Freedom Convoy: Disruptive, but not a public order emergency

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The Federal Court of Appeal (FCA) has ruled that Cabinet lacked reasonable grounds to believe that a national emergency existed when it invoked the *Emergencies Act* to counter the "Freedom Convoy" demonstrations. In *Canada (Attorney General) v. Canadian Civil Liberties Association*,[1] the Court found the *Proclamation Declaring a Public Order Emergency*[2] to be unreasonable and *ultra vires.* The FCA also found portions of the resulting enforcement measures to be contrary to the *Charter.*[3] In coming to these conclusions, the FCA confirmed that Cabinet decisions are subject to judicial review, and confirmed the role that statutory prerequisites can have as legal constraints on reasonableness review.

Background

The opening weeks of 2022 saw a series of demonstrations and blockades throughout Canada in relation to Covid-19 public health measures. On February 14, 2022, the Governor General in Council (GIC) declared by Proclamation that it had reasonable grounds to believe a public order emergency existed. GIC then issued the *Emergency Measures Regulations*[4] and the *Emergency Economic Measures Order.*[5] The Regulations prohibited travelling to or providing property to facilitate an assembly that might reasonable by expected to lead to a breach of the peace, or one occurring at designated places such as Parliament Hill.[6] The Order required financial institutions to determine whether they possessed property controlled by "designated persons" and report that information to the RCMP or CSIS.[7]

Applications for judicial review of the GIC's decisions were brought by the Canadian Civil Liberties Association, the Canadian Constitutional Foundation and individuals involved in the protests. The Federal Court found the GIC's decisions to be unreasonable as the Proclamations did not meet the requirements of subsection 17(1) of the *Emergencies Act* and that sections of the Regulations and Economic Order breached the *Charter.* The FCA agreed on appeal.

Cabinet decisions are reviewable

The FCA first considered the relationship between the GIC, which issued the proclamation, and Cabinet, which made the decision to do so. The FCA considered this issue in response to the Federal Court's decision to admit evidence that had been before Cabinet but not the GIC–typically a Court deciding a judicial review is to consider only the record that had been before the decision maker.[8] The FCA concluded that there was no practical distinction between Cabinet and the GIC. By constitutional convention, many decisions of the Governor General are made by Cabinet, including to issue the Proclamation.[9] As the result, the FCA concluded that Cabinet, not the Governor General, was the real decision-maker at issue, and that it should consider the information that was before Cabinet, not only the information that Cabinet had placed before the Governor General.[10] The FCA ruled that the FC did not err in admitted this evidence.[11] In coming to this conclusion the FCA confirmed that decisions of Cabinet can be subject to judicial review.[12]

The proclamation was not reasonable

The FCA's decision highlights that the reasonableness of an administrative decision must be assessed subject to the constraints imposed on the decision-maker by the applicable statutory scheme, as established in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[13]

The *Emergencies Act* authorizes Cabinet to make a proclamation declaring a public order emergency when it has reasonable grounds to believe that a public order emergency exists. The *Emergencies Act* defines a "public order emergency" as a situation that:

1. Arises from threats to the security of Canada as defined in section 2 of the *Canadian Security Intelligence Service Act;* and
2. Is so serious as to be a national emergency, which is defined as an urgent and critical situation of a temporary nature that seriously endangers the lives, health or safety of Canadians, exceeds the capacity or authority of a province to deal with it and cannot be effectively dealt with under any other law of Canada.

The FCA ruled that the *Emergencies Act* does not give Cabinet unconstrained discretion.[14] Instead, the FCA found that the two criteria articulated above are statutory prerequisites that must be met before Cabinet could then declare a public order emergency at its discretion.[15]

While Cabinet has a high degree of discretion to declare a public order emergency, that discretion is only exercised when Cabinet has reasonable grounds to believe that the two objective statutory prerequisites of "threats to the security of Canada" and a "national emergency" are met.

