

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(East Region)**

B E T W E E N :

HIS MAJESTY THE KING

Respondent

-and-

JEFFREY EVELY

Appellant

---

**APPELLANT'S FACTUM**

---

May 1<sup>st</sup>, 2025

**CHARTER ADVOCATES CANADA**

[REDACTED]

**Christopher Fleury**

LSO No: 67487L

[REDACTED]

**Hatim Kheir**

LSO No: 79576J

[REDACTED]

**Counsel for the Appellant**

**Jeffery Evely**

## PART I – STATEMENT OF THE CASE

1. The Appellant, Jeffrey Evelyn, was charged with the *Criminal Code* offences of mischief and obstructing a peace officer.<sup>1</sup> He pleaded not guilty, and a trial was held before Justice L. Miles of the Ontario Court of Justice (the “**Trial Judge**”) on August 26 and 27, 2024. The Trial Judge’s decision was rendered orally on September 17, 2025. Mr. Evelyn was convicted of two counts of mischief and one count of obstructing a peace officer.

2. The charges against Mr. Evelyn are particularized as occurring on or about February 19, 2021. The arrest occurred in the context of a large and sustained police effort to remove protestors from downtown Ottawa. The protest began weeks earlier with vehicles and protestors arriving in downtown Ottawa on January 28, 2022. The protest was largely in reaction to the legislative response by Federal and Provincial Governments to COVID-19. The protest became known to protestors and the public alike as the “Freedom Convoy.”

3. Mr. Evelyn is a veteran. He was responsible for organizing a sentry duty to guard the Ottawa War Memorial after it was vandalized at the outset of the Freedom Convoy protest. Mr. Evelyn regularly took the least popular shifts himself which were in the pre-dawn hours.

4. Mr. Evelyn was arrested in the early morning hours of February 19, 2021, while on his way to the War Memorial for his sentry duty shift. On February 18, the day prior, police had forcibly removed protestors and vehicles from an area near Rideau and Sussex and locked down the area, preventing members of the public from accessing it. Mr. Evelyn entered the area on foot and fled police when they demanded that he stop. He was arrested following a short 15 second pursuit.

5. Following Mr. Evelyn’s arrest, police used his identity to gather information from his social media profiles. That information was in turn used to identify Mr. Evelyn in a police drone video from February 18, 2021, and other open-source videos. The Trial Judge relied on this evidence in convicting Mr. Evelyn of mischief.

6. At trial Mr. Evelyn brought an application to exclude evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”). The application argued that Mr.

---

<sup>1</sup> The Appellant faced two counts of mischief under sections 430(1)(c) and (d) of the *Criminal Code* related to the same occurrences. He also faced one count of obstructing a peace officer pursuant to section 129(a) of the *Criminal Code*.

Evely's arrest was unlawful and that any subsequent searches were therefore unreasonable contrary to sections 9 and 8 of the *Charter* respectively.

7. At the heart of the *Charter* application, and the defence of the obstruct charge, was whether police had lawful authority under the common law to lockdown downtown Ottawa by creating checkpoints and forcing every person wishing to enter to identify themselves. The Appellant argued that they did not and that he had no obligation to comply with police demands that he stop and identify himself. He argued that his arrest was arbitrary, largely on that basis.

8. The Trial Judge disagreed and found that police did have lawful authority for their actions. However, in doing so the Trial Judge failed to identify or apply the *Waterfield* test set out *Dedman v. The Queen* which outlines the limits of police authority to interfere with individual liberty or privacy while executing their duties.<sup>2</sup>

9. The Appellant frames the issues on appeal as follows:

1. Did the Trial Judge err in her finding that police powers under common law included the ability of police to lockdown downtown Ottawa?
2. Did the Trial Judge err in her determination that the Appellant's right to be free from arbitrary detention was not infringed by his arrest?
3. Did the Trial Judge err in her determination that the Appellant's right to be free from unreasonable search and seizure was not infringed by a police search following his arrest?
4. Did the Trial Judge err in failing to exclude evidence obtained as a result of the *Charter* breaches.
5. Did the Trial Judge erred in law in her assessment of the essential elements of mischief and their application to the evidence in this matter?

---

<sup>2</sup> *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2.

## PART II – SUMMARY OF THE FACTS

### **1. Evidence at Trial**

10. The trial and the defence motion to exclude evidence proceeded in a blended fashion with all evidence being heard together over the course of the two-day trial.

11. The Crown’s evidence consisted of three witnesses, namely: Cst. Christopher Meuleman, Cst. Matthew Purton, and Cst. Wade Walker. It also included an agreed statement of fact, two maps of downtown Ottawa, and video evidence obtained from Mr. Evelyn’s social media, open sources, and a police drone. The videos were admitted without the need for authentication but subject to the exclusion motion under section 24(2) of the *Charter*.

