Court File No. 23-A8288

ONTARIO SUPERIOR COURT OF JUSTICE
(East Region)

B E T W E E N:

HIS MAJESTY THE KING

Prosecutor

- and -

EVAN BLACKMAN

Defendant

SUMMARY CONVICTION APPEAL
FACTUM OF THE APPELLANT

John Wright

Assistant Crown Attorney

[redacted]

PART I: STATEMENT OF THE CASE

1. Between February 18th and 19th 2022, one of the most significant police public order operations in Canadian history took place. This operation was undertaken in response to the so-called "Freedom Convoy", a nearly three-week-long protest of government mandates that saw Ottawa's downtown occupied by hundreds of vehicles and thousands of protestors.

2. Ottawa was brought to a standstill. The impact of the "Freedom Convoy" was such that the City of Ottawa, the Province of Ontario, and the Federal government all declared a state of emergency. On February 14, 2022, the Federal Government invoked the Emergencies Act for the first time to assist with bringing an end to the occupation of Ottawa's downtown streets. By February 18, 2022, police forces from across the country had been deployed in Ottawa to assist in one of the largest-scale public order police operations seen in Canadian history.

3. On February 18th, 2022, following the issuance of notices to demonstrators to leave the area on February 16th, Mr. Blackman was arrested in the area of Colonel By Drive in front of the Westin Hotel. The police Public Order Unit had formed a line moving forward slowly. Mr. Blackman is observed on drone footage gesturing and either yelling or singing. Mr. Blackman knelt down in front of the police line and was arrested when the line moved forward.

4. Mr. Blackman was charged with once count of obstructing a peace officer contrary to s. 129(a) of the *Criminal Code* and two counts of mischief contrary to sections 430(1)(c) and 430 (1)(d) of the *Criminal Code*. He was tried in the Ontario Court before Justice Crewe.

5. The Crown argued that Mr. Blackman was part of the so-called "Freedom Convoy" and liable as a party to the mischief that characterized the "Freedom Convoy's" occupation of Ottawa. This theory, which spanned party liability as a co-principal, aider and abettor was supported by Mr. Blackman's actions on February 18th as well as his social media excerpt which the Crown argued demonstrated support of the "Freedom Convoy".

6. The trial judge acquitted Mr. Blackman of all counts. The trial judge found that while he could infer that Mr. Blackman was present to make a nuisance of himself to police and anybody else who was present but could not find that it rose to a level of criminal offence. The trial judge found that the Crown was required to proved beyond a reasonable doubt that Mr. Blackman was made are in some fashion that Sergeant Riopel wanted him to leave and intentionally refused to do so.

7. The Appellant submits that the trial judge erred.

    a. First, the trial judge's analysis of the principles of party liability was flawed as it failed to appreciate the context surrounding the "Freedom Convoy" and overlooking binding authority on how party liability operates in the context of collective mischief cases.

    b. Second, the trial judge misapprehended the evidence by failing to give effect to it, which had a material impact on the outcome.

    c. Finally, the trial judge misstated the *mens rea* requirement with respect to the count of obstruct, overemphasizing the significance of whether or not Mr. Blackman was provided a verbal warning to leave.

8. The evidence available at trial was sufficient to support a conviction for mischief. Based on the trial judge's findings a conviction on the count of obstruct was supported. The Crown seeks an order overturing the acquittal and entering a conviction with respect to the two counts of mischief and one count of obstruct. In the alternative, the Crown seeks a new trial on all counts.

Part II: Summary of The Facts (Paragraphs 9-16 taken from an agreed statement of facts at trial, exhibit #1 at trial)

1.0 The "Freedom Convoy"

9. Starting on January 28, 2022, and continuing through to February 19, 2022, individuals from all over Canada began to arrive in Ottawa to protest the legislative response to the COVID-19 pandemic. This became known as the "Freedom Convoy".

10. Participants in the Freedom Convoy protest parked their vehicles on the streets of downtown Ottawa. These included hundreds of tractor trailers, semi-trucks, pickup trucks, heavy trucks, as well as passenger vehicles, camper vans, trailers and cars on some lanes of some streets.

11. The vehicles forming part of the "Freedom Convoy" were parked in most lanes of roadways and sideroads of downtown Ottawa. Sometimes all lanes of major arteries such as Kent Street were frequently occupied, making passage virtually impossible for periods of time.

