

# KEEPING CURRENT

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## Summons issued against Premier Ford valid but unenforceable because of parliamentary privilege.

By Stephen Thiele

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There has been much political debate over the past few weeks about Premier Ford's and Deputy Premier Jones's refusal to voluntarily testify at the federal public inquiry into federal government's use of the *Emergencies Act* to end the Freedom Convoy protest in Ottawa and to quash a summons issued by the Commission of inquiry to compel them to testify. Ontario's opposition parties have grilled Premier Ford in the Ontario legislature and accused him of "running" and "hiding" from the inquiry.

However, as determined by the Federal Court in [Ford v. Commissioner of the Public Order Emergency Commission, 2022 FC 1513](#), Premier Ford and Deputy Premier Jones had legitimate legal reasons for refusing to testify and for challenging the summonses. In this regard, the rule of law trumped the political hyperbole of the opposition parties.

On April 25, 2022, a Commission was established to inquire into the circumstances that caused the federal government to declare a public order

emergency under the [Emergencies Act, R.S.C. 1985, c. 22 \(4<sup>th</sup> Supp\)](#).

The power was used in response to the Freedom Convoy protest that had shut down parts of Ottawa for a few weeks in mid-February 2022.

On October 24, 2022, the summonses were issued against Premier Ford and Deputy Premier Jones to appear before the inquiry on November 10, 2022.

Among other things, Premier Ford and Deputy Premier Jones argued that they were protected from testifying by parliamentary privilege, that their evidence was unnecessary, and that the summonses were in any event issued without jurisdiction. The evidence disclosed that the Ontario government had provided hundreds of pages of documents to the inquiry and that two senior staff officials would be testifying at the inquiry.

The respondents argued that the parliamentary privilege did not apply to a commission of inquiry. They explained

that many other politicians had already agreed to testify and, relying on commentary from a textbook entitled *House of Commons Procedure and Practice* (3<sup>rd</sup> ed. 2017) that the privilege was "... not intended to be used to impede the course of justice and, therefore, is regularly waived."

In determining whether the summonses should be stayed, the Court was required to apply the three-part test established in [RJR-MacDonald Inc. v. Canada \(Attorney General\), 1994 CanLII 117 \(SCC\)](#). Under this test, Premier Ford and Deputy Premier Jones were required to show that i) there was a serious issue to be tried, ii) that they would suffer irreparable harm if they were compelled to testify, and iii) the balance of convenience favoured the granting of the stay.

In general, a low threshold applies to the first part of the test such that a court is not required to extensively review the merits of a case. However, a more extensive review of the merits of the case and a higher threshold will apply where the stay will end the litigation.

In the circumstances here, a more extensive review was required as well because Premier Ford and Deputy Premier Jones argued that the issue before the court involved a question of constitutionality which presented itself as a simple question of law alone. This presented an exception to the general rule and application of a low threshold, but also meant that Premier Ford and Deputy Premier Jones were not required to establish irreparable harm or satisfy the balance of convenience component of the three-part test.

The Court agreed that in the circumstances a higher threshold applied and that the second and third elements of the stay test did not need to be considered.

With respect to the merits of the application,

the Court found that Premier Ford and Deputy Minister Jones satisfied the higher threshold. The Court explained that parliamentary privilege referred to the sum of the privileges, immunities and powers that were necessary for members of the Senate, the House of Commons and provincial legislative assemblies to full their legislative duties and that under the category of testimonial immunity contained thereunder privilege could be asserted while a legislature was in session and for 40 days immediately before and after the session. The Court noted that Ontario legislature was in session and the Respondents accepted the existence of the parliamentary privilege for testimonial immunity.

More importantly, and contrary to the Respondents' contention, the Court held that testimonial immunity applied to a summons issued by a Commissioner for inquiry. Parliamentary privilege protected parliamentarians from vexatious litigation and civil proceedings generally as well as criminal, administrative and military matters. Accordingly, it applied to a summons issued by a Commission of inquiry, which, like a criminal proceeding, was being presumptively conducted in the public interest. The Court stated at paragraph 53: "If a parliamentary privilege is determined to exist, it must be extended to every proceeding. This includes commissions of inquiry."

Although this finding ended the matter, the Court found as well that Premier Ford and Deputy Premier Jones had satisfied the second and third elements of the stay test. The Court stated that if a stay was not granted there would be irreparable harm suffered to the parliamentary privilege and the rule of law. Parliamentary privilege was fundamentally important to the constitutional separation of powers between the state, the executive and



the judiciary and protected the operation of the legislature from outside interference.

The Court further found that permitting a violation of parliamentary privilege outweighed the interests of the Commission in receiving Premier Ford's and Deputy Premier Jones's testimony because the government of Ontario had provided numerous documents to the Commission and two Ontario senior staff members were going to testify at the inquiry. In contrast, rejecting the stay would cause a breach of the parliamentary privilege. As stated by the Supreme Court of Canada in [Canada House of Commons v. Vaid, 2005 SCC 30](#) at [paragraph 21](#), the parliamentary privilege is "...one way in which the fundamental constitutional separation of powers is respected."

However, the Court's decision to find that the summonses were unenforceable did not impact the validity of the summonses. The summonses were validly issued within the mandate of the Commission of inquiry. The mandate of the inquiry included:

- 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.

Under this mandate, the Court surmised that Premier Ford and Deputy Premier Jones might have had valuable evidence to offer.

The key takeaway from this case is that the parliamentary privilege for testimonial immunity is a valuable principle under Canada's constitutional democracy that cannot be lightly interfered with. Canada's constitution is built on a separation of powers between the state, the executive and the judiciary, all of which must be respected. Accordingly, while opposition parties will always make noise whenever a high-ranking politician justifiably seeks to avoid complying with a summons, particularly one issued by a public inquiry, the rule of law must always be respected and will always trump the sensationalized, headline-grabbing, political rhetoric that the high-ranking politician is simply trying to run and hide from the public. In the circumstances, Premier Ford has been vindicated for his position.

### Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at [sthiele@grllp.com](mailto:sthiele@grllp.com).

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