12. Overall, the police witnesses describe an incident occurring on February 19, 2022, at approximately 4:25 a.m., in a locked down area of downtown Ottawa near the Chateau Laurier. All three officers agreed that the area in question was locked down with civilian access restricted and residents being forced to provide proof that they lived or worked in the area.<sup>3</sup> They described a short, approximately 15-second, pursuit<sup>4</sup> of Mr. Evelyn after he refused to stop and speak with police.

13. Cst. Meuleman is a member of the York Regional Police. He was deployed to Ottawa on February 17, 2022, as part of a community response unit, to assist in removing the Freedom Convoy.<sup>5</sup> He testified that in the early morning hours of February 19, he was stationed behind a police line near the Chateau Laurier, monitoring a crowd separated by temporary fencing.<sup>6</sup> At around 4:25 a.m., Cst. Meuleman heard yelling and saw an Ottawa police vehicle following a man—later identified as the Mr. Evelyn—running southbound toward the police line on Wellington Street.<sup>7</sup> Cst. Meuleman and Cst. Purton intercepted him.<sup>8</sup>

---

<sup>3</sup> Transcript of Proceedings (August 26, 2024), Appeal Book, Tab 3, p. 38, ll. 5-13 (Meulman); p. 52, ll. 1-9 (Purton); p. 73, ll. 27-31 (Walker).

<sup>4</sup> *Ibid.* at p. 73, ll. 18-20.

<sup>5</sup> *Ibid.* at p. 11, ll. 12-14.

<sup>6</sup> *Ibid.* at p. 14, ll. 4-22.

<sup>7</sup> *Ibid.* at p. 16, ll. 7-20.

<sup>8</sup> *Ibid.* at p. 17, ll. 11-14.

14. Cst. Meuleman further testified that he shouted for Mr. Evelyn to stop when he was 5-10 meters away. He tackled Mr. Evelyn with a bear hug, bringing him to the ground.<sup>9</sup> Post-arrest, Mr. Evelyn was handcuffed and turned over to Ottawa police.<sup>10</sup> Meuleman testified that Mr. Evelyn yelled, “I want to go to the War Memorial,” both while running and after arrest.<sup>11</sup>

15. Constable Purton, also a member of the York Regional Police, arrived in Ottawa on February 17, 2022, as part of the quick reaction team.<sup>12</sup> On February 19, he was stationed with Cst. Meuleman south of Wellington Street, facing the Chateau Laurier<sup>13</sup>. His evidence essentially mirrored that of Cst. Meuleman’s. At around 4:25 a.m., Purton heard someone yelling and saw an Ottawa police officer chasing Evelyn, who was running westbound on the north sidewalk of Wellington near Sussex.<sup>14</sup>

16. Cst. Purton intercepted Mr. Evelyn with Cst. Meuleman. The pair took Mr. Evelyn to the ground in a controlled manner.<sup>15</sup> Mr. Evelyn was then handcuffed by Cst. Walker.<sup>16</sup> Purton emphasized the takedown was not excessively forceful.<sup>17</sup>

17. Post-arrest, Cst. Purton noticed that Mr. Evelyn wore a leather vest with a military name tag and military medals.<sup>18</sup> On cross-examination Cst. Purton acknowledged seeing other veterans with medals during the protests.<sup>19</sup>

18. Cst. Walker was a member of the Ottawa Police in February of 2022 (although he later transferred to OPP). In the early morning hours of February 19, he was put on cordon security at the intersection of Rideau and Sussex.<sup>20</sup> The area was cordoned with barriers, police cruisers, and officers to prevent unauthorized entry.<sup>21</sup>

---

<sup>9</sup> *Ibid.* at p. 19, ll. 6-23.

<sup>10</sup> *Ibid.* at p. 20, ll. 20-23.

<sup>11</sup> *Ibid.* at p. 17, ll. 21-23 and p. 20, ll. 20-22.

<sup>12</sup> *Ibid.* at p. 41, ll. 15-21.

<sup>13</sup> *Ibid.* at p. 43, ll. 5-14.

<sup>14</sup> *Ibid.* at p. 44, ll. 11-16.

<sup>15</sup> *Ibid.* at p. 46, ll. 7-11.

<sup>16</sup> *Ibid.* at p. 47, ll. 5-10.

<sup>17</sup> *Ibid.* at p. 46, ll. 25-30.

<sup>18</sup> *Ibid.* at p. 47, ll. 11-20.

<sup>19</sup> *Ibid.* at p. 49, ll. 15-24.

<sup>20</sup> *Ibid.* at p. 59, ll. 9-11.

<sup>21</sup> *Ibid.* at p. 60, ll. 1-10.

