Form / *Formule* 1
APPLICATION
DEMANDE

(Rule 2.1, *Criminal Rules of the Ontario Court of Justice*)
(Règle 2.1, Règles de procédure en matière criminelle de la Cour de justice de l'Ontario*)*

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO

East / Est
Region / *Région*

22-A8184
Court File No. (if known)
N° du dossier de la cour (s'il est connu)

BETWEEN: / *ENTRE*

HIS MAJESTY THE KING / *SA MAJESTÉ LE ROI*

- and / *et* -

JEFFREY EVELY
(defendant(s) / *défendeur(s)*)

1. APPLICATION HEARING DATE AND LOCATION
DATE ET LIEU DE L'AUDIENCE SUR LA DEMANDE

Application hearing date: **August 26, 2024**
Date de l'audience sur la demande

Time **10 am**
Heure

Courtroom number: **TBD**
Numéro de la salle d'audience

Court address: **161 Elgin Street, Ottawa**
Adresse de la Cour

2. LIST CHARGES
LISTE DES ACCUSATIONS

Charge Information / *Renseignements sur les accusations*			
Description of Charge ***Description de l'accusation***	**Sect. No.** ***Article n°***	**Next Court Date** ***Prochaine date d'audience***	**Type of Appearance (e,g. trial date, set date, pre-trial meeting, etc.)** ***Type de comparution (p. ex., date de procès, établissement d'une date, conférence préparatoire au procès, etc.)***
Mischief (2x)	**430(1) (c) & (d)**	**August 19, 2024**	**Trial Management**
Disobey lawful order	**127(1)**	**August 19, 2024**	**Trial Management**
Obstruct peace officer	**129(a)**	**August 19, 2024**	**Trial Management**

3. NAME OF APPLICANT
NOM DE L'AUTEUR DE LA DEMANDE

Jeffrey Evely

4. CHECK ONE OF THE TWO BOXES BELOW:
COCHEZ LA CASE QUI CONVIENT CI-DESSOUS

☐ I am appearing in person. My address, fax or email for service is as follows:
Je comparais en personne. Mon adresse, mon numéro de télécopieur ou mon adresse électronique aux fins de signification sont les suivants :

☒ I have a legal representative who will be appearing. The address, fax or email for service of my legal representative is as follows:
J'ai un représentant juridique qui sera présent. L'adresse, le numéro de télécopieur ou l'adresse électronique de mon représentant juridique aux fins de signification sont les suivants :

Christopher Fleury

Email:

5. CONCISE STATEMENT OF THE SUBJECT OF APPLICATION
BRÈVE DÉCLARATION DE L'OBJET DE LA DEMANDE

(Briefly state why you are bringing the Application. For example, "This is an application for an order adjourning the trial"; "This is an application for an order requiring the Crown to disclose specified documents"; or "This is an application for an order staying the charge for delay.")
(Expliquez brièvement pourquoi vous déposez la demande. Par exemple : « Il s'agit d'une demande d'ordonnance d'ajournement du procès. », « Il s'agit d'une demande d'ordonnance exigeant de la Couronne qu'elle divulgue les documents précisés. », ou « Il s'agit d'une demande d'ordonnance d'annulation de l'accusation pour cause de retard. »)

See: Appendix A

6. GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION
MOTIFS QUI SERONT INVOQUÉS À L'APPUI DE LA DEMANDE

(Briefly list the grounds you rely on in support of this Application. For example, "I require an adjournment because I am scheduled to have a medical operation the day the trial is scheduled to start"; "The disclosure provided by the Crown does not include the police notes taken at the scene"; or "There has been unreasonable delay since the laying of the charge that has caused me prejudice.")
(Énumérez brièvement les motifs que vous invoquez à l'appui de la demande. Par exemple : « J'ai besoin d'un ajournement parce que je dois subir une intervention médicale le jour prévu pour le début du procès. », « Les documents divulgués par la Couronne ne contiennent pas les notes de la police prises sur les lieux. » ou « Un retard excessif a suivi le dépôt des accusations qui m'a causé un préjudice. »)

See: Appendix A

7. DETAILED STATEMENT OF THE SPECIFIC FACTUAL BASIS FOR THE APPLICATION
DÉCLARATION DÉTAILLÉE DES FAITS PRÉCIS SUR LESQUELS SE FONDE LA DEMANDE

See: Appendix A

8. INDICATE BELOW OTHER MATERIALS OR EVIDENCE YOU WILL RELY ON IN THE APPLICATION
INDIQUEZ CI-DESSOUS D'AUTRES DOCUMENTS OU PREUVES QUE VOUS ALLEZ INVOQUER DANS LA DEMANDE

☐ Transcripts (Transcripts required to determine the application must be filed with this application.)
Transcriptions (Les transcriptions exigées pour prendre une décision sur la demande doivent être déposées avec la demande.)