12. Many of the vehicles parked in Ottawa's downtown core were equipped with horns, including air horns and train horns. Some members of the "Freedom Convoy" honked their horns in a sustained manner and at all hours, beginning the first week of the occupation. This noise continued until it abated between 11PM and 7AM following the granting of a Superior Court interim injunction on February 7, 2022.

13. This Freedom Convoy protest affected some downtown residents' ability to move freely and enjoy their property.

14. Some downtown businesses, community centers and establishments chose to close.

15. For clarity: it is not admitted that any freedom convoy protestor, or the accused Evan Blackman, committed mischief or any other criminal offence on or about February 18, 2022.

16. A selected timeline of the response to the Freedom Convoy includes the following events:
    i. **February 6, 2022** – Mayor of Ottawa, Jim Watson, declares a state of emergency in Ottawa (supporting materials, 1B).
    ii. **February 7, 2022** – An interlocutory injunction is granted by the Superior Court of Ontario (McLean J.), prohibiting the use of air horns or train horns in downtown Ottawa for 10 days (supporting materials, 1C).
    iii. **February 9, 2022** – Ottawa Police issues a Message to Demonstrators advising that "anyone blocking streets or assisting others in the blocking of streets may be committing a criminal offence" and that anyone continuing this Activity may face charges (supporting materials, 1D).
    iv. **February 11, 2022** – The Province of Ontario declares a province-wide state of emergency pursuant to the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (supporting materials, 1F).
    v. **February 12, 2022** – The Ontario Government issues Regulation 71/72, "Critical Infrastructure and Highways" under the Emergency management and Civil Protection Act, R.S.O. 1990, c. E.9 (supporting materials, 1F).

vi. **February 14, 2022** – An injunction is granted by the Superior Court of Ontario (McWatt A.C.J.) pursuant to s. 440 of the *Municipal Act, 2001*, S.O. c. 25 (supporting materials, 1G).

vii. **February 15, 2022** – The Federal Government registers three regulations under the *Emergencies Act*, RSC 1985, c. 22 (4th Supp) (supporting materials, 1I).

i. SOR/2022-20 – "Proclamation Declaring a Public Order Emergency"

ii. SOR/2022-21 – "Emergency Measures Regulations"

iii. SOR/2022-22 – "Emergency Economic Measures Order"

viii. ix. **February 16, 2022** – Ottawa Police issue a Notice to Demonstrators advising that "you will face severe penalties if you do not cease further unlawful activity and remove your vehicle and/or property immediately from all unlawful protest sites" (supporting materials, 1J).

ix. x. **February 18, 2022** – Police operations were underway to clear the downtown core.

2.0 Evan Blackman

17. A facebook post from February 17th 2022 suggests Mr. Blackman was present and encouraging other to attend the "Freedom Convoy" on this date. Mr. Blackman captioned a number of photos "Here to support, here to stay… Where You At???"

18. On February 18th, police operations were underway to clear protesters from downtown Ottawa.

19. Sergeant Riopel was working as a team lead with the Emergency Response Unit. The Emergency Response Unit was deployed at approximately 7 am in the area of Rideau Street near the Westin Hotel.[1]

20. Sergeant Riopel had received direction to move towards the intersection of Rideau and Sussex. The Crowd dynamics consisted of individuals standing in front of the police line, some talking, some engaging with the police, others yelling, screaming, waving flags, but from the most part, Sgt Riopel described the crowd as very cooperative.[2]

[1] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 7-8
[2] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023 page 8-9

21. In the lead up to Mr. Blackman's arrest, Mr. Blackman was preventing the line from moving forward, he was verbally aggressive, yelling and screaming in an officer's face. Sgt Riopel engaged with Mr. Blackman at least once telling him he had to calm down, he had to leave. Mr. Blackman refused.[3]

22. Sgt. Riopel indicated at times the accused saying "you know, they're not gonna move, he-he's not gonna be removed from here".[4]

23. In cross examination Sgt Riopel acknowledged that he could not recall verbatim the words he spoke to Mr. Blackman, nor could be recall exactly what Mr. Blackman's verbal response had been.[5]

24. Mr. Blackman had knelt or sat on the ground, interfering with the officers' ability to move the line. Sgt. Riopel had pushed Mr. Blackman. Mr. Blackman grabbed Sgt. Riopel's arm. As the line moved forward, Sgt Riopel's teammates walked around Mr. Blackman and he was arrested.[6]

