Court File No.: DC-24-00000169-00JR

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL BRISCO

Applicant

and

ONTARIO CIVILIAN POLICE COMMISSION and WINDSOR POLICE SERVICE

Respondents

APPLICATION UNDER Rules 14.05(2), 38 and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and Sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1.

APPLICANT'S FACTUM

July 15, 2024

CHARTER ADVOCATES CANADA

James Manson, LSO #54963K

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Counsel for the Applicant

PART I – OVERVIEW

1. On March 24, 2023, Hearing Officer Superintendent (Retired) Morris Elbers (the "**Hearing Officer**"), found the applicant, Constable Michael Brisco ("**Brisco**"), a police officer with the respondent, Windsor Police Service ("**WPS**"), guilty of one count of discreditable conduct contrary to s. 2(1)(a)(xi) of the Code of Conduct (the "**Code of Conduct**") contained in Ontario Regulation 268/10 at the Schedule, pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 (the "***PSA***").

2. On May 18, 2023, the Hearing Officer issued his penalty decision with reasons, ordering Brisco to forfeit 80 hours of pay, pursuant to s. 85(1)(f) of the *PSA*.

3. Pursuant to s. 87(1) of the *PSA*, Brisco appealed both the Hearing Officer's finding of guilt and the penalty imposed to the Ontario Civilian Police Commission (the "**Commission**"). The hearing before the Commission took place on November 21, 2023. In a decision dated February 14, 2024 (the "**Decision**"), the Commission dismissed Brisco's appeal in its entirety.

4. For the reasons that follow, Brisco seeks judicial review of the Commission's Decision.

5. **First**, the Commission committed fatal errors in failing to recognize the *Charter* value of freedom of peaceful assembly engaged in its Decision, and in failing to take those values into account and weigh the Decision's effect on those values.

6. **Second**, it was unreasonable and incorrect for the Commission to conclude that the prosecution had met (or *could ever* meet) its burden to demonstrate with "clear and convincing evidence" that the Freedom Convoy protests were illegal at the time Brisco made his donation.

7. **Third**, it was unreasonable for the Commission to conclude that the limitation of Brisco's *Charter* freedom of expression in this case was proportionate in the circumstances.

8. **Fourth**, it was unreasonable for the Commission to refuse to consider whether the underlying proceeding amounted to an abuse of process.

PART II – CONCISE SUMMARY OF FACTS

9. Brisco is a 15-year veteran of the WPS. He has been a hardworking officer throughout his career, holding many specialist positions in the WPS and performing them to a high standard. He has no prior disciplinary history.[1]

10. Beginning in January 2022, vehicles and persons from all over Canada began to arrive in downtown Ottawa with the primary purpose of peacefully protesting the federal and provincial legislative responses to the COVID-19 pandemic. The vehicles included tractor trailer style trucks and other commercial vehicles. The protest became known as the "**Freedom Convoy**."

11. Various fundraisers were organized in support of the Freedom Convoy in Ottawa. One such fundraiser was organized by a Canadian named Tamara Lich on a website called "GiveSendGo".

12. On February 8, 2022, Brisco made a $50 donation to the fundraiser organized by Tamara Lich. This donation was made anonymously from his personal computer and while on unpaid leave from duty. In the end, the account containing funds was frozen by a civil court order. None of the funds, including the $50 donated by Brisco, made it through to the Ottawa protest.

13. A list of donors to the GiveSendGo fundraiser was illegally obtained through a computer "hack" and made public. On February 16, 2022, the Ontario Provincial Police ("**OPP**") obtained this list of donors and commenced investigations. It prepared a list of officers in other police forces who may have donated to the fundraiser and shared this list with WPS.

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[1] Decision of Hearing Officer Elbers, dated May 18, 2023 (the "**Penalty Decision**"), p. 1233 of 1243, WPS Disclosure, pp. 1230-1243. **Applicant's Compendium ("Compendium"), Vol. 2, Tab 12, at p. 338.** Also see Application Record, Vol. 1, Tab 4, p. 87.

14. Brisco was charged under section 2(1)(a)(xi) of Code of Conduct and section 80(1)(a) of the *PSA* with one count Discreditable Conduct in relation to the donation. The allegation against Brisco was that the protest in Ottawa was illegal, and that by providing support to the protest, Brisco was providing financial support to an illegal activity. It was further alleged that there was a link between the Ottawa and Windsor protests, and that by supporting the Ottawa protest, the funds could have been used to support an illegal protest in an area within the WPS's jurisdiction.

15. Brisco's hearing commenced on February 6, 2023 (the "**Hearing**"). The prosecution's evidence on the substantive issues was provided chiefly by Sgt. Leah McFadden, who had no first-hand knowledge of the protest in Ottawa. Her investigation into the legality of the Ottawa protest relied solely on media reports and the conclusory opinions of public officials quoted therein.

16. By decision dated March 24, 2023, the Hearing Officer convicted Brisco of Discreditable Conduct. Following a further hearing on penalty, the Hearing Officer imposed a penalty of a forfeiture of 80 hours worth of remuneration.

PART III – ISSUES & ANALYSIS

17. Brisco submits that, in addition to the identification and use of the proper standards of review, this application for judicial review raises the following issues:

A. whether the Commission erred in failing to recognize and respect the *Charter*[2] value of freedom of peaceful assembly engaged in its Decision;

B. whether it was unreasonable and incorrect for the Commission to conclude that the prosecution had met (or *could ever* meet) its evidentiary burden to demonstrate with "clear

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[2] *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

and convincing evidence" that the Freedom Convoy protests were illegal at the time Brisco made his donation;

C. whether it was unreasonable for the Commission to conclude that the limitation of Brisco's *Charter* freedom of expression in this case was proportionate in the circumstances; and

D. whether it was unreasonable for the Commission to refuse to consider whether the underlying proceeding amounted to an abuse of process.

Standards of Review

18. Following *Vavilov*, the presumptive standard on judicial review is reasonableness.[3]

19. The rule of law, however, requires courts to apply correctness review for certain types of legal questions, including constitutional questions and general questions of law of central importance to the legal system as a whole.[4] For example, in *York Region District School Board v. Elementary Teachers' Federation of Ontario*,[5] the Supreme Court of Canada held that correctness review applied to the determination of whether the *Charter* applies to school boards, since this issue was a constitutional question that required a final and determinate answer by the courts that will apply generally and that is not dependent on the particular circumstances of the case.[6]

20. The Court also held that the correctness standard applied to review the arbitrator's decision itself, specifically the "issue of constitutionality on judicial review – of whether a *Charter* right

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[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 10 (SCC) [*Vavilov*].
[4] *Vavilov*, para 53.
[5] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 (SCC) [*York Region*].
[6] *Ibid.*, para 62.

arises, the scope of its protection, and the appropriate framework of analysis – is a constitutional question that requires a final determinate answer from the courts".[7]

A. <u>The Commission erred by failing to recognize and respect the *Charter* freedom of peaceful assembly engaged by its Decision</u>

21. The Commission's Decision is permeated by its deference to the Hearing Officer's conclusion that the Freedom Convoy protests were "illegal".[8] Although the Commission noted Brisco's contention that "officials had no legal authority to declare the protests illegal",[9] the Commission ironically viewed the question of whether the protests were "illegal" as simply a question of fact, finding "no basis to interfere with the Hearing Officer's factual finding".[10]

22. The Commission further used this "factual finding" in deciding that Brisco's *Charter* s. 2(b) freedom of expression was reasonably infringed by the Hearing Officer's decision finding him guilty of misconduct[11] (and inferentially the penalty assessed against him).[12] The Commission also used this conclusion to dismiss Brisco's argument that the decision would have a "negative systemic effect on *Charter* values and the right to expression".[13]

23. The Commission, however, failed to identify that the *Charter* s. 2(c) freedom of peaceful assembly was also directly engaged by the Hearing Officer's decision, premised as it was on his finding that the protest was illegal.[14] It cannot be denied that a government decision punishing those who support a protest engages the freedom of peaceful assembly guaranteed by s. 2(c).

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[7] *Ibid*., paras. 63-64 (internal citations omitted).
[8] See the Decision, at paras 14-19, **Application Record, Vol. 1, Tab 3, pp. 21 – 22.**
[9] See the Decision, at para 17, **Application Record, Vol. 1, Tab 3, p. 22.**
[10] See the Decision, at para 18, **Application Record, Vol. 1, Tab 3, p. 22.**
[11] See the Decision, at paras. 59-61, **Application Record, Vol. 1, Tab 3, pp. 34 - 35.**
[12] See the Decision, at para. 76, **Application Record, Vol. 1, Tab 3, p. 38.**
[13] See the Decision, at para. 61, **Application Record, Vol. 1, Tab 3, pp. 34 - 35.**
[14] *Charter*, s. 2(c).

