Federal Court  Cour fédérale

Date: 20221107

Docket: T-2218-22

Citation: 2022 FC 1513

Ottawa, Ontario, November 7, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE HONOURABLE DOUG FORD, PREMIER OF ONTARIO AND THE HONOURABLE SYLVIA JONES, MINISTER OF HEALTH AND DEPUTY PREMIER

Applicants

and

COMMISSIONER OF THE PUBLIC ORDER EMERGENCY COMMISSION AND OTTAWA COALITION OF RESIDENTS AND BUSINESSES

Respondents

ORDER AND REASONS

I. Overview

[1] The Honourable Doug Ford, Premier of Ontario [Premier] and the Honourable Sylvia Jones, former Solicitor General and now Minister of Health and Deputy Premier [Minister] in the Ontario Government [collectively the Applicants], have brought an urgent motion to stay two

summonses issued by the Commissioner of the Public Order Emergency Commission [Commission].

[2] The Commission was established on April 25, 2022 pursuant to s 63(1) of the *Emergencies Act*, RSC, 1985, c 22 (4th Supp) and Part I of the *Inquiries Act*, RSC, 1985 c I-11, to inquire into the circumstances that led to the declaration of a public order emergency between February 14 and 23, 2022, and the measures taken to deal with the emergency.

[3] The summonses were issued on October 24, 2022. The Applicants are scheduled to testify before the Commission on November 10, 2022.

[4] The Applicants challenge the summonses on the ground that the Ontario Legislative Assembly is currently in session, and as elected officials they benefit from the parliamentary privilege of testimonial immunity. They allege that the summonses were issued without jurisdiction, and should be quashed. They seek a stay of the summonses until the underlying application can be determined on its merits.

[5] The Respondents say that the application of the parliamentary privilege of testimonial immunity to a commission of inquiry is not established in law. They maintain that the privilege is not intended to be used to impede the course of justice, and is regularly waived.

[6] For the reasons that follow, the summonses issued by the Commission to the Applicants are valid. However, so long as the Ontario Legislative Assembly remains in session, the

Applicants may resist the summonses by asserting parliamentary privilege and the Commission cannot take steps to enforce their attendance and compel them to give evidence.

[7] The motion is granted in part.

II. Background

[8] Subsection 63(1) of the *Emergencies Act* provides as follows:

Inquiry	**Enquête**
63 (1) The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.	**63 (1)** Dans les soixante jours qui suivent la cessation d'effet ou l'abrogation d'une déclaration de situation de crise, le gouverneur en conseil est tenu de faire faire une enquête sur les circonstances qui ont donné lieu à la déclaration et les mesures prises pour faire face à la crise.

[9] The Honourable Paul Rouleau was appointed as Commissioner to conduct the inquiry. The Commissioner's final report must be delivered to each House of Parliament by February 20, 2023.

[10] The Commissioner's mandate includes inquiring into the following matters:

(a) the evolution and goals of the convoy and blockades, their leadership, organization and participants;

(b) the impact of domestic and foreign funding, including crowdsourcing platforms;

(c) the impact, role and sources of misinformation and disinformation, including the use of social media;

(d) the impact of the blockades, including their economic impact; and

(e) the efforts of police and other responders prior to and after the declaration.

[11] The Order in Council directs the Commissioner to "provide provincial, territorial and municipal governments with an opportunity for appropriate participation in the Public Inquiry, if they request it". The Government of Ontario has not sought standing to participate in the work of the Commission.

[12] Two senior provincial officials are scheduled to testify before the Commission: Mario Di Tommaso, Deputy Solicitor General of Ontario and Ian Freeman, former Assistant Deputy Minister of Integrated Policy and Planning Division with the Ontario Ministry of Transportation. Neither of these witnesses is a member of Ontario's Legislative Assembly.

[13] On October 11, 2022, Commission Counsel communicated with Counsel with the Ontario Ministry of Attorney General [MAG Counsel] regarding the possibility of the Premier and Minister testifying at the inquiry:

> The Commission remains of the view that their testimonies are important to its fact-finding mandate and that there will likely be important gaps in its record if they do not testify. Should these gaps remain, or should the evidence of other parties raise the possibility of adverse findings against them, the Commission may consider issuing summons if Ontario does not come forward. For now, the Commission will stand by and see how the evidence unfolds. We will get back to you on this issue if necessary.

