Federal Court Cour fédérale

Date: 20230127

Dockets: T-316-22
T-347-22

Citation: 2023 FC 118

Ottawa, Ontario, January 27, 2023

PRESENT: The Honourable Mr. Justice Mosley

Docket: T-316-22

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-347-22

AND BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

ATTORNEY GENERAL OF ALBERTA

Intervener

AMENDED ORDER AND REASONS

I. Introduction

[1] This is a joint motion by the Moving Parties in writing under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106 for an order pursuant to Rule 312 granting leave to the Canadian Civil Liberties Association (CCLA) to file an affidavit additional to those provided for in Rule 306, namely the Affidavit of Cara Zweibel.

[2] On February 18, 2022 and February 23, 2022, respectively, the Moving Parties issued notices of application for judicial review in respect of the *Proclamation Declaring a Public Order Emergency*, S.O.R./2022-20 [*Emergency Proclamation*], made pursuant to s. 17(1) of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) [the *Act*], and also in respect of two regulations made pursuant to s. 19(1) of the *Act*: the *Emergency Measures Regulations*, P.C. 2022-107, S.O.R./2022-21, and the *Emergency Economic Measures Order*, P.C. 2022-108, S.O.R./2022-22.

[3] Two other parallel judicial review applications are currently ongoing: an application brought by the Canadian Frontline Nurses and Kristen Nagle (“FCN”) on February 18, 2022 (T-306-22); and an application brought by Jeremiah Jost, Edward Cornell, Vincent Gircys, and Harold Ristau (“Jost et al.”) on February 23, 2022 (T-382-22). The four applications for judicial review are being case managed together and will be heard together.

[4] Jost et al have submitted a separate motion to file supplementary materials, which will be dealt with in another Order.

[5] In the present motion, the Applicants seek to file a selection of documents, transcripts and witness summaries produced during the proceedings of the Public Order Emergency Commission (POEC), established by Order in Council P.C. 2022-392 on April 25, 2022.

[6] Four of the documents attached to the affidavit of Cara Zweibel are described as relating to the Recommendation from the Clerk of the Privy Council to the Prime Minister to invoke the powers of the *Emergencies Act.* These consist of:

- Exhibit “A”, email from Jeremy Adler dated February 14, 2022, attaching a Memorandum for the Prime Minister from the Clerk of the Privy Council with the subject “Invoking the Emergencies Act to End Nation-Wide Protests and Blockages” (the “Invocation Memorandum”);
- Exhibit “B”, the Invocation Memorandum;
- Exhibit “C”, an excerpt from the POEC testimony of Prime Minister Justin Trudeau in which the Prime Minister explains the role that the Invocation Memorandum played in the decision-making process; and

- Exhibit “D”, an excerpt of the Commission testimony of the Clerk in which she provides further context regarding the Invocation Memorandum.

[7] Three of the documents relate to a Policing Plan developed in February 2022 and police assessment of the tools available to address the protests during that time. These are:

- Exhibit “E”, an e-mail exchange between the Commissioner of the RCMP and the Chief of Staff in the Office of the Minister of Public Safety dated February 13 and 14, 2022 in which the Commissioner explains her view that not all available tools to address the protests had yet been exhausted;

- Exhibit “F”, the “Convoy for Freedom Ottawa Integrated Mobilization Operational Plan” written by the “Integrated Planning Cell” (RCMP, OPP, Toronto Police Service, York Regional Police, and Peel Regional Police), dated February 13, 2022 (the “Policing Plan”).

- Exhibit “G”, an excerpt from the testimony of the RCMP Commissioner in which she explains that she was not able to present either the Policing Plan or her view about the available tools to the Incident Response Group (“IRG”) on February 13, 2022.

[8] In their reply to the Respondent’s Written Representations, the Applicants state that they will no longer pursue the admission of Exhibit F.

[9] Five documents are attached that are said to relate to the threat assessments conducted by the Canadian Security Intelligence Service (“CSIS”):

- Exhibit “H”; an excerpt from a summary of an interview of four senior officials from CSIS and the Integrated Terrorism Assessment Centre (“ITAC”);

- Exhibit “I”, an excerpt from the public summary of the Commission’s *in camera, ex parte* hearing held for the examination of three senior officials from CSIS and ITAC;

- Exhibit “J”, an excerpt of the Commission testimony of the Clerk of the Privy Council, in which she confirms that the CSIS’s threat assessment was shared with the IRG but could not confirm it went to the full Cabinet.

