

ONTARIO COURT OF JUSTICE

B E T W E E N:

HIS MAJESTY THE KING

-and-

CHRISTOPHER BARBER

Accused

FINAL SUBMISSIONS OF CHRISTOPHER BARBER

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Table of Contents

OVERVIEW	3
CONTEXT – LAWFUL PROTEST	4
CARTER APPLICATION	18
Step One: The trier of fact must consider all of the evidence and decide whether the alleged agreement has been proven beyond a reasonable doubt.	19
Step Two: If the alleged agreement is proved, the trier of fact must decide, based on evidence directly admissible against a particular accused, whether, on the balance of probabilities, that person is probably a party to the agreement.	31
Step Three: If the trier of fact is satisfied that an accused is probably a party to the agreement, the trier of fact must then decide whether the Crown has proved beyond a reasonable doubt that the accused is a party to the agreement. To do so, the jury must consider the evidence directly admissible against an accused and the acts and declarations done or made in furtherance of the agreement by anyone else who was found at step two to be a probable party to the agreement.	31
OFFENCE OF INTIMIDATION – COUNTS #5 AND #2	32
OFFENCE OF MISCHIEF – COUNTS #6 AND #1.....	37
OFFENCE OF OBSTRUCT POLICE – COUNTS #4 AND #3.....	40
OFFENCE OF DISOBEY A COURT ORDER – COUNTS #7.....	43
CONCLUSION.....	58

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OVERVIEW

1. It is clear from the totality of the evidence that Chris Barber's purpose for travelling to Ottawa in January 2022 and staying in Ottawa until his arrest on February 17, 2022, was to exercise his constitutional rights to Freedom of Expression and Freedom of Assembly to protest the Federal Government's Covid-19 mandates. In his planification to travel to Ottawa and during his stay in Ottawa, he did everything he could to ensure that he followed the law and continuously encouraged other protestors to be peaceful and law abiding. He retained counsel to ensure what he was doing was legal. He parked his truck (Big Red) where the police told him to park on Wellington Street. He moved his truck when police started telling protestors to move their vehicles. He continually maintained contact with the police and cooperated with

the police throughout his travel and stay in Ottawa. He assisted the police in moving vehicles to clear roadways. He attended a meeting with City officials and the police and assisted with implementing an agreement arrived at between the Mayor`s office and the Freedom Convoy 2022. He physically went on the streets to convince truckers to move their trucks as per the agreement. He attempted to convince truckers to silence their horns. He posted numerous videos to tell people to follow the law, to listen to the police, to be peaceful and to comply with the police`s demands if they were arrested. He surrounded himself with lawyers to ensure what he was doing was legal. He himself was very compliant with the police when arrested, leading by example. The intent of Mr. Barber is clear throughout, he lacked any criminal intent in his words and behaviour.

2. The context is crucial in looking at the totality of evidence and in assessing whether the Crown has proven each of the offences beyond a reasonable doubt. Considering the totality of the evidence, *mens rea* cannot be proven beyond a reasonable doubt on the evidence before the court on any of the charges Mr. Barber faces. On most of the offences, the *actus reus* can also not be proven. A doubt exists as to the guilt of Mr. Barber with respect to each of the offences he faces.

CONTEXT – LAWFUL PROTEST

3. The rights to Freedom of Expression and Freedom of Assembly in the context of a political protest have been recognized by the Supreme Court of Canada:

One aspect of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers` corner have by tradition become places of protected expression. The question here is whether s. 2(b) of the Canadian

Charter protects not only what the appellants were doing, but their right to do it in the place where they were doing it, namely a public street.¹

4. The Supreme Court added:

In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.²

5. Wellington Street and the parliamentary precinct have historically been a place of protests of all sorts in the nation's capital. This was the place to be if you wanted to protest the federal mandates relating to Covid-19.

6. In the context of the G20 Summit protests of 2010, Justice Green recognized the right to protest in the context of a political rally:

[43] At the time of his arrest the defendant was attending a political rally. One need look no further than the daily headlines respecting events in the Middle and Near East and North Africa to recognize how vital political demonstrations are to the operation of a viable democracy and how important it is that, short of criminal conduct and true threats to public order, participants should be afforded broad latitude for expression of their political beliefs. **Indeed, rights of expression, peaceful assembly and association are enshrined as “fundamental freedoms” under s. 2 of the Canadian Charter and Rights and Freedoms.**

[44] The zealous exercise of police arrest powers in the context of political demonstrations risks distorting the necessary if delicate balance between law enforcement concerns for public safety and order, on the one hand, and individual rights and freedoms, on the other. It further risks what one commentator has described as “the criminalization of dissent” (J. Esmonde, “The Policing of Dissent – The Use of Breach of the Peace Arrests at Political Demonstrations” (2002), 1 J.L. & Equality 246, at para. 72). Such criminalization may occur in three ways: First, by effectively granting a broad discretion to the police to decide themselves what constitutes a breach of the peace. In this regard, it is of more than passing interest that the Law Reform Commission of Canada (Working Paper 41) (Ottawa:

¹ *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), para 61

² *Montréal (City) v. 2952-1366 Québec Inc.*, supra, para 75

Law Reform Commission of Canada, 1985, at 62) recommended the elimination of the arrest power afforded by s. 31 because it is premised on an “exceedingly vague” standard. Second, because those who fail to comply with police commands founded on overly broad interpretation of this discretion may nonetheless be charged with resisting arrest or obstructing the police. (Indeed, the defendant faced this very jeopardy until the Crown rightly invited that this charge be dismissed at the close of the Crown case.) And third, by metaphorically hijacking the message conveyed by those participating in demonstrations through the discrediting and delegitimation that accompanies mass arrests. None of this is to say that there are not occasions when forceful police action is warranted to maintain public order. However, the calculus in each case must, to the degree possible, respect the rights and liberties of those engaged in political speech and assembly.³

7. Protests are organic and often evolve on their own. The protests that took place in Ottawa between January 28, 2022, and February 19, 2022, were a monumental example of protests evolving on their own, separating into different factions and moving in different directions. There was no centralized power for these protests. There was no one leader and no followers. There were hundreds and thousands of individuals who decided to protest for their own personal reasons mainly against the Covid-19 mandates and others for other reasons. Some came by foot, public transportation, others in personal vehicles or trucks. Some were truckers, many were not. Some knew of Chris Barber, but many did not. Chris Barber was a social media personality having gained a large TikTok following on his bigred19755 account that posted satirical videos.
8. Chris Barber and others had a constitutional right to descend on Ottawa to protest the Federal Covid-19 mandates. The place to do that was in front of Parliament Hill. The Defence does not suggest that this constitutional right gives protestors “carte blanche” to commit criminal

³ *R. v. Puddy*, 2011 ONCJ 399, paras. 43-44

offences. However, if they are protesting lawfully, people cannot be arrested just because they were protesting lawfully amongst others that may have been committing criminal offences, unless it can be proven beyond a reasonable doubt that they were either counselling, aiding or abetting those who were committing criminal offences.

9. Inspector Russell Lucas, the operations support Inspector for the Ottawa Police Services (OPS) and the incident commander during the protest testified that the OPS was aware of the protest in advance of the arrival of the protestors in January 2022 and that he assigned various people for purposes of public order plans, traffic plans, tactical plans and overarching plans.⁴ The OPS had a team of police liaison officers (PLT) assigned to the protest, as usually is the case with all protests and special events in the City of Ottawa.⁵
10. Inspector Lucas testified that the OPS' general practice is to try to find a balance between facilitating lawful protests and its impact on the community and to try and find a balance between the two.⁶ Inspector Lucas acknowledged that:

...regardless of what people might think about any groups message that they want to get out, we want to find that right balance of allowing that message to be heard in accordance with the *Charter* and their rights, and balancing that with reasonable impacts on the City. This is the nations capital. These are things that we deal with on a daily basis and there is a variety of impacts. Whether they are the trucker convoy or any of the other social movements we have seen over the last decade, we try and find ways to facilitate that. To allow those people march through the street to get their message out, and then, how do we mitigate those impacts to ensure that those message can get out.⁷

⁴ Transcript of evidence of Russell Lucas, September 6, 2023, p.2 (p.5pdf), p.6-7 (p.9-10pdf)

⁵ Transcript of evidence of Russell Lucas, September 6, 2023, p.8 (p.11pdf)

⁶ Transcript of evidence of Russell Lucas, September 6, 2023, p.9 (p.12 pdf)

⁷ Transcript of evidence of Russell Lucas, September 6, 2023, p.15 (p.18 pdf)

11. Inspector Lucas testified at trial that at first the OPS believed they were dealing with potentially 5 different groups, then the OPS believed they were up to 13 different groups by the time they arrived in Ottawa on January 28, 2022, after that there were more groups that were growing every day.⁸
12. Inspector Lucas testified that in terms of planning for this protest, there was a couple of factors that came into play, including the fact that the special events team had managed two prior truck protests in the downtown of Ottawa in recent years at which time OPS had closed off Wellington. Inspector Lucas acknowledged that although the primary hotel rooms were booked up to the Monday only, the OPS knew there could be a core group that would be remaining past that time because of various statements from various people that they would stay until the mandates were lifted.⁹
13. The OPS had intel that the western province group were cooperating with police as a Western city police posted a Tweet to acknowledge and thank the protestors for changing their route outside of a police operation. From Inspector Lucas' perspective, there was cooperation from that group. There were no flags that came out from their behaviour on route that were indicators for the OPS of potential issues.¹⁰
14. Inspector Lucas explained that he approved and endorsed the plan for the staging areas and that the plans were sent up the chain of command. The traffic plan included parking trucks and other vehicles on Wellington Street, as well as the Ottawa River Parkway, George-Etienne

⁸ Transcript of evidence of Russell Lucas, September 6, 2023, p.10 (p.13 pdf)

⁹ Transcript of evidence of Russell Lucas, September 6, 2023, p.12 (p.15 pdf)

¹⁰ Transcript of evidence of Russell Lucas, September 6, 2023, p.14 (p.17 pdf)

Parkway, Sir John A McDonald Parkway, a small segment of Queen Elizabeth Drive and the Coventry Jetfrom baseball stadium.¹¹ These locations had been discussed with partners such as the NCC and other stake holders and were viewed as having minimal impact on the local population because they were not residential for the most part.¹²

15. Inspector Lucas was aware that truckers were provided exact routes to the staging areas, being directed where to exit, where to turn and where to go to various staging areas, including being directed to park on Wellington Street.¹³ Trucks parking on Wellington Street was something Inspector Lucas felt, at the time of the protest and still at the time of testifying at the trial, was the best way to mitigate the impact on the core of the City.¹⁴
16. PLT officers and truckers were provided maps as to where to park, which included parking on Wellington Street.¹⁵
17. Officer Blonde testified on January 29, 2022, that “all overpasses and on and off ramps were full of demonstration supporters on highway 417.”¹⁶
18. The Crown cannot call the protest unlawful to support its case without proving that the protest became an “unlawful assembly”. This was a protest of unprecedented numbers of participants and length of time, but Canadians had lived through unprecedented restrictive mandates for the previous two years. Thousands of Canadians wanted to protest and have their views heard

¹¹ Transcript of evidence of Russell Lucas, September 6, 2023, p.17-20 (p.20-23 pdf)

¹² Transcript of evidence of Russell Lucas, September 6, 2023, p. 20-21 (p.23-24 pdf)

¹³ Transcript of evidence of Russell Lucas, September 6, 2023, p.42-44, 91 (p.45-47, 94 pdf)

¹⁴ Transcript of evidence of Russell Lucas, September 6, 2023, p.44, 94 (p.47, 97 pdf)

¹⁵ Transcript of evidence of Nicole Bach, November 20, 2023, p.19-20 (p.23-24 pdf); Exhibit 127

¹⁶ Transcript of evidence of Jordan Blonde, November 1, 2023, p.31 (p.34 pdf)

by the Federal Government. There was no evidence of riot type situation, protestors armed with weapons, destruction of properties or violence of any scale such as what was seen at the G-20 summit for example. It was remarkably peaceful considering the number of people and the length of the protest.