[14] On October 18, 2022, the lawyers convened a videoconference to discuss the Premier's and Minister's testimony before the Commission, following which Commission Counsel sent the following message to MAG Counsel:

> I am not satisfied that Messrs. Freeman and Di Tommaso can provide answers to all the Commission's questions as concerns Ontario, notably:
>
> - On the question of Ontario politicians' choice not to participate in the tripartite table. Mr. Di Tommaso said during his interview that he could not speak for the politicians on this point. The evidence so far is that Premier Ford told Mayor Watson the table was [a] waste of time. Why? The other levels of government don't seem to think so. What is Ontario's point of view?
>
> - There will be federal evidence that Premier Ford told Minister LeBlanc that he would direct the SOLGEN to participate in the tripartite table. But she did not, why?
>
> - Why did the provincial emergency regulations not target the parliamentary precinct specifically? Why did it not take a conduct based approach instead of the traffic-based?
>
> - The federal emergency declaration facilitated a police response, but policing is provincial jurisdiction. The Premier supported the federal public order emergency, why? Was he not satisfied that Ontario could resolve the situation in Windsor and Ottawa using provincial powers alone? Why?
>
> […] The Commission is grateful to have the perspective of Ontario senior civil servants, but feels it is in the public interest to gain insight into the political choices that were made when faced with

> the events of early 2022. The Commission will eventually draw conclusions about these political decisions, [and] it may play to Ontario's advantage if it can express its point of view through its elected officials.

[15] MAG Counsel took the position that the evidence of the Premier and Minister was not necessary, and raised the possibility that they might resist any summons issued by the Commission by invoking parliamentary privilege. Commission Counsel expressed the hope that it would not be necessary to engage in that debate, but nevertheless requested the legal authorities on which Ontario relied. These were provided the same day.

[16] On October 19, 2022, Commission Counsel forwarded to MAG Counsel a joint letter received from counsel for the Ottawa Coalition of Residents and Businesses, the Canadian Constitution Foundation and the Canadian Civil Liberties Association, requesting that the Premier and Minister be called to testify. Commission Counsel noted that the reasons for the request were similar to those Commission Counsel had advanced in its previous communications. Commission Counsel asked MAG Counsel to obtain final instructions as to whether or not the Premier and Minister would come forward voluntarily.

[17] MAG Counsel responded on October 21, 2022, and reiterated the view that the Premier's and Minister's evidence was not necessary. MAG Counsel noted that Ontario had provided an institutional report containing a concise summary of all key actions taken by Ontario in response to the protests in Ottawa, Windsor and elsewhere. Ontario had also provided more than 800 documents containing information relevant to the Province's actions and decisions, including the documents that were before the Ontario Cabinet when it confirmed the Premier's declaration of

an emergency. In addition, two senior provincial officials were scheduled to testify before the Commission, and could speak to the various actions taken by the Province, both in response to the protests and in support of the municipalities and police responders.

[18] The message from MAG Counsel concluded as follows:

> It is Ontario's view that these protests invited primarily a policing response and the police witnesses that are testifying can best provide the Commission with the evidence it needs.
>
> We will continue to monitor the hearings to watch how the evidence unfolds over the next weeks. Ontario's witnesses will testify and we believe will answer many of the questions parties have about Ontario's institutional response to the protest activities. We are of course always happy to speak about this matter further, but at the moment we will continue to decline the invitation of the Commission to have the Premier and Minister attend to provide evidence.

[19] On October 24, 2022, the Commissioner issued summonses to the Premier and the Minister to give evidence before the Commission on November 10, 2022. Each summons included the following statement: "This summons is enforceable in the same manner as a summons issued by a civil court of competent jurisdiction, including by contempt of court proceedings".

[20] The First Session of the 43rd Parliament of the Ontario Legislature began on August 8, 2022, and it is currently in session. The Commission's public hearings began on October 13, 2022, and are expected to conclude on November 25, 2022.

