Court File No.: 23-11401103

ONTARIO COURT OF JUSTICE
(East Region)

HIS MAJESTY THE KING

Applicant

- and –

CHRISTOPHER BARBER

Respondent

APPLICATION FOR SUMMARY DISMISSAL:
STAY OF PROCEEDINGS BASED ON OFFICIALLY INDUCED ERROR

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PART I: Background and Reasons for Application

[1] On April 3, 2025, this Court found Christopher Barber ("the Respondent") and his co-Accused, Tamara Lich ("Lich") both guilty of mischief and counselling others to commit mischief pursuant to ss. 430(3) and 464(a) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("the *Code*") in relation to their involvement in the so called "Freedom Convoy". The finding of guilt on the counselling offence against both the Respondent and Lich was judicially stayed at the request of the Crown ("the Applicant") pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729. The Respondent was additionally found guilty of counselling others to disobey a court order, contrary to s. 464(a) of the *Code*.

[2] On April 16, 2025, the Respondent filed an Application requesting a stay of proceedings alleging that his actions were the product of an officially induced error. The Respondent wishes to testify in support of his Application. The Respondent provided no authority that evidence can be called on the Application, as opposed to it being litigated on the trial record. The Applicant sees several issues potentially arising from calling further evidence, including those involving *Browne v. Dunn* (1893) 6 R. 67, H.L., the requirement to call further evidence (or recall witnesses), and evidence being led that ultimately requires the Court to revisit its findings.

[3] For the reasons more fulsomely set out below, the Applicant requests that the Respondent's Application be summarily dismissed as it is "manifestly frivolous" (*R. v. Haevischer*, 2023 SCC 1, at para. 90). Even taking the Respondent's argument at its very highest, in light of this Court's findings at trial, there is simply no legal pathway from which the Application can succeed and no way the remedy sought could subsequently issue on its facts (*Haevischer*, at para. 85).

[4] In short, there was no legal advice sought by (and erroneously given to) the Respondent or Lich by any state official. The Respondent cannot rely on the "advice" from the Ottawa Police Service ("OPS") that demonstrators could park on Wellington (and elsewhere) subject to certain conditions being followed to claim an officially induced error, while ignoring all of the other "advice" from OPS and other government officials indicating that demonstrators needed

to clear out, that the demonstration had become unlawful, and that enforcement would commence. Similarly, the Respondent cannot ignore his own statements acknowledging impending enforcement, as well as his resistance to it and resolve to stay firmly planted in the city. For this and other reasons outlined below, there is simply no air of reality for the excuse of officially induced error on the facts of this case.

PART II: Summary of the Facts

[5] The Applicant relies on the findings of fact made by this Court: *R. v. Barber & Lich*, [2025] O.J. No. 1564 (Ont. C.J.) ("the Decision"). The Applicant will also rely on certain evidence from trial not referenced in this Court's decision.

PART III: (i) Issues, (ii) Law, and (iii) Application

(i) Issues

[6] The sole issue to be determined on this Application is: Whether the Respondent's Application for a stay of proceedings based on an officially induced error is "manifestly frivolous" such that it should be summarily dismissed?

(ii) The Law

Summary Dismissal

[7] In *Haevischer*, the Supreme Court of Canada held that in criminal proceedings, applications should only be summarily dismissed if they are found to be "manifestly frivolous" (*Haevischer*, at paras. 3, 62). The standard strikes a balance between protecting an accused's right to full answer and defence and ensuring efficient court proceedings (*Haevischer*, at para. 3). This standard was described by the Court at paras. 71-72 as follows:

> Thus, the "manifestly frivolous" standard, which connotes the obvious necessity of failure, is the appropriate threshold for the summary dismissal of applications made in the criminal law context. <u>If the frivolous nature of the application is not manifest</u>

> or obvious on the face of the record, then the application should not be summarily dismissed and should instead be addressed on its merits.
>
> The standard best serves both the values of trial efficiency and trial fairness. It is a rigorous standard that will allow judges to weed out those applications that would never succeed and which would, by definition, waste court time. The blunt tool of summary dismissal, which precludes the applicant from proceeding, is not the only way judges can protect efficiency. The judge's panoply of case management powers allows for tailored proceedings and mitigates concerns that "fishing expeditions" may derail a trial's progress, generate undue delay, or result in the disproportionate use of court time. [Citations omitted.] [Emphasis added.]