24. The question of whether the Freedom Convoy protest was "illegal" is therefore both a constitutional question and a general question of law of central importance to the legal system as a whole, and thus, following *Vavilov*,[15] reviewable on the correctness standard. The Commission's failure to recognize that the *Charter* s. 2(c) freedom of peaceful assembly was engaged by its Decision is similar to the error identified by the Supreme Court of Canada in *York Region*, where the arbitrator "failed to recognize that the teachers' s. 8 *Charter* rights applied"; such an error was viewed as "fatal",[16] even though no *Charter* breach was alleged before the labour arbitrator.[17]

25. The effect of this error on the Decision is significant. Not only did the Commission fail to apply any appropriate legal test for determining whether the Freedom Convoy protests were illegal (as discussed below), it also failed entirely to consider the scope of the freedom of peaceful assembly or the appropriate framework for analyzing it in these circumstances,[18] resulting in a complete failure to respect this fundamental freedom and *Charter* value.[19]

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[15] *Vavilov*, para 53.
[16] *York Region* at para 69.
[17] *York Region* at para 2.
[18] See *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, at paras. 77-78. See also Basil S Alexander, Exploring a More Independent Freedom of Peaceful Assembly in Canada, 2018 CanLIIDocs 66, (2018) 8:1 *Western Journal of Legal Studies*. See also Kristopher EG Kinsinger, Restricting Freedom of Peaceful Assembly During Public Health Emergencies, 2021 30-1 *Constitutional Forum* 19, 2021 CanLIIDocs 815.
[19] *Charter*, section 2(c); see also *Universal Declaration of Human Rights*, GA Res. 217A(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 20(1), ("Everyone has the right to freedom of peaceful assembly"); *International Covenant on Civil and Political Rights*, (December 19, 1966), 999 UNTS 171, art. 21 (entered into force March 23, 1976, accession by Canada May 19, 1976) ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."). Note that "it must be presumed that the *Charter* affords at least as much protection as the international human rights instruments ratified by Canada." *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, at para. 64, quoting *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para. 23.

26. Although the law on freedom of peaceful assembly is underdeveloped,[20] there can be no doubt that it plays a crucial role in the constellation of Canada's fundamental freedoms in preserving Canada's free and democratic society. Its importance was noted Mr. Chief Justice Hughes of the U.S. Supreme Court in the case of *De Jonge v Oregon* at pp. 364-365.[21] Justice Adams also explained the value of the right to assemble in *Ontario (Attorney-General) v. Dieleman* at paras. 700-701.[22]

27. Failure to take into account the constitutional values at stake in a decision, and meaningfully address the considerations consequently arising, renders an administrative decision unreasonable: "*To be reasonable, a decision must reflect the fact that the decision maker considered the Charter values that were relevant to the exercise of its discretion[.]*"[23] The Supreme Court of Canada has held that an administrative decision must reasonably address *Charter* values that are engaged, even if the decision is directed at persons whose *Charter* rights are not affected.[24] The need for government decisions to respect *Charter* values is important not just for people affected by those decisions, but for society as a whole.[25]

28. Thus, in the case at bar, given the fact that the Commission's Decision significantly engaged the values undergirding the *Charter* s. 2(c) freedom of peaceful assembly, the Commission was required to take those values into account and weigh the Decision's effect on

[20] See the authorities cited at footnote 18.
[21] *De Jonge v. Oregon*, 299 U.S. 353 at pp. 364-365 (1937) (US. Sup. Ct.).
[22] *Ontario (Attorney-General) v. Dieleman*, 1994 CanLII 7509 (ON SC) at paras. 700-701, quoting Tarnopolsky and Beaudoin eds., *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), at 142-148.
[23] See *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*] at para 68; see also para 92.
[24] See *CSFTNO* at paras 74.
[25] *Ibid.*, paras. 75 and 77.

those values. The Commission's failure to do so, and its concomitant failure to even recognize that the freedom of peaceful assembly was engaged by its Decision at all, are fatal errors.

B. The Commission's finding that the prosecution had proven the allegations against Brisco with "clear and convincing evidence" was unreasonable and incorrect

29. Pursuant to the charge and the burden of proof, "clear and convincing evidence" that the Freedom Convoy in Ottawa was "illegal" was required in order to convict Brisco. The only evidence relied on to conclude that the Freedom Convoy was illegal at the time Brisco donated to it were newspaper reports, largely quoting hearsay, conclusory statements of opinion made by various public officials.

30. In its Decision, the Commission unreasonably failed to appreciate that there was no "clear and convincing" evidence tendered by the prosecution before the Hearing Officer.

31. The Commission also incorrectly failed to recognize that, as a matter of law, none of the public officials cited in the various news articles had at that time exercised legal authority to "deem" or "declare" or otherwise proclaim the Freedom Convoy protest in Ottawa illegal. As a further general question of law of central importance to the legal system as a whole, and as a matter of constitutional law as discussed above, protests as a whole cannot be lawfully characterized as "illegal" merely by statements of public officials. There are limited and specific means by which a protest can be declared illegal, and none of those means apply in this case.

32. Brisco was charged with one count of Discreditable Conduct. The charge was particularized with reference to section 2(1)(a)(xi) of the *Code of Conduct*[26] which defines Discreditable Conduct as "*[acting] in a disorderly manner or in a manner prejudicial to discipline*

[26] O. Reg 268/10 (the "**Code of Conduct**").

or likely to bring discredit upon the reputation of the police force of which the officer is a member".[27]

33. Section 84(1) of the *PSA* requires that such allegations be proven on "clear and convincing evidence".[28] "Clear and convincing" is described in the caselaw as a *higher* burden than a balance of probabilities.[29] The Hearing Officer correctly described "clear and convincing" as "weighty, cogent and reliable evidence…"[30] Despite this, Brisco was convicted based on evidence that was neither weighty, nor cogent, nor reliable.

34. Before the Commission, Brisco took issue with two findings of fact made by the Hearing Officer that were central to his conviction: (a) that his $50 donation to a registered charity was to be used to further an illegal activity; and (b) that the $50 donation could have provided material support for the protest in Windsor.

The Commission's Decision was Unreasonable

35. The Commission based its Decision largely on the incorrect assertion at paragraph 19 that the Hearing Officer "*considered a constellation of facts, all of which were proximate in time to when the Appellant made his donation, before concluding '[i]t is clear at the time of [the Appellant's] donation that the protest was unlawful*".[31]

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[27] The case law establishes a five-part legal test. The test is primarily an objective one, wherein the Board must measure the conduct of the officer by the reasonable expectations of the community. The Board must consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time. See, e.g., *Constable Craig Galassi and the Hamilton Wentworth Police Service*, 2003 CanLII 75459 (ONCPC) at para 15.
[28] RSO 1990, c. P. 15.
[29] *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345 at para 12.
[30] Decision of the Hearing Officer, March 24, 2022 at p 17. **Compendium**, **Vol. 1, Tab 1, p. 1**. The Hearing Officer's full decision is found in the **Application Record, Vol. 9, Tab 4, p. 1251**.
[31] Decision, para 19. **Application Record, Vol. 1, Tab 3, p. 23.** At pages 15-16 of his original decision, the Hearing Officer lays out all the statements made by various officials that they believed the protests were "unlawful", an "occupation" and "lawless." He then concludes at page

36. This assertion by the Commission was unreasonable. The Hearing Officer manifestly did not consider "a constellation of facts". Rather, he considered only a collection of newspaper articles, which contained nothing but hearsay declarations, made by various officials, claiming (without authority) that the protest was becoming or had become "illegal", "unlawful", etc.[32] Examples of such declaratory statements include Premier Ford calling the protests an "occupation"[33], Ottawa city councillors calling it a "siege"[34], and former Ottawa Police Chief Sloly calling it "lawless."[35] It is not clear from the media articles whether any of these individuals witnessed any events on the ground, or whether their own opinions are based on further hearsay.

37. In any event, on cross-examination, Sgt McFadden testified that she did a general online search for Freedom Convoy 2022 to look for imagery/videos depicting the violence and danger described by public officials. She conceded that she could not find any such evidence.[36]

38. This was not sufficient evidence, on a "clear and convincing" standard, to conclude that the Freedom Convoy protest was, in fact, unlawful or illegal, at the time Brisco made his donation. It is simply not good enough to conclude that a protest is illegal just because some news articles

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16 of the decision that "it is clear at the time of Constable Brisco's donation that the protest was unlawful". See pages 15-16 of the Decision; **Compendium, Vol. 2, Tab 5.**

[32] Day Two Hearing Transcript, p. 85 lines 14-16, **Compendium, Vol. 1, Tabs 3 and 4 (in its entirety).**

[33] Hearing Transcript, Day One (February 6, 2023) ("**Day One Hearing Transcript**"), p. 119, lines 13-21; referencing Prosecution disclosure, p. 238. **Compendium, Vol. 2, Tab 6** Application Record, Vol. 10, Tab 4, p. 1551.