III. Procedural History

[21] The Applicants sought judicial review of the summonses on October 25, 2022, naming the Commissioner of the Public Order Emergency Commission as the sole Respondent. The Applicants also requested an urgent hearing of a motion for an Order pursuant to s 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, staying the summonses until the Court renders its decision on the underlying application to quash the summonses for lack of jurisdiction.

[22] On October 28, 2022, the Court received a letter from counsel for the Ottawa Coalition of Residents and Businesses [OCRB], a group of community associations and business improvement areas that has been granted standing before the Commission. The OCRB took the position that the application for judicial review was defective because it contravened Rule 303(1) of the *Federal Courts Rules*, SOR/98-106.

[23] The OCRB asserted that the Commissioner is a "federal board, commission or other tribunal" pursuant to ss 2(1) and 18.1(2) of the *Federal Courts Act*. Pursuant to Rule 303(1)(a), an applicant "shall name as a respondent every person … directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought". The OCRB also claimed that it was "directly affected by the order sought" in the application, because it had asked for the summonses to be issued.

[24] The OCRB maintained that a commissioner of a public inquiry could be named as an intervener under Rule 109 if necessary, but should then be limited to explaining the record of its

proceedings and making representations relating to its jurisdiction (citing *Chrétien v Canada (Attorney General)*, 2005 FC 591 at para 22). The OCRB asked that the motion for interlocutory relief be adjourned until the proper respondents were named, and the parties had an opportunity to consider their positions and make submissions as required.

[25] By letter dated October 31, 2022, counsel for the OCRB informed the Court that the Applicants and the Respondent did not oppose its request to be added as a Respondent, and the OCRB was prepared to serve and file its response to the motion for interlocutory injunctive relief by the end of the day. The Court issued an Order adding the OCRB as a Respondent, together with the following direction to counsel for the Applicants:

> In advance of the hearing of the Applicants' motion for a stay of the summonses, currently scheduled for 10:00 am tomorrow, the Applicants shall notify the Attorney General of Canada and any other person directly affected by the relief sought in these proceedings, and shall be prepared to address the naming of Respondents before the motion is heard.

[26] By letter dated October 31, 2022, counsel for the Attorney General of Canada advised the Court as follows:

> We write on behalf of the Attorney General of Canada to confirm that he is aware of the above noted proceeding and does not seek to be added as a Respondent in this matter or to otherwise participate in the proceeding. We also wish to advise the Court that it is the position of the Attorney General of Canada that Rule 303(2) does not apply in this proceeding given that there are directly affected parties named as Respondents in this matter.

[27] At the commencement of the hearing of the motion for interlocutory relief, counsel for the Applicants informed the Court that they had communicated with counsel for the Canadian Constitution Foundation and the Canadian Civil Liberties Association, the two other parties that had asked the Commission to issue the summonses. Both indicated that they did not wish to be named as Respondents or participate in the motion for interlocutory injunctive relief.

[28] Counsel for the Commissioner confirmed that he was content to be named as a Respondent in the same manner as occurred in comparable proceedings before this Court (see, *e.g.*, *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 and *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry Into The Deployment of Canadian Forces To Somalia)*, 1997 CanLII 5388 (FC)). The parties noted that the Commissioner had not rendered a decision regarding the application of parliamentary privilege to the summonses, and the Commissioner's submissions would in any event be limited to jurisdictional matters.

[29] The OCRB indicated it was satisfied the proper parties were before the Court. The motion to stay the summonses proceeded on this basis.

IV. Issue

[30] The sole issue raised by this motion is whether the summonses issued by the Commissioner should be stayed pending the Court's determination of the application to quash the summonses for lack of jurisdiction.

V. Analysis

[31] In order to obtain a stay of the summonses, the Applicants must meet the well-established test for interlocutory injunctive relief articulated by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] at page 334. First, a preliminary assessment must be made of the merits of the case to ensure there is a serious question to be tried. Second, it must be determined whether the Applicants will suffer irreparable harm if the stay is refused. Third, an assessment must be made as to which of the parties will suffer greater harm from the granting or refusal of the stay pending a decision on the merits.