[8] The onus rests with the party seeking summary dismissal to establish that the underlying application is manifestly frivolous (*Haevischer*, at para. 90). In a summary dismissal motion, the court must take the Applicant's arguments at their highest and assume the facts alleged to be true – but can reject factual allegations and inferences that are themselves manifestly frivolous (*Haevischer*, at paras. 83-84). For example, where no anticipated evidence exists to establish a necessary fact (*Haevischer*, at para. 83). When deciding a summary dismissal motion, the court must consider the consequences associated with the underlying application and how the Applicant's fair trial rights will be affected by a dismissal (*Haevischer*, at para. 104).

[9] Applications can only be found manifestly frivolous where there is a "fundamental flaw in the application's legal pathway" or "applications that depend on legal propositions that are clearly at odds with settled and unchallenged law" (*Haevischer*, at para. 85). An application can also be manifestly frivolous where the remedy sought could never issue on the facts of the application (*Haevischer*, at para. 86). With that said, the Supreme Court is clear that any fundamental flaw with the Application "ought to be manifest" and that the error must be apparent on the face of the record, and if not, the application should proceed (*Haevischer*, at para. 88).

Officially Induced Error

[10] Generally speaking, a mistake of law does not excuse an accused from criminal responsibility; there is no significant difference between a mistake of law and ignorance of it (*R. v. Jorgensen*, [1995] 4 S.C.R. 55, at para. 4). This principle is codified in s. 19 of the *Code*: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence". With that said, there is certain exception to this principle, one being where an "officially induced error" exists, which operates as an excuse as opposed to a full defence (*Jorgensen*, at paras. 25, 36). The excuse operates to prevent injustice by virtue of "the state approving conduct with one hand and seeking to bring criminal sanction for that conduct with the other" (*Jorgensen*, at para. 30). An accused must have reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law (*R. v. Cancoil Thermal Corp* (1986), 27 C.C.C. (3d) 295, at para. 33 (Ont. C.A.)).

[11] In *Jorgensen*, at paras. 28-36 and in *Lévis (City) v. Tétreault*, [2006] 1 S.C.R. 420, the Supreme Court of Canada set out the five-part test that must be established by an accused to benefit from this excuse:

1. The accused must have considered the legal consequences of their actions and sought legal advice;
2. The legal advice must have been obtained from appropriate government officials who were involved in the administration of the law in question;
3. The legal advice must have been erroneous;
4. The accused must have relied on the advice; and
5. Their reliance on the advice must have been reasonable.

[12] In *R. v. Pea* (2008), 93 O.R. (3d) 67, at para. 5 (Ont. C.A.), the Court considered the requirement that "the legal advice must have been obtained from appropriate government officials who were involved in administering the law in question". In *Pea*, the accused was arrested for impaired driving and spoke with duty counsel who advised him not to provide any

breath samples. Following that advice, the accused refused to comply with a breathalyzer demand and was charged with refusal. At trial, the accused sought to rely on officially induced error on the basis of the advice received from duty counsel. The question for the court became whether duty counsel could be an "appropriate official" for the purposes of satisfying the test set out in *Jorgensen*. The Ontario Court of Appeal held that duty counsel does not meet the requirement, as "duty counsel [does not] become a 'government official' simply as a result of being paid by public money or because police are obligated to facilitate a detainee's contact with duty counsel" (*Pea*, at para. 21). Instead, the Court held that the relationship between duty counsel and an accused person was similar to one which would exist with a privately retained lawyer (*Pea*, at paras. 19, 21-23). It is trite law that even those who act in good faith on the mistaken advice of their legal counsel cannot defend their actions on the basis of ignorance of law (*Pea*, at para. 17, 23):

> A further consideration is significant. If reliance on advice from duty counsel could constitute officially induced error, then detainees who speak to duty counsel will have available a defence that is unavailable to those who speak to privately retained lawyers. If mistake of law is not a valid defence for those who rely on the erroneous advice of privately retained lawyers, it does not make sense that those who receive the same advice from duty counsel should be afforded an exception to the rule that ignorance of law is no defence. As a matter of criminal law policy, it cannot be right that some persons could avoid conviction simply because they received erroneous advice from duty counsel instead of a privately retained lawyer. [Emphasis added.]

