Court File No.: 23-11401103

ONTARIO COURT OF JUSTICE
(East Region)

HIS MAJESTY THE KING

Respondent

- and –

CHRISTOPHER BARBER

Applicant

RESPONDENT'S FACTUM: APPLICATION FOR STAY OF PROCEEDINGS BASED ON OFFICIALLY INDUCED ERROR

Siobhain Wetscher and Tim Radcliffe
Assistant Crown Attorneys

Ottawa Crown Attorney's Office
161 Elgin Street
Ottawa, Ontario
K2P 2K1

Tel.: (613) 239-1200
Fax: (613) 239-1214

PART I: Background and Reasons for Responding

[1] On April 3, 2025, this Court found Christopher Barber ("the Applicant") 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 Applicant and Lich was judicially stayed at the request of the Crown ("the Respondent") pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729. The Applicant 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 Applicant filed notice that he would seek a stay of proceedings alleging that the facts underpinning the findings of guilt against him were the product of an officially induced error. The Respondent has requested this Court summarily dismiss the Application as there is no legal pathway from which it can succeed (see: Application for Summary Dismissal: Request for Stay of Proceedings Based on Officially Induced Error, April 22, 2025). On May 14, 2025, this Honourable Court advised the parties that it would hear the Application on its merits, dismissing the Application for Summary Dismissal.

[3] The Respondent maintains the position that the Applicant has not met his burden to establish an officially induced error, and this is not one of the "clearest of cases" warranting a stay of proceedings (*R. v. Jorgensen*, [1995] 4 S.C.R. 55, at paras. 2, 37). The Respondent further maintains that there is simply no air of reality to the excuse on the facts of this case. Lastly, the Respondent continues to have concerns regarding the evidentiary record from which this application should be considered, though reserves comment for oral submissions.

PART II: Summary of the Facts

[4] The Respondent relies on the findings of fact made by this Court: *R. v. Barber & Lich*, [2025] O.J. No. 1564 (Ont. C.J.) ("the Decision").

[5] In addition, the Applicant will also rely on certain evidence adduced at trial and not referenced in this Court's decision in oral submissions.

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

(i) Issues

[6] This issues to be determined on this Application are:

1. Did the Applicant consider the legal consequences of his actions and seek legal advice?
2. Was the legal advice obtained from the appropriate government officials who were involved in the administration of the law in question?
3. Was the legal advice erroneous?
4. Did the Applicant rely on that advice?
5. Was the Applicant's reliance on that advice reasonable?

(ii) The Law

Officially Induced Error

[7] 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 (*Jorgensen*, 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 is 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.)). Notably, passive ignorance is not a defence (*Lévis (City) v. Tétreault*, [2006] 1 S.C.R. 420, at paras. 30-33).

[8] In *Jorgensen*, at paras. 28-36 and in *Lévis*, 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.

[9] 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.]

[10] 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).

[11] 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.]

[12] 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

Issue 1: The Applicant did not consider the legal consequences of his actions, nor did he seek legal advice.

[13] An accused who seeks to rely on the excuse of officially induced error must have turned their mind to the legality of their conduct and sought advice as a consequence (*Jorgensen*, at para. 29). This is to incentivize "responsible and informed citizenry" (*Jorgensen*, at para. 29).

[14] There is simply no evidence in the trial record that the Applicant considered the legality of his actions during the Freedom Convoy that underpin his convictions. Some examples of these actions include, but are not limited to:

1. Parking his truck, "Big Red", on Wellington Street and contributing to the blockade of that street for 11 days (Decision, at para.284);
2. Contributing to gridlocking the city, including by participating in "slow rolls" and "train wrecking" traffic (Decision, at para. 295);
3. Suggesting certain streets be blocked (for example, by setting up stick hockey) (Decision, at para. 304);
4. Continuing to remain in Ottawa, after being told by police that demonstrators needed to leave (Decision, at para. 301);
5. Encouraging demonstrators to attend Ottawa, even in the face of direct evidence that police were "coming for us" (Decision, at para. 307); and

6. Asking truckers to "grab that horn switch and don't let go" until police "are bustin' your fucking windows down" in the face of an injunction prohibiting that very conduct (Exhibit 24).

