CITATION: R. v. Lich, 2022 ONSC 4390
COURT FILE NO.: CR-22-8171BR
DATE: 2022-07-28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
HER MAJESTY THE QUEEN Respondent	)	M. Karimjee, for the Crown Attorney
- and -	)	
TAMARA LICH Applicant	)	L. Greenspon and E. Granger, for the Applicant
	)	**Heard**: July 25 and 26, 2022

RULING ON APPLICATION FOR BAIL REVIEW - SECTION 520 OF THE *CRIMINAL CODE*

A.J. GOODMAN J.

[1] This is an application pursuant to s. 520 of the *Criminal Code,* R.S.C. 1985, c. C-46*,* for a review of the applicant's, Tamara Lich's, detention order.

[2] Ms. Lich was detained following a bail hearing on July, 8, 2022 before Justice of the Peace Harris of the Ontario Court of Justice in Ottawa.

[3] The applicant stands charged with one count of counselling intimidation, not committed by one or more persons, a count of counselling the resistance or willful obstruction of a peace officer, not committed by one or more persons, a count of resisting or willfully obstructing a peace officer, one count of intimidation, a count of mischief, and a count of fail to comply with a release order, all contrary to their respective provisions in the *Criminal Code*. The alleged date for these offences is between February and June 2022. The Crown will be proceeding by indictment.

[4] The predicate offences arise out of the so-called Freedom Convoy that occupied the downtown core of Ottawa for an extended period of time earlier this year. It is alleged that Ms. Lich was a key organizer of the highly disruptive event that occurred at or near Parliament Hill. The most recent charge stems from the applicant's actions at an awards gala held in Toronto on June 16, 2022.

[5] On July, 8, 2022, the Justice of the Peace ordered the applicant's detention on the secondary and tertiary ground. Ms. Lich has remained in custody since her latest arrest on June 27, 2022.

[6] This is the third successive bail review application in the Superior Court. At the conclusion of the hearing, I provided my oral ruling to the parties with full reasons to follow. These are my reasons.

Positions of the Parties:

[7] The applicant argues that that there was an error on the record warranting a review.

[8] The applicant submits that the detention order is clearly inappropriate in the face of the fact that she is a 49 year old grandmother with no criminal record, who self-identifies as Métis, has a stable employment history, and an available surety who was previously approved of by two judges of this Court and deemed to still be qualified to act by the Justice of the Peace. The substantive offences that are non-violent in nature and raise triable issues, and a new breach allegation that raises strong triable issues. There is no allegation of conduct that endangers the protection or safety of the public.

[9] The applicant submits that the decision in issue here bears a striking similarity in many respects to the original bail decision of February 22, 2022, on the substantive offences made by Bourgeois J., since overturned on review. The Justice of the Peace makes one of the very same key errors made by Bourgeois J., as explained by Johnston J. in his bail review decision setting aside the detention order. Justice of the Peace Harris failed to assess the circumstances particular to the applicant's case and what impact they have on the potential for a lengthy period of imprisonment and the question of detention on the tertiary grounds.

[10] Specifically, the applicant argues that the Justice of the Peace erred in law in the following ways; by conflating the reverse onus at a bail hearing in assessing the apparent strength of the Crown's case; by failing to apply the principle that for a breach of a condition, the condition is to be strictly construed as against the Crown; by failing to analyze the impact of the proposed bail plan on the question of release; and by failing to consider any of the changes in circumstances since the applicant's initial arrest as had been identified by Phillips J., in his review decision of May 25, 2022.

[11] Further, the applicant alleges that the Justice of the Peace erred in law by failing to apply the fundamental principles that the targeted risk on the secondary grounds is linked to the protection and safety of the public and not the risk of committing any further criminal offence in the abstract.

[12] The applicant also submits that the decision was clearly inappropriate. It was replete with statements of fact that were not supported by the evidence and conclusions that were devoid of proper analysis or logic.

[13] The applicant requests that the detention order be set aside and replaced by a release order, on essentially the same terms as the order of Phillips J. of May 25, 2022, with some consideration to address the terms of any non-communication condition going forward, so as to ensure that there is not a further hearing before a court for a sixth time dealing with judicial interim release in this matter.

[14] The Crown responds that the Justice of the Peace did not commit an error and fully considered the evidence, the applicant's background, her flagrant breaches of court orders and the proposed plan. The Justice of the Peace considered the evidence fully and fairly when arriving at his reasonable conclusions.

[15] The Crown contends that the allegations involve serious misconduct. The Crown says that considering the strength of its case, Ms. Lich's conduct while on a form of release demonstrates a wanton disregard for abiding by bail conditions and has not changed the very real concerns over her inability to follow court orders. The Crown asserts that none of the factors elicited by the applicant adequately address the secondary ground concerns.

[16] With respect to the tertiary ground, the Crown refers to the evidence to the effect that the prosecution's case is very strong and the applicant faces a potential lengthy sentence. The circumstances surrounding the commission of the offence are also most serious and have and continue to have critical consequences that go beyond the nature of the charges.

[17] Further, the Crown reiterates that Ms. Lich was flagrantly breaching her terms of release, which demonstrates a fundamental lack of interest in complying with court orders. The Crown submits that the public would lose confidence in the administration of justice if the applicant was permitted again to be released on bail in these circumstances. The Crown submits that the application ought to be dismissed with the applicant's continued detention until trial.

Summary of the Evidence:

[18] A summary of the evidence, allegations and submissions before Justice of the Peace Harris has been filed by the applicant:

> The applicant was one of the acknowledged leaders of the Freedom Convoy that arrived in Ottawa in late January and early February 2022. The Crown has lead ample evidence of the leadership role she played at each and every bail-related hearing in this matter.
>
> The applicant was arrested on February 17, 2022. She had a bail hearing before Bourgeois J. on February 19, 2022. On February 22, 2022, the applicant was denied bail by Bourgeois J. on the secondary and tertiary grounds. In detaining on the secondary grounds, Bourgeois J. noted the applicant's leadership role, videos of her participation in press conferences, her directorship in the non-profit organization established to distribute funds contributed to the Freedom Convoy, and evidence of her repeated use of the phrase "hold the line" both prior to and after her arrest. On the tertiary grounds Bourgeois J. characterized the apparent strength of the case against the applicant as "relatively strong" noting her statements at press conferences that

Bourgeois J. characterized that “seemed” to counsel mischief and noting “you are clearly acting and accepting the title of leader”.

