Court File No: 22-A8382

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

BETWEEN

**HIS MAJESTY THE KING**

*Respondent*

*- and -*

**Scott HOCKADAY**

*Applicant*

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# CROWN RESPONSE RECORD
## Response to *Charter* Application

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Don Couturier
Assistant Crown Attorney
[redacted]
Ottawa Crown Attorney's Office
[redacted]

# INDEX

# Form / *Formule* 2
# RESPONSE
# *RÉPONSE*

(Rule 2.2, *Criminal Rules of the Ontario Court of Justice*)
*(Règle 2.2,* Règles de procédure en matière criminelle de la Cour de justice de l'Ontario*)*

ONTARIO COURT OF JUSTICE
*COUR DE JUSTICE DE L'ONTARIO*

**East / Est**
Region / *Région*

**22-A8382**
Court File No. (if known)
*N° du dossier de la cour (s'il est connu)*

**BETWEEN: / *ENTRE***

**HER MAJESTY THE QUEEN / *SA MAJESTÉ LA REINE***

**- and / *et* -**

**Scott HOCKADAY**
(defendant(s) / *défendeur(s)*)

**1. NAME OF RESPONDENT**
***NOM DE LA PERSONNE INTIMÉE***
**His Majesty the King**

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

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

☒ I have a legal representative who will be appearing. The address, fax or email for service of my legal representative is as follows:
*J'ai un représentant juridique qui sera présent. L'adresse, le numéro de télécopieur ou l'adresse électronique de mon représentant juridique aux fins de signification sont les suivants :*
**Don Couturier, Assistant Crown Attorney**
**don.couturier@ontario.ca / 161 Elgin St., Ottawa ON**

**3. CONCISE STATEMENT OF REASONS FOR RESPONDING**
***BRÈVE DÉCLARATION DES MOTIFS DE LA RÉPONSE***
(Briefly state why you are opposing the Application. For example, "The Applicant has not provided any medical evidence about pending surgery"; "The Crown disclosure is complete"; or "The length of time is not unreasonable, the Applicant has acquiesced to any delay, and there has been no prejudice flowing from the time to trial.")
*(Expliquez brièvement pourquoi vous vous opposez à la demande. Par exemple : « L'auteur de la demande n'a pas produit de preuve médicale au sujet de son intervention chirurgicale imminente. », « La Couronne a divulgué tous les documents qu'elle pouvait. », « Le temps écoulé n'est pas excessif. L'auteur de la demande a accepté n'importe quel retard et le temps écoulé jusqu'au procès ne lui a causé aucun préjudice. » )*
**This is a response to the Charter application of the Applicant that alleges breaches of ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms. The Respondent also respectfully requests an abridgment of timing in filing this response.**

**4. RESPONSE TO THE APPLICANT'S GROUNDS TO BE ARGUED IN SUPPORT OF APPLICATION (#6 on application)**
***RÉPONSE AUX MOTIFS DE L'AUTEUR DE LA DEMANDE QUI SERONT INVOQUÉS À L'APPUI DE LA DEMANDE (point 6 de la demande)***
**See Detailed Response, appended.**

**5. DETAILED STATEMENT OF SPECIFIC FACTUAL BASIS FOR OPPOSING APPLICATION**
***DÉCLARATION DÉTAILLÉE DES FAITS PRÉCIS SUR LESQUELS SE FONDE L'OPPOSITION À LA DEMANDE***
**See Detailed Response, appended.**

**6. INDICATE BELOW OTHER MATERIALS OR EVIDENCE YOU WILL RELY ON IN RESPONSE TO THE APPLICATION**
***INDIQUEZ CI-DESSOUS D'AUTRES DOCUMENTS OU PREUVES QUE VOUS ALLEZ INVOQUER EN RÉPONSE À LA DEMANDE***

☒ Brief statement of legal argument
*Bref exposé des arguments juridiques*

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

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

☐ Agreed statement of facts
*Exposé conjoint des faits*

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

**Evidence from Cpl. Grant, Det. Fahey, and potentially intake Sergeant**

☒ Other (Please specify)
*Autre* *(Veuillez préciser)*

**Oral submissions**

**March 6, 2023**
(Date)

Signature of Respondent or Legal Representative / *Signature de l'intimé ou de son représentant juridique*

To: **Hatim Kheir**
*À :* (Name of Applicant or legal representative / *Nom de l'auteur de la demande ou de son représentant juridique*)

**Charter Advocates**
[redacted]
(Address/fax/email for service / *Adresse, numéro de télécopie ou adresse électronique aux fins de signification*)

**NOTE: Rule 2.2 requires that a response to an application be served on the applicant and on any other affected parties.**
***NOTA : La règle 2.2 exige qu'une réponse à une demande soit signifiée à l'auteur de la demande et aux autres parties concernées.***

## DETAILED RESPONSE

## I. OVERVIEW

1. The Applicant was arrested in Ottawa on February 18th, 2022, while police were conducting an operation to clear the downtown area of "Freedom Convoy" demonstrators who refused to leave. Despite numerous notices to demonstrators issued leading up to February 18th and warnings to leave or face arrest on the day in question, the Applicant was still protesting, and he was arrested.