[15] In relation to his actions, the Applicant claims that he sought the advice of police officers, lawyers, politicians, former premiers of provinces, the Mayor's office, as well as a Judge of the Superior Court of Justice (NOA, at paras. 17, 18). In addition, the Applicant claims to have obtained an Order allowing him and others to "continue to protest lawfully, peacefully, and safely" (NOA, at para. 17). Notably, not a single police officer or government official in this trial testified to being asked by the Applicant for advice or about providing the Applicant with any advice condoning any of the specific aforementioned actions. Further, there was no order obtained by Applicant from the Superior Court confirming that demonstrators "could continue to protest as long as they continued to protest peacefully and safely" (NOA, at para. 9).

[16] The interactions between the Applicant, the Mayor's office, and the Ottawa Police Service ("OPS") involved *negotiation* to mitigate the mischief. This is entirely different from a situation where an accused who – prior to engaging in the conduct they've contemplated – seeks the advice of an appropriate state official as to the legality of that conduct. In this instance, the mischief was well underway by February 12, 2022, when the Mayor's office reached out in an attempt to negotiate a deal with the Freedom Convoy leadership (Exhibit 100). It is notable that it was not the Applicant who initiated contact, and so it can't be said that he sought advice from them. Furthermore, a review of Exhibit 100 makes clear that the Mayor's office did not condone the demonstration. <u>The letter is not advice</u>, but instead, an attempt to reduce the mischief. Similarly, there was no order sought by the Applicant to allow the continuance of the Freedom Convoy in the form that it took, nor did the Applicant seek the advice of a Superior Court Judge. Assuming that the Applicant is referring to McLean J.'s Orders, colloquially known as the "Honking Injunctions", dated February 7 and 16, 2022 and their related proceedings, they were the product of the very mischief that the Applicant is now alleging he was erroneously advised by state officials to partake in. These Orders were the result of an injunction brought by residents of Ottawa who were being disturbed by the actions of the Applicant and the Freedom Convoy; they were not sought by the Applicant, as he suggests. In fact, both the Applicant and Lich initially opposed these Orders.

[17] The Applicant never directly sought "advice" from McLean J., instead, he claims to have relied on his privately retained lawyer, Keith Wilson ("Wilson"), to do so. As this Court rightfully found, McLean J. was only ever asked to address the issue of honking of horns "and not infringements of the *Charter* or the *Criminal Code* with respect to the broader protest" (Decision, at paras. 241-242):

> Justice McLean says February 7, pg. 33 "if there are other issues that the local authorities want to take issue with, that's their issue. This injunction is aimed at horns." At pg. 39 and 40. "That's the only issue. That's the only issue before me … there's nothing here in any of the materials that says the right of movement has been infringed, that's – it's just noise, that's it. And I'm not going to get into anything else because I'm not asked to". At pg. 47, the Affidavit evidence before Justice McLean was about noise levels, the effects of the noise, nerves frayed, can't sleep, anxiety".

[18] Justice McLean was never asked by Wilson to provide "advice" on the legality of the broader demonstration, or with respect to the Applicant's own actions. Justice McLean made abundantly clear throughout his reasons that he had not been asked to consider it. In fact, the "advice" that McLean J. did provide with respect to the demonstration in a broader sense was that the protesters could not use "anything massively disruptive to other people in other words keeping people from going to work, keeping people from sleeping" (Decision, at para. 247). Similarly, the Applicant did not seek advice from McLean J. or any state official about whether an exception to His Honour's Orders could arise as a result of police attempting to restore public order by coming to arrest demonstrators. What the Applicant did was assumed that his conduct was permissible, which insufficient for the purposes of advancing an excuse of officially induced error (*Jorgensen*, at para. 29).

Issue 2: Wilson is not an appropriate state official and cannot be used as a vessel for advice from a Superior Court Judge

[19] The basis of a successful officially induced error excuse is premised upon the state doing something to "disentitle it to a conviction" (*Jorgensen*, at para. 37). This is why the erroneous advice relied upon by an accused must come from an appropriate state official (*Jorgensen*, at para. 30). Government officials who are "involved in the administration of the law in question

will be considered appropriate officials" (*Jorgensen*, at para. 30). There is no doubt that a police officer or a judge sitting in an official capacity could be considered an appropriate official. Depending on the circumstances, the mayor of a city providing advice in an official capacity could also be considered an appropriate official.