A. *Serious Issue*

[32] The threshold for establishing a serious issue to be tried is generally low. The issue must be neither frivolous nor vexatious. However, the Supreme Court of Canada has identified two exceptions to the general rule that a judge hearing an interlocutory motion should not engage in an extensive review of the merits. The first arises when the result of the motion will in effect amount to a final determination of the underlying proceeding. This will be the case either when the right the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to a full hearing on the merits (*RJR-MacDonald* at 338).

[33] When this exception arises, a more extensive review of the merits of the case must be undertaken. The Court must be satisfied that the Applicants are likely to prevail in the underlying

application (*Monsanto v Canada (Health)*, 2020 FC 1053 at para 56). The Applicants say that their submissions and evidence on the interlocutory motion and the underlying application will be the same, and it would be an inefficient use of scarce judicial resources to argue the matter twice.

[34] Furthermore, the Applicants maintain that this case falls within a second exception to the prohibition on an extensive review of the merits, which arises when a question of constitutionality presents itself as a simple question of law alone (*RJR-MacDonald* at 339-40):

> A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

[35] The Applicants note that parliamentary privilege is a part of the Canadian constitution by virtue of the preamble to the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*], which states that Canada is to have a "Constitution similar in Principle to that of the United Kingdom". Section 18 of the *Constitution Act, 1867* provides as follows:

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any	**18** Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de manière à ce qu'aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns

privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.	privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la présente loi, sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette Chambre.

[36] The parties accept that, for all practical purposes, the Court's decision on the motion to stay the summonses will amount to a final disposition of the underlying application for judicial review. Unless the Court expedites the application and renders a final decision before November 25, 2022, the application will likely become moot and the Commissioner will have no choice but to issue his report without the benefit of hearing the testimony of the Premier and Minister.

[37] I therefore conclude that the Applicants must establish the existence of a serious issue on an elevated standard. To the extent that it is necessary to consider irreparable harm and the balance of convenience, the Court will not grant the relief sought unless it is satisfied, on a balance of probabilities that the parliamentary privilege of testimonial immunity applies in the present circumstances.

[38] Parliamentary privilege refers to the sum of the privileges, immunities and powers that are necessary for members of the Senate, the House of Commons and provincial legislative assemblies to fulfill their legislative duties (*Canada (House of Commons) v Vaid*, 2005 SCC 30 [*Vaid*] at para 29). Testimonial immunity is an established category of Parliamentary privilege that all Members of Parliament can assert while the legislature is in session and for 40 days

before and afterward (*Telezone Inc v Canada (Attorney General)*, 69 OR (3d) 161 (ONCA) [*Telezone*] at paras 29-33).

[39] The role of the Court in an application for judicial review is limited to determining the existence of the privilege (*Samson Indian Nation and Band v Canada*, 2003 FC 975 [*Samson*] at para 13). Courts may not review the exercise of a necessary parliamentary privilege; that is the role of the legislature. As the Supreme Court of Canada held in *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*], legislative assemblies are accountable only to the electorate (*per* Karakatsanis J. at para 24):

> When tethered to its purposes, parliamentary privilege is an important part of the public law of Canada (see *Vaid*, at para. 29(3)). The insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it. Judicial review of the exercise of parliamentary privilege, even for Charter compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature (*New Brunswick Broadcasting*, at pp. 350 and 382-84; *Vaid*, at para. 29(9)). However, while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate (*Chaplin*, at p. 164).

[40] The Respondents do not contest the existence of the parliamentary privilege of testimonial immunity. Nor do they deny that the Ontario Legislative Assembly is currently in session, and will remain in session beyond the date on which the Commissioner concludes his evidentiary hearings. The only dispute between the parties is whether the privilege may be invoked to resist a summons issued by a commission of inquiry, as opposed to one issued by a court or other tribunal.

