Form / *Formule* 1
APPLICATION
DEMANDE

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO

East / Est
Region / *Région*

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

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

BETWEEN: / *ENTRE*

HIS MAJESTY THE KING / *SA MAJESTÉ LE ROI*

- and / *et* -

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

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

Application hearing date: **March 11-14, 2024; April 23, 2024**
Date de l'audience sur la demande

Time **10 am**
Heure

Courtroom number: **2**
Numéro de la salle d'audience

Court address: **161 Elgin St, Ottawa, ON, K2P 2K1**
Adresse de la Cour

2. LIST CHARGES
LISTE DES ACCUSATIONS

Charge Information / *Renseignements sur les accusations*			
Description of Charge ***Description de l'accusation***	**Sect. No.** ***Article n°***	**Next Court Date** ***Prochaine date d'audience***	**Type of Appearance (e,g. trial date, set date, pre-trial meeting, etc.)** ***Type de comparution (p. ex., date de procès, établissement d'une date, conférence préparatoire au procès, etc.)***
Mischief	**430(1)(c)**	**March 4, 2024**	**Trial Confirmation**
Mischief	**430(1)(d)**	**March 4, 2024**	**Trial Confirmation**
Disobey lawful order	**127(1)**	**March 4, 2024**	**Trial Confirmation**
Obstruct peace officer	**129(a)**	**March 4, 2024**	**Trial Confirmation**

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

Scott Hockaday

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

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

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

[redacted]

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

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

This is an application for the exclusion of evidence under s. 24(2) of the Charter as a remedy to breaches of the Applicant's Charter rights protected by ss. 8, 9 and 10(b).

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

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

See Schedule A attached.

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

See Schedule A attached.

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

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

☒ Brief statement of legal argument
Bref exposé des arguments juridiques

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

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

☐ Agreed statement of facts
Exposé conjoint des faits

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

Scott Hockaday

☒ Other (Please specify)
Autre (Veuillez préciser)

Submissions of counsel

February 7, 2024
(Date)

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

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

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

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

Court File No.: 22-A8382

ONTARIO
COURT OF JUSTICE
EAST REGION

B E T W E E N:

HIS MAJESTY THE KING

Respondent

-and-

SCOTT HOCKADAY

Applicant

SCHEDULE A TO FORM 1 CHARTER APPLICATION

I. OVERVIEW

1. The Applicant, Scott Hockaday, seeks to exclude evidence as a remedy to breaches of his ss. 8, 9, and 10(b) *Charter* rights. The evidence includes identification evidence obtained by a search incident to arrest, an utterance made while in detention, and social media evidence obtained using the identification evidence. No evidence as to the officers' grounds for arrest exist.. In the absence of reasonable grounds to arrest, the arrest was unlawful and a violation of the Applicant's s. 9 right to be free from arbitrary detention.

2. While under arrest, a demand was made for the Applicant's identity and identification was taken from his wallet. The absence of reasonable grounds and the unlawful nature of the arrest render the demand for identity an unreasonable search contrary to s. 8. Using the Applicant's name, other officers obtained social media evidence. The Applicant also made an utterance while under detention. At no point was he permitted to speak to counsel. The Applicant submits that admission of the foregoing evidence would bring the administration of justice into disrepute and requests that it be excluded.

II. FACTUAL BASIS

3. At some point between 7:30 and 7:55 am on February 18, 2022, Constable Gooding and Corporal Grant (the "**Arresting Officers**") of the RCMP arrested the Applicant. The two officers had been a part of efforts to clear out the Freedom Convoy protest. The officers observed the Applicant approach other police officers and turn around and place his hands behind his back. Staff Sergeant Gollob requested that the Arresting Officers place the Applicant under arrest. They did so.

4. The Arresting Officers searched the Applicant. Among other things, they found his wallet which contained identification. The Arresting Officers also made a demand for the Applicant's identity. He verbally identified himself as Scott Hockaday (collectively, the "**Identity Evidence**").

5. At 7:55 am, the Arresting Officers turned over custody of the Applicant to Detective Fahey of the Ottawa Police Service. While in Det. Fahey's custody, the Applicant uttered that he had a trailer with license plat S5697A. Det. Fahey maintained custody of the Applicant until 8:44 am. At that time, custody of the Applicant was transferred to the OPP to be transported to a Hand-Off Team processing site at 185 Slidell Street. At no point did Det. Fahey allow the Applicant to speak to counsel.