25. Sgt Riopel indicated "you can see that we are all looking forward. Our focus is what's in front of us, not necessarily what's behind us. We do have rear coverage so that no one is to come in- and they may be offscreeen here- but under no circumstance would we push through a line and leave an individual or multiple individuals behind us that would not have been controlled by another officer. The risk- it would pose a risk to our safety and anyone else behind us".[7]

26. Upon being arrested Mr. Blackman was polite and cooperative. [8]

27. A drone video capturing the arrest of Mr. Blackman was made an exhibit at trial.[9]

Part III: Issues and the Law

28. There can be no doubt that the "Freedom Convoy" occupation constituted a mischief. A substantial body of evidence to this effect was led, and the trial judge agreed, holding that there was "no doubt that the Freedom Convoy protesters committed the offence of

[3] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 12.
[4] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 18.
[5] Cross examination of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 42.
[6] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 13.
[7] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 22.
[8] Examination in Chief of Sgt. Jason Riopel, Proceedings at Trial, October 23, 2023, page 14.
[9] Exhibit 2 at trial.

mischief by way of interfering with the use and enjoyment of property of the residents of downtown Ottawa".

29. The Crown argued that Mr. Blackman was a party to this mischief. The Crown's position was that Mr. Blackman was a principal to the offence of mischief and that he was also liable as aider or abettor.

30. The trial judge found that at it's highest, Mr. Blackman surfaced in Ottawa the day before his arrest on February 17th. One of his online supporters urged him not to get arrested.

31. The trial judge found that it was not clear on the evidence that he was aware he was not welcome to be where he was that morning, at least until the police told him to leave.

32. The trial judge found that approximately 9 minutes of drone footage was the evidence of Mr. Blackman's activities during the so called Freedom Convoy.

33. During the 9 minutes, the trial judge characterized Mr. Blackman as talking aggressively, yelling, gesticulating wildly, although at times either holding other protesters back or trying to be a peacemaker.

34. The trial judge's finding was that "on limited the limited evidence I have of his limited involvement in the activities of the convoy overall, and the manner in which the video unfolded, I am not prepared to find beyond a reasonable doubt that Mr. Blackman is guilty of mischief.

35. The trial judge failed to engage with the Crown's argument with respect to party liability. The trial judge overlooked binding caselaw addressing the offence of mischief in the context of protests and other large assemblies of persons.

1.1 Party Liability Generally

36. Sections 21 to 23 *CC* establish pathways to liability for parties to an offence, flowing from the reasoning that moral culpability is the same for parties as it is for the perpetrator of the offence. Section 21(1) *CC* addresses perpetrators, aiders, and abettors of an offence while s. 21(2) *CC* addresses common intention.

37. Pursuant to s. 21(1)(a) CC, a person may be co-principal to an offence when they contribute to its commission. Put differently, members of a group who participate in a common act are jointly liable as principals pursuant to section 21(1)(a) CC, even if each has not performed every act making up the actus reus of the offence. This flows from the notion that a person who contributes to the offence cannot offer their individual involvement alone and ignore the effect of the collective action for liability purposes. The degree of culpability as informed by the level of involvement is a matter for sentencing; it does not absolve the co-principal of liability.

Tab 1: R. v. Shilon (2006), 240 C.C.C. (3d) 401 at paras 47, 53-54, 2006 CarswellOnt 9888;
Tab 2: R. v. Cabrera, 2019 ABCA 184 at para. 79, 2019 CarswellAlta 914, aff'd by 2019 SCC 56.

38. Pursuant to s. 21(1)(b)-(c) *CC*, a person may be liable as party to an offence as an aider or an abettor. Aiding and abetting, while connected, are distinct routes to liability. To aid is to assist or help the actor. Abetting includes encouraging, instigating, promoting, procuring, or supporting the offence. In both cases, the aider or abettor must know that the perpetrator intends to commit the crime and intend to aid or abet. However, it is not necessary for the aider or abettor to know precisely how the offence will be committed, or even desire for the offence to be successfully committed. It is also not necessary for the Crown to prove the identity of the other participants, or the precise part played by each person for the accused to be declared guilty.

Tab 3: R. v. Briscoe, 2010 SCC 13 at paras 14-18, 2010 CarswellAlta 588;
Tab 4: R. v. Cowan, 2021 SCC 45 at paras 29, 31, 33, 2021 CarswellSask 624.