☐ Brief statement of legal argument
Bref exposé des arguments juridiques

☐ Affidavit(s) (List below)
Affidavits (Énumérez ci-dessous)

☒ Case law or legislation (Relevant passages should be indicated on materials. Well-known precedents do not need to be filed. Only materials that will be referred to in submissions to the Court should be filed.)
Jurisprudence ou lois. (Les passages pertinents doivent être indiqués dans les documents. Les arrêts bien connus ne doivent pas être déposés. Il ne faut déposer que les documents qui seront mentionnés dans les observations au tribunal.)

☐ Agreed statement of facts
Exposé conjoint des faits

☒ Oral testimony (List witnesses to be called at hearing of application)
Témoignage oral (Liste des témoins qui seront appelés à témoigner à l'audience sur la demande)

Jeffrey Evely

☒ Other (Please specify)
Autre (Veuillez préciser)

Submissions of Counsel

July 26. 2024
(Date)

Signature of Applicant or Legal Representative / *Signature de l'auteur de la demande ou de son représentant juridique*

To: **Ottawa Crown Attorney's Office**
À : (Name of Respondent or legal representative / *Nom de l'intimé ou de son représentant juridique*)

Email: **&**
(Address/fax/email for service / *Adresse, numéro de télécopie ou adresse électronique aux fins de signification*)

NOTE: Rule 2.1 requires that the application be served on all opposing parties and on any other affected parties.
NOTA : La règle 2.1 exige que la demande soit signifiée à toutes les parties adverses et aux autres parties concernées.

Court File No.: 22-A8184

ONTARIO
COURT OF JUSTICE
EAST REGION

B E T W E E N:

HIS MAJESTY THE KING

Respondent

-and-

JEFFREY EVELY

Applicant

SCHEDULE A TO FORM 1 (CHARTER APPLICATION)

PART 5 – CONCISE STATEMENT OF THE SUBJECT OF THE APPLICATION

1. The Applicant, Jeffrey Evely, is accused of the *Criminal Code* offences of mischief and obstructing police. The charges against Mr. Evely are particularized as occurring on or about February 19, 2022. The charges arise out of what is widely known as the "Freedom Convoy" protest, and the police enforcement action which ultimately removed protestors and vehicles from downtown Ottawa.

2. Mr. Evely is military veteran. He was responsible for the scheduling of a sentry duty to guard the National War Memorial after some vandalism had occurred there at the outset of the Freedom Convoy protest. Mr. Evely regularly took the least popular shifts himself which were in the pre-dawn hours.

3. On February 18, 2021, police began to remove vehicles and protestors from the downtown core. Following the removal of protestors, Police blocked off large sections of the downtown core and prevented the public at large, including Mr. Evely, from accessing it. This included the Ottawa War Memorial.

4. Mr. Evely was arrested in the early morning hours of February 19, 2021, while on his way to the War Memorial for his sentry duty shift. Mr. Evely submits that his arrest was unlawful and that any subsequent searches were therefore unreasonable contrary to sections 9 and 8 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") respectively.

5. In this Application Mr. Evely argues that police did not have the common law power to create checkpoints and lockdown downtown Ottawa, forcing every single person wishing to enter to identify themselves.

6. Where the Crown may be relying on the *Emergencies Act* Emergencies Act, RSC 1985, c 22 (4th Supp) (the "***Act***")[1], and the *Emergency Measures Regulations,* SOR/2022-21 (the "***Regulations***")[2], as providing authority for the police enforcement action, and ultimately providing grounds for Mr. Evely's arrest, the Applicant makes two additional arguments. The Applicant argues that the decision to invoke the *Act* was *Ultra Vires* and that the *Regulations* were in breach of his rights under section 2(b) of the *Charter* and not saved by section 1.

7. Following Mr. Evely's arrest, police used his identity to gather information from his social media profiles. That information was intern used to purportedly identify Mr. Evely in a police drone video from February 18, 2021 and an open-source video. The Crown is seeking to rely on the social media evidence, open-source video evidence, and drone video evidence against Mr. Evely at trial. Mr. Evely requests that this Court exclude all evidence obtained as a result of the infringement of his *Charter* rights, pursuant to section 24(2) of the *Charter*.

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[1] *Emergencies Act, RSC 1985*, c 22 (4th Supp).

[2] *Emergency Measures Regulations*, SOR/2022-21.

PART 7 – DETAILED STATEMENT OF THE SPECIFIC FACTUAL BASIS FOR THE APPLICATION

8. The following are the anticipated facts to be led at the hearing of this Application, based primarily on the disclosure provided to the Applicant and Mr. Evely's anticipated evidence.