19. At 4:25 a.m., Cst. Walker was standing in the intersection and heard a female officer yell “Stop” from north on Sussex. He saw Mr. Evelyn running southbound on the west sidewalk, pursued by officers at the cordon.<sup>22</sup> Walker yelled “Stop” and moved to intercept. Evelyn turned west onto Rideau.<sup>23</sup>

20. Mr. Evelyn reached the intersection of Mackenzie and Rideau, where Cst. Meuleman and Cst. Purton intercepted him. Cst. Walker testified that Mr. Evelyn attempted to push through, after which the officers took him down.

21. On cross-examination Cst. Walker acknowledged that following his arrest Mr. Evelyn identified himself, mentioning his service and wearing a black leather jacket with medals.<sup>24</sup> He also acknowledged that veterans had arranged with Ottawa Police to guard the War Memorial against vandalism.<sup>25</sup>

22. An agreed statement of fact was submitted to the Trial Judge which provided some background regarding significant events in the timeline of the Freedom Convoy in January and February of 2022.<sup>26</sup> It essentially acknowledged that some elements of the Freedom Convoy interfered with the use and enjoyment of property between January 28 and February 18, 2022. It included the caveat, “For clarity: it is not admitted that any freedom convoy protestor, or the accused Jeffrey Evelyn, committed mischief or any other criminal offence on or about February 19, 2022.”<sup>27</sup>

23. The Crown also relied on 6 videos submitted on a USB.<sup>28</sup> Referring to them in the order they were entered, the first video is an ariel drone video showing a line-up of police officers dressed in riot gear attempting to remove protestors from downtown Ottawa. Protestors are seen resisting police efforts. The second video is an open-source video which appears to show the same scene from the ground level. The final four videos show Mr. Evelyn making public statements during the

---

<sup>22</sup> *Ibid.* at p. 61, ll. 20-30.

<sup>23</sup> *Ibid.* at p. 62, ll. 1-3.

<sup>24</sup> *Ibid.* at p. 78, ll. 24-28.

<sup>25</sup> *Ibid.* at p. 71, ll. 15-23.

<sup>26</sup> Trial Exhibit 1 – Agreed Statement of Fact, Appeal Book, Tab 6.

<sup>27</sup> *Ibid.* at para 9.

<sup>28</sup> Trial Exhibit 3 – USB containing map and 6 videos, Appeal Book, Tab 8.

Freedom Convoy. The videos were admitted on consent without the need to authenticate them but being subject to the *Charter* application to exclude evidence.

24. Mr. Evely testified on the exclusion motion only. Mr. Evely's evidence differed from the police witnesses as follows:

1. He only heard the female officer say "stop" initially and did not hear other officers until near Mackenzie Street.<sup>29</sup>
2. During the takedown and arrest Mr. Evely raised his hands and went to the ground voluntarily as officers approached. The two officers guided him down. He assisted in the handcuffing by turning his thumb down and putting his hands behind his back.<sup>30</sup>
3. He emphasized his veteran status and the ongoing sentry duty, asserting the War Memorial was still under veteran control.<sup>31</sup>

## **2. Reasons for Judgment (Charter Application)**

25. The rulings on both the exclusion motion and the trial were issued on the same day, September 17, 2024.<sup>32</sup> The Trial Judge ruled against the Appellant's *Charter* application finding that there was neither a breach of his rights under section 8 or 9 of the *Charter*. Given that finding, the Trial Judge did not engage in an analysis under section 24(2) of the *Charter* regarding whether the evidence ought to have been excluded.

26. The thrust of the Appellant's argument on the *Charter* application was that police did not have authority under common law to set up a large exclusionary zone in downtown Ottawa, preventing the public from access. Where Mr. Evely's arrest was based primarily on his entrance into that zone and refusal to stop for police, the Appellant asserted that his detention was arbitrary.

27. On the issue of common law police powers the Trial Judge did not agree. Her reasoning was as follows:

---

<sup>29</sup> Transcript of Proceedings (August 27, 2024), Appeal Book, Tab 4, p. 24, ll. 1-5.

<sup>30</sup> *Ibid.* at p. 13, l. 10 – p. 14, l. 20.

<sup>31</sup> *Ibid.* at p. 14, l. 28 – p. 15, l. 1.

<sup>32</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5.

*“It would be illogical and contrary to their objective if, after clearing the area, [police] could not restrict movement so as to prevent the protesters and vehicles from reoccupying the space they had just cleared. To say otherwise would allow for the absurd situation where protesters would be permitted to re-occupy the secured area to continue their illegal activities, and thereby, force police to start over each morning in their efforts to clear the protesters, secure the area, and restore order.”*<sup>33</sup>

28. The Trial Judge went on to distinguish the case of *Stewart*<sup>34</sup> on the basis that this was not police “restricting access to a planned protest”. Rather it was police acting to “maintain order in the area they had already secured.”<sup>35</sup>

29. Although the Trial Judge relied on decisions which address the *Waterfield* test set out *Dedman v The Queen*<sup>36</sup> it is noteworthy that she did not identify the test or apply it to the facts of the case at bar. Given, the finding that police had the authority to create checkpoints and prevent access to downtown Ottawa, Mr. Evely’s refusal to stop when demanded by police constituted grounds for arrest for obstructing a peace officer.