[41] This Court has previously considered the application of parliamentary privilege to the proceedings of a federal commission of inquiry in *Gagliano v Canada (Attorney General)*, 2005 FC 576 [*Gagliano*]. In that case, the events and circumstances that gave rise to the inquiry were also examined by the Public Accounts Committee of the House of Commons. A party before the commission of inquiry sought to cross-examine a witness on statements he had made before the parliamentary committee.

[42] Justice Danièle Tremblay-Lamer upheld the commissioner's refusal to permit cross-examination on the witness' testimony before the parliamentary committee, holding that this would contravene the parliamentary privilege of free expression. She observed that the establishment of the inquiry and the application for judicial review illustrated "the interface among the various branches of government while pointing to the concomitant need to respect the legitimate sphere of jurisdiction of each" (*Gagliano* at paras 107-108):

> Parliamentary privilege helps to demarcate the legitimate spheres of jurisdiction, and is therefore a fundamental aspect of our constitutional democracy. It makes those powers, privileges and immunities which are necessary to Parliament's functioning in the present Canadian context subject to the exclusive jurisdiction of Parliament. It is my opinion that precluding cross-examination based on evidence presented to a parliamentary committee is necessary for that committee, primarily because it encourages witnesses to speak openly.

[43] The Respondents concede that *Gagliano* confirms the application of the parliamentary privilege of free expression to a federal commission of inquiry; however, no court has ever ruled that the parliamentary privilege of testimonial immunity applies in the same manner. Justice Tremblay-Lamer accepted that "the Commission cannot contravene the parliamentary privileges

enjoyed by the House of Commons any more than the civil or criminal courts can do so" (*Gagliano* at para 67). She nevertheless considered it necessary to determine whether the privilege continued to be necessary to the proper functioning of the legislature in a contemporary context (*Gagliano* at paras 69-70):

> […] one final excerpt from *New Brunswick Broadcasting Co.*, at page 387, is noteworthy in signalling the need to consider the current context:
>
> > The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?
>
> Thus, since it is not certain whether the power to protect a witness against cross-examination in a proceeding where there is no legal consequence fell within the ambit of the free speech privilege existing in the United Kingdom at the time of Confederation, the Court must focus attention on the Canadian context of 2005 and determine whether this privilege passes the test of necessity.

[44] The Respondents say that the scope of the privilege not to attend court remains contentious. For example, as Warren J. Newman noted in "Parliamentary Privilege, the Canadian Constitution and the Courts", (2008) 39 Ottawa Law Review 573, there are conflicting authorities regarding the application of the privilege when a member of a legislative assembly is a party to litigation (at fn 154). The Quebec Court of Appeal has held that the privilege did not apply (*Arthur c Gillet*, 2007 QCCA 470 at para 11), while the Ontario Superior Court of Justice has held that it did (*Riddell v Right Point*, [2007] OJ No 3943 at paras 47-48).

[45] According to the Respondents, the scope of the privilege claimed by the Premier and Minister plainly exceeds the purpose of ensuring that members of the Ontario Legislative Assembly are able to perform their parliamentary duties. In the current context, the privilege is not required to ensure that parliamentarians are freed from distraction by "vexatious litigation". Public inquiries are the antithesis of vexatious litigation, and "fulfil an important function in Canadian society" (citing *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 62).

[46] The Respondents therefore argue that this Court must decide anew whether the parliamentary privilege of immunity from summons issued by a federal commission of inquiry meets the test of necessity in the Canadian context of 2022. They note that many parliamentarians have agreed to testify before the Commission, and the privilege "is not intended to be used to impede the course of justice and, therefore, is regularly waived" (citing Marc Bosc and André Gagnon, *House of Commons Procedure and Practice* (3rd ed 2017), chap 3, p 10/32).

[47] The Respondents suggest that the Court would benefit from evidence of the frequency with which members of legislative assemblies have complied with summonses issued by courts and other tribunals, despite the availability of parliamentary privilege. As Justice Richard Low of the British Columbia Court of Appeal remarked in *Ainsworth Lumber Co v Canada (Attorney General)*, 2003 BCCA 239 [*Ainsworth*]: "Although the member, in claiming the privilege, perhaps does not have to demonstrate that he is actually engaged in parliamentary work on the date of return of the subpoena or appointment, he ought not to claim the privilege unless that is the fact" (at para 64).

