Federal Court  Cour fédérale

Date: 20220826

Docket: T-347-22

Citation: 2022 FC 1233

Ottawa, Ontario, August 26, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant/
Moving Party

and

THE ATTORNEY GENERAL OF CANADA

Respondent/
Responding Party

and

ATTORNEY GENERAL OF ALBERTA

Intervenor/
On Application Only

ORDER AND REASONS

I. Introduction

[1] This is a motion by the Applicant, the Canadian Constitution Foundation (the "Applicant" or the "CCF"), arising from its application for judicial review in relation to the *Proclamation Declaring a Public Order Emergency,* SOR/2022-20 [Emergency Proclamation], issued on February 14, 2022 pursuant to s. 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp) (the "Act"). The Emergency Proclamation declared "that a public order emergency exists throughout Canada and necessitates the taking of special temporary measures for dealing with the emergency."

[2] The underlying application for judicial review challenges the lawfulness of the Emergency Proclamation and related measures. In their Notice of Application, the Applicant requested the production of records related to the Emergency Proclamation under Rule 317 of the *Federal Courts Rules,* SOR/98-106 (the "Rule 317 Request").

[3] Some records were initially produced in response to the Rule 317 Request. The Respondent has recently disclosed redacted versions of Cabinet records of discussions that led to the decision to issue the Emergency Proclamation. Portions of the records are redacted under section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*] and other claims of privilege.

[4] On this motion, the Applicant seeks a declaration that the response to its Rule 317 Request is incomplete and serves to immunize the decision from judicial review. It seeks an order directing the Respondent to deliver the items for which Cabinet Confidence has been

claimed in an unredacted form and on a counsel-only basis, subject to undertakings of confidentiality.

[5] With the recent delivery of records by the Respondent, the Court is unable to conclude that the assertion of privilege under section 39 has the effect of immunizing the decision to issue the Emergency Proclamation from judicial review. For that reason, the motion is dismissed. However, the assertion of additional heads of privilege over other portions of the Cabinet records will require further examination by the Court to determine whether those claims are valid.

II. Background

A. *Protests and Government Response*

[6] On January 28, 2022, convoys of trucks and other vehicles from across Canada, entitled the "Freedom Convoy", arrived in Ottawa as part of a protest movement against the federal government's public health response to the COVID-19 pandemic. The protest movement spread to different parts of the country, including to ports of entry such as Ambassador Bridge in Windsor, Ontario and the border crossing in Coutts, Alberta.

[7] On February 10, 2022, Prime Minister Trudeau convened the Incident Response Group ("IRG") in order to address the ongoing blockades across the country. According to an announcement of changes to the structure and mandate of Cabinet committees on August 28, 2018, the IRG is a "dedicated emergency committee that will convene in the event of a national crisis or during incidents elsewhere that have major implications for Canada … the Group will

bring together relevant ministers and senior government leadership to coordinate a prompt federal response and make fast, effective decisions to keep Canadians safe and secure, at home and abroad."

[8] In addition to its meeting of February 10, 2022, the IRG subsequently met on February 12 and 13, 2022. Cabinet also met on February 13, 2022. Over the course of its three meetings, the IRG had what was described as a "robust discussion" of whether to issue a public order emergency: "February 14, 2022 Declaration of Public Order Emergency Explanation pursuant to subsection 58(1) of the *Emergencies Act*" at p. 4 [Section 58 Explanation].

[9] The Emergency Proclamation specified that the public order emergency constituted of:

> (i) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,
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> (ii) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,
>
> (iii) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,
>
> (iv) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

> (v) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians;

[10] The Emergency Proclamation was followed by the issuance of the *Emergency Measures Regulations*, P.C 2022-107, SOR/2022-21 and *Emergency Economic Measures Order*, P.C. 2022-108, SOR/2022-22 [collectively, the "Emergency Regulations"] on February 15, 2022. The three instruments collectively form the decision that is subject to judicial review in the underlying application.

[11] On February 16, 2022, the Section 58 Explanation report was tabled in the House of Commons, together with a motion for confirmation of the Emergency Proclamation. The House of Commons confirmed the motion on February 21. Debate on the motion was also commenced in the Senate; however, the Emergency Proclamation was revoked pursuant to s. 22 of the Act on February 23, 2022. As a direct consequence of the revocation, the Emergency Regulations expired on February 23, 2022, in accordance with s. 26(2) of the Act. The revocation of the Emergency Proclamation took place before the Senate could vote on whether to confirm the motion.

B. *Applications for Judicial Review*

[12] The CCF is a registered charity that brings its underlying judicial review application on the basis of a claimed public interest standing. The organization's stated mission is to protect constitutional freedoms through education, communication, and litigation. The CCF filed a Notice of Application for Judicial Review on February 22, 2022 seeking, with other relief, declarations that the Emergency Proclamation and Emergency Regulations were unlawful.

[13] Similar applications for judicial review are pending before the Court in files T-316-22, *Canadian Civil Liberties Association v Attorney General of Canada* ("CCLA"), T- 306-22, *Canadian Frontline Nurses et al. v Attorney General of Canada* ("CFN") and T-382-22, *Jost et al. v Attorney General of Canada* ("Jost et al.".)

(1) The Rule 317 Request and response

[14] In their Notice of Application, the CCF requested, pursuant to Rule 317, certified copies of the following materials in the possession of the Respondent:

1. The record of materials before the Governor in Council ("GIC") in respect of the *Emergency Proclamation*.

2. The record of materials before the GIC in respect of the *Emergency Measures Regulations*.

3. The record of materials before the GIC in respect of the *Emergency Economic Measures Order*.

[15] On March 15, 2022, the Assistant Clerk of the Privy Council delivered a Record to the Federal Court consisting of:

> -Order in Council: Order directing that a Proclamation be issued, P.C. 2022-0106
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> -Proclamation Declaring a Public Order Emergency, SOR /2022-20
>
> -Order in Council: Emergency Measures Regulations, P.C. 2022 - 0107
>
> -Annexed Emergency Measures Regulations, SOR /2022-21

> -Order in Council: Emergency Economic Measures Order, P.C. 202-0108; and
>
> -Annexed Emergency Economic Measures Order, SOR/2022-22.

[16] Other material before the GIC was withheld on the grounds of Cabinet confidentiality, as the Assistant Clerk's letter asserted that such material was a confidence of the Queen's Privy Council for Canada. This included:

> -Three submissions dated February 2022 to the GIC from the Minister of Public Safety and Emergency Preparedness, one of each of the Emergency Proclamation, the Emergency Measures Regulations and the Emergency Economic Measures Order "including the signed Ministerial recommendation, a draft Order in Council regarding a proposed proclamation, a draft proclamation, and accompanying materials."
>
> -The record recording the decision of the GIC concerning the Emergency Proclamation and the two Emergency Regulations.