- Exhibit “K” an excerpt of the Commission testimony of Robert Stuart, Deputy Minister of Public Safety;

- Exhibit “L”, an e-mail exchange between Jody Thomas, the National Security and Intelligence Advisor to the Prime Minister, to Mike MacDonald (among others), dated February 14, 2022, in which Ms. Thomas requests an alternative threat assessment of the “blockades” from the Clerk of the Privy Council (as opposed to CSIS).

[10] The Respondent opposes the motion. I think that it is appropriate to note that the context of this motion includes initial resistance on the part of the Respondent to disclose information beyond a bare minimum of records pertaining to the formal issuance of the *Proclamation* and related regulations. The Respondent has also relied on a broad application of Cabinet privilege to decline further disclosure. Much has changed, however, since the dates of filing of the four applications and the Respondent has disclosed a great deal more information about inputs into the decision-making process. The Applicants contend that it is still not enough for judicial review of the decision to be meaningful.

II. Issues

[11] The sole issue is whether the Applicants should be granted leave to file the additional affidavit and exhibits to form part of the record on their applications for judicial review.

III. Legal Framework

[12] Rule 312 of the *Federal Courts Rules* provides that a party may, with leave of the Court, file affidavits additional to those provided for in Rules 306 and 307, or file a supplementary record.

[13] As a general principle, applications for judicial review are summary proceedings that should be determined without undue delay and the discretion of the Court to permit the filing of additional material should be exercised with great circumspection: *Mazhero v Canada (Industrial Relations Board)* 2002 FCA 295 [*Mazhero*].

[14] In order to succeed on a motion for leave under Rule 312, an applicant must first satisfy the Court that the evidence is admissible on the application for judicial review and relevant to an issue that is properly before the Court: *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4 [*Forest Ethics*].

[15] Having satisfied those preliminary requirements, the applicant must persuade the Court that it is in the interests of justice to exercise its discretion in favour of admitting the evidence. The following principles for considering whether the test is met were set out by the Federal Court of Appeal in *Forest Ethics* at paras 5-6 citing *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101 at para 2 [*Holy Alpha*]:

(a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?

(b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?

(c) Will the evidence cause substantial or serious prejudice to the other party?

[16] The scope of the record on judicial review is normally limited to the material that was before the administrative decision maker and not that generated thereafter: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 85-87 [*TWN*]; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* [*Access Copyright*], 2012 FCA 22 at paras 14-19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 22-28 [*Bernard*].

IV. Analysis

A. *Context*

[17] A detailed background to these proceedings, as they stood in August 2022, is set out in my decision in *Canadian Constitution Foundation v Attorney General of Canada* 2022 FC 1233 [*CCF 2022*]. I describe therein the efforts of the Applicants to obtain production under Rule 317 of the records that were before Cabinet when the decision to invoke the *Act* and issue the proclamation and related instruments was made and the limited response those efforts received. There was no lack of diligence on their part to obtain the records.

[18] I noted in *CCF 2022* that certain records were initially produced in response to the Rule 317 request of which substantial portions were redacted as Confidences of the Privy Council under section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*] and, subsequently, under other claims of privilege. Additional records were disclosed in July 2022, with redactions, of the Cabinet discussions that led to the decision. As a result of those disclosures, I dismissed the CCF's motion for production of the documents on an unredacted, counsel-only basis. I also declined to go behind the claim of solicitor-client privilege asserted for certain information. That

left open one claim of public interest privilege under s 37 of the *CEA*, which has since been resolved and a number of other claims based on the risk of injury to national security, national defence and international relations interests under s 38 of the *CEA*.

[19] With respect to the s 38 *CEA* claims, applications were initiated by the Attorney General of Canada in the Designated Proceedings Registry of the Court to protect the redacted information. Supporting classified affidavit evidence was filed. A hearing was conducted, with the assistance of an *amicus curiae*, and an order issued on January 9, 2023 upholding some of the claims and approving substitutions or summaries for other redacted text in the disclosed Cabinet documents.

[20] The POEC held both fact-finding and policy hearings between October 13, 2022 and December 2, 2022. In furtherance of its mandate, the Commission sought documents in the possession or control of any party to its proceedings, including the Government of Canada (Government or GOC).

