to the
6 democratic right to protest against government actions.
7 It can't be the test that because people are
8 protesting -- yet that is the reason -- and I'll come
9 to it -- that seems to be the reason certainly why the
10 Office of the Privy Council supported the invocation of
11 the Emergencies Act.

12 You can see what's revealed, once again
13 by our Prime Minister's testimony at the inquiry -- and
14 this is at page 43 of our compendium. You can see what
15 the focus was by the Prime Minister.

16 "First of all, what if the worst had
17 happened? What if someone had got hurt? What if a
18 police officer had been put in the hospital? What if I
19 had had an opportunity to do something and I had waited
20 and the unthinkable happened?"

21 But that needs to be --we can't operate
22 in a world, Your Honour, in my submission, in term of
23 invoking the Emergencies Act in a world of pure
24 speculation and hypotheticals. There needs to be
25 credible threats of violence. There needs to be either
26 actual serious violence or credible threats, and there
27 simply just wasn't that there. And of course in his
28 testimony he neglects to reference the information that

1 had been provided by CSIS in their view of whether they
2 in fact met the test of a serious threat to the
3 security of Canada.

4 And as I said earlier, there had been
5 no serious (inaudible) at all, Your Honour,
6 notwithstanding the numerous people that were here for
7 an extended duration of time.

8 If you could turn, Your Honour, to page
9 46 --

10 JUSTICE MOSLEY: The problem when
11 you're talking when you're looking for something is,
12 it's not picked up by the sound system, and that means
13 it will not appear in the transcript. And also we have
14 an interpreter that must be able to hear what you have
15 to say.

16 MR. COWLING: Thank you, Your Honour,
17 I'll endeavor to do better.

18 If you have, as I say, page 46 of our
19 compendium?

20 JUSTICE MOSLEY: Yes, I have that.

21 MR. COWLING: In my submission, this is
22 actually is very revealing of the true reason for the
23 invocation of the Emergencies Act. And you can see that
24 there's a recognition -- and this is -- there's a
25 recognition that the affected areas, the border areas
26 have been restored access. But they go on:

27 "While there is no current evidence of
28 significant implications by extremist groups or

1 international sponsors" (as read)

2 And this is what they point to.

3 "Privy Council Office notes that the
4 disturbance and public unrest is being felt across the
5 country and beyond the Canadian borders." (As read)

6 And this is their concern:

7 "Which may provide further momentum to
8 the movement and lead to what they characterize as
9 remedial harms." (As read)

10 And the harms they point to aren't
11 about serious violence, they are about social cohesion,
12 national unity and Canada's international reputation.

13 The last statement is somewhat ironic,
14 given that Canada's international reputation was so
15 hurt by the invocation of the Emergencies Act causing
16 the President of El Salvador to say the Canadian
17 government's credibility with respect to democracy and
18 freedom is now zero.

19 But that's the concerns. It's not
20 about serious violence, it's about political concerns.
21 It's about concerns that the movement I described in my
22 submissions to you earlier today, that movement that
23 was designed to support bodily autonomy, that that
24 movement might grow. And that's an improper motive, in
25 my submission, for the invocation of the Emergencies
26 Act.

27 There's some recognition there by the
28 Office notwithstanding their view that it fits within

1 the statutory parameters defining threats to the
2 security of Canada, though this conclusion may be
3 vulnerable to challenge.

4 Well, I certainly hope so because it
5 has the hallmarks of totalitarianism in there, that if
6 you don't agree with government and your movement is
7 growing, that this is the threat to security of Canada.
8 That that growing movement, the fact that population --
9 as I say, we put the Angus Reid poll in front of you,
10 Your Honour -- that in two weeks the majority of
11 Canadians during the two weeks of the Freedom Convoy
12 that it now was the majority -- it had been increased
13 by 14 percent of Canadians that were opposed to all
14 COVID vaccine mandates and restrictions.

15 Again, there's the reveal. There's the
16 reveal about the true intent. It's not about serious
17 violence or a threat to Canada's security; it's about
18 the fact that social cohesion, national unity and
19 reputation is at stake. And it's a level -- it suggests
20 a level of arrogance that one needs to actually see to
21 believe, Your Honour. And if you dare protest
22 government policy, it could lead to remedial harms,
23 particularly if your movement starts to grow. If the
24 movements against the government policies start to
25 grow, those could be viewed by the government as
26 remedial harms, and that the momentum to your movement
27 is a threat somehow to the security of Canada.

28 And they are quite right. As I said

1 earlier, Canada's Freedom Convoy did give a voice to
2 people all over the world. The government is right.
3 Those that were victimized by unreasonable COVID
4 restrictions, typically the most disadvantaged and the
5 most vulnerable, were given a voice. They had a
6 country and they had a movement that they could attach
7 themselves to. They had a voice, and public opinion was
8 changing, Your Honour.

9 So we have a situation where there's no
10 serious injuries, there's a vague memorandum to alter
11 the government, but no threats, according to CSIS, that
12 amount to a serious threat the Canada. And then we have
13 the invocation of the Emergencies Act.