[48] The Respondents note that the Ontario Legislative Assembly is not scheduled to sit during the week that the Premier and Minister have been summoned to give evidence before the Commission.

[49] In *Gagliano*, the Court found it necessary to determine the necessity of the parliamentary privilege of free expression only because its scope and application to a commission of inquiry were uncertain. This is apparent in paragraph 70 of Justice Tremblay-Lamer's decision: "[…] since it is not certain whether the power to protect a witness against cross-examination in a proceeding where there is no legal consequence fell within the ambit of the free speech privilege […]."

[50] The same cannot be said of the parliamentary privilege of testimonial immunity. The established "categories" of parliamentary privilege include immunity of members of legislative assemblies from subpoenas during a parliamentary session (*Vaid* at para 29(1), citing *Telezone*; *Ainsworth*; *Samson*). Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

[51] The parliamentary privilege of testimonial immunity is not limited to safeguarding parliamentarians from vexatious litigation, but extends to civil proceedings generally (*e.g.*, *Telezone*; *Ainsworth*; *Samson*), as well as criminal, administrative and military matters (*Ainsworth* at para 134, citing Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1983 at 131). Like commissions of inquiry, criminal proceedings are presumptively conducted in the public interest.

[52] As the Supreme Court of Canada explained in *Vaid*, once a category of privilege is established, proof of necessity is no longer required (at para 29(9)):

> Proof of necessity is required only to establish the existence and scope of a category of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of the exercise of a privilege need not be shown to be necessary" [citations omitted].

[53] If a parliamentary privilege is determined to exist, it must be extended to every proceeding. This includes commissions of inquiry (*Gagliano* at paras 67, 80, citing *Prebble v Television New Zealand Ltd*, [1995] 1 AC 321 (PC); *Hamilton v Al Fayed*, [2000] 2 All ER 224 (HL). The Ontario Legislative Assembly is the sole judge of the occasion and manner of the exercise and the privilege by the Premier and the Minister, and this is not reviewable by the courts. The specific instances of the exercise of the privilege need not be shown to be necessary.

[54] The Commission relies on the decision of the Ontario Court of Appeal in *Duffy v Canada (Senate)*, 2020 ONCA 536 at paragraph 102 for the proposition that:

> […] (1) at the federal level, the two-step approach applies to both legislated and inherent parliamentary privilege; (2) at the provincial level, inherent parliamentary privilege must always meet the necessity test, while a legislated parliamentary privilege would likely have to do so.

[55] Even if the analysis conducted by this Court in *Gagliano* were required in this case, the result would be the same. The issue that preoccupied Justice Tremblay-Lamer was whether the parliamentary privilege of free expression could be abrogated in a proceeding where there could be no legal consequence. There is no similar ambiguity about the effect of issuing a coercive summons. Parliamentarians will potentially be distracted from their duties by an enforceable summons regardless of whether or not the body issuing the summons has the power to impose legal consequences on the parties.

[56] A summons issued by a commission of inquiry is enforceable in the same manner as a subpoena issued by a civil court of competent jurisdiction, including by contempt of court proceedings (*Inquiries Act*, s 5). As counsel for the Applicants explained during the hearing of this motion, it doesn't matter who is doing the compelling; it matters who is compelled.

[57] I therefore conclude that the Applicants have established that the parliamentary privilege of testimonial immunity may be invoked in the present circumstances. The privilege provides the Premier and Minister with a lawful excuse not to comply with the summonses issued by the Commissioner on October 24, 2022.

[58] However, I am not persuaded that the summonses themselves are invalid, or that they were issued "without jurisdiction, pursuant to an error of law, and must be quashed", as alleged in the Notice of Application. To accept this assertion would be to turn parliamentary privilege from a shield into a sword, contrary to parliamentary intent (*Canada (House of Commons) v Vaid*, 2002 FCA 473 at para 65; rev'd on other grounds, 2005 SCC 30).