2. The Applicant was immediately *Chartered* and cautioned twice, first by the arresting officer and then by the Hand Off Team. Standing outside in the cold while being processed in the aftermath of his arrest, the Applicant stated that he was driving a sixteen-foot enclosed trailer, which was towed the same day.

3. Subsequently, and using the identity of the Applicant obtained through the arrest, a social media Facebook profile of the Applicant was located. This open-source evidence supports the charges of mischief in relation to the Applicant's activities on February 18th, 2022.

4. The Applicant claims breaches under ss. 8, 9 and 10(b). These claims should be dismissed. The arresting officer formed the requisite reasonable and probable grounds to effect a lawful arrest. The subsequent social media search was therefore justified. Any delay that occurred in facilitating a call to a lawyer while he was being processed by the Hand Off Team was justified, given that police were undertaking an unprecedented police operation and the practical realities of the operation precluded a private phone call outside in freezing temperatures amongst mass arrests.

## II. FACTUAL BASIS FOR THE RESPONSE

*a. The factual context of the "Freedom Convoy"*

5. Starting on January 28, 2022, and continuing into February 2022, individuals from all over Canada began to arrive in Ottawa to protest public health measures taken in response to the COVID-19 pandemic. This became known as the "Freedom Convoy".

6. Upon arrival in Ottawa, members of the "Freedom Convoy" parked their commercial and passenger vehicles along most lanes of major roadways in Ottawa's downtown area. The effect of the protest was to restrict the use of streets and movement of persons and vehicles throughout the area. The disruption was broadcasted globally.

7. On February 11, 2022, the Government of Ontario declared a province-wide state of emergency and enacted the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. On February 12, 2022, it issued Regulation 71/72, which stated that no person shall impede access to any highway as defined by the *Highway Traffic Act*, where the impediment interferes with their use or impacts the well-being of the public.

8. On February 14, 2022, the federal government declared a national public order emergency. On February 15, 2022, it registered three regulations that empowered the state to restore public order to the areas occupied by "Freedom Convoy" demonstrators.

9. On February 16, 2022, the Ottawa Police Media Unit released a Notice to Demonstrators. Members of the Police Liaison Teams handed out pamphlets to demonstrators in the downtown core and other encampment areas. The wording included the following: "You must leave the area now. Anyone blocking streets, or assisting others in the blocking of

streets, are committing a criminal offence and you may be arrested. You must immediately cease further unlawful activity, or you will face charges …".

10. Members of the "Freedom Convoy" were provided opportunities to leave without charges ahead of police enforcement action. On February 18, 2022, police began enforcement to clear the downtown core of Ottawa of protestors and to secure the area.

*b. The Applicant Scott Hockaday*

11. The Applicant is charged with two counts of mischief, one count of obstructing a peace officer, and one count of disobeying a court order under the *Criminal Code*, in relation to his actions on February 18th, 2022, during the "Freedom Convoy" in Ottawa. The Crown will proceed only on the two mischief counts.

12. At 7:50 a.m. on February 18th, the Applicant was arrested near Laurier Avenue and Nicholas Street by RCMP officers Cpl. Dave Grant and Cst. Aaron Gooding. This area was located within the "redzone" that police were instructed to clear.

13. Cpl. Grant and Cst. Gooding observed the Applicant engaging with police and turning his back toward the officers and putting his hands behind his back.

14. Cpl. Grant formed reasonable grounds to arrest the Applicant and did so at 7:50 a.m. He immediately issued rights to counsel and a police warning from memory.

15. The Applicant was searched incident to arrest. He was in possession of a bible, cellphone, pocketknife, and wallet. The Applicant verbally identified himself as Scott Hockaday and this was confirmed by identification in his wallet.

16. The Applicant was turned over to Det. Chris Fahey and Sgt. David Allchin at 7:55 a.m. These officers were part of Hand Off Team #4, tasked with processing and transporting individuals arrested that day as part of the police operation.