14 And it gives, in my submission, to you,
15 Your Honour, the most pernicious part of that Order as
16 a result of the invocation gave to the government --
17 provided, more accurately, a new power never before
18 seen in Canada. The ability never before seen in
19 Canada, the hallmark of undemocratic, totalitarian
20 regimes. The ability to freeze protesters out, and,
21 even more insidiously, anyone that supports those
22 protesters, freeze them out of the financial markets,
23 out of their own financial assets and, I'm going to
24 suggest, without any due process.

25 In my submission, to you, Your Honour,
26 the invocation of the Emergencies Act had far more to
27 do with crass political reasons that were designed to
28 crush and intimidate political opposition than it did

1 with respect to any actual national emergency. And we
2 know that -- and I have read my friends' document
3 obviously -- there's grave assurances about, no, we
4 only went after the actual people that were -- the
5 banks only froze assets of the actual people that were
6 participating. They didn't go after people that had
7 provided donations.

8 We'll take you to the Order and how
9 broad in scope it is and the fear it put in any
10 Canadian that supported the organization. But if you
11 listen to the Justice Minister David Lametti's
12 interview -- and it's at page 133 of our record -- he
13 was asked whether individuals who donated to the
14 Freedom Convoy movement should be worried about banks
15 freezing their accounts.

16 And he says, I think if you know you're
17 a member of a pro-Trump movement who's donating
18 millions of dollars to this kind of thing, then you
19 ought to be worried.

20 This was on February 16th.

21 First, obviously in my view it's a
22 fantastical slur on ordinary Canadians who supported
23 the Convoy that somehow they were pro-Trump supporters.
24 The irony appears to be lost on Minister Lametti that
25 Trump was the President that developed vaccine s at a
26 warp speed.

27 But contrary to the AG's assurances in
28 their factum that the only persons that really should

1 have been worried were those that were actively
2 protesting, it is clear the Justice Minister wanted to
3 instill fear in any of the people that had financially
4 contributed to the protesters. And it's clear that
5 anyone who had donated ought to be worried. And this
6 pernicious message that even supporting protesters will
7 expose you was the message that the government wanted
8 to send to their political opponents.

9 And it worked. It's worked, Your
10 Honour. We've seen the gives and go list that was
11 hacked. And now you have employees who were being
12 disciplined by their employers as a result. Police
13 officers who thought they had anonymously donated are
14 facing prosecutions as a result of donating. The stigma
15 of being associated with a threat to the security of
16 Canada is chilling, long lasting and very real. And
17 it's been a great way for this government to take away
18 the funding for its opponents well after the revocation
19 because people were scared by the Order that purported
20 to be cast as wide as it was.

21 Let me take you to the Order -- I'll
22 first take you to the Regulations. So it's at Tab 12, I
23 think page 65 of our compendium.

24 So there were four sections of
25 prohibitions in the Emergency Measures, including what
26 I would say was a new and novel definition of "breach
27 of peace". Section 2.1 prevented a person who
28 participated in a public assembly that may reasonably

1 be expected to lead to a breach of peace. And it
2 defined it in a way that breach of peace -- and I'm a
3 management side labour lawyer have never seen it
4 defined this way:

5 "Where a serious disruption of the
6 movement of persons or goods or the serious
7 interference of trade." (As read)

8 And it's clear the government takes
9 that position constituted a breach of peace and
10 therefore a violation of section 2. And it would have
11 impacted, in my submission, on any issue or instance
12 where there was a serious disruption of the movement of
13 persons. And that would capture every picket line I
14 have ever experienced or seen or sought to obtain an
15 injunction against.

16 And there's prohibitions on foreign
17 nationals attending. I don't think there's much
18 applicability to the vast majority of Canadians.

19 And the travel section, 4, where it
20 prohibited persons from going to those assembly areas,
21 including bringing underage -- including bringing
22 minors to within 500 meters of the area. We know that
23 Ms. Nagle in fact contravened that section.

24 As I say, the most insidious aspect of
25 this measure, section 5 -- and it's so broad, Your
26 Honour:

27 "A person must not directly or
28 indirectly use, collect, provide, make available or

1 invite a person to provide property to facilitate or
2 participate in any assembly referred to in subsection
3 2.1 or for the purpose of benefiting any person who is
4 facilitating or participating in such an activity." (As
5 read)

6 It captures anyone who has any --
7 almost any support for someone who was involved in that
8 activity, including people that might support the
9 supporters. So a donation to frontline nurses, to the
10 extent that Your Honour stated was a conduit for funds,
11 supporting them would be, in my submission, indirectly
12 supporting those people that were participating in the
13 subsection 2(1) activity that was so broadly
14 constituted as to describe a serious disruption of
15 movement of persons. So it captured -- they captured,
16 it was not limited in its scope.

17 Now, maybe ultimately in practicality
18 they didn't -- the banks, more accurately, because it
19 was their obligation -- didn't freeze everyone's
20 assets, thankfully. But that's not what the measure
21 purported to cover. The measure purported to cover
22 anyone who directly or indirectly supported anyone that
23 was in a section 2(1) assembly.