[59] I am satisfied that the Commissioner had jurisdiction to issue the summonses. The matters in respect of which the Premier and Minister have been called to testify are within the scope of the Commissioner's mandate, and it appears that both witnesses may have valuable evidence to offer.

[60] At the time the summonses were issued, the Premier and Minister had not definitively stated they would claim immunity by invoking parliamentary privilege. Furthermore, it remains open to the Premier and Minister to waive parliamentary privilege and testify as scheduled on November 10, 2022. The summonses are valid. However, they cannot be enforced so long as the Premier and Minister continue to resist them by asserting parliamentary privilege.

[61] I agree with the Applicants that this case falls within the rare and narrow second exception recognized by the Supreme Court of Canada in *RJR-MacDonald* that arises when a question of constitutionality presents itself as a simple question of law alone. Accordingly, I need not consider the second or third components of the test for granting a stay: the existence of irreparable harm or the location of the balance of convenience are irrelevant (*RJR-MacDonald* at 339-340).

[62] For the sake of completeness, I will nevertheless comment briefly on whether refusing to grant interlocutory injunctive relief would result in irreparable harm, and where the balance of convenience lies.

B. *Irreparable Harm*

[63] Irreparable harm is harm that cannot be compensated or remediated by monetary damages, or otherwise cured (*RJR-MacDonald* at 341). The analysis focuses on the nature or quality of the harm, not its magnitude.

[64] Any personal inconvenience or risk of criticism that may be endured by the Premier and Minister if they testify cannot amount to irreparable harm in law. As Justice James Hugessen stated in *Muttray v Canada (Royal Canadian Mounted Police)*, 1998 CanLII 8397 (FC), "[t]he duty to appear and testify before a public inquiry is one which may be cast upon any citizen and so long as the witness tells the truth, he or she has nothing to fear" (at para 6).

[65] I am nevertheless persuaded that declining to grant interlocutory injunctive relief would cause irreparable harm to the parliamentary privilege enjoyed by members of the Ontario Legislative Assembly, and to the rule of law. The privilege is a "necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces … in order for these legislators to do their legislative work" (*Telezone* at para 13).

[66] Parliamentary privilege is "one of the ways in which the fundamental constitutional separation of powers is respected". It supports the exercise of parliamentary sovereignty to ensure that a legislature is "safeguarded a due measure of autonomy from the other two branches of the state, the executive and the judiciary". Parliamentary privilege protects the operation of the legislature from outside interference, where such interference would impede the fulfilment of its

constitutional role (*Chagnon* at para 65, citing *Vaid* at para 21). Permitting the summonses to be enforced in the face of a valid claim of parliamentary privilege would impair and undermine the constitutional separation of powers.

[67] The Respondents say that the Premier and Minister can easily avoid any harm that may be done to parliamentary privilege and the rule of law by waiving the privilege and testifying voluntarily. They therefore argue that any potential harm to the rule of law is speculative. As Justice David Stratas remarked in *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at paragraph 24:

> […] it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief. Similarly, it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief.

[68] A waiver of parliamentary privilege in these circumstances would be the product of coercion, and would have the effect of undermining the privilege. The decision to waive privilege falls within the exclusive jurisdiction of the Ontario's Legislative Assembly itself, not the courts. It makes no difference whether the privilege is asserted by the legislature or by its individual members (*Samson* at paras 57-58). The Court's role when examining a claim of parliamentary privilege is limited to confirming whether the privilege exists and applies in the circumstances (*Vaid* at paras 47-48; *Telezone* at para 51).

[69] I am therefore satisfied that permitting the summonses to be enforced in a manner that breaches parliamentary privilege would cause irreparable harm to the Applicants as parliamentarians, and to the rule of law.

C. *Balance of Convenience*

[70] The third and final stage of the *RJR-MacDonald* framework requires an assessment of which party will suffer the greater harm from the granting or refusal of the stay or injunction, pending a decision on the merits.

[71] The prejudice to the Applicants that would result from permitting a violation of parliamentary privilege outweighs the legitimate interest of the Commission in receiving their testimony. While Commission Counsel have outlined a number of discrete areas where the Premier and Minister are uniquely qualified to give evidence, the primary mandate of the inquiry is directed towards federal decision-making, not provincial. The Commission has received numerous documents from the Government of Ontario, and two high-ranking witnesses from the Ontario public service are scheduled to testify.