17. Det. Fahey issued rights to counsel and primary and secondary cautions. The Applicant was held while waiting for the OPP transport vehicle. During this time, the Applicant stated to Det. Fahey that he was driving a sixteen-foot enclosed trailer, registered to Nick Hildebrandt with Ontario plate S5697A. The vehicle was towed that same day.

18. At 8:44 a.m. the Applicant was handed over to OPP transport and brought to the temporary processing site at 185 Slidell Street.

19. The Applicant arrived at the temporary processing site at 10:33 a.m. and was paraded before the custody sergeant. The Applicant was asked by intake officers if he has a lawyer and if he wants to call a lawyer. The Applicant's response to this is unknown at this time but may be clarified by witnesses in the *Charter* voir dire.

20. Officers were advised to state the following to an arrestee who expresses a wish to speak with a lawyer:

> I know that you indicated that you wanted to call a lawyer. We have facilities for that; however, just so you are aware, it is our intention to release you from custody with a court date and some release conditions as soon as possible. We are not seeking to interview you or obtain a statement. Do you still want to call a lawyer?

21. If the arrestee answers yes, police were advised to facilitate a call. If the arrestee answers no, police were advised to release the individual with a court and print date.

22. The Applicant was issued an undertaking and he declined to sign it. He stated that he understood the conditions. He was released at 10:53 a.m., 20 minutes after arriving.

## III. LEGAL ARGUMENT

*a. No s. 9 or 8 breach: the arrest was lawful, thus the subsequent search was reasonable*

23. The Applicant claims there is "no evidence" that Cpl. Grant had subjective grounds for arrest that were objectively reasonable. That is not the case. Cpl. Grant is expected to provide his subjective grounds for arrest, which will likely be based on the morning briefing he on February 18th, 2022, his direct observations of the Applicant, and any information he received from other officers. These grounds were objectively reasonable in the totality of the circumstances.

24. The legal authority to effect arrests on February 18th, 2022, is as follows. All officers participating in the enforcement operation that day had reasonable grounds to believe that anyone in the redzone without lawful excuse was committing the offence of mischief. The police operation was premised on the lawful authority to restore public order.

25. The authority to restore public order through enforcement has both common law and statutory sources. The common law authority exists independently of the *Emergencies Act* passed in response to the Freedom Convoy demonstration, which also independently justified the restoration of public order in the circumstances.

26. Police were authorized to establish an exclusion zone in the downtown core and restore public order under the common law ancillary powers doctrine (*Waterfield* test). The test originated in Britain and was adopted into Canadian common law, explained most fully

by the Supreme Court in *Clayton*. It requires police to be exercising a lawful duty, and the conduct be a justifiable use of police powers associated with that duty.

*R. v. Clayton*, 2007 SCC 32 at para. 22 [**BOA Tab 1**]

27. Drawing on its earlier jurisprudence in *Knowlton v. The Queen*, *Clayton* specifically affirmed *Knowlton*, which held that officials may restrict the right of free access of the public to streets if necessary to preserve peace, order, and public safety. The power to do so has therefore been held at common law to satisfy the *Waterfield* test.

*R. v. Clayton*, 2007 SCC 32 at para. 22 [**BOA Tab 1**]

*Knowlton v. The Queen*, [1974] S.C.R. 443 at paras. 10-13 [**BOA Tab 2**]

28. Officers also had statutory authority to conduct arrests under s. 430 of the *Criminal Code* (mischief). Provided officers subjectively believed an individual was participating in or contributing to the obstruction of public space, and that belief is objectively reasonable, those officers possessed the grounds necessary to effect a lawful arrest.

29. On February 18th, 2022, the authority to arrest where an individual refused to leave the secure zone area was subjectively known by all participating officers, provided they had some basis for believing that the individual was connected to the demonstration.

30. The reasonable and probable grounds standard is not onerous. It cannot be inflated to the context of testing trial evidence. Officers are not required to conduct a full investigation, make further inquiries, seek out additional information, or examine all available evidence. Hearsay is admissible to establish the officer's subjective and contemporary state of mind,

and to prove that they acted on reasonable grounds to believe. Such hearsay can include information obtained from local police officers.

*R. v Bush*, 2010 ONCA 554 at para. 46, 61 [**BOA Tab 3**]

*R. v. Chehil*, 2013 SCC 49 at paras. 34, 67 [**BOA Tab 4**]

31. Moreover, reasonable grounds to believe can be transferred from one officer to another. An officer can act on the instructions of another officer in making a lawful arrest, provided the instructing officer has sufficient grounds to give the arrest.