30. The Trial judge also found that grounds for arrest existed for the charge of mischief. This was based primarily on the fact that Mr. Evely was running in the direction of the protesters, towards the backs of officers who were maintaining the barricade and who were unaware of his approach and attempting to join the protest.<sup>37</sup>

31. Where evidence of accused and the police officers differed, the evidence of the officers was preferred.<sup>38</sup>

---

<sup>33</sup> *Ibid.* at p. 12, l. 23 – p. 13, l. 9.

<sup>34</sup> *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255; overturning: *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785.

<sup>35</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 13, ll. 10-25.

<sup>36</sup> *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2.

<sup>37</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 17, ll. 6-9.

<sup>38</sup> *Ibid.* at p. 17-18.



32. Given that the arrest was not found to be arbitrary, the subsequent search of Mr. Evelyn was not found to be unreasonable. The Trial Judge agreed with the position of the Crown and dismissed the application. The video evidence described above was admitted.

### **3. Reasons for Judgment (Trial)**

33. The Trial Judge began her reasons by reviewing the evidence of the 3 police witnesses described above.

34. She then reviewed the video evidence filed as exhibit three. The Ottawa Police Service drone footage (Video 1) and open-source video (Video 2) from February 18, 2022, captured clashes between police and protesters.<sup>39</sup> The court compared these videos to footage from Evelyn's social media, identifying him by his appearance—a red baseball cap with white writing (“Lest we forget” with “Lest” crossed out), a black vest with medals, and other unique features—allowing for identification of the man in the videos as Mr. Evelyn.<sup>40</sup> This evidence was crucial in establishing Mr. Evelyn's participation and intent, linking his actions on both February 18 and 19.<sup>41</sup>

35. On the mischief charges, the Trial Judge examined Mr. Evelyn's physical resistance and presence at the protest, as shown in the videos and described by police witnesses.<sup>42</sup> She concluded that these actions indicated a shared intention to aid and abet other protesters in disrupting the lawful use of property, satisfying the elements of the charge. She concluded that not only did Mr. Evelyn's actions on February 18 (as captured on video) constitute mischief, but that his actions of fleeing police on February 19 did as well. She found that these actions constituted “encouragement or assistance” of other protestors at the scene, as “strength in numbers can be found to be an important source of encouragement.”<sup>43</sup>

36. On the obstruct police charge the Trial Judge considered Mr. Evelyn's refusal to stop when ordered by Cst. Walker.<sup>44</sup> These actions were found to have made it more difficult for police to

---

<sup>39</sup> *Ibid.* at p. 23, ll. 25-30; p. 24, ll. 1-15.

<sup>40</sup> *Ibid.* at p. 31, ll. 5-25; p. 32, ll. 1-15; p. 34, ll. 5-25.

<sup>41</sup> *Ibid.* at p. 35, ll. 5-20.

<sup>42</sup> *Ibid.* at p. 28, ll. 15-30.

<sup>43</sup> *Ibid.* at p. 35, ll. 18-27.

<sup>44</sup> *Ibid.* at p. 35, ll. 30-36; p. 36, ll. 1-15.

carry out their duty to secure the area, clearly constituting an offense. The findings on the *Charter* application regarding police duties applied to this charge.

### **PART III – ISSUES AND THE LAW**

37. The Appellant raises a number of interrelated issues on appeal. The Appellant characterizes the issues as follows:

1. What is the applicable standard of review?
2. Did the Trial Judge err in her finding that police powers under common law included the ability of police to lockdown downtown Ottawa?
3. Did the Trial Judge err in her determination that the Appellant’s right to be free from arbitrary detention was not infringed by his arrest?
4. Did the Trial Judge err in her determination that the Appellant’s right to be free from unreasonable search and seizure was not infringed by a police search following his arrest?
5. Did the Trial Judge err in failing to exclude evidence obtained as a result of the *Charter* breaches.
6. Did the Trial Judge erred in law in her assessment of the essential elements of mischief and their application to the evidence in this matter?