9. Beginning on January 28, 2022, vehicles and persons from all over Canada began to arrive in downtown Ottawa with the primary purpose of protesting federal and provincial government's legislative responses to the Covid-19 pandemic. The vehicles included tractor trailer style trucks and other commercial vehicles. This protest became known by participants and the public alike as the Freedom Convoy.

10. Participants in the Freedom Convoy protest parked their vehicles on the streets of downtown Ottawa. These included tractor trailers, semi-trucks, pickup trucks, heavy trucks, as well as passenger vehicles, camper vans, trailers and cars on some lanes of some streets.

11. The vehicles associated with the "Freedom Convoy" extended to the majority of the downtown core of Ottawa, bounded by Wellington Street in the north, Laurier Avenue in the south, Lyon Street in the west and the Rideau Canal in the east.

12. While vehicle numbers and locations were fluid throughout most of the protest, the vehicles forming part of the "Freedom Convoy" were parked in most lanes of roadways and sideroads of downtown Ottawa making passage by vehicle more difficult than it would otherwise be.

13. Some of the vehicles parked in Ottawa's downtown core were equipped with horns, including air horns and train horns. Some members of the "Freedom Convoy" honked their horns at all hours, beginning the first week of the occupation. The honking continued until it abated between 11 pm and 7 am following the granting of a Superior Court interim injunction on February 7, 2022.

14. While the Freedom Convoy protest affected some downtown residents' ability to enjoy their property, the protest was overwhelmingly peaceful in nature.

15. Some downtown businesses, community centers and establishments *chose* to close. These institutions included the Rideau Centre, the National Arts Centre, museums, public libraries as well as the COVID-19 clinic at the University of Ottawa.

16. On February 14 the Federal Government invoked the *Act* and passed the *Regulation*. The *Regulation* prevented individuals from participating in certain types of assemblies, outlined in more detail below.

17. Mr. Evely is military veteran. He was responsible for organizing a sentry duty to guard the Ottawa War Memorial after some vandalism had occurred there at the outset of the Freedom Convoy protest. Mr. Evely regularly took the least popular shifts himself which were in the pre-dawn hours.

18. On February 18, 2022, police began an enforcement action aimed at removing the protestors and vehicles from the downtown core. During the day police succeeded in removing some protestors and vehicles from some areas of downtown Ottawa.

19. Upon clearing the streets of protestors and vehicles, police closed major roads in downtown Ottawa and set up roadblocks and check points. Members of the public were not permitted to pass these checkpoints without showing identification. If a person did live or work in the area, they would not be permitted past the checkpoint.

20. The Applicant was first observed by Cst. Walker of the Ottawa Police on February 19, 2022, at approximately 4:25 in the morning. At that time, he is running southbound on Sussex Drive towards Rideau Street. An unknown police officer is heard to yell "stop sir". The identity of

the officer yelling “stop sir” is unknown. The reason they were yelling “stop sir” is unknown. It is anticipated these unknowns will remain a mystery during and following the trial.

21. The area of Sussex Drive where Mr. Evely was first observed was inaccessible to the public. Entry could only be made by passing a police checkpoint.

22. Cst. Walker was standing at the intersection of Sussex and Rideau. He attempted to intercept the Applicant. Cst. Walker chased the Applicant a short distance toward Mackenzie Drive where he was quickly intercepted by officers Meuleman and Durton of the York Regional Police.

23. Cst. Walker placed the Applicant under arrest for the *Criminal Code* offences of obstructing a peace officer and mischief. The Applicant understands that Cst. Walker’s grounds for arrest are essentially as follows:

a. the Applicant had bypassed a blocked and manned road;

b. he ignored police direction;

c. he fled;

d. he attempted to charge past police to join the Freedom Convoy protest; and

e. the public had been warned that participation in the Freedom Convoy protest would result in arrest.

24. The Applicant was searched incident to arrest. His wallet was located in his left jacket pocket. His wallet contained various forms of identification including an Ontario Driver’s license in the name of Jeffrey Evely. He was held for show cause and ultimately released with conditions later in the day February 19.

25. Following The Applicant’s release, police used his identification to locate and download his social media profiles. The Crown intends to rely on this evidence at trial.

26. Police used the social media evidence to purportedly identify him in a police drone video from February 18, 2024, and an open-source video. The Crown also intends to rely on these videos at trial.

PART 6 – GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION

27. The Applicant raises the following interrelated issues in this application:

A. Police did not have authority under common law to lockdown downtown Ottawa.

B. The invocation of the *Act* was *Ultra Vires*.

C. The *Regulation* was in breach of the Applicant's Freedom of Expression.

D. The *Regulation* was not a reasonable limit of the Applicant's freedom.

E. His arrest was arbitrary.

F. Any subsequent searches were unreasonable.

G. Evidence obtained as a result of the arbitrary arrest and unreasonable searches should be excluded.

A. Police did not have authority under common law to lockdown downtown Ottawa.

Overview

28. The actions of the police in locking down downtown Ottawa and preventing all civilians from accessing public areas greatly exceeded their powers at common law. Police did not have the power to stop every single person entering that area. Mr. Evely's refusal to comply with an unlawful police demand, based on a purported authority to stop each and every person entering the downtown core, cannot form the basis for his arrest.