24 And then we come to the new power, the
25 Emergency Economic Measures Order, and the excerpts are
26 at page 57. And it thrusts the duty on Canadian
27 financial institutions and those foreign banks that
28 have their business in Canada. And it's effectively, if

1 I read paragraph 3 correctly -- and I think I am on
2 this point -- covers every financial institution in the
3 country. It gave them the obligation to determine --
4 the banks or the financial institutions, the trust
5 companies -- to determine in a process that's far from
6 clear, but it gives them the obligation to effectively
7 cease doing business with anyone who is a designated
8 person, including making available -- you can see
9 this -- it's -- section 3 outlines the scope of the
10 institutions -- my reading is every financial
11 institution that operates in this country -- and then
12 gives them the obligation to cease dealing, and it's
13 outlined in subsection 2(1) -- with anyone who is a
14 designated person. Anyone who owns or controls or holds
15 property directly or indirectly that's a designated
16 person.

17 And it's more than just that. They
18 can't even close their accounts. It's not that you get
19 your funds, your funds are frozen. You are completely
20 deprived of those funds. You can't interact at all with
21 any financial institution. The banks or the financial
22 trust companies can't make under 2(1)(c) available any
23 property that is the property of the designated person,
24 including funds or virtual currency to or for the
25 benefit of a designated person.

26 And remember how wide that net is cast
27 under the Emergency Regulations. It's anyone who in any
28 way directly or indirectly supports anyone who has

1 participated in a section 2(1) assembly. That message
2 is clear. It's don't support those organizations, don't
3 support our political opponents. And that's the
4 insidious message of this legislation. And it's clear
5 there was no real emergency.

6 People are rightfully concerned and
7 still are concerned, Your Honour, that donating money
8 to an organization that even participated or was we say
9 was a significant participant in the Freedom Convoy
10 placed themselves in significant jeopardy. Justice
11 Lametti's message and the language of the Order itself
12 have resonated.

13 There's another precondition, Your
14 Honour, and I touched on it very briefly earlier on in
15 my submissions. In my submission to you, and I
16 appreciate my friends take some issue with this, about
17 the effectiveness of statutes. I think that's an
18 interpretive debate about that, I concede. My
19 submission to you is that the invocation of the
20 Emergencies Act must be seen to be a measure of last
21 resort, and that when the statute is talking about
22 effectiveness, it means whether the existing law can be
23 effective in terms of dealing with the emergency.

24 Now I'm past the point in my
25 submissions where I effectively have conceded
26 notwithstanding all of my submissions to you that there
27 is an emergency, it needs to be addressed. But the
28 question is: Are the existing statutes or laws of

1 Canada sufficient or efficient enough to address those?

2 As I say in my submission to you, that
3 needs to be a measure of last resort.

4 And you can see the difference, I
5 guess, illustrated again in Prime Minister Trudeau's
6 testimony at Tab 7, page 44. He's talking about -- this
7 is the invocation of the Emergencies Act and he's
8 talking about we were able to solve the situation with
9 the invocation of the Emergencies Act, there was no
10 loss of life, no serious violence. He goes on:

11 "I'm not going to pretend that it was
12 the only thing that could have done it."

13 I think this -- I think it may not be
14 accurate, but I think what he's saying is it did do it.
15 It did do it, not "to it".

16 And I think that admission is fatal.
17 It's fatal. It's fatal when you consider the evidence
18 of senior police leaders that they already had the laws
19 they needed, the criminal laws. They had the section
20 20(1) of the Royal Canadian Mounted Police Act where
21 any provincial government can enter into an arrangement
22 with the RCMP for the use of employment of the RCMP to
23 aid in the administration of justice for that province.

24 They had the Criminal Code where
25 individuals could be charged with mischief, unlawful
26 assembly, causing a disturbance, nuisance, uttering
27 threats, assault.

28 They also had the ability -- and which

1 was very successful at the Ambassador Bridge -- the
2 federal government sought an injunction. That's my
3 experience, is that you often have picket lines that
4 are often nationwide. There's certainly often threats
5 to safety, some violence, certainly more than occurred
6 at the Freedom Convoy, and the inevitability of the
7 commission of crimes of nuisance and mischief are an
8 integral part of any picket line. But notwithstanding
9 that criminal activity, police won't act typically
10 until there's an Order of the Court. And what you need
11 to do is you need to go to Court to get an injunction
12 if you are wanting to restrain that activity.

13 And what the Courts do, and which
14 didn't happen here, Your Honour, is the Courts then
15 balance the inevitable criminal activity and associated
16 criminal activity with the concepts of freedom of
17 expression and association. And they balance the rights
18 of the citizens.

19 And so typically you see that balance
20 in the injunctions that are ordered. So you'll see
21 there's some delay that's allowed notwithstanding it's
22 a clear breach of the Criminal Code. But they balance
23 those rights with rights like freedom of association
24 and freedom of expression.

25 And there was no injunction sought
26 here. There was -- and I wonder why. Why didn't the
27 government pursue that remedy? I know the provincial
28 government did and was successful in dealing with the

1 Ambassador Bridge situation. The injunction was
2 enforced.

3 And my only conclusion, Your Honour, is
4 that they were afraid of the result. It may not have
5 achieved what they wanted, the political result that
6 they wanted because you'd have to come to a Court and
7 have those -- have that balance put into effect. And it
8 may have left some protesters there, it may have
9 allowed for some continued level of protest that may
10 not -- and I don't suspect it would allow for ongoing
11 blockade of downtown Ottawa, but that isn't the result
12 this government was prepared to allow to happen. They
13 didn't want that result. They wanted them gone.