The FCA grounded this finding in the established principle that statutory language constrains both the scope of a decision maker's discretion and the degree of deference owed.[16] Where legislation uses precise language to define the limits of a decision maker's authority, the decision maker's discretion to interpret those provisions is constrained.[17]

In arguing to the contrary, the Attorney General relied on the Public Order Emergency Commission's report, issued on February 17, 2023 (the Commission Report) to assert that Cabinet should be afforded a high degree of discretion in interpreting the *Emergencies Act* prerequisites. In concluding that the threshold for invoking a public order emergency had been met,[18] the Commission Report characterized the *Emergencies Act* as including broad, open-ended concepts such as "threat" and "serious" that leave room for reasonable people to disagree.[19]

The FCA rejected this argument, stating that the Commission's mandate differed from the role of the Court on judicial review.[20] The Commission's task was to inquire into the circumstances that lead to the declaration of a public order emergency, while the Court's task was to adjudicate the lawfulness of the Proclamation.[21]

The FCA further highlighted that the broad concepts in the *Emergencies Act* are particularized through detailed definitions that reference other statutes and include language that has been subject to prior judicial interpretation.[22] Parliament's choice to circumscribe Cabinet's discretion in the *Emergency Act* must be understood against the backdrop of its predecessor statute, the *War Measures Act*.[23] The *War Measures Act* empowered Parliament to make a proclamation similar to the declaration of public emergency under the *Emergencies Act*, but did not precisely define the circumstances justifying such a proclamation.[24]

The FCA noted that Parliamentary debates surrounding the enactment of the *Emergencies Act* showed that the legislature had deliberately included statutory language circumscribing Cabinet's discretion so that courts could judicially review emergency proclamations on an objective basis.[25]

Taken together, these factors led the FCA to conclude that the statutory prerequisites in the *Emergencies Act* operate as objective legal constraints that must be satisfied before Cabinet can use its discretion to issue a proclamation.[26]

In this case, the FCA upheld the Federal Court's finding that Cabinet's decision to issue the Proclamation was unreasonable as neither prerequisite of the *Emergencies Act* was satisfied.

Notably, in the Federal Court's decision, the Judge made a sympathetic statement that he may have agreed to invoke the *Emergencies Act* had he been at the Cabinet table. Canada argued that this demonstrated that the Federal Court improperly assessed Cabinet's decision through the lens of hindsight. The FCA was not persuaded that this statement undermined the Federal Court's findings. Rather, in the FCA's view, it illustrated the point that anyone (even Judges) may err if placed in the circumstances of the Government. Judicial review is not concerned with what a Judge might have done in the circumstances, but whether the decision reached was reasonable in light of the facts and law that were before the decision maker. In this case, the decision was Cabinet's, and the fact that a Federal Court Judge may have agreed to invoke the *Emergency Act* in February of 2022 was irrelevant and did not make the decision reasonable.

1. Threats to the security of Canada

The *Emergencies Act* adopts the definition of threats to the security of Canada from section 2 of the *Canadian Security Intelligence Service Act* (*CSIS Act*). Applying the

modern approach to statutory interpretation, the FCA noted that Parliament expressly chose the *CSIS Act* definition to give the term a settled and consistent meaning.[27] The *CSIS Act* definition of "threats to the security of Canada" has been adopted in nine other federal statutes and subjected to extensive parliamentary scrutiny.[28]

The FCA then applied the presumption of consistent expression, which requires that the term threats to the security of Canada should be given the same meaning across statutes.[29] The *CSIS Act* definition requires a risk of "serious violence"[30] against persons or property. The FCA found that serious violence against persons must involve at least bodily harm as defined in the *Criminal Code*, and serious violence against property must rise to the level of *Criminal Code* offences relating to destruction or damage to property.[31]

The FCA further held that interpreting serious violence to include economic disruptions to critical infrastructure was unwarranted and unreasonable in light of the text, context and purpose of the *CSIS Act* definition.[32] The FCA linked Parliament's adoption of the *CSIS Act* definition to its intent to prevent the recurrence of the excesses and abuses that occurred under the *War Measures Act* by narrowly defining the circumstances in which a public emergency may be declared.[33]

When Cabinet decided to issue the Proclamation, it had very little hard evidence of any actual serious violence or threats of it.[34] Instead, Cabinet's justification focused on the economic impact of the blockades and on speculation as to what might happen if the protests were not brought to an end. In addition, Cabinet was in possession of an assessment from CSIS that the protests did not constitute a threat to the security of Canada. Cabinet had no alternative threat assessment before it.[35] As a result, the FCA concluded that there was no rational evidentiary foundation capable of supporting a reasonable belief that the statutory threshold had been met. In particular, the FCA held that the meanings of "threats to the security of Canada" and "serious violence" do not encompass purely economic consequences or speculative disruption of essential goods and services.[36]

