S.C.C. Court File No.: 42262

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)

REPLY

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A. Overview

1. The Attorney General of Canada's ("AGC's") Response highlights why leave should be granted. The AGC submits that the Applicants, Canadian Frontline Nurses ("CFN") and Kristen Nagle ("Nagle"), were not affected by the emergency measures because no bank account of CFN or Nagle was actually frozen and no penal sanction was imposed on them. This is precisely the issue raised by this Application: (A) whether a person is "directly affected" for the purposes of determining direct standing when they are within the class of persons subject to coercive sanctions or (B) whether, although in the class, they only have direct standing once the threatened sanction is actually and selectively imposed upon them.

2. The AGC's Response mischaracterizes the Applicant's position on standing as being predicated on the possibility of continued exposure to prosecution and treats the Application as though it asks this Court to revisit the Federal Court's factual findings. This is not accurate. The Application asks this Court to clarify the legal threshold for direct standing where instruments made under delegated emergency authority prohibit conduct engaged in by the Applicants, attach penal consequences to that conduct, and create, *inter alia*, a framework under which access to financial services may be cut off. This is the legal question of public importance.

3. The Respondent also characterizes the clean hands issue as a routine discretionary ruling. It is not. The issue is when directly affected litigants may be denied further participation in judicial review because of the parties' alleged litigation conduct or advocacy, where the line is to be drawn, and the ability of the parties to address these matters before a court decides them.

4. The *Canadian Bill of Rights* issue is also an issue of public importance. In their Response, Saskatchewan contends that it is important for this Court to address unresolved issues concerning the application of the *Canadian Bill of Rights* to delegated legislative powers under the *Emergencies Act*. The Applicants agree with Saskatchewan on this point.

B. The Respondent's position confirms the direct standing issue

5. The Respondent submits the law is settled because a person lacks direct standing unless the impugned measure "directly affects" them. This submission ignores that the dispute is over what that phrase means. The issue is whether a person is directly affected only if the sanction is imposed, or whether a person is directly affected when the measure applies to their conduct, prohibits what they are doing, and exposes them to the coercive effects of penal sanction, including here the loss of access to financial services. This interpretive debate regarding what constitutes being "directly affected" has broad implications beyond this case in terms of who and when a person has standing to challenge government actions.

6. The Respondent relies heavily on the assertion that CFN and Nagle were not "named" as designated persons and did not have their bank accounts frozen. The question is not whether CFN

and Nagle's name did or did not appear on some supposed list. That framing is misleading and incorrect. A person became a "designated person" by operation of the definition in the Order: an individual or entity engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the Regulations.[1] There is no question that CFN and Nagle's activities[2] brought them within the scope of the Regulations and Order, made them "designated persons" and, therefore, made them subject to the sanctions, whether or not they were actually imposed. The question is whether that was enough to make them sufficiently "directly affected" to ask the Federal Court to review the legality of the decision of the Governor-in-Council to make the Proclamation, Regulations and Order.

7. CFN and Nagle were active and visible participants in the Ottawa protest both before and after the Proclamation and promulgation of the Regulations and Order. They engaged in public advocacy, fundraising, distribution of contributions, and material support for protest participants.[3] Those were the kinds of participation and support explicitly addressed by the Regulations and Order and, unquestionably, made CFN and Nagle "designated persons." The AGC's and the courts below's focus on the absence of an eventual freezing of the Applicants' accounts does not answer whether CFN and Nagle were directly affected when they commenced their Application for judicial review.

8. By focusing on whether or not CFN and Nagle were frozen out of their accounts or subject to prosecution, the AGC and the courts below treat the issue of standing as something that is to be determined by events that occurred (or did not occur) after the application for judicial review was commenced. CFN and Nagle submit that this conflates standing with mootness. Standing should be determined by asking whether CFN and Nagle were entitled to bring the application when they did.[4] This is distinct from mootness which asks whether, after the Proclamation, Regulations, and Order were revoked, there remained a live controversy warranting adjudication.[5] Those are different questions. Respectfully, the courts below, and the AGC in their submissions, conflate these two concepts; clarity around these concepts is a matter of public importance.