[34] Day One Hearing Transcript, at pp. 119-120, lines 25, 1-4; referencing Prosecution disclosure, p. 238. **Compendium, Vol. 2, Tab 6, p. 316-317.**

[35] Day One Hearing Transcript, p. 116, line 12. **Compendium, Vol. 2 Tab 7.** Application Record, Vol. 10, Tab 4, p. 1548.

[36] Hearing Transcript, Day Two (February 7, 2023) ("**Day Two Hearing Transcript**") pp. 25-26, lines 11-15. **Compendium, Vol. 2 Tab 9**, **pp. 320-321.** Application Record, Vol. 10, Tab 4, subtab 10, pp. 1656-1657.

say so, and then conclude that a police officer who made a donation to a charity supporting that protest has committed misconduct – but that is, essentially, what the Hearing Officer did.

39. Thus, the Commission's conclusion that there was sufficient evidence on the "clear and convincing" standard of proof was unreasonable. Following the Supreme Court of Canada's guidance in *Vavilov*, the Decision was not based on a rational chain of analysis present in the Commission's holding on this issue.[37] The Commission's conclusion did not and could not follow from its analysis.[38]

40. The Commission's statement at paragraph 20 of its Decision is also curious. There, the Commission notes that Brisco "*was aware public officials made statements that their position was the Freedom Convoy demonstration in Ottawa was illegal, which he disagreed with*". The Commission also notes that Brisco "*conceded the act of blocking roadways violated the Highway Traffic Act*", and that Brisco "*agreed in testimony that the blockade at the Ambassador Bridge in Windsor was unlawful and that he did not support it, but that he was unaware of the blockade at the time he made the donation. The Hearing Officer rejected the Appellant's evidence that he was unaware of the blockade…*"

41. This reasoning by the Commission is problematic because it assumes that because there is evidence of potential illegal activity that takes place during a protest, then (a) that activity can be definitively characterized as illegal, without any further inquiry needed; and (b) the entire protest itself is also automatically illegal.

42. Brisco submits that there is a critical difference between illegal activity at a protest and an illegal protest. In this case, the Commission's observations at paragraph 20, at their highest, refer

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[37] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras 102-103 (SCC) [*Vavilov*].
[38] *Vavilov*, para 103.

to instances of potential (but never proven) illegal activity at a protest. However, that is not the same thing as a protest that has itself become illegal. If it were, then any protest would automatically transformed into an "illegal protest" at the first instance of any illegal behaviour committed by a protestor. Given that some illegal behaviour at otherwise legal protests is a common occurrence, it cannot be reasonable to base a finding of guilt in Brisco's case on the notion that because Brisco knew (or ought to have known) that some illegal conduct may have been taking place, the entire Freedom Convoy protest was illegal.

43. Thus, the Decision on this issue was not justified in relation to the constellation of law and facts relevant to the Decision.[39]

Further, the Commission's Decision was Incorrect

44. The Commission's Decision on this issue was not only unreasonable, but also incorrect.

45. An "illegal protest" is not simply whatever an administrative decision-maker or a public official (or, for that matter, a judge) arbitrarily says it is. Whether a protest is "illegal" or "unlawful" is not a question of fact, but rather one of law. Accordingly, a protest can only be determined to be "illegal" by a competent decision-maker who determines that a given protest satisfies certain criteria prescribed by a given law. In Canada, our legal system recognizes a number of such mechanisms. None of them, however, were used to determine that the Freedom Convoy protest was, as a matter of law, "illegal" or "unlawful", whether by a judge or other competent decision-maker, Parliament, legislature, or the executive branch.

[39] *Vavilov*, para 105.

46. One way to determine that a given protest is "illegal" is through a finding made under the *Criminal Code*.[40] For example sections 63(1) and 64 of the *Criminal Code* define the terms "unlawful assembly" and "riot".[41]

47. Thus, where a court of competent jurisdiction finds that a given protest meets the legal criteria described in ss. 63(1) or 64, one may then conclude that the protest is unlawful. In *R. v. Lockhart et al.*,[42] the Court held that the word "*tumultuously*" in s. 63(1) was relevant to the analysis of whether an assembly was unlawful, and that mere disorder, confusion or uproar is insufficient for a finding of criminal liability.[43] The Court went on to hold that "*tumultuously*" "*…must connote in a general sense some element of violence or force which may be exhibited by menaces or threats*".[44]

48. There was no evidence tendered before the Hearing Officer concerning the use of violence or force that, following *Lockhart*, is required in order to make a finding of unlawful assembly.

49. Another way of finding that a protest is unlawful would be through a declaration made by a competent body. For example, labour relations boards are often empowered to declare strikes illegal. For example, section 91(2) of the *Canada Labour Code*[45] empowers the Canada Industrial Relations Board to make a declaration that a strike is illegal.[46] Similar to the *Criminal Code* issue above, a declaration of an illegal strike would require an evidentiary hearing before a determination is made.

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[40] *Criminal Code*, RSC 1985, c. C-46 [*Criminal Code*].
[41] *Ibid.*, ss. 63(1) and 64.
[42] *R. v. Lockhart et al.* (1976), 15 NSR (2d) 512 (NSCA).
[43] *Ibid.*, paragraph 35.
[44] *Ibid.* See also *R v Brien,* 1993 CanLII 2842 at para. 33 (NWTSC).
[45] *Canada Labour Code*, RSC 1985, c. L-2, s. 91(2).
[46] See *British Columbia Terminal Elevator Operators' Association,* 2007 CIRB 384 at para 15 (CanLII).

50. Yet another way for a protest to be appropriately deemed illegal would be for Parliament or a legislature to pass an enactment declaring certain organizations or activities unlawful. No such enactment, however, was tendered by the prosecution for consideration by the Hearing Officer.

51. Finally, a lawful invocation of the *Emergencies Act*[47] might conceivably include declarations or regulations declaring an entire protest to be unlawful.[48] However, in this case, while the federal government did invoke the *Emergencies Act*, it only did so on February 14, 2022, several days after Brisco made his donation.[49] In any event, the invocation itself was found to have been an unlawful use of the power by the government.[50]

52. In short, there have been no relevant legal findings by a competent court or tribunal that the Freedom Convoy was itself unlawful, and there have been no relevant declarations or enactments to that effect made by a competent authority.

53. Accordingly, from a legal point of view, the Hearing Officer's finding that the Freedom Convoy protest was "illegal" was meaningless, and the Commission's Decision affirming that holding is incorrect. It was not based on any criteria established in law. It was based on arbitrary notions of what an "illegal protest" is, premised on the disapprobation of some public officials.

54. As outlined in Issue A, above, this is an issue of significant constitutional as well as legal importance. The exercise of constitutional rights cannot simply be deemed "illegal" without applying a *legal* and *constitutional* framework necessary for respecting those rights.

55. The Commission's Decision was unreasonable in upholding the Hearing Officer's reliance on hearsay conclusions of some government actors to deem a protest illegal, and incorrect in failing

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[47] *Emergencies Act*, RSC 1985, c. 22 (4th Supp).
[48] *Ibid.*, section 19(1)(a).
[49] *Proclamation Declaring a Public Order Emergency*, SOR 2022-20, February 14, 2022.
[50] *Canadian Frontline Nurses v. Canada (Attorney General)*, 2022 FC 284.

to apply legal criteria and weigh the *Charter* freedom of peaceful assembly that, as a matter of law, must be reflected in the determination of whether a protest is illegal.

C. The Decision unreasonably weighed Briscoe's *Charter* freedom of expression

56. Before the Commission, Brisco submitted that the Hearing Officer had failed entirely to employ the *Doré* analysis. Ultimately, the Commission agreed with Brisco's submission, and held that it was an error for the Hearing Officer not to consider Brisco's freedom of expression and apply *Doré*.[51] The Commission proceeded to conduct its own *Doré* analysis.

57. Brisco submits, however, for the reasons that follow, that the Commission's conclusion on the *Doré* issue was unreasonable. Accordingly, the Decision must be set aside.

58. As Brisco submitted to the Commission, once one or more *Charter* rights are found to be engaged, the second step of the *Doré* analysis asks whether, "*in assessing the impact of the relevant* Charter *protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play*".[52] *Doré* requires that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives.