19. Sections 63 and 64 of the *Criminal Code* define unlawful assembly and riots as follows:

Unlawful assembly

63 (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, **assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they**

- **(a) will disturb the peace tumultuously; or**
- **(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.**

Lawful assembly becoming unlawful

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves **with a common purpose in a manner that would have made the assembly unlawful** if they had assembled in that manner for that purpose.

Riot

64 A riot is **an unlawful assembly that has begun to disturb the peace tumultuously**

20. In *R. v. De Bellefeuille*, the Court recognized that:

[5] **The right to publicly protest one's disagreement or point of view on any subject and to assemble to do so is a fundamental and basic right, which no one disputes.** In rights-based society, however, the legitimacy of a claim does not include the right to argue it by any means. **Sections 63 to 66 of the Criminal Code balance out the right to assemble as long as the peace is not disturbed tumultuously.**

[7] The concept of riot is intimately related to unlawful assembly. Indeed, section 64 provides that a riot is an unlawful assembly that has begun to disturb the peace tumultuously...

[8] Both section 65 and section 66 include an objective element. Contrary to popular belief, the law does not identify any legal obligation on the part of the police to declare an assembly unlawful for there to in fact be an unlawful assembly. Rather, the test is that of the reasonable person in the same circumstances.

[9] Both of these offences also include a subjective element; neither section 65 nor section 66 [translation] "convicts a member of an assembly who was not aware of any facts indicating that the peace would be disturbed tumultuously. **It has never been the intention of criminal law to punish a person who is unaware of a situation of fact**".

[10] Indeed, both are general intent offences. It is therefore necessary to prove beyond any reasonable doubt the accused's intent or recklessness with respect to his taking part in an assembly that is objectively unlawful and that, as in this case, turned into a riot.¹⁷

21. In *R. v. Conway*, the Quebec Court of Appeal found that the trial judge erred in using two different definitions of "tumultuous" when referring to an "unlawful assembly" and a "riot". The trial Judge stated that "tumultuous means a disturbance that is disorderly, noisy, turbulent, one marked by disorderly commotion, that's tumultuous", in the context of an "unlawful assembly".¹⁸ The Quebec Court of Appeal found that to be an error of law.¹⁹
22. Indeed, the Quebec Court of Appeal recognized that "'tumultuousness" in both offences requires an element of violence, and **not merely possible violence** as it relates to the offence of unlawful assembly"²⁰, in other words "the atmosphere that reigned at the relevant time was one of violence that those assembled were ready and willing to inflict if the occasion to do so had arisen".²¹

¹⁷ *R. c. De Bellefeuille*, 2014 QCCQ 1514 (CanLII), paras. 5-10

¹⁸ *Conway c. R.*, 2015 QCCA 1389 (CanLII), para. 35

¹⁹ *Conway c. R.*, supra, para. 49

²⁰ *Conway c. R.*, supra, para. 40

²¹ *Conway c. R.*, supra, para. 49

23. Similarly, the Court in *R. v. Cote* agreed with the BCCA “that a tumultuous disturbance requires an atmosphere of actual or constructive force or violence”.²²
24. The evidence in the present case does not suggest that “the atmosphere that reigned at the relevant time was one of violence that those assembled were ready and willing to inflict if the occasion to do so had arisen” or that there was an “atmosphere of actual or constructive force or violence” prior to Mr. Barber’s arrest on February 17, 2024.
25. Considering the totality of the evidence, including *viva voce* testimony and the various videos filed, during the time that Mr. Barber was in Ottawa, he was part of a lawful assembly, in other words, a lawful protest.
26. The Crown, at paragraph 17 of its Written Submissions, suggests that the Ottawa Protest was not a “lawful protest” and was “not peaceful” because of what the Crown qualifies as a “large-scale group mischief” (a) due to the numerous streets being either fully or partially closed; (b) due to excessive noise generated by honking, fireworks and parties; (c) due to air pollution in the form of diesel fumes; and (d) due to certain demonstrators who acted in an intimidating, harassing or threatening manner towards others.
27. First, in saying that the protest was not lawful, the Crown is really suggesting that it was an unlawful assembly. Furthermore, the Crown is totally disregarding the legal definition of an “unlawful assembly” as interpreted by caselaw and the need for an atmosphere of violence for

²² *R. v. Cote*, 2011 ONCJ 778 (CanLII), para. 40

the assembly or protest to be qualified as unlawful, which was not present according to the evidence heard at this trial.

28. There may have been disturbance of the peace by way of noise, smell and parking violations (or blocking of streets) but the peace was not disturbed tumultuously as required to qualify as an unlawful assembly or unlawful protest. There may have been people guilty of criminal offences such as mischief, but that does not make the protest “unlawful” within the meaning of the *Criminal Code*.
29. The totality of the evidence does not rise to reasonable grounds to fear that the neighbourhood would be disturbed tumultuously as were the facts in *Conway, De Bellefeuille* or in *Puddy* and at the G-20 summit.
30. The suggestions under (a) through (c) have nothing to do with violence, threat of violence or application of force and cannot be considered for the purpose of deciding whether the protest constituted an “unlawful assembly” as the peace was not disturbed tumultuously.
31. The suggestion under (d) hints at possible violence, however it is anecdotal only and very minimal and sporadic. The evidence heard at trial from the Crown witnesses in this regard must be considered with caution as it comes from witnesses who have a stake in the matter (i.e. the class action). In addition, these very limited events, if they are to be believed, did not create, on an objective standard of the reasonable person in the same circumstances, an atmosphere of violence or an atmosphere where the people assembled were ready to inflict violence. On the contrary, in general, the atmosphere was one of love, joy and at times party. The videos and photos filed as Exhibits 115, 116, 119, 120 and 121 so demonstrate in addition

to the numerous Tiktok videos of Mr. Barber showing the demonstration between January 29 and February 16, 2022.

32. In addition, the videos of Mr. Barber and Ms. Lich repeatedly promoted love and peace before and during the protest and condoned any acts of violence or threats of violence.
33. At paragraph 75 and 76 of its Written Submissions, the Crown relied on the decision of *Canadian Frontline Nurses v. A.G.C.* to suggest that the protest was unlawful because of the finding from Justice Mosley that the protest was a “gathering that employ physical force, in the form of enduring or intractable occupations of public space that block local residents...”. However, the evidence in this trial does not suggest the use of any physical force.
34. Furthermore, Justice Mosley in *Canadian Frontline Nurses v. A.G.C.* ultimately found that the decision to invoke the *Emergencies Act* on February 14, 2022, was unreasonable and *ultra vires* as there was no national emergency and no reasonable grounds to believe that there was a threat to national security²³.
35. Similarly, at paragraph 76 of its Written Submissions, the Crown relies on Justice Wadden’s comments in *Romlewski*, to the effect that the Freedom Convoy “was not a peaceful assembly protected by s. 2 of the Charter”. However, *Romlewski* involved a self-represented accused and the issues of “lawful assembly” or the application of s. 2 of the *Charter* do not appear to have been properly (if at all) debated at the trial and summary conviction appeal. In addition,

²³*Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42 (CanLII), paras. 255, 297

the Court made that finding based on an entirely different evidentiary record than what is in evidence in this matter.

36. Moreover, Mr. Romlewski was arrested on February 19, 2022, during a police operation to remove demonstrators. As was shown in the evidence at trial, the atmosphere during the police operation was starkly different to what had reigned in the weeks prior and up to the arrest of Mr. Barber. Finally, the decision in *Romlewski* is currently under appeal at the Court of Appeal.
37. The other comments referred to by the Crown at paragraph 76 of its Written Submissions with respect to the *Decaire* matter do not appear to relate to acts of violence or the atmosphere of violence that is required to prove an “unlawful assembly”. Again, the issue of the lawfulness of the protest was not debated in that case and the decision in *Decaire* is also currently under appeal.
38. The evidence in this trial includes the evidence of Cst. Blonde that testified that during the protest people were “in great spirits, very happy people”²⁴; “They were just having conversations. They were screaming different slogans and chants to include ‘Freedom’. Talking to each other, mingling, walking between the trucks, that type of thing.”²⁵; some people wanted to be part of history, saw the protest as a learning experience for their children, and some people “were chanting, cheering, had social activities organized”.²⁶

²⁴ Transcript of evidence of Nicole Bach, November 20, 2023, p.61 (p.65 pdf)

²⁵ Transcript of evidence of Nicole Bach, November 20, 2023, p.63 (p.67 pdf)

²⁶ Transcript of evidence of Nicole Bach, November 20, 2023, p.64 (p.68 pdf)

39. In addition, Inspector Lucas testified at the trial that he supported the right to protest of the people that were demonstrating.²⁷ He added that on February 15, 2022, enforcement action was required so that the footprint did not spread onto other parts of the outlying neighbourhood and to set parameters. Inspector Lucas specified that such enforcement action could be in the form of issuing traffic tickets, enforcing parking regulations, working with the fire department if there were burn barrels etc. However, Inspector Lucas did not speak of enforcement action in terms of removing protestors at that stage in the protest.²⁸
40. Furthermore, Officer Bach testified that on January 28, 2022, at a briefing for PLT Officers at the start of her shift, they were provided the mission objective for the OPS for that day which included “while respecting democratic freedoms of thought, believe, opinion, expression and peaceful assembly”. Officer Bach put an asterisk in her duty book note beside the Mission Objective as she found that the mission “is very important when you are giving plans”. Officer Bach also testified that they were asked to write the Mission Objective in their duty book notes.²⁹
41. Similarly, on January 30, 2022, PLT officers were provided the PLT mission statement which included “ensure lawful, peaceful, safe demo”³⁰
42. Officer Bach testified that on February 13, 2022, there was a new chain of command for the PLT members and that again the PLT members were briefed on the mission statement which

²⁷ Transcript of evidence of Russell Lucas, September 6, 2023, p.84 (p.87 pdf)

²⁸ Transcript of evidence of Russell Lucas, September 6, 2023, p.99 (p.101 pdf)

²⁹ Transcript of evidence of Nicole Bach, November 20, 2023, p.22 (p.26 pdf)

