



Decision on Application to Compel the Production of Documents, Summons Witnesses and Other Relief

1. Freedom 2022 Human Rights and Freedoms not-for-profit corporation (“Freedom Corp.”), an organization that was granted joint standing with a group of convoy organizers in this Commission, brings an application for, among other relief, an order that a third party produce documents and four further witnesses testify at the factual hearings, which are in their final week.
2. This decision explains why I would dismiss Freedom Corp’s application.

Background to the Application and Applicable Rules and Statutes

3. On November 20, 2022, Freedom Corp served an application record seeking the following relief under s. 4 of the *Inquiries Act*:
 - a. an order that the Ottawa Police Services (the “OPS”) and/or the Ontario Provincial Police (the “OPP”) produce the results of a license plate search of a truck (the “Truck”) that was photographed in Ottawa at the time of the protests. In the photograph, the back of the Truck is displaying a Confederate flag and an upside-down Canadian flag;
 - b. an order requiring the Government of Canada to produce unredacted copies of the following records: SSM.CAN.NSC.00002838_REL.0001, SSM.CAN.00006131_REL.0001 and SSM.CAN.NSC.00002872_REL.0001. The Government of Canada has redacted these documents citing s. 39 of the Canada Evidence Act;
 - c. an order that the strategic communications firm, Enterprise Canada, produce documents to the Commission; and



- d. an order that two individuals associated with Enterprise Canada, including Brian Fox, be compelled to testify at the Commission.
4. As described below, Freedom Corp. has amended its application to seek that two further individuals be compelled to testify.
5. The initial application record was not supported by an affidavit. It did include references to certain documents from the Party Database, as well as news articles and other open-source information.
6. In essence, Freedom Corp. alleges that, before the convoy arrived in Ottawa, certain members of the “political executive” and their staff decided to paint the protesters as racists and extremists, notwithstanding the intelligence from law enforcement saying otherwise. Freedom Corp. continues that, once the protests in Ottawa began, the political executive and their staff furthered this labelling by pointing to photographs of Nazi and Confederate flags that had been circulating online.
7. Freedom Corp. alleges that there is “evidence and grounds to suspect that the flags and purported protestors using them, were not protestors with the convoy at all, but provocateurs”. Among other allegations, Freedom Corp. suggests that the Truck did not belong to a protester, as it was parked away from other protest vehicles and photographed by a person that did not support the protests and who Freedom Corp. says is a politician.
8. More troubling, Freedom Corp. asserts that Brian Fox and another person from Enterprise Canada arranged to have Confederate and Nazi flags appear at the protest. In particular, they allege:



- a. that Mr. Fox was pictured taking a photograph of an *agent provocateur* carrying Confederate flag with an image of a truck in the centre (the “Truck Flag”); and
 - b. on a separate occasion, Mr. Fox himself was photographed holding a Nazi flag.
9. Freedom Corp. originally made these assertions by comparing photos from the protests to photos of Mr. Fox that Freedom Corp. obtained online. In both instances, the face of the person Freedom Corp. says is Mr. Fox is obscured.
10. Finally, Freedom Corp. asserts that, based on the material it has reviewed, “it is possible” that Enterprise Canada “carried out such conduct at the direction of the Prime Minister, his staff or both”.
11. On November 21, 2022, counsel for Freedom Corp. repeated these allegations during his cross-examination of representatives from the Canadian Security Intelligence Services (“CSIS”) and the Integrated Threat Assessment Centre (“ITAC”), including the allegation that Mr. Fox had been holding a Nazi flag. Freedom Corp.’s counsel also asked Minister Bill Blair about Enterprise Canada and Mr. Fox. The examinations produced no evidence in support of Freedom Corp.’s allegations.
12. Shortly after that examination, Enterprise Canada released the following denial in a press release:

TORONTO, ON – Today, in the scope of the Emergencies Act Inquiry, Brendan Miller, the lawyer representing “Freedom Corp” made an entirely unsubstantiated and deeply offensive accusation against Enterprise Canada principal Brian Fox.

