



[2022] 1 F.C.R. D-12

CONSTITUTIONAL LAW

Parliamentary privilege — Urgent motion to stay two summonses issued by respondent Commissioner of Public Order Emergency Commission — Commission established to inquire into circumstances that led to declaration of public order emergency between February 14 and 23, 2022, measures taken to deal with emergency — Applicants scheduled to testify before Commission on November 10, 2022 — Applicants challenged summonses on ground that Ontario Legislative Assembly in session, that as elected officials benefitting from parliamentary privilege of testimonial immunity — Respondents stated that application of parliamentary privilege of testimonial immunity to commission of inquiry not established in law — Maintained that privilege not intended to be used to impede course of justice, regularly waived — Whether summonses issued by Commissioner should be stayed pending Court's determination of application to quash summonses for lack of jurisdiction — In order to obtain stay of summonses, applicants having to meet well-established test for interlocutory injunctive relief articulated by Supreme Court of Canada in *RJR-MacDonald Inc v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 — Applicants having to establish existence of serious issue on elevated standard — Only dispute between parties whether parliamentary privilege of testimonial immunity may be invoked to resist summons issued by commission of inquiry, as opposed to one issued by court or other tribunal — Court previously considered application of parliamentary privilege to proceedings of federal commission of inquiry in *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555 — In *Gagliano*, Court found it necessary to determine necessity of parliamentary privilege of free expression only because its scope, application to commission of inquiry were uncertain — Same cannot be said of parliamentary privilege of testimonial immunity — Parliamentary privilege of testimonial immunity not limited to safeguarding parliamentarians from vexatious litigation, but extending to civil proceedings generally, criminal, administrative, military matters — If parliamentary privilege determined to exist, it must be extended to every proceeding including commissions of inquiry — Parliamentary privilege of testimonial immunity may be invoked in present circumstances — However, summonses themselves not invalid or issued without jurisdiction, warranting that they be quashed — To accept this assertion would be to turn parliamentary privilege from shield into sword, contrary to parliamentary intent — Commissioner had jurisdiction to issue summonses — Matters in respect of which applicants called to testify within scope of Commissioner's mandate — However, summonses cannot be enforced so long as applicants continue to resist them by asserting parliamentary privilege — This case falling within rare, narrow second exception recognized in *RJR-MacDonald* that arises when question of constitutionality presents itself as simple question of law alone — Declining to grant interlocutory injunctive relief would cause irreparable harm to parliamentary privilege enjoyed by members of Ontario Legislative Assembly, to rule of law — Permitting summonses to be enforced in the face of valid claim of parliamentary privilege would impair, undermine constitutional separation of powers — Waiver of parliamentary privilege in these circumstances would be product of coercion, would have effect of undermining privilege — Prejudice to applicants resulting from permitting violation of parliamentary privilege outweighing legitimate interest of Commission in receiving their testimony — Conversely, permitting summonses to take effect would cause Commission to breach established parliamentary privilege — Motion granted in part.

ONTARIO (PREMIER) V. CANADA (COMMISSIONER OF THE PUBLIC ORDER EMERGENCY COMMISSION) (T-2218-22, 2022 FC 1513, Fothergill J., reasons for order dated November 7, 2022, 28 pp.)