[21] For the proceedings before the POEC, the Government waived Cabinet privilege attached to certain records. As a result, several documents that were inputs to the Cabinet process were provided to the Commission during the course of the hearings and were subsequently released publicly for the first time. This resulted in the lifting of certain of the redactions subject to *CEA* s 38 claims in the materials disclosed to the parties in these proceedings prior to the hearing on those applications.

[22] The Moving Parties argue, and I accept, that none of the evidence they seek to introduce in this Motion was available to them when they commenced the underlying judicial review applications. And, following the service and filing of their applications, with the exception of the formal documents submitted for signature by the Governor General, evidence of the Cabinet proceedings that led to the decision to invoke the *Act* was not disclosed despite repeated requests over the course of these proceedings. In the Applicants' view, which I accept, the selected excerpts of Commission Evidence are essential to the just and proper determination of the underlying judicial review applications. It will ensure that this Court considers those applications with a full and accurate picture of what informed the decision to invoke the *Act*. The evidence, as the Applicants contend, goes directly to the questions of whether the applicable legislative thresholds were met.

[23] The Applicants break down the POEC evidence they wish to introduce into three categories: Recommendations from the Clerk of the Privy Council to the Prime Minister, the Policing Plan and the police assessment of the available tools, and the threat assessments available or requested.

B. *First preliminary requirement: the evidence is admissible*

[24] The Moving Parties argue the evidence is admissible either because it was before the decision maker or because it falls into one of the *Access Copyright* recognized exceptions, two of which they submit are relevant:

- General background in circumstances where the information might assist the Court in understanding the issues relevant to the judicial review, but care must be

> taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the decision maker; and
>
> - To highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.
>
> (*Access Copyright* at para 20)

[25] With respect to the first category of exhibits attached to the affidavit, the Recommendations from the Clerk of the Privy Council to the Prime Minister, the Moving Parties submit the evidence was clearly before Cabinet, as Exhibit A and B went to the Prime Minister. Exhibits C and D, testimony of the Prime Minister and the Clerk of the Privy Council, they contend, provide relevant background and context by explaining how Exhibit B figured in the decision-making process.

[26] Exhibit A has little evidentiary value other than to show that the Invocation Memorandum, Exhibit B, was sent to the Prime Minister's Office. Exhibit B is a key document as it sets out a summary of the situation with the test to be met under the *Emergencies Act* and a recommendation. Exhibit C, an excerpt of the POEC testimony of the Prime Minister establishes that he read the memorandum and provides his explanation of the role that it played in the decision-making process. Similarly, the excerpts of the testimony of the Clerk of the Privy Council and Deputy Clerk in Exhibit D provide further context regarding the Invocation Memorandum. All of this is admissible in my view under the background information exception and relevant to the applications for judicial review.

[27] With respect to the Policing Plan and Police Assessment, Exhibit F, the Applicants have conceded that the documents were not before Cabinet notwithstanding that they were prepared in response to a request from a Cabinet Minister prior to a Cabinet meeting on that issue. There is no other basis, in my view, for their admissibility.

[28] Exhibit G, the testimony of the RCMP Commissioner, falls into the "evidence of absence of evidence" exception as the Commissioner confirmed she was not able to communicate her views to the IRG or to Cabinet.

[29] Exhibit H, an excerpt from a summary of an interview of four senior officials from CSIS and ITAC, is evidence that the Director of CSIS presented CSIS's draft threat assessment to the IRG on February 13, 2022. Exhibit I confirms the Director's evidence that at no point did CSIS assess that the protests in Ottawa and elsewhere constituted a threat to the security of Canada under s 2 of the *Canadian Security Intelligence Act* RSC, 1985, c C-23 [*CSIS Act*]. In her testimony reproduced in Exhibit J, however, the Clerk of the Privy Council could not confirm that the written CSIS threat assessment was provided to the full Cabinet. All of this evidence is, in my view, admissible and relevant.

[30] Exhibit K, an excerpt of the testimony of the Deputy Minister of Public Safety, is to the effect that he was personally aware that CSIS had not identified a "threat to the security of Canada" within the meaning of s 2 of the *CSIS Act*, and that Cabinet did not ask CSIS to provide its opinion on whether that test was met. This evidence is admissible and relevant as both background and evidence of a lack of evidence.