(2) First Section 39 Certificate

[17] On March 31, 2022, the Interim Clerk of the Privy Council signed a Certificate claiming confidence of the Queen's Privy Council of Canada in relation to the following materials set out in a Schedule to the Certificate:

> 1) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council directing that a proclamation be issued pursuant to subsection 17(1) of the *Emergencies Act*, including the signed Ministerial recommendation, a draft Order in Council regarding a proposed proclamation, a draft proclamation, and accompanying materials;
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> 2) The record recording the decision of the GIC concerning the Emergency Proclamation, dated February 2022, signed by Council;

> 3) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection l9(l) of the Emergencies Act and concerning emergency measures regulations, including the signed Ministerial recommendation, a draft Order in Council regarding proposed emergency measures regulations, draft regulations, and accompanying materials;
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> 4) The record recording the decision of the GIC concerning emergency measures regulations, dated February 2022;
>
> 5) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection 19(1) of the *Emergencies Act* and concerning an emergency economic measures order, including the signed Ministerial recommendation, a draft Order in Council regarding a proposed emergency economic measures order, a draft order, and accompanying materials.
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> 6) The record recording the decision of the GIC concerning an emergency economic measures order, dated February 2022.

[18] The Interim Clerk determined that the three requested Submissions constituted memoranda the purpose of which was to present proposals or recommendations to the GIC, and therefore came within paragraph 39(2)(a) of the *CEA*.

[19] As for the three requested records, the Interim Clerk determined that they constitute agendas of Council or records recording deliberations or decisions of Council, and thus, come within paragraph 39(2)(c) of the *CEA*.

[20] The Interim Clerk further certified that paragraphs 39(4)(a) – the twenty-year limitation period – and 39(4)(b) – the discussion paper exception - did not apply in respect of the information.

[21] In a letter dated April 4, 2022, the Respondent expressed their position to the CCF, CCLA, CFN and Jost et al. applicants that the Section 39 Certificate bars any disclosure of the requested information. On April 12, 2022, the Respondent filed a Motion to Strike the four applications on the grounds that the applicants lack standing and that their applications for judicial review were moot. On consent, the Respondent's motion to strike will be heard when the merits of the four applications are set down for argument.

(3) Applicant's motion

[22] In this Motion, as filed, the Applicant sought a declaration that the Respondent had delivered an incomplete record in response to the Rule 317 Request by failing to include the following items:

> a. The Minutes of the meetings of the Incident Response Group on February 10, 12, 13, 2022;
>
> b. The Minutes of the meeting of the Governor in Council ("Federal Cabinet") on February 13, 2022; and
>
> c. Electronic records such as, without limitation, emails, texts and other electronic correspondence "reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy" (section 39(2)(d) of the *Canada Evidence Act*).

[23] The Applicant's Written Representations in support of the Motion do not contain any allegations of fact or arguments pertaining to electronic records as described in "c" above, and do not list this request as one of the declarations sought, nor was this raised at the hearing.

[24] The Applicant also sought an Order directing the Respondent to deliver the three sets of items described above pursuant to Rule 318(1) of the *Federal Court Rules,* and Orders to deliver the items listed in the Schedule to the First Section 39 Certificate pursuant to Rules 151 and 152 and/or the plenary powers of the Federal Court under the Common Law, its status as a "court" under s. 101 of the *Constitution Act, 1867* and/or the unwritten constitutional principle of the Rule of Law.

[25] In a related motion filed on April 1, 2022, the Applicant sought to amend its Notice of Application in order to obtain records in relation to the decision dated February 23, 2022 in which the GIC, on the recommendation of the Cabinet, issued the *Proclamation Revoking the Declaration of a Public Order Emergency,* SOR/2022-26 [Revocation Proclamation] which revoked the Emergency Proclamation. Following s. 15(2) of the Act, all orders and regulations made pursuant to the prior declaration were thus revoked.

[26] This Motion and the Motion to Amend the Applicant's Notice of Application were set down for hearing on August 8, 2022, following several postponements due to ongoing procedural steps in the underlying file and the related files, as well as an indication from the Respondent that a further *CEA* s. 39 certificate would be forthcoming. The motions brought by the CCF were scheduled to be heard together with a Motion brought by the CCLA which also pertained to the application of *CEA* s. 39 to the record produced by the Respondent in relation to the Emergency Proclamation.

(4) Delivery of the redacted records

[27] On July 19, 2022, the Respondent delivered redacted minutes of the meetings of the IRG on February 10, 12, and 13, 2022 and of Cabinet on February 13, 2022 to the parties in the four applications. The Chair's annotated and redacted agendas for the IRG meetings were delivered to the parties on July 22, 2022. The documents bear notations that the redactions were made pursuant to privilege claims under *CEA* sections 37, 38 and 39, for claims of solicitor-client privilege and for lack of relevance. The redacted documents were also delivered to the Court and deposited in the public files for each of the applications for judicial review.

[28] In correspondence to the Court on July 22, 2022, the Applicant acknowledged that its motion for a declaration that the Respondent had delivered an incomplete Certified Tribunal Record by omitting the IRG and Cabinet Minutes of February 10, 12 and 13, 2022 was moot following the filing of the materials with the Court Registry.

[29] In light of the redactions to the delivered records, the Applicant sought leave to amend its motion to seek the following remedies:

> 1. An order directing the AGC to deliver unredacted versions of the following materials to the Court Registry under seal forthwith: (a) the items listed in the Schedule to the Section 39 Certificate; (b) the minutes of the IRG meetings held on February 10, 12 and 13, 2022; (c) the minutes of the Cabinet meeting held on February 13, 2022; (d) the Chair's Annotated Agendas for the three IRG meetings held on February 10, 12 and 13, 2022; (e) the Revocation Proclamation CTR (if the Applicant's motion to amend is granted); and (f) the documents listed in the Schedule to the Second Section 39 Certificate (if issued).
>
> 2. The appointment of an *amicus curiae* with full access to these materials, to make *in camera, ex parte* submissions on the merits of the Application.

(5) The Second Section 39 Certificate

[30] On August 4, 2022, the Clerk of the Privy Council signed a second certificate to which was attached a schedule referencing the portions of the documents delivered to the parties and the Court for which Cabinet Confidence and other privileges were claimed. These were the Minutes for the meetings of the IRG and Cabinet on February 10, 12 and 13 and the Annotated Agendas for the IRG meetings of those dates.

