

Court File: A-29-23

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	February 3 2023 Kevin Lemieux Appellant
CALGARY, AB	1

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

 Court File: A-

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard in Ottawa.

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal pursuant to sections 27(1)(c) and 52(b) of the *Federal Courts Act*, R.S., 1985, c. F-7, and Rules 335(a) and 337 of the *Federal Courts Rules*, SOR/98-106, from an interlocutory order of the Honourable Mr. Justice Mosley of the Federal Court of Canada issued jointly in Federal Court files T-316-22 (*Canadian Civil Liberties Association v. Attorney General of Canada*) and T-347-22 (*Canadian Constitution Foundation v. Attorney General of Canada*).

THE APPELLANT ASKS FOR:

1. An order setting aside the Federal Court's decision to admit into the record on these applications for judicial review the affidavit of Cara Zwibel and the exhibits attached thereto ("Zwibel Affidavit");
2. An order declaring that the Zwibel Affidavit is inadmissible and does not form part of the record in these applications for judicial review;
3. In the alternative, an order referring the matter back to the Federal Court for a new determination with such directions with respect to the record as this Court may deem appropriate;
4. An order placing this appeal in abeyance pending the Federal Court's final order on the merits of the underlying applications for judicial review; and
5. An order for costs in this appeal.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. The Federal Court misdirected itself in the exercise of its discretion or otherwise erred in fact and law by admitting into the evidentiary record documents that were not the record of the Governor-in-Council (GIC) when it made the decisions under judicial review, and documents that did not constitute exceptional evidence;
2. The GIC is the sole federal tribunal, as defined under s. 2 of the *Federal Courts Act*, whose orders are under judicial review for the purposes of s. 18.1 of the *Federal Courts Act*. The record of the decision-maker for the purposes of judicial review under s. 18.1 of the *Federal Courts Act* is restricted to the actual material the administrative decision-maker had before it when making the decision and nothing more;
3. The Federal Court erred in law by determining that an actor other than the GIC, the exclusive administrative decision-maker designated by Parliament to exercise the powers under the *Emergencies Act*, made the orders under judicial review: the *Proclamation Declaring a Public Order Emergency*, S.O.R./2022-20 [*Emergency Proclamation*], made pursuant to s. 17(1) of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) [the *Act*], the *Emergency Measures Regulations*, P.C. 2022-107, S.O.R./2022-21, and the *Emergency Economic Measures Order*, P.C. 2022-108, S.O.R./2022-22, made pursuant to s. 19(1) of the *Act*. These provisions of the *Act* (ss. 17(1) and 19(1)) reflect Parliament's choice to identify the GIC as the exclusive entity to exercise powers under the *Act*;
4. The Federal Court erred in law in determining that Cabinet, an entity that exists solely by constitutional convention as a forum for political discussion, and/or an

individual Minister, the Prime Minister, was the body or person having and exercising the powers conferred by the *Act*, despite acknowledging that the *Constitution Act, 1867* did not support this approach;

5. The Federal Court erred in law by failing to apply established principles of statutory interpretation when interpreting its jurisdiction under s. 18.1 of the *Federal Courts Act* and in interpreting the term “federal board, commission, or other tribunal” as defined under s. 2 of the *Federal Courts Act*;

6. The Federal Court erred in introducing a novel test that distinguishes between a *de facto* decision-maker and the *de jure* decision-maker to identify the “federal board, commission, or other tribunal” as defined under s. 2 of the *Federal Courts Act*, and whose decision is at issue for the purposes of an application for judicial review under s. 18.1 of the *Federal Courts Act*;

7. The Federal Court erred in law by determining that the material prepared for Cabinet, Cabinet committee meetings, and for individual Ministers within their department constitutes the record actually before the GIC when the GIC makes orders in council;

8. The Federal Court misdirected itself in the exercise of its discretion or otherwise erred in fact and law when applying the “background evidence” or “background context” exception to the general prohibition against admitting new evidence on judicial review under Rule 312 of the *Federal Courts Rules*, i.e., by admitting evidence in a manner contrary to this Court’s decision in *Association of*

Universities and Colleges of Canada v Canadian Copyright Licensing Agency, 2012 FCA 22 [*Access Copyright*];

9. The Federal Court misdirected itself in the exercise of its discretion or otherwise erred in fact and law when applying the “evidence of an absence of evidence” exception to the general prohibition against admitting new evidence on judicial review under Rule 312 of the *Federal Courts Rules*, i.e., by admitting evidence in a manner contrary to this Court’s decision in *Access Copyright*;

10. The Federal Court erred in law or misdirected itself in the exercise of its discretion by drawing inconsistent and unsupported inferences regarding the use to which certain evidence from the Zwibel Affidavit would be put, including finding that the evidence was both before the decision-maker (Cabinet, Cabinet committees and individual Ministers within their department) yet simultaneously admissible under one of the *Access Copyright* exceptions because it was not before the decision-maker;

11. The Attorney General of Canada will rely on the following statutory provisions:

Federal Courts Act, ss. 2, 18.1, 52(b);

Federal Courts Rules, Rules 3(a), 312, 317, 335, and 337;

Emergencies Act, ss. 17(1) and 19(1).

12. The Attorney General of Canada proposes that this appeal be heard in Ottawa.

Ottawa, February 3, 2023

**Aaron,
David**

Digitally signed by Aaron, David
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