[31] Exhibit L, the email exchange between the National Security and Intelligence Advisor to the Prime Minister, Jody Thomas, to PCO officials in which she requested an alternative threat assessment of the "blockades" from the Clerk (as opposed to CSIS) also falls within both general background and evidence of a lack of evidence as the alternative assessment was not produced.

[32] The Respondent argues the decision maker in this case is the Governor in Council (GIC), and not any individual minister or a collective of ministers, and that Cabinet cannot qualify as a federal board, commission or other tribunal under section 18.1 of the *Federal Courts Act*. The Respondent argues the GIC convened on February 14 and 15, 2022 and made the orders that are the subject of the Applications separately from Cabinet, which met on February 13, 2022. The Respondent submits that even though other actors were involved in the general matter of whether to invoke the *Act* (such as the Incident Response Group (IRG), Cabinet, the Prime Minister, the Clerk of the Privy Council, etc.), none of those government actors were the decision-maker for the purpose of judicial review under s 18.1 of the *Federal Courts Act*. None of the exhibits to the Zweibel affidavit were in front of the decision maker, especially not those constituting transcripts or summaries of the testimony given to the POEC, that is Exhibits C, D, G, J, K and I.

[33] With respect to Exhibits A, B and L, the Respondent argues that the Court cannot assume that documents prepared for the purpose of individual consideration and use by a single minister were brought before or considered by the collective. Moreover, these three exhibits were not before Cabinet, as they were sent by email the day after the Cabinet meeting.

[34] In *CCF 2022*, I stated that while the Respondent's position regarding the decision-maker was constitutionally correct, it ignores the reality that the Cabinet was the decision-maker responsible for the declaration of the Emergency Proclamation and subsequent regulations. In my view, the Respondent's attempt to distinguish the Cabinet from the GIC is dissociated from constitutional convention and the practical functioning of the executive. Decisions of the GIC are *de facto* made by Cabinet and not by the GIC itself. To conclude otherwise would effectively prevent any Court from reviewing materials relied upon by the Cabinet in making its decisions under any circumstances, even when confidentiality under *CEA* s 39 was never invoked.

[35] I note that in *TWN* at para 19, the Federal Court of Appeal had deemed the terms "Cabinet" and "Governor in Council" to be interchangeable in its discussion of the effect of *CEA* s 39:

> Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed.
>
> [emphasis added].

[36] And as stated by the late Professor Peter Hogg:

> "[m]odern statutes […] always grant powers to the Governor General in Council […] when they intend to grant powers to the cabinet […] in the certain knowledge that the conventions of responsible government will shift the effective power into the hands of the elected ministry where it belongs": Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 1:14, Convention and law [Hogg]. Thus, "[w]here the Constitution or a statute requires that a decision be made by the "Governor General in Council" […] [t]he cabinet (or a cabinet committee to which routine Privy Council business has been delegated) will make the decision, and send

> an “order” or “minute” of the decision to the Governor General for signature (which by convention is automatically given): Hogg at § 9:5, The Cabinet and the Privy Council [emphasis added].

[37] In this instance, the Applicants submit, Exhibit D, the POEC testimony of the Clerk and Deputy Clerk, is particularly important to demonstrate that the *de facto* decision-maker, Cabinet, delegated the final decision to the Prime Minister. The Invocation Memorandum, Exhibit B, was sent directly to the Prime Minister (as shown in Exhibit A), to whom Cabinet delegated the decision-making authority. I do not accept the Respondent’s argument that the memorandum was not before the decision-maker or that it should be discounted because it was only “for the purpose of individual consideration and use by [a] single minister”. As the Applicants submit, the Prime Minister was the *key* minister, Chair of the Cabinet, and had consulted the First Ministers, representing the Governors in Council of the Provinces, as s. 25 of the *Act* required, before the formal proclamation was submitted and signed. In my view, the Invocation Memorandum is essential to understanding the decision making process.

[38] Exhibit E was sent in response to an inquiry from the Minister of Public Safety, therefore the Moving Parties argue, and I agree, it is reasonable to infer that it was before the Minister who then made key submissions to Cabinet.

[39] The Transcripts and witness summaries (Exhibits C, D, G, H, I, J and K) were clearly not before the decision-maker. However, as the Applicants contend, they provide necessary context. Exhibits C and D explain the development and use of the Invocation Memorandum (Exhibit B), and Exhibit G explains how and why the Policing Plan was not considered by the decision-

maker. Additionally, Exhibits H, I, J and K reference information that was before the IRG, the Cabinet committee that played a major role in the process, and is admissible on that basis.