Common Law Police Powers to Restrict Assembly

29. The common law confers broad authority on police to carry out a wide range of duties. In *Dedman*,[3] the Supreme Court of Canada relied on the legal test developed in the English Court of Appeal case of *Waterfield* to determine whether an officer's conduct is authorized by common law. The test is two-fold:

i. Did the police conduct fall within the general scope of any duty imposed by statute or recognized by common law?

ii. Did such conduct involve an unjustifiable use of powers associated with the duty?

30. The *Waterfield* test has been applied to, and found to provide authority for, the creation of a controlled perimeter in the following circumstances:

a. around a police officer who is executing an arrest;[4]

b. around a police officer who is questioning a suspect or a witness;[5]

c. around a crime scene to preserve evidence;[6]

d. around a hazardous area to preserve public safety[7]

e. around a potential target of violent crime in order to ensure the target's protection[8]

31. The constitutionality of roadblocks involving vehicle traffic has also been considered many times at the appellate Court level and have frequently been found not to be arbitrary.[9] But, police actions regulating the attendance of protestors at public demonstrations have rarely been found to

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[3] *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2; See also: *Fleming v. Ontario*, 2019 SCC 45 (CanLII), [2019] 3 SCR 519.
[4] *R. v. Wutzke*, 2005 ABPC 89 at paras 60-66.
[5] *R. v. Dubien*, [2000] Q.J. No. 250, J.E. 2000-461 (C.M.), at paras 14-26.
[6] *R. v. Edwards*, 2004 ABPC 14 at paras. 4-6, 24-48, 66;
[7] *R. c. Rousseau*, [1982] J.Q. no 490, [1982] C.S. 461 (Sup. Ct.), at pp. 461-62, 463-64.
[8] *Knowlton v. R.*, 1973 CanLII 148 (SCC), [1974] SCR 443.
[9] *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA); see also: *R. v. Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725.

be within the general scope of any duty recognized by common law. For example, in *Stewart v. The Toronto Police Services Board*[10] a police perimeter, including baggage searches, around a public park where demonstrators were gathering to protest a meeting of the G20 was found not to be within the general scope of any common law duty. Police were found not to have legal authority to impose such conditions on entry. The protest at issue in *Stewart* was characterized by peaceful protests intertwined with protestors intent on violence and property destruction. Such violence and property destruction presented "unprecedented peacekeeping and security challenges".[11]

32. Virtually identical issues were raised in another case involving the Toronto G20 protest: *Figueiras v. Toronto (Police Services Board).*[12] With reasons mirroring *Stewart*, the Court of Appeal applied the *Waterfield* test and found that the creation checkpoints demanding bag searches did not fall within the ambit of common law ancillary police powers. Further, in preventing Mr. Figueiras' from protesting for his chosen cause (animal rights), police conduct violated his freedom of expression under the *Charter*.

33. To the Applicant's knowledge only one case has applied the test in *Waterfield* to the actions of police in clearing the Freedom Convoy. In *R v Romlewski*,[13] the accused was found in an area that had not yet been cleared of protesters and vehicles. When approached by police the accused sat down and refused to leave. He was charged criminally with obstructing police and mischief. At trial Mr. Romlewski alleged that police did not have authority to demand that he leave. The Court applied the test in *Waterfield* and ultimately found that police did have authority under the

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[10] *Stewart v. Toronto (Police Services Board),* 2020 ONCA 255; overturning: *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785.
[11] *Stewart v. Toronto (Police Services Board),* 2020 ONCA 255 at para 13.
[12] F*igueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 at para 59.
[13] *R. v. Romlewski*, 2023 ONSC 5571; overturning: *R. v. Romlewski*, 2022 ONCJ 502.

common law *to demand that Mr. Romlewski leave*. The Court's analysis relied in part on the authority provided by way of the *Act* and the *Regulations*, which Mr. Romlewski did not contest.

Analysis

34. Returning to the two-part test in *Waterfield*:

a. Did the police conduct fall within the general scope of any duty imposed by statute or recognized by common law?
b. Did such conduct involve an unjustifiable use of powers associated with the duty?

35. In this case the conduct at issue was the lockdown of the downtown core of Ottawa with police checkpoints at the perimeter. No persons could enter the perimeter without being stopped by police. If persons could not prove that they lived and worked in the area, they were turned away. Simply put: the City of Ottawa had devolved into a state of martial law.

36. While the Freedom Convoy presented policing challenges, and no doubt caused some unease among the citizens of Ottawa, any disturbances created by the Freedom Convoy did not rise to the level which would require or justify this type of unprecedented police conduct.