For the record, there is no truth to this absurd and despicable accusation. Neither Brian Fox, nor anyone from Enterprise Canada was in attendance



at the “Freedom Convoy” protests in any capacity. Mr. Fox was in Toronto for the duration of these protests and had no involvement in them.

Mr. Fox and everyone at Enterprise Canada stands firmly against the hatred represented by the symbol Mr. Miller referenced, and strives for our workplace to be an inclusive and accepting environment for everyone.

Both Mr. Fox and Enterprise Canada plan to review all legal options and take swift action to defend against this unsubstantiated attack on the personal and professional reputation of Mr. Fox.

13. On November 22, 2022, Freedom Corp.’s counsel cross examined Minister of Public Safety Marco Mendocino and pursued the theory that is the subject of this application. Again, no supportive evidence was adduced.

14. On the same day, November 22, 2022, Enterprise Canada published a letter that its lawyer had sent to Mr. Miller regarding the allegations Freedom Corp. had raised with the CSIS and ITAC witnesses. The letter stated, among other things, that:

- a. Mr. Fox was not in Ottawa in January or February 2022. He last visited Ottawa in 2019;
- b. Neither Enterprise Canada nor Mr. Fox had any involvement in the convoy protests that are the subject of the Commission;
- c. Mr. Fox is not a Liberal Party member, supporter or collaborator. He is a longstanding member of and contributor to the Conservative Party of Canada, and participated in the recent leadership process to support Pierre Poilievre; and
- d. The allegation that Mr. Fox colluded with the incumbent government to discredit protesters has absolutely no basis in fact, and is reckless.



15. In accordance with the Commission's Rules, Freedom Corp.'s application was circulated to the parties, who were given an opportunity to respond. The Commission received responses from the following parties:

- a. The OPS advised that, while the OPS has access to license plate information for law enforcement purposes, the Ministry of Transportation is the record holder. OPS' position is that the information must come from the Ministry of Transportation, which as the authority to release the information.
- b. The OPP took no position on the relief sought, but has also advised that the database of license plate numbers is a Ministry of Transportation database, and that the inquiry should be directed to that ministry. The OPP further stated that, if any police service is ordered to do a search, it should be the OPS as the truck was photographed in Ottawa. The OPP also asserted that the owner of the license plate may wish to assert a privacy interest. Finally, the OPP stated that if an order is made to have the search conducted and directs it to the OPP, the service would arrange for a search.
- c. The Ottawa Coalition of Residents and Businesses stated that, given the nature of the theory being raised, Freedom Corp.'s assertions should be either confirmed or disproved and, for this reason, "most if not all of the requests should be granted".
- d. The Criminal Lawyers' Association and the Canadian Council of Criminal Defence Lawyers stated that, if counsel uses an assertion so that it might



form the basis of a negative finding against a person or group, that assertion should be proven by admissible evidence and the person or group at risk of a negative finding should have a full opportunity to respond to the assertion. If the assertion is not proven, it has no evidentiary value.

e. Windsor Police Service advised that it took no position.

16. The Government of Canada filed submissions respecting only Freedom Corp.'s request for the production of unredacted documents. It did not make submissions on other aspects of the application. Canada indicated that it had undertaken a further review of the three documents identified by Freedom Corp. Following this review, it agreed to lift certain redactions, and in other instances provided a brief explanation as to why it was maintaining other redactions.

17. The partially unredacted documents were delivered to Commission counsel and the parties while Minister Bill Blair was testifying on November 21, 2022. At the request of counsel for the Freedom Convoy, who had completed his examination of Minister Blair before reviewing the documents, I exercised my discretion to allow him additional time to examine on the unredacted records.