14 And when you come to Court, there's a
15 balance and there's a recognition that crimes of
16 mischief and nuisance would go on. There's not a
17 prohibition, there's a balance.

18 But that didn't happen here, and that
19 was a tool that was available but never used, never
20 attempted. And it was never attempted before what I'll
21 call the sledgehammer of all sledgehammers, the
22 invocation of the Emergencies Act. And in my view
23 that's fatal to their position that there's a -- that
24 the laws of Canada, including the common law, that the
25 laws of Canada didn't provide for an alleviation of
26 what was potentially viewed -- and I appreciate that
27 the citizens of Ottawa saw it as an emergency. So go to
28 Court and have those interests heard and balanced, and

1 deal with it there. Don't use the sledgehammer.

2 Now, it's -- I'm -- it's also -- it's
3 our position, obviously, Your Honour, that the
4 proclamation was ultra vires and the preconditions
5 weren't met. And because the preconditions for the
6 proclamation weren't met, that any of the measures and
7 orders that were made pursuant to those -- to that
8 proclamation are similarly ultra vires.

9 Now, and I don't intend to cover this
10 because I suspect we tried to coordinate amongst the
11 Applicants to try to avoid significant overlap in our
12 submissions, but it's also clear -- and I'll be very
13 brief -- that constitutional questions -- maybe I'll
14 make a concession, Your Honour, this is a -- to be
15 viewed on a reasonableness standard, I accept that
16 analysis. This is a judicial review and Cabinet's
17 decision is based on reasonableness standard. It's our
18 submission their decision was unreasonable in the
19 extreme.

20 But constitutional questions, including
21 those under the Bill of Rights, are to be reviewed on a
22 correctness standard. I have already taken you through
23 some of the measures and the orders. It's our view that
24 these measures are so clearly overbroad, arbitrary and
25 grossly disproportionate to any reasonable objective
26 that they are a breach of the Charter and the Bill of
27 Rights.

28 I'll focus -- my friends are going to

1 make more extensive submissions on the Charter aspects,
2 but I certainly support that what occurred with respect
3 to the invocation of the -- sorry, or proclamation and
4 the orders and measures that flowed from it constituted
5 breaches of Charter rights, including section 2(b),
6 freedom of thought, belief, expression; 2(c), peaceful
7 assembly, freedom of association, unreasonable search
8 and seizure and the liberty and trust.

9 But I will just make some more
10 submissions just on the Bill of Rights. And what's
11 fascinating, Your Honour -- and some of us have enough
12 seniority to recall the Bill of Rights and the debate
13 at the time of the Charter coming into place about
14 property rights and whether property rights should be
15 included in the Charter. Ultimately they were not. But
16 this legislation, the Emergencies Act, makes clear that
17 both the Bill of Rights and the Charter apply to it.

18 And what's fascinating -- and if you
19 could turn up -- sorry, back to the explanation
20 pursuant to D8(1) of the Emergencies Act, so Tab 5 of
21 our authorities, going to the conclusion of that
22 explanation, which is at page 33 and 34, they outline
23 what I say are the illegitimate reasons about why they
24 declare the emergency. But they go on over to page 34,
25 and its very brief in terms of analysis. They suggest
26 the measures have been carefully tailored such that any
27 potential effects on rights protected under the Charter
28 rights are reasonable and proportionate in the

1 circumstances.

2 And what's interesting, throughout the
3 document there is no mention, no consideration at all
4 to the Bill of Rights and the additional protection
5 that's contained therein with respect to property and
6 the requirements prior, I would submit to you, before
7 being deprived of the use of that property. There's no
8 protection even after the property has been seized, if
9 you look at the Order. It gives the banks the authority
10 in terms of how to deal with that. And no mechanism
11 certainly was promulgated that I'm aware of by the
12 financial institutions as to how they were to deal with
13 that. So there's no consideration in the Bill of
14 Rights. There seems to have been implicit in this
15 explanation an assumption that the Bill of Rights was
16 somehow fully subsumed within the Charter. My
17 submission to you is the most pernicious part of the
18 Order, in fact, deals with the deprivation of property
19 rights and the signaling and chilling effect that
20 flowed as a result.

21 And so obviously there's an additional
22 right that's not contained in the Charter, section 1(a)
23 of the Bill of Rights, at Tab 13, Your Honour. I'll
24 just reference 1(a) of the Bill of Rights, which is a
25 different -- an additional right that was recognized by
26 the Bill of Rights that was not recognized -- arguably
27 not recognized in the Charter, which is the right to
28 the enjoyment of property and the right not to be

1 deprived thereof except by due process of law.

2 The Attorney General failed to answer
3 that and simply said Ms. Nagle and CFN didn't have
4 their rights to pry. But the effect of not complying
5 with the Bill of Rights is the same as the Charter. It
6 renders the very underlying proclamation ultra vires.

7 And what does due process law mean
8 under section 1(a)? And we have Chief Justice Laskin's
9 decision in Kerr and the Queen (ph). It means a fair
10 hearing in accordance with the principles of
11 fundamental justice. And then that requires -- and this
12 is in the current Queen -- and I'm not going to ask you
13 to turn it up, it's at Tab 14, Your Honour -- and when
14 a principal of fundamental justice is invoked, we have
15 the decision of this Court -- and I'm probably
16 butchering this name -- Saladeen and Canada (ph) at
17 Tab 15 of our authorities. It requires a determination
18 as to whether there was procedural fairness according
19 to the decision-maker.