[31] The August 4 Section 39 Certificate states that the Clerk had examined the information described in the attached schedule for the purpose of determining whether it constitutes a confidence of the Queen's Privy Council for Canada and whether it should be protected from disclosure under s. 39 of the *CEA.* The schedule consists of a table which identifies the date and type of document, from whom and to whom it was directed, the determination by the Clerk and a description of the information in each document for which s. 39 privilege is claimed. The column under the heading "Determination" states which portions of the documents are within paragraph 39(2)(d) or (e), or both. One entry cites paragraph 39(2)(c). The column describing the information tracks the language of the relevant paragraph of s. 39.

[32] Upon receipt of the Second Section 39 Certificate, the CCLA elected not to proceed with its Motion but requested an opportunity to make submissions during the hearing of the CCF Motion respecting the *CEA* s. 39 Certificates. The Court granted that request. The CCLA made no submissions with respect to the CCF's Motion to Amend. The CFN and Jost et al. applicants and the Attorney General of Alberta, granted intervenor status only with respect to the hearing of the applications, took no part in the hearing of the CCF motions.

III. Issues

[33] The CCF seeks an Order from the Court for the delivery of unredacted copies of any item listed in the Section 39 Certificates on a counsel-only basis and subject to a confidentiality undertaking. It argues that this is the only means by which meaningful judicial review of the decision to issue the Emergency Proclamation can be undertaken through the adversarial process.

[34] In the limited oral argument for which leave was granted, the CCLA supported the CCF motion to the extent that it urged the Court to develop a flexible approach to ensure effective judicial review of decisions made under the Act.

[35] Given the change in the Respondent's position with respect to the materials it was prepared to produce in response to the Rule 317 Request, much of what the CCF sought to achieve with this motion became moot. However, the CCF contends that the annotated agendas and minutes of the IRG meetings and the Cabinet meeting minutes continue to be an inadequate response to its Rule 317 Request due to the extensive redactions of the text of the documents.

[36] It is apparent on the face of the delivered agendas and minutes that there are a significant number of redactions under heads of privilege other than those for which Cabinet Confidence is asserted. In describing each of the records, the Schedule forming part of the Certificate indicates that "[c]ertain portions are within s. 39(2)(c)" or paragraphs (d) and (e) as the case may be. The redactions on each record contain similar notations as well as references to other privilege claims.

[37] The determinative question on this motion is whether the record before the Court is complete. Corollary to that is whether the record as a whole including the delivery of the redacted Cabinet materials has immunized the decision from judicial review.

IV. Legal Framework

[38] The legislative provisions relevant to this motion are Rules 317 and 318 of the *Federal Courts Rules* and sections 37 to 37.3, 38 to 38.15 and 39 of the *CEA.* Only the text of s. 39 will be reproduced here in full. The other provisions can be summarized.

[39] Rule 317 of the *Federal Courts Rules* allows a party to request relevant material in the possession of a tribunal by filing a written request either in a Notice of Application for Judicial Review or separately. “Tribunal” has the same meaning as “federal board, commission or other tribunal” in the *Federal Courts Act*, RSC 1985, c F-7. For the purposes of this proceeding, there is no dispute that it applies to the Federal Cabinet and Privy Council Office. The relevance of the material in question in these proceedings has not been contested. The IRG and Cabinet minutes are relevant and thus producible pursuant to Rule 317, as they provide an account of the collective reasoning process engaged in by members of these two bodies in reaching the decision under review.

[40] Rule 318 sets out a process for dealing with objections to requests under Rule 317. Where a tribunal or party objects to a Rule 317 request, it must inform all parties and the Court of the reasons for the objection. The Court may give directions to the procedure for making submissions with respect to the objection and, after hearing submissions with respect to an

objection, the Court may order that a certified copy or the original of all or part of the material requested be forwarded to the Registry.

[41] Sections 37 to 37.3 of the *CEA* provide a scheme for the making and determination of objections to the disclosure of information on the grounds of a specified public interest. The effect of an objection is to preclude disclosure of the information unless and until permitted by the reviewing court, which may be a provincial Superior Court or the Federal Court.

[42] Objections to the disclosure of information that may be injurious to international relations, national defence and national security are dealt with under sections 38 to 38.15 of the *CEA.* These enactments constitute a comprehensive and self-contained scheme distinct from the s. 37 procedure. In brief, the scheme requires that notice be given to the Attorney General of Canada that information that may be injurious to the three protected national interests may be disclosed in a proceeding, a determination by the Attorney General as to disclosure and, if not disclosed, an application to the Federal Court to determine whether the information may be disclosed and, if so, in what form.

[43] Section 39 of the *CEA* allows a Minister of the Crown or the Clerk of the Privy Council to object to the disclosure of confidences of the Queen's Privy Council before a court. This requires the Clerk or Minister to consider two questions: first, whether the information is a Cabinet Confidence within the meaning of the section; and second, whether it is information which the government should protect taking into account the competing interests in disclosure

and retaining confidentiality: *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 22 [*Babcock*]. The full text of the enactment is as follows:

Confidences of the Queen's Privy Council for Canada	**Renseignements confidentiels du Conseil privé de la Reine pour le Canada**
Objection relating to a confidence of the Queen's Privy Council	*Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada*
39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.	**39 (1)** Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.
Definition	*Définition*
(2) For the purpose of subsection (1), a confidence of the Queen's Privy Council for Canada includes, without restricting the generality thereof, information contained in	**(2)** Pour l'application du paragraphe (1), un renseignement confidentiel du Conseil privé de la Reine pour le Canada s'entend notamment d'un renseignement contenu dans :
(a) a memorandum the purpose of which is to present proposals or recommendations to Council;	**a)** une note destinée à soumettre des propositions ou recommandations au Conseil;
(b) a discussion paper the purpose of which is to present background explanations,	**b)** un document de travail destiné à présenter des problèmes, des analyses ou des

analyses of problems or policy options to Council for consideration by Council in making decisions;

options politiques à l'examen du Conseil;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d);

(f) draft legislation.

f) un avant-projet de loi ou projet de règlement.

Definition of Council

Définition de Conseil

(3) For the purposes of subsection (2), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Pour l'application du paragraphe (2), Conseil s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

Exception

Exception

(4) Subsection (1) does not apply in respect of

(4) Le paragraphe (1) ne s'applique pas :

(a) a confidence of the Queen's Privy Council for Canada that

a) à un renseignement confidentiel du Conseil privé de

has been in existence for more than twenty years; or	la Reine pour le Canada dont l'existence remonte à plus de vingt ans;
(b) a discussion paper described in paragraph (2)(b) **(i)** if the decisions to which the discussion paper relates have been made public, or **(ii)** where the decisions have not been made public, if four years have passed since the decisions were made.	**b)** à un document de travail visé à l'alinéa (2)b), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

V. Analysis

[44] As indicated above, this motion has changed since it was filed several months ago. At the outset, the CCF sought the Court's intervention because the Respondent initially took the position that only what was formally before the Governor in Council with respect to the grounds for invoking the *Emergencies Act* could be disclosed. This did not include the composition of the IRG, any of the information submitted to that committee or to Cabinet leading to the decision to invoke the Act or any record of their deliberations.