³⁰ Transcript of evidence of Nicole Bach, November 20, 2023, p.26-27 (p.30-31 pdf)

again included to have “the utmost respect to the individual’s Charter of Rights and Freedoms...” Again, Officer Bach placed an asterisk beside the note in her duty book.³¹

43. At the start of her shift on February 15, 2022, Officer Bach had a PLT briefing where again the PLT members were told of the mission which included the following:

“Using an integrated response to Ottawa Police and policing partners will keep the peace, enforce legislation and maintain public safety for the duration of the Ottawa truck demonstration with the utmost respect to the individuals Charter of Rights and Freedoms with priority, and emergency service, personal safety and wellbeing.”³²

44. Officer Bach testified that they received a sticker with the mission statement, which she stuck in her duty notebook. Officer Bach understood that it was the Charter Rights and Freedoms of the protestors that needed to be respected.³³

45. Officer Bach testified that at 2:30 pm on February 15, 2022, before the end of her regular shift, she was advised that the Chief of police had resigned and for her to go home. She only returned on February 18, 2022, the first day of the police removal operation.³⁴

46. Justice McLean of the Ontario Superior Court endorsed in the two honking injunction Orders he granted, the following term:

THIS COURT ORDERS that, provided the terms of this Order are complied with, the Defendants and other persons remain at liberty to engage in a peaceful, lawful and safe protest.³⁵

³¹ Transcript of evidence of Nicole Bach, November 20, 2023, p.56 (p.60 pdf)

³² Transcript of evidence of Nicole Bach, November 20, 2023, p.56 (p.60 pdf)

³³ Transcript of evidence of Nicole Bach, November 20, 2023, p.56 (p.60 pdf)

³⁴ Transcript of evidence of Nicole Bach, November 20, 2023, p.59 (p.63 pdf)

³⁵ Exhibit # 122A and 122B - Injunctions from February 7 and 16, 2022

47. It is important to the context of the protest that on February 16, 2022, one day after the invocation of the *Emergency Act*, that Justice McLean maintained in his order the protestors' right to engage in peaceful, lawful and safe protest.
48. Mr. Barber was arrested on February 17, 2022. There was no enforcement action to remove the protestors on February 17, 2022. Mr. Barber was detained until the evening of February 18. He left the Ottawa on the morning of February 19, 2022³⁶. Mr. Barber was no longer part of the protest as of his arrest on February 17, 2024.

CARTER APPLICATION

49. The Crown is seeking a ruling from the Court to allow evidence admissible against Ms. Lich to be found admissible against Mr. Barber, through the co-conspirator exception to the hearsay rule, commonly called a *Carter* application.
50. In order to have the hearsay evidence admissible, the Crown must satisfy the Court of the 3 Carter steps, namely:

Step One: The trier of fact must consider all of the evidence and decide whether the alleged agreement has been proven beyond a reasonable doubt.

Step Two: If the alleged agreement is proved, the trier of fact must decide, based on evidence directly admissible against a particular accused, whether, on the balance of probabilities, that person is probably a party to the agreement.

Step Three: If the trier of fact is satisfied that an accused is probably a party to the agreement, the trier of fact must then decide whether the Crown has proved beyond

³⁶ Exhibit # 136 - Admission #3, para. 5

a reasonable doubt that the accused is a party to the agreement. To do so, the jury must consider the evidence directly admissible against an accused and the acts and declarations done or made in furtherance of the agreement by anyone else who was found at step two to be a probable party to the agreement.

Step One: The trier of fact must consider all of the evidence and decide whether the alleged agreement has been proven beyond a reasonable doubt.

51. In order for the Court to apply the *Carter* exception to the rule against hearsay there must be a common unlawful purpose. There must be a “meeting of the minds”, an agreement, about the particular common unlawful purpose such that each member can be said to be the agent of the other in the pursuit of the common unlawful purpose.

52. As found by our Court of Appeal in *Stordy*, in order to prove an agreement such as the agreement necessary to prove a conspiracy “there must be a true agreement between the co-conspirators. An apparent “agreement” is not sufficient”.³⁷ There must be “a consensus reached between at least two parties to engage in conduct” that is unlawful³⁸ and the “actual agreement requires genuine intention”³⁹. Furthermore, “whether the communications between the parties generate evidence of a true consensus is ultimately a question of fact to be determined on the entirety of the evidence.”⁴⁰

53. In the present case, the Crown alleges the following 5 “common unlawful purpose”:

- a. Intimidation of government officials by blocking or obstructing roads
- b. Obstruction, interruption, or interference with (any person in) the lawful use, enjoyment, or operation of property

³⁷ *R. v. Stordy*, 2024 ONCA 284 (CanLII), para. 54

³⁸ *R. v. Stordy*, supra, para. 56

³⁹ *R. v. Stordy*, supra, para. 55

⁴⁰ *R. v. Stordy*, supra, para. 57

- c. Obstruction of police
- d. Assembling with others (with the intent to pressure government officials) in such a manner as to cause persons in the neighbourhood of assembly to fear (on reasonable grounds) that they will disturb the peace tumultuously
- e. Counselling and/or aiding and/or abetting any of the above

54. Essentially the Crown is alleging that there was an agreement between people, including Ms. Lich and Mr. Barber to commit the offences which they are also facing as principles and an agreement to be part of an “unlawful assembly”. The common unlawful purpose referred under (d) is the definition of “unlawful assembly” under section 63 of the *Criminal Code*.

55. We have already addressed the “unlawful protest” or “unlawful assembly” argument under the context of the lawful protest section and as there is no evidence that this protest had an atmosphere of violence, the Crown has not proven that there was an agreement between people to render the protest unlawful. The evidence suggests the opposite: there was no agreement to render the protest tumultuous. The evidence does not support a meeting of minds to render the protest tumultuous. This was an organic protest involving various groups and individuals and there is no evidence of a meeting of the minds in this regard.

56. Furthermore, there is no evidence of a meeting of the minds with respect to the other 4 alleged common unlawful purposes. The evidence that is discussed below under each of the offences also clearly shows that there was no consensus or agreement to commit any of these criminal offences. An apparent agreement is not sufficient. The evidence is lacking in this regard to satisfy the Court beyond a reasonable doubt of an actual true agreement by the parties involved in the protest.

57. In addition, as there is no direct evidence of an agreement to engage in any of the alleged 5 “common unlawful purpose”, the Crown must rely on circumstantial evidence to prove the

agreement beyond a reasonable doubt, as such the principals of *Villaroman* apply. In this regard there are other reasonable inferences that can be drawn from the totality of the evidence other than an actual and true agreement by people to commit any of the 5 alleged common unlawful purposes.

58. The Crown suggests that the purpose of the protest was “to pressure government officials to repeal Covid-19 vaccine mandates and passports” and that this is a “common unlawful purpose”. It cannot be said in a free and democratic society that wanting to protest government policy is an “unlawful purpose”. It is part of the most important freedoms that each Canadian have in this country, the right to freedom of expression, the right of assembly and the right to protest. A protest by its very nature is designed to put pressure on the government for whatever cause it is supporting. It is the antithesis of democracy to suggest that “evidence adduced at trial depicting hundreds if not thousands of demonstrators congregated together over a lengthy period of time is in and itself proof of the common unlawful purposes alleged”.
59. The purpose of protesting lawfully and peacefully and putting pressure on the government is very much legal. Unions of government employees protest and put pressure on the government every time they go on strike; various groups protest at various times to put pressure on the government for various political reasons all the time. Inspector Lucas recognized that in his evidence when he said “This is the nation's capital. These are things that we deal with on a daily basis and there is a variety of impacts.”⁴¹

⁴¹ Transcript of evidence of Russell Lucas, September 6, 2023, p.15 (p.18 pdf)

60. The Crown states in paragraph 152 of its Written Submissions that it is established “beyond a reasonable doubt that there was an agreement reached among demonstrators to attend Ottawa and protest government mandates related to covid-19”. There is nothing unlawful about an agreement to go protest federal government measures in front of the Parliament of Canada. The Crown further suggests that the nature of the agreement quickly shifted to commit the 5 unlawful purposes listed above. However, there is no evidence to support the Crown’s suggestion that the purpose of attending Ottawa to protest shifted to an unlawful purpose.
61. The Appendices attached to the Crown’s Written Submissions do not prove beyond a reasonable doubt that there was an agreement to commit any of the 5 common unlawful purposes suggested by the Crown. It is not the only reasonable inference from the totality of the evidence that there was an agreement amongst people to commit one of the 5 suggested common unlawful purposes. The other very reasonable inferences that can be drawn from the totality of the evidence is that people were in Ottawa to protest the government’s covid mandates. The evidence does not support a “true consensus” or an “actual agreement” with regards to any of the 5 common unlawful purposes suggested by the Crown.
62. The fact that the Freedom Convoy 2022 had its own facebook page, had accountant, bookkeeper, lawyers, spokespeople, coordinators actually suggests that the intentions of the individuals involved were legitimate and lawful in wanting to ensure the protest was lawful. The fact that the organization shared police notifications and legal updates also suggests that the intentions of these individuals were lawful. The videos contained at Appendix D of the Crown’s written submissions are videos encouraging people to peacefully protest, to protect

their *Charter* rights and to respect police officers, again that evidence suggests the opposite of an “unlawful purpose”.

63. At paragraph 155 of its Written Submissions the Crown suggests that Ms. Lich and Mr. Barber “organized, communicated about attending a meeting to discuss strategy to “gridlock the city””, however there is NO evidence that any consensus was actually reached at the meeting to do so. The evidence is to the contrary. Mr. Barber’s action clearly shows that he worked over and over again with the police to clear the streets of vehicles that were blocking the roads.
64. On January 31, 2022, Mr. Barber was in contact with Officer Bach trying to find solutions for proper protesting. Mr. Barber told Officer Bach that he wanted to do slow rolls⁴² an objective that he frequently brought up with police, on TikTok and by text message⁴³. Later on, Mr. Barber asked Officer Bach whether they could angle park the trucks already on Wellington Street. Mr. Barber also suggested they should meet to go over a few things⁴⁴
65. It became clear early on that Mr. Barber did not have the ear or the control over all the protestors. During a text exchange between Mr. Barber and Officer Bach on January 31, 2022, Mr. Barber said “trucks have been told to stop horns at 9:00... well getting them to listen is the next thing”. On February 1, 2022, during another text message exchange, when they discussed two trucks that would not move, Officer Bach told Mr. Barber that these two truckers were listening to a person named “Stu”⁴⁵.