37. The situation is similar to *Stewart* in that the Freedom Convoy protest was "unprecedented" and presented serious "peacekeeping and security challenges". But evidence was led in Stewart that G20 protests across the globe are typically characterized by "a high level of violence and destruction of property was common at G20 events."[14] No such a "high level of violence and destruction of property" were present at the Freedom Convoy. In *Stewart*, even in the anticipation of a high level of violence and property destruction, police common law powers were not found to include the ability to conduct searches at the perimeter of a public park. Notably the police action in *Stewart* was far less draconian. Police did not exclude the public entirely from the park, let alone the downtown core of a city.

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[14] *Stewart v. Toronto (Police Services Board),* 2020 ONCA 255 at para 12.

38. The Applicant agrees with the decision in *Romlewski* that holds that common law police powers extended to the ability to clear the roadways of downtown Ottawa of protestors and vehicles which were creating an unawful disruption. But *Romlewski* does not go so far as to say that police can also cordon off and lockdown the downtown core of the City of Ottawa.

39. The police conduct in this case did not fall within the general scope of any duty imposed by statute or recognized by common law.

B. The Invocation of the *Act* was *Ultra Vires*.

40. It is the Applicant's understanding that the Crown is relying primarily on common law police powers to justify the lockdown in downtown Ottawa, and ultimately provide authority for the arrest of the Applicant. However, in the event that individual responding police officers in this case state in evidence that they were relying on the *Act*, the Crown has reserved the right rely upon that *Act*. For that reason, the Applicant contests the invocation of the *Act* as being *ultra vires.* He also contests the *Charter* compliance of the *Regulations* as addressed below

41. In making these assertions the Applicant relies heavily on the decision of Justice Mosley of the Federal Court of Appeal in *Canadian Frontline Nurses v. Canada (Attorney General)* ("*CFN*").[15] In that case several individual applicants and two civil liberties organizations challenged both the invocation of the *Act* and the *Charter* compliance of the two regulations issued under the *Act*. They raised identical issues to the issues raised by the Applicant. In a lengthy, well-reasoned decision following the review of thousands of pages of evidence and several days of submission, Mosley J. found that the *Act* was not properly invoked, and the subsequent regulations were unlawful and not a reasonable limit of the applicants' freedoms. The Applicant considers

[15] *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42.

these issues to be a matter of settled law. In the alternative, the decision in *CFN* forms a highly persuasive precedent.

42. Section 17 of the *Act* sets out that "special temporary measures for dealing with the emergency" may be relied upon where "the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates" the taking of such measures. Public order emergency is defined at section 16 of the *Act* as an emergency "that arises from threats to the security of Canada and that is so serious as to be a national emergency." Section 3(a) of the *Act* defines a national emergency as "an urgent and critical situation of a temporary nature that (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it…".[16]

43. It is unknown to the Applicant whether the Crown intends to lead evidence in the present case regarding "threats to the security of Canada" and whether a "national emergency" was present. To date no evidence on this point has been presented to the Applicant. Rather, the evidence relates entirely to the situation in downtown Ottawa in January and February of 2022.

44. Even in *CFN*, where the Government of Canada presented its case at its highest, leading thousands of pages of relevant evidence including the affidavits of police and other witnesses, the Federal Court found that the high threshold for invoking the *Act* not was met.

45. The Applicant relies on the sound reasoning of Mosley J in his conclusions on the issue:

> [294] While these events are all concerning, the record does not support a conclusion that the Convoy had created a critical, urgent and temporary situation that was national in scope and could not effectively be dealt with under any other law of Canada. The situation at Coutts was dealt with by the RCMP employing provisions of the Criminal Code. The Sûreté du Québec dealt with the protests in that province and the Premier expressed his opposition to the Emergencies Act being deployed there. Except for Ottawa, the record does not indicate that the police of local jurisdiction were unable to deal with the protests.

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[16] *Emergencies Act, RSC 1985*, c 22 (4th Supp).

[295] Ottawa was unique in the sense that it is clear that the OPS had been unable to enforce the rule of law in the downtown core, at least in part, due to the volume of protesters and vehicles. The harassment of residents, workers and business owners in downtown Ottawa and the general infringement of the right to peaceful enjoyment of public spaces there, while highly objectionable, did not amount to serious violence or threats of serious violence.

[296] This is not to say that the other grounds for invoking the Act specified in the Proclamation were not valid concerns. Indeed, in my view, they would have been sufficient to meet a test of "threats to the security of Canada" had those words remained undefined in the statute. As discussed in Suresh and Arar, the words are capable of a broad and flexible interpretation that may have encompassed the type of harms caused to Canada by the actions of the blockaders. But the test for declaring a public order emergency under the EA requires that each element be satisfied including the definition imported from the CSIS Act. The harm being caused to Canada's economy, trade and commerce, was very real and concerning but it did not constitute threats or the use of serious violence to persons or property.