39. Section 21(2) *CC*, on the other hand, has a broader scope and provides that a person may be liable for an incidental offence committed by another person if that offence, was a probable consequence of carrying out an intention in common. Liability derives from the accused's promise to devote physical and intellectual resources to the achievement of the common unlawful purpose. The accused's liability in respect of the incidental offence stems from his or her decision to participate in carrying out the unlawful purpose and to contribute resources needed to achieve it.

Tab 5: R. v. Gauthier, 2013 SCC 32 at para. 44, 2013 CarswellQue 5203.

1.2 Mischief Generally

40. The mischief offences at issue criminalize the interference with the use of property by another person or persons. Mischief is a general intent offence such that where the Crown has proven the accused voluntarily committed the *actus reus* of mischief, the *mens rea* will be met by proof of an intentional or reckless causing of the *actus reus*.

Tab 6: R. v. Schmidtke (1985), 19 C.C.C. (3d) 390 (Ont. C.A.), 1985 CarswellOnt 88.

41. The term "enjoyment" of property within the meaning of ss. 430(1)(c) and (d) is to be read plainly and includes mere enjoyment – there is no need for interference with property or related rights. The offence also captures interference with commercial properties.

Tab 7: R. v. Maddeaux (1997), 33 O.R. (3d) 378 (Ont. C.A.), 1997 CarswellOnt 1119;
Tab 8: R. v. Nicol, 2002 MBCA 151, 2002 CarswellMan 474;
Tab 9: R. v. Tysick, 2011 ONSC 2192, 2011 CarswellOnt 15568.

42. With these principles in hand, it is helpful to review some cases that have considered the offence of mischief in the context of protests, picketing and blockades.

43. Dooling offers an interesting example that illustrates the difference between non-criminal annoyances and criminal mischief. In that case the accused was charged with mischief contrary to s. 430(1)(d). The accused was involved in picketing a Shoppers Drug Mart. At the time, the store was in a "protracted labour dispute with the United Food and Commercial Workers Union" and those workers were in a lawful strike – Dooling was one of those workers.

Tab 10: R. v. Dooling (1994), 94 C.C.C. (3d) 525 (Nfld Sup. Ct., T.D.), 1994 CarswellNfld 137.

44. The alleged mischief related to a picket line that was set up in a small lobby which was approximately 10 feet by 10 feet and through which shoppers would gain access to the store. The facts related to the *actus reus* were set out by the appeal judge:

> On the night in question, Dooling, a union member who was on strike, and another union member, Linda Marie Chafe (who was also charged and convicted on the same evidence and whose appeal is also being dealt with in the same manner as this case in separate reasons being filed on today's date) attended at the drugstore premises, entered the lobby area and commenced picketing activities. They displayed signs which were approximately 2 feet by 3 feet. The evidence is undisputed that customers of the drugstore were

> not physically prevented in any way from entering the store and that aside from having, in some cases, to alter their path of travel to avoid the picketers, did in fact enter the store to transact business and leave without incident. The police witnesses testified that the picketers generally stood next to the door, as opposed to right in front of the door and did not impede people coming in or going out. The picketers were cooperative and not abusive.

Tab 10: *R. v. Dooling* (1994), 94 C.C.C. (3d) 525 (Nfld Sup. Ct., T.D.) at para. 5, 1994 CarswellNfld 137.

45. Dooling was charged and convicted. He appealed. On appeal the summary conviction appeal court overturned the conviction. In coming to this decision, the appeal court cited and distinguished two "similar" cases.

> In R. v. Mammolita (1983), 9 C.C.C. (3d) 85 (Ont. CA), where a large group of picketers interfered with police who were attempting to escort personnel into a workplace, the obstruction or interference was found in the "human barricade" that was created. It was "more than mere presence and passive acquiescence" (p. 88). In R. v. March (K.J.) et al (1993), 111 Nfld. & PEIR 116 (NFSC) where picketers of a struck store in a shopping mall were milling about in a circular motion "completely blocking off the front entrance" (p. 120) to the store in an intimidating atmosphere, the obstruction or interference was found in the creation of difficulty of access to and egress from the store which went "well beyond an information picket line."

Tab 10: *R. v. Dooling* (1994), 94 C.C.C. (3d) 525 (Nfld Sup. Ct., T.D.) at para. 24, 1994 CarswellNfld 137.