6. At 10:33 am, the Applicant was paraded before the custody sergeant at a Hand-Off-Team processing site. He was released on an undertaking at 10:53 am. At no point during the three hours he was in custody was he provided an opportunity to speak to counsel.

7. On March 26, 2022, Constable Farley of the Ottawa Police Service searched social media websites for accounts with the name "Scott Hockaday." Cst. Farley obtained screenshots of a Facebook account under the name "Scott Hockaday" and downloaded videos from that account (collectively, the "**Social Media Evidence**").

III. LEGAL ISSUES

8. This Application raises the following issues:

a. Was the Applicant's arrest unlawful and thus an infringement of s. 9?

b. If, unlawfully arrested, did the search of the Applicant and police's demand that the Applicant identify himself while detained violate the Applicant's s. 8 right to be free from unreasonable search or seizure?

c. Further, did police violate the implementational component of the Applicant's s. 10(b) right to counsel?

d. If one or more *Charter* rights were infringed, should the Identity Evidence, Social Media Evidence and evidence of his utterance while detained be excluded under s. 24(2)?

IV. GROUNDS TO BE ARGUED

A. The unlawful arrest of the Applicant infringed s. 9

9. The Applicant alleges that there were no reasonable and probable grounds to arrest him and that his arrest was therefore unlawful. Consequently, the search flowing therefrom was unreasonable and would not have occurred but for the unlawful arrest.

10. In *R. v. Baker*, grounds for arrest were not present, when a search following the detention resulted in the discovery of drugs, leading to three counts of possession of controlled substances for the purpose of trafficking and one count of possession of property (Canadian currency) obtained by crime.

11. Justice MacDonnell found that the section 9 breach was a serious one meriting exclusion of evidence.

> There are several circumstances, however, that make the *Charter*-infringing conduct serious. The power of arrest is a formidable power. An

> arrest not only has a profound impact on the arrested person's liberty but in almost every case it will lead to a search of his or her person. In this case, not only did McCann lack reasonable grounds to believe that the arrest was necessary to secure the applicant's safety, he never turned his mind to whether there were other ways of addressing that concern. I reject the Crown's submission that this is a case where McCann acted on grounds falling just short of constitutional adequacy. There is nothing in his evidence to support a suggestion that he was even close to having reasonable grounds to conclude that an arrest was necessary.[1]

12. 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.[2]

13. 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.[3]

14. The Applicant submits that the onus is on the Crown to establish that the arresting officer's grounds would rise to the level of reasonable and probable grounds required for a lawful arrest.[4]

15. Furthermore, the Supreme Court of Canada in *R v Storrey* found:

> There is an additional safeguard against arbitrary arrest. **It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist**. That is to say a reasonable person, standing in

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[1] *R v Baker*, 2013 ONSC 415 at para 25.
[2] *R v Le,* 2019 SCC 34 at paras 30, 38.
[3] *R v Storrey*, [1990] 1 SCR 241 at paras 18-19 [pages 250-251].
[4] *R v Chehil,* 2013 SCC 49 at para 45.

> the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See R. v. Brown (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; Liversidge v. Anderson, [1942] A.C. 206 (H.L.), at p. 228.
>
> **In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.** On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.[5]

16. When reviewing the existence of reasonable grounds, "the Court is concerned only with the circumstances known to the officer" at the time of the arrest.[6]

17. Where reasonable grounds are conveyed by another officer, the arrest will only be lawful if the instructing officer had reasonable and probable grounds.[7]

18. In the present case, there is no evidence that the Arresting Officers had subjective grounds for the arrest that were objectively reasonable, either directly or indirectly. There is no evidence as to the subjective grounds of St./Sgt. Gollob who requested the arrest of the Applicant.

19. Therefore, in considering the totality of the circumstances, the arrest of the Applicant was unlawful and infringed the Applicant's right not to be arbitrarily detained contrary to section 9 of the *Charter*.

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[5] *R v Storrey*, *supra*, at paras 16-17 [Emphasis added].
[6] *R v Wong,* 2011 BCCA 13 at para 19.
[7] *R. v. Gerson-Foster*, 2019 ONCA 405 at para 84.

B. The compelled identification of the Applicant while detained infringed s. 8

20. The search of the Applicant and the demand that he identify himself constituted an unreasonable search or seizure contrary to s. 8.