20 And recall in the Order who is the
21 decision-maker? It's the financial institutions
22 themselves are obliged to determine who is a designated
23 person. And one of the objections that were ignored,
24 again, much like in my friend's factum, much like the
25 explanation ignores the Bill of Rights. It's just
26 ignored because it's a fatal flaw that they didn't
27 outline the due process. There's no due process.

28 One of their positions -- and I'll

1 address it now -- is that somehow this process could be
2 sort of dealt with later, it could come later. Again,
3 that ignores the fundamental rights of Canadians to
4 know the process, know the case against them, know what
5 that process is. And they were deprived of that
6 opportunity because there was simply no process.

7 Of course, the case of Gomez and Canada
8 which I have also excerpted for you at paragraph 117,
9 basic minimal procedural protections must be provided.
10 A person that would be adversely affected by a decision
11 is entitled to know the case to meet, which requires
12 that they have sufficient information about that which
13 will be relied on to make the decision and that they
14 have this information before the decision is made and
15 in time for them to respond.

16 The answer seems to be a simplistic one
17 from the Attorney General. You should know if you're
18 participating in what they've now declared to be an
19 illegal assembly, you should know that you're now
20 vulnerable to having property deprived.

21 But that's not even their case. Their
22 case is more complicated than that. They are not going
23 to deprive you unless you participate notwithstanding
24 the language in the Order. So we don't know. We don't
25 know what the process is. We don't know how it's to be
26 interpreted. There's not even a minimal amount of
27 procedural fairness. And that's evident on the face of
28 the Order. There's no hearing provided for, there's no

1 information given with respect to being a designated
2 person or not. There's no right to challenge one's
3 status. There's no right to challenge the decision.

4 And what we do know as we
5 cross-examined Superintendent Beaudoin is -- and his
6 evidence is at Tab 17, page -- I'll refer you to the
7 pages because that's where it begins -- that the
8 Order -- sorry, that the manner in which the Order was
9 implemented went beyond even the Order that was
10 contemplated. There was an admission -- I'm going to
11 suggest to you, Your Honour, the Order was clearly
12 designed to breach the designated person's reasonable
13 privacy expectations, tarnish their reputations with
14 financial institutions, and punish them for being
15 guilty of the crime -- I put that in air quotes -- for
16 daring to express their dissent against the government
17 in Ottawa. Every interaction that a deemed designated
18 person had with the police that was recorded on a
19 database was provided to financial institutions. It was
20 not limited to convictions, it wasn't limited to
21 charges relating to the Emergencies Act. Any record
22 relating to an interaction with the police was shared
23 with these financial institutions.

24 Where's the process to deal with that?
25 This is -- what they did went even beyond the Order.

26 And you can see what they were supposed
27 to do at page 20 -- sorry, page 94 of our compendium.

28 JUSTICE MOSLEY: Before you go to that

1 can you give me the pinpoint on that first reference
2 you made, that information from the cross-examination
3 of the officer?

4 MR. COWLING: Yes, just bear with me,
5 Your Honour, I apologize. So 84 through 90.

6 JUSTICE MOSLEY: Okay, so that's six
7 pages --

8 MR. COWLING: Sorry, paragraphs 84
9 through 90. So it's 90 to 91.

10 They're talking about what would be
11 reported to the banks in terms of what this database
12 picked up. And you can see over at the top of the page
13 90 interactions with police beyond their participation
14 in the Freedom Convoy protests in Ottawa? And the
15 answer is yes.

16 And these databases that the police
17 have obviously have all of the interactions with police
18 registered in them. And those databases were, in fact,
19 shared.

20 And you can also see at page 92 they
21 provided -- and I don't -- there's some question about
22 whether they also provided some social media
23 information with the financial institutions.

24 And you can see over at -- starting at
25 paragraph 95 there was questions asked whether these
26 records were destroyed afterwards or whether they still
27 have them. And the answer was, I don't know if they
28 still have them.

1 I invite you to read the entire
2 transcript, Your Honour, probably more informative than
3 my piecemeal of it. There was a form that was provided
4 and filled out and given to these financial
5 institutions that had all this information in it. And
6 the authorities clearly didn't bother to follow up to
7 even see if that information was destroyed after the
8 proclamation was revoked. And that's the problem, Your
9 Honour, when there's no process.

10 The form is at -- Your Honour, I think
11 that's probably more illustrative -- at the next
12 page -- sorry, the next tab.

13 JUSTICE MOSLEY: Are you still --

14 MR. COWLING: The actual form that was
15 provided by the RCMP to the financial institutions is
16 at Tab 18. And you can see, for example, that vehicle
17 profiles, database checks, any -- this would include
18 any interaction with the police -- over on page 102,
19 social media queries, corporate checks, company
20 inquiries, other relevant information.