46. Unlike those cases, the appeal court held that the actions of Dooling in the present case did not obstruct or impeded customers from entering the store. Notably, the court identified that pursuant to s.128 of the Labour Relations Act the picketing per se was lawful and permissible. A conviction under s.430(1)(d) therefore, required something more than mere presence and picketing. In *Dooling*, that was absent:

> In my view, Section 430 does not protect an employer's use, enjoyment or operation of property from being subject to a picket line in the course of a lawful strike. It is not the picketing per se and its resultant effect on the employer's business that constitutes the offence; rather, one must look at the actions accompanying the picketing to determine whether the offence has

been made out. If those actions consist of something more than what is designed to communicate picketing information, then those actions could constitute mischief, if they result in an obstruction, interruption or interference with the employer's use, enjoyment or operation of property.

Tab 10: *R. v. Dooling* (1994), 94 C.C.C. (3d) 525 (Nfld Sup. Ct., T.D.) at para. 28, 1994 CarswellNfld 137.

47. *Dooling* can be contrasted with *Tysick*, which is a case that is particularly on point. In that case the accused had set up "blockades" at two points of access and egress to a commercial property in Pembroke referred to as "the pit". The court explained the blockades:

> The defendants erected an encampment at the first entrance. The encampment was located on the road leading into the pit, just outside the gates. The encampment consisted of: a military style, canvass tent, pitched on the road; a generator; two campers; a port-a-potty; food and clothing sufficient for several days and; several vehicles parked on the road.
> A half ton pick-up truck was parked crossways on the road leading into the second entrance, just outside the gates.

Tab 9: R. v. Tysick, 2011 ONSC 2192 at paras 4-5, 2011 CarswellOnt 15568.

48. The owners of the pit were contacted by the OPP and informed that there may be an issue with access to the pit due to the blockades. When the owners and employees attempted to gain access to the pit they were stopped by the OPP and informed that the pit was closed due to the blockade.

49. Tysick and several others were charged as a result of their involvement in the blockade. At trial the trial judge granted a motion for directed verdict in relation to a charge of mischief, contrary to s.430(1)(c) of the Code. In particular, the trial judge held:

> a. There was no evidence of direct contact between the company employees and the defendants;
>
> b. There was no evidence that the defendants were asked to leave the scene; and

c. There was no evidence that the protest actually occurred on pit property.

Tab 9: *R. v. Tysick*, 2011 ONSC 2192 at para. 10, 2011 CarswellOnt 15568.

50. On appeal, the Court held that the trial judge erred in relation to each of these points:

a. First, in relation to the lack of direct contact, the court rejected the notion that there needed to be direct contact between the accused and the victims. "To follow the reasoning of the trial judge, the police officers at the scene were obligated to permit direct contact to occur between the company employees and the defendants as an essential element of the offence": Tysick at para 27. Section 430 does not require direct contact.

b. Second, in relation to asking the accused to leave, the court noted that the accused relied on Dooling in support of the argument that the OPP or the victims simply had to move the truck that was blocking one of the entrances. With respect to Dooling, the court noted that in that case the accused "made no attempt to prevent or impede people from entering the drug store": Tysick at para 36. Instead, the court held that R v Mammolita [Tab 27] was on point and of assistance. In that case, the court held that a group of picketers that set up a "human barricade" that constituted mischief. In short, the court held, the creation of the blockade constitutes the offence.

c. Third, as conceded by defence, the trial judge erred in concluding that the blockade must be on pit property. Citing R v Maddeaux [Tab 24], the court held that the location of the mischief can be on an "adjacent property": Tysick at para 13.

1.3 Party Liability in the Context of Collective Mischief Cases

51. Courts have also considered how party liability operates in mischief cases with multiple offenders. A close review of the Ontario Court of Appeal's decision in *Mammolita* illustrates the principles of party liability overlooked by the trial judge in this case. In *Mammolita*, employees of Hawker Siddeley Canada Inc. were on strike. On the date of the offence, they set up a picket line which blocked the entrance and exit to and from the offices of that company. The Court of Appeal explained the facts related to the offence:

> At approximately 8:20 a.m. on August 20, 1980, upwards of 75 to in excess of 100 persons formed a picket line or group in front of the main gate and

> the general areas leading to the plant. Some were standing and watching but a good number were walking around, generally in a circle. The picket line or group prevented the vehicles containing management and office personnel from entering the plant. Some of the picketers stood in front of the vehicles. A loud speaker was used by the police to inform the group that they were violating the injunction and the law but their voices were drowned out by booing, loud shouting and a car horn. Police reinforcements were summoned and some thirty-one police officers moved in to drive a wedge through the large crowd. At first they were repulsed. However they regrouped and created an opening at the main gate so that the management and office personnel and their vehicles could pass through. The incident lasted about half an hour. During the incident, a police photographer took pictures of the group, and of what was transpiring.