[13] The excuse of officially induced error appears to arise most commonly in offences involving permits (*e.g.*, driving while disqualified, some firearms offences), breach of court orders, refusal, offences against morals, and offences against the administration of justice. Many of these offences involve language such as "without lawful excuse". In *R. v. Almeida*, 2001 CarswellOnt 4603 (S.C.), the excuse was raised in the context of mischief. The accused had mounted a surveillance camera on his house to see over an eight-foot privacy fence installed by his neighbour. The accused took issue with his neighbour's dogs barking and therefore sought to record the barking in order to make a municipal complaint. The accused was acquitted at trial and the Crown appealed. The accused had raised the excuse of officially induced error on the basis that he sought advice regarding the appropriateness of mounting

such a camera on his property from various individuals including a police officer but had not disclosed the full level of the extent of his intrusion. On appeal, the Court found this fell short of a defence of officially induced error (*Almeida*, at para. 7).

[14] The excuse of officially induced error can only be raised after the Crown has proven all elements of the offence in question (*Jorgensen*, at para. 36). This is because, similar to entrapment, this excuse does not affect a determination of culpability (*Jorgensen*, at para. 37):

> As this excuse does not affect a determination of culpability, it is procedurally similar to entrapment. Both function as excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor. As in the case of entrapment, the accused has done nothing to entitle him to an acquittal, but that state has done something which disentitles it to a conviction. Like entrapment, the successful application of an officially induced error of law argument will lead to a judicial stay of proceedings rather than an acquittal. Consequently, a stay can only be entered in the clearest of cases, an officially induced error of law argument will only be successful in the clearest of cases. [Emphasis added.] [Citations omitted.]

[15] The burden always rests on the accused to establish that their actions were the product of an officially induced error on a balance of probabilities (*Jorgensen*, at para. 38). A stay can only be entered in the clearest of cases, and as such, an officially induced error of law argument will similarly only be successful in the clearest of cases (*Jorgensen*, at paras. 2, 37).

(iii) Application

The Application is "Manifestly Frivolous" as there is no air of reality to officially induced error in light of findings made by this Court.

[16] In light of a "fundamental flaw in the application's legal pathway", the Applicant submits that there is no air of reality to an excuse of officially induced error, and therefore, the Application at bar is "manifestly frivolous" (*Haevischer*, at para. 85). This is primarily because the Respondent has advanced two major grounds in support of the Application that – on their face – run wholly contrary to findings that have been made by this Court. These two grounds rely on: (1) the Traffic Plan (Exhibit 125) provided to certain demonstrators by the Ottawa

Police Service ("OPS") permitting them to park on Wellington Street, and (2) the Orders of MacLean J., colloquially known as the "honking injunctions" (Exhibit 122). Ultimately, the Respondent is seeking to re-litigate findings already made by this Court regarding the extent to which these orders were the cause of what ultimately transpired in Ottawa from January 28 – February 19, 2022. In sum, the Applicant's position is that no improper or "erroneous" advice was provided to either the Respondent or Lich by any state actor. Any "advice", to the extent that it can be called that, provided to the Respondent or Lich by OPS was not adhered to, as found by this Court. Furthermore, any advice provided to the Respondent or Lich by Keith Wilson ("Wilson") cannot be relied upon for an excuse of officially induced error, as Wilson is not a state official, discussed in further detail below.