The applicant brought a bail review application on the basis of various errors as well as a material change in circumstances in the form of a new surety. Johnston J. was impressed by the proposed surety (who is proposed again at this hearing) and found her credible and suitable and that the applicant could be released pursuant to the secondary grounds with conditions supervised by this surety. He concluded that some of these aspects of the case may not be proven by the Crown as against the applicant, particularly where there were a number of participants and a number of leaders in relation to these matters. Noting the difficulty that would arise from the very real possibility that the applicant would spend more time in custody awaiting trial than she would upon conviction, Johnston J. concluded that she was releasable on the tertiary grounds.

Two further applications were brought concurrently and heard by Phillips J. of this Court on May 19th and 20th, 2022. The applicant brought a variation application seeking to vary the condition banning her from the Province of Ontario, so as to accept the George Jonas Freedom Award presented by the Justice Centre for Constitutional Freedoms in Toronto on June 16th, to be able to return to the City of Ottawa for family-related reasons and to limit the complete social media ban. The Crown brought an application to revoke the applicant’s bail, which was advanced on the basis of two alleged breaches of the applicant’s conditions as well as alleged errors of law.

Phillips J. released his decision on May 25, 2022 (citation: 2022 ONSC 3093), allowing the applicant’s application in part and dismissing the Crown’s application. He concluded that there had been a material change in circumstances that justified him considering the issue of bail afresh. He further noted that this change of circumstances would even have lead Bourgeois J. to a different conclusion than she had reached.

Phillips J. concluded that the Freedom Convoy was now “over and has left town” and that it would be “practically impossible” to mount a comparable protest in Ottawa again. He noted that the applicant had shown that she could be trusted to follow release conditions, in particular that she has shown that she has stayed off of social media since her release. He noted that the circumstances of the pandemic and the governments’ approach had meaningfully changed. Ultimately he concluded that “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". Phillips J. released Ms. Lich with conditions: These conditions included, *inter alia,* that she be supervised by a surety on various terms meant to both keep her out of the downtown area of Ottawa and to prevent her from promoting or participating in the organization of any future public demonstrations by constraining the use of social media as well as having no contact with named persons involved in the demonstrations.

The applicant attended the gala event in Toronto on June 16, 2022 to receive the George Jonas Freedom Award presented by the Justice Centre for Constitutional Freedoms, being the same organization that is representing the applicant in legal matters arising from her involvement in the Freedom Convoy.

On June 21, 2022, Detective Chris Benson of the Ottawa Police Service became aware of images of the applicant posted on social media that caused him to commence an investigation into a potential breach of her conditions. He ultimately located a photo on social media purporting to show the applicant together with Mr. Tom Marazzo at the event on June 16, 2022 and a video of the applicant's acceptance speech at the ceremony.

The video showed Mr. Marazzo seated at the same table as Ms. Lich and immediately following the speech the applicant is shown to return to her table where she starts to walk around the table back to her seat where she is greeted first by Maxime Bernier, then by a woman seated next to Mr. Bernier, then seated next to that woman is Mr. Marazzo who, when as the applicant passes by his seat, Ms. Lich is seen to pass by Mr. Marazzo, touch him on the back, then whisper something in his ear. The whole exchange lasts less than three seconds. Asked about who was at the applicant's table at the event, Det. Benson noted "from the people I could identify" and indicated Maxime Bernier, a "blonde female" that the officer believed to be Maxime Bernier's spouse, Tom Marazzo, the applicant's spouse, and Rex Murphy. Det. Benson acknowledged he had "no idea" what the planning for the event was, when it came to populating the head table. He acknowledged that he didn't know if there were other people at the table, but pointed out some other people who he could not identify where it was not clear to him whether or not they were at the applicant's table. Det. Benson also indicated with respect to the photograph "I don't believe there's any counsel, to my knowledge, and there's no counsel that – that you had previously asked me about in

this photograph". He acknowledged that there was no evidence of any communication between Mr. Marazzo and Ms. Lich before, during, or after the photograph.

Det. Benson reviewed the applicant's speech "several times" and didn't note anything else that was in some way in violation of the other conditions. He confirmed that he did not have any evidence of any other breaches of any of the applicant's other conditions. With respect to the Justice Centre, who was putting on the event, he acknowledged "I'm sure there's a lot of lawyers, but I do not know who they are". He also acknowledged that he knew that Mr. Wilson, a lawyer with the Justice Centre, was representing the applicant, but also acknowledged "I do not know where Mr. Wilson was".

Det. Benson obtained an arrest warrant from Justice of the Peace St-Jean on June 22, 2022, which could only be executed in the province of Ontario. Justice of the Peace St-Jean endorsed the warrant authorizing the release of the applicant by a peace officer pursuant to section 499 of the *Criminal Code.* On June 24, 2022 Det. Benson received approval from Ottawa Crown Attorney, Brian Holowka, who gave approval to extend the warrant to Canada-wide status so as to be able to arrest the applicant in Alberta. On June 27, 2022, having not yet obtained a valid warrant that could be executed in Alberta, the applicant was arrested by police. On June 28, 2022, the Crown in Alberta sought and obtained a six day remand to enable police in Ontario to get the warrant endorsed for arrest in Alberta. Two investigators in the homicide unit with the Ottawa Police Service, travelled to Alberta to execute the warrant once it had been endorsed for execution in Alberta and returned the applicant to Ontario.

At the bail hearing before Justice of the Peace Harris, the surety testified that she had become aware of the photograph in question on June 17, 2022 when it had been shown to her by the applicant, and it had raised concerns for her because she knew that Ms. Lich was not to communicate with Tom Marazzo. In response to that concern, she indicated that she called Ms. Lich immediately and questioned her as to who was in the picture and if lawyers were present. The applicant assured her that lawyers had approved of the picture and were just off camera and that the surety believed one of the people in the picture was a lawyer. The applicant had told her that she had been seated at the same table as Tom Marazzo on June 19th.