[72] Conversely, permitting the summonses to take effect would cause the Commission to breach an established parliamentary privilege; a privilege that the Supreme Court has ruled is "one way in which the fundamental constitutional separation of powers is respected" (*Vaid* at para 21). There can be no question that the Commissioner intends to discharge his functions in accordance with the rule of law, and there is an overwhelming public interest that he do so.

[73] The balance of convenience favours the Applicants.

VI. Conclusion

[74] This motion falls within the narrow confines of the second exception identified by the Supreme Court of Canada in *RJR-MacDonald*. This Court has finally determined the constitutional issue in favour of the Applicants, and it is unnecessary to consider the second or third stages of the test for injunctive relief. The existence of irreparable harm or the location of the balance of convenience are irrelevant, inasmuch as the constitutional issue has been finally determined.

[75] In the alternative, the Applicants have met the elevated threshold of demonstrating a serious issue to be tried. They have also demonstrated that irreparable harm will result if the summonses are enforced in a manner that breaches parliamentary privilege, and that the balance of convenience favours granting interlocutory injunctive relief.

[76] The Applicants have not established that the summonses were issued "without jurisdiction, pursuant to an error of law, and must be quashed". To the extent that this Order amounts to a final disposition of the application for judicial review, the relief sought by the Applicants must be denied. The summonses issued by the Commission are valid. However, they cannot be enforced so long as the Premier and Minister continue to resist them by asserting parliamentary privilege.

[77] The Applicants are entitled to a declaration that, so long as they continue to assert a valid claim of parliamentary privilege, they have a lawful excuse for not complying with the summonses issued by the Commission. The Commission cannot take steps to enforce their attendance and compel them to give evidence as contemplated by s 5 of the *Inquiries Act*.

[78] Parliamentary privilege protects the operation of the legislature from outside interference, where such interference would impede the fulfilment of its constitutional role. The decision to waive privilege falls within the exclusive jurisdiction of the legislature, which is ultimately accountable to the electorate and not the courts.

[79] I commend counsel for the high quality of their written and oral submissions in this motion, which was brought on an urgent basis under strict time constraints.

VII. Costs

[80] The Applicants seek costs against the Commission. They say the summonses should never have been issued, and awarding costs is necessary to deter future unjustified incursions into the parliamentary privilege of members of the Ontario Legislative Assembly.

[81] I have determined that the summonses were validly issued. The Commission cannot be faulted for seeking to marshal and present all relevant evidence within its statutory mandate. Furthermore, it is doubtful that awarding costs against one publicly-funded entity in favour of another will serve any useful purpose. All costs will ultimately be borne by the taxpayer.

[82] By agreement of the parties, no costs should be awarded against the OCRB.

[83] The motion will therefore be granted in part, without costs to any party.

ORDER

THIS COURT ORDERS AND DECLARES that:

1. The motion is granted in part.

2. The summonses issued by the Public Order Emergency Commission to the Honourable Doug Ford, Premier of Ontario and the Honourable Sylvia Jones, Minister of Health and Deputy Premier [Applicants], are valid.

3. So long as the Ontario Legislative Assembly remains in session and the Applicants continue to resist the summonses by asserting parliamentary privilege, the Commission cannot take steps to enforce their attendance and compel them to give evidence as contemplated by s 5 of the *Inquiries Act*, RSC, 1985, c I-11.

4. No costs are awarded to any party.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2218-22
STYLE OF CAUSE:	THE HONOURABLE DOUG FORD, PREMIER OF ONTARIO AND THE HONOURABLE SYLVIA JONES, MINISTER OF HEALTH AND DEPUTY PREMIER v COMMISSIONER OF THE PUBLIC ORDER EMERGENCY COMMISSION AND OTTAWA COALITION OF RESIDENTS AND BUSINESSES
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 1, 2022
ORDER AND REASONS:	FOTHERGILL J.
DATED:	NOVEMBER 7, 2022

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