[297] For these reasons, I am also satisfied that the GIC did not have reasonable grounds to believe that a threat to national security existed within the meaning of the Act and the decision was *ultra vires*. While I agree that the evidence supports the conclusion that the situation was critical and required an urgent resolution by governments the evidence, in my view, does not support the conclusion that it could not have been effectively dealt with under other laws of Canada, as it was in Alberta, or that it exceeded the capacity or authority of a province to deal with it. That was demonstrated not to be the case in Quebec and other provinces and territories including Ontario, except in Ottawa.[17]

C. The *Regulations* were in breach of the Applicant's Freedom of Expression.

46. The relevant provisions of the *Regulations* prohibiting public assembly are as follows:

> Prohibition — public assembly
> 2 (1) A person must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace by:
>
> (a) the serious disruption of the movement of persons or goods or the serious interference with trade;

[17] *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42 at paras 294-297.

(b) the interference with the functioning of critical infrastructure; or
(c) the support of the threat or use of acts of serious violence against persons or property.

….

Travel

4 (1) A person must not travel to or within an area where an assembly referred to in subsection 2(1) is taking place.

47. These sections of the *Regulation* infringe the *Charter* section 2(b) right to freedom of expression. In particular, they satisfy the criteria enumerated in *Irwin Toy Ltd. v. Quebec (Attorney General)*:[18]

i. the Applicant was engaged in expressive activity;

ii. nothing about the method or location of the expressive activity removes it from the scope of protected expression; and

iii. the impugned government action has either the purpose or the effect of restricting freedom of expression.

48. Expression protected by section 2(b) has been defined broadly as "any activity or communication that conveys or attempts to convey meaning."[19] Expression is not only speech or text but can include actions where those actions communicate a meaning. For example, the actions of private citizens in building a very visible structure on Parliament Hill and maintaining a vigil for more than two years, was found to convey meaning for the purposes of the test in *Irwin Toy*.[20]

49. In this case the *Regulation* impeded the Applicant's ability to complete his sentry duty at the National War Memorial. A sentry duty has both a broader meaning and a specific meaning in this case. Both are relevant for the purposes of the *Irwin Toy* analysis. Broadly speaking sentry

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[18] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927.
[19] *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 SCR 877 at para 81.
[20] *Weisfeld v. Canada (C.A.)*, 1994 CanLII 3503 (FCA), [1995] 1 FC 68.

duties are conducted by militaries around the world. They express solidarity with military veterans who gave their lives in combat and a thankfulness for their sacrifices. In this case specifically, where the Ottawa police attempted to gate off the National War Memorial following an incident of vandalism, veterans felt the need to express that the War Memorial belonged to them. Not the City of Ottawa or the Ottawa Police. It was *their* duty to guard the War Memorial and prevent further vandalism or disrespectful behaviour. This was acknowledged, at least tacitly, by the agreement with the Ottawa Police that veterans, including the Applicant, would stand guard at the War Memorial for the duration of the Freedom Convoy.

50. Nothing about the method of a sentry duty, or location of the National War Memorial removes it from the scope of protected expression.

51. The prohibition on public assembly in downtown Ottawa had the obvious effect of limiting the Applicant's ability to carry out his sentry duty, and to in turn express himself. He was arrested for attempting to do so. In effect the *Regulation* was a total prohibition on the Applicant's chosen form of expression.

52. The Applicant again relies on the reasoning of Mosley J in *CFN* in deciding virtually identical issues:

> [308] I agree with the Applicants that the scope of the Regulations was overbroad in so far as it captured people who simply wanted to join in the protest by standing on Parliament Hill carrying a placard. It is not suggested that they would have been the focus of enforcement efforts by the police. However, under the terms of the Regulations, they could have been subject to enforcement actions as much as someone who had parked their truck on Wellington Street and otherwise behaved in a manner that could reasonably be expected to lead to a breach of the peace.
>
> [309] One aspect of free expression is the right to express oneself in certain public spaces. By tradition, such places become places of protected expression: *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62 at para 61. To the extent that peaceful protestors did not

participate in the actions of those disrupting the peace, their freedom of expression was infringed.[21]

D. The *Regulations* are not a reasonable limit of the Applicant's freedoms.

53. The party seeking to uphold a limitation on a right or freedom guaranteed by the *Charter* bears the burden on a preponderance of probability to demonstrate that the infringement is justified: *R v Oakes*.[22] Two central criteria must be satisfied. First the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[23] This is usually referred to as a "pressing and substantial objective". Second, the means chosen must be shown to be reasonable and demonstrably justified as proportionate to the objective.[24] The infringing measures must be justified based on a "rational inference from evidence or established truths"[25] Bare assertions will not suffice: evidence, supplemented by common sense and inference, is needed.[26]

54. The Applicant concedes that the Federal Government had a pressing and substantial objective when they enacted the measures: to clear out the blockades that had formed as part of the Freedom Convoy protest. The Applicant also concedes that the provisions at issue were rationally connected to that goal.