Tab 11 : *R. v. Mammolita* (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) at para. 5, 1983 CarswellOnt 1235.

52. Thirty-three persons were charged with mischief. The trial judge acquitted them. The Crown appealed. The summary conviction appeal court allowed the Crown's appeal and ordered a new trial. That court held that:

> The trial judge in holding that mere presence only had been proved against the accused had erred in not considering the inferences that could be drawn from the evidence. In his opinion, based on the evidence as a whole, it could clearly be inferred that there was a concerted effort on the part of 80 to 100 strikers to prevent management and other office personnel from entering the plant premises. Furthermore, insofar as aiding and abetting was concerned, an inference could be drawn that there was more than mere presence and passive acquiescence in the light of the commotion which was going on and the large number of police officers present.
>
> [emphasis added]

Tab 11 : R. v. Mammolita (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) at para. 9, 1983 CarswellOnt 1235.

53. A further appeal was taken to the Court of Appeal. Leave was granted, but the appeal was dismissed. In dismissing the appeal and upholding the ruling that overturned the acquittal and ordered a new trial, the Court of Appeal considered liability of the accused as both principals and parties.

54. With respect to liability as a principal, the court held:

> …a person may be guilty as a principal of committing mischief under s. 387(1)(c) [now s. 430(1)(c)] if he forms part of a group which constitutes a human barricade or other obstruction. The fact that he stands shoulder to shoulder with other persons even though he neither says nor does anything further may be an act which constitutes an obstruction. The presence of a person in such circumstances is a very positive act.
>
> […]
>
> It may not be very difficult to infer that a person standing shoulder to shoulder with other persons in a group so as to block a roadway knows that his act will probably cause the obstruction and is reckless if he does not attempt to extricate himself from the group. This is particularly the case if the person knows of the existence of a strike and is confronting a large group of police officers who are trying to clear a passage. The same conclusion could be drawn where a person is part of a group which was walking around in a circle blocking the roadway. Those who are standing on the fringe of the group blocking the roadway may similarly be principals if they are preventing the group blocking the roadway from being by-passed.
>
> [emphasis added]

Tab 11: *R. v. Mammolita* (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) at paras. 13-14, 1983 CarswellOnt 1235.

55. With respect to liability as a party, the court noted the following criteria: i) there must be an act or omission of assistance or encouragement; ii) the act must be done or the omission take place with the knowledge that the crime will be or is being committed; and iii) the act must be done or the omission take place for the purpose of assisting or encouraging the perpetrator in the commission of the crime.

Tab 11 : *R. v. Mammolita* (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) at para. 17, 1983 CarswellOnt 1235.

56. The Court of Appeal elaborated on these criteria in the context of mischief and noted that "the act of assistance or encouragement may be the presence of the accused at the scene of the crime during its commission, as the aider or abetter is there for that purpose … the strength of numbers may at times be an important source of encouragement."

Tab 11 : R. v. Mammolita (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) at para. 17, 1983 CarswellOnt 1235.

57. In another decision, *Pascal* the court explored the tension in modes of party liability arising in group action such as protests, and offers similarly helpful guidance on mischief

58. and party liability. In that case a group of protesters were opposed to the development of a proposed ski resort and decided to set up a protest on Highway 99 in British Columbia. The protesters set up a makeshift camp alongside the highway. As the protesters began their blockade they were dressed in camouflage. What followed was set out by the trial judge as follows:

> On July 5, 2002, camouflage clad protesters using rocks and long spiked boards blocked the highway and stopped a convoy of logging trucks coming from Lillooet. By then the protest was known to the police and the travelling public. Vehicles of all sorts had been stopped over the preceding few weeks. In the early morning hours of that day, a large contingent of R.C.M.P. officers was also on hand. They stayed well back of the trucks and out of sight until summoned by Staff Sergeant Browning, one of the three officers who initially attended. Staff Sergeant Browning went there with the intention of making arrests, if necessary.

Tab 12: R. v. Pascal, 2002 CarswellBC 3838 (Prov. Ct.) [WL] at para. 3.

59. The accused were convicted. Notably, the court discussed the required participation of several individuals and the overlap of principal and party liability in such cases.