Legal Principles:

[19] It is well-settled that the approach to a bail review under ss. 520 or 521 of the *Criminal Code* has been revamped since the release of the Supreme Court of Canada's seminal decision in *R. v. St-Cloud,* 2015 SCC 27*,* [2015] 2 S.C.R. 328.

[20] In *St-Cloud*, at paras. 120-121, the Supreme Court explained that, under s. 520 of the *Code*, the reviewing judge does not have an open-ended power to review the initial order respecting the detention or release of an accused. It will be appropriate for the reviewing judge to intervene if: (1) the justice has erred in law; (2) the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another; or (3) new evidence is tendered that shows a material and relevant change in the circumstances of the case.

[21] In accordance with the secondary ground, detention is justified where it is necessary for the protection or safety of the public having regard to all of the circumstances. It has been settled that in dealing with the secondary ground, the danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for detention. Appellate courts have held that, in general, society does not countenance preventative detention of individuals simply because they have a proclivity to commit crime: *R. v. Morales,* [1992] 3 S.C.R. 711, at p. 32.

[22] The authorities provide that the fundamental rights of an accused require that the Justice of the Peace or judge ensure that interim detention is truly justified having regard to all of the relevant circumstances of the specific case. It bears repeating that bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice

while on bail. Bail is denied only for those who pose a “substantial risk” of committing an offence or interfering with the administration of justice. Moreover, detention is justified only when it is “necessary” for public safety.

[23] The Supreme Court of Canada in *St.-Cloud* provided fresh insights respecting the tertiary ground for detention. The application of this ground of detention is not limited to exceptional circumstances, to unexplainable crimes or to certain classes of crimes. There is no requirement that the provision is to be interpreted narrowly or sparingly applied. To answer this question, a court must adopt the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a person versed in law or the subtleties of the various defences that are available to the accused.

[24] The application of s. 515(10)(*c*) is not limited to exceptional circumstances, to “unexplainable” crimes or to certain types of crimes. The Crown can rely on s. 515(10)(*c*) for any type of crime. The question is whether the detention or release of the accused is justified to maintain confidence in the administration of justice.

[25] As mentioned, “public" in this context consists of someone who is thoughtful and who is not prone to emotional reactions. This person ought to be aware of the importance of the presumption of innocence and the right to liberty unless just cause be shown for detention.

[26] This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders

detention where detention is not justified. The Supreme Court also pointed out that public fear and concern about safety, although relevant, are not the exclusive considerations in assessing the public's confidence in the administration of justice: see *St.-Cloud*, at para. 73, citing *R. v. Mordue* (2006), 223 C.C.C. (3d) 407 (Ont. C.A.), at paras. 23-25.

[27] Section 515(10)(c) provides that: Detention is justified where it is necessary to maintain [public] confidence in the administration of justice, having regard to all of the circumstances, including: The apparent strength of the prosecution's case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[28] The aforementioned four circumstances listed in the *Criminal Code* are not exhaustive. A court need not necessarily order detention even in situations where the four listed circumstances support this result. Rather, the court must instead consider the totality of the circumstances of each case, paying particular attention to the enumerated factors to determine whether detention is justified: *St- Cloud,* paras. 68 and 69.

[29] It is also now well established that jurists must consider the least intrusive approach for bail and release terms as directed by the Supreme Court of Canada in *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509.

The Application of Legal Principles to this Case:

[30] My role or function in this bail review is not just a matter of substituting my opinion for that of the show cause justice, for that is not permitted.

[31] In *R. v. Morrissey*, (1995), 22 O.R. (3d) 514, (C.A.), Doherty J.A. explained what the phrase “misapprehension of the evidence” means, at p. 538:

> A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence.

[32] Courts are required to give reasons that deal with and resolve the live issues in the case. The principles at play are fully discussed by Charron J. in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 24:

> In *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, the court confirmed that courts have a duty to give reasons. Reasons serve many purposes; in particular, they explain the court's disposition of the case and facilitate appellate review of findings made at trial. The content of the duty will, of course, depend upon the exigencies of the case. As this Court has noted, "the requirement of reasons is tied to their purpose and the purpose varies with the context" (*Sheppard*, at para. 24).

[33] Of course, we are dealing with reasons provided by a Justice of the Peace at a show cause hearing. For the most part, this branch of the Ontario Court of Justice comprising of Justices of the Peace is a lay bench. While this was not a typical show cause hearing, I am mindful of the busy bail courts in Ottawa and the time constraints placed upon judicial officers. To address the reality of that tangible, Hill J. in *R. v. Brooks* (2001), 153 C.C.C. (3d) 533 (Ont. S.C.), stated:

> [While] the judicial official presiding in a busy bail court.. in providing reasons for detention [in that case] need [not] deliver breathless prose or slavishly track the wording of one or more of the paragraphs of s. 515(10) of the *Code*. However, the text of the reasons must, in some

> meaningful and coherent fashion, expose analysis related to the primary, secondary or tertiary grounds described in that statutory provision.

[34] The *Sheppard* case instructs courts to adopt a functional approach to reviewing the sufficiency of reasons. The inquiry should not be conducted in the abstract, but instead should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel: See also *R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32.

[35] I do not wish to overemphasize the requirement for prolix prose, or reasons, for the sake of providing reasons; however, it is expected that a Justice of the Peace's conclusions or justification for the detention of an individual will be reflected in the reasons. Indeed, this decision is not to be taken as setting any threshold or floor for the delivery of reasons. Much of these guidelines and principles have been amply articulated by the appellate courts. The judicial officer need not slavishly discuss every piece of testimony that comes before him or her. Nor is it necessary to reflect upon, recount or recite all of the evidence. However, there has to be some link and analysis to the evidence in order to support the conclusions. In sum, some cogent and reasoned analysis of the evidence is required to support the findings. This is not only necessary for a potential review, but also serves the interests of the parties and the administration of justice.