21 JUSTICE MOSLEY: Is that the document
22 which appears at pages 100 and following of your
23 compendium?

24 MR. COWLING: Yes, 100 and 101 --
25 actually, three pages, 100, 101, and 102.

26 Your Honour, I don't think there is an
27 answer to the requirement to have the enjoyment of
28 one's property only be deprived by due process. There

1 was no process here. It's a fatal law, it's a breach
2 of human rights -- it's a breach of the Canadian Bill
3 of Rights and, therefore, is ultra vires.

4 And it's my submission to you that you
5 can't have that pernicious message that dissent won't
6 be tolerated by the government, that it will be
7 silenced. We look to the Courts to provide a check on
8 what we submit is this government's abuse of power, and
9 we are asking you to declare that that decision was
10 unreasonable. And, moreover, that the invocation of
11 the Emergencies Act on February 14, 2022, is ultra
12 vires.

13 And subject to any questions you have,
14 Your Honour, those are my submissions.

15 JUSTICE MOSLEY: Just bear with me for
16 a moment. At paragraph 4 of your factum you state that
17 Nagle and CFN arrived in Ottawa on January 28, 2022.

18 I take it that the only representative
19 of CFN throughout this was Nagle?

20 MR. COWLING: No, there were other
21 representatives of CFN there.

22 JUSTICE MOSLEY: Well, she says that
23 other members arrived at paragraph 5.

24 Is there any other evidence of this?

25 MR. COWLING: In some of the videos
26 that were submitted, there were obviously individuals
27 associated with Canadian Frontline Nurses that are
28 there. And you have Ms. Nagle's --

1 JUSTICE MOSLEY: Other events that they
2 attended where they protested from hospitals and the
3 like. But at the Ottawa --

4 MR. COWLING: At the Ottawa event.

5 JUSTICE MOSLEY: Well, there's no one
6 mentioned in her evidence. At paragraph 19 she refers
7 to "our hotel room at the Sheraton".

8 Would that be her and her family?

9 MR. COWLING: I believe it's Ms.
10 Choujounian was also in attendance.

11 JUSTICE MOSLEY: That's the other
12 Director. That name I have seen on the Certificate of
13 Incorporation but it doesn't appear anywhere else in
14 the record.

15 MR. COWLING: That may be correct, Your
16 Honour, I can't say for sure.

17 JUSTICE MOSLEY: So the money donated
18 to CFN paid for that hotel room?

19 MR. COWLING: I can't answer that
20 question, Your Honour.

21 JUSTICE MOSLEY: She says so.

22 MR. COWLING: If she says so then I'd
23 certainly adopt her affidavit with respect to that.

24 JUSTICE MOSLEY: At paragraph 9 of her
25 affidavit she says "My hope and the hope of CFN".

26 Is there any evidence of CFN as a
27 corporation? Was there a resolution passed by the
28 Board of Directors or a declaration at an AGM or

1 anything of that nature?

2 MR. COWLING: I don't know. There's an
3 admission that was communicated to me about CFN, and
4 more than just by Ms. Nagle. I outlined the goals, I
5 think, at the very beginning of my submissions.

6 Mr. Boissonneau-Lehner just informed me
7 that the Corporation Profile Report, as I understand,
8 also sets out the mission of the organization. And
9 we're looking for it now.

10 JUSTICE MOSLEY: Throughout this
11 period, according to paragraph 51 of her affidavit,
12 there was no family income. They were relying on funds
13 stored at the bank and credit cards?

14 MR. COWLING: That's my understanding
15 based --

16 JUSTICE MOSLEY: Presumably donations
17 received by the organization?

18 MR. COWLING: Yes.

19 Just in answer to your previous
20 question, the Certificate of Incorporation, the
21 statement of the purpose of the corporation is to unite
22 nurses across Canada and bring ethics back into
23 healthcare. And that's at page 95 of the Applicants'
24 record.

25 JUSTICE MOSLEY: At paragraph 37 of
26 your factum you make a reference to statements by seven
27 provincial premiers. I didn't see a source for that
28 statement.

1 Do you have that?

2 MR. COWLING: I don't, but I expect
3 that my friends from Alberta will be making, I'll say,
4 more fulsome submissions with respect to that issue. I
5 don't have them at the moment. I'm not sure, it's
6 probably in the record somewhere but I don't have it at
7 the tips of my fingers.

8 JUSTICE MOSLEY: Okay, all right, thank
9 you very much.

10 MR. COWLING: Schedule A of Alberta's
11 Application Record -- sorry, my apologies, their
12 Memorandum of Facts and Law.

13 JUSTICE MOSLEY: Okay, thank you. Very
14 good, thank you, Mr. Cowling.

15 MR. COWLING: Thank you, Your Honour.

16 JUSTICE MOSLEY: It's 2:17.

17 Ms. Krajewska, do you wish to start now
18 or do you wish a few minutes? We can take the
19 afternoon break and then proceed on from there.

20 MS. KRAJEWSKA: Yes, thank you, I would
21 prefer to take a very brief recess and I can get set
22 up.

23 JUSTICE MOSLEY: So the Court will
24 recess for 15 minutes.

25 THE REGISTRAR: The Court is in recess
26 for 15 minutes.

27 --- Recess taken at 2:18 p.m.

28 --- On resuming at 2:30 p.m.

F

4. Based on the information available at the time, the GIC believed, on reasonable grounds, that a public order emergency existed and necessitated the taking of temporary special measures for dealing with the emergency.