⁴² Transcript of evidence of Nicole Bach, November 20, 2023, p.33 (p.37 pdf)

⁴³ Appendix B attached, items 4, 9, 10, 11 and 14

⁴⁴ Transcript of evidence of Nicole Bach, November 20, 2023, p.33-34 (p.37-38 pdf)

⁴⁵ Transcript of evidence of Nicole Bach, November 20, 2023, p.36-37, 40-41 (p.40-41, 44-45 pdf)

66. As early as February 2, 2022, Mr. Barber was trying to work with the police to try to open up areas to make them safer.⁴⁶ In text messages Officer Bach asks Mr. Barber to give her an update on opening Kent Street and actually told Mr. Barber that there was a spot on Albert Street for people to park, curbside. Mr. Barber responded “we gained 3 blocks. Still more to do but had to run back”. Officer Bach then writes “Ok that’s great That’s really good progress and we appreciate everything you’re doing...” Officer Bach testified that she was sincere when she told Mr. Barber that the OPS appreciated what he was doing.⁴⁷
67. Mr. Barber than responded “Yes we will continue when I have time” – talking about clearing Kent Street.⁴⁸
68. On February 2, 2022, Mr. Barber also assisted Officer Blonde to have the area in front of 199 Kent Stret opened up for emergency services and for people to be able to go in and out of that residential high-rise.⁴⁹
69. On the morning of February 3, 2022, Mr. Barber advised Officer Bach via text that the people from the JCCF arrived in Ottawa and he provided the name and contact information for lawyer Eva Chipiuk and told Officer Bach “**They are here to help us find our ways through this legally**” adding “...**my main goal is safety and working with law enforcement**”.⁵⁰ Mr. Barber also advised Officer Blonde that he had legal representation.⁵¹

⁴⁶ Transcript of evidence of Nicole Bach, October 19, 2022, p.31 (p.35 pdf)

⁴⁷ Transcript of evidence of Nicole Bach, November 20, 2023, p.44 (p.48 pdf); Exhibit #127, p.29-30

⁴⁸ Transcript of evidence of Nicole Bach, November 20, 2023, p.45 (p.49 pdf); Exhibit #127 p.30

⁴⁹ Transcript of evidence of Jordan Blonde, October 27, 2023, p.20-22 (p.24-26 pdf)

⁵⁰ Exhibit #127 – Text Messages with Cst. Bach at pp. 30-33

⁵¹ Transcript of evidence of Jordan Blonde, November 1, 2023, p.34 (p.37 pdf)

70. On the morning of February 4, 2022, Officer Bach asked Mr. Barber how the night went and whether he could meet with her again Mr. Barber responded “Yes. Pissed me off. We cleared 3 blocks of Kent and they plugged it again. Stupid asses.”⁵² Officer Bach agreed that Mr. Barber was actively trying to keep lanes open on Kent at that time.⁵³ The intent of Mr. Barber is clear. He is trying to ensure that demonstrators are law abiding; he is assisting police in moving trucks that are blocking lanes. He was visibly upset at truckers plugging Kent up again after all his efforts in clearing it up. He is trying to lawfully protest and get his message across in a lawful manner.
71. As early as February 4, 2022, Mr. Barber was trying to move trucks from residential streets to commercial areas.⁵⁴
72. Officer Bach testified that she recalled more than one conversation where Mr. Barber talked about him trying to get trucks to move.⁵⁵
73. Officer Blonde testified that Mr. Barber was polite and respectful throughout his interactions with him and that Mr. Barber was “very amenable to working with police.”⁵⁶
74. On the morning of February 5, 2022, Officer Bach told Mr. Barber that trucks needed to move and asked what happened about moving trucks out to staging areas and opening up lanes. Mr. Barber responded “**I’m trying to get these guys to listen.** The weekend is here. I’m hoping

⁵² Exhibit #127 – Text Messages with Cst. Bach at p.38

⁵³ Transcript of evidence of Nicole Bach, November 20, 2023, p.49 (p.53 pdf)

⁵⁴ Transcript of evidence of Nicole Bach, November 20, 2023, p.50 9p.54 pdf); Exhibit #127, p. 49-52

⁵⁵ Transcript of evidence of Nicole Bach, November 20, 2023, p.42 (p.46 pdf)

⁵⁶ Transcript of evidence of Jordan Blonde, November 1, 2023, p.33 (p.36 pdf)

once Monday morning happens we can roll to staging areas” adding “I’ll be back out this morning talking with guys. Rolling convoys would be so much more productive.”⁵⁷

75. At 08:50:10 am, Ottawa time, Mr. Barber tells Officer Bach:

“I wish you could see inside my sole [sic]. If I could pick each one up and move them I would...”⁵⁸

76. Mr. Barber continued by saying “slow rolls shutting the city down in small stages would be way more effective” and Officer Bach agreed and responded “I know. I know it is. That’s why I keep pushing (you) to set the precedence... get the word out about the intent and plan and try to grasp some order on your end...” adding “a planned rolling convoy at PH everyday would get the job done, and bring back some peace to the City.”⁵⁹

77. Mr. Barber responded “I understand that. I was thinking of trying to get my truck out to Coventry” but also told her “I cant get out” that he was boxed in across from the Supreme Court and that “...at worst case can we plan for monday?”⁶⁰

78. Mr. Barber had the same type of conversation with Officer Blonde on February 4, 2022, explaining that he wanted trucks out of residential areas and into commercial areas and that he wanted to do rolling convoys. Mr. Barber told Officer Blonde that he told those participating in rolling convoys to obey all traffic laws. Mr. Barber also told Officer Blonde that ideally, he wanted staging areas for trucks to get them out of the City. Mr. Barber told

⁵⁷ Exhibit #127 – Text Messages with Cst. Bach at pp.54-55

⁵⁸ Exhibit #127 – Text Messages with Cst. Bach at p.57

⁵⁹ Exhibit # 127 – Text Messages with Cst. Bach at p.58

⁶⁰ Exhibit #127 – Text Messages with Cst. Bach at p.59-61

Officer Blonde that he wanted to work with PLT to get what he called “rogue elements” out of the convoy.⁶¹

79. On Sunday February 6, 2022, Mr. Barber told Officer Bach “**Tomorrow is a day I fire up my truck and lead some of the ones out.** Wellington will stay but the side streets are my priority.”⁶² Officer Bach and Mr. Barber continued to discuss plans to move trucks out of the core, Mr. Barber suggested “Embrun would be perfect”, adding “**I can plan all I want. You have seen how no one tells them what to do.**”⁶³

80. On February 8, 2022, Mr. Barber confirmed to Officer Bach that he had moved his truck outside of the City.⁶⁴

81. On February 9, 2022, Mr. Barber had a conversation with Officer Bach regarding his idea to reposition trucks and then restaging some of them on Wellington. Officer Bach testified that during that conversation they discussed the fact that he had been trying to help the police with doing so. Mr. Barber let Officer Bach know on the morning of February 10, 2022 that “**I got lots out last night.**”⁶⁵ Again showing Mr. Barber’s *mens rea* and intention not to block the streets of Ottawa.

82. During a conversation with Officer Bach on February 10, 2022, regarding slow rolls that were causing a congestion at the airport, Mr. Barber told her that:

⁶¹ Transcript of evidence of Jordan Blonde, November 1, 2023, p.34 (p.37 pdf)

⁶² Exhibit #127 – Text Messages with Cst. Bach at p.62

⁶³ Exhibit #127 – Text Messages with Cst. Bach at pp.63-65

⁶⁴ Transcript of evidence of Nicole Bach, October 19, 2022, p.47 (p.51 pdf)

⁶⁵ Transcript of evidence of Nicole Bach, October 19, 2022, p.64-65 (p.68-69 pdf); Exhibit #127, pp.79-82

“he would try to do his best to message to anyone in support of the convoy or participating in the convoy through social media channels to avoid the airport and to focus on rolling in and out as opposed to like, congesting traffic and stopping, impeding traffic.”⁶⁶

83. On February 13, 2022, Mr. Barber attended a meeting at City Hall where Kim Ayotte, the superintendent of police, Mr. Drummond and Ms. Chipiuk, amongst others, were present to discuss how to implement the agreement that was made between the Mayor and the Freedom Convoy 2022 the previous day. The plan was to move trucks out of residential areas and onto Wellington Street or to other staging areas.⁶⁷ The consensus was that it would take up to 72 hours to move the trucks.⁶⁸ The letter from the Mayor also suggested it could take up to 72 hours to implement the agreement.⁶⁹
84. On February 14, 2022, while he was trying to move vehicles as per the agreement with the City, Mr. Barber contacted Officer Blonde because a police cruiser was parked in the way and he was unable to move vehicles.⁷⁰
85. The move required coordination with city officials and the OPS. In a single day on February 14, 2022, 102 vehicles, including 40 heavy trucks were moved out of residential areas onto Wellington Street and other places. This represented roughly 25% of the vehicles to be moved out of residential areas in total. Mr. Ayotte acknowledged that it was a complex operation for

⁶⁶ Transcript of evidence of Nicole Bach, October 19, 2022, p.66 (p.70 pdf)

⁶⁷ Transcript of evidence of Kim Ayotte, September 21, 2023, p.5-6, 12 (p.8-9, 15 pdf)

⁶⁸ Transcript of evidence of Kim Ayotte, September 21, 2023, p.31 (p.34 pdf)

⁶⁹ Exhibit #100 – Letter dated Feb 12 ,2022 from Mayor Jim Watson to Tamara Lich

⁷⁰ Transcript of evidence of Jordan Blonde, October 27, 2023, p.33 (p.37 pdf)

Mr. Barber and others to try to work through; considering that there were large trucks and small vehicles all packed like sardines.⁷¹

86. Mr. Ayotte went for a walk to see for himself if trucks were being moved and observed that a good portion of Metcalfe was clear, and he was quite pleased to see how many trucks had been moved. He also noticed that they hadn't just been moved, but they had been placed in a row so as to be able to park more trucks on Wellington Street. Mr. Ayotte was pleased to see that the agreement was in the process of being put into action.⁷²

87. Although the City viewed the operation as a success, the next day. OPS made a decision to put an end to the implementation of the agreement.⁷³

88. Mr. Ayotte agreed that the organizers and protestors did not renege on the agreement. It was OPS that put a stop to it.⁷⁴

89. On the morning of February 15, 2022, Mr. Barber texted Mr. Ayotte and told him he wore himself out the previous day in moving those vehicles, that he was now rested and prepared to get at it again.⁷⁵

90. On February 15, 2022, Mr. Barber also had a conversation with Officer Bach, he told her he was ready to begin moving trucks again that day. During that conversation Mr. Barber explained that they didn't get as much done the previous day because they were delayed by

⁷¹ Transcript of evidence of Kim Ayotte, September 21, 2023, p.14, 48, 52 (p.17, 51, 55 pdf)

⁷² Transcript of evidence of Kim Ayotte, September 21, 2023, p.32-33 (p.35-36 pdf)

⁷³ Transcript of evidence of Kim Ayotte, September 21, 2023, p.14(p.17 pdf)

⁷⁴ Transcript of evidence of Kim Ayotte, September 21, 2023, p.38(p.41 pdf)

⁷⁵ Transcript of evidence of Kim Ayotte, September 21, 2023, p.15 (p.18 pdf)

the police. Officer Bach advised Mr. Barber that OPS were no longer assisting in moving trucks⁷⁶. Officer Bach found Mr. Barber agitated. Mr. Barber explained that the reason he was agitated was because they got a delayed start the day prior because of police and that:

“He was explaining how it’s difficult to move trucks of that size in such small areas and spaces, so it was unreasonable to assume that, you know, all of the trucks or a larger portion of them could have moved during the small timeframe. And then ... he was frustrated at what I was telling him, obviously.”⁷⁷

91. At this step of the Carter analysis, the Court must also consider the evidence directly admissible against Ms. Lich that would not otherwise be admissible against Mr. Barber. The evidence adduced at trial only directly admissible against Ms. Lich is the evidence the Crown wishes, through the Carter application, to be found admissible against Mr. Barber. It consists of videos from Ms. Lich, Facebook postings and interviews. None of this evidence assists the Crown in proving that there was an actual agreement to commit any of the 5 alleged common unlawful purposes.
92. It is submitted that the Crown has failed to prove, beyond a reasonable doubt, the existence of a common unlawful purpose, a true meeting of the minds with regards to one of the 5 alleged common unlawful purpose, thus the Carter application fails and none of the evidence only admissible against Ms. Lich can be considered as against Mr. Barber.
93. In the event the Court finds that an agreement to commit one of the 5 common unlawful purposes alleged has been proven beyond a reasonable doubt, the analysis moves to step two.

