

CITATION: *R. v. Lich*, 2022 ONSC 3093

COURT FILE NO.: CR-22-8171-BR

DATE: 2022/05/25

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Crown

– and –

TAMARA LICH

Defendant

)
)
) Moiz Karimjee for the Crown
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)
) Lawrence Greenspon and Eric Granger for
) the Defendant
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) **HEARD:** May 19-20, 2022

BAIL REVIEW DECISION

Phillips J.

[1] Tamara Lich is charged with mischief and related offences arising out of the so-called Freedom Convoy of 2022. It is alleged that she was a key organizer of the highly disruptive event and thereby interfered with the lawful use and enjoyment of property. This is a bail review application under s.520 of the *Criminal Code*. There are two ways by which a judge situated as I am could alter the existing status quo: either if the current state of affairs is a result of error, or if I find that a fresh analysis is warranted as a result of there being a material change in the circumstances and that *de novo* analysis results in a different outcome.

[2] Ms. Lich was ordered detained by Bourgeois J. of the Ontario Court of Justice on February 22, 2022. Subsequently, she was released with a surety after a bail review before Johnston J. of the Ontario Superior Court of Justice on March 7, 2022. Johnston J. found that Bourgeois J.

committed legal error in her analysis of the gravity of the offence and her assessment of the likelihood of a potentially lengthy period of imprisonment. Impressed by a new surety that was put before him, Johnston J. released Ms. Lich to be supervised by that surety on various terms meant to both keep her out of Ottawa and to prevent her from participating in the organization of any future public demonstrations.

[3] Presently, the parties are before the court each alleging that Johnston J. made legal errors. The Crown submits that he erred in his treatment of Bourgeois J's reasoning. It is argued that Johnston J. improperly second-guessed her assessment of the gravity of the offence and the likely sentence potentially forthcoming and that Bourgeois J.'s detention order should be restored. Unsurprisingly, the Defence disagrees. At the same time, however, the Defence submits that Johnston J. erred in his failure to properly calibrate a social media ban to the circumstances. In essence, submits the Defence, the social media ban is an unrestrained over-infringement into the accused's expression rights and other interests and is thus a mistake.

[4] The parties are also each submitting that there has been a material change in the circumstances. The Crown argues that even if the release order survives, Ms. Lich is in breach of her conditions because she has been selected by an organization called the Justice Centre for Constitutional Freedoms to receive something called the George Jonas Freedom Award and she has agreed to accept. The Crown argues that accepting this award is tantamount to providing "support" for anything related to the Freedom Convoy contrary to her release conditions and that Ms. Lich should be returned to custody.

[5] The defence also makes submissions to the effect that there has been a material change in circumstances. First and foremost, the defence points out that the Freedom Convoy protest is over. As a thing of the past, the likelihood of reoffence on the part of Ms. Lich and the analysis under the tertiary ground would be different now than when the protest and its effects were recent and raw. Further, the defence submits that Ms. Lich has lived in her community without being charged with any breach since March 7, 2022, a meaningful stretch that shows she is capable of following terms of release. As a result of all of this, it is argued that Ms. Lich should be allowed to travel into Ontario and indeed to Ottawa to address some family obligations that she will have here in

the fall. It is proposed that there is no longer reason to prevent her from accepting the aforementioned award in person in Toronto.

[6] I shall begin my analysis by explaining why I do not accept the Crown's submission that Ms. Lich has breached her release conditions by agreeing to receive an award. It seems to me that most people understand that bail involves a rational connection between release terms and the general prevention of the sort of contested behaviour that brings the accused before the court. What was Johnston J. attempting to accomplish here? I consider that a reasonable person could believe that the release terms made March 7, 2022, were intended to prevent a reoccurrence of the sort of event that paralyzed the downtown of the nation's capital for many weeks this past winter. While Johnston J. was clearly seeking to limit Ms. Lich's freedom in respect of her contributing to the organizing of another such demonstration, no court would ever seek to control the possession or manifestation of political views. The courts are not a thought police. We seek only to control conduct to the extent that certain behavior will violate or likely lead to violation of the law. Here, the objective was to keep a highly problematic street protest from reviving or reoccurring.