[45] The Respondent contended that the record subject to production under Rule 317 consisted solely of the materials delivered to the Court and the parties on March 15, 2022 by the Assistant Clerk of the Privy Council. Other information that was before the IRG and Cabinet, the Respondent asserted, was not part of the record before the GIC as decision maker and was protected as a confidence of the Queen's Privy Council for Canada under s. 39.

[46] The context in which the Court must now consider the motion has been substantially altered by the delivery of the IRG and Cabinet Minutes, the IRG's Annotated Agendas and the issuance of the Second Section 39 Certificate. These developments rendered moot much of what the CCF sought to achieve through the motion, as it acknowledged in its correspondence to the Court on July 22, 2022. The parties now have considerably more information about the record leading to the declaration then they had prior to the delivery of these materials.

[47] The Applicant maintains, however, that the delivered record continues to be unresponsive to its Rule 317 Request due to the redactions in the IRG and Cabinet material. The CCF submits that effective and meaningful judicial review of the decision to invoke the Act can only be achieved through the adversarial process and that this requires unredacted copies of the record to be delivered to the parties on a counsel-only basis with undertakings of confidentiality on their part.

[48] The Respondent argues that, in its entirety, the record is sufficient for meaningful judicial review and that there is no provision in law for the remedy that the Applicant seeks. The CCLA, not a party to the motion but granted leave to make brief oral submissions, argues that as this is the first time that the Act has been invoked since it was enacted in 1981, the Court should craft an innovative and flexible means to conduct judicial review of such decisions going forward.

[49] Having considered the arguments of counsel at the hearing on August 8, 2022, there are several matters the Court considers it must address before reaching a conclusion on this motion. These are whether the distinction in law between the Federal Cabinet and the Governor in

Council has a bearing on the decision to be made, and the effect of the other claims of privilege raised by the Respondent in addition to the s. 39 claims.

A. *Is the distinction between Cabinet and the Governor in Council relevant to this motion?*

[50] The Respondent argues that the material requested under Rule 317 must come from the "federal board, commission or other tribunal" responsible for the impugned decision, and that the Applicant's Rule 317 Request pertained to material that was before the GIC as the 'tribunal' pursuant to s. 2 of the *Federal Courts Act* and not the Cabinet. This argument is based on the constitutional distinction between the GIC and the Cabinet whereby the legal powers of the state are vested in the GIC as the formal executive and decision-maker, while the Cabinet is the forum for political deliberation.

[51] The Respondent's position is supported by s. 13 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, which defines the GIC, not Cabinet, as a legal institution, and by the language of s. 39 of the *CEA*, which acknowledges the distinction between the bodies. See also *British Columbia (Attorney General) v Provincial Court Judges Association of British Columbia*, 2020 SCC 20 at paras 95-97 [*BC Judges*], citing Nicholas d'Ombrain, "Cabinet Secrecy" (2004), 47(3) *Canadian Public Administration* 332, p 335.

[52] In the Court's view, while this argument is constitutionally correct, it ignores the reality that the Cabinet, informed by the discussions before the IRG, was the decision maker responsible for the declaration of the Emergency Proclamation and subsequent regulations.

[53] The Respondent's attempt to distinguish the Cabinet and IRG from the GIC is dissociated from constitutional convention and the practical functioning of the executive.

[54] In *Tsleil Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 19 [*TWN*], the Federal Court of Appeal deemed the terms 'Cabinet' and 'Governor in Council' to be interchangeable in its discussion of the effect of s. 39 of the *CEA*:

> 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].

[55] As noted by 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].

[56] Decisions of the GIC are always *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 under any circumstances, even where confidentiality under s. 39 is never invoked. Thus, where s. 17(1) of the *Emergencies Act* authorizes the GIC to declare a public order emergency, this must be understood as conferring power upon Cabinet and/or its committees.

[57] The CCLA, in its written argument, questioned whether the IRG was a Cabinet Committee. The CCF did not take that position when it was put to them directly during the hearing. Indeed, it argued the contrary as necessary to support their application.

[58] While I don't consider it necessary to decide the question, it seems to me that the proposition that the IRG is not a Cabinet Committee is dubious given its composition and mandate. It is clear that the IRG's consideration of reports about the situation across the country and attempts to deal with it fed directly into the decision made by Cabinet on February 13, 2022 to invoke the Act. In that respect, it was no different from other committees of Cabinet that consider issues, options and recommendations before they are presented to Cabinet for decision.

[59] Those in attendance at the IRG meetings, in addition to Ministers, were all senior federal public servants. The IRG was not a consultative body involving third parties outside the government as the CCLA initially thought it might be. This could, of course, have been made clear at the outset of these proceedings had the Respondent been prepared to disclose the composition of the IRG.

[60] While the Respondent maintained its argument about the legal distinction to be made between Cabinet and the GIC at the hearing, the delivery of the redacted materials rendered that legal distinction immaterial.

B. *Scope of the motion*

[61] As noted above, the CCF seeks an order from the Court for the delivery of unredacted copies of any item listed in the Section 39 Certificates on a counsel-only basis and subject to a confidentiality undertaking. The Second Section 39 Certificate describes each of the Cabinet and IRG minutes and the IRG annotated agendas and the privilege claims over the content of each.

(a) *Relevance of the Cabinet and IRG minutes and IRG Annotated Agendas.*

[62] Material requested under Rule 317 must be relevant to the application, as determined with reference to the grounds stated in the Notice of Application: *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41 at para 26, citing *TWN* at para 109.

[63] The IRG and Cabinet minutes are relevant and thus producible pursuant to Rules 317 and 318, as they provide an account of the collective reasoning process engaged in by members of these two bodies in reaching the decision under review. The IRG played a central role in the Cabinet's decision to issue a declaration of public order emergency, as indicated by the Section 58 Explanation, which states that this decision was informed by "robust discussion" at the meetings of the IRG.

[64] The reasonableness of the decision remains to be determined at a later date. Without the inclusion of the IRG and Cabinet minutes, redacted as they are, the Court may have concluded that the record was incomplete.

(b) *Request for production of electronic records*

[65] As noted above, the Applicant's Written Representations do not contain any allegations of fact or arguments pertaining to electronic records as referenced in the Rule 317 Request, and do not list this request as one of the declarations sought. Unlike the Cabinet and IRG minutes, the existence of the requested electronic records is speculative and their scope undefined. The reference to electronic records lacks the requisite degree of specificity for a request under Rule 317: *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 at paras 10-11.