9. Prior to any other application being brought relating to the *Emergencies Act*, CFN and Nagle commenced their application while the Proclamation, Regulations, and Order were still operative. They also sought urgent interim relief. As designated persons, at the February 22, 2022 case conference, they sought an undertaking from the AGC that their assets would not be frozen.

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[1] Emergency Economic Measures Order, SOR/2022-22 at s.1, Emergency Measures Regulations, SOR/2022-21 at ss. 2-5.
[2] Canadian Frontline Nurses v. Canada (Attorney General), 2024 FC 42, at para 164; Affidavit of Kristen Nagle, sworn March 4, 2022 (Exhibits Excluded) at paras 14, 19-23 [Applicants' Leave to Appeal "LTA", Tab 3A].
[3] *Ibid*.
[4] *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ON CA), at para 7.
[5] *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC)

No undertaking was provided.[6] The legal threat had not passed. It was live. Even after the revocation, the Applicants reiterated the request for the same undertaking on February 25, 2022 at the motion and this request was again refused.[7]

10. The implication of the decisions of the courts below is that direct standing may be denied because, by the time of the hearing, the threatened sanction had not been imposed and was unlikely to be imposed. The Applicants submit that this is the wrong legal approach. More importantly for present purposes, it raises an issue of public importance: whether direct standing is assessed when judicial review is sought, by reference to the applicant's position under the impugned measures at that time, or later, by reference to whether the threatened sanction had been imposed by the time the court heard the application. The AGC's submissions and the decisions below effectively ignore the pernicious and coercive impact of the Regulations and Order on designated persons that were subject to sanctions but did not have the sanctions visited upon them; this is the issue the Applicants submit is of public importance.

11. In its own leave application, the AGC relies on Ms. Nagle's involvement in the Ottawa protest as part of its factual narrative.[8] It is difficult to reconcile that reliance with the suggestion that CFN and Nagle's participation added nothing to the proceedings below. That inconsistency highlights why courts ordinarily prefer to hear from parties who were actually involved in, and claim to have been subject to, the challenged state action.[9] Only parties who are directly involved can furnish evidence and perspective on the factual context in which the challenged measures were adopted.

12. The result of the decisions of the Federal Court and Federal Court of Appeal below is that there is now conflicting jurisprudence with respect to direct standing. The Federal Court of Appeal's prior decisions of *Moresby Explorers Ltd. v Canada (Attorney General)* and *Friends of the Canadian Wheat Board v. Canada (Attorney General)* held that it is sufficient to be in the class of affected persons and that an applicant need not wait until the sanctions befall them,[10] while the courts below reached the opposite conclusion.

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[6] Excerpts of Transcript of the Motion before Justice Mosely, Federal Court, February 25, 2022 at p 8, lines 20-27 [LTA, Tab 3B].
[7] *Ibid* at p 9, lines 27-28, p 10, line 1-9; p 11, line 28, pp 12-1 [LTA, Tab 3B].
[8] Memorandum of Argument dated March 17, 2026 at para 10, Application for Leave to Appeal of the Attorney General of Canada (Court File No. 42261) at 463.
[9] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37.
[10] *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FCA 101at paras 27-32; *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 at paras 16-21.

C. The clean hands issue is not merely a request to revisit the lower courts' findings

13. The Respondent says the clean hands issue is discretionary and fact specific. That characterization avoids the issue raised by the Application. The Applicants do not dispute that courts have authority to control their processes or to deny discretionary relief in proper cases. The issue is what standard applies before a directly affected litigant may be denied further participation in a judicial review application on the basis of alleged litigation conduct or counsel's advocacy.