> Blocking logging trucks on a main highway is apt to be a daunting, if not, hazardous activity if undertaken by a single person. Such an activity can practically only be undertaken through the concerted efforts of several people. The distinction between party and principal is not as clear in these types of cases as it is where an offence can, and often is, committed by a single person, as, for example, the offence in the case of R. v. Dunlop (1979), 47 C.C.C. (2d) 93 (S.C.C.).

Tab 12: R. v. Pascal, 2002 CarswellBC 3838 (Prov. Ct.) [WL] at para. 46.

60. The court continued, and with reference to one of the accused, it explained how her actions were sufficient to establish her culpability as both a party and principal:

> That is not to suggest that in roadblock cases the court need do no more than find that the person was there. There must be at least sufficient

> evidence to show the person to have been a party within the meaning of Section 21 of the *Criminal Code*. It could be argued that that section might apply to Ms. Tom, as there is no evidence that she operated a camera, pulled spike boards on or off the road, held up stop signs and so forth. But she was out on the highway in her camouflage gear after the police arrived and warned them all of pending arrests. Her presence there with Mr. Kinistino and Ms. Alfred at 5:00a.m., wearing camouflage, amply indicate that she shared a common intention with the others and by her presence offered her encouragement, if not outright assistance, by standing on the highway. Certainly, she is a party, but one could also accurately call her a principal. Her utterances to Mr. Pascal suppose these conclusions, as foes her earlier presence at the site when vehicles were being stopped and when she was there wearing a Mohawk flag.
>
> [emphasis added]

Tab 12: *R. v. Pascal*, 2002 CarswellBC 3838 (Prov. Ct.) [WL] at para. 49.

61. In concluding its ruling, the court emphasized that the "wearing of camouflage" is "not an inconsequential detail". This "uniform" is a "symbolic projection of a militant presence, the object of which is intimidation, and it shows solidarity".

Tab 12: R. v. Pascal, 2002 CarswellBC 3838 (Prov. Ct.) [WL] at para. 54.

1.4 Elements of the Offence of Obstruct

62. In R. v. Yussuf, 2014 ONCJ 143, Paciocco J. (as he then was) described the necessary elements of the offence of obstruction of a peace officer in the execution of his duty:
Element 1 - There must be a peace officer who is in the execution of a lawful duty as a peace officer;

Element 2- The accused person must know or be wilfully blind to the fact that this person is a peace officer and must know or be wilfully blind to the act the officer is executing;

Element 3- The alleged obstructive conduct must be an intentional act by the accused person, or an intentional omission by the accused person constituting a failure by the accused to comply with a legal duty;

Element 4- That act or omission must make it more difficult for a peace officer to carry out their duties; and

Element 5 - The accused person must intend to make it more difficult for the police to execute their duty. [Emphasis in original.]

Tab 15: *R. v. Yussuf*, 2014 ONCJ 143 at para. 52.

63. *R. v. Tortolano* (1975), 28 C.C.C. (2d) 562 (Ont. C.A.), setting out the elements of the offence:
- That there was an obstruction of an officer;
- That the obstructing affected the officer in the execution of a duty that they were then executing; and
- That the person obstructing did so wilfully.

Tab 16: Regina v. Tortolano, Kelly and Cadwell, 1975 CanLII 1248 (ON CA) at page 3 (565).

1.5 Errors in the Trial Decision

64. Returning to the decision of the trial judge, the above discussion of mischief and party liability makes clear that he erred in the following ways:

65. *First* the trial judge did not consider the application of the principles of party liability and the significance of the relationship of Mr. Blackman's presence to the broader mischief occurring at the time.

66. In *Mammolita*, the court explained how presence may be sufficient to constitute an act of assistance or encouragement for the purposes of the aider or abetter analysis. This is because the criminal act in itself required collective action. The collective aspect of the offence does not obviate its criminal nature, nor can it absolve an individual who contributed to the strength in numbers the offence required.

67. The Pascal decision recognized that the line between principal and party is blurred when the offence itself may require the concerted actions of several people, as in unlawful protest cases. However, this does not mean the accused is not liable. The court in that case concluded that the requirements of s. 21(1) were made out on the facts as there was sufficient evidence that the accused was participating in the unlawful blockade. There was no requirement that the accused be specifically directed to leave.