⁷⁶ Transcript of evidence of Nicole Bach, October 19, 2022, p.73-74 (p.77-78 pdf)

⁷⁷ Transcript of evidence of Nicole Bach, October 19, 2022, p.74 (p.78 pdf)

Step Two: If the alleged agreement is proved, the trier of fact must decide, based on evidence directly admissible against a particular accused, whether, on the balance of probabilities, that person is probably a party to the agreement.

94. At this stage, considering only the evidence directly admissible against Mr. Barber it is clear, through his various videos, text messaging, action and communication with the police that Mr. Barber was not part of an agreement to commit one of the 5 listed common unlawful purposes alleged. The evidence listed above under step one that shows all the efforts that Mr. Barber made to keep to unblock streets and keep the horns silent belies any suggestion that he was part of an agreement for any of the listed common unlawful purpose.

Step Three: If the trier of fact is satisfied that an accused is probably a party to the agreement, the trier of fact must then decide whether the Crown has proved beyond a reasonable doubt that the accused is a party to the agreement. To do so, the jury must consider the evidence directly admissible against an accused and the acts and declarations done or made in furtherance of the agreement by anyone else who was found at step two to be a probable party to the agreement.

95. If the Court is satisfied that Mr. Barber was probably a party to an agreement to commit one of the 5 common unlawful purposes, the Crown has failed to prove, beyond a reasonable doubt, that he was a party to such an agreement. Again, considering the totality of the evidence there are other reasonable inferences that suggest that he was not a party to any such agreement. Indeed, his actions throughout the protest and his clear intent through his words and his deeds was to protest lawfully, to follow the law and to assist law enforcement to ensure a peaceful and lawful protest. He even removed his own truck from Wellington Street, that of itself is clear evidence that he was not a party to any of common unlawful purpose to block streets. He assisted over and over again with the moving of trucks that were blocking streets. He made numerous TikTok videos telling protestors to be peaceful, to respect police officers and to comply with police officers' demands.

96. Mr. Barber surrounding himself with lawyers to ensure whatever he was doing was lawful.⁷⁸
97. When Mr. Barber told Officer Bach on the morning of February 3, 2022, members of the JCCF arrived in Ottawa and he provided the name and contact information for lawyer Eva Chipiuk and told Officer Bach “**They are here to help us find our ways through this legally**” and adding “**...my main goal is safety and working with law enforcement**”⁷⁹ that shows the clear and unequivocal intent of Mr. Barber to protest lawfully and to follow the law.
98. Mr. Barber took advise from former Premiers (Brian Peckford and Brad Wall) as well as from a sitting member of the Legislative Assembly of Saskatchewan (Hugh Nerlien).⁸⁰
99. The totality of the evidence should leave the Court with a doubt that Mr. Barber was a party to any such common unlawful purpose.
100. Finally, the evidence the Crown is attempting to have admitted against Mr. Barber, is not in furtherance of any unlawful common purpose. That evidence from Ms. Lich is in furtherance of a lawful purpose.

OFFENCE OF INTIMIDATION – COUNTS #5 AND #2

COUNT 5 AND FURTHER THAT

Tamara Lee LICH and Christopher John BARBER

between the 26th day of January in the year 2022 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did wrongfully and without lawful authority, for the purpose of compelling one or more persons to abstain from doing anything that the person had a lawful right to do, or do anything that the person had a lawful right to abstain from doing, block or obstruct one or

⁷⁸ Exhibits # 81 and 83 – TikTok videos posted on February 14 and February 16, 2022

⁷⁹ Exhibit #127 – Text Messages with Cst. Bach at pp. 30-33

⁸⁰ Exhibit 135, Vol. 2, Tab 40, chat 1263; Vol. 2, Tab 53, chat 1711; Exhibit 82

more highways contrary to section 423, subsection (1), clause (g) of the Criminal Code of Canada

COUNT 2 AND FURTHER THAT

Christopher John BARBER and Tamara Lee LICH

between the 1st day of December in the year 2021 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did counsel to commit the indictable offence of Intimidation, which offence was not committed by one or more persons, contrary to Section 464, clause (a) of the Criminal Code of Canada

101. Section 423(1) of the Criminal Code reads as follows:

423 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, **wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do**, or to do anything that he or she has a lawful right to abstain from doing,

...

(g) blocks or obstructs a highway.

102. There is no evidence before the Court to suggest that Mr. Barber, himself, blocked or obstructed any streets in Ottawa.

103. Although Big Red was parked on Wellington Street for a short while, there is no evidence that it was actually blocking any street or that Mr. Barber intended to block any streets.

104. Indeed, Big Red was parked on Wellington Street at the direction of the police and in accordance with the maps provided to the truckers by the OPS⁸¹. Between the date Mr. Barber arrived in Ottawa, January 29, 2022, and February 5, 2022, the day when Officer Bach first

⁸¹September 6 Transcripts at p.17 / 20 of PDF and p.44 / 47 of pdf), Exhibits 68, 68a -Tiktok video of January 29), Exhibit 127 - Text messages with Cst. Bach and Exhibit 125 - Maps

told Mr. Barber that trucks should be moved out⁸², there is no evidence that Mr. Barber was told by police to move Big Red.

105. On February 5, 2022, at 8:03:24 AM, Cst. Bach sent Mr. Barber the following messages: “The trucks need to move. This is getting out of hand. What happened moving trucks out to staging areas and opening up lanes, and what happened to being safe and lawful?”. This is the first message where Cst. Bach indicates that trucks needed to move.⁸³

106. In response, Mr. Barber sent the following at 8:08:52 AM and 8:09:32 AM: “I’m trying to get these guys to listen. The weekend is here. I’m hoping once Monday morning happens we can roll to staging areas” and “I’ll be back out this morning talking with guys. Rolling convoys would be so much more productive”.⁸⁴

107. The following exchange then takes place on the same day between 9:00 and 9:05am, Mr. Barber to Cst. Bach:

“I understand that. I was thinking of trying to get my truck out to Coventry”
From Cst. Bach to Mr. Barber: “I really think that’s a good idea.” “The rest of the Convoy?”
From Mr. Barber to Cst. Bach: “I can’t get out. I’ll head back out soon. Keep talking to the children.”
From Cst. Bach to Mr. Barber: “Like your truck is boxed in?”
From Mr. Barber to Cst. Bach: “Yes. Across from Supreme court”⁸⁵

⁸² Exhibit 127 – Text messages with Cst. Bach on February 5, 2022

⁸³ Exhibit 127 – Text messages with Cst. Bach at p.54

⁸⁴ Exhibit 127 – Text messages with Cst. Bach at p.55-56

⁸⁵ Exhibit 127 – Text messages with Cst. Bach at p.59-60

108. On February 6, 2022, in response to Cst. Bach's message "Why not now. This will be a huge endeavor and it make sense that we start now", Mr. Barber further clarified "We have a day planned on the stage. Did you see the people here yesterday? It was huge. Monday people go back to work and things calm . With so many people walking around its a safety issue".⁸⁶

109. On February 8, 2022, Mr. Barber moved out Big Red from Wellington and parked in Embrun⁸⁷. Mr. Barber told Officer Blonde that others followed him to Embrun as well. But not everyone did.

110. There is no evidence that Mr. Barber aided, abetted or counselled any of the drivers that blocked streets in Ottawa.

111. There is no evidence that Mr. Barber placed any of the various structures that obstructed the streets of Ottawa or that he aided, abetted or counseled anyone to do so.

112. The *actus reus* of the offence of intimidation or counselling such an offence has not been proven beyond a reasonable doubt.

113. The *mens rea* that must be proven beyond a reasonable doubt by the Crown with respect to this offence is that Mr. Barber's **purpose** was "to intimidate" the persons who have a lawful right to use the highway in order to compel such persons to abstain from using the highway.⁸⁸

⁸⁶ Exhibit 127 – Text messages with Cst. Bach at p.63

⁸⁷ See Appendix B, #5, #8, #13; Exhibit #127, pp.63-65

⁸⁸ *R. v. Boast*, 2017 ONCA 602 (CanLII), para. 5, 10; *Regina v. Branscombe*, 1956 CanLII 830 (ON CA)

114. When the Crown in its written submissions under the heading for Count #5 states “Barber and Lich unlawfully and without authority blocked and/or obstructed highways **for the purpose of compelling the government of Canada** to drop Covid-19 related mandates”, it misapprehends the *mens rea* required for the offence.

115. If the Crown concedes that the purpose of blocking streets was to compel the government to drop the covid-19 mandates then the Crown concedes that the *mens rea* of the offence of intimidation has not been proven because in order to prove this offence, the purpose of blocking streets has to be “to compel such persons to abstain from using the highway” as per the Court of Appeal’s decision in *Boast* (not to compel the government from doing something).

116. If the Crown, in the alternative, tries to argue that the purpose of blocking the streets was to compel the people of Ottawa to abstain from using the streets, there is no evidence that Barber had such intent. In fact, the evidence points in the total opposite direction considering all the efforts Mr. Barber put into assisting the police to unblock the streets of Ottawa.

117. Furthermore, because there is no direct evidence of Mr. Barber’s intent, if the circumstantial evidence is consistent with two different conclusions, Mr. Barber must be acquitted.⁸⁹ For example, even if a reasonable inference can be made, as suggested by the Crown (which is not admitted) that Mr. Barber’s intent was to block streets in order to intimidate the people of Ottawa from using those streets; there is another reasonable inference take can be made from

⁸⁹ *R. v. Boast*, supra, para. 7

the totality of the evidence, that Mr. Barber was motivated only by the wish to protest and to send a message to the government regarding the covid19 mandates, thus must be acquitted.⁹⁰

OFFENCE OF MISCHIEF – COUNTS #6 AND #1

COUNT 6 AND FURTHER THAT

Tamara Lee LICH and Christopher John BARBER

between the 26th day of January in the year 2022 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did commit mischief contrary to section 430, subsection (3) of the Criminal Code of Canada

COUNT 1

Christopher John BARBER and Tamara Lee LICH

between the 1st day of December in the year 2021 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did counsel to commit the indictable offence of Mischief, which offence was not committed by one or more persons, contrary to Section 464, clause (a) of the Criminal Code of Canada

118. Section 430 of the Criminal Code provides that:

430 (1) Every one commits mischief who wilfully

...

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property;
or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

...