[36] In *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010) the author noted that the purpose of the bail hearing is to apply the criteria in s. 515(10) to the facts of the particular case. To do so, the justice or judge will require information about the allegations, as well as information about the accused,

sureties and his, her or their personal circumstances. All questions of relevance may be tested by considering the proffered evidence in light of these substantive areas. The author further comments at §5:20:

> [I]t is apparent that the scope of inquiry at a bail hearing is much more far-reaching than any other type of criminal proceeding. The trial, of course, usually focuses on the binary issue of guilt or innocence. Rules of evidence have developed to ensure that this determination is done fairly and in accordance with Charter values. At a bail hearing, the court is required to make a prediction about the accused person's future conduct, as well as the impact of a decision to release on public confidence in the justice system. The assessment is based upon what the accused is alleged to have done, along with information about the accused person's social circumstances and character. Subject to rules of admissibility (discussed below), anything that sheds light on these issues is relevant at a bail hearing. Consequently, evidence may be led that would not be relevant and admissible at a trial… Of course, merely because evidence may fall into one of these categories does not necessarily mean that it must be received. The quality of the evidence and its relation to a live [issue] at the bail hearing must be considered in determining whether it is admissible, and how much weight (if any) it should be afforded.

[37] It is trite law that s. 518(1) of the *Criminal Code* also confers broad discretionary powers on the justice conducting a bail hearing. For example, the justice may make "inquiries, on oath or otherwise" (s. 518(1)(a)), take into consideration "any relevant matters agreed on" by counsel (s. 518(1)(d)), and "receive and base his decision on evidence considered credible and trustworthy by him in the circumstances of each case" (s. 518(1)(e)). Some of the provisions in s. 518(1) pertain to relevance, while others deal with admissibility. Collectively, the subsections give broad discretion as to what kind of evidence may be adduced by the parties.

Alleged Errors on the Face of the Record:

[38] Justice of the Peace Harris' analysis and reasons are detailed in 29 pages of transcript.

The Application of the Onus in Assessing Apparent Strength of the Crown's case:

[39] The applicant contends that the Justice of the Peace conflated the onus on a bail hearing with the onus at trial. When examining the clause related to the non-contact provision with certain persons, it stipulates exceptions that include "in the presence of counsel".

[40] During the course of submissions, the Justice of the Peace inquired of the defence "do you have any testimony from any lawyers to say that they were at the table or that they were in the vicinity at the time of the photo?" When his attention was drawn to the surety's statements attributed to the applicant, the Justice of the Peace responded: "But the concern I have here…this is a bail hearing…We're talking about matters which relate to Ms. Lich's potential release on bail…We're not talking about a trial down the road…So, I-I mean it's a reverse onus. It's up to Ms. Lich to be able to show the court, or sorry, to support her statement…that, as you've stated, there were lawyers present." He determined that there was "no verifiable evidence in the form of attestations, affirmations, or direct testimony" tendered "to confirm the presence of legal counsel".

[41] While there was a reverse onus at the bail hearing to justify release, any assessment of the apparent strength of the Crown's case is necessarily an assessment of the relevant strength of the prosecution's case for trial. With respect, I must disagree with Mr. Karimjee's position regarding the burden of evidential proof imposed on an accused and his suggested inferences to be drawn from *Morales* and other authorities. At a show cause hearing there

is no onus on the applicant to negate the strength of the Crown's case or as stated by the Justice of the Peace, "to support her statement".

[42] As the Supreme Court of Canada noted in *St-Cloud*, the justice at a bail hearing "must also consider any defence raised by the accused": at para 59. The Supreme Court noted that the accused would "most likely not" raise such a defence at the initial bail hearing, but "if there appears to be some basis for the defence" the justice must take this into account when assessing the apparent strength of the Crown's case. As the Supreme Court observed "it would be unfair to allow the prosecution to state its case if the justice is not in a position to consider not only the weaknesses of that case, but also the defences it suggests": at para 59, citing *R. v. Coates*, 2010 QCCA 919.

[43] The police investigation had not identified everyone in the alleged offending photo, nor conclusively identified membership at the applicant's table. There was the suggestion that there were "a lot" of lawyers with the Justice Centre, but didn't know who they are or where they were situated at the relevant time. The surety had attributed a statement to the applicant to the effect of specifically invoking a claim that counsel were, in fact, present.

[44] While the sole statement providing positive support for the presence of counsel was in hearsay form, which is admissible at a bail hearing, the circumstantial evidence suggests such a statement could be capable of belief at trial. The evidence gathered by the police is not entirely inconsistent with the applicant's claims that counsel were present. The applicant's surety, provides some circumstantial and trustworthy evidence that the applicant subjectively believed she had not breached her conditions. This was followed up by an immediate call and questions from the surety to Ms. Lich.

[45] It seems that the Justice of the Peace failed to fully assess and weigh the defence position in assessing the apparent strength of the Crown's case, owing to his belief that on a reverse onus bail hearing, the applicant was required to provide further "support" for her statement invoking the defence.

[46] Without descending into the abyss of speculation, there was an air of reality that legal counsel may have been in close proximity or at least present during Ms. Lich's alleged contact and communications with Mr. Marazzo.

[47] It is legal error for the Justice of the Peace to sustain the notion that the applicant was under an evidentiary onus at the bail hearing to provide confirmatory evidence regarding the strength of the Crown's case.

The Interpretation of the Release Order Condition as Drafted:

[48] I agree with the applicant that the Justice of the Peace compounded this aforementioned error by misapprehending the evidence and failing to apply the necessary legal standards applicable to proof of a breach of a term of a release order. This is aptly illustrated through the Justice of the Peace's comment that it is "a faulty argument" or "it is absolutely ridiculous to think that the intention of the court-ordered condition not to communicate and to have no contact could be superseded simply by your lawyer's presence".

[49] As mentioned, the specific condition in the release order prohibited contact or communication "except in the presence of counsel". The release condition was without qualification or limitation and required nothing further of the applicant. Whether or not its intent or spirit was, as described by the Justice of the Peace, "except when in the process of preparing a defence or

responding to the charges they face", is not sustainable in considering the broad language and strict interpretation of the impugned clause.