5. The Applicants are now asking this Court to use hindsight to determine that the invocation of the *EA* was not necessary. However, that is not what is required in these judicial reviews. The Court is not to “step into the shoes” of the GIC to see if it would have made the same decision as the GIC, nor to question the wisdom of this polycentric decision. The Court’s role is to determine if the decision made to invoke the *EA* was reasonable in the context in which it was made and upon the reasonable grounds to believe standard. Upon a proper application of that deferential standard, it is clear that the invocation of the *EA* was reasonable.

PART I – FACTS

ORIGINS OF THE FREEDOM CONVOY 2022

6. On November 19, 2021, the Public Health Agency of Canada announced that effective November 30, 2021, there would no longer be a vaccine exemption for entry to Canada for several groups, including essential service providers and truck drivers.¹

7. On December 3, 2021, Canada Unity, one of the organizing groups in what would become the Freedom Convoy 2022 (Convoy), posted a memorandum of understanding (MOU) seeking the removal of various COVID-19 related measures, including the

¹ Affidavit of Rebecca Coleman sworn April 4, 2022 [**Coleman Affidavit**] at para 3, Ex A, Application Record for T-316-22 [**CCLA AR**], Vol 4 Tab 12, pp 2221-2222 and 2262-2272. NB: For documents which appear in other/all of the Application Records, we will be referring to the CCLA AR for consistency unless otherwise noted.

abolishment of vaccine mandates. The MOU also outlined Canada Unity’s goal of forming a committee with the Senate and the Governor General to override all levels of the Canadian government.²

8. On January 13, 2022, the Federal Government announced travel restrictions that applied to truck drivers entering Canada, and the next day a Facebook page titled “Freedom Convoy 2022” was created.³ Going forward, Convoy participants were organized via social media and encrypted chat apps like Telegram and Zello.⁴

9. On January 22, 2022, the Convoy departed from Prince Rupert, British Columbia, gathering supporters along its way to a planned demonstration in Ottawa, scheduled for January 29, 2022.⁵

OCCUPATION OF OTTAWA

10. On January 28, 2022, the Convoy consisting of thousands of truckers and demonstrators arrived in Ottawa, ultimately requiring a police response beyond that of the Ottawa Police Service (OPS) and including officers from the RCMP, the Ontario Provincial Police (OPP), and the Toronto, Durham, London, and York police services.⁶

² Coleman Affidavit at para 4, Ex B, CCLA AR Vol 4 Tab 12, pp 2222, 2274–2288; see also Transcripts from the Cross–Examination of Kristen Nagle, held June 24, 2022 [**Nagle Cross–Exam Transcript**], Responding Record [**RR**] Vol 1 Tab 3, pp 145–146, 150–154

³ Coleman Affidavit, paras 5–7, Ex E, CCLA AR Vol 4 Tab 12, pp 2222–2223, 2295

⁴ Nagle Cross–Exam Transcript, RR Vol 1 Tab 3, pp 128–129.

⁵ Coleman Affidavit, para 122, Ex QQQQQ, CCLA AR Vol 4 Tab 12, pp 2257, 2988

⁶ Coleman Affidavit, paras 16, 18, Exs N and P, CCLA AR Vol 4 Tab 12, pp 2225–2226, 2360–2373, 2381–2391; Explanation Pursuant to Subsection 58(1) of the *Emergencies Act* (February 14, 2022) [**Section 58 Explanation**], CCLA AR Vol 1 Tab 3, pp 39–52

11. While many Convoy participants were peaceful, the Convoy also included extremist elements. Ms Nagle, for instance, was in contact with Jeremy MacKenzie, the founder of Diagonlon, during her time in Ottawa. Ms Nagle knew about Diagonlon’s proposal to establish a new “diagonal” country encompassing regions of North America from Alaska to Florida, and that their slogan was “gun or rope.”⁷

12. Ms Nagle also confirmed that Mr MacKenzie was arrested in January 2022, before he came to the Convoy in Ottawa, and was charged with a number of firearms offences when police allegedly found five restricted weapons, prohibited magazines, ammunition and body armour at his house. Subsequently, in May 2022, Mr MacKenzie was charged in connection with an anti-masking protest outside the home of Nova Scotia’s Chief Medical Officer of Health.⁸ Some of the body armour found at Coutts had Diagonlon’s insignia on it.⁹

13. Ms Nagle had also met one of Mr McKenzie’s associates, a “vlogger” named Derek “Rants” Harrison. Ms Nagle confirmed that Mr Harrison made a video in which he said he wanted to turn the Convoy into “our own January 6th event” and wanted to see some of the truckers “plow right through that 16 foot wall.”¹⁰

14. These extremist elements also featured visible symbols of hate held or worn by protesters. Mr Jost and Ms Nagle both saw demonstrators wearing yellow Star of David emblems featuring the words “Non Vaxx,” comparable to the yellow stars Nazis made Jews and other groups wear during the Holocaust.¹¹ Photographs in news articles also documented