[66] Furthermore, the Applicant's written submissions have not established the relevance of these electronic records to the decision of the GIC, as the enactment of the Emergency Proclamation was a decision taken by Cabinet as a whole and not by any ministers in particular. The relevance of electronic communications of individual ministers cannot be deemed self-evident in light of the convention of cabinet solidarity and the collective responsibility for the decisions of the cabinet: Hogg at § 9:7, Ministerial responsibility.

(c) *Effect of the redactions*

[67] The CCF wishes to have its counsel review unredacted copies of the delivered materials in order to support its application for judicial review. As noted above, the materials delivered to

the parties by the Respondent are subject to redactions pursuant to privilege claims under sections 37 and 38 of the *CEA*, claims of solicitor-client privilege and lack of relevance to the underlying application, each of which have to be taken into consideration in addition to the s. 39 Cabinet Confidence claims.

[68] The focus of argument on the motion has been on the s. 39 redactions, but a considerable amount of the redacted text appears to fall within the scope of the other claims of privilege. For example, in the minutes of the IRG for February 10, 2022, identified as Document 1-22IRG-C, six of the ten pages bear notations indicating that redactions were made pursuant to one or more of the three statutory provisions and, in some instances, solicitor-client privilege. Some redactions in the document are exclusively claimed as Cabinet Confidences; other notations cite s. 39 as well as sections 37 and 38 and solicitor-client privilege.

[69] The annotated agenda for the IRG meeting of February 12, 2022 is the sole document bearing redactions attributed exclusively to s. 39. Solicitor-client privilege is cited as the basis for redactions in four documents overlapping with s. 39 and s. 38 claims. Section 38 is claimed in six documents, often overlapping with s. 39 claims. Two entire pages of the Cabinet Minutes are redacted solely under s. 38. Section 37 claims appear on three documents, notably the IRG Minutes of February 12, 2022, in which pages 11-13 are entirely redacted under that head of privilege.

[70] Aside from the blocks of text which are redacted exclusively under just one of the privilege grounds, it is unclear from the notations on the documents where demarcations, if any,

lie between claims of Cabinet Confidence and the other heads of privilege. It is not clear whether there is duplication of the claims over the same redacted text or to what extent the Cabinet Confidence claims to portions of the text could be severed from the text subject to other claims.

[71] At the hearing, the Court drew the attention of counsel to the difficulty this presented particularly with reference to what is often referred to as "national security privilege" under s. 38 of the *CEA*. If information is redacted solely on the basis of a s. 38 claim, there is a well established procedure for dealing with such claims upon an application to the Federal Court.

[72] I consider that it is necessary to comment further on the other privilege claims and the effect they have on this motion and the underlying proceeding for the benefit of the parties in each of the four applications before the Court and for any non-legally trained readers of these reasons.

[73] As for the few lines redacted for lack of relevance, the Court has no reason to question that exclusion by the Clerk. There is no allegation of bias or prejudice on the part of the Clerk or evidence of anything other than a good faith effort to apply the law to the text. Moreover, the location and juxtaposition of the relevance redactions to the other text does not suggest that they are of any significance.

(2) Section 37 Public Interest Privilege

[74] Relevant information will generally be subject to production and admissible as evidence unless there are compelling grounds for its exclusion. One of these grounds, which has long been

recognized at Common Law and in the *CEA*, is the concept of Public Interest Privilege. While the term is undefined, it has been found to apply to various types of information which are deserving of protection, including at Common Law prior to the enactment of section 39. Where a s. 39 certificate has not been issued, the Common Law will still apply to such information: *Parker v Canada (Attorney General)*, 2021 FC 496 at para 31. Moreover, the list of possible public interests the Courts may recognize is not closed: *Canadian Human Rights Commission v Northwest Territories*, 2001 FCA 259 at para 8.

[75] In the present circumstances, where two Section 39 Certificates have been signed, the Court may infer that the claims of privilege under s. 37 which appear in the notations on the delivered materials refer to public interests other than those in relation to Cabinet Confidences. However, what they may be is not apparent.

[76] Public interest immunity "prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure". This requires a careful balancing of the competing public interests, which must be weighed with reference to a specific document in the context of a particular proceeding: *BC Judges* at paras 99-100.

[77] The main factors to be considered by a Court weighing the competing public interests were set out by the Supreme Court in *Carey v Ontario*, [1986] 2 S.C.R. 637 at pp. 670-673:

(1) the level of the "decision-making process";

(2) the "nature of the policy concerned";

(3) the "particular contents of the documents";

> (4) the timing of disclosure;
>
> (5) the "importance of producing the documents in the interests of the administration of justice"; and
>
> (6) whether the party seeking the production of the documents "alleges unconscionable behaviour on the part of the government"

[78] When presented with an objection to the claim of a specified public interest under s. 37, the Court may find that the specified interest is not engaged at all, in which case the information may be ordered disclosed: *Goguen v Gibson*, [1983] 1 F.C. 872. The Court may also prohibit disclosure of the information, authorize disclosure of all or part of the information with or without conditions, or authorize disclosure of a summary of the information or a written admission of facts relating to the information: *Khan v Canada (Minister of Citizenship and Immigration*), [1996] 2 F.C. 316 at para 25.

[79] If the Court does not order disclosure pursuant to subsection 37(4.1) or subsection 37(5), then the Court shall prohibit disclosure of the information pursuant to subsection 37(6): *Wang v Canada (Public Safety and Emergency Preparedness),* 2016 FC 493 at para 38 [*Wang*].

[80] There is no specific process to follow to determine s. 37 objections. The Federal Court has held that it has full discretion to choose its own procedure based on the circumstances before it: *Canada (Attorney General) v Chad*, 2018 FC 319 at para 10 [*Chad*]. In choosing its procedure, the Court determined that it should consider the nature of the public interest at stake, the factual and statutory context within which the objection to disclose information is made, as well as the sensitivity of the redacted material: *Chad* at para 10.

[81] In *Wang*, Justice Mactavish stated the following at para 39:

> When faced with an application under section 37 of the *Canada Evidence Act*, the Court must first decide whether the application can be dealt with based upon the affidavit material filed with the Court, or whether an "apparent case" for disclosure has been made out requiring that the Court to examine the evidence in question in order to determine the validity of the privilege claim: *Khan*, above, at para. 24.

[82] As has been stated numerous times by the Supreme Court of Canada, the open court principle embodies the importance of ensuring that justice is done openly and is a hallmark of a democratic society: *Vancouver Sun (Re)*, 2004 SCC 43 at para 23. As such, court proceedings should presumptively be a matter of public record: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1361.

[83] The filing of the Respondent's objection to production under Rule 317 and delivery of the redacted materials with notations indicating claims of public interest privilege can be construed as an application under s. 37 of the *CEA*. There may well be adequate explanations for why the information in question has been withheld, but the Court is, at present, not aware of them. The Court has no evidence before it indicating what the specific public interest is in relation to the material redacted under that head of privilege or what the justification may be for protecting it.