59. In this case, Brisco's fundamental freedom of expression guaranteed by s. 2(b) of the *Charter* must therefore be balanced with the objectives of s. 80(1) of the *PSA* and s. 2(1)(a)(xi) of the Code of Conduct. It goes without saying that an individual's freedom of political expression lies at the core of the freedom that section 2(b) is intended to protect.[53] Moreover, it bears noting as well that section 11 of O. Reg 268/10 explicitly gives a municipal police officer permission to

[51] See the Decision, at para 47, **Application Record, Vol. 1, Tab 3, p. 30**.
[52] *Doré v. Barreau du Québec*, 2012 SCC 12, paragraph 57 (SCC).
[53] See, e.g. *Strom v. Saskatchewan Registered Nurses Association*, 2020 SKCA 112, para 161.

"*make contributions of money or goods to… (i) a political party or other organization engaged in political activity*".[54] Thus, Brisco's ability to make a political donation is well-protected at law.

60. In this case, the objective of the *PSA* to be balanced under *Doré* is the (admittedly important) goal of disciplining police officers who violate the Code of Conduct. Yet, insofar as a balancing of the interests at play in this case is concerned, Brisco submitted before the Commission, and maintains in this Court, that his fundamental rights and freedoms must be given primacy when the Commission considers whether his conduct met the test for "discreditable conduct". This is particularly the case here, where (a) Brisco's alleged violation was minor by any reasonable standard; (b) Brisco's alleged violation was non-violent; and (c) Brisco's donation was intended to be anonymous and only came to light after the "hacking" incident.

61. Moreover, the Hearing Officer seems to have overlooked the fact that polling data tendered into evidence showed that nearly half (46%) of Canadians believed the Ottawa protestors' "*frustration is legitimate and worthy of our sympathy.*" Sympathy for protestors rose to 61% among Canadians aged 18-34."[55] This militates even more strongly in favour of protecting Brisco's freedom of expression in this case. When one also considers the evidence, referenced above at paragraphs 18-21, of other political figures' support for the Ottawa protests, as well as Retired Supt. Morris's concerns about the sensationalization of the events taking place in Ottawa, the *Doré* balance weighs even further in favour of Brisco's freedom of expression.

62. Further still, amidst all of the consternation about whether or not the protest itself was "illegal", the Hearing Officer lost sight of the reality that Brisco did not commit any unlawful act.

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[54] Code of Conduct, O.Reg. 268/10, s. 11.

[55] Online article – Ipsos – "Nearly Half (46%) of Canadians say they "May Not Agree with Everything" Trucker Convoy Says or Does, But…", dated February 18, 2022. WPS Disclosure at p. 307 of 1243. **Compendium Vol. 2, Tab 19, p. 368.** See also Application Record Vol. 3, Tab 4, p. 484.

Any unlawful activity that may have been committed by other people/protestors cannot be laid at Brisco's feet simply because he gave a $50 donation. That would impose a chilling effect on officers who would understandably feel unable to "guarantee" that their donations were not being used to further illegal activity through no fault of their own. These considerations are relevant to the *Doré* analysis.

The Commission's *Doré* Analysis was Unreasonable

63. The Commission's analysis on this issue is found at paragraphs 50-63 of the Decision.

64. First, at paragraph 51, the Commission properly found that the disciplinary process in this case did limit Brisco's freedom of expression.[56] Next, beginning at paragraph 57, the Commission then turned to consider whether: "the Respondent has demonstrated that the Act's limit on the Appellant's *Charter* protections, namely the finding that his donation constituted misconduct and the penalty imposed, is proportionate to the effect on the Appellant's *Charter* rights."[57]

65. Brisco submits that the Commission's consideration of this issue was unreasonable. The heart of the Commission's *Doré* analysis is found at paragraphs 58-60. Distilled to its essence, the Commission concluded that because the Freedom Convoy protest was **illegal**, the limit on Brisco's *Charter* freedom was proportionate in the circumstances.

66. The determination that the Freedom Convoy protest was illegal was unreasonable and incorrect, as discussed above at paragraphs **21-54** under Issues A. and B., because 1) the Commission completely failed to respect the *Charter* value of freedom of peaceful assembly in making that determination; 2) the Commission failed to apply any appropriate legal standard to

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[56] Decision, para 51. **Application Record, Vol. 1, Tab 3, p. 33**.
[57] *Ibid.*, paragraph 57.

determine the illegality of a protest, and 3) the evidence of illegality only consisted of a series of news articles reporting that various officials had referred to the protests as "illegal" or unlawful".

67. In *Commission scolaire*, the Supreme Court of Canada confirmed that the *Doré* approach requires a reviewing court to inquire into the weight accorded by the decision maker to the relevant considerations to assess whether a proportionate balancing was conducted by the decision maker.[58]

68. In Brisco's submission, this Court must find that the excessive weight accorded by the Commission to the notion that the Freedom Convoy protest was "illegal" was misguided. In fact, no weight ought to have been given to that consideration at all, because, as a matter of both fact and law, such a finding was not open to the Hearing Officer on the record before him.

69. Once the improper weight that was given to the unreasonable and incorrect determination that the protest was illegal is removed from the analysis, it then becomes clear that the Decision manifestly does not amount to a proportionate infringement of Brisco's freedom of expression, in light of the factual and legal constraints.[59] There was no evidence of the claimed violence and danger[60] of the Freedom Convoy. Yet, Brisco was found guilty of discreditable conduct and ordered to forfeit 80 hours of pay for a mere $50 dollar donation toward this political protest.

70. Accordingly, the Commission's Decision must be set aside. In Brisco's submission, there is no need to remit this matter back to the Commission for reconsideration; this is because the outcome in this matter is inevitable and there would be no useful purpose in remitting. Where that is the case, *Vavilov* instructs that it is preferable for a reviewing court to provide substantive relief.

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[58] *Commission scolaire francophone des Territoires du Nord-Ouest c. Territoires du Nord-Ouest (Education, Culture et Formation)*, 2023 SCC 31, para 72 (SCC).
[59] *Ibid.*, paras. 73, 92.
[60] See **Day Two Hearing Transcript**, pp. 25-26, lines 11-15. **Compendium, Vol. 2 Tab 9**, **pp. 320-321.** Application Record, Vol. 10, Tab 4, subtab 10, pp. 1656-1657.

Brisco submits that nothing would be gained by subjecting him to an "endless merry-go-round of judicial reviews and subsequent reconsiderations".[61]

71. Rather, a fair and reasonable application of the *Doré* analysis leads to the inexorable conclusion that the finding of guilt in this matter, as well as the penalty imposed on Brisco, were both disproportionate to the effect on Brisco's *Charter* freedoms. Thus, this Court ought to set the Commission's Decision aside, enter a finding of "Not Guilty", and order the Respondent to provide Brisco with the remuneration he was ordered to forfeit.

D. The Commission Unreasonably Failed to Consider Brisco's Abuse of Process Argument

72. Brisco submits here, as he did before the Commission, that the investigation into the events leading to the hearing before the Hearing Officer amounted to an abuse of process. The entire investigation into Brisco's alleged misconduct was based on illegally obtained evidence that ought never to have been used, and absent which no investigation would ever have happened. This was a grave error that calls the integrity of the entire police disciplinary system into question. Accordingly, the Decision should be set aside and a stay of proceedings should be entered.

73. The Commission declined to consider Brisco's argument on this issue. It found that it was inappropriate to consider abuse of process for the first time on appeal.

74. As discussed in the following paragraphs, Brisco submits that the Commission's refusal to consider the abuse of process argument was unreasonable.

75. Before the Commission, Brisco relied on *Power v. London Police Service*[62] to illustrate that the doctrine of abuse of process is recognized in the Commission's past decisions.

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[61] *Vavilov*, para 142.
[62] *Power v. London Police Service*, 2013 ONCPC 14 [*Power*]. See in particular paras 63-66.

76. In *Power*, the Commission found that the manner in which the investigation had been conducted was an abuse of process. In that case, two investigations (one criminal, the other disciplinary) were commenced against Constable Power arising out of a break and enter/theft incident at a retail store.

77. Although both investigations were supposed to have been conducted independently of one another, the Commission found that the notion of two "siloed" investigations was "abandoned from the outset".[63] Instead, the two investigations were conducted in concert. The investigators' improper collaboration went so far as to compel Constable Power to a Part V interview in an effort to obtain information from Constable Power in order to further the criminal investigation.[64]

78. The Commission found that the investigators' tactic was "*completely outside the legal limits of the investigators*",[65] and ordered a stay of proceedings.[66]

79. Relying on the Commission's observations and clear disapproval of the investigators' conduct in *Power*, Brisco submitted below that the investigation against him in this case was similarly tainted from the outset. This was shown with reference to the following evidence and testimony adduced before the Hearing Officer.