⁷ Nagle Cross–Exam Transcript, RR Vol 1 Tab 3, pp 137–138, 141–144

⁸ *ibid*

⁹ Coleman Affidavit, para 122, Ex QQQQQ, CCLA AR Vol 4 Tab 12, pp 2985–2993

¹⁰ Nagle Cross–Exam Transcript, RR Vol 1 Tab 3, pp 140–141

¹¹ Transcripts from the Cross–Examination of Jeremiah Jost, held June 15, 2022 [**Jost**

flags featuring swastikas, as well as Gadsden and Confederate flags held by protesters,¹² and signs featuring the Nazi “SS” symbol.¹³ Reports of hate incidents increased throughout the occupation requiring a hate incident hotline to be set up.¹⁴

15. Beyond the extremist elements of the occupation, the high-decibel noise disruption caused by demonstrators – truck honking, air horns, train whistles, street parties, and fireworks being set off near residences – was not peaceful. Nor was the widespread presence of containers of flammable diesel fuel throughout the core of the Nation’s Capital, including adjacent to Parliament Hill.¹⁵

16. Between January 30 and February 2, 2022, the Convoy began erecting structures and organizing for a prolonged occupation. The OPS launched several criminal investigations into the desecration of national monuments, as well as "threatening/illegal/intimidating behaviour" toward police officers, workers and private citizens.¹⁶ However, the OPS were also outnumbered, unable to deal with the highly-disruptive demonstrations, which were unique in nature, massive in scale, polarizing in context and threatening in so many ways.¹⁷

Cross–Exam Transcript] and Ex 2, RR Vol 2 Tab 10 and 10B, pp 665–673, 841; Nagle Cross–Exam Transcript and Ex F, RR Vol 1 Tab 3 and 3J, pp 214–217, 308

¹² Coleman Affidavit, para 19, Ex Q, CCLA AR Vol 1 Tab 12, pp 2227, 2393–2394

¹³ Nagle Cross–Exam Transcript, RR Vol 1 Tab 3, pp 203–204; Jost Cross–Exam Transcript, RR Vol 2 Tab 10, pp 658. See also Transcript from the Cross–Examination Harold Ristau, held June 13, 2022, RR Vol 2 Tab 8, p 412

¹⁴ Coleman Affidavit, paras 20, 24, Exs R, V, CCLA AR Vol 4 Tab 3, pp 2228, 2396–2402, 2421–2422; Jost Cross–Exam Transcript, RR Vol 2 Tab 10, p 684

¹⁵ Jost Cross–Exam Transcript and Exs 1 and 3, RR Vol 2 Tab 10, pp 620–625, 687–696, 720–725, 840, 842; Coleman Affidavit, paras 21, 40, 72, 112, 123, Exs S, LL, SSS, GGGGG, RRRRR, CCLA AR Vol 4 Tab 12, pp 2404–2408, 2524–2546, 2723–2734, 2915–2929, 2994–3041

¹⁶ Affidavit of Abigail Deshman, sworn March 4, 2022 [**Deshman Affidavit**], Ex F, CCLA AR Vol 2 Tab 8, pp 450–451

¹⁷ Coleman Affidavit, paras 18–31, Exs P–CC (pp 180, 181), CCLA AR Vol 4 Tab 12, pp

17. There were even reports of an ambulance being pelted with rocks and protestors yelling racial slurs at a paramedic when he went to check the damage to the vehicle.¹⁸

18. On February 2, 2022, the OPS noted a significant element of American involvement in the organization and funding of the Convoy. This same day, the OPS Chief stated that “there may not be a policing solution to the demonstration” and “there need to be other elements brought in to finding a safe, swift and sustainable end to this demonstration that’s happening here and across the country.”¹⁹

19. On February 3, 2022, the Mayor of Ottawa submitted a request for additional resources to the Minister of Public Safety and Emergency Preparedness to deal with the Convoy. On this same day, Convoy organizers held a press conference and stated that they would remain in Ottawa until all COVID-19 mandates were removed.²⁰ Convoy participants continued to promote Canada Unity’s proposal to have the Governor General dismiss the Prime Minister until late in the occupation.²¹

20. On February 6, 2022, the Mayor of Ottawa declared a state of emergency, which reflected the seriousness of the danger and threat to the safety and security of residents posed

2226–2230, 2381–2480; Deshman Affidavit, Exs , CCLA AR Vol 2 Tab 8, p 630

¹⁸ Coleman Affidavit, paras 8, 112, Exs F and GGGGG, CCLA AR Vol 4 Tab 12, pp 2306–2307, 2918

¹⁹ Coleman Affidavit, paras 30, 33, 112, Exs BB, EE, GGGGG, CCLA AR Vol 4 Tab 12, pp 2229–2230, 2253, 2467–2468, 2484–2486, 2920; Affidavit of Madeleine Ross, sworn February 22, 2022 [**Ross Affidavit**], Ex D, CCLA AR Vol 1 Tab 7, pp 113–123

²⁰ Coleman Affidavit, paras 69, 112, Exs PPP, GGGGG, CCLA AR Vol 4 Tab 12, pp 2241, 2253, 2713–2716, 2922; Ross Affidavit, Ex D, CCLA AR Vol 1 Tab 7, pp 113–123

²¹ Coleman Affidavit, para 69, Ex PPP, CCLA AR Vol 4 Tab 12, pp 2241, 2713–2716; see also Nagle Cross–Exam Transcript, RR Vol 1 Tab 3, pp 145–146, 150–154