Additional Submissions and Materials

18. At 1:31 a.m. on November 22, 2022, after the deadline for parties to respond to the application, Mr. Miller submitted an amended application record.

19. In the amended application record, Freedom Corp.:

a. Advised that it planned to deliver an affidavit from an individual named Shawn Folkes and asked that Mr. Folkes be called to testify. In October



2022, Freedom Corp. had provided the Commission with a will-say statement from Mr. Folkes stating that Mr. Folkes had an interaction with a man carrying a Nazi flag at the protests. Mr. Folkes' October statement made no reference to Brian Fox or Enterprise Canada; and

- b. Sought the production of records from a freelance photographer named David Chan and requested that the Mr. Chan either testify under oath or be interviewed by Commission Counsel.

20. With respect to Mr. Chan, Freedom Corp. alleges that he was the photographer who took photos of the alleged *agent provocateur* holding the Truck Flag. Freedom Corp. states that Mr. Chan's photo was then used by the Toronto Star to accompany an opinion piece in the Toronto Star. The opinion piece was authored by a second Enterprise Canada representative Freedom Corp. seeks to compel.

21. I pause to note that, in the initial application record, Freedom Corp. suggested that it was Mr. Fox who had taken the photo that appeared in the Star article. It is not clear whether Freedom Corp. has discarded that suggestion in favour of a new theory that it was Mr. Chan.

22. Although the amended application record identifies Mr. Chan as a freelance photographer, Freedom Corp. also describes him as a "photographer for the Prime Minister". The statement appears to be based on the fact that the Mr. Chan's online portfolios include several pictures of the Prime Minister at different events. Freedom Corp. says these portfolios are "telling". In his examination of Minister Mendicino, Mr. Miller sought to establish connections between Mr. Chan and the Prime Minister. He did not.



23. At 12:49 p.m. on November 22, 2022, Freedom Corp. delivered an affidavit from Mr. Folkes. In the affidavit, Mr. Folkes states that, on January 29, 2022, he saw a man holding a Nazi flag at the Ottawa protests, approached him and “attempted to speak with him”. Mr. Folkes continues that, having watched the livestream of Mr. Miller’s examinations on November 21, 2022, he went to Enterprise Canada’s website on the same day and identified Mr. Fox as the man he attempted to speak with 10 months earlier. Mr. Folkes also states that he has now reviewed two other photos provided by Freedom Corp.’s counsel and can further confirm that the man he spoke with was Mr. Fox.

Applicable Statutes

24. Section 4 of the Inquiries Act states:

Powers of commissioners concerning evidence

4 The commissioners have the power of summoning before them any witnesses, and of requiring them to

(a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

Analysis

25. Below I deal with the four requests for relief. Before doing so, however, I think it is worth recalling the guiding principles that the Commission has adopted for the conduct of this inquiry. These principles, contained in Rule 10 of the Commission’s Rules, are proportionality, transparency, fairness, timelines, and expedition. As we near



the end of the public proceedings, I believe that it is important for all participants involved to remind themselves of these foundational principles on which all of these proceedings have been based.

License Plate Searches

26. In its application record, Freedom Corp. notes that the license plate information it seeks is publicly available through the Ontario Ministry of Transportation, but there is a 15-day waiting period. The public hearings on the factual phase end this week.

27. The OPS and OPP have advised that they are not the record keeper of the license plate information that the Freedom Corp. seeks in respect of the Truck.

28. It is an interesting question whether section 4 of the *Inquiries Act* empowers me to compel a person or entity to obtain records that it is not in fact in possession of for the purpose of producing it to the Commission. I do not need to express a view on this issue. Even if the OPS or the OPP had the information within its possession, I would decline to order its production at this stage of the hearings.

29. The basis for seeking this information is purely speculative. There is no proper foundation in the evidence to believe that the registration information for this vehicle would disclose the existence of an *agent provocateur*. Having carefully reviewed the information provided by Freedom Corp., I conclude that this is, in essence, a fishing expedition. Taking into account my mandate, the key issues that I must determine to fulfill that mandate, the current stage of the proceedings, and the overall principles set out in Rule 10, I would refuse to make the order requested.