The Evidence Before the Commission

80. In order to properly understand the substance of Brisco's argument on this issue, it is important for this Court to appreciate the evidence referred to before the Commission. It was:

1) Sergeant McFadden's Investigative Report

[63] *Power*, para 16.
[64] *Power*, para 16.
[65] *Power*, para 68.
[66] *Power*, paras 75, 79-81, 89, 94.

81. Sergeant McFadden's Investigative Report was entered at Tab 1 of Exhibit #5. The report's summary confirms that the Donor List information was "hacked" from the GiveSendGo website and ultimately downloaded by the OPP using "approved covert devices".[67]

2) The Donor List Information

82. The Donor List information provided to the Windsor Police Service by the OPP is found at Tab 4 of Exhibit #5.[68]

3) Don Reid's E-mail of May 16, 2022 to Sergeant McFadden

83. On May 16, 2022, Constable Don Reid of the OPP sent Sergeant McFadden an e-mail, which is helpful in understanding how the investigation proceeded.[69] It reveals that the OPP did not in fact send the actual hacked GiveSendGo files to any other police services. Rather, it appears that the OPP in fact invited other police services, including the Windsor Police Service, to request information from the OPP about the identities of possible police officers on those other forces who were included in the hacked Donor List information.

84. It also appears that in the case of the Windsor Police Service, the "first contact" concerning the hacked information was made in March 2022 by the OPP to the Chief of the Windsor Police Service, who then ultimately set the investigation against Constable Brisco in motion.

4) Evidence-in-Chief of Sergeant McFadden

85. Sergeant McFadden also gave the following additional evidence in the course of her examination-in-chief:

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[67] Exhibit #5, Item 1, WPS Disclosure at p. 15 of 1243. **Compendium Vol. 2, Tab 20, p. 375**. See also Application Record Vol. 1, Tab 4, p. 192.

[68] Exhibit #5, Item 4, WPS Disclosure, pp. 54-61. **Compendium Vol. 2, Tab 21, p. 389.** See also Application Record Vol. 2, Tab 4, pp. 231-238.

[69] Exhibit #5, Item 9, WPS Disclosure at pp. 77-79. **Compendium Vol. 2, Tab 22, p. 397**. See also Application Record Vol. 2, Tab 4, pp. 254-256.

a) the Donor List information was obtained because the GiveSendGo website had been hacked and the information was made public. The OPP was notified of the hacked information by the media, and OPP "intel" obtained the data;[70]

b) McFadden was told by Officer Reid of the OPP that it was possible that the hacker had manipulated the data, that there was no way to be sure;[71]

c) McFadden told Reid on a telephone call that there were "holes in the data, and therefore, we can't rely on the evidence, and OPP's maintaining a list and responsible to speak with how it came to light";[72]

d) the actual hacked files were not provided by the OPP to Windsor Police Service; rather, OPP "maintained" the list and shared some information with Windsor Police Service;[73]

e) the information ostensibly provided to GiveSendGo by Constable Brisco did not identify him as a Windsor Police Service member;[74]

f) ultimately, however, Sergeant McFadden nonetheless compelled Constable Brisco to an interview, which took place on May 24, 2022;[75]

g) during the compelled interview, Constable Brisco admitted that he had donated $50 to the Freedom Convoy;[76]

5) Cross-Examination of Sergeant McFadden

86. On cross-examination, Sergeant McFadden conceded the following points:

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[70] Hearing Transcript, Day 1, page 26, Lines 21-25. **Compendium Vol. 2, Tab 23, p. 400.** See also Application Record Vol. 10, Tab 4, p. 1458

[71] Hearing Transcript, Day 1, p. 26, Line 25 to p. 27, Line 4. **Compendium Vol. 2, Tab 23, p. 400-401.** See also Application Record Vol. 10, Tab 4, at p. 1458-1459.

[72] Hearing Transcript, Day 1, at p. 27, Lines 4-9. **Compendium Vol. 2, Tab 23, p. 401.** See also Application Record Vol. 10, Tab 4, p. 1459

[73] Hearing Transcript, Day 1, p. 29, Lines 5-9. **Compendium Vol. 2, Tab 24, p. 402.** See also Application Record Vol. 10, Tab 4, p.1461.

[74] Hearing Transcript, Day 1, p. 43, Lines 17-20. **Compendium Vol. 2, Tab 25, p. 403.** See also Application Record Vol. 10, Tab 4, p. 1480

[75] Hearing Transcript, Day 1, p. 52, Lines 3-10. **Compendium Vol. 2, Tab 26, p. 404.** See also Application Record Vol. 10, Tab 4, p.1484 NOTE: the entire interview recording was played into the record at the hearing. See pp. 55-106 of the Hearing Transcript, Day 1. **Compendium Vol. 2, Tab 27.** See also Application Record Volume 10, Tab 4, at pp. 1487 - 1538

[76] Hearing Transcript, Day 1, pp. 64-65. **Compendium Vol. 2, Tab 28, p. 457.** See also Application Record Vol. 10, Tab 4, pp. 1496-1497

a) when conducting a Professional Standards Branch investigation, she works to the "*same standards*" that she would in a criminal investigation – meaning that she is "*thorough and complete*" with her investigation;[77]

b) the Donor List information – which McFadden did not object to being characterized as "illegally obtained by hacking into a website" – came from a third party to the OPP, and in turn to the Chief of the Windsor Police Service. But it was forwarded to her through Staff Sergeant Jeffrey down the chain of command;[78]

c) the Donor List information was found on the "reddit.com" website;[79]

d) Officer Reid from the OPP cross-referenced the information (which Sergeant McFadden characterizes as "hacked from Reddit") with "open-source searches that tie "Michael Jason Brisco" to Windsor Police as a police officer, which in turn "would be questions for him to answer";[80]

e) in other words, the OPP identified a "potential person" from the hacked information "that worked for the Windsor Police Service";[81]

f) Sergeant McFadden then proceeded to cross-reference the postal code found in the hacked information that was said to be associated with Constable Brisco, with information contained on the Windsor Police Service's "Versadex" internal system;[82]

g) if the hacked information was standalone evidence, and nothing else was obtained, Sergeant McFadden could not have conclusively said the hacked information related to Constable Brisco;[83]

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[77] Hearing Transcript, Day 2, Page 10, Lines 3-13, **Compendium Vol. 2, Tab 29, p. 459.** See also Application Record Vol. 10, Tab 4, p. 1641
[78] Hearing Transcript, Day 2, Page 27, Line 8 to Page 30, Line 21. **Compendium Vol. 2, Tab 30, p. 460.** See also Application Record Vol. 10, Tab 4, at p. 1658
[79] Hearing Transcript, Day 2, Page 30, Lines 12-19. **Compendium Vol. 2, Tab 31, p. 464.** See also Application Record Vol. 10, Tab 4, p. 1661
[80] Hearing Transcript, Day 2, p. 30, Line 23 to p. 31, Line 12. **Compendium Vol. 2, Tab 32, p. 465-466.** See also Application Record Vol. 10, Tab 4, p. 1661-1662.
[81] Hearing Transcript, Day 2, Page 31, Lines 21-24. **Compendium Vol. 2, Tab 33, p. 467.** See also Application Record Vol. 10, Tab 4, p. 1662.
[82] Hearing Transcript, Day 2, Page 33, Lines 15-22. **Compendium Vol. 2, Tab 34, p. 468.** See also Application Record Vol. 10, Tab 4, p. 1664.
[83] Hearing Transcript, Day 2, Page 33, Line 23 to Page 34, Line 9. **Compendium Vol. 2, Tab 35, 469-470.** See also Application Record Vol. 10, Tab 4, pp. 1664-1665

h) the hacked information **would not have been accessible** to Sergeant McFadden in the context of a misconduct allegation **without a prior judicial authorization**;[84] and

i) during Sergeant McFadden's cross-examination, opposing counsel also agreed with Constable Brisco's counsel that the "*nature and substance of an investigation, and how it takes place, and how the information is gathered is important*".[85]

87. To recap, then, it appears that while the Donor List information was originally provided to GiveSendGo privately by donors, that information was then somehow "hacked" from the GiveSendGo website by an unknown actor in February 2022. No attempt was ever made by any police service to investigate the hacking incident. Neither Sergeant McFadden, nor the rest of the Windsor Police Service (including the Chief), nor the OPP, nor any other police service was in the least bit interested in where the Donor List information came from or how it had been obtained, despite McFadden's confirmation that a misconduct investigation must be "thorough and complete" and done to the same standard as a criminal investigation. Constable Reid of the OPP, for his part, did not testify at the hearing, although he was the person who appears to have done most, if not all, of the "legwork" to link the Donor list information to Constable Brisco.