#### **1. Standard of Review**

38. The standard of review on pure questions of law is correctness, meaning that “the appellate court is free to place the opinion of the trial judge with its own.”<sup>45</sup> The standard of review on questions of fact is “palpable and overriding error”, meaning that the court ought only intervene if there is an obvious error that significantly impacts the case’s outcome.<sup>46</sup>

39. Matters of mixed fact and law lie along a spectrum. Where an error with respect to a finding of mixed fact and law can be attributed to the application of an incorrect standard, a failure to

---

<sup>45</sup> *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8. (“*Housen*”)

<sup>46</sup> *Housen* at para 10.

consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness.<sup>47</sup>

40. A lower court's determination of a whether there was a *Charter* breach is reviewed on the standard of correctness. However, the evidence underlying the Charter breach can only be reviewed on the standard of "palpable and overriding error."<sup>48</sup> When determining whether an accused was unlawfully detained under section 9 of the *Charter*, "the issue of whether the facts as found by the trial judge amount at law to reasonable and probable grounds is a question of law."<sup>49</sup>

## **2. The Trial Judge erred in her finding that police powers under common law included the ability of police to lockdown downtown Ottawa**

### *Overview*

41. At trial the Appellant argued that the actions of police in locking down downtown Ottawa and preventing all civilians from accessing public areas greatly exceeded their powers at common law. Police did not have the power to stop every single person entering that area. The Appellant relied on the seminal decision of *Dedman*,<sup>50</sup> wherein the Supreme Court of Canada adopted a two-part test from the English Court of Appeal case of *Waterfield* to determine whether an officer's conduct is authorized by common law.

42. The Appellant's argument at trial was that, where police did not have authority to demand that he stop, Mr. Evelyn's refusal to comply with an unlawful police demand, based on a purported authority to stop each and every person entering the downtown core, cannot form the basis for his arrest.

43. At trial the Appellant's counsel accepted that this Court's findings in *Romlewski*<sup>51</sup> were binding on the trial judge. Namely, that police had authority under common law to demand that Freedom Convoy protestors behaving unlawfully cease their unlawful behaviour and leave the vicinity. But counsel argued that these powers did not extend to the creation of a police perimeter

---

<sup>47</sup> *Housen* at para 36.

<sup>48</sup> *R. v. Farrah (D.)*, 2011 MBCA 49 at para 7.

<sup>49</sup> *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. at para 20.

<sup>50</sup> *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2; See also: *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 SCR 519.

<sup>51</sup> *R. v. Romlewski*, 2023 ONSC 5571 at para 261; overturning: *R. v. Romlewski*, 2022 ONCJ 502.

around the downtown core of the City of Ottawa, restricting access to only those who lived or worked there.

44. The Trial Judge disagreed with the Appellant concluding that: “the legitimate police operation to end the illegal occupation of the downtown streets included police efforts to secure the area and restore order. This would include restricting peoples’ movements into the area that had been cleared by police during the day on February 18th, 2022.”<sup>52</sup>

45. The Trial Judge came to this conclusion without reference or engagement with the test in *Waterfield*, adopted by the Supreme Court of Canada in *Dedman* and again in *Fleming*.<sup>53</sup>

46. Appellant’s counsel relied on the analogous case of *Stewart*.<sup>54</sup> The Trial Judge differentiated *Stewart* stating that “This was not police action which restricted peoples’ ability to enter into an area where a planned demonstration was going to take place or attempts to impose conditions on entry to the protest area. The police were acting to maintain order in the area they had secured and not allow the illegal disruption to continue.”<sup>55</sup>

### *Legal Framework*

47. The common law confers broad authority on police to carry out a wide range of duties. In *Dedman*,<sup>56</sup> the Supreme Court of Canada relied on the legal test developed in the English Court of Appeal case of *Waterfield* to determine whether an officer’s conduct is authorized by common law. The test is two-fold:

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

---

<sup>52</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at pg. 12, ll. 16-22.

<sup>53</sup> *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2; See also: *Fleming v. Ontario*, 2019 SCC 45 (CanLII), [2019] 3 SCR 519.

<sup>54</sup> *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 (“*Stewart*”); overturning: *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785.

<sup>55</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 13, ll. 18-25.

<sup>56</sup> *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2; See also: *Fleming v. Ontario*, 2019 SCC 45 (CanLII), [2019] 3 SCR 519.

48. The *Waterfield* test has been applied to, and found to provide authority for, the creation of a controlled perimeter around: a police officer who is executing an arrest;<sup>57</sup> a police officer who is questioning a suspect or a witness;<sup>58</sup> a crime scene to preserve evidence;<sup>59</sup> a hazardous area to preserve public safety,<sup>60</sup> and a potential target of violent crime in order to ensure the target's protection.<sup>61</sup> The constitutionality of roadblocks involving vehicle traffic has also been considered many times at the appellate Court level and have frequently been found not to be arbitrary.<sup>62</sup>