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

⁹⁰ *R. v. Martin*, 2006 BCSC 1874 (CanLII), para. 34

119. Furthermore, section 429(2) provides that:

429 (2) A person shall not be convicted of an offence under sections 430 to 446 if they act with legal justification or excuse or colour of right.

120. There is no evidence before the Court to suggest that Mr. Barber, himself, blocked or obstructed any streets in Ottawa. Although Big Red was parked on Wellington Street for a short while, it was parked there at the invitation and direction of the police as stated previously in these submissions. In addition, the agreement with the Mayor's office on February 12, 2022; the implementation meeting of February 13, 2022 (which included Superintendent Ferguson); and the implementation of February 14, 2022 strongly suggests that trucks were permitted to be on Wellington Street as part of the protest up to February 14, 2022. Big Red was no longer on Wellington Street as of February 8, 2022.

121. The Defence of legal justification or excuse would apply as it is the OPS that told truckers to park on Wellington Street at the beginning of the protest and then the City and the police up until February 14, 2022.

122. In addition, there is no evidence that Big Red was actually blocking the road, while it was parked on Wellington Street.

123. Furthermore, when Officer Bach told Mr. Barber that the trucks should move from Wellington Street on Saturday February 5, 2022, Mr. Barber told her he could not get out and he would try on the Monday. He did get Big Red out of Wellington Street on February 8, 2024 and into a farmer's field in Embrun Ontario at exit 88.

124. There is no evidence that Mr. Barber aided, abetted or counselled any of the drivers to blocked streets in Ottawa. To the contrary, Mr. Barber assisted the police, over and over again, to move trucks that blocked roads.⁹¹ The fact that Mr. Barber encouraged people and truckers to come to Ottawa to protest lawfully does not equate with aiding, abetting or counselling to block streets. Indeed, Mr. Barber repeatedly told Officer Bach and Blonde that his preference was for slow rolls while following all traffic laws. Officer Bach actually approved of this way of protesting and told Mr. Barber “a planned rolling convoy at PH everyday would get the job done, and bring back some peace to the City.”⁹²

125. When Mr. Barber says in a TikTok video that he will replace every trucker arrested by 3 other trucks or that he wants millions of Canadians to descend onto Ottawa, it is not the only reasonable inference that his intention was to commit mischief. Considering the totality of the evidence, the actions of Mr. Barber throughout the protest, his repeated stated intention, there is more than one reasonable inference for such videos. One other reasonable inference can be, as suggested by the Crown, that such videos shows a criminal intent to cause mischief (which is not admitted), however the other reasonable inference, from the totality of the evidence, is to have people attend to Ottawa to protest lawfully with slow rolls in front of Parliament Hill, as suggested by Officer Bach, or elsewhere in the City, while abiding by all traffic laws. Again, there is nothing unlawful with wanting to continue to protest lawfully and to assist the police in making other protestors follow the law.

⁹¹ See Appendix B

⁹² Exhibit # 127 - Text messages with Cst. Bach at p.58

126. Mr. Barber's intention was to participate in a lawful protest, his intentions were clear when he surrounded himself with lawyers (to ensure what he is doing is legal) and when he has the support of people such as Brian Peckford, one of the signatories to the *Charter of Rights and Freedom*, former Premier Brad Wall, and Hugh Nerlien, a sitting member of the Saskatchewan Legislature. The clear intent that comes out of the totality of the evidence is that Mr. Barber had no criminal intent when he came to Ottawa to protest and stayed in Ottawa to continue to protest.

127. Furthermore, there is no evidence that Mr. Barber placed any of the various structures that obstructed the streets of Ottawa or that he aided, abetted or counseled anyone to do so.

128. There exist, on the totality of the evidence, a reasonable doubt as to whether Mr. Barber committed these offences.

OFFENCE OF OBSTRUCT POLICE – COUNTS #4 AND #3

COUNT 4 AND FURTHER THAT

Tamara Lee LICH and Christopher John BARBER

between the 26th day of January in the year 2022 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did resist or wilfully obstruct a peace officer in the execution of his duty or any person lawfully acting in aid of such an officer, contrary to section 129, clause (a) of the Criminal Code of Canada

COUNT 3 AND FURTHER THAT

Christopher John BARBER and Tamara Lee LICH

between the 26th day of January in the year 2022 and the 19th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did counsel to commit

the indictable offence of Obstruct Police, which offence was not committed by one or more persons, contrary to section 464, clause (a) of the Criminal Code of Canada

129. Section 129(a) of the *Criminal Code* reads:

129 Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

...

is guilty of

(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
(e) an offence punishable on summary conviction.

130. The Crown's case regarding the obstruct charges relates to events between February 18 and February 22, 2022, when the police were removing protestors and clearing the streets.

131. The Crown suggests that Mr. Barber is guilty of obstructing police as a principal because "although unable to be physically present on February 18 and onward, Barber and Lich continued to metaphorically stand shoulder-to-shoulder with those who remained downtown"⁹³.

132. You cannot be found guilty of obstruct police for "metaphorically" doing something that you actually did not do. There is no *actus reus* in that hypothesis. Mr. Barber was arrested on February 17, 2022. He cannot be found guilty of obstructing police officers as a principal or as an aider between February 18 to 22.

⁹³ Paragraph 132 of Crown's written submissions

133. With respect to abetting or counseling obstruct police, Mr. Barber repeatedly told people to respect police, saying words to the effect of “We do not engage. If they have a gun against your forehead, you ask how you can comply”, “You remember, we are all peaceful. I’ve said it before, I’ll say it again: they arrest you, put your hands behind your back and comply. The only thing we need to do.” and “They are saying something’s coming. When it happens, put your hands behind your back, take it like a man.”⁹⁴

134. There is no evidence before the court as to what Mr. Barber was actually doing prior to being arrested on February 17, 2022. We don’t even know whether Mr. Barber, was simply walking down the street, nowhere near any actual protest, when he was arrested. We have a video of Mr. Barber already handcuffed and being searched by two police officers. The video depicts a very compliant Mr. Barber. There is no evidence to suggest he obstructed police.⁹⁵

135. Mr. Barber was arrested in the manner he told people to be: respectful and compliant.

136. The Crown puts a lot of emphasis on the phrase “hold the line” and suggests it means stand shoulder-to-shoulder and do not move. That can be one interpretation for the phrase. But that expression has been used many times before February 18 and not in the context of standing shoulder-to-shoulder and obstruct police. For example, as early as January 31, 2022, a person by the name of Peter told Mr. Barber “Hold the line my friend we are all so proud of you”.⁹⁶ It can be reasonably inferred that in that context and on that date the phrase “Hold the line” meant stay strong or don’t give up. The expression hold the line, in the context of the totality

⁹⁴ See Appendix A, #1, 2, 9, 12-13, 15

⁹⁵ Exhibit #55

⁹⁶ Exhibit #, Tab 62, chat #2319, p.12

of the evidence can reasonably be inferred to mean stay strong or don't give up, it certainly can have a meaning other than stay shoulder-to-shoulder and obstruct police. Such a meaning is inconsistent with, for example, Mr. Barber saying "We're doing super good with it. Everybody's holding the lines. Everybody's doing an amazing job." in a TikTok video posted on February 1, 2022, which well before there were any police operation to remove demonstrators⁹⁷.

137. Considering the totality of the evidence, including the various videos and text messages from Mr. Barber asking people to respect and listen to police and considering Mr. Barber's actual action in trying to assist the police in moving trucks and silencing the honking⁹⁸, the Crown has failed to prove the *mens rea* of the offence of obstruct police (as a principal or as a party) or the offence of counselling to obstruct police.

138. There exist, on the totality of the evidence, a reasonable doubt as to whether Mr. Barber committed these offences.

OFFENCE OF DISOBEY A COURT ORDER – COUNTS #7

COUNT 7 AND FURTHER THAT

Christopher John BARBER

on or about the 9th day of February in the year 2022 at the City of Ottawa in the East/De L'Est Region did counsel to commit the indictable offence of disobeying a court order, which offence was not committed, contrary to Section 464, clause (a) of the Criminal Code of Canada.

139. Section 464(a) of the *Criminal Code* provides that:

⁹⁷ Exhibit 70, 70(a) - Tiktok video posted on February 1, 2022

⁹⁸ See Appendix A

464 Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable

140. Section 127 of the *Criminal Code* provides that:

127 (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

141. The TikTok video used by the Crown for the basis of this offence is found at Exhibit 24 (transcript 24a).

142. The actus reus of the offence of counselling requires the following:

[83] Counselling includes but is not limited to procuring, soliciting and inciting. **What is essential is an active inducement or advocacy, not merely the description of the commission of an offence.** *R. v. Hamilton*, [2005] 2 S.C.R. 432, at paras. 15, 22 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 56. In other words, the actus reus of counselling requires:

- deliberate encouragement

or

- active inducement

of the commission of a criminal offence. *Hamilton* at para. 29⁹⁹

⁹⁹ *R. v. Root*, 2008 ONCA 869 (CanLII), para. 83, application for leave dismissed *Jeffrey Root v. Her Majesty the Queen*, 2009 CanLII 59427 (SCC)

143. The actus reus of the offence of counselling requires the accused to counsel the commission of an offence, here the breach of a court Order. Mr. Barber cannot be convicted if the words spoken do not counsel the breach of Justice McLean's Order. If Mr. Barber is to be convicted of this offence, the Crown must prove the elements of the underlying s.464 Counselling Offence.¹⁰⁰

144. For the Crown to satisfy the actus reus for this count, it must prove beyond a reasonable doubt that Mr. Barber's post deliberately encouraged or actively induced the commission of the offence of breaching a Court Order. Mr. Barber's statements in the video found at Exhibit 24 must be viewed objectively when considering if it actively induced the commission of the offence. This is a high threshold that cannot be relaxed merely because the communications took place on a TikTok account and may have reached a wide audience.¹⁰¹

145. For the offence of breach of a Court Order to be proven, the Order itself must be clear and free from ambiguity:

[9] The necessity of a clear order has been repeatedly emphasized by our Court of Appeal. I was referred to *Gurtins v. Goyert*, 2008 BCCA 196 at para. 15, wherein Frankel J.A. said:

The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing.