88. Moreover, no judicial authorization appears to have even been *contemplated*, let alone obtained, by any police service in connection with the obtaining, possession or use of the Donor List information. Incredibly, no one stopped to consider whether it was proper to make any use of the hacked Donor List information *at all*. Instead, the propriety of using the Donor List information was taken for granted. It was apparently originally sent to the Chief of the Windsor Police Service on or about March 17, 2022. It is not clear who sent the information to the Chief, or why.

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[84] Hearing Transcript, Day 2, Page 38, Line 22 to Page 40, Line 7. **Compendium Vol. 2, Tab 36, p. 471-473.** See also Application Record Vol. 10, Tab 4, p. 1669-1671

[85] Hearing Transcript, Day 2, Page 45, Lines 1-5. **Compendium Vol. 2, Tab 37, p. 474.** See also Application Record Vol. 10, Tab 4, p. 1676.

89. Relying on the same reasoning as set out above in *Power*, Brisco submits that the entire investigation, as described above, amounted to an abuse of process and called the entire police disciplinary system into question. The critical evidence before the Hearing Officer in this case was obtained as a result of illegal activity – that is, the illegally hacked Donor List information from the GiveSendGo website. Without the Donor List information, there never would have been an investigation at all, and Brisco would never have been compelled to give evidence at his interview.

90. In this context, the use of the disciplinary process against Constable Brisco, in circumstances where the information anchoring the process was obtained illegally, for donating $50 to a political protest is "contrary to the interests of justice"[86] and "offensive to societal notions of fair play and decency".[87] Illegal "hacking" activities are incentivized where it becomes apparent that the authorities will use such hacked material to investigate and punish one's political rivals or enemies. This represents an obvious threat to democracy and free speech that can only be remedied by a stay of proceedings in this case.

Raising the "Abuse of Process Issue" on Appeal

91. Brisco recognized before the Commission that the issue of whether the investigation in this matter amounted to an abuse of process was not squarely raised before the Hearing Officer. Nonetheless, he submitted that this issue could fairly be raised on appeal before the Commission.

92. Brisco relied on *R. v. Brown*,[88] where Justice L'Heureux-Dubé, writing in dissent (but not on this point, with which the other justices agreed),[89] set out three prerequisites that must be

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[86] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 120 (SCC).
[87] *R. v. Babos*, 2014 SCC 16 at para 35 (SCC).
[88] *R. v. Brown*, [1993] 2 S.C.R. 918 (SCC).
[89] Writing for the majority, Justice Iacobucci held that the appeal in this case ought to be allowed "for substantially the same reasons given by Harradance J.A." of the Alberta Court of Appeal. The Alberta Court of Appeal's reasons are found at 73 CCC (3d) 481 (CA).

satisfied in order to permit the raising of a new issue for the first time on appeal. **First**, there must be a sufficient evidentiary record to resolve the issue. **Second**, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. **Third**, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.[90]

93. Brisco argued that in this case, the test was met and the “abuse of process” issue should have been considered by the Commission. First, this issue could be resolved on the basis of the current record. Second, there was no evidence to suggest that Brisco deliberately chose not to raise the abuse of process issue before the Hearing Officer as a matter of tactics or strategy. Third, there would be an obvious miscarriage of justice if the Commission did not address the issue.

The Commission Declines to Consider the Abuse of Process Issue

94. The Commission declined to consider Brisco’s abuse of process argument at all. Its reasons on this issue are found at paragraphs 29-34 of the Decision.[91]

95. The Commission cited *R. v. J.F.*,[92] a recent decision of the Supreme Court of Canada, at paragraphs 40-41. The Commission also cited *Gangadeen v. Peel Regional Police Service*, 2022 ONCPC 11 at paragraph 39,[93] which itself cited the requirements noted by Justice L’Heureux-Dubé in *Brown*, *supra*, as restated by the Ontario Court of Appeal in *R. v. Reid* at paras. 37-44.[94]

96. The Commission disposed of Brisco’s argument at paragraphs 33 and 34 of the Decision.

97. At paragraph 33 of the Decision, the Commission held that Brisco did not establish that he ought to be permitted to raise the abuse of process issue on appeal. In the Commission’s view, there was not a “*sufficient evidentiary record before the Commission to adjudicate this question*”.

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[90] *Ibid.*, para 20. See also *A. (A). v. B. (B.)*, 2007 ONCA 2, para 9 (CA).
[91] Decision, paras 29-34. See **Application Record Vol. 1, Tab 3, pp. 25-26.**
[92] *R. v. J.F.*, 2022 SCC 17 at paras 40-41 (SCC).
[93] *Gangadeen v. Peel Regional Police Service*, 2022 ONCPC 11 at para 39 (ONCPC).
[94] *R. v. Reid*, 2016 ONCA 524 at paras. 37-44 (CA).

The Commission's Decision was Unreasonable

98. Although the Commission identified the correct principles applicable where a new issue is raised on an appeal, its application of those principles to the facts in this case was unreasonable.

99. **First**, the Commission did not employ the applicable legal test *at all*, as set out in *Brown*, *Reid* and *R. v. J.F.* It did not grapple with the issue of whether Brisco should be allowed to argue the abuse of process issue on appeal. Instead, it dismissed Brisco's argument out of hand.

100. At paragraph 33, the Commission only states:

> Sgt. McFadden's evidence touched on the donor list provided to the OPP and the investigative steps taken to identify the Appellant as one of the donors. None of this evidence was elicited in the context of an abuse of process argument. [Emphasis added.]

101. The Commission's statement here, while attempting to be incisive, is in fact illogical and redundant. *Naturally* the evidence before the Hearing Officer had not been elicited "*in the context of an abuse of process argument*". This was a new issue raised on appeal, because, for whatever reason, Brisco's former counsel before the Hearing Officer did not raise the issue at first instance. In order for a new issue to be argued on appeal, the evidence below will *always* have been elicited in connection with other issues. Thus, the Commission's "reason" for holding that Brisco should not be permitted to raise a new issue on appeal was merely the restatement of an obvious point.

102. That is why it was necessary for the Commission to properly and fully consider the test set out in *Brown*, *Reid* and *R. v. J.F.* However, the Commission did not consider any of the steps of the tests set out in those cases. Rather, the Commission's analysis ended before it even got started. This demonstrates a failure to consider whether the abuse of process issue ought to have been considered in a rational and logical way, as required by *Vavilov*.[95]

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[95] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 102-103 (SCC) [*Vavilov*].

103. **Second**, apart from its meaningless finding at paragraph 33 (which it unreasonably held to be "dispositive"), the Commission failed to provide any explanation as to *how* the record was insufficient to "*fully, effectively and fairly determine the issue raised on appeal*".

104. The record was sufficient for the Commission to address the abuse of process issue. With respect, the Commission totally failed to grapple with this issue. It ignored all of the evidence, discussed above, including Sgt. McFadden's oral testimony, both in chief and on cross-examination. That evidence established clearly that the investigation into Brisco's alleged misconduct stemmed from illegally obtained information. Such evidence was volunteered by Sgt. McFadden and confirmed on cross-examination. No objections were made with respect to the admissibility of this evidence. What else, then, was required?

105. Brisco submits that the abuse of process argument was thus straightforward, and based entirely on evidence that was already in the record. None of the witnesses were confused or surprised about the questions they were asked. None of the witnesses were prejudiced in the sense that any evidence was lacking on the abuse of process issue. The simple reality is that the "hacking" incident happened. It doesn't matter "why" or "how" it happened. No further details were necessary for the Commission to have considered whether the manner in which the investigation was commenced amounted to an abuse of process. The Commission had all the evidence it needed to consider the abuse of process argument.