49. Police actions regulating the attendance of protestors at public demonstrations have rarely been found to be within the general scope of any duty recognized by common law. For example, in *Stewart v. The Toronto Police Services Board*<sup>63</sup> a police perimeter, including baggage searches, around a public park where demonstrators were gathering to protest a meeting of the G20 was found not to be within the general scope of any common law duty. Police were found not to have legal authority to impose such conditions on entry. The protest at issue in *Stewart* was characterized by peaceful protests intertwined with protestors intent on violence and property destruction. Such violence and property destruction presented “unprecedented peacekeeping and security challenges”.<sup>64</sup>

50. Virtually identical issues were raised in another case involving the Toronto G20 protest: *Figueiras v. Toronto (Police Services Board)*.<sup>65</sup> With reasons mirroring *Stewart*, the Court of Appeal applied the *Waterfield* test and found that the creation checkpoints demanding bag searches did not fall within the ambit of common law ancillary police powers. Further, in preventing Mr. Figueiras’ from protesting for his chosen cause (animal rights), police conduct violated his freedom of expression under the *Charter*.

---

<sup>57</sup> *R. v. Wutzke*, 2005 ABPC 89 at paras 60-66.

<sup>58</sup> *R. v. Dubien*, [2000] Q.J. No. 250, J.E. 2000-461 (C.M.), at paras 14-26.

<sup>59</sup> *R. v. Edwards*, 2004 ABPC 14 at paras. 4-6, 24-48, 66;

<sup>60</sup> *R. c. Rousseau*, [1982] J.Q. no 490, [1982] C.S. 461 (Sup. Ct.), at pp. 461-62, 463-64.

<sup>61</sup> *Knowlton v. R.*, 1973 CanLII 148 (SCC), [1974] SCR 443.

<sup>62</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA); see also: *R. v. Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725.

<sup>63</sup> *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255; overturning: *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785.

<sup>64</sup> *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para 13.

<sup>65</sup> *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 at para 59.

51. Only one case has applied the test in *Waterfield* to the actions of police in clearing the Freedom Convoy. In *R v Romlewski*,<sup>66</sup> the accused was found in an area that had not yet been cleared of protesters and vehicles. When approached by police the accused sat down and refused to leave. He was charged criminally with obstructing police and mischief. At trial Mr. Romlewski argued that police did not have authority to demand that he leave. The Court applied the test in *Waterfield* and ultimately found that police did have authority under the common law to demand that Mr. Romlewski leave.

### *Analysis*

52. In this case the conduct at issue, as confirmed by the respective police witnesses, was the lockdown of the downtown core of Ottawa with police checkpoints at the perimeter. No persons could enter the perimeter without being stopped by police. If persons could not prove that they lived and worked in the area, they were turned away.

53. Where the Trial Judge did not cite or apply the relevant legal test, no deference is owed to her finding that police actions were pursuant to common law authority.

54. The Trial Judge's finding relies primarily on the supposition that "It would be illogical and contrary to their objective if, after clearing the area, they could not restrict movement so as to prevent the protesters and vehicles from reoccupying the space they had just cleared." There was no evidence at trial and there were no factual findings of the Trial Judge which support this assertion.

55. The Trial Judge also improperly distinguishes *Stewart* on the basis that the case at bar did not involve police restricting access to a planned protest. Rather, it involved police acting to "maintain order in the area they had already secured."<sup>67</sup> There is no principled reason to distinguish the two cases on that basis. In particular, the Court in *Stewart* found that some protestors were intent on violence and property destruction. The situation in *Stewart* was in some ways much more serious than the case at bar where it was "unprecedented" and presented serious "peacekeeping and security challenges". Further evidence was led in *Stewart* that G20 protests across the globe

---

<sup>66</sup> *R. v. Romlewski*, 2023 ONSC 5571; overturning: *R. v. Romlewski*, 2022 ONCJ 502.

<sup>67</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 13, ll. 10-25.

are typically characterized by “a high level of violence and destruction of property was common at G20 events.”<sup>68</sup>

56. No such “high level of violence and destruction of property” were present at the Freedom Convoy. In *Stewart*, even in the anticipation of a high level of violence and property destruction, police common law powers were not found to include the ability to conduct searches at the perimeter of a public park. Notably the police action in *Stewart* was far less draconian. Police did not exclude the public entirely from the park, let alone the downtown core of a city.

57. The police conduct in this case did not fall within the general scope of any duty imposed by statute or recognized by common law. The accused must be acquitted obstruct charge on that basis. The impact upon section 9 of the *Charter* is described in further detail below.