2. National emergency

The FCA further held that Cabinet did not have reasonable grounds to believe that the situation rose to the level of a "national emergency." In making this determination, the FCA noted that the interpretation of "national emergency" must be consistent with the distribution of legislative powers in the *Constitution Act, 1867*.[37] The definition of a national emergency in section 3 of the *Emergencies Act* mirrors the language the Supreme Court of Canada used in the *Anti-Inflation Reference*[38] to describe the emergency branch of the peace, order and good government power. The FCA found that this parallel indicates that Parliament intended Cabinet to declare public order emergencies only sparingly and in the most exceptional of circumstances.[39]

In this case, there was no evidence on the record before Cabinet to suggest that anyone's lives, health or safety was at stake.[40] In addition, the Court found that there was insufficient evidence before Cabinet that the emergency was "national" in scope.

In particular, the FCA noted that most Provinces in consultation had told Cabinet that provincial capacity and authority had not been exceeded, and that invocation of the *Emergencies Act* would be divisive, unconstructive and unnecessary.[41] The FCA found

that Cabinet failed to meaningfully engage with those submissions in its reasons for the Proclamation.[42] Accordingly, Cabinet, on the basis of the record before it, could not reasonably conclude that existing provincial capacity and authority were insufficient to effectively address the situation.[43]

The FCA lastly found that Cabinet lacked reasonable grounds to conclude that the situation could not be effectively dealt with under other laws of Canada.[44] The FCA considered that there were many *Criminal Code* offences that empowered the police to arrest and charge protestors[45] Other Convoy protests outside of Ottawa had been effectively managed under existing legal tools.[46] Cabinet's reasons did not include due consideration of these tools.

Portions of the Regulations and Order breached the *Charter*

The FCA then considered whether the Regulations and Order were contrary to *Charter* sections 2(b), 2(c), and 8.First, the Regulation prohibited anyone from participating in a public assembly that may reasonably be expected to lead to a breach of the peace, prohibited travel to an area where such an assembly was taking place, and prohibited anyone from directly or indirectly providing property to facilitate such an assembly or to benefit a participant. The Court found that these prohibitions breached the *Charter* section 2(b) protection of freedom of expression.

The FCA found that participating in a protest or blockade was a matter of expression.[47] The FCA went on to find that the Regulation criminalized mere attendance at the protests by anyone, whether or not they participated in the violent conduct or otherwise breached the peace. In the FCA's view, the Regulation infringed the expressive rights of protestors who wanted to peacefully convey their dissatisfaction with Government policy.[48] The FCA found that restricting freedom of expression was the Regulations' purpose and effect.[49]

The FCA found that the *Charter*-infringing restrictions were not justified under section 1. More specifically, the Federal Court of Appeal found that there could have been more proportionate means of achieving Cabinet's goals: the restrictions were not geographically restricted,[50] would capture individuals not actively participating in blockades,[51] and could also capture people who were merely present in the area or gave food or water to peaceable protestors.[52] These impacts were not justified.

Second, the Order directed financial institutions to cease dealing with the assets of certain designated persons, as well as to inform CSIS or the RCMP the property the institutions had in their control belong to the designated persons. The Court found the latter provision to breach the *Charter* section 8 protection from unreasonable search.

A search will be reasonable if the enabling law is reasonable, and if the search is carried out in a reasonable manner.[53] The Order did not meet this standard. Searches without a warrant, such as those enabled by the Order, are presumptively unreasonable.[54] The FCA noted that the Order required institutions to provide the police with confidential information of individuals that had been deemed to have committed offences under the Regulation.[55] In the FCA's view, the Order "deputized" the financial institutions but without giving them direction as to how to comply with their obligations to provide

information.[56] The FCA was also concerned that the Order provided the "designated individuals" with no redress mechanism,[57] and "most egregiousl[y]," that the information gathered by the institutions could be shared with the RCMP or CSIS without warrant or prior authorization.[58] These information provisions did more than minimally impair the section 8 protection from unreasonable search and seizure, such that the breach was not justified under *Charter* section 1.