*R. v. Debot*, [1989] 2 S.C.R. 1140 at paras. 49-50 [**BOA Tab 5**]

32. In forming reasonable grounds, an officer must conduct the inquiry which the circumstances reasonably permit. They must consider all information available to them that they believe is reliable. They may draw inferences and make deductions based on common sense and experience.

*R. v. Golub* (1997), 117 CCC (3d) 193 (ONCA) at para. 21 [**BOA Tab 6**]

*R. v. Bush*, 2010 ONCA 554 at paras. 54, 61 [**BOA Tab 3**]

33. Reasonable grounds were present in this case. Consider the totality of the circumstances subjectively known by each participating officer on February 18th, 2022, including Cpl Grant. Consistent messaging was delivered leading up to February 18th, 2022, advising that demonstrators must vacate the area or face arrest. Officers could reasonably draw the conclusion that anyone still participating in the demonstration had decided not to leave and were thereby committing the offence of mischief.

34. It is anticipated that Cpl. Grant will testify that he formed his own grounds. He may have received information from other officers about the activities of the Applicant that would justify arrest, but that is a permissible use of hearsay evidence. He was entitled to rely on information from other officers to conclude that the Applicant was participating in the demonstration and was refusing to leave. He directly observed the Applicant within the redzone offering himself to officers for arrest. His subjective believe was objectively reasonable in the circumstances.

35. Citing the Court of Appeal decision of *Gerston-Foster* at para. 84, the Applicant claims that when an officer relies on the grounds of another, the officer who initially transmits the grounds must have reasonable grounds for the arrest to be lawful. That is the case where the arresting officer has *no reasonable grounds whatsoever*. That principle of law does not apply when the arresting officer does possess their own grounds, as here. And those grounds can be formed in part by hearsay and information from other officers.

36. For this reason, no s. 9 breach should be found. And because no s. 9 breach should be found, no s. 8 breach should be found flowing from this. Any searches conducted by police – which would include a subsequent search of social media after the Applicant was identified on arrest – were reasonable under the search incident to arrest doctrine.

*b. No s. 10(b) breach: the Applicant was given an opportunity to contact a lawyer once that opportunity was reasonably available*

37. There is no claim that the Applicant was not properly advised of his rights under s. 10(b). The Applicant was advised immediately upon arrest, and again once transferred to the

hand off team five minutes later. Instead, the Applicant claims there has been a breach of the implementational component of s. 10(b).

38. The Applicant assumes that the implementational component of s. 10(b) was triggered upon arrest. But only the informational component of s. 10(b) is triggered immediately. Unlike the informational component, the implementational component is not triggered until detainees actually indicate a desire to exercise their right to counsel. Diligence must also accompany a detainee's exercise of the right.

*R. v. Willier*, 2010 SCC 37, at paras. 30, 35 [**BOA Tab 7**]

39. Thus, the Applicant's claim is only viable if there is evidence that he signalled his desire to speak to a lawyer and was diligent in his request. Should the Applicant testify on the *voir dire*, presumably he will say that he signalled his desire to speak to a lawyer upon arrest. The evidence called by the Crown may suggest otherwise, and it will be for the trial judge to determine where the truth lies on a balance of probabilities.

40. Assuming a viable s. 10(b) claim, there are two "phases" to the arrest that warrant consideration. First is whether a s. 10(b) breach arose during the Applicant's detention *before* he was transported to the processing facility. Second is whether such a breach arose during the 20 minutes in which he was processed before release. It should be born in mind that the only time the Applicant made an utterance that the Crown seeks to rely on was during the Hand Off Team procedure *before* he was transported. No such utterances were made, and no questions asked at the processing facility.

41. Once the implementational component is triggered, there are a variety of circumstances in which the right may be suspended. The assessment of whether such a delay is justified is always fact specific and contextual. The following are distilled from the case law:

- The right should not be suspended unless exigent circumstances exist.

  *R. v. Suberu*, 2009 SCC 33, at para. 24.

- It may be suspended where there are safety concerns for the public.

  *R. v. Thind*, 2011 ONSC 2054 at paras. 113-15 and 122.

- It may be suspended where there are practical considerations such as a lack of privacy or where there is no telephone access.

  *R. v. Khairi*, 2012 ONSC 5549 [**BOA Tab 8**].

- The suspension should only be for a long as necessary.

  *R. v. Mazza*, 2016 ONSC 5581 at para. 83 [**BOA Tab 9**].

42. With respect to the first phase of the Applicant's arrest, the circumstances amply justify any suspension of the right that occurred. Police were in the midst of an unprecedented tactical operation in which large numbers of arrests were expected. They were required to focus on processing each arrested individual and moving on to the next. There was no privacy whatsoever. The Hand Off Teams were operating outside in freezing temperatures. There will likely be evidence that the Applicant was experiencing frozen hands, which would hamper his ability to have a phone conversation in any event.