### **3. The trial judge erred in her determination that the Appellant’s right to be free from arbitrary detention was not infringed by his arrest**

58. Section 9 of the *Charter* provides that “Everyone has the right not to be arbitrarily detained or imprisoned.” A detention, including an arrest, will be considered arbitrary within the meaning of section 9 of the *Charter* if it is not authorized by law.<sup>69</sup>

59. A warrantless arrest requires a subjective and objective component. An arrest without a warrant is lawful if the police officer has reasonable grounds to believe that the person arrested has committed an indictable offence. The subjective requirement requires that the police officer believes that he has reasonable grounds. The objective component requires that the belief be based on information that would lead a reasonable and cautious person in the position of the police to conclude that reasonable grounds existed for the arrest.<sup>70</sup>

60. The arresting officer, Cst. Walker, asserted reasonable grounds to arrest Mr. Evely on both mischief and obstructing a peace officer. The Appellant does not take issue with subjective belief of Constable Walker. Rather the objective basis for that belief is at issue in this appeal.

---

<sup>68</sup> *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para 12.

<sup>69</sup> *R v Le*, 2019 SCC 34 (CanLII), [2019] 2 SCR 692 at paras 30, 38.

<sup>70</sup> *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241 at paras 18-19.

61. With regards to the objective basis to arrest Mr. Evely for obstructing a peace officer, the Appellant repeats the analysis above that police were acting outside the scope of any common law duty. There was no objective basis to believe that he was obstructing a peace officer *in his lawful duties*.

62. With regards to the mischief count, at the time of arrest Mr. Evely was seen running down Sussex Avenue at approximately 4:25 in the morning. He was alone. Vehicle and pedestrian traffic were blocked by police. It appears on the evidence that Cst. Walker and perhaps one or two other police officers were the only other persons on Sussex Avenue at that time. Officers Meuleman and Durton of the York Regional Police were also a short distance away on Wellington.

63. The Trial Judge relies on a finding Mr. Evely was running in the “direction of the protesters, towards the backs of officers who were maintaining the barricade and who were unaware of his approach.”<sup>71</sup>

64. Not everyone who was in downtown Ottawa on February 18-19 was committing mischief simply by being present, and particularly not merely by travelling there. This Court found as much in upholding an acquittal in similar circumstances in *R. v. Decaire*.<sup>72</sup>

“the trial judge’s suggestion that Ms. Decaire could have been there to passively protest or out of curiosity were reasonable theories. There was at this time a large-scale protest in Ottawa. Many citizens went to various protest to sites to observe, to peacefully protest, or in some cases, to passively support those who were protesting. That the trial judge suggested that Ms. Decaire might be one of those persons is not a speculative proposition but rather reasonable one and in accordance with the evidence before him regarding the Freedom Convoy.”

65. At the time of his arrest Mr. Evely was unknown to the officers. Simply travelling to the scene of criminal activity is not evidence of an attempt to join others in its commission. At best it is circumstantial evidence, which on its own, would not lead a reasonable and cautious person in the position of the Cst. Walker to conclude that reasonable grounds existed for the arrest.

---

<sup>71</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 17, ll. 6-9.

<sup>72</sup> *R. v. Decaire*, 2024 ONSC 4713 at para 42.



66. There is no objective basis on which to form reasonable and probable grounds that Mr. Evely was interfering with anyone's lawful use, enjoyment or operation of their property or that he was attempting to do so.

**4. The Trial Judge erred in her determination that the Appellant's right to be free from unreasonable search and seizure was not infringed by a police search following his arrest**

67. A warrantless search that follows an unlawful arrest is unreasonable. Counsel at trial conceded that, if the arrest is found to be lawful, the search incident to arrest was lawful, and vice versa.<sup>73</sup> The Trial Judge agreed that the section 8 breach "rises and falls" on the determination of whether Mr. Evely's arrest was lawful.<sup>74</sup>

68. Where the Appellant's arrest and detention was arbitrary any subsequent searches, including the search of his person for identification,<sup>75</sup> were not reasonable.

**5. The Trial Judge erred in failing to exclude evidence obtained as a result of the *Charter* breaches.**

*The Evidence was "obtained in a manner"*

69. Evidence can only be excluded if it is "obtained in a manner" that infringed the Applicant's Charter rights.<sup>76</sup>

70. Evidence that satisfies the "obtained in a manner" requirement of s. 24(2) where it has a temporal, contextual, or causal connection to the *Charter* breach or some combination of the three. The approach is to be a generous one.<sup>77</sup>

71. Here, the social media evidence, and in turn the drone video, was only found using the Applicant's name which was obtained by the arresting officers search of his person after he had been unlawfully arrested. There is a direct casual connection between the evidence and the breach. But for the Applicant's arrest, the evidence would not have been obtained. Further, there is a

---

<sup>73</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 9, ll. 24-27.

<sup>74</sup> *Ibid.* at p. 9, ll. 3-6.

<sup>75</sup> *R. v. Harris*, 2007 ONCA 574 at para 40.

<sup>76</sup> *R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para 59.

<sup>77</sup> *R v Davis*, 2023 ONCA 227 at para. 28.

contextual connection in that the social media searches were made as part of searches related to individuals arrested at the Freedom Convoy protest.