68. The requirements of s. 21(1) *CC* were met on record before the trial court. Mr. Blackman's presence on February 18, 2022, in a line of demonstrators constituted active participation in the demonstration in light of *Mammolita.* When assessed in light of the events of that day, including the police operation, Mr. Blackman's presence on Colonel By Drive takes on a different meaning and constitutes an act of assistance or encouragement sufficient to ground his liability as a party.

69. Mr. Blackman' participation in a line of demonstrators which spanned a number of lanes of traffic also make it clear that Mr. Blackman would also be co-principle to the offence of mischief. The line of demonstrators was aimed at obstructing the police operation to clear the streets. By placing himself on the street in the context and location of more extensive blockades, Mr. Blackman was directly contributing to the large-scale interference with property associated with the "Freedom Convoy".

70. The trial judge distinguished the case of *Mammolita* based on the lack of clarity surrounding the communication to Mr. Blackman that he is required to leave. The accused being made aware of a requirement to leave is not an element of the offence of mischief. Mischief is a general intent offence. The Applicant's position is that the evidence did lend support to a finding that Mr. Blackman was told to leave. Even had that not been the case the Applicant's position is that *Mammolita* can not be distinguished based on that factor.

71. *Second* the trial judge found that Mr. Blackman was not aware that he was not welcome to be where he was until the police told him to leave. This finding is inconsistent with the trial judge's finding that he was able to infer that Mr. Blackman's intention was to make a nuisance of himself to the police and anybody else who was present.

72. This inference that Mr. Blackman was present to make a nuisance of himself is well supported on the evidence. The drone footage capturing Mr. Blackman and his arrest was made an exhibit. Mr. Blackman had clearly inserted himself at or near

the front of the protest line. It was clear given the posture, positioning, clothing, and numbers of police officers, that they were present for a police operation to remove individuals from the area. Equally, it was clear that the line of demonstrators were present to slow down and resist the police operation.

73. There was also direct evidence provided through Sgt Riopel that Mr. Blackman was specifically warned to leave the area. The Crown's position is that the lack of clarity with respect to exact wording or timing of the direction to leave does not lead to the inference that the warning was not made. A finding that Mr. Blackman was not specifically directed to leave would be an error unsupported by evidence.

74. The Applicant's positions is that while a direct verbal warning that Mr. Blackman was required to leave is useful in conducting the analysis of the mens rea with respect to the obstruct offence, but it is not necessary in this case. There was considerable circumstantial evidence of Mr. Blackman's intent without any need for direct verbal warning. Indeed, the trial judge was able to infer that Mr. Blackman was present to make a nuisance of himself.

75. *Third* the trial judge misapplied the law with respect to the obstruct count stating that the Crown was required to prove that Mr. Blackman was made aware in some fashion that Sgt Riopel wanted him to leave and intentionally refused to do so.

76. The trial judge focused on the ambiguity caused by Sgt. Riopel's inability to indicate precisely when Mr. Blackman was told to leave and what exact words were used.

77. The Crown's position is that a warning or direction to leave is not an element of the offence.

78. The trial judge did find that Mr. Blackman was present to make a "nuisance of himself to police". There was no suggestion that Sgt. Riopel was not a police officer acting within his authority. It was Sgt. Riopel's unchallenged evidence that Mr. Blackman's actions were obstructing Sgt. Riopel and the other members of the Public Order Unit by sitting on the ground and interfering with their ability to move the line.

79. Based on the trial judge's findings there is no other conclusion available other than that Mr. Blackman's conduct meets the elements of obstruct in a criminal court context. This inference is also clear from the video evidence presented in trial. It is clear that Mr. Blackman placed himself on the front line of a group of

demonstrators. The nature of the police operation would have been unquestionably clear the blockade present at the time. It would have been clear that the police operation was aimed at removing demonstrators from the area. Individuals who were willingly present in the line were clearly aiming at making the police operation more difficult.

80. The trial judge's conclusion failed to give effect to this evidence. Giving effect to this evidence would have led to the conclusion that Mr. Blackman was guilty of an obstruct.

PART IV: ORDER REQUESTED

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

82. In the alternative, the Appellant asks that an order be made for a new trial on the counts of mischief and obstruct.

PART V: TIME ESTIMATES

83. The Appellant estimates that 4 hours will suffice for the hearing of this appeal.

ALL OF WHICH IS RESPECTFULY SUBMITTED THIS 8th day of December, 2023.

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JOHN WRIGHT

Assistant Crown Attorney

Ottawa Crown Attorney's Office

[redacted]