106. Yet the Commission failed to do so. It failed to explain in the Decision what additional evidence would have been necessary in order for the record to have been "sufficient" in its view. It failed to explain how Brisco had not met this aspect of the test. Again, this demonstrates both

the lack of a rational and logical chain of analysis, as well as a failure to justify the decision not to consider the abuse of process issue in light of the relevant "constellation of law and facts".[96]

107. **Third**, at para. 34, the Commission based its decision on irrelevant considerations that do not form part of the test as set out in *Brown*, *Reid* and *R. v. J.F.* Those cases do not suggest that an appellant who seeks to raise a new issue must explain why the issue was not raised on appeal. This represents a failure on the Commission's part to provide an intelligible and justifiable decision on this issue. It is not rational or logical for the Commission to base its conclusion, in part, on irrelevant observations. Such a conclusion is not justified in relation to the relevant law and facts.[97]

108. Thus, the Commission's decision not to consider the abuse of process argument was unreasonable. First, there is no rational chain of analysis present in the Commission's holding on this issue.[98] The Commission's conclusion did not and could not follow from its analysis.[99]

109. Moreover, the Commission's decision on this issue was not justified in relation to the constellation of law and facts relevant to the decision.[100] The Commission failed to actually apply the applicable legal test to the evidence elicited at Brisco's hearing before the Hearing Officer.[101]

110. Accordingly, the Commission's decision not to consider the abuse of process issue does not bear the hallmarks of reasonableness as described in *Vavilov*. The Commission's decision on this issue is not justifiable or intelligible, as required.[102]

111. The Commission's decision on this issue must therefore be set aside. There is no need to remit this matter back to the Commission for reconsideration; this is because the outcome in this

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[96] *Vavilov*, para 105.
[97] *Ibid.*
[98] *Vavilov*, para 103.
[99] *Vavilov*, para 103.
[100] *Vavilov*, para 105.
[101] *Vavilov*, para 111.
[102] *Vavilov*, para 99.

matter is inevitable and there would be no useful purpose in remitting. Where that is the case, *Vavilov* instructs that it is preferable for a reviewing court to provide substantive relief. Brisco submits that nothing would be gained by subjecting him to an "endless merry-go-round of judicial reviews and subsequent reconsiderations".[103]

112. Rather, the inexorable conclusion is that this matter ought to be stayed on the grounds of abuse of process. Thus, this Court ought to grant that relief now.

PART IV – ORDER REQUESTED

113. In light of all of the above arguments, Brisco requests:

a) an order granting Brisco's request for judicial review in this proceeding;

b) an order setting the Commission's Decision aside, entering a finding of "Not Guilty", and requiring the Windsor Police Service to provide Brisco with the remuneration he forfeited as a result of the Decision;

c) alternatively, a stay of proceedings in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: July 15, 2024

CHARTER ADVOCATES CANADA

James Manson (LSO No. 54963K)
Chris Fleury (LSO No. 64785L)

Counsel for the Applicant

[103] *Vavilov*, para 142.

Court File No.: DC-24-00000169-00JR

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL BRISCO

Applicant

and

ONTARIO CIVILIAN POLICE COMMISSION and WINDSOR POLICE SERVICE

Respondents

APPLICATION UNDER Rules 14.05(2), 38 and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and Sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1.

APPLICANT'S CERTIFICATE

The Applicant's counsel estimates that 2 hours will be required for his oral argument, not including reply.

Date: July 15, 2024

CHARTER ADVOCATES CANADA

James Manson (LSO No. 54963K)
Chris Fleury (LSO No. 67485L)

Counsel for the Applicant

SCHEDULE A – LIST OF AUTHORITIES

	Case Law
1.	*A. (A). v. B. (B.)*, 2007 ONCA 2
2.	*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44
3.	*British Columbia Terminal Elevator Operators' Association*, 2007 CIRB 384
4.	*Canada v. Vavilov (Minister of Citizenship and Immigration)*, 2019 SCC 65
5.	*Canadian Frontline Nurses v. Canada (Attorney General)*, 2022 FC 284
6.	*Commission scolaire francophone des Territoires du Nord-Ouest c. Territoires du Nord-Ouest (Education, Culture et Formation)*, 2023 SCC 31
7.	*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31
8.	*Constable Craig Galassi and the Hamilton Wentworth Police Service,* 2003 CanLII 75459 (ONCPC)
9.	*De Jonge v. Oregon*, 299 U.S. 353
10.	*Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47
11.	*Doré v. Barreau du Québec*, 2012 SCC 12
12.	*Figueiras v. Toronto Police Services Board*, 2015 ONCA 208
13.	*Gangadeen v. Peel Regional Police Service*, 2022 ONCPC 11
14.	*Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345
15.	*Ontario (Attorney-General) v. Dieleman*, 1994 CanLII 7509 (ON SC)
16.	*Power v. London Police Service*, 2013 ONCPC 14
17.	*R. v. Babos*, 2014 SCC 16
18.	*R v Brien*, 1993 CanLII 2842
19.	*R. v. Brown*, [1993] 2 S.C.R. 918 (SCC)
20.	*R. v. Brown*, 1992 CanLII 12795 (AB CA) Reasons for Decision 73 CCC (3d) 481
21.	*R. v. J.F.*, 2022 SCC 17
22.	*R. v. Lockhart et al.* (1976), 15 NSR (2d) 512 (NSCA)
23.	*R. v. Reid*, 2016 ONCA 524
24.	*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4
25.	*Stirling-Rawdon (Police Service) v. Oliver*, 2014 ONCPC 2502
26.	*Strom v. Saskatchewan Registered Nurses Association*, 2020 SKCA 112
27.	*York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 (SCC)
	Secondary Sources
28.	Basil S Alexander, Exploring a More Independent Freedom of Peaceful Assembly in Canada, 2018 CanLIIDocs 66, (2018) 8:1 *Western Journal of Legal Studies*
29	Kristopher EG Kinsinger, Restricting Freedom of Peaceful Assembly During Public Health Emergencies, 2021 30-1 *Constitutional Forum* 19, 2021 CanLIIDocs 815

SCHEDULE B – RELEVANT PROVISIONS OF STATUES, REGULATIONS and BY-LAWS

Tab	Description	Page
1.	O.Reg. 268/10, s. 11. At s. 11 and Schedule at 2(1)(a)(xii).	34
2.	*Police Services Act,* R.S.O., 1990, c. P.15. at s. 80.	36
3.	*Canadian Charter of Rights and Freedom,* being Part 1 of the *Constitution Act, 1982,* at s. 2.	38
4.	*Universal Declaration of Human Rights*, GA Res. 217A(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 20(1)	39
5.	*International Covenant on Civil and Political Rights*, (December 19, 1966), 999 UNTS 171, art. 21	40
6.	*Criminal Code,* R.S.C. 1985, c. C-46, at ss. 63-64.	41
7.	*Canada Labour Code,* R.S.C. 1985, c. L-2, at s. 91(2).	42
8.	*Emergencies Act,* R.S.C. 1985, c. 22 (4th Supp) at s. 19(1)(a).	43
9.	*Proclamation Declaring a Public Order Emergency*, SOR 2022-20, February 14, 2022.	44
10.	*Statutory Powers Procedures Act,* RSO 1990 c S22	47
11.	*Judicial Review Procedures Act*, R.S.O. 1990, c J.1, s. 2(3)	48

Police Services Act

ONTARIO REGULATION 268/10

General

Note: This Regulation was revoked on April 1, 2024. (See: O. Reg. 134/24, s. 1)

Last amendment: 134/24.

Legislative History: 59/16, CTR 25 JL 17 - 5, 371/18 (rev. by 603/20), 526/18, 603/20, 134/24.

This is the English version of a bilingual regulation.

POLITICAL ACTIVITY

Political rights

11. A municipal police officer may,

(a) vote in an election;

(b) be a member of or hold office in a political party or other organization engaged in political activity;

(c) make contributions of money or goods to,

(i) a political party or other organization engaged in political activity, or

(ii) a candidate in an election. O. Reg. 268/10, s. 11.

…

SCHEDULE
CODE OF CONDUCT

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

(a) DISCREDITABLE CONDUCT, in that he or she,

(i) fails to treat or protect persons equally without discrimination with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(ii) uses profane, abusive or insulting language that relates to a person’s race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(iii) is guilty of oppressive or tyrannical conduct towards an inferior in rank,

(iv) uses profane, abusive or insulting language to any other member of a police force,

(v) uses profane, abusive or insulting language or is otherwise uncivil to a member of the public,

(vi) wilfully or negligently makes any false complaint or statement against any member of a police force,

(vii) assaults any other member of a police force,

(viii) withholds or suppresses a complaint or report against a member of a police force or about the policies of or services provided by the police force of which the officer is a member,

(ix) is guilty of a criminal offence that is an indictable offence or an offence punishable upon summary conviction,

(x) contravenes any provision of the Act or the regulations, or

(xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member;

Police Services Act

R.S.O. 1990, CHAPTER P.15

Note: This Act was repealed on April 1, 2024. (See: 2019, c. 1, Sched. 3, s. 2)

Last amendment: 2023, c. 19, s. 23.