[7] I make that point in order to make this one: I accept Ms. Lich's evidence that she saw no connection between her release terms and the acceptance of an award meant to celebrate her advocacy of constitutional freedoms as she and others understand them. I believe she would have perceived herself to be restricted by the Johnston J. order only from engaging in any kind of organizing of or support for any sort of protest, either as a principal or party. I can accept that she would have seen that as different from attending a gala in Toronto months after the Freedom Convoy ended in Ottawa. The route between attendance at that function as it has been advertised and problematic "support" for a demonstration that will by then have been long over is so indirect as to be barely perceptible. On the s. 518 (c) (iii) heading I am to determine here, I find that the Crown has failed to prove that the accused has previously committed an offence under s.145. In respect of the *mens rea* element alone, I see considerable room for doubt. I believe Ms. Lich when she explains that she does not see her acceptance of the award in question to be any sort of support for the Freedom Convoy because that initiative is over with. As she put it, "I didn't see that I was supporting the convoy. There is no convoy to support".

[8] There has been a significant change in the circumstances that is material to the issues relevant to bail. First, I find it of significant importance that the Freedom Convoy is over and has left town. In my view, it would be practically impossible to mount a comparable protest in Ottawa again. Second, Ms. Lich has shown that she can be trusted to follow release conditions. I accept that she has lived in her community without breach since March 7, 2022. Third, I accept that she has been off social media since her release. It is hard to escape the thought that depriving Ms. Lich of the echo chamber that is social media these days has likely had salutary effect on her and her susceptibility to getting caught up in the sort of toxic group-think that animated the crowd back in February. Fourth, I consider it material that the circumstances of the pandemic and the governments' approach to it have meaningfully changed. There is no more mask mandate, for instance. Most of the restrictions have been lifted and the temperature in respect of opposition to the official approach has lowered. Indeed, as a member of the legal community, I am aware that there are now several court challenges being brought in respect of some of the remaining vaccination mandates. While I am indifferent about the outcome of those endeavours, I see them as good things. Such litigation will serve to ventilate and channel the emotions felt by many about the pandemic and its consequences. The bottom line is this: the circumstances relevant to assessment of Ms. Lich's bail prospects in the sense of the likelihood of further criminal offence and the assessment of what it would take to maintain confidence in the administration of justice are materially different now than they were back in February and early March.

[9] In my judgment, the present circumstances as outlined above would have led Bourgeois J. to arrive to a different conclusion than she did. A contextual reading of the Bourgeois J. reasons indicates that she was highly influenced by what she saw as a substantial likelihood of further offences arising from Ms. Lich's then recent behaviour in light of the then-existent threat of the protest's resurgence and that her analysis under the tertiary ground was significantly driven by the attitude that was recently apparent from Ms. Lich of having no respect for the law. Analysis under both of these headings would lead to different conclusions now. This is all the more so given the high quality of the surety now on the table, a factor that enhances Ms. Lich's releasability on both the secondary and tertiary grounds. The tertiary ground, like the other two grounds, must be assessed in all of the circumstances - that is to say inclusive of the beneficial effects of the proposed plan of release.

[10] Similarly, the present circumstances as outlined above would have led Johnston J. to arrive at a different conclusion than he did. He too was seized of the case when the city was still reeling from the effects of the protest. It is worth recalling that the federal government believed the country to be in a highly exceptional state of emergency as late as February 23, 2022, less than two weeks before Johnston J. assessed the matter. Finally, I note that he was also dealing with an accused who had no history of compliance with court orders and who gave only indication of having little, if any, respect for the law.

[11] I am convinced that it would be proper for me to engage in a *de novo* assessment of the judicial interim release issues because of the material change in circumstances. I need not consider, therefore, the position advanced by the Crown that Johnston J. erred in his treatment of the Bourgeois J. decision. Even if Johnston J. is wrong in his treatment of Bourgeois J's reasoning, it remains the case that the Bourgeois J. order is now subject to replacement by a new order on the grounds that there has been a material change. For that matter, the Johnston J. order is also now subject to replacement for the same reason.