43. The practical realities of the operation justified any temporary suspension of the right.

44. It would have been impossible for the Applicant to place a call while he was being physically transported to the temporary processing site.

45. During the second phase of his arrest, once at the processing site, the Applicant was afforded an opportunity to speak with a lawyer. During the second phase of his arrest, it is more probable than not that the Applicant was told that police did not wish to question him or obtain a statement, and that he would be released from custody. The Applicant spent only 20 minutes at the processing site and no statement was obtained. The right, if it was suspended, was only suspended in accordance with the exigencies of the situation and the practical constraints during the first phase of the arrest.

*d. In the event of a* Charter *breach, the evidence should not be excluded under s. 24(2)*

46. Should the Court find a breach or breaches of the *Charter*, the on-site utterance that the Applicant was driving a sixteen-foot trailer, and the social media evidence located later in time using the Applicant's identity, should not be excluded.

47. On the first branch – the seriousness of the *Charter*-infringing state conduct – the totality of the evidence will point to a highly professional and methodical police operation. Cpl. Grant followed the instructions of his morning briefing and did not deviate. Far from a demonstration of "negligence" as the Applicant claims, police were there pursuant to their lawful authority to restore public order, which was critical and necessary by February 18th, 2022. Cpl. Grant was entitled to form his grounds for arrest, and he was quick and diligent about providing a soft caution to the Applicant.

48. On the second branch – the impact to the *Charter*-protected interests – the s. 24(2) analysis in the *Fisher*, another convoy case decided by Justice Brown of this Honourable Court, provides some useful guidance on the tenuous connection between the arrest and the derived social media evidence.

49. The impact of any breaches on the Applicant was minimal, as it was in *Fisher*, which also addressed social media evidence the Applicant sought excluded. The evidence in this case is highly discoverable. There is no real privacy interest in the social media evidence. With respect to the trailer, it was parked in downtown Ottawa and was towed the same day. It most definitely would have been discovered but for the utterance to police.

50. As the Supreme Court has emphasized, where evidence would have been discovered despite the *Charter* breach, the actual impact on the rights is minimal. And the case law confirms there is no real privacy interests in social media posts.

> *R. v. Fisher*, unreported decision, June 2, 2023 [**Tab 10**]
>
> *R. v. Cote*, 2011 SCC 46, at paras. 6-75 [**Tab 11**]
>
> *R. v. Adem*, 2021 ONCJ 210, at para. 43 [**Tab 12**]

51. The Supreme Court in *Beaver* also recently held that the impact of a s. 9 breach is lessened when a person cannot reasonably have expected to be left alone. This is because s 9 protects "liberty from unjustified state interference" and "the right to be left alone". The Applicant could not reasonably have expected to be left alone when he was in downtown Ottawa on February 18th, and neither lived nor worked in the area.

> *R. v. Beaver*, 2022 SCC 54, at para. 127 [**Tab 13**]

52. On the final branch of *Grant* – societal interest in adjudication on the merits – the Supreme Court has repeatedly emphasized that relevant factors include the reliability of the evidence and the importance of the evidence to the prosecution's case, as well as the seriousness of the offence.

> *R. v. Tim*, 2022 SCC 12, at para. 96 [**Tab 14**]
>
> *R. v. McColman*, 2023 SCC 8, at para. 73 [**Tab 15**]

53. The social media evidence and the evidence of the trailer are the best pieces of evidence available to prove the charges. The truth-seeking function of the trial is best served by admitting the videos and the evidence related to the vehicle.

54. While the Respondent accepts that a mischief charge is not necessarily a serious offence on its own, it submits that these offences are indeed serious when placed in their proper context on February 18th, 2022. The full-scale police operation that was met with resistance did not occur in a vacuum. Police were required to clear the redzone beginning on February 18th, 2022. There is strong public interest in holding accountable those who attempted to prevent police from carrying out their lawful duties.

## IV. ORDER REQUESTED

55. That the Application be dismissed, on the basis that no *Charter* breaches occurred, or in the alternative, because no remedy ought to be granted under s. 24(2).

**ALL OF WHICH IS RESPECTFULLY SUMITTED** this 6th day of March 2024

Don Couturier
Assistant Crown Attorney
Ottawa Crown Attorney's Office
[redacted]

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

BETWEEN:

**HIS MAJESTY THE KING**

*Respondent*

*- and -*

**Scott HOCKADAY**

*Applicant*

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## Response to *Charter* Application

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