[50] Where there may be ambiguity, and in accordance with statutory interpretation principles, the strict wording of the release condition must be adopted. While not on all fours, by analogy, this principle is referred to in the case of *R. v. S.A.C.,* 2008 SCC 47 at paras. 30-31.

[51] Nonetheless, this approach is consistent with the principles of fairness that where the liberty of the subject is at stake, any provision advanced as a basis to limit the liberty of the accused must be strictly construed against the state. Rather than expressing that the defence position being "absolutely ridiculous", any doubt as to whether any communication or contact happened "in the presence of counsel" would be a full defence to the breach charge.

[52] Thus, properly considered, the claim that counsel were present was not "absolutely ridiculous" or a "misguided excuse" as characterized by the Justice of the Peace. Moreover, my reading of the transcripts tends to suggest that the Justice of the Peace may have proceeded to demean the arguments advanced by defence counsel.

[53] Even if the Justice of the Peace was correct in law that the subject condition must be interpreted according to the original intent behind it, he failed to consider that such an interpretation would almost inevitably and necessarily create a considerable *mens rea* problem. It is settled law that a breach under s. 145 of the *Code* requires subjective knowledge, willful blindness or recklessness: *R. v. Zora*, 2020 SCC 14. I am not persuaded that the case of *R. v. McCaffrey*, 2020 O.J. No. 5148 (S.C.) at para. 22, assists the Crown.

It speaks only to the issue of the legal scope or effect of a condition and a mistake of law and not to the specific issues raised here.

[54] In order to convict on a breach, an accused must know what the condition is that they are subject to at the time of the conduct that is alleged to be a breach. In this case, the applicant would have needed to know at that time that she was subject to a condition that was different from the wording on the release order. The Crown would be required to establish that the applicant knew or was reckless to the fact that she was subject to a more preventative or restrictive condition than what the condition itself said on its face of the order.

[55] In this case, the plain language reading of the condition permitted contact and communication with certain named persons, including Mr. Marazzo, so long as it took place in the presence of counsel. Period. The police and Crown were aware that Ms. Lich would be attending the gala event sponsored by the Justice Centre for Constitutional Freedoms. With respect, in my view, the Justice of the Peace overemphasized its scope and effect.

<u>The Change in Circumstances Since the February Arrest:</u>

[56] While the Justice of the Peace properly identified a number of circumstances that he needed to consider in relation to the secondary grounds and the tertiary grounds, it appears that he did not conduct a critical analysis of many of the relevant circumstances that had changed since the applicant's initial arrest in February.

[57] Phillips J. identified a number of changed circumstances since that time that, in his view, had they been known to Bourgeois J., would have led her to a

different conclusion. It seems to me that had these circumstances been considered by the Justice of the Peace, they would have resulted in a different conclusion. They include findings made by Phillips J. to the effect that: the Freedom Convoy was now "over and has left town"; that it would be "practically impossible" to mount a comparable protest in Ottawa again; the applicant had stayed off of social media since her release; the circumstances of the pandemic and the governments' approach had meaningfully changed. He also stated: "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".

[58] The Justice of the Peace ought to have noted Phillips J.'s observation that the purpose of the bail release plan was to adequately reduce the risk of a repetition of conduct similar to that which lead to the charges in February.

[59] To the contrary, rather than focus on any present risk posed by the applicant herself as a result of the breach and on a s. 524 analysis, the Justice of the Peace made the assertion that the applicant "continues to pose a risk for the protection and safety of the public" noting "freedom protests continue here in the nation's capitol [sic], and I'm sure throughout other cities in Canada" without relating these observations to any potential risk posed by the applicant and, in particular, by her release.

[60] Even with the fresh evidence adduced by the Crown, this conclusion was not temporally linked to current circumstances that brought the applicant back to a show cause hearing. The Justice of the Peace's apparent focus

on item #17 did not change that reality. I will speak more about this momentarily.

Addressing the Secondary Ground:

[61] As mentioned earlier, in *Morales*, the Supreme Court of Canada made clear that the danger or likelihood of committing a criminal offence alone does not provide just cause for detention. What will justify detention on the secondary grounds is where detention is necessary due to a substantial likelihood, not just that the applicant would re-offend, but would re-offend in a manner that would endanger the protection or safety of the public. While reference is made to the relevant case law, the Justice of the Peace does not appear to have addressed this important distinction.

[62] Given that the applicant has no criminal record, is charged with entirely non-violent offences, and the new allegation of breach does not implicate the protection and safety of the public, rather than addressing the alleged breach as “flagrant”, the Justice of the Peace needed to grapple with the circumstances of the offender and a question of how detention could be justified related to the fundamental principles under s. 515(10)(b) and the related jurisprudence.

[63] Contrary to the Justice of the Peace’s conclusion that the applicant “is not prepared to follow court orders, and is prepared to do whatever she feels like doing”, at the time of her June arrest, the applicant had developed a track record with this surety, avoiding the repetition of the sort of conduct that had justified the conditions that were imposed. There was no evidence of the applicant engaging in any conduct giving rise to the breach that could endanger the protection or safety of the public.

[64] Moreover, the potential for interference with the administration of justice does not arise in the circumstances of this case. Whether or not the Justice of the Peace referred to Mr. Marazzo as a “co-accused” is of no moment. However, aside from conclusory comments, there is no factual basis upon which to assert that the transient contact with Mr. Marazzo or reference to item 17 along with other evidence advanced at the bail hearing could have posed any interference with the administration of justice.

Addressing the Tertiary Ground:

[65] The Justice of the Peace focused his analysis under the tertiary grounds on a belief that the new evidence in item #17 was of some import. He accepted the Crown’s submissions regarding Ms. Lich’s leadership role with the emphasis on item 17 in order to substantiate the strength of the Crown’s case.