14. That issue matters beyond this case. Judicial review is how courts supervise the legality of executive action. If a litigant may be excluded from participation because of alleged lack of candour, exaggeration, or improper advocacy, the standard should be clear. Parties should know what conduct may lead to that result. Courts should also explain what factors matter when the discretion is exercised. This Court's guidance is needed on those questions.

15. The advocacy issue is also important. Counsel for CFN and Nagle advanced submissions about the factual and political context of the Proclamation, including whether it was motivated by an improper purpose, a recognized reasonableness review concept. [11] The Respondent and the courts below treated those submissions as misconduct. The issue is not whether the submissions should have succeeded. The issue is whether, and in what context, dissatisfaction with the manner in which counsel advanced an arguable position may justify denying the client further participation in judicial review.

D. The Canadian Bill of Rights issue remains live and important

16. The Respondent submits that CFN and Nagle cannot raise the *Canadian Bill of Rights* because their accounts were not frozen. That submission relies on the same narrow standing theory that the Applicants ask this Court to address. If direct standing requires an actual account freeze, then the *Canadian Bill of Rights* issue may escape review by persons who were within the class targeted by the Order but against whom the financial consequence was not imposed.

17. The Respondents submit that the Order's fairness cannot be challenged in the abstract, citing *Green v. Law Society of Manitoba*. However, the issue the Applicants raise concerns the *vires* of the Order, rather than the procedural fairness requirement that was at issue in *Green*. This Court has repeatedly recognized that a claimant need not demonstrate that the impugned provisions of a challenged law infringe their own rights in order to challenge its validity.[12] The Applicants' challenge to the Order does not turn on the freezing of their accounts but rather if the Order itself – the making of which was expressly subject to the Canadian Bill of Rights – is *ultra vires*.

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[11] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 108 and 137; *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC).

[12] *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) at paras 37-38; *R v Nur*, 2015 SCC 15 at para 51.

18. *Authorson* does not resolve the issue; *Authorson* concerned primary legislation enacted through the parliamentary process, with all of the accompanying safeguards.[13] This Application and the AGC's Application for Leave concern federal executive action and delegated instruments made under emergency legislation. Parliament expressly subjected the measures made pursuant to the *Emergencies Act*, such as the Order, to *the Canadian Bill of Rights*.[14] The question is what an Order affecting the enjoyment of property requires in these circumstances.

E. The Form 23C certificate

19. The Respondent's submissions regarding the Applicants' Form 23C certificate should not have been raised in response to the leave Application. The certificate is part of this Court's own process. It is a requirement of this Court's Rules and is filed in a prescribed form. It exists because public confidence in this Court's decisions depends on parties identifying circumstances that may raise a question about a judge's participation. The certificate does not bear on whether the Application raises issues of public importance. It was inappropriate for the Respondent to rely on it as a basis to resist leave.

20. Nevertheless, the concern identified in the certificate is not "nonsense" as the Respondent dismissively characterizes it. The referenced comments addressed the Freedom Convoy protest, the facts on the ground in Ottawa, and the character of persons who participated in the protest. Those matters are sensitive in this Application and in the AGC's Application for Leave, because CFN and Nagle participated in the Ottawa protest and because the "facts on the ground" are relevant to whether the statutory thresholds to proclaim a public order emergency were met.[15]

F. Conclusion

21. The Respondent's Response seeks to recast this Application as a fact-specific challenge to discretionary findings. It is not. The Application raises broader legal questions: when is a person directly affected by emergency state action such that they have standing; when litigation conduct or counsel's advocacy may justify denying a litigant participation in judicial review; and what role the *Canadian Bill of Rights* continues to play where emergency executive measures carry property consequences.

22. Those questions arise in a uniquely important context: the first invocation of the *Emergencies Act*. They are legal questions of public importance. Leave should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April 2026

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Counsel for the Applicants

[13] *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 62.
[14] *Emergencies Act*, RSC 1985, c 22 (4th Supp), preamble.
[15] *Ibid*, at s16.

TABLE OF AUTHORITIES

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