[12] On the evidence before me, I agree that release remains appropriate. I find that all of the circumstances, including the quality of the surety, the success thus far in respect of release conditions, along with Ms. Lich having had a taste of jail, all combine to make for a “pull of bail” that will adequately lower the risk of reoffence. I am impressed by the proposed surety. I find it reassuring, for instance, that she has taken her task so seriously that she has been regularly checking Ms. Lich’s computer devices to make sure the social media ban is being followed. She has posted a sizeable bond. In my judgment, she has been doing a suitable job.

[13] I reiterate that there is no evidence establishing that Ms. Lich has breached her conditions. I specifically reject the idea that she is responsible for what someone else did with the photo of her wearing a pendant with a truck on it. Similarly, I reject the idea that she is culpable for how the Centre for Constitutional Freedoms conducts its business in seeking to commemorate an event that sits now in the past. I realize that Ms. Lich is not exactly behaving like someone chastened by the charges. Even so, the word to focus on in that sentence is charges, not chastened. Provided she continues to follow the law in the sense of not repeating the behaviour that is now so hotly contested, she is allowed to perceive herself and behave like the innocent person the law presumes

her to be. To that I will add this, however: a trial is no sure thing for either side and one of the possible outcomes here is a conviction. Ms. Lich may wish to consider that her conduct in advance of trial could end up being relevant on sentence. The Crown may well rebut the presumption of innocence and Ms. Lich might learn the hard way from Her Majesty the Queen that she who laughs last laughs longest. That far from certain proposition, though, is more of a post-trial consideration than a pre-trial one.

[14] In my view, a reasonable member of the community who appreciates the presumption of innocence and the right to bail would agree that a release could be designed that structures Ms. Lich's life so that the risk of re-offence is sufficiently low and public confidence would be maintained in the administration of justice. The question becomes: on what terms? The court must be careful to make sure that bail terms are tailored to only the issues pertinent to interim release and not stray into punishment before trial. What rules are necessary to lower the substantial likelihood of further criminal offences to a tolerable level? Likewise, what release conditions, in all the circumstances, would have the effect of making incarceration unnecessary to maintain confidence in the administration of justice?

[15] After a *de novo* analysis of the social media question, I come to the same result as did Johnston J. Although it is unnecessary that I do so, I shall indicate that I disagree with the proposition that Johnston J. committed legal error when he imposed the social media ban as he did. I cannot accept that Johnston J. was unrestrained or somehow unreasonable in the exercise of his discretion on the subject. No judge is required to specifically mention any particular case or guiding principle. A judge need only show that he or she is acting in accordance with the law. Read on the whole, that is exactly what Johnston J.'s reasons show him doing.

[16] In any event, I independently find that the social media ban is warranted and appropriate. As I have touched upon already, social media can be a problematic feedback loop where people get egged on and caught up in group activity they would never perform on their own. In a very real way, social media undoubtedly contributed to and even drove the now impugned conduct and Ms. Lich staying away from it is necessary to lower the risk of re-offence to an acceptable level. In arriving to this conclusion, I have of course engaged in a balancing exercise involving the interests of the accused. I am aware that social media has its uses and can be generally enjoyable.

That said, I know that Ms. Lich is in her late 40s. Born in the early 1970s, therefore, she would have quite a lot of memory of how to use the social skills she surely built up before the advent of the internet. I am confident that Ms. Lich can use a phone, write a letter, or meet her friends in a coffee shop like we all used to. Additionally, she can email and text and thereby send and receive photos and, as canvassed before Johnston J., she does not require social media for her work. Simply put, I see the infringement into her interests from the social media ban to sit at the low end and outweighed by the other considerations. Though I accept that Ms. Lich can use social media for legitimate purposes and wishes to continue doing so for understandable reasons, I conclude that, on balance, a social media ban continues to be called for in the context of the alleged misconduct and its genesis.

[17] I now turn to the question of whether Ms. Lich should continue to be prevented from entering the province of Ontario and more specifically the city of Ottawa. In that regard, I consider it important to reflect on why such a term was imposed in the first place. It is unusual to ban anyone from a city and especially a province. It seems to me that the geographical restriction imposed here was influenced by the fact that at the time there was real worry that the protest was going to restart. I gather there was concern that Ms. Lich could emerge from jail, blow on the embers, and revive what had been a roaring bonfire. Furthermore, there is evidence that the protest had a very harmful impact upon residents and businesses situated in Ottawa's downtown. It would appear that the court was also motivated to remove Ms. Lich from the city in the same way an accused would be forbidden from returning to a location that s/he had allegedly harmed by a potentially criminal act.