55. The Applicant takes issue with whether the measures were minimally impairing.

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[21] *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42 at paras 308-309.
[22] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at paras 66-67.
[23] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 para 69.
[24] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at para 70.
[25] *RJR-MacDonald Inc. v. Canada (Attorney General)*,1995 CanLII 64 (SCC), [1995] 3 SCR 199 at para 128.
[26] *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 SCR 45 at para 78.

56. Minimal impairment requires that the measures affect the rights as little as reasonably possible; they must be "carefully tailored"[27] The *Regulation* fails the minimal impairment test for two reasons: 1) it applied throughout Canada; and 2) there were less impairing alternatives available.

57. The *Regulation* did not simply prohibit illegal and disruptive conduct, such as blocking roadways or honking truck airhorns late at night, but criminalized the attendance of every single person at or near the Freedom Convoy protests regardless of their actions. This included the Applicant's sentry duty which was not disruptive at all.

58. Further the *Regulation* exposed everyone in the country to its reach: the fact that it was not enforced in particular areas is inconsequential because they still applied everywhere. The *Regulation* impaired the right to free expression more than was necessary. It captured bystanders who did not agree with the blockades, did not create them and protested in a non-disruptive way. The *Regulation* also criminalized travelling to a protest where there might have been a blockade, no matter the person's purpose for being there and whether an actual breach of the peace had occurred or not. This is not minimally impairing.

59. In *CFN*, Mosley J expressed the concern that "from a section 1 justification perspective … there was no standard applied to determine whether someone should be the target of the measures or process to allow them to question that determination." Accordingly, the infringement caused by the *Regulation* was not a reasonable limit on the right to free expression and is not justified under s. 1.

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[27] *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 66.

E. The Applicant's arrest was arbitrary

Overview of Arbitrary Detention

60. Section 9 of the *Charter* provides that "Everyone has the right not to be arbitrarily detained or imprisoned".

61. A detention, including an arrest, will be considered arbitrary within the meaning of section 9 of the *Charter* if it is not authorized by law.[28]

62. A warrantless arrest requires a subjective and objective component. An arrest without a warrant is lawful if the police officer has reasonable grounds to believe that the person arrested has committed an indictable offence. The subjective requirement requires that the police officer believes that he has reasonable grounds. The objective component requires that the belief be based on information that would lead a reasonable and cautious person in the position of the police to conclude that reasonable grounds existed for the arrest.[29]

63. When reviewing the existence of reasonable grounds, "the Court is concerned only with the circumstances known to the officer" at the time of the arrest.[30] Where reasonable grounds are conveyed by another officer, the arrest will only be lawful if the instructing officer had reasonable and probable grounds.[31]

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[28] *R v Le*, 2019 SCC 34 (CanLII), [2019] 2 SCR 692 at paras 30, 38.
[29] *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241 at paras 18-19.
[30] *R. v. Wong*, 2011 BCCA 13 at para 19.
[31] *R. v. Gerson-Foster*, 2019 ONCA 405at para 84.

Analysis

64. Mr. Evely was placed by under arrest by Cst. Walker in the early morning hours of February 19, 2021. The Applicant's understanding is that Cst. Walker's grounds for arrest were as follows:

a. the Applicant had bypassed a blocked and manned road;

b. he ignored police direction;

c. he fled;

d. he attempted to charge past police to join the Freedom Convoy protest; and

e. the public had been warned that participation in the Freedom Convoy protest would result in arrest.

65. Assuming that the person who was initially yelling at Mr. Evely to "stop sir" was even a police officer, the Court is left with no idea why that person wanted Mr. Evely to stop. If it was a police officer, it is noteworthy that the officer was not yelling "stop, you're under arrest", or something to that effect. The logical inference is that the initial officer yelling at Mr. Evely to stop did not form grounds for arrest.

66. All of Cst. Walker's grounds for arrest rest on the assumption that he had authority to compel the Applicant to stop for no reason other than being present in a zone controlled by police. That purported authority relies on the premise that the police decision to lockdown downtown Ottawa, setting up roadblocks and checkpoints, was made pursuant to a police duty, whether at common law or under the *Act*. For the reasons set out above, there was no such police duty. Accordingly, Cst. Walker's grounds for arrest lack an objective basis.

67. This case is factually similar to *Stewart*, *supra* where Mr. Stewart physically challenged the police perimeter and defied police authority by rushing past the police and into the park. In that

case the Court of Appeal agreed with Mr. Stewart that where officers were not acting pursuant to any known duty, an arrest of Mr. Stewart for not complying with officer's demands was arbitrary.