[84] In the Court's view, the CCF has made out an "apparent case" for disclosure of the information redacted under this claim subject to further consideration. Thus, in order to determine the validity of this privilege claim, the Court considers that it may have to review the material in an unredacted form with the benefit of evidence tendered by the Respondent to

explain the justification for the claims: *Chad* at paras 15 and 40. This may require the filing of unredacted versions of the records under seal in the Court and a closed hearing.

(3) Section 38: International Relations, National Defence and National Security

[85] As noted above, objections to the disclosure of information pertaining to international relations, national defence and national security are dealt with under the procedures set out in sections 38 to 38.15 of the *CEA.* The scheme is triggered by notice to the Attorney General of Canada of the possible disclosure of potentially injurious or sensitive information. The effect of the notice is to preclude disclosure of the information, unless and until disclosure is authorized by either the Attorney General or by a designated judge of the Federal Court on application under the scheme. The application may be brought by the Attorney General or by the person seeking disclosure of the information. While the Attorney General has the right to make *ex parte* representations, the Court endeavours to conduct as much as the proceedings as possible in public in keeping with the open court principle.

[86] Given that the Respondent relies on claims of privilege under section 38, it may be that the Attorney General has received notice and has elected to prohibit disclosure on the basis that it would cause injury to one or more of the three protected national interests. The Respondent properly notes that there is no application under s. 38 before the Court. That can be rectified by the Attorney General filing an application with supporting affidavit evidence. In such circumstances, the Attorney General has a right to be heard with respect to such a claim on an *ex parte* and *in camera* basis. That can be arranged to be heard on an expedited basis in the Court's secure premises.

(4) Solicitor-client privilege

[87] Portions of the redacted text in the delivered materials indicate that they are subject to solicitor-client privilege claims. While some of these appear to be isolated references, others are interspersed with the other claims.

[88] Counsel will understand that information subject to solicitor-client privilege is very rarely disclosed. For the benefit of other readers of these reasons, I think it necessary to elaborate on this and how it applies to this case.

[89] The privilege is as close to absolute as possible to ensure public confidence. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis: *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 36.

[90] Solicitor-client privilege is essential to the effective administration of justice and aims to protect the confidential relationship between lawyer and client. Save for limited exceptions inapplicable here, such information is permanently protected from disclosure unless expressly waived by the client: *Descôteaux et al. v Mierzwinski*, [1982] 1 SCR 860 at para 398; *Blank v Canada (Minister of Justice),* 2006 SCC 39 at para 26.

[91] While solicitor-client privilege can be restricted or overridden by statute, such legislation must be interpreted restrictively. As stated by Justice Binnie in *Privacy Commissioner of Canada v Blood Tribe Department of Health,* 2008 SCC 44 at para 11 [*Blood Tribe*]: “The privilege

cannot be abrogated by inference. Open textured language governing production of documents will be read not to include solicitor-client documents." That would include production under Rule 317.

[92] Disclosure of privileged solicitor-client communications, whether under common law or statutory exceptions, will only be ordered where absolutely necessary: *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para 20.

[93] However, not everything that is done by a government lawyer on behalf of a client attracts solicitor-client privilege. Policy advice, for example, does not fall within the scope of the privilege.

[94] The Court may reasonably infer from the circumstances that the presence of government lawyers at the meetings of the IRG was to provide Ministers with confidential legal advice. There is no allegation before the Court to show that the privilege was not properly claimed. Absent that, there is a presumption of fact that any communications between the government lawyers and the members of Council would be considered *prima facie* confidential in nature: *Blood Tribe* at para 16.

[95] Nonetheless, it would be preferable to have confirmation of that fact in writing from a government lawyer with personal knowledge of the circumstances in which the communications took place and of their nature as privileged communications.

(5) Section 39: Confidences of the Queen's Privy Council for Canada

[96] As noted above, there have been two section 39 certificates signed in this matter: that of the Interim Clerk signed on April 1, 2022, attaching a Schedule describing the materials to which it applied, and the Certificate signed by the Clerk (confirmed in the position in the interim) on August 4, attaching a Schedule in the form of a table describing the information to which it applied in the materials delivered on July 19 and 22, 2022. Both certificates appear on their face to conform to the formal requirements set out by the Supreme Court of Canada in *Babcock* at para 28.

[97] While the second certificate was signed following the delivery of the redacted materials to the parties in the four applications, nothing turns on that in my view. This is not a case where the Respondent has sought to retrospectively claim protection for already disclosed documents. Moreover, the Second Section 39 Certificate is clear that it applies only to "portions" of the delivered documents.

[98] The Applicant submits that in the case of judicial review of Cabinet decisions, material put before Cabinet such as ministerial submissions and draft proposals are not excluded from the reach of Rule 317. In support of this, the Applicant relies on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 87 [*Vavilov*] where the Supreme Court emphasized the importance of considering the reasoning process leading to the decision in question. The Applicant draws an analogy to case law pertaining to municipal city councils to assert that the record of a Cabinet decision must also include the minutes that memorialize "debate [and] deliberations" among its members in reaching its decision: *Vavilov* at para 137, citing *Catalyst*

Paper Corp v North Cowichan (District), 2012 SCC 2 at para 29. The Applicant argues that it is vital that the full record be disclosed to the Court, as reasonableness review requires that formal reasons for a decision be read "in light of the history and context of the proceedings in which they were rendered" – i.e., the record: *Vavilov* at para 94.

[99] The analogy which the Applicant draws between the records of collective decision making by municipal city councils and decisions made by the Queen's Privy Council for Canada fails to take into account the strong protections traditionally afforded cabinet privilege under the common law as well as under the *CEA*. The fact that both municipal councils and the Cabinet are multi-member deliberative bodies cannot diminish the importance afforded to Cabinet privilege under our system of law. As stated by the Supreme Court in *Babcock* at para 15, "Cabinet confidentiality is essential to good government."

[100] That said, under s. 17(1) of the *Emergencies Act*, the bodies "exercising jurisdiction or powers conferred by or under an Act of Parliament", within the meaning of s. 2 of the *Federal Courts Act*, are the Cabinet and the IRG, even though the Act refers explicitly only to the GIC. Therefore, the record produced in response to the Applicant's Rule 317 Request had to include materials before the Cabinet and IRG, subject or not to a *CEA* s. 39 or other privilege claim. Without such information, a gap in the record would persist, as it would lack any information about the reasoning process that led to the issuance of the Emergency Proclamation, and thus prevent the Court from properly reviewing the impugned decision.