[20] Wilson, the vessel from which the Applicant is said to have obtained direct advice from McLean J., is not an authorized representative of the state which is required for the excuse of officially induced error to succeed (*Pea*, at paras. 17, 23). Therefore, the Applicant cannot benefit from 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 privately retained lawyer representing the Applicant, Lich, and others, in defence of an injunction brought by numerous complainants in relation to honking. Wilson was an "independent source of legal assistance in [the Applicant's] confrontation with the state", or in this case, the opposing party (*Pea*, at para. 20). Wilson was also a participant in the Freedom Convoy.

Issue 3: No erroneous advice was provided.

[21] *Jorgensen* makes clear that when no erroneous advice has been given, the excuse of officially induced error cannot operate (*Jorgensen*, at para. 34). In this case, there is not only a dearth of advice on the Applicant's particular conduct, but to the extent that anything said to the Applicant by a state official could be considered "advice", it was not erroneous. The only "erroneous advice" that the Applicant appears to have received is through his legal counsel, Wilson.

[22] The irony in the Applicant's position, is that he points to the very advice he purportedly received from state officials; the advice this Court found he did not follow, as an excuse for his criminal conduct. Had the Applicant followed direction from state officials, it is very likely he would never have faced criminal charges. Not following this advice is what got him into trouble, and so it therefore can't be said that it was erroneous.

[23] Among other things, the Applicant relies on the fact that, consistent with the "Traffic Plan" (Exhibit 125) generated by OPS and distributed to certain demonstrators, he was directed to park on Wellington Street by police. This direction from OPS and the extent to which it served to shield the Applicant and Lich from culpability was already considered and rejected by this Court in its Decision, at paras. 293-295:

> Defence counsel suggest the fact that Ottawa police directed them 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 keep an adjacent emergency lane clear. The map provided also set out max number of vehicle capacity and weight limits from each parking area. None of that was adhered to by the truckers. 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 of 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.]

[24] This Court also found that although OPS did authorize demonstrators to park their vehicles on Wellington Street for a period of time, they did not at any time authorize 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 Applicant 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). At no time did the OPS provide the Applicant with erroneous advice that induced him into committing (both as a principal and a

party) the mischief which forms the basis of his conviction, nor did they advise him to counsel the disobeyance of a court order.

[25] In addition to the "Traffic Plan", the Applicant also relies on advice received from directly from McLean J. via his lawyer, Wilson. There are effectively three pieces of advice that the Applicant says that he obtained from McLean J.: (1) that demonstrators "could continue to protest as long as they continued to protest peacefully and safely" (NOA, at para. 9); (2) that air horns could be used in situations of emergency (NOA, at para. 10); and (3) that the Orders were civil and not criminal (Response to Application for Summary Dismissal, at para. 23).

[26] Dealing with the first piece of "advice", this Court already found following a thorough and thoughtful review of the transcripts related to the proceedings underpinning these Orders that McLean 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 McLean 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 McLean 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 this 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.

[27] As previously mentioned, McLean J. was only asked to address the issue of the honking of horns "and not infringements of the *Charter* or the *Criminal Code* with respect to the broader protest" (Decision, at paras. 241-242). As noted in the passage above, what McLean J. made clear, was that demonstrators could not use "anything massively disruptive to other people in other words keeping people from going to work, keeping people from sleeping" (Decision, at para. 247). Justice McLean's commentary and Orders did not advise or direct that the Freedom Convoy could continue in the form it took. Wilson misinterpreted McLean J.'s ruling, did not

pose any questions tailored to the Applicant's particular circumstances or the demonstration at large, and as a result, gave the Applicant bad legal advice.

[28] Dealing with the second piece of advice, this Court has already 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 an exception to McLean 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 McLean 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] It cannot therefore be said there was erroneous advice from McLean J. that would have induced the Applicant into believing that warning others about impending arrest constituted an exception to his Orders. His Honour was never even asked about this scenario and therefore the only source of advice that the Applicant would have received in this regard, would have been from Wilson. Again, this is bad legal advice coming from a private lawyer and not erroneous advice from a state official.

[30] This is not the first time that 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.