[40] The Respondent argues that allowing into evidence recollections of events provided by the Prime Minister, the Clerk and other witnesses, months after the Orders in Council were made is contrary to the purpose of a judicial review, which aims to review the reasonableness of a decision at the time it was made. However, as the Applicants note, the Respondent had an opportunity to challenge the accuracy of any of the testimony before the POEC or to correct any errors if necessary and did not do so. I agree with the Applicants that any discrepancy the Respondent may wish to raise between the witnesses' sworn recollections and what actually transpired goes to weight and is not a bar to admissibility.

[41] The Respondent contends that the evidence goes beyond providing "general background information to assist in understanding the issues relevant to the judicial review". In *Bernard,* at para 23, Justice Stratas described the background information exception as entirely consistent with the rationale behind the general rule. The background information, he stated, is not new information going to the merits; rather it is a summary of the evidence relevant to the merits that was before the merits decider. The exception assists the "Court's task of reviewing the decision by identifying, summarizing and highlighting the evidence most relevant to that task" (*Bernard*, at para 20). In my view, that principle applies to the evidence in question.

[42] The Respondent submits the evidence does not fall into the second recognized exception permitting new evidence highlighting the complete absence of evidence before the decision

maker, as it argues this exception covers rare situations where a key finding is "unsupported by any evidence at all", not situations where there is evidence but a party wishes there were more. The Applicants argue that this is too narrow an interpretation as a decision can be shown to have been unreasonable because it was made without sufficient evidence. Exhibit L is admissible, they submit, because it highlights that the decision-maker reached conclusions without sufficient evidence as CSIS had concluded there was no threat to the security of Canada for the purposes of section 2 of the *CSIS Act* (as shown in Exhibit H, I and K). Exhibit L is evidence that an alternative threat assessment was never prepared.

[43] In *Bernard*, at para 24, Justice Stratas described the second exception as providing a means for a party to tell the reviewing court not what is in the record but what cannot be found there. The evidence may, therefore, support a finding that the decision is unreasonable. In this instance, the evidence points to what Cabinet did not consider in making its decision.

[44] The Invocation Memorandum, disclosed to the POEC with *CEA* s 39 and solicitor-client privilege redactions, states that "[a] more detailed threat assessment is being provided under separate cover." The Applicants contend that the evidence will establish that this was never done. I agree that the evidence is admissible for that purpose.

[45] The Respondent argues the Moving Parties' proposed evidence has been "selectively chosen" to support their arguments on the merits. It was open to the Respondent to put forward the full record before the decision-maker or to adduce responding records based on the evidence

before the Commission if it felt that the Applicants were cherry picking what best supported their cases. It chose not to do so.

C. *Preliminary requirement two: the evidence is relevant*

[46] The Moving Parties submit that the POEC evidence is relevant to key questions before this Court such as whether Cabinet had reasonable grounds to declare a public order emergency under section 17 of the *Act*.

[47] They contend that the evidence relating to the Recommendations from the Clerk to the Prime Minister is relevant to the issue of whether the determination under section 17 of the *Act* was reasonable, as it illuminates what the Prime Minister considered in making that determination. Further, the evidence relating to the Policing plan is relevant to the issue of whether the situation could have been "effectively dealt with under any other law of Canada", as required by section 3 of the *Act*. Finally, the evidence relating to threat assessments is relevant to the issue of whether there was a "threat to the security of Canada" within the meaning of section 2 of the *CSIS Act*.

[48] The Respondent made no submissions on this specific question.

D. *The Interests of Justice*

[49] The Moving Parties submit they could not have obtained the documents with the exercise of due diligence, arguing that the documents were in the sole possession, power or control of the

Respondent, and were not disclosed in the course of these proceedings. The Moving Parties say they became aware of some of the documentary inputs only when the Government produced them to the Commission or when the witnesses were examined.

[50] To be sufficiently probative, the Applicants submit, the evidence need only to be capable of affecting the result or assisting the Court in determining the application: *Holy Alpha*, at para. 11. In the case at hand, the Moving Parties argue the POEC is not only relevant and probative, but essential to presenting a full and accurate record of the information that influenced the decision maker in invoking the *Act*. They argue that without this evidence the Court will be deprived of information that Ministers, senior members of the public service and high-ranking police and intelligence officers have sworn was provided to the Cabinet.