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

22. If the arrest is unlawful or arbitrary, any search flowing from it will also be unlawful.[8]

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

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

> A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police: *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64, 57 C.C.C. (3d) 1. In the circumstances, Harris's identification in response to the officer's question constitutes a seizure and attracts s. 8 protection.[10]

25. Similarly, the Applicant was under arrest and hand-cuffed when the Arresting Officers demanded his identification which was subsequently used to obtain evidence against him. Just as in *Harris*, the demand for identification is a search for the purposes of s. 8.

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[8] I*bid*, at para 101.
[9] *Ibid*, at para. 75
[10] *R. v. Harris*, 2007 ONCA 574 at para. 40.

26. The search of the Applicant was unreasonable. Warrantless searches are presumptively unreasonable. The Crown bears the onus of establishing that the search was lawful. In the present case, the search was made incident to an illegal arrest and is therefore unlawful and unreasonable.

C. The Applicant's s. 10(b) right to counsel was infringed

23. The right to be advised of one's right to counsel in accordance with section 10 (b) of the *Charter* "arises immediately upon detention, whether or not the detention is solely for investigative purposes." That is the informational component.

24. Section 10(b) also includes an implementational component that affords a person with a "reasonable opportunity to obtain legal advice" and encompass "delaying asking or demanding that detainees participate in the investigation against them until they have had a reasonable opportunity to consult counsel."[11]

25. The Applicant's section 10(b) rights were triggered at the outset of the officer's detention and arrest, subject only to concerns about officers or public safety or in accordance with reasonable limitations prescribed by law.[12]

26. As the Ontario Court of Appeal found in *Noel*:

> That interest is the right is to consult counsel without delay. **The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied**. Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel. It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.[13]

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[11] *R v Suberu*, 2009 SCC 33 at para 38.
[12] *Ibid* at paras 38, 42.
[13] *R v Noel*, 2019 ONCA 860 at para 22.

27. Furthermore, the "right to counsel without delay exists because those arrested or detained are apt to require **immediate** legal advice that they cannot access without help, because of their detention."[14]

28. Similarly, the Ontario Court of appeal in *R v Rover* found that:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.[15]

29. The Applicant did not give an express, informed, and voluntary waiver of his s. 10(b) rights at any time.

30. The importance of the right to counsel cannot be overstated. This is a foundational Charter right afforded to detained or arrested persons that would have been easily foreseeable in the context of planning the arrest of the Applicant.

31. Unlike a situation where an arrest arises spontaneously and with little advance notice, the arrest of the Applicant was part of a planned operation, in the context of a peaceful demonstration, such that police organized various teams to effect the arrest, a field processing center operated by the Hand Off Team (HOT), transportation, and a temporary processing centre (185 Slidell Street). Yet the police failed to have a plan in place to ensure that the well-established and fundamental right to counsel be afforded to each arrestee.

32. As found by our Court of Appeal:

> **25** Detention also raises questions of immediate importance relating to the detainee's rights during detention, including the right against self-incrimination: *Bartle*, at p. 191; *R. v. T.G.H*, 2014 ONCA 460, 120 O.R.

[14] *Ibid* at para 23.
[15] *R v Rover*, 2018 ONCA 745 at para 45.

(3d) 581, at para. 4.

> **26** Beyond this, the right to counsel is also important in providing "reassurance" and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty: *Debot*, at p. 1144; *Suberu*, at para. 41. As Doherty J.A. said in *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 45:
>
> > The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.[16]

33. The breach of the Applicant's Charter 10(b) rights is clear in the circumstances of this case.

D. The evidence should be excluded under s. 24(2)

i) The evidence was "obtained in a manner" that infringed the Applicant's Charter rights

27. Evidence 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.[17]

28. Here, the social media evidence was only found using the Applicant's name which was obtained by the Arresting Officers' demand for identification made after the Applicant had been unlawfully arrested. Therefore, the evidence was causally connected to the breach. Further, there is a contextual connection in that the social media searches were made as part of searches related to individuals arrested at the Freedom Convoy protest. Again, but for the Applicant's arrest, the evidence would not have been obtained.

