ONTARIO COURT OF JUSTICE
East Region

BETWEEN

HIS MAJESTY THE KING

Respondent

and

EVAN BLACKMAN

Applicant

***CHARTER* MOTION:**
CROWN REPONSE

Crown Attorney's Office
[redacted]

1.0 CONCISE STATEMENT OF REASONS FOR RESPONDING

The Applicant brings an application with respect to third party records of the RCMP and TD Bank. The records sought are records and correspondence, other documents relating to the "freezing" of his bank accounts. The Crown seeks summary dismissal of the application taking the position that the application in question is "manifestly frivolous". The relevance of the impugned records depends on there being a prospect of success to the ultimate application under Section 8 Charter and 24(1).

2.0 DETAILED STATEMENT OF SPECIFIC FACTUAL BASIS FOR OPPOSING APPLICATION

1. The Respondent largely agrees with the anticipated factual basis outlined by the Applicant.

2. Subject to hearing evidence related evidence it certainly sounds possible that the Applicant's TD Bank accounts were "frozen" as a result of his participation in the "Freedom Convoy".

3. Ultimately the degree of the Applicant's involvement in the "Freedom Convoy" and timeline of his involvement is a central issue for the trial proper. The Respondent's position is that is largely irrelevant for the purpose of this application.

3.0 RESPONSE TO THE APPLICANT'S GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION

3.1 Governing Principles

4. An *O'Connor* application provides a general mechanism for ordering production of *any record* beyond the possession or control of the prosecuting Crown, it requires the following steps:
   -The accused must first obtain a subpoena under ss. 698(1) and 700(1) of the *Criminal Code* and serve it on the third-party record holder. The subpoena compels the record holder to attend court with the targeted materials.

   -The accused must bring an application, supported by appropriate affidavit evidence, demonstrating that the records are likely to be relevant in his or her trial. The accused must give notice of the application to the prosecuting Crown, the person who is the subject of the records, and any other person who may have a privacy interest in the records.

   -After hearing from the Crown, record holder, and any other interested party, the judge determines whether production should be compelled in accordance with the two-step test established in *O'Connor*:

5. At step 1, the judge must be satisfied that the records are "likely relevant" to the proceedings against the accused. If so satisfied, the judge may order production of the records for the court's inspection.

6. At step 2, the judge reviews the records and determines whether, and to what extent, production should be ordered to the accused. This step requires balancing a variety of factors.

   McNeil, supra at paras. 11, 25, 27.
   Jackson, supra at para. 84.
   Gubbins, supra at para. 25.
   Quesnelle, supra at para. 13.

7. The Court of Appeal in *R. v. Jackson* confirmed that the third-party records regime not only applies to a record holder that is a "complete stranger to the litigation" (i.e. a doctor or a therapist) but also to those record holders that are not a complete stranger to the litigation (i.e. another Crown entity) *even though* some records of the same entity may be subject to first party disclosure. The Supreme Court in *R. v. Gubbins* followed up on this point when it confirmed that "not all police records will be subject to first party disclosure" and while the police are required to disclose the investigative file under *Stinchcombe*, "other files or records in the hands of police are subject to the *O'Connor* process".
   Jackson, supra at para. 85.
   Gubbins, supra at para. 24.

A. __Summary Dismissal post-*Haevischer*__

8. On April 28, 2023, the Supreme Court released its decision in *R. v. Haevischer*, 2023 SCC 11. In that decision the Supreme Court clarified that the standard to be applied on applications for summary dismissal in criminal proceedings is that the application must be "manifestly frivolous."

9. The *Haevischer* decision originates from British Columbia and concerns stay applications based on abuses of process. The Crown asked for a *Vukelich* hearing, the purpose of which was to determine whether the application ought to be summarily dismissed or ought to proceed to a *voir dire*. The Crown argued that the applications did not disclose a sufficient foundation to establish that an evidentiary hearing was necessary, and that even if the allegations were true, they would not be successful.

10. The trial court agreed to conduct the *Vukelich* hearing, which spanned six days. Even though defence had indicated its intention to call witnesses, there was no opportunity to provide *viva voce* evidence. Ultimately, the trial court found that even if the applications were taken at their highest, they could not support a stay of proceedings such that an evidentiary hearing on the merits would be of no assistance. It accordingly summarily dismissed the applications.

11. The British Columbia Court of Appeal allowed the appeals, finding that the trial court had imposed too high a standard to permit an evidentiary hearing pursuant to *Vukelich* by failing to take certain submissions at their highest and by weighing some of the evidence.