Further Document Redactions



30. Following its re-examination of the three documents at issue in this Application, Canada provided the following submissions:

- a. **SSM.CAN.NSC.00002838_REL**: Canada has agreed to lift a redaction over the words “Please find...”. In all other respects Canada maintains that the redacted information, while relevant, constitutes a confidence of the King’s Privy Council for Canada.
- b. **SSM.CAN.00006131_REL**: Canada maintains all redacted information, while relevant, constitutes a Confidence of the King’s Privy Council for Canada.
- c. **SSM.CAN.NSC.00002872_REL**: Canada has agreed to lift a redaction over the text “1pm Ministerial update readout. Please let me know if there are any questions.” As well as portions of page 1 – 3. With respect to the remaining redacted information, Canada maintains that, while it is relevant, it constitutes a Confidence of the King’s Privy Council for Canada.

31. Canada provided partially unredacted versions of these documents to the parties by email and is in the process of making them available in the Party Database. In the meantime, as noted above, the Commission arranged for the partially unredacted documents to be used in examination by Freedom Corp. on November 21.

32. For the reasons described in my *Decision on Application to Compel Production of Unredacted Government of Canada Records*, I would dismiss this aspect of the Application. Canada has reviewed the documents in question and re-assessed whether they constitute Cabinet Confidences. I have no reason to question the good faith of their



review. Having completed that review, I see no useful purpose in ordering that the redactions be lifted. Requiring Canada to produce a s. 39 certificate at this stage under the process set out in Rule 82 would not be an appropriate use of time or resources.

33. I do note that, where I have been able to see behind the Government of Canada's redactions for irrelevance and parliamentary privilege in the other application, none of the redacted material relates in any way to the allegations raised by Freedom Corp. in this application.

[Enterprise Canada, David Chan and Shawn Folkes](#)

34. I would dismiss Freedom Corp.'s requests to compel evidence from Enterprise Canada, David Chan and Shawn Folkes for the following four reasons.

35. First, Freedom Corp. has raised serious allegations regarding Enterprise Canada with little foundation in evidence.

36. The claim was initially supported by a side-by-side comparison of unclear photographs and a man that Freedom Corp. has asserted is Mr. Fox. The photos provide no useful information about who was holding or photographing the flags in issue. It is not even clear from Freedom Corp.'s own materials who they now assert took the photo of the protester holding the Truck Flag.

37. Freedom Corp. has also now had the opportunity to pursue the various components of its theory with representatives from CSIS and ITAC, as well as two members of Cabinet. Those examinations elicited no evidence to support the theory.

38. Second, the late disclosure of Mr. Folkes' affidavit does not resolve the absence of the foundation. The affidavit is untested and is contradicted by Enterprise Canada's public statements. For it to be relied upon by the Commission, it would have to be



subjected to cross examination to assess the credibility and reliability of the statements in the affidavit. It is fair to say that the strength of that identification evidence is not high. Given the seriousness of the allegations, the Commission would likely have to receive evidence from Enterprise Canada and those individuals targeted by Freedom Corp.'s allegations. This would constitute a very significant distraction from the Commission's core mandate. In light of the absence of any other factual support, it is not a prudent use of the Commission's remaining time to pursue Freedom Corp.'s theory.

39. Third, the allegations have been made very late in the factual hearings and no explanation has been provided as to why they were not raised earlier.

40. Fourth and finally, as troublesome as Freedom Corp.'s allegations might be, even if they had been supported by compelling evidence the fact is that they would have little, if any, relevance to the key issues that the Commission must determine.

41. For these reasons the application, as amended, is dismissed.

Signed

The Honourable Paul S. Rouleau
Commissioner

November 22, 2022