[16] *R v Noel*, *supra,* at paras 25-26.
[17] *R v Davis*, 2023 ONCA 227 at para. 28.

ii) Admission of the evidence would bring the administration of justice into disrepute

29. In deciding whether to exclude evidence obtained, as a result of a *Charter* breach, the Court must take into account the following factors:

1. The seriousness of the *Charter*-infringing state conduct (i.e. admission may send the message that the justice system condones serious state misconduct);
2. The impact of the breach on the *Charter*-protected interests of the applicant (i.e. admission may send a message that individual rights count for little);
3. Society's interest in the adjudication of the case on its merits.[18]

The three *Grant* factors weigh against admission of the social media evidence.

30. First, the *Charter*-infringing conduct is serious. While not falling at the extreme end of egregious conduct, the infringement of the Applicant's rights was the result of police negligence.[19] "Ignorance of *Charter* standards" and "negligence…cannot be equated with good faith."[20]

31. The requirement for reasonable grounds to arrest is well established and understood by police. The arresting officers could have easily obtained St./Sgt. Gollob's grounds for arrest. Their failure to do so was negligent. The police misconduct falls closer to the high end of the spectrum.

[18] *R .v. Grant*, 2009 SCC 32 at para 71; *R. v. Harrison*, 2009 SCC 34 at para 36.
[19] See *R .v. Grant*, *supra*, at paras. 74-75.
[20] *Ibid* at para. 75.

32. 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."[21]

33. The Applicant's liberty was severely curtailed as he was hand-cuffed and moved about from officer to officer. The seriousness of the breach was compounded by the infringement of the Applicant's s. 8 right to privacy and s.10(b) right to counsel. The Ontario Court of Appeal recently reiterated the seriousness of a section 10(b) breach.[22]Cumulatively, they pose a serious impact on the Applicant's *Charter*-protected interests.

34. The fact that the unlawful search and seizure from the Applicant was conducted under the aegis of an arbitrary detention where he was never given the opportunity to call counsel exacerbates the seriousness of the state misconduct and generates a cumulative sense that the police disregarded the Applicant's *Charter* interests.[23]

35. Third, society's interest in adjudication on the merits does not strongly weight in favour of admission. While the importance of the evidence to the prosecution's case is a factor to be considered, in the present matter, the social media evidence is only necessary because of the absence of any observations by the Arresting Officers or St./Sgt. Gollob. This is a case of arresting first and obtaining evidence later. The negligence which caused the *Charter* infringement should not be used to weight in favour of admission at the third stage of the *Grant* analysis.

36. The overall balance weighs in favour of exclusion. The "sum of the first two inquiries identified in *Grant*" provides the weight favouring exclusion. Where the first two factors both

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[21] *Ibid* at para. 77.
[22] *R. v. Davis*, *supra*, at para 51.
[23] *R v Mohammed*, 2015 ONSC 905 at paras 156-158.

favour exclusion "the third inquiry will seldom, if ever, tip the balance in favour of admissibility."[24]

37. The first two factors favour exclusion of the evidence. Police negligence in effecting the Applicant's arrest led to a severe deprivation of liberty and an illegal search. Public confidence in the justice system would be weakened if police are seen as able to arrest protesters without reasonable grounds and collect evidence after-the-fact by relying on an illegal search.

V. RELIEF REQUESTED

38. Accordingly, the Applicant requests that the Court exclude the Identification Evidence, the evidence of the Applicant's utterance to Det. Fahey, and the Social Media Evidence.

Dated this 6th day of February, 2024.

Hatim Kheir

CHARTER ADVOCATES CANADA

[redacted]

Counsel for the Applicant

[24] *R. v. McGuffie*, 2016 ONCA 365 at paras. 62-63.

SCHEDULE "A" – AUTHORITIES CITED

R v Baker, 2013 ONSC 415

R v Chehil, 2013 SCC 49

R. v. Davis, 2023 ONCA 227

R. v. Gerson-Foster, 2019 ONCA 405

R .v. Grant, 2009 SCC 32

R. v. Harris, 2007 ONCA 574

R. v. Harrison, 2009 SCC 34

R v Le, 2019 SCC 34

R. v. McGuffie, 2016 ONCA 365

R v Mohammed, 2015 ONSC 905

R v Noel, 2019 ONCA 860

R v Rover, 2018 ONCA 745

R v Storrey, [1990] 1 SCR 241

R v Suberu, 2009 SCC 33

R v Wong, 2011 BCCA 13