[66] The Justice of the Peace asserted “In light of the so-called new evidence also provided in the text messages in item #17, Ms. Lich has revealed herself as one of the leaders of the trucker protest, and her inculpatory statements about not wanting to make a decision about gridlock in the nation’s capital”.

[67] While the Justice of the Peace is entitled to take the Crown’s case at its highest, in my view, he appeared to have overemphasized the import of item 17 as it did not “reveal” Ms. Lich to be a leader by virtue of the new text message and related evidence.

[68] Clearly, even with the suggestion of “gridlock”, this is not new, late-breaking evidence to sustain that notion. The defence all but concedes that there was already ample evidence of her leadership role, which was considered and

acknowledged by the prior bail judges and reviewing courts. Judicial notice can be taken that, for three weeks, the streets of Ottawa were indeed in some degree of gridlock. Indeed, while acknowledging that the item 17 text message is dated, in addressing the strength of the Crown's case in relation to both the secondary and tertiary ground, the Justice of the Peace appeared to overemphasize this piece of evidence. In fact, the text exchange in item #17 was repeatedly cited at least 11 times throughout the ruling.

[69] Significantly, the Justice of the Peace then goes on to address Ms. Lich's potential for a lengthy term of imprisonment with some discussion about terminology. During his analysis, he determined that the applicant faced a potential term of imprisonment, up to 10 years for the mischief-related offences with a reference to a three-year jail term as asserted by the Crown attorney.

[70] Pursuant to s. 515(10)(c), this enumerated factor relates to the potential sentence the accused faces upon conviction for the offence. There is no strict rule regarding what constitutes a 'lengthy term' of imprisonment, and the justice presiding at the bail stage should resist the temptation to engage in a complex exercise of calculating an anticipated sentence. Rather, the court must consider all the circumstances of the case as known at the time of the bail hearing and reflect, in general terms, on the potential for a lengthy sentence: *St. Cloud*, at paras. 63-65.

[71] In fairness, the Justice of the Peace is nether expected to know the intricacies of the sentencing regime in the *Criminal Code* nor the authorities surrounding the disposition of various offences. I appreciate that Justice of the Peace Harris may not be legally trained or well versed in the

jurisprudence related to indictable or hybrid offences, and cannot be held to the same standard as a judge on points of law. However, given that the lynchpin of the reasons under the tertiary ground was premised on the gravity of the offence and the Crown's argument about the potential for a lengthy term of imprisonment, and having turned his mind to the issue, some focused questions ought to have been posed, or at least some analysis undertaken. The defence challenged the Crown with respect to the potential for significant term of imprisonment. As such, this warranted more than just accepting the Crown's submissions as gospel.

[72] There is indeed a maximum available potential sentence. There is also the judicious consideration of the reality and reasonableness for a potential sentence for all offences in the *Criminal Code*. Had there been some limited, albeit focused questioning in this regard, the Justice of the Peace would have likely learned that the "potential" for a sentence for mischief over $5000, intimidation or obstruct police officer and related charges did not warrant the bald assertions advanced by the Crown attorney.

[73] The Crown ought to have alerted the Justice of the Peace that the potential for a lengthy sentence may also be tempered by principles that implicate the nature of the offence, the degree of participation and culpability of the offender with considerations of the personal circumstances of the offender.

[74] Ever mindful of my limited role and that this is a bail review, whether as a principal actor or counselling an offence, no case in Canada in the past 25 years has even come close to the Crown's assertions of a maximum sentence of 10 years for mischief over $5000, or even a penitentiary

sentence for that matter; either on stand-alone basis or premised on the sentencing principle of totality.

[75] The only isolated exception is the case of *R. v. Dube*, 2018 QCCQ 9059, involving destruction to the Hydro-Quebec grid, distinguishable on its facts.[1]

[76] Similarly, no case in Canada has come remotely close to the maximum sentence of five years for the offence of Intimidation.

[77] With respect, the Crown attorney appears to conflate his argument of Ms. Lich's counselling, organizing or perhaps directing the events related to the tumultuous protests and gridlock that adversely effected the citizens of Ottawa and required significant policing intervention with being a principal or counselling for the predicate charges she now faces.

[78] Of course, I am not alone in this assessment. My colleague, Johnston J. noted that, in his view, without proof of these more aggravating elements, a conviction would not have the potential for a lengthy term of imprisonment. Johnson J. ultimately concluded it was "very doubtful" that the applicant would face a penitentiary sentence in this case, with all of the circumstances taken into consideration. Philips J. seemed to share a similar view.

[79] I agree that in failing to undertake any critical analysis of the Crown attorney's potential 10-year imprisonment claim, even briefly, the Justice of

[1] Dube did not have a formal criminal record but had been involved with the police with prior violent acts and demonstrated disrespect for authority. Dube had planned and directly caused the wanton, extensive destruction to the Hydro-Quebec power network impacting a significant segment of the population. Damages to the grid and to Hydro-Quebec exceeding $29 million. This exceptional case is the high water mark with a jail sentence imposed of seven years and the seizure of an airplane. Dube was also charged and convicted with two counts of criminal harassment and four counts of arson on a separate occasion. He then tried to appeal these convictions, and also asked for the second sentence to be served consecutively with the mischief sentence. The Court of Appeal rejected all of his appeals.

the Peace committed the very same error identified by Johnston J. in his ruling on this very point.

[80] While I need not go further, for the sake of completeness, I am persuaded that the Justice of the Peace's decision contains statements that are neither supported by the evidence, nor inherently reasonable.

[81] For example, the Justice of the Peace characterizes the Freedom Award as being "undoubtably in support of her actions at the February gridlock siege of the nation's capital in Ottawa". This was somewhat speculative. While it would be a reasonable inference that the applicant was presented the award, at least in part, in relation to her participation in relation to the Freedom Convoy, the Justice of the Peace's reasons suggest he has concluded that the award was in essence a glorification of criminal conduct. The evidence leaves unclear what aspects of the applicant's involvement in the Freedom Convoy formed the basis for the award. It may also be considered as an indirect attack on the order granting permission to attend such an event issued by the Superior Court.