12. Recognizing the discretionary nature of the trial court's decision, the Court of Appeal nevertheless found that the standard is meant to be low and was met on the facts of the case.

13. The Supreme Court ultimately dismissed the appeal and agreed with the Court of Appeal that the applications ought to have been decided on their merits.

i. **"Manifestly frivolous"**

14. In arriving at the "manifestly frivolous" standard now applicable to summary dismissal in criminal cases, the Supreme Court drew heavily on a balance between the values of trial efficiency and trial fairness. Citing *R. v. Jordan*, 2016 SCC 27, it recognized that these values coexist and are practically interdependent.
R. v. Haevischer, 2023 SCC 11 at para. 46.

15. In discussing trial efficiency, the Court pointed to the post-*Jordan* context and the role of summary dismissal in ensuring that trials occur within a reasonable time. It urged all actors to carefully consider their applications' impact on trial time:
All participants in the criminal justice system share a responsibility to take a "proactive approach . . . that prevents unnecessary delay by targeting its root causes." According a high degree of deference to summary dismissal decisions encourages trial judges to take on that responsibility and to exercise this discretionary power where appropriate.
[notes omitted, emphasis in original]
R. v. Haevischer, 2023 SCC 11 at para. 50.

16. In discussing trial fairness, the Court raised concerns where applications that are dismissed on the basis of a limited or incomplete record may have proved successful after a full hearing on the merits. In its view, setting too lax a standard on summary dismissal is undesirable where it could prevent novel arguments that allow the law to develop from being advanced.
R. v. Haevischer, 2023 SCC 11 at para. 58.

17. What is clear from the Court's discussion of the "manifestly frivolous" standard is that it did not do away with prior jurisprudence such as *Jordan* and *Cody*. Rather, the Court draws from these cases in setting the standard, fully recognizing the imperatives of trial fairness in the post-*Jordan* context. In so doing, it reaffirmed its exhortation to trial judges to use their case management powers to promote efficiency, including by summarily dismissing motions where they are or become manifestly frivolous.
R. v. Haevischer, 2023 SCC 11 at paras 63-66, 76, 89, citing *R. v. Cody*, 2017 SCC 31 at para. 38 and *R. v. Jordan*, 2016 SCC 27 at para. 63.

18. *Haevischer* clarified that an application will be "manifestly frivolous" where its legal pathway is flawed. It recognized that this will be the case where the court has no jurisdiction to grant the requested remedy, or where the remedy sought by the application cannot be reached on the facts of the application, as put forward by the applicant. It gave as an example that of a *Garofoli* application which, even if successful, would not result in the striking down of the warrant and the ultimate exclusion of the evidence so obtained.
R. v. Haevischer, 2023 SCC 11 at paras. 85-86;

3.2 PRINCIPLES APPLIED

19. While the impugned records may be relevant to the anticipated Section 8 and 24(1) arguments, the Crown's position is that those Charter arguments present no prospect of success and for that reason the application should be dismissed summarily.

20. The alleged misconduct concerns the direct actions of TD Bank and the indirect actions of the RCMP. Remedies under Section 24(1) and 24(2) are available when a Charter violation occurs as a result of government action or decision. In large part the application impugned the conduct of a non-government entity that being TD Bank and only impugned government action indirectly.

21. Significantly, the alleged conduct only occurs (or is discovered) following the Applicant's release from custody in relation to the allegations before the Court. There is no nexus between the alleged conduct and the investigation or prosecution of the case. None of the officers involved in this case would have been involved in, or would have knowledge of the "freezing" of the Applicant's bank account. No evidence would have been obtained as a result of "freezing" of the Applicant's bank account.

22. A stay of proceedings is s remedy permissible in the "clearest of cases". The Crown's position is that in all likelihood the "freezing" of the Applicant's bank account would have been justified. The Crown's position is that the Applicant is a party to the substantial mischief caused by the "freedom convoy". The invocation of the Emergencies Act has already been considered in context of a public inquiry. Even had Mr. Blackman no involvement in the "freedom convoy" and the "freezing" of his bank account was entirely arbitrary, and the misconduct was attributable to government action with a sufficient nexus to the criminal case… Even then, this could not be considered one of the "clearest of cases" where a stay of proceedings would be appropriate.

23. For a multitude of reasons the prospective Section 8 and 24(1) application has no prospect of success. The Crown's position is that the Court should summarily dismiss the application and decline to order disclosure of the impugned records.