[51] With respect to the first category (Recommendations from the Clerk to the Prime Minister), the Moving Parties submit the documents will "undoubtedly" assist the Court. Exhibit B, the Invocation Memorandum, went from the Clerk to the Prime Minister and provided advice regarding the invocation of powers under the *Act* and reasons why he should use those powers. In Exhibit C, the Prime Minister himself testified to his reliance on this memorandum confirming that it was "essential to him". In Exhibit D, the Clerk testified to the importance of the memorandum. The Moving Parties thus argue both Exhibit B and C provide necessary background and context concerning Exhibit B.

[52] The RCMP Commissioner's views that the police "had not yet exhausted all available tools" were sent in an email (in Exhibit E) to the Minister of Public Safety's Chief of Staff in

response to a request from the Minister. I agree that it is a reasonable inference that the information was provided to the Minister and through him to Cabinet in the decision making process. I also agree with the Applicants that the Commissioner's testimony, in Exhibit G, will benefit the Court in understanding what policing inputs were before the decision maker.

[53] With respect to the third category, the threat assessment evidence, the Moving Parties argue that Exhibit H, I, J and K show that the Director of CSIS shared his view that the threshold of section 2 of the *CSIS Act* was not met with Cabinet. As noted above, Exhibit L is evidence that a requested assessment was ultimately not prepared.

[54] The Respondent submits, that as a matter of comity the Court should defer to the POEC's jurisdiction and avoid making a decision on partial evidence from a large evidentiary record not before it to avoid the risk of making findings of fact in relation to this selection of evidence that conflict with those of the POEC. The Respondent contends this risk is manifest as the Court does not know whether the POEC will accept or reject the evidence the Moving Parties seek to introduce into this proceeding. The Respondent argues the Applicants are "attempting to create a parallel proceeding in which they ask this Court to render a decision through a different legal and evidentiary lens, but based on a curated selection of evidence".

[55] The Moving Parties argue that granting the motion would not impinge on the POEC's process as the POEC and the Court have different mandates that will remain distinct if the new evidence is adduced. While the mandates overlap to some extent, the POEC's mandate includes examining the political situation that gave rise to the protests and making recommendations

about good policy going forward, while the Court's mandate is whether the invocation of the *Act* was reasonable and consistent with the law and whether the regulations at issue were *Charter* compliant. Additionally, the Moving Parties argue, the *Act* itself was designed with both a public inquiry and judicial review in mind. Comity cannot relieve the Court of its judicial duty, they submit. The outcomes of the POEC and the Court's processes are different as only this Court is able to provide declaratory relief.

[56] In my view, the Court need not fear that it will have an impact on the Commission's mandate. The Court has a duty to hear and rule on the judicial review applications. Its mandate is whether the invocation of the *Emergencies Act* and making of the related regulations were consistent with the law. It overlaps with the Commission's to some extent but that of the Court is narrower even if it may provide forms of declaratory or other relief not open to the Commission.

[57] The legislative history of the *Emergencies Act*, to which the Applicants refer, is clear that judicial review of the reasonableness of invocation was contemplated by Parliament when the statute was enacted. The intent was to ensure that Canadians would have the ability to challenge the decision in court. The Court cannot abdicate that responsibility because the POEC was given a broader mandate and powers under the *Inquiries Act*, which the Court does not have.

[58] The POEC heard from many witnesses over 30 days and received more than 60,000 documents as part of its investigative process, and all this evidence remains before the Commission for its consideration. It must provide its report to Parliament by February 20, 2023. The subsequent hearing of the judicial review applications will have no effect on that process,

and the Court is confident that the Respondent will take pains to advise in its written and oral arguments on the merits of the applications the limits of what findings of fact are open to the Court on the evidence and which are not.

[59] The Respondent points to section 30(10(a)(i) of the *CEA*, and contends that it makes inadmissible any part of a business record made in the course of an investigation or inquiry. Section 30 (1) provides that where oral evidence would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible. Section 30(10(a)(i) limits the scope of that exception to the general principles of admissibility where the record in question is a record made in the course of an investigation or inquiry. The Applicants do not seek to have the evidence admitted as business records but rather that they fall within the principled exception to the hearsay rule as both necessary and reliable. Moreover, the scope of section 30(10)(a)(i) is subject to section 30(11)(b) which reads as follows:

> (11) The provisions of this section shall be deemed to be in addition to and not in derogation of
>
> (a) …
>
> (b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

[60] In my view, the limitation on the business records exception does not apply in these circumstances and the evidence is both necessary and reliable.