Lastly, the FCA declined to decide an appeal from the FC's ruling that the Regulations did not breach the *Charter* section 2(c) right to "freedom of peaceful assembly."[59] Without agreeing with the FC's analysis, the FCA ruled that the section 2(c) claim was subsumed under the section 2(b) claim such that it was not necessary to make a ruling on that *Charter* ground.[60]

Key takeaways

This important decision has takeaways for both the future use of the *Emergencies Act* and for administrative law in general. These takeaways include:

- Cabinet decisions are subject to judicial review, even where Cabinet is the *de facto* but not formal decision maker. This ensures accountability through the mechanism of Federal Court judicial review (and also applies to Provincial Cabinets).[61]
- Statutory pre-requisites to decision making jurisdiction serve as legal constraints under *Vavilov* reasonableness review. Decisions made without satisfying statutory prerequisites will be afforded little deference and will not be considered reasonable.
- In particular, decision makers considering issues of statutory interpretation are constrained by established meanings of the same or similar language in related statutes.
- Future Cabinet decisions invoking the *Emergencies Act* by proclamation will be reasonable only when Cabinet finds objectively reasonable grounds to believe that a public order emergency exists as defined in the Act.
- Future applications of the *Emergencies Act* should be tailored such that the restrictions imposed reflect the harm being addressed given the significant breadth of the powers available.

Footnotes

[1] *Canada (Attorney General) v. Canadian Civil Liberties Association*, 2026 FCA 6 [*Decision*].

[2] *Proclamation Declaring a Public Order Emergency*, S.O.R./2022-20 (the Proclamation).

[3] Canadian Charter of Rights and Freedoms – Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.).

[4] *Emergency Measures Regulations*, S.O.R./2022-21 (the Regulations)

[5] *Emergency Economic Measures Order*, S.O.R./2022-22 (the Order)

[6] *Decision* at paras 35-37.

[7] *Decision* at para 40.

[8] *Decision* at paras 122-123.

[9] *Decision* at paras 126-135.

[10] *Decision* at paras 138-141.

[11] *Decision* at para 139.

[12] *Decision* at para 141-144.

[13] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*); *Decision* at para 159.

[14] *Decision* at para 171.

[15] *Decision* at para 166-181.

[16] *Decision* at para 173, 180.

[17] *Decision* at para 169.

[18] *Decision* at paras 50, 165.

[19] *Decision* at para 174.

[20] *Decision* at para 175.

[21] *Decision* at para 175.

[22] *Decision* at paras 171, 175

[23] *War Measures Act*, RSC 1985, c W-2; *Decision* at para 176.

[24] *Decision* at paras 129, 177.

[25] *Decision* at para 178.

[26] *Decision* at para 166, 181.

[27] *Decision* at paras 191, 204.

[28] *Decision* at para 191-192

[29] *Decision* at para 203-204.

[30] *Decision* at para187.

[31] *Decision* at paras 200, 206.

[32] *Decision* at para 208.

[33] *Decision* at paras 208, 226.

[34] *Decision* at para 212.

[35] *Decision* at paras 219, 221.

[36] *Decision* at paras 209.

[37] *Decision* at para 247-248.

[38] *Re: Anti-Inflation Act*, 1976 CanLII 16 (SCC).

[39] *Decision* at para 250.

[40] *Decision* at para 242.

[41] *Decision* at para 275.

[42] *Decision* at para 275

[43] *Decision* at para 270.

[44] *Decision* at para 267.

[45] *Decision* at para 254

[46] *Decision* at para 263.

[47] *Decision* at para 335.

[48] *Decision* at paras 341-345.

[49] *Decision* at paras 347-351.

[50] *Decision* at para 371.

[51] *Decision* at para 374.

[52] *Decision* at paras 379-380.

[53] *Decision* at para 437.

[54] *Decision* at para 439.

[55] *Decision* at paras 441-444.

[56] *Decision* at paras 446-450.

[57] *Decision* at para 450.

[58] *Decision* at para 470.

[59] *Decision* at para 482.

[60] *Decision* at paras 502-505.

[61] *Decision* at para 141.

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