*Admitting the evidence would bring the administration of justice into disrepute*

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

73. Second, the impact on the Applicant's *Charter*-protected interests was significant. The analysis on the second factor requires assessing "the interests engaged by the infringed right" and "the degree to which the violation impacted on those interests."<sup>78</sup>

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

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

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

77. Third, society's interest in adjudication on the merits does not strongly weigh in favour of admission. The Freedom Convoy protests were political protests which arose in response to divisive legislation of questionable utility. The invocation of the *Act* was an unlawful use of

---

<sup>78</sup> *R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para. 77.

government power.<sup>79</sup> Society's overall interests are in moving on from a politically divisive time of Canadian history. At best, this branch of the test is neutral.

78. The Trial Judge ought to have excluded the video evidence on this basis.

**6. The Trial Judge erred in law in her assessment of the essential elements of mischief and their application to the evidence in this matter**

79. Mr. Evelyn was convicted of mischief in relation to both the February 18 conduct shown on the respective videos, but also his February 19 conduct as observed by the three police witnesses. Where the video evidence ought to have been excluded any conviction in relation to that conduct cannot stand and ought to be reversed by this court.

80. In relation to the February 19 conduct, the Trial Judge found as follows:

“Mr. Evelyn was running towards the barricade to rejoin the protesters with whom he had been committing mischief earlier that day. This constitutes an act of assistance or encouragement of the other protesters at the scene, as strength in numbers can be found to be an important source of encouragement... I find, on the evidence as a whole, I accept that I am satisfied beyond a reasonable doubt Mr. Evelyn is guilty of mischief and I find him guilty on that count.”<sup>80</sup>

81. The phrasing of the Trial Judge of “on the evidence as a whole” strongly implies that the video evidence played a role in the Trial Judge’s findings of Mr. Evelyn’s intentions which respect to the February 19 conduct. Were the videos to have been excluded, the February 19 observations of the three police witnesses are insufficient to establish liability for criminal mischief.

82. The above analysis with respect to reasonable grounds to arrest for mischief also applies here. At the time of his arrest Mr. Evelyn was unknown to the officers. Simply moving in the direction, without more, does not amount to the actus reus of attempting to commit mischief. Not everyone who was in downtown Ottawa on February 18-19 was committing mischief simply by

---

<sup>79</sup> See: *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42.

<sup>80</sup> Transcript of Reasons for Judgment (September 17, 2024), Appeal Book, Tab 5 at p. 35, ll. 18-28.

being present, and particularly not be travelling there. This Court found as such in upholding an acquittal in similar circumstances.<sup>81</sup>

#### **PART IV – ORDER REQUESTED**

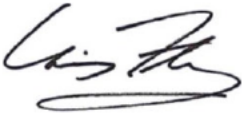
83. The Appellant asks this Honourable Court to grant an order allowing the Appeal and substituting acquittals on the counts of mischief and obstruct.

84. In the alternative, the Appellant asks that an order be made for a new trial on all counts.

#### **PART V – TIME LIMITS FOR ORAL ARGUMENT**

85. The Appellant estimates that the hearing of this appeal can be completed in 3 hours.

All of which is respectfully submitted this 1<sup>st</sup> day of May 2025.



**Christopher Fleury**

LSO No: 67487L

[Redacted]



**Hatim Kheir**

LSO No: 79576J

[Redacted]

**Charter Advocates Canada**

[Redacted]

**Counsel for the Respondent**  
**Jeffery Evelyn**

---

<sup>81</sup> *R. v. Decaire*, 2024 ONSC 4713 at para 42.

## **SCHEDULE “A” - Authorities to be Cited**

*Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2.

*Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255.

*Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785.

*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

*R. v. Farrah (D.)*, 2011 MBCA 49.

*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R.

*R. v. Romlewski*, 2023 ONSC 5571.

*R. v. Romlewski*, 2022 ONCJ 502.

*Fleming v. Ontario*, 2019 SCC 45 (CanLII), [2019] 3 SCR 519.

*R. v. Wutzke*, 2005 ABPC 89.

*R. v. Dubien*, [2000] Q.J. No. 250, J.E. 2000-461 (C.M.).

*R. v. Edwards*, 2004 ABPC 14.

*R. c. Rousseau*, [1982] J.Q. no 490, [1982] C.S. 461 (Sup. Ct.).

*Knowlton v. R.*, 1973 CanLII 148 (SCC), [1974] SCR 443.

*Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA).

*R. v. Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725.

*Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208.

*R v Le*, 2019 SCC 34 (CanLII), [2019] 2 SCR 692.

*R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241.

*R. v. Decaire*, 2024 ONSC 4713.

*R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353.

*R v Davis*, 2023 ONCA 227.

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