I was also referred to *R. v. Dhillon*, 2019 BCCA 373 at paras. 21-22, in which Butler J.A. cited cases such as *Carey v. Laiken* and *Gurtins v. Goyert* for the propositions that the “**terms of an injunction order on which a**

¹⁰⁰ *R. v. Hamdan*, 2017 BCSC 1770 (CanLII), para. 32

¹⁰¹ *R. v. Hamdan*, supra, para. 37

prosecution for criminal contempt rests must be free from ambiguity, vagueness, or uncertainty so that those governed by the injunction will know with precision what actions are forbidden,” and “[a]nyone subject to court orders must be able to readily determine their obligations and responsibilities by having regard to what is on the face of the formal order setting out what they are required to do or refrain from doing.” In this same vein, in *Halas v. Halas* (1998), 1998 CanLII 5219 (BC CA), 56 B.C.L.R. (3d) 110 (C.A.) at para. 8, Finch J.A. (as he then was) refused to find contempt and thus expose a person to loss of liberty based on an implication or inference that might be drawn from the wording of the order.¹⁰²

146. In the present case, the Order of Justice McLean from February 7, 2022, was not free and clear of all ambiguity. The Order reads in part:

2. THIS COURT ORDERS that any persons having notice of this Order are hereby restrained and enjoined from using air horns or train horns, other than those on a motor vehicle of a municipal fire department, in the geographic location anywhere in the City of Ottawa, in the vicinity of downtown Ottawa, being any streets north of Highway 417, otherwise known as the Queensway, for 10 days from the date of this Order.
- ...
9. THIS ORDER shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority.¹⁰³

147. Keith Wilson was counsel for Mr. Barber, Ms. Lich and other defendants at the Motion for the interlocutory injunction.¹⁰⁴

148. During the discussions after the ruling, one of the issues raised by counsel was with respect to the use of horns:

MR. CHAMP: The - the difficulty with that, Your Honour, is that these trucks have been in different parts of Ottawa. Some have been out at Coventry Road and so

¹⁰² *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2023 BCSC 201 (CanLII), para. 9; See also *R. v. Gibbons*, 2014 ONSC 4269 (CanLII), para. 20; *Fettes v. Culligan Canada Ltd.*, 2010 SKCA 151 (CanLII), paras. 18-33

¹⁰³ Exhibit #122(a), Order of Justice McLean dated February 7, 2022

¹⁰⁴ Exhibit #, Transcript of February 7, 2022 hearing before Justice McLean, cover page

forth. And I'll add this, Your Honour, the way we framed that is, we drew the language from Section 74 of the *Highway Traffic Act*. That's - it's - it's - it's practically the same as the language of the *Highway Traffic Act*. So, it's *prima facie* an offence under the *Highway Traffic Act* to be using an air horn unreasonably...

THE COURT: Oh, I know that.

MR. CHAMP: or unnecessarily. **And then there's the exception, obviously, for....**

THE COURT: Yeah, but you, I think, in some of your documents, and maybe I've forgotten, you ask for an area to be enjoined.

...

MS. STEWART: Your Honour, if I may just address that specific clause, 5(c). It would be in order to seize any item, for example, an air horn, that could be used to contravene the order of the court. I - just to....

THE COURT: Well, I know that. But I don't think we can - I'm not going to give that kind of order.

MS. STEWART: Thank you.

MR. WILSON: Just to confirm, My Lord, we're talking about factory-installed equipment. I don't....

THE COURT: No, no, I'm not - we're not getting there. The issue is whether using it. Okay. You can have it. There's nothing to prevent you from having it. You just can't use it. Because then it gets into a whole more - whole larger issue, and **that is the requirement under the Highway Traffic Act to have them**. And it the - and you know, and there - **you get into the issue of liability exactly**. If they move their vehicle for some reason, and they're enjoined from using it, and some child runs in front of the road - in front of them, they have to use it. There's no question about that.

MR. WILSON: In fact, sir, if it was removed, they wouldn't be able to move.

THE COURT: Well, that's what I mean. Like, it'd be - you know, we - I - it would cause a whole problem. And that's - the - the issue, as I said before, it's not the thing, it's the person. You know, it's not the thing, it's the person. So, I can't - I don't agree with (c).¹⁰⁵

149. During the discussions regarding the terms of the Order, Justice McLean left it to the lawyers to draft the terms of the Order and then come back to him, if there were any issues with any of the terms.¹⁰⁶ The lawyers for the parties took approximately 1 hour to discuss the terms of the Order and come to an agreement.¹⁰⁷

¹⁰⁵ Exhibit #, Transcript of proceedings, February 7, 2022, p.79

¹⁰⁶ Exhibit #, Transcript of proceedings, February 7, 2022, p.99

¹⁰⁷ Exhibit #, Transcript of proceedings, February 7, 2022, p.99, 105

150. One of the terms that was included in the Order was:

9. THIS ORDER shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority

151. Honking can be used according to the legislation or as statutory duty, power or authority to warn others of potentially hazardous situations or emergency situations or for informing someone of a looming danger or to attract attention in case of a potentially dangerous situation. In addition, commercial trucks operators must do daily inspections of their equipment, including verifying if the horn is functional by engaging it and they must keep records of these daily inspections pursuant to the *Highway Traffic Act Regulations*.¹⁰⁸

152. The context and timing of the video at Exhibit 24 is essential to decide whether the Crown can prove the *actus reus* of this offence. That video is posted on February 9, 2022, and starts while Mr. Barber is walking at night and saying:

Hi kids, live from Ottawa, Sooo, just want to go over a few things, **we got a lot of rumors, a lot of ramblings about hmm, internet blackouts coming and riot police are coming, indications are probably saying Thursday our earliest** blah, blah blah, maybe we are just giving our thing for law enforcement here, and they are probably watching us anyways, rumours are they have the phones tapped, blah blah blah, this is our Canadian fucking government, I thought for a minute we were in China, Canada there, and all of the sudden its boom.

So, this word going out to everybody in the trucks around the city. **Right now, there's an order in place to keep the horns down, horns have to be quiet, okay. If you see a large, vast majority of police coming towards your truck like they do, like, the, the ... like they're building up.** Guys lock that door, crawl into that bunk. But before you do that, grab that horn switch and don't let go. Let that fuckin' horn go no matter what time it is, and let it roll as long as possible until they're bustin' your fuckin' windows down. We want everybody to know when the time comes, and that is the best way to do it is when that happens. Do that guys, please. **Let that horn go. Don't let it go. When we see that mass force of police coming**

¹⁰⁸ Regulations 199/07 - Commercial motor vehicle inspections, section 6 and Column 1

at you. Ok guys, be strong, we got this, we got some more announcements, its going to be pretty scool here we can see if we can fire some shit up.¹⁰⁹

153. In further context for the video found at Exhibit 24, there are two videos posted on February 7, 2022, concerning the same subject of threats of riot police and kettling, where Mr. Barber says, amongst other things, in a video filmed during the daytime:

... it's been brought to our attention that ri-, riot police are being brought in Ottawa tonight starting at six o'clock. Riot police, people. Riot police. So we've had snipers on roofs of buildings, we've had – come on, like, c-, this is ridiculous. I have never hugged so many people and shook so many hands in my life, **and they got riot police coming in tonight?**

Guys, we wanna keep everybody safe. We don't want the old police service here to be engaging and – and provoking us into things that we're absolutely, under no circumstances, going to do. We do not engage. If they have a gun against your forehead, you ask how you can comply... So please, guys, everything will work itself out in the courts after. There's been a whole bunch of rules and laws that have been broken... **I'll update you on the rumour later** 'cause I don't think I can let that out quite yet but, um, be safe, guys, please. **Be very, very, very safe and don't let any trouble happen.**¹¹⁰

154. In a further video also posted on February 7, 2022, while Mr. Barber was walking outside at night, Mr. Barber continued and said:

Hey everybody live from Ottawa here, so we're just going to do a little update tonight, as I walk, k last night our sources were pretty clear, we knew something was happening, and it happened at Coventry, k, **the snippers on the roof,** here's the stories we are hearing tonight and we can't confirm them but we just need to make sure everybody knows this, the rumours are that the riot police are on their way to Ottawa right now. **Riot police. K. the numbers can be from anywhere from 1800 to 3000,** we've heard different numbers, we've heard different stories, there's a lot of bullshit out there. I want to put this call out to everybody right now, if we go dark in Ottawa, if we go dark meaning no more social media posts go out, that means their operations is being deployed ok, that means they cut all of our cell service, our internet, our blah, blah blah, we have no communication to the **out they start the kettle operation where they come around in full tactical gear and swat** and they apparently have places now where they are going to start processing all of

¹⁰⁹ Exhibit 24 and 24a)

¹¹⁰ Exhibit 74 and 74(a)

us terrorist or criminals or whatever even though its been the world largest peaceful gathering there's been absolutely no violence...¹¹¹

155. In addition, on the morning of February 9, 2022 at 07:51:42 am, Ottawa time, Mr Barber texted Officer Bach and says:

“I have a few guys getting ready to pull out today from downtown core. **These rumors of a full scale tactical sweep on Thursday better be bullshit.** The world is watching very, very closely, and it will not be received well. Please tell me it is not true.”

156. Officer Bach responded that she was not aware of any kind of “sweep” and that she would keep him informed. Mr. Barber responded “It’s been thick. **Rcmp riot starting Thursday.** Cell towers shut. Rounding all up and towing.”

157. It can be inferred from the context of the previous days that the video at Exhibit 24 was made in a buildup of fear of being kettled and swarmed by fully geared tactical officers creating a dangerous or hazardous situation for truckers.

158. It is telling that the first thing Mr. Barber says in the video at Exhibit 24 is that “there’s an order in place to keep the horns down, horns have to be quiet, okay” and he pauses for a split second when he says ok and looks at the camera; making sure, it can be inferred, that people understand that there is an Order in place that needs to be respected. Mr. Barber then continues to tell truckers, in his own words, that there is an exception to that Order and that is in case of an emergency where the police are coming at them and kettling them, then they should sound

¹¹¹ Exhibit# 7 and 7a)

an alarm horn to warn others of the dangerous or hazardous situation that is happening as permitted by paragraph 9 of the February 7th Order.

159. Mr. Barber was represented by counsel at the Motion for the injunction, it is a reasonable inference that his lawyer would have told him about the exception that air horns can be used in situations mandated by legislation or in situations of emergency.

160. It is a reasonable inference that Mr. Barber, in his own words, tried to explain to fellow truckers that they could use their horns in that very exceptionally dangerous and hazardous situation of seeing “that mass force of police coming at you”.

161. It is clear that an exception to the horn injunction existed through paragraph 9 of the February 7, 2022 Order. It is further submitted that the situations in which those exceptions existed were not clear and unambiguous, thus leaving a reasonable doubt as to whether the *actus reus* of the offence was committed.

162. Furthermore, at the hearing of February 16, 2022, for the extension of the injunction Order, the parties agreed to add the additional term to the injunction Order, after the video at Exhibit 24 and another video from Mr. Pat King were raised during submissions. Again, it is the lawyers for the parties that drafted the terms of the Order (prior to the actual hearing) with the ultimate approval of Justice McLean. The following term was added to the injunction Order:¹¹²

3. **THIS COURT ORDERS** that any persons having notice of this Order are hereby restrained and enjoined from ordering, requesting, inciting, counselling, promoting or encouraging in any manner whatsoever, either directly or indirectly, via social

¹¹² Transcripts of February 16, 2022 hearing before Justice McLean

media or otherwise, any person to use air horns or train horns in downtown Ottawa for as long as the Order is in effect.

163. The fact that the parties added another term to the injunction Order to make it clearer that messages such as the one in Mr. Barber's video (Exhibit 24) were not permitted, confirms that the February 7th Order was unclear and unambiguous in some respect. It is, at the very least, a reasonable inference that can be made. Mr. Wilson on behalf of the defendants indicated that he was not there to debate whether there had been a breach of the Order otherwise different materials would be before the Court, but he did agree to the additional term to make the Order clearer.¹¹³

164. Further, or in the alternative, in the circumstances of the present case the Crown cannot prove beyond a reasonable doubt that they have the full statement with regard to Exhibit 24.