[82] Most significantly, the Justice of the Peace asserts "Ms. Lich's involvement, in this court's opinion, continues to pose a risk for the protection and safety of the public". The Justice of the Peace cited the applicant's purported contact with Mr. Marazzo and the circumstances surrounding the awards ceremony and asserts that "such actions most certainly erode the public's confidence in the administration of justice". I agree with the applicant that these assertions are conclusory. The analysis fails to identify what about this alleged breach distinguishes this statement from a general assertion that all breaches tend to erode public confidence. It also neglects to consider how

the breach is rationally connected to the terms imposed by Phillips J. in the circumstances of this case.

[83] Finally, the Justice of the Peace asserts that the “vulnerable victims of the February freedom trucker convoy protest undoubtedly will continue to fear a re-occurrence of the protests if persons such as Ms. Lich and Mr. Marazzo are allowed to continue to communicate and socialize in whatever way they deem legitimate”. I am persuaded that he may have overstated the effect of such contact. There was no evidence of such fear, either directly or circumstantially, linked to the alleged breach at the gala event. It is not reasonable to draw the inference that an interaction of less than three seconds in public at an awards ceremony as well as a group photograph and related, albeit brief contact giving rise to the potential for a breach of terms would reasonably cause such fear.

[84] How the events can properly be characterized, and whether or not the applicant participated in any criminal conduct will ultimately fall to be decided by a trial court.

[85] In sum, I am satisfied that the applicant has met her onus. With respect, I find that the Justice of the Peace’s reasons suffer from erroneous conclusions of the relevant legal issues and he misapprehended the evidence when addressing the secondary and tertiary ground concerns.

[86] As the Justice of the Peace’s decision is clearly inappropriate, the detention order must be set aside.

[87] I am prepared to assess the volume of evidence previously filed before Johnston and Phillips JJ. This will include the limited right of cross-

examination of the applicant and the surety as requested by the Crown, in order to engage in an assessment as to whether the applicant has shown cause for release in accordance with ss. 520(7) and 515(10) of the *Code.*

Bail Hearing *de novo:*

[88] The applicant bears the onus to show cause why she should not be detained on the secondary and tertiary ground. The Crown does not allege any concerns on the primary ground.

The Plan for Release:

[89] Turning to the plan itself, the applicant proposes supervision similar to that presented at the show cause hearing and the prior bail reviews before Johnson and Phillips JJ. The applicant says that she has shown cause why she should be granted release on similar terms imposed by this court.

[90] The Crown submits that, according to the evidence presented, there is a substantial risk that the applicant would continue to commit offences if released on bail. The applicant cannot be trusted and her direct involvement and leadership to gridlock the city establishes the Crown's concerns.

[91] The Crown contends that there is simply no reason to believe that the applicant or the proposed surety and plan can sufficiently mitigate the public safety risk, and would jeopardize the public's confidence in the administration of justice. There is evidence supporting the fear of re-occurrence and the applicant has not addressed her onus as nothing new has been provided since the bail hearing.

Analysis:

[92] The questions to be posed are whether there is a substantial likelihood that the applicant, if released, would commit further offences, or put the safety of the public at risk or interfere with the administration of justice? Is the applicant's detention justified to maintain confidence in the administration of justice? I am cognizant of para. 63 of *Morales,* that is wholly applicable in this case.

[93] My review of the extensive evidence involves consideration of the applicant's background, the named surety as presented, with the overall plan being proposed, along with the nature of the current charges, the strength of the Crown's case and other factors raised by the Crown and defence. There is no doubt that Mr. Karimjee is passionate about the case and forcefully represents the Crown's interests on behalf of the community.

Secondary Ground:

[94] The jurisprudence has clearly established that the strength of the Crown's case is applicable to the three grounds enumerated in s. 515 of the *Code.* The case of *St.-Cloud* makes it clear that in considering whether or not a person's release is justified, "the justice must determine the apparent strength of the prosecution's case: at para. 58. The court noted that "the justice who presides at that hearing must consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this factor in his or her balancing exercise".

[95] However, as the Supreme Court of Canada cautioned in *St.-Cloud*, "the justice must be careful not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing" (at para. 58).

[96] I have already related the evidence to some of the issues before the Justice of the Peace and expressed my opinion on those factors as they relate to the secondary ground. Those comments remain applicable here.

[97] The likelihood of a re-occurrence and substantial risk and endangerment to the community remains low and is attenuated by the evidence and the corresponding submissions of counsel.

[98] There were also a number of accused persons implicated in the events. Some of the alleged crimes, which occurred inside the protest zone, went far beyond simply blocking streets and bridges. The honking of truck horns, the train horns, are another aspect to the allegations, that in my view, are aggravating to the charge of mischief but its nexus to this accused will be the challenge for trial. I say this even with the emphasis raised by the Crown as demonstrated in item 17, attributing to the notion of gridlocking the city.

[99] While on release, there has been strict compliance with the terms of bail, save the contact with Mr. Marazzo at the gala. While Ms. Lich must recognize that terms of bail are non-negotiable, arguably, the breach in the circumstances of this case is tenuous and will, no doubt, be the subject of challenge at trial. Can it not be said that the breach itself was incidental to the underlying event that gave rise to its genesis? There remains a very live question as to whether there has been a breach of the release order at all.

[100] Aside from the impugned breach at the gala event, the evidence is that the applicant has fully complied with her conditions for a period of nearly four months including the prohibition from using social media and the prohibition on organizing any further protests. When she sought to expand her

activities, rather than simply ignore her conditions, she sought and obtained a variation to her conditions through the court.

[101] I am persuaded from the evidence that the surety actively monitored Ms. Lich and took her responsibilities seriously. In fact, the surety did her job by promptly questioning the applicant and, upon receiving exculpatory answers that accorded with common sense based on the information known, taking no further steps. There is no suggesting that this breach endangered the protection or safety of the public. This bodes well for compliance and reduces the risks of re-offending under the secondary ground.