68. With regards to the mischief count, at the time of arrest Mr. Evely was seen running down Sussex Avenue at approximately 4:25 in the morning. He was alone. Vehicle and pedestrian traffic were blocked by police. It appears on the evidence that Cst. Walker was the only other person on Sussex Avenue at that time. Officers Meuleman and Durton of the York Regional Police were also a short distance away. There is no objective basis on which to form reasonable and probable grounds that Mr. Evely was interfering with anyone's lawful use, enjoyment or operation of their property.

69. Lastly, while fleeing from police can constitute circumstantial evidence of guilt, and form part of an officer's grounds for arrest, it is not clear what underlying crime Mr. Evely might have been guilty of committing. Where the flight itself is alleged to constitute disobeying an officer's demand, that demand must be lawful, which it was not in this case.

F. The subsequent search was unreasonable

70. Section 8 of the Charter guarantees that "everyone has the right to be secure against unreasonable search and seizure."

71. If the arrest is unlawful or arbitrary, any search flowing from it will also be unlawful.

72. The Applicant advances breaches of both 8 and 9 of his *Charter* Rights. The Crown has the burden of proving both that the arrest and the search were legal. Where the arrest the Crown is relying upon to justify the search incident to arrest is subject to a section 9 challenge, the Crown will carry the burden on both of the overlapping section 8 and 9 claims and must prove that the arrest was legal.

73. Demands for identification to a detainee constitutes a search. The Court of Appeal has held that:

> A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police: *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64, 57 C.C.C. (3d) 1. In the circumstances, Harris's identification in response to the officer's question constitutes a seizure and attracts s. 8 protection.[32]

74. As Mr. Evely's arrest was arbitrary, all subsequent searches, including the search of his person which located his identification, were unreasonable.

G. Evidence obtained as a result of the arbitrary arrest and unreasonable searches should be excluded.

The Evidence was "obtained in a manner"

75. Evidence can only be excluded if it is "obtained in a manner" that infringed the Applicant's Charter rights.[33]

76. Evidence that satisfies the "obtained in a manner" requirement of s. 24(2) where it has a temporal, contextual, or causal connection to the *Charter* breach or some combination of the three. The approach is to be a generous one.[34]

77. Here, the social media evidence, and in turn the drone video, was only found using the Applicant's name which was obtained by the Arresting Officer's search of his person after he had been unlawfully arrested. There is a direct casual connection between the evidence and the breach. Further, there is a contextual connection in that the social media searches were made as part of

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[32] *R. v. Harris*, 2007 ONCA 574 at para. 40.
[33] *R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para 59.
[34] *R v Davis*, 2023 ONCA 227 at para. 28.

searches related to individuals arrested at the Freedom Convoy protest. Again, but for the Applicant's arrest, the evidence would not have been obtained.

Admitting the evidence would bring the administration of justice into disrepute

78. First, the *Charter*-infringing conduct is serious. The decision of police to lockdown downtown Ottawa resulted in the creation check points and roadblocks surrounding the downtown core. Anyone wishing to enter was forced to show identification. Anyone who could not prove that they lived or worked in the area would be turned back and not permitted entry. Downtown Ottawa was subject to a type of martial law for a period of days. This infringement of rights falls at the extreme end of egregious conduct.

79. Second, the impact on the Applicant's *Charter*-protected interests was significant. The analysis on the second factor requires assessing "the interests engaged by the infringed right" and "the degree to which the violation impacted on those interests."[35]

80. The infringement of the Applicant's freedom of expression described above was total. He was not permitted to stand guard at the War Memorial as part of his sentry duty. This was a matter of great personal importance to the Applicant.

81. As a result of attempting to attend at the War Memorial, the Applicant was arrested. He was taken to the ground and handcuffed. His liberty was further curtailed as he was moved about from officer to officer. The seriousness of the breach was compounded by the infringement of the Applicant's section 8 right to privacy and the search of his person conducted upon arrest.

82. Cumulatively, these breaches pose a serious impact on the Applicant's *Charter*-protected interests.

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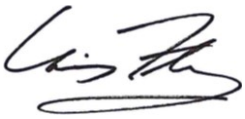
[35] *R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para. 77.

83. Third, society's interest in adjudication on the merits does not strongly weigh in favour of admission. The Freedom Convoy protests were political protests and arose in response to divisive legislation of questionable utility. The invocation of the *Act* was an unlawful use of government power. Society's overall interests are in moving on from a politically divisive time of Canadian history. At best, this branch of the test is neutral.

84. The Applicant requests that the Court exclude the identification evidence and all evidence obtained as a result including: the social media evidence, the police drone video and the open source video.

Dated this 26th of July, 2024.



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