[18] I accept the evidence that Ms. Lich's child will be attending for post-secondary education in Ottawa commencing this fall. To my mind, it is reasonable that Ms. Lich as a mother would wish to accompany her child from Alberta to Ottawa in order to participate in the move-in process into what will be her child's first room away from home. Does such attendance by Ms. Lich in Ottawa lead to any increase in the likelihood of further criminal offences? Relatedly, does such presence in Ottawa undermine the public's confidence in the administration of justice given what Ms. Lich allegedly got up to the last time she visited this town? I answer the first question in the negative. As I have said, I find that it would be practically impossible for Ms. Lich to again

organize anything even approaching the protest that forms the basis of the charges. This is especially true given that she will be disconnected from social media tools. As I have tried to make clear, I see access to social media as a condition precedent to engaging in anything in the realm of the alleged misconduct. As for the second related question, I also come to a negative conclusion but only after considering the effect of a particular condition. I agree that it is contrary to the reputational interest of the administration of justice to allow Ms. Lich to walk around the very neighbourhoods she is alleged to have traumatized. Accordingly, I intend to impose a term that she be allowed to visit Ottawa, but she shall not be allowed to attend the downtown core.

[19] Tamara Lich is a 49 year old grandmother. She is married and maintains full-time employment. She has no criminal record. She is of Metis heritage. Ms. Lich is, of course, presumed to be innocent. In the circumstances of this very unusual case, there is significant uncertainty about the degree to which she will be held culpable for the assortment of alleged bad acts committed over many weeks by various actors in a crowd of thousands. It is of relevance that the day before her arrest, she was arguably told by the Ontario Superior Court that she may continue to protest. In my view, her personal characteristics and the uncertainty about the degree of responsibility for the Freedom Convoy that will be laid at her feet make it impossible to say that she is so liable on conviction to receive a potentially lengthy period of imprisonment that detention is necessary to maintain public confidence in the administration of justice.

[20] Naturally, I assume that the community values the presumption of innocence as well as the constitutional right to reasonable bail. Evidence for that can be found in the fact that accused persons are released all the time without controversy on many serious allegations up to and including murder. I am confident that the release plan I am about to outline will both keep the likelihood of further criminal activity below the “substantial likelihood” threshold and ensure the public’s continued confidence in their justice system.

[21] Having said all of that, however, it would appear that some of the release terms should be edited or deleted. It has become apparent that some of them are unworkable and ill-suited to the current state of affairs. It is ordered that Tamara Lich be released on the same order issued by Johnston J. but instead with the following conditions:

- You are to keep the peace and be of good behaviour;
- You are to reside at XX;
- You shall not contact or communicate in any way either directly or indirectly, by any physical, electronic or other means, with the following: Christopher BARBER, Pat KING, Daniel BULFORD, Benjamin DICHTER, James BAUDER, Tyson BILLINGS, Owen SWIDERSKI, Tom MARAZZO, Brian CARR, Kerry KOMIX, except through counsel or in the presence of counsel;
- You are not to log onto social media or post any messages on social media. You are to allow your surety reasonable access to your electronic devices to ensure compliance with these terms, inclusive of cell phone, laptop or other computer or iPad or similar devices. You are not to allow anyone else to post messages on social media on your behalf or indicate your approval for any future protests;
- You are not to organize or aid or abet in the organizing of any public protest, demonstration or unlawful assembly. Without limiting the generality of the foregoing, you are not to engage in the organization or promotion of any public protest, demonstration or unlawful assembly in respect anything related to the Covid 19 pandemic or Freedom Convoy activities; and
- You are not to attend the area of the City of Ottawa bounded by the Ottawa river, the Rideau river, The Queensway (also known as Highway 417), and Booth Street, except as may be necessary for attendance at court or to meet with legal counsel.



Justice Kevin B. Phillips

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Defendant

BAIL REVIEW DECISION

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Released: May 25, 2022