[17] According to the Application, the Respondent will testify that, consistent with the "Traffic Plan" generated by the OPS and distributed to certain demonstrators, he was directed to park on Wellington Street by the police. The Respondent will further testify that on February 5, 2022, he was directed by Constable Nicole Bach ("Bach") that the trucks should move from Wellington Street, and that he moved Big Red out of downtown and to a rural area on February 8, 2022.

[18] The fact that there was a Traffic Plan provided by the OPS to certain demonstrators and the extent to which that served as a shield from culpability was already considered and rejected by this Court at paras. 293-295 of the Decision:

> Defence Counsel suggest the fact that Ottawa police directed them in with maps etc. gave them carte balance [*sic*] to fill out the streets and block roads and intersections as occurred from the observations of Cst. Bach, A/Sgt. Blonde and the observations of Mr. Ayotte and Arpin and the civilian witnesses.
>
> An examination of exh [*sic*] 125 makes clear "Take Direction from Police whenever applicable. Leave Open Space for Emergency vehicles AT ALL TIMES, No closed trailers on Wellington near Parliament Hill. All staging area must be keep an adjacent emergency lane clear. The map provided also set out max number of vehicle capacity and weight limits from each parking area. <u>None of that was adhered to by the truckers</u>. <u>Ottawa police did not tell the truckers arriving to gridlock the city. The Operational plan with the maps and directions attempted to do just what Inspector Lucas said to allow trucks and persons to come and exercise their Freedom of Expression while at the same time limiting the number and types</u>

> and trucks to go to certain areas to lessen the impact on residents of the downtown core. Inspector Lucas agreed that the trucks were directed into Ottawa, but he also said at some point that welcome expired. [Emphasis added.]

[19] Indeed, this Court further found that while the Respondent and Lich arrived in Ottawa with the "noblest of intentions", several factors came together that led to the initial gridlock and contributed to the conditions being set by OPS not being followed, and neither party took any steps to alleviate the mischief until "much later in the demonstration" (Decision, at para. 296). This Court further held that although evidence existed that OPS conveyed "more of a wish" to the Respondent that trucks needed to leave by 8:00 a.m. on January 30, 2022, by February 4, 2022, their position was made clear to him, and he clearly understood (Decision, at paras. 297-298).

[20] Furthermore, the Respondent's own words when considered in relation to the findings of this Court regarding police direction run completely contrary to a finding that there was any officially induced error on his part. As noted previously, at no time did the police tell protesters that they could "gridlock the city", yet that is precisely what the Court found the Respondent spoke of doing (Decision, at para. 295):

> Mr. Barber as early as January 29 the day after their arrival (exh 135 Vol 1 Tab 29 pg 10) says "We are completely messing this city up". Same day, he says (exh 132 Vol 1 Tab 30) "We fucked this town up". January 30 while talking with others (Dale) who are talking about gridlock, Barber responds, "its already locked, we train wrecked it" and on February 10, 8:31 pm, speaking about a Slow roll, Barber says "Really Good Train wrecked traffic." By these texts authored by Mr. Barber, he clearly knew what was going on in the streets of Ottawa. He knew we were completely messing up this city. He says "We train wrecked" not "some other group", but we did.

[21] This Court found that although OPS did authorize the demonstrators to park their vehicles on Wellington Street for a period of time, they did not at any time authorize the demonstrators to "gridlock the city" (Decision, at para. 294). In fact, this Court held that the truckers did not adhere to the rules provided by OPS that were intended to strike a balance between lawful demonstration and the impact to residents of downtown Ottawa (Decision, at para. 294). Furthermore, this authorization was not extended for an indefinite period, and that by at least

February 4, 2022, the Respondent knew that police wanted them to leave: "As of this date, it would have been very clear that the Freedom Convoy was no longer welcome and that police would be seeking to restore public order. Mr. Barber clearly understood this from his response. It is only as of this date that the evidence shows that Mr. Barber was willing to try and alleviate the impact on the residents" (Decision, at para. 301).