165. This is distinguishable from *R. v Pawlowski*¹¹⁴ in that the Court in that case had the entire the speech, while it is not clear that we do in the present case.

166. In *R. v. Sonne*, Mr. Sonne was charged with counselling to commit an indictable offence that was not committed. It was the position of the Crown that tweets made by Mr. Sonne and pictures that he posted, counselled persons to commit the offence of mischief by scaling or pulling down fencing for the G20. The Court found that the Crown could not provide the *actus*

¹¹³Transcripts of February 16, 2022 hearing before Justice McLean

¹¹⁴ *R v Pawlowski*, 2023 ABCJ 131 (CanLII)

reus of the offence because the Crown could not satisfy the Court that the entire dialogue or statement was before the Court.

[348] The Defence submitted that, in this case, it was not a fragment of a verbal conversation that was overheard but, instead, a fragment of an online dialogue that was captured. The tweets were made with the hashtag #g20report and it is common for conversations to emerge along a hashtag. However, in this case, as the Defence submits, the record may be inadequate to contextualize the relevant tweets and establish what, if anything, was said before or after the tweets in question made by Mr. Sonne.

[349] Given the way the tweets are worded and the fact there are these gaps where there could have been other tweets not before the Court, it is possible, for example, that Mr. Sonne was responding to a single person, pointing out what he perceived to be a design flaw in the fence and how easily it could be taken advantage of. For example, as the Defence submitted, had a tweet appeared immediately prior to Mr. Sonne's tweets along the lines of "that cheap-looking fence doesn't look so hard to climb to me" then the tweets by Mr. Sonne would lose much of their incriminating character. Certainly the context of what Mr. Sonne stated could well change if there were other tweets not before the Court that he was responding to.

[350] For these reasons I conclude that even if the tweets before the Court could result in the Crown establishing the *actus reus* of the offence, the fact the Court does not necessarily have the entire dialogue would require an acquittal on count 5 in any event.¹¹⁵

167. In the present case, the TikTok video at Exhibit 24 includes the following words from Mr.

Barber:

Ok guys, be strong, we got this, **we got some more announcements...**¹¹⁶

168. The Crown cannot satisfy the Court that the entire statement is before the Court when the video suggests a continuation to that statement. As the Court does not have the entire

¹¹⁵ *R. v. Sonne*, 2012 ONSC 2126 (CanLII), para. 325, 348-350

¹¹⁶ Exhibit 24 and 24(a)

statement, the *actus reus* cannot be proven beyond a reasonable doubt and an acquittal is required on this count.

169. In the event the Court is satisfied beyond a reasonable that the *actus reus* of the offence has been proven. A reasonable doubt persists as to whether Mr. Barber had the *mens rea* necessary to prove the offence of counselling a breach of Justice McLean's Order.

170. The Court of Appeal in *R. v. Root*, reiterated the test for the *mens rea* to the offence of counselling:

[84] The mental element or *mens rea* in counselling “requires nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counseling” (emphasis removed): Hamilton at para. 29. Said somewhat differently, **the prosecution must prove beyond a reasonable doubt that an “accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused’s conduct”**: Hamilton at para. 29.¹¹⁷

171. In proving the *mens rea* necessary for the offence of counselling, the Crown must also prove that Mr. Barber “intended that **the offence** counselled by committed” or “knowingly counselled the commission **of the offence** while aware of the unjustified risk that **the offence** counselled was in fact likely to be committed”. In proving either of these modes of *mens rea*, it must be proven that Mr. Barber knew that what he was counselling was an actual offence. If Mr. Barber believed that what he said on his TikTok video found at Exhibit 24 was in conformity with the Order of Justice McLean, he cannot be found guilty of this offence. As

¹¹⁷ *R. v. Root*, supra, para. 84

stated by the Supreme Court of Canada, a person that is “morally innocent should not be punished”.¹¹⁸

172. In order to prove the *mens rea* of the offence of breaching a court order, “subjective mens rea” must be proven beyond a reasonable doubt.¹¹⁹

173. In *R. v. Zora*, the Supreme Court explained in the context of the offence of breaching a court order under section 145 of the *Criminal Code* that:

...A subjective fault standard would focus on what was in the accused’s mind at the time they breached their bail condition. It directs a court to consider whether the accused “actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether [they] ‘could’, ‘ought’ or ‘should’ have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability” (*R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 S.C.R. 867, at pp. 882-83, quoting D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 123-24). In applying a subjective mens rea, courts can consider personal circumstances...¹²⁰

174. The text of sections 127 and 145 are similar, the analysis of the Supreme Court of Canada in *Zora* decidedly suggests that a “subjective *mens rea*” is also required to prove the offence of breaching a court order under section 127 and counselling an offence under section 464.¹²¹

175. As the Supreme Court stated:

Subjective mens rea generally must be proven with respect to all circumstances and consequences that form part of the actus reus of the offence.¹²²

¹¹⁸ *R. v. Zora*, 2020 SCC 14 (CanLII), para. 33

¹¹⁹ *R. v. Zora*, supra, para. 107

¹²⁰ *R. v. Zora*, supra, para. 29

¹²¹ *R. v. Zora*, supra, paras. 29, 32-33, 36-37, 48, 50-51

¹²² *R. v. Zora*, supra, para. 109

176. In other words, the Crown must prove beyond a reasonable doubt that Mr. Barber (1) knowingly failed to act according to Justice McLean's Order, meaning that he knew of the circumstances requiring him to comply with the Order; or (2) he was willfully blind to those circumstances, and failed to comply with the Order despite that knowledge; or (3) Mr. Barber recklessly failed to act according to the Order, meaning that Mr. Barber perceived a substantial and unjustified risk that his conduct would likely be a breach of Justice McLean's Order and persisted in this conduct.¹²³

177. The Supreme court specified with regards to recklessness that:

Given that s. 145(3) can operate to criminalize otherwise lawful day-to-day behaviour, I would conclude that knowledge of any risk of non-compliance is not sufficient to establish that an accused was reckless. Instead, **the accused must be aware that their continued conduct creates a substantial and unjustified risk of non-compliance with their bail conditions.** This Court has previously adopted this standard of risk in describing recklessness for certain offences (see **R. v. Hamilton**, 2005 SCC 47, [2005] 2 S.C.R. 432, at paras. 27-29; *Leary v. The Queen*, 1977 CanLII 2 (SCC), [1978] 1 S.C.R. 29, at p. 35 (per Dickson J. dissenting, but not on this point)). The risk cannot be far-fetched, trivial, or de minimis. The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with which the risk could be avoided, are all relevant considerations (Manning and Sankoff, at p. 229). Although the trial judge will assess whether a risk is unjustified based on the above considerations, **because recklessness is a subjective standard, the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.**¹²⁴

178. In the present case, considering that Mr. Barber was represented by counsel at the motion for the injunction it is a reasonable inference that his lawyer explained to him what occurred at

¹²³ *R. v. Zora*, supra, para. 109, 116-117

¹²⁴ *R. v. Zora*, supra, para. 118

the hearing, including the fact that exceptions to the horn injunction had been made part of the Order. Two different inferences can be made from those facts, (1) Mr. Barber's lawyer told him about the exceptions and how they could apply or (2) Mr. Barber inferred from the exceptions noted at paragraph 9 of the Order that this included an exception in case of an emergency or hazardous situation that required warning of others.

179. It is clear from the totality of the evidence that between February 7 to 9, 2022, Mr. Barber was concerned with mass riot police kettling truckers, he repeatedly talked about that on TikTok videos. In addition, he spoke to different people about it via text messages.

180. In one of the chats, Mr. Barber had the following exchange on February 7th, 2022 with Nick:

Feb 7, p.6 Nick: "We good here tonight at queen street"...

p.7 Nick: "So we good here or should we leave the city just curious, we are not in the wrong being here my truck safe and me and my dog?"

Chris: "**I'd say get to Coventry or out to exit 88 . If your locked in your truck tonight you should be good**"

p.8 Nick: "Watched your live have know idea what to think now"

Chris: "Right . Craw in the bunk and lock the door"

Nick: "**I think I'm going exit 88 that's that pin on fb right**"

Chris: "**Yes. If your not on wellington get out. I'm going ti move out after lunch**"

Feb 8, p.9 Nick: "**So arnprior then**"

Chris: "**Yup I'll be firing up soon**"¹²⁵

181. Mr. Barber also had the following chat with Rooster on February 7, 2022:

Feb 7 p.6 Rooster: I know, but do ya think that's gonna happen , I see swat and snipers in our base camp right now ,

Chris: Ya just be prepared if you are scared. **Fire up and get to the exit 88**

¹²⁵ Exhibit 135, vol. 2, Tab 66, chat #2340

182. Mr. Barber advised these individuals to go to Exit 88 (a private farmland where Mr. Barber brought Big Red) because of the potential for riot police swarming the truckers. Mr. Barber moved his own truck to Exit 88 on February 8, 2022. Mr. Barber's state of mind can be inferred from the totality of the evidence. Mr. Barber was scared of the situation and saw the possibility of kettling by mass riot police officers as an emergency type situation and in that state of mind believed that is one of the type of exceptions permitted by Justice McLean's Order. That is the subjective *mens rea* that can be inferred from the totality of the evidence.

183. The fact that Mr. Barber started that video (Exhibit 24) by telling truckers that they have to follow the horn injunction and then spoke of an exception to that Order provides the basis for the reasonable inference that Mr. Barber's intent was to follow the Order of Justice McLean and that he did not have the *mens rea* necessary to prove the offence of counselling to breach a court Order.

184. The totality of the evidence raises a reasonable doubt with respect to the *mens rea* of this offence.

CONCLUSION

185. Christopher Barber is a truck driver from Swift Current, Saskatchewan with a particular sense of humour as evidenced in his many TikTok videos. He came to Ottawa driving "Big Red" with a group of other truckers from the West. He wanted to protest the federal government Covid-19 mandates.

186. What transpired between January 28, 2022, and February 19, 2022, exceeded what the police had anticipated. Similarly, it also exceeded what protestors anticipated. There were various

groups, various protests, lone protestors, it was an organic movement that Mr. Barber did not control.


187. In its submissions, the Crown is asking this Court to scrutinize Christopher Barber's words and actions in a vacuum to impute him a criminal *mens rea* when the evidence overwhelmingly shows that Christopher Barber fought tooth and nail to get protestors to comply with police demands and to have a peaceful and lawful protest.

188. Considering the totality of the evidence, and the reasonable inferences that can be drawn from the direct evidence, a reasonable doubt exists as to whether Mr. Barber committed any of the offences charged.

189. Mr. Barber tried everything to make sure he was engaged in a lawful and peaceful protest and that he did not participate in any criminal activities. He surrounded himself with lawyers to ensure what he was doing and saying was legal. He also took advice from former Premiers (Brian Peckford and Brad Wall) as well as a sitting member of the Legislative Assembly of Saskatchewan (Hugh Nerlien). He maintained contact with police and assisted police in moving vehicles that were blocking streets and in trying to silence the horns.

190. As stated by the Supreme Court of Canada, a person that is “morally innocent should not be punished. Mr. Barber ought to be acquitted of all charges.

Date: August 12, 2024


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