E. *Prejudice to the Respondent*

[61] The Moving Parties submit that the POEC evidence will not cause any prejudice to the Respondent, as the documents are all documents the Attorney General had in its possession or control, or documents it could have accessed and provided to the Court with minimal diligence. Additionally, the transcripts and witness summaries became available to the Attorney General at the same time as the Moving Parties, and the witnesses in question were all individuals to whom the Respondent had access and an opportunity to cross-examine during the Commission proceedings. The Respondent made no submission on this question. I am satisfied that the Respondent will suffer no undue prejudice from the admission of this additional evidence.

V. Conclusion

[62] As noted above, judicial review applications are intended to be summary in nature and determined without undue delay. These matters will have been underway for over a year by the time the hearings on the merits will take place. The discretion of the Court to permit the filing of additional material should be exercised with great circumspection. The underlying applications involve questions of significant public importance regarding the first invocation of legislation that grants the Government extraordinary powers to deal with a public emergency. The addition of admissible and relevant evidence to the record would help the Court to understand how that decision was made and whether it was lawful. What weight is to be afforded that evidence remains to be seen. The fact that the testimony of witnesses before the POEC occurred months after the events in question can undoubtedly go to weight unless supported by contemporaneous documentary evidence.

[63] At the outset of these proceedings, only a very limited amount of information selectively chosen by the Government was released in response to the Applicants' Rule 317 response. A broad assertion of Cabinet privilege was imposed on the inputs and records that led up to the invocation of the *Emergencies Act* and making of the related regulations. The *CEA* s 39 privilege claims were relaxed somewhat in July 2022 and more information was made available when the POEC proceedings began.

[64] The Cabinet documents released to the Applicants continue to bear extensive redactions under *CEA* s 39 and to a lesser extent, redactions under *CEA* s 38 and solicitor client privilege claims. The Court was not, of course, privy to the decisions to invoke *CEA* s 39 or solicitor client privilege but did have an opportunity to review and rule on the *CEA* s 38 claims. In doing so, I was satisfied that the claims were for the most part well founded, subject to several substitutions of words or summaries, which I authorized. I have no reason to question the *CEA* s 39 or solicitor client redactions. But, in the result, substantial portions of the Cabinet documents disclosed to the Applicants continue to be redacted.

[65] The evidence which the Applicants seek to introduce on this motion has been "selectively chosen", in the Respondent's words, not to augment the record but to clarify it regarding what Cabinet did and did not consider before invoking the *Emergencies Act*. In my view, this evidence is admissible and relevant and will serve the interests of justice.

[66] As the Applicants contend, the Respondent initially took the position that the record should be limited to the Minister of Public Safety's formal submissions to the Governor in

Council for the issuance of the *Proclamation* and regulations. Subsequently, some of Cabinet's decision-making inputs were disclosed in July 2022 but further information of what Cabinet considered was produced before the POEC. The evidence which I consider to be admissible and relevant will assist the Court in the determination of the applications for judicial review.

VI. Costs

[67] The Parties do not seek costs and none will be awarded.

ORDER

THIS COURT ORDERS that:

1. The Applicants are granted leave to file the Affidavit of Cara Zweibel and attached Exhibits with the exception of Exhibit “F”.
2. No Costs are awarded.

“Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-316-22 AND T-347-22
DOCKET:	T-316-22
STYLE OF CAUSE:	CANADIAN CIVIL LIBERTIES ASSOCIATION v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-347-22
STYLE OF CAUSE:	CANADIAN CONSTITUTION FOUNDATION v THE ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ALBERTA
DATE OF HEARING:	WRITTEN SUBMISSIONS ONLY
AMENDED ORDER AND REASONS:	MOSLEY J.
DATED:	JANUARY 27, 2023

WRITTEN SUBMISSIONS BY:

EWA KRAJEWSKA BRANDON CHUNG	FOR THE APPLICANT CANADIAN CIVIL LIBERTIES ASSOCIATION
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