Tertiary Ground:

Apparent Strength of the Prosecution's Case:

[102] For the tertiary ground, after balancing all of the relevant considerations, the ultimate question is whether detention is necessary to maintain confidence in the administration of justice. This exercise requires examination of all the relevant factors as they relate to this accused and whether her detention or release would bring the justice system into disrepute. In other words, if an accused is released, the accused person's release plan must be relevant to whether public confidence in the administration of justice is capable of being maintained: *R. v. B.(A.)* (2006), 204 C.C.C. (3d) 490 (Ont. S.C.), at p. 501.

[103] As mentioned, the four circumstances listed in s. 515(10)(c) are not exhaustive. The satisfaction of the four circumstances enumerated in the section does not lead to the automatic detention. Detention is only necessary to maintain the public's confidence in the administration of justice having regard to all the circumstances of the case.

[104] The apparent strength of the case against an accused may often be difficult to assess at the early stage of the proceedings when bail is often addressed. A Court must look at the quality of the evidence in order to determine what weight will be given to that evidence. This includes considering the defence raised by the accused: *St.-Cloud,* at paras. 57-59.

[105] Two justices of the peace opined that the Crown's case was strong. However, two Superior Court colleagues have made findings that the case for the Crown is subject to certain challenges. I share that view. The prosecution's case regarding the predicate offences cannot be considered as strong, albeit it may be persuasive at trial.

The Circumstances Surrounding the Offence:

[106] On the facts as alleged by the prosecution, there is evidence which, if accepted, points to Ms. Lich's leadership role and planning for the underlying conduct giving rise to the charges. However, what brings her back to court is the alleged breach of terms. I note the comments of Phillips J. at para. 13:

> …. 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.

[107] As mentioned, while it is for a trial court to eventually determine the outcome of these charges, in the context of this bail review and the alleged breach of the impugned release terms, it seems to me that the Crown will have a hurdle to establish the *mens rea* element of the alleged breach, even if the wording of the release order as it pertains to “in the presence of counsel” is subject to interpretation.

[108] Ms. Lich is 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 persons in a crowd of thousands.

[109] The Supreme Court also pointed out that fear and concern about safety, although relevant, are not the exclusive considerations in assessing the public's confidence in the administration of justice: *St.-Cloud*, at para. 73.

[110] How then would a thoughtful person, who is reasonable and well informed, react to the release of Ms. Lich, given the circumstances of this case?

[111] This involves a balancing process. At the end of this exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice.

[112] Of import, is s. 11(d) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), which provides that an accused person has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Section 11(e) of the *Charter* gives every person charged with a criminal offence the right not to be denied reasonable bail without just cause

[113] Section 7 of the *Charter* grants an accused person the right not to be deprived of her liberty or security except in accordance with the principles of fundamental justice.

[114] In this case, the court's role under a bail review is to consider whether there is a plan to control conduct to the extent that certain behavior will violate or likely lead to violation of the law. It is clear that the objective in this case is to keep a highly problematic street protest from reviving or re-occurring.

[115] There are, no doubt, divergent social, public interest and political views held by individuals on both sides of the equation in relation to the actions and consequences arising from the Freedom Convoy's occupation of the downtown core of Ottawa. Reasonable people have the right to disagree in expressing their opinions.

[116] Fundamentally, Ms. Lich is charged with mischief and obstructing police-related offences, not sedition or inciting a riot. While the impact of the February events both in Ottawa, and elsewhere may be of national import and tumultuous and was more than just a mere nuisance for those impacted by the ubiquitous acts of the protesters, the charges here related to what are commonly referred to as minor offences in the *Criminal Code*. While the Crown emphasized the nature of the occupations and its impact, which is reasonable, most of the allegations, whether counselling or acting as a principal or otherwise under s. 21 of the *Code*, does not sustain the proffered suggestion of a potential lengthy sentence. I have already referenced the sentencing ranges. It bears repeating that a trial judge will have to consider not only the offence but the degree of culpability of the offender with the circumstances of the offender. As mentioned by my colleagues, I opine that

it is highly unlikely that this 49 year old accused, with no prior criminal record and questions regarding her direct participation in the overall protests and gridlock of the city, would face a potential lengthy term of imprisonment.

[117] I tend to agree with the applicant that taking the Crown's case at its very highest, the reality is that the applicant would spend very little additional time (if any) in custody than she has already served. Again, I say this only in respect of my overall analysis for this bail review. However, it is important to stress that my opinion is not to be construed as any direction to a lower court as to the proper disposition of the case or as precedent for sentencing principles. My comments are directed only at my specific task to consider and assess the relevant tertiary ground factors.

[118] Counsel are well aware that accused persons facing more serious indictable offences - and with breaches of release terms, are often granted a further opportunity for judicial interim release. On the other hand, the courts do not sanction a revolving door policy whereby accused persons who commit serious breaches of court orders can expect to be continually released.

[119] The fundamental criteria for pre-trial release or detention relates to the specific accused person and the presumption of innocence as well as the constitutional right to reasonable bail.

[120] Perhaps I cannot say it any better than my colleague, Phillips J. expressed at paras. 14 and 20 of his ruling:

> 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?
>
> 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.

[121] Nothing in these reasons is intended to minimize the harm done to the citizens of Ottawa, the various levels of government or related financial and resourcing costs. Indeed, the nuisance and disturbance by the participants, organizers and persons known and unknown related to the extended protests in February 2022, on the citizens of Ottawa, cannot be understated or condoned. I take judicial notice that are many persons both in Ottawa and elsewhere, who take issue with the actions of those involved in the protest and who are upset about the Freedom movement and disagree with their message and *modus operandi*. Some of this angst may be directed to Ms. Lich as one of the purported leaders.

[122] However, the bail process is not the forum to address the myriad of opinion or issues arising from Ms. Lich's or the Freedom Convoy's disruption of the public peace or behaviour or to advance a political or social position one way or the other. I also agree with Phillips J. that no court would ever seek to control the possession or manifestation of political views.

[123] So what is the bottom line? This court's role under a bail review is to consider whether there is a plan to control conduct to the extent that certain behavior will not likely lead to violations of the law. It is clear that the objective for this bail hearing is to keep a highly problematic street protest from reviving or re-occurring that ended up paralyzing the downtown