[22] Had the Respondent left town as of 8:00 a.m. on January 30, 2022, there *may be some* air of reality to an officially induced error. Although since the direction provided to police was not adhered to, this is debatable. Nevertheless, that is not what this Court found. Instead, this Court held that the Respondent remained in the city, and both participated in and counselled others to continue the mischief, long after OPS had advised that he needed to vacate. In addition, the Court held that the Respondent spoke of activities that ran completely contrary to the "advice" provided by officials. Examples include, but are not limited to:

1. **February 3, 2022**: the Respondent is seen giving an "enthusiastic thumbs up" to a completely blocked intersection at Kent Street and Slater Street stating "we're here" among other things (Decision, at para. 303).

2. **February 4, 2022:** the Respondent is seen walking on Wellington Street and encouraging people to come down and continue blocking the street by pointing out an area and stating, "We're going to have some stick hockey down on Wellington and Lyon". "Got a beautiful spot picked out, the trucks are parked back here (pointing to a blocked street) and that way. Come down here, and we're going to make this happen" (Decision, at para. 304).

3. **February 4, 2022:** the Respondent showed awareness that residents of downtown were being disturbed by stating "there's a few people in high rises that don't like horns and I apologize for that. I don't know what else I can do to fix that" (Decision, at para. 305).

4. **February 9, 2022:** the Respondent, while speaking of police enforcement, states that if truckers see a large majority of police coming, to lock the doors to their trucks, crawl in the bunk and grab the horn switch and don't let go. This Court found that this was the Respondent's "rallying cry to sound the alarm if there is enforcement by police" (Decision, at para. 306).

5. **February 9, 2022:** the Respondent states that "they're coming for us", meaning police. He further states that police have been instructed to clear the streets of downtown and that "we have instructed them that for every trucker who is

protesting in downtown Ottawa, that is arrested and has to sign. For every truck that signs to get out of custody. We will then replace that drive that truck driver with three new truckers when the call goes out, guys, get everybody and their **** dog to come to Ottawa cause we need all the help we can get. They think they can control the number of guys right now; you wait to see how many we bring to replace us" (Decision, at para. 307).

6. **February 10, 2022**: The Respondent says "do you think we're leaving? Do you think we're leaving? We might move a few trucks around just a little bit … you know we moved a few trucks out of the downtown core and then they kind of replaced somewhere else, so that's unfortunate you guys, my goodness". The Court notes that the Respondent is speaking sarcastically as he says this (Decision, at para. 309).

[23] This, in addition to the fact that the Court has held that the Respondent's and Lich's mere presence was a positive act in terms of their culpability in relation to the mischief created by the Freedom Convoy (Decision, at para. 310). The Respondent's continued involvement in the demonstration well after OPS advised that the welcome had expired, as well as his direct participation in activities that ran completely contrary to the instruction set out by police leaves no legal pathway to a claim of induced error to support an excuse for mischief. This is also consistent with one of the reasons that this Court found no air of reality to a defence of colour of right; namely, that in addition to there being no evidence from which the Court could assess the Respondent's or Lich's honest belief, "<u>the restrictions set out by the police were not followed</u>" (Decision, at para. 330) [Emphasis added.].

[24] In this vein, it is quite important to remember that a colour of right argument offers a defence based on a mistake of fact where an accused has an honest but mistaken belief in facts, which if true, would have justified or excused the offence (*R. v. Simpson*, 2015 SCC 40, at para. 31). It is not a defence that can be raised following a finding of guilt. Conversely, an excuse of officially induced error must be predicated on a mistake of law or mistake of mixed fact and law <u>based on the erroneous advice of a state official</u>. In the current circumstances, the Respondent's window to argue a mistake of fact, or "colour of right" (which is somewhat suggested on the facts of his Application) has passed as he exercised his right not to testify at his trial.

[25] In addition to the "Traffic Plan" provided to certain demonstrators by the OPS, the Respondent also relies on Maclean J.'s Orders dated February 7 and 16, 2022 and advice he received from his lawyer Wilson in relation to those Orders to serve as a basis for his excuse of officially induced error. Specifically, that the Respondent was advised after both hearings that MacLean J. confirmed that demonstrators "could continue to protest as long as they continued to protest peacefully and safely" (Application, at para. 9). Furthermore, that the Respondent was advised by his lawyer that "there were exceptions to the air horns injunction and the air horns could be used in situations mandated by legislation or in situations of emergency" (Application, at para. 10). Lastly, on the issue of the court Order, the Respondent states that his lawyer advised him that a breach of the Order would amount to civil contempt and not a criminal offence (Application, at para. 11).

[26] Wilson was a privately retained lawyer and not an authorized representative for the state, as would be required for the excuse of officially induced error to succeed (*Pea*, at paras. 17, 23). Therefore, the Respondent cannot benefit – even if acting in good faith – on any erroneous advice provided to him by Wilson to excuse his criminal conduct. Wilson was not an individual "with the power to speak on behalf of the government" (*Pea*, at para. 20). Rather, he was a lawyer representing the Respondent, Lich, and others, in defence of an injunction brought by a number of complainants in relation to honking. Wilson was "an independent source of legal assistance in [the Respondent's] confrontation against the state", or in this case, the opposing party (*Pea*, at para. 20). Wilson was arguably also a participant in the Freedom Convoy.

[27] This is not the first time an accused has attempted to rely on Wilson's erroneous advice to proffer an excuse for their conduct in relation to the Freedom Convoy. In *R. v. Gandzalas*, (June 25, 2023), Ottawa, 22-15605 (Ont. C.J.) the accused attempted to rely on Wilson's position regarding the invocation of the *Emergencies Act*, R.S.C., 1985, c. 22, specifically, that the "legal proclamation continued to allow for peaceful demonstration" as an excuse for his conduct. In dismissing this argument, Dorval J. stated as follows (*Gandzalas*, at p. 13):

> It is very unfortunate that the defendant was misled by the videotaped message of Mr. Wilson, who is a lawyer and participant in the Freedom Convoy. Mr. Wilson's legal opinion was incorrect. Ignorance of the law does not constitute a defence to the charge. There is therefore no breach of s. 2(b) of the *Charter*.

[28] Similar to Mr. Gandzalas, to the extent that the Respondent relied upon erroneous advice from Wilson, it is unfortunate, but it cannot be used to legally excuse his conduct. To the extent that the Respondent is relying on MacLean J. as the source of erroneous advice, this Court held that the February 7 Order was "clear and not ambiguous" (Decision, at para. 487). The Court specifically rejected the argument that "there was a buildup of fear of being swarmed by a mass of riot police and that this created a dangerous and hazardous situation" as an inference that could be drawn as exception to MacLean J.'s Order (Decision, at para. 494). On this point, the Court stated at para. 495:

> Police coming to arrest is not the type of dangerous or hazardous situation that might authorize the use of the horn and disobeying the court order. A review of the transcript of the proceedings before Justice MacLean in which the Accused's counsel participated indicates that what was discussed was if the truck is driving on the road and a child darts across the road, then using the horn would be warranted. That is the perfect example of using the horn for its intended purpose, which is to prevent injury or harm, not to warn others that police were moving in to enforce.

[29] In fact, this Court found that the only purpose of the Respondent's Tik Tok that formed the basis of his counselling disobey court order charge, was "to alert others" and that the Respondent's words show "a deliberate encouragement to disobey the order in place, and that there is an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counselling" (Decision, at paras. 498-499). The Court held that the Respondent was fully aware of the existence and terms of the order (Decision, at para. 496). Furthermore, after careful and thoughtful review of the transcripts related to the "horn injunction" hearings, this Court held that MacLean J. "in no way, expressly or implicitly, endorses or declares that what was going on in the streets of Ottawa was peaceful, lawful, or safe" (Decision, at para. 247):

> Justice MacLean in his decisions is trying to grapple with the right to protest and dissent balanced against the need to protect the public. In fact, examining the words of Justice MacLean above, he clearly found that the manner and effects of the Freedom Convoy from the civil standard had crossed the line saying "but the protesters must understand that they can convince people to do other things however, they cannot use force of the kind or other pain or anything massively

disruptive to other people in other words keeping people from going to work, keeping people from sleeping. They can't use that to put their beliefs on other members of the public. And in the circumstances, the public's rights are superior in the way this has gone." This is in no way an endorsement of the Freedom Convoy Protest.

[30] In this case, there was no "erroneous advice" provided by a state official from which the Respondent's reliance was "objectively reasonable". As found by this Court, the direction provided to certain demonstrators by OPS was not erroneous – rather, it was not adhered to. Furthermore, this "direction" was not advice sought by the Respondent. It was direction which was proactively provided to demonstrators by OPS in an attempt to manage public order while facilitating the *Charter* rights of those participating in the Freedom Convoy. To the extent that the Respondent interacted with law enforcement, he was engaged in *negotiation* as opposed to seeking advice. Similarly, in his Application, the Respondent claims that he "sought the advice of police officers, lawyers, and politicians as well as former premiers of provinces. In addition, the Applicant retained the services of counsel and obtained an Order allowing him and others to continue to protest lawfully, peacefully, and safely" (Application, at para. 17). The Respondent also claims that "there were multiple levels of advice including from police officers, the Mayor's office, as well as from a Judge of the Superior Court of Justice" (Application, at para. 18). Respectfully, none of this was advice, and no order was obtained by the Respondent that expressly permitted the Freedom Convoy to continue.

1. The interactions with the Respondent and OPS, as well as the Mayor's Office involved negotiation to mitigate the mischief. The police consistently provided the demonstrators with direction, not advice. At certain points, this Court found there was explicit direction provided to the Respondent by OPS that enforcement action would commence to restore public order. There are instances in the evidentiary record where the Respondent talks about "playing cat and mouse" with police, OPS informing the Respondent that the demonstration was unlawful, where the Respondent outright refuses to leave and asks people to "flood the city", and states that for every trucker arrested, they would replace them with three more. To the extent that this Court considers the direction from OPS "advice", it was not adhered to by the Respondent or Lich, which was a finding this Court made at trial.

2. Similarly, contrary to the Respondent's position, there was no Order sought by the Respondent to allow the continuance of the Freedom Convoy, nor did the Respondent seek the advice of a Superior Court Judge. Assuming that the

Respondent is referring to MacLean J.'s Orders, they were the product of the very mischief that the Respondent is now alleging he was advised to partake in. The Orders were the result of an injunction brought by residents who were being disturbed by the Freedom Convoy. They were not sought by the Respondent, as he suggests. In fact, both the Respondent and Lich initially opposed these orders.

3. It was not objectively reasonable for the Respondent to assume that the initial permission provided by OPS to park on Wellington, subject to conditions being adhered to (which were in fact, not adhered to) meant that the demonstration could carry on indefinitely. This is a finding that this Court made at trial. Furthermore, even had this finding never been made, the multiple messages by OPS indicating that enforcement activities were going to commence, the Respondent's own repeated acknowledgment that police were going to start clearing out demonstrators, and the multiple states of emergencies declared, and invocation of the *Emergencies Act* would negate any reasonableness in this assumption. Furthermore, it was not just the blocking of streets that formed the mischief, but the noise and air pollution created by the Freedom Convoy – none of which was condoned by OPS – and all of which formed the basis of both the Respondent and Lich's convictions for mischief and counselling mischief.

[31] Most importantly, the Respondent cannot rely on the "advice" from OPS that demonstrators could park on Wellington and in other areas subject to certain conditions being followed to claim an officially induced error, while ignoring all of the other "advice" from OPS and other government officials informing the Respondent that demonstrators needed to clear out and that enforcement would commence. Similarly, the Respondent cannot rely on police inaction to form the basis of an officially induced error. The Respondent cites Inspector Russel Lucas' ("Lucas") evidence throughout his Application – most notably, that Lucas "did not speak of enforcement action in terms of removing protesters at that stage in the protest" (referring to February 15, 2022). There is zero evidence that the Respondent ever spoke to Lucas, much less received legal advice from him. In fact, Lucas testified that he did not have any contact with Lich or Barber and that he was not directly involved in individual decisions in terms of negotiating the movement of trucks off Wellington (Transcript of Proceedings, September 6, 2023, at p. 42).

[32] In *R. v. Clifford*, 2014 ONSC 2388, the accused was under a five-year prohibition from operating a motor vehicle flowing from a conviction for driving while disqualified. As a result of the prohibition, the accused purchased an e-bike, which he believed did not qualify as a

"motor vehicle" within the meaning of the *Code*. The accused testified at his trial and alleged that he was operating under an "officially induced error", based on several of his post-suspension roadside interactions with police where he was pulled over on his e-bike and not charged. In each case, the officer was aware of the driving prohibition imposed on the accused and ultimately chose to let him go on his way without charging him. In one instance, the accused had a discussion with one of the officers about the prudence of riding the e-bike while his license was suspended. The accused argued that since the police knew about his suspension and his use of the e-bike and on three separate occasions did not charge him, he assumed this to mean that the e-bike was not a violation of his prohibition.

[33] The excuse ultimately failed on the facts of the case. The court held that at no time did the officers explicitly or even impliedly advise the accused that he could use the e-bike. Furthermore, the accused did not actually seek out the advice. In one instance, the officer actually advised the accused that another officer may well have charged him for driving the bike while under suspension. In another interaction, the officer declined to lay charges as he was uncertain as to whether or not the e-bike was a "motor vehicle". The court found that, notwithstanding some uncertainty amongst police as to whether the e-bike was a motor vehicle, at no time did the police ever advise the accused that he could lawfully use it (*Clifford*, at paras. 29, 33, 37). In summary, *Clifford*, at para. 37 held:

> I find that [the accused] was not induced to ride his e-bike by the actions of the police officers with whom he had encounters during the months prior to being charged. The comments made to him by [the police officers] should have caused him to refrain from riding his e-bike, and to take reasonable steps to ascertain his rights, which he failed to do. Finally, I find that [the accused's] decision to ride his e-bike was intentional, and it was made in circumstances where he was aware or should have been aware that he might be breaking the law by riding his e-bike. [Emphasis added.]

[34] Like Mr. Clifford, just because the Respondent was not arrested prior to February 18, 2022, does not mean the police condoned or "advised" that the blocking of streets or the noise and air pollution was lawful. There is no evidence in this trial that at any point the Respondent approached any official to ask, "Is what we're doing lawful?". At no time did the police, or the Court through its multiple honking injunctions, advise the Respondent or Lich that they could

lawfully gridlock the city. At no point did the police or Court condone the noise or air pollution that resulted from the occupation. Nor did they advise the Respondent or Lich that the Freedom Convoy could go on until such time as their demands were met. As this Court has already held, the direction provided to demonstrators by the police was not adhered to. There was simply no erroneous advice provided.

[35] There is simply no air of reality to the excuse of officially induced error.

PART IV: Conclusion and Order Requested

[36] Summary dismissal is one method at the Court's disposal to maximize the efficiency of the court by weeding out applications that would never succeed and, as a result, would waste court time (*Haevischer*, at paras. 71-72). The Applicant respectfully submits, for reasons set out in these materials, that this is such a case, and therefore requests that the Respondent's Application for a stay of proceedings be summarily dismissed.

[37] Mindful of s. 11(b) concerns raised repeatedly during the trial by the Respondent and Lich, the Applicant suggests that should this Court grant the Application for Summary Dismissal, the three days tentatively set aside to hear the Respondent's Application be utilized instead for sentencing and forfeiture.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of April, 2025

Siobhain Wetscher & Tim Radcliffe

Siobhain Wetscher, Assistant Crown Attorney
Tim Radcliffe, Assistant Crown Attorney

SCHEDULE
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Information No. 23-11401103

ONTARIO COURT OF JUSTICE
(East Region)

BETWEEN

HIS MAJESTY THE KING

—AND—

CHRISTOPHER BARBER

APPLICATION FOR SUMMARY DISMISSAL: STAY OF PROCEEDINGS BASED ON OFFICIALLY INDUCED ERROR

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