[101] The Respondent has avoided a declaration to the effect that it had produced an incomplete record by belatedly delivering the IRG and Cabinet minutes and agendas. This would have been in keeping with the Court's plenary power to control the integrity of its own processes: *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at para 36. In *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at para 6 [*Lukács*] the Federal Court of Appeal held that plenary powers allow a court to ensure that materials that are part of the record can be produced to the applicant, even in the face of an objection under Rule 318(2).

[102] As noted by Mr. Justice Stratas of the Federal Court of Appeal in *Lukács* at para 7:

> […] If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paras. 314-15 (dissenting reasons, but not opposed on this point).

[103] However, as noted in *Lukács*, at para 15, in fashioning a remedy pursuant to plenary powers, the imperative of meaningful judicial review of administrative decision-making must be reconciled with the protection of any legitimate confidentiality interests. That is a key consideration in the present context.

[104] The Applicant submits that the Court should order the Respondent to deliver any items listed in the Certificates on a counsel-only basis and pursuant to a confidentiality undertaking

notwithstanding s. 39. The Applicant argues that the Court's plenary power authorizes it to privately review the materials shielded by the Certificates, in order to exercise its supervisory jurisdiction over the federal executive. The Applicant also argues that the adversarial process, which is essential to effective judicial review, requires in this context that the materials also be shared with counsel subject to their undertaking not to further disclose the information.

[105] The Applicant relies on *Canada (Citizenship and Immigration) v Canadian Council of Refugees*, 2021 FCA 72 at para 99 [*STCA*], for the proposition that materials subject to s. 39 claims may be privately reviewed by the court in order to exercise its supervisory jurisdiction over the Cabinet, and further argues that the Federal Court of Appeal rejected the existence of an absolute and unqualified right to assert a s. 39 privilege, even if immunization of decision-making results.

[106] The Applicant draws a distinction with two decisions that took a more restrictive approach to the disclosure of materials protected by Cabinet privilege, *Babcock*, above, and *Singh v Canada (Attorney General)*, [2000] 3 FC 185 [*Singh*]. The Applicant stresses that, in those two cases, the materials over which Cabinet privilege was asserted were separate from the decision under review, as a decision of the Cabinet was not at issue in either case. Neither of the two decisions, the Applicant argues, may be read as precluding the mechanisms elaborated by the Federal Court of Appeal in *STCA* for reconciling confidentiality with the supervisory jurisdiction of the courts; namely, summaries, the appointment of a special advocate, and the viewing of documents on a counsel-only basis accompanied by an undertaking of confidentiality.

[107] In *Singh*, the Applicant submits, the Federal Court of Appeal left open the possibility at para 45 that s. 39 could be rendered inapplicable, citing a statement in the Appellant's factum that "Parliament cannot authorize the Executive to shield its own conduct from constitutional scrutiny". At para 46, the Court stated: "As a general proposition, this argument has considerable force and must be seriously considered."

[108] The Applicant contends that the Court should provide counsel-only access to the items listed in the Section 39 Certificates to ensure that the reasons for the declaration are tested in an adversarial proceeding. Neither the appointment of an *amicus* to review the protected materials or the disclosure of a summary, the other mechanisms suggested in *STCA*, would be appropriate in the Applicant's view. Counsel-only access to the materials, the Applicant argues, would be consistent with the strong presumption to maintain the essential features of the adversarial process.

[109] The Respondent asserts that the disclosure of information certified under s. 39 of the *CEA* to the Court or to parties is prohibited, as supported by the plain language of s. 39 and by the policy rationales that support non-disclosure – candour (*Babcock* at para 18) and solidarity (*BC Judges* at paras 95-96). The Respondent relies on *Babcock* at paras 54-57 to argue that the unwritten principles of the rule of law, independence of the judiciary, and separation of powers must be balanced against parliamentary supremacy. The Respondent notes that the confidentiality of the executive branch's decision-making process is fundamental to the Canadian system of representative democracy based on the rule of law, responsible government, and the division of powers.

[110] Ultimately, the Respondent submits, the convention of Cabinet solidarity renders the views of individual Cabinet members irrelevant. It is the reasonableness of the collective decision that is to be reviewed by the Court. The issuance of a s. 39 certificate does not impugn the integrity of the Court's process as the issue of production is resolved by the Clerk, or the Minister as the case may be, who is responsible for balancing the public interests – not the Court: *Babcock,* at para 32. A court order to produce s. 39 confidences for review by the Court or for inspection by applicants' counsel to "ensure that it is tested in an adversarial proceeding" would defeat the purpose of s. 39 and would amount to an error in law.

[111] Section 39 has typically been understood as constituting an absolute bar to disclosure of Cabinet Confidences before a reviewing Court: *Babcock* at para 23. The imperative language of the enactment provides that where s. 39 is engaged, "disclosure of the information shall be refused without examination or hearing of the information by the court, person or body". As noted by the Federal Court of Appeal in *TWN* at para 27:

> The role of this Court in reviewing a section 39 certificate is limited. We must refuse disclosure of the information covered by the certificate "without examination or hearing of the information": *Babcock* at para. 38. We only review to ensure that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised": *Babcock* at para. 39, citing *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[112] The jurisprudence pertaining to s. 39 has also held that its "draconian" cloaking of Cabinet Confidences does not offend the rule of law, the separation of powers, or the independence of the judiciary, nor does it impermissibly invade the core jurisdiction of the superior courts: *Babcock* at paras 39, 57, 60; *Singh* at paras 25-44.

[113] The CCF, supported in this regard by the CCLA, argues that the review of a decision having an impact on the balance of powers of Canadian federalism and on civil liberties as significant as the invocation of the Act requires that a reviewing Court adopt a more expansive approach to guarantee that such a decision is subject to meaningful judicial oversight and review. As noted by the Federal Court of Appeal in *STCA* at para 104, courts conducting judicial review "are in the business of enforcing the rule of law", and thus ensuring the accountability of the executive to legal authority. The Court recognized in *STCA* that there could be exceptional circumstances not contemplated in *Babcock*, in which the invocation of a s. 39 certificate is to immunize public decision-making from review.

[114] Justice Stratas stated at para 102 of *STCA* that "[t]he complete barring of review by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law." Courts must be "alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making": *STCA* at para 106.

[115] From these cases, it can be concluded that the determinative question is whether the s. 39 Certificate immunizes the impugned decision from judicial review in a manner inconsistent with the rule of law. It is noteworthy that a s. 39 certificate protecting information from disclosure was overridden in none of the cases cited by the Applicant. Moreover, the Federal Court of Appeal in *STCA* did not state that any of the three proposed disclosure mechanisms described

would apply to override the language of s. 39 absent a finding that the government had taken steps to immunize the decision from review.

[116] Concerns about immunization of administrative decision-making come to the fore where "the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever—*i.e.*, there is not even a summary or hint of what was before the administrative decision-maker—or the record is completely lacking on an essential element": *TWN* at para 78. That is not the case in the present circumstances.