[31] Similar to Mr. Gandzalas, to the extent that the Applicant relied upon erroneous advice from Wilson, it is unfortunate, but it cannot be used to legally excuse his conduct. The proper forum for the Applicant to air his grievances with respect to this advice is with the Law Society.

[32] The Respondent will address the third piece of advice purportedly provided by McLean J. in its oral submissions (civil vs. criminal sanctions).

Issue 4: The Applicant did not rely on any "advice" that he received.

[33] To benefit from the excuse of officially induced error, the Applicant must demonstrate that he relied upon the official advice (*Jorgensen,* at para. 35). One way in which this can be done is by "proving that the advice was obtained before the actions in question were commenced" and by "showing that the questions posed to the official were specifically tailored to the accused's situation" (*Jorgensen,* at para. 35).

[34] This Court found that while the Applicant and Lich arrived in Ottawa with the "noblest of intentions", several factors came together that led to the initial gridlock of the city and contributed to the conditions 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 the evidence conveyed "more of a wish" to the Applicant 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).

[35] Furthermore, the Applicant's own words when considered in relation to findings of this Court regarding police direction run completely afoul to a finding that there was any officially induced error on his part. As noted previously, at no point did OPS tell the protesters that they could "gridlock the city", yet that is precisely what the Court found the Applicant spoke of, and participated in 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.

[36] Had the Applicant left town as of 8:00 a.m. on January 30, 2022, as police instructed, there *may be some* air of reality to an officially induced error. Although, since the direction provided to police was not adhered to by the Applicant, this is debatable. Nevertheless, that is not what this Court found nor what occurred. Instead, this Court held that the Applicant remained in the city, and counselled, participated, aided, and abetted others to continue the mischief, long after OPS advised that he needed to vacate. In addition, the Court held that the Applicant's own words and actions ran contrary to the "advice" provided by officials. Some examples include, but are not limited to:

1. **February 3, 2022**: the Applicant 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 Applicant 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 Applicant 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 Applicant, 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 Applicant's "rallying cry to sound the alarm if there is enforcement by police" (Decision, at para. 306).

5. **February 9, 2022:** the Applicant 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 Applicant 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 Applicant is speaking sarcastically as he says this (Decision, at para. 309).

[37] This, in addition to the fact that this Court held that the Applicant 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 Applicant's continued involvement in the demonstration, well after OPS advised that the welcome had expired, as well as his direct participation (both as a principal and party) in activities that ran completely contrary to police direction is proof positive that the Applicant did not rely on any advice received by authorities. As this Court noted: "the restrictions set out by the police were not followed" (Decision, at para. 330).

[38] One way that the Applicant can demonstrate that he relied upon official advice is by demonstrating that it was obtained before the actions in question were commenced (*Jorgensen*, at para. 35). Save and apart from the initial Traffic Plan from OPS, which was a police initiative and not the product of consultations with the Applicant, all sources of advice that the Applicant points to having received, for example, from the Mayor's office and McLean J. (if the Court is inclined to accept that these authorities provided advice) were not engaged with until well after the mischief had already begun. For example, by the time of the first injunction proceeding took place before McLean J., on February 7, 2022, the City of Ottawa had already declared a state of emergency. By the time the second injunction took place, notices had started going out to demonstrators and the Federal Government of Canada had declared a national public order emergency and invoked the Emergencies Act. It cannot therefore be said that the Applicant placed any reliance on these individuals to form the basis of the mischief he was ultimately found guilty of. Similarly, another way that the Applicant could prove reliance on advice

received is by "showing that the questions posed to the official were specifically tailored to [his] situation (*Jorgensen*, at para. 35). As has been discussed in these materials, no state official was asked any questions specific to the Applicant's circumstances.

Issue 5: The Applicant did not rely on "objectively reasonable" advice:

[39] Once an accused has established that they consulted with the appropriate official, they must demonstrate that the advice was reasonable in the circumstances (*Jorgensen*, at para. 33). Given that in most instances the accused person will have less knowledge of the law than the official in question, this is not difficult criteria to meet (*Jorgensen*, at para. 33). Therefore, given an appropriate official is consulted, "the advice obtained will be presumed reasonable unless it appears on its face to be utterly unreasonable" (Jorgensen, at para. 33).