Legislative History: 1991, c. 12; 1994, c. 1, s. 25; 1995, c. 4, s. 4; 1996, c. 1, Sched. Q, s. 3; 1997, c. 8, s. 1-41; 1997, c. 16, s. 12; 1997, c. 17, s. 8-10; 1997, c. 21, Sched. A, s. 5; 1999, c. 6, s. 55; 2001, c. 11; 2001, c. 25, s. 481; 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. N, s. 58-71; 2005, c. 5, s. 58; 2006, c. 19, Sched. F, s. 5; 2006, c. 21, Sched. C, s. 130; 2006, c. 32, Sched. C, s. 49; 2006, c. 33, Sched. Z.3, s. 27; 2006, c. 34, s. 40; 2006, c. 34, Sched. C, s. 27; 2006, c. 35, Sched. C, s. 111, 131; 2007, c. 5; 2007, c. 7, Sched. 32; CTS 10 DE 08 - 1; 2009, c. 18, Sched. 23, s. 14, 15; 2009, c. 30, s. 43-62; 2009, c. 33, Sched. 2, s. 60; 2009, c. 33, Sched. 6, s. 78; 2009, c. 33, Sched. 9, s. 10; CTS 20 AU 14 - 1; 2014, c. 15, Sched. 2, s. 1; 2015, c. 30, s. 26; 2017, c. 34, Sched. 46, s. 48; 2018, c. 3, Sched. 1, s. 211, 212 (But see 2019, c. 1, Sched. 3, s. 3); 2018, c. 3, Sched. 4, s. 41 (But see 2019, c. 1, Sched. 5, s. 41); 2018, c. 8, Sched. 24; 2019, c. 1, Sched. 2; 2019, c. 1, Sched. 3, s. 2; 2019, c. 1, Sched. 5, s. 42; 2020, c. 6, Sched. 5; 2021, c. 25, Sched. 27, s. 4; 2022, c. 15; 2023, c. 19, s. 23.

Misconduct

80 (1) A police officer is guilty of misconduct if he or she,

(a) commits an offence described in a prescribed code of conduct;

(b) contravenes section 46 (political activity);

(c) engages in an activity that contravenes subsection 49 (1) (secondary activities) without the permission of his or her chief of police or, in the case of a municipal chief of police, without the permission of the board, being aware that the activity may contravene that subsection;

(d) contravenes subsection 55 (5) (resignation during emergency);

(e) commits an offence described in subsection 79 (1) or (2) (offences, complaints);

(f) contravenes section 81 (inducing misconduct, withholding services);

(g) contravenes section 117 (trade union membership);

(h) deals with personal property, other than money or a firearm, in a manner that is not consistent with section 132;

(i) deals with money in a manner that is not consistent with section 133;

(j) deals with a firearm in a manner that is not consistent with section 134;

(k) contravenes a regulation made under paragraph 15 (equipment), 16 (use of force), 17 (standards of dress, police uniforms), 20 (police pursuits) or 21 (records) of subsection 135 (1). 2007, c. 5, s. 10.

Off-duty conduct

(2) A police officer shall not be found guilty of misconduct under subsection (1) if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force. 2007, c. 5, s. 10.

…

Findings and disposition

84 (1) If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. 2007, c. 5, s. 10.

CONSTITUTION ACT, 1982 Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Universal Declaration of Human Rights, GA Res. 217A (III)

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

International Covenant on Civil and Political Rights

ADOPTED

16 December 1966

BY

General Assembly resolution 2200A (XXI)

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Criminal Code, R.S.C. 1985, c. C-46.

Unlawful Assemblies and Riots

Unlawful assembly

63 (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct them- selves when they are

Assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they will disturb the peace tumultuously; or

(b) will by that assembly needlessly and without rea- sonable cause provoke other persons to disturb the peace tumultuously.

Lawful assembly becoming unlawful

Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

Exception

(2) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an in- dictable offence therein.

R.S., c. C-34, s. 64.

Riot

64 A riot is an unlawful assembly that has begun to dis- turb the peace tumultuously.

R.S., c. C-34, s. 65.

Canada Labour Code (R.S.C., 1985, c. L-2)

Declarations Relating to Strikes and Lockouts

Employer may apply for declaration that strike unlawful

91 (1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.

Declaration that strike unlawful and strike prohibited

(2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to make representations on the application, make such a declaration and, if the employer so requests, may make an order

(a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;

(b) enjoining any employee from participating in the strike;

(c) requiring any employee who is participating in the strike to perform the duties of their employment; and

(d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

R.S., 1985, c. L-2, s. 91 1998, c. 26, s. 40 1999, c. 31, s. 162(E)

Emergencies Act, R.S.C. 1985, c. 22 (4th Supp).

Orders and regulations

19 (1) While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

(a) the regulation or prohibition of

(i) any public assembly that may reasonably be expected to lead to a breach of the peace,

(ii) travel to, from or within any specified area, or

(iii) the use of specified property;

(b) the designation and securing of protected places;

(c) the assumption of the control, and the restoration and maintenance, of public utilities and services;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and

(e) the imposition

(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

for contravention of any order or regulation made under this section.

Proclamation Declaring a Public Order Emergency (SOR (Statutory Orders and Regulations)

/2022-20

Regulations are current to 2024-06-19

Proclamation Declaring a Public Order Emergency

SOR (Statutory Orders and Regulations)

/2022-20

EMERGENCIES ACT

Registration 2022-02-15

Proclamation Declaring a Public Order Emergency

Mary May Simon

[L.S.]

Canada

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

François Daigle

Deputy Attorney General of Canada

Great Seal of Canada

TO ALL WHOM these presents shall come or whom the same may in any way concern,

GREETING:

A Proclamation

Whereas the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency;

Whereas the Governor in Council has, before declaring a public order emergency and in accordance with subsection 25(1) of the Emergencies Act, consulted the Lieutenant Governor in Council of each province, the Commissioners of Yukon and the Northwest Territories, acting with consent of their respective Executive Councils, and the Commissioner of Nunavut;

Now Know You that We, by and with the advice of Our Privy Council for Canada, pursuant to subsection 17(1) of the *Emergencies Act*, do by this Our Proclamation declare that a public order emergency exists throughout Canada and necessitates the taking of special temporary measures for dealing with the emergency;

And We do specify the emergency as constituted of

(a) 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 actsof serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,

(b) 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,

(c) 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,

(d) 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

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

And We do further specify that the special temporary measures that may be necessary for dealing with the emergency, as anticipated by the Governor in Council, are

(a) measures to regulate or prohibit any public assembly — other than lawful advocacy,protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure,

(b) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and the provision of reasonable compensation in respect of services so rendered,

(c)measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of

Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade,

(d) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference,

(e) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*; and

(f) other temporary measures authorized under section 19 of the *Emergencies Act* that are not yet known.

In testimony whereof, We have caused this Our Proclamation to be published and the Great Seal of Canada to be affixed to it.

WITNESS:

Our Right Trusty and Well-beloved Mary May Simon, Chancellor and Principal Companion of Our Order of Canada, Chancellor and Commander of Our Order of Military Merit, Chancellor and Commander of Our Order of Merit of the Police Forces, Governor General and Commander-in-Chief of Canada.

At Our Government House, in Our City of Ottawa, this fourteenth day of February in the year of Our Lord two thousand and twenty-two and in the seventy-first year of Our Reign.

BY COMMAND,

Simon Kennedy

Deputy Registrar General of Canada

Date modified:

2024-07-08

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From June 3, 2021 to the e-Laws currency date.

Last amendment: 2021, c. 25, Sched. 27, s. 1-3.

Legislative History: 1993, c. 27, Sched.; 1994, c. 27, s. 56; 1997, c. 23, s. 13; 1999, c. 12, Sched. B, s. 16; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. B, s. 21; 2006, c. 19, Sched. C, s. 1 (1, 2, 4); 2006, c. 21, Sched. C, s. 134; 2006, c. 21, Sched. F, s. 136 (1); 2009, c. 33, Sched. 6, s. 87; 2015, c. 23, s. 5; 2021, c. 4, Sched. 6, s. 91; 2021, c. 25, Sched. 27, s. 1-3.

Evidence

What is admissible in evidence at a hearing

15 (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Judicial Review Procedure Act

R.S.O. 1990, Chapter J.1

Consolidation Period: From July 8, 2020 to the e-Laws currency date.

Last amendment: 2020, c. 11, Sched. 10.

Legislative History: 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1); 2020, c. 11, Sched. 10.

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

MICHAEL BRISCO -and- **WINDSOR POLICE SERVICE** et al. Court File No. DC-24-00000169-00JR
Applicant Respondents

DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

APPLICANT'S FACTUM

CHARTER ADVOCATES CANADA

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