[117] The Federal Courts have quashed administrative decisions where the "evidentiary record—even if bolstered by permissible inferences and any evidentiary presumptions—disables the reviewing court from assessing reasonableness under an acceptable methodology": *TWN* at para 79, citing *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 137; *Canada v Kabul Farms Inc*, 2016 FCA 143 at paras 31-39; *Canadian Association of Broadcasters v Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337 at para 17. This is the case where there is "a complete lack of anything in the record on an essential element": *TWN* at para 79.

[118] The requirement for there to be a discernable reasoned explanation "is one that depends on the context, including the nature of the administrator and constraints acting on the decision-maker": *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 34 [*Portnov*], citing *Vavilov* at paras 91-98.

[119] Where confidentiality concerns are raised pertaining to Cabinet secrecy, the GIC "is limited in what it can provide by way of explanation" for practical and legal reasons: *Portnov* at para 53. Thus, as in *Portnov*, "it would be inappropriate for a reviewing court to translate Vavilov's requirement of a reasoned explanation into an obligation on the Governor in Council to provide a complete, comprehensive, public explanation" as to why it declared a public order emergency and issued emergency regulations: *Portnov* at para 54. Rather, the Court will have to "assess the reasonableness of the outcome the administrative decision-maker reached using surrounding documents and circumstances and whatever bits of reasoning or rationale, if any, it has before it, including any information the applicant for judicial review has been able to obtain" under a Rule 317 request: *Portnov* at para 54.

[120] The Respondent's voluntary disclosure of the redacted minutes and agendas in July undermines the argument that it has attempted to immunize the impugned decision from judicial review in a manner inconsistent with the rule of law. This information, together with the certified tribunal record, the Section 58 Explanation, the *Report to the Houses of Parliament: Emergencies Act Consultations*, the Orders-in-Council issued pursuant to the *Emergencies Act*, and other contextual information on the record before the Court provide a basis for effective, meaningful, and fair judicial review of the decision. Whether the decision was reasonable or not remains to be determined on the full record.

[121] The bar that has been set by case law for the sufficiency of the record of GIC decisions is quite low: *Portnov* at para 34, citing *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 74. In this case, it can't be said that there is a complete lack of anything in the

record on an essential element. Thus, there is no basis on which to conclude that a remedy such as that discussed in *STCA* should be employed to ensure meaningful review.

[122] The CCLA invited the Court to consider the reasoning in *Canada (Environment) v Canada (Information Commissioner)*, 2003 FCA 68, affirming *Canada (Information Commissioner) v Canada (Minister of Environment)*, 2001 FCT 277 [*Ethyl*]. In *Ethyl*, the controversy involved a refusal by the Minister of the Environment to disclose certain Cabinet discussion papers relevant to decisions regarding a fuel additive. The case turns on the discussion paper exception to the bar to disclosure of Cabinet Confidences, which is not applicable in this case.

[123] There may well be a need for an expedited framework to deal with challenges to any future employment of the *Emergencies Act*, as the CCLA proposes. However, that question is not for this Court to determine. There are other processes underway that will make recommendations for Parliament's consideration. Absent a finding that the decision has been immunized from judicial review, which I am not prepared to make, the Court must apply the law as it presently is, not create new remedies.

VI. Conclusion

[124] Having considered the written and oral arguments of the parties, the text of the statutes and the jurisprudence cited, I am unable to grant the remedy sought by the Applicant. I do not accept that the decision to declare a public safety emergency on February 15, 2022 is immunized from judicial review by the claims of privilege over portions of the record of Cabinet's

deliberations before it invoked the *Emergencies Act.* Sufficient information has now been disclosed, in addition to that which was previously produced, to allow for effective, fair and meaningful judicial review of the decision.

[125] Questions remain to be resolved with respect to the claims of privilege under sections 37 and 38 of the *CEA.* Such claims require a balancing of the competing public interests and Parliament has left that task to the Courts. Unlike Cabinet Confidences, the task of determining whether such privileges apply is not reserved to a Minister or to the Clerk of the Privy Council.

[126] In light of my findings, I think it necessary to provide the Attorney General with an opportunity to consider whether the claims under sections 37 and 38 will be maintained. Based on my comments in case management conferences, counsel for the Respondent are well aware that such claims would have to be justified on an evidentiary record. There is, at present, none before the Court. If necessary, the Court will order that the Respondent file applications or disclose the information subject to these claims.

[127] While there is no reason at present to believe that the claims of solicitor-client privilege are unfounded, as noted above, it would be preferable to have that fact confirmed in writing by a government lawyer, with the ethical responsibilities that entails, with personal knowledge of the circumstances in which the communication of legal advice took place.

[128] The Respondent has requested costs on this motion. In light of the nature of the underlying application brought on the basis of public interest standing, to be determined at the hearing on the merits, the Court considers it appropriate to exercise its discretion not to award costs.

ORDER IN T-347-22

THIS COURT ORDERS that:

1. The Motion for a declaration that the Governor in Council's Response to the Applicant's Rule 317 Request is incomplete is dismissed;
2. The Motion for an Order that the Respondent shall deliver unredacted versions of the records described in the Section 39 Certificates on a counsel-only basis and subject to undertakings is dismissed;
3. The Respondent shall advise the Court and the parties in this matter, and the related judicial review applications, within 14 days of the receipt of this Order whether it intends to maintain claims of privilege under Sections 37 and 38 of the *Canada Evidence Act* in the disclosed materials;
4. The Court will convene a case management conference with counsel upon receipt of the Respondent's position to discuss next steps in this and the related proceedings; and
5. No costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-347-22
STYLE OF CAUSE:	CANADIAN CONSTITUTION FOUNDATION V THE ATTORNEY GENERAL OF CANADA V THE ATTORNEY GENERAL OF ALBERTA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE AT OTTAWA
DATE OF HEARING:	AUGUST 8, 2022
ORDER AND REASONS:	MOSLEY J.
DATED:	AUGUST 26, 2022

APPEARANCES:

SUJIT CHOUDHRY JANANI SHANMUGANATHAN	FOR THE APPLICANT
KATHLEEN KOHLMAN CHRIS RUPAR	FOR THE RESPONDENT
MANDY ENGLAND SHAHEER MEENAI	FOR THE INTERVENOR

SOLICITORS OF RECORD:

CHOUDHRY LAW TORONTO, ONTARIO	FOR THE APPLICANT
GOODARD & SHANMUGANATHAN TORONTO, ONTARIO	
ATTORNEY GENERAL OF CANADA OTTAWA, ONTARIO	FOR THE RESPONDENT
ALBERTA JUSTICE AND SOLICITOR GENERAL EDMONTON, ALBERTA	FOR THE INTERVENOR