[40] The Respondent maintains that the Applicant did not receive any official advice that would serve as a basis to conclude that he was led into error by the state. As this Court duly found, the direction from OPS to the demonstrators did not provide demonstrators with "carte blanche" to fill the streets or block intersections (Decision, at para. 293-295). Furthermore, as noted by Inspector Russel Lucas ("Lucas"), the welcome had eventually expired (Decision, at para. 294). Similarly, McLean J. never expressly or implicitly endorsed or declared what was going on in the streets of Ottawa as peaceful, lawful, or safe (Decision, at para. 247). In the words of this Honourable Court: "there is no question that the evidence adduced at this trial establishes that the trucks and truckers and persons who came to Ottawa created a mass mischief during the protest period and that what occurred significantly interfered with the lawful use and enjoyment of property (Decision, at para. 286). Even had the Applicant received advice that he could remain in the city and continue as he was, or that he could encourage demonstrators to honk in order to warn each other about police enforcement, this advice would have been "utterly unreasonable" considering the following circumstances that existed at the time (*Jorgensen*, at para. 33):

1. Numerous requests from OPS for demonstrators to leave;
2. States of emergencies being declared at the municipal and federal level; and

3. The invocation of the *Emergencies Act*.

PART IV: Conclusion and Order Requested

[41] In this case, there was no "erroneous advice" provided by a state official from which the Applicant's reliance was "objectively reasonable". As found by this Court, the direction provided to certain demonstrators by OPS was not erroneous, but rather, not adhered to. Furthermore, this "direction" was not advice sought by the Applicant in contemplation of his actions. It was direction that 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 Applicant interacted with any state official, it was in negotiation as opposed to his seeking advice, or in responding to an injunction brought on the part of citizens. None of his interactions with the state involved advice.

[42] Most importantly, the Applicant cannot rely on the "advice" received by OPS that demonstrators could park on Wellington Street and in other areas subject to certain conditions being followed to claim an officially induced error, while ignoring all other "advice" from OPS and other government officials that would have informed the Applicant that demonstrators needed to clear out and that enforcement would commence. Similarly, the Applicant cannot rely on police inaction to form the basis of an officially induced error. The Applicant cites Lucas throughout the NOA – most notably that Lucas "did not speak of enforcement action in terms of removing protesters at that stage in the protest" (referring to February 5, 2022). There is zero evidence that the Applicant 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).

[43] 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.

[44] 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.]

[45] Like Mr. Clifford, just because the Applicant was not arrested prior to February 18, 2022, does not mean the police or courts 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 Applicant 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 Applicant 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 Applicant 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.

[46] There is simply no air of reality to the excuse of officially induced error. The Respondent therefore respectfully submits that this Court dismiss this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of May, 2025

Siobhain Wetscher & Tim Radcliffe

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

SCHEDULE

AUTHORITIES TO BE CITED

JURISPRUDENCE

R. v. Kienapple, [1975] 1 S.C.R. 729

R. v. Haevischer, 2023 SCC 1

R. v. Lich & Barber, (April 3, 2025), Ottawa, 23-11401103 (Ont. C.J.)

R. v. Jorgensen, [1995] 4 S.C.R. 55

R. v. Cancoil Thermal Corp (1986), 27 C.C.C. (3d) 295 (Ont. C.A.)

Levis (City) v. Tetreault, [2006] 1 S.C.R. 420

R. v. Pea (2008), 93 O.R. (3d) 67 (Ont. C.A.)

R. v. Almeida, 2001 CarswellOnt 4603 (S.C.)

R. v. Simpson, 2015 SCC 40

R. v. Gandzalas, (June 25, 2023), Ottawa, 22-15605 (Ont. C.J.)

R. v. Clifford, 2014 ONSC 2388

Information No. 23-11401103

ONTARIO COURT OF JUSTICE
(East Region)

BETWEEN

HIS MAJESTY THE KING

—AND—

CHRISTOPHER BARBER

RESPONDENT'S FACTUM: APPLICATION FOR STAY OF PROCEEDINGS BASED ON OFFICIALLY INDUCED ERROR

Siobhain Wetscher and Tim Radcliffe
Assistant Crown Attorneys

Ottawa Crown Attorney's Office
161 Elgin Street
Ottawa, Ontario
K2P 2K1

Tel.: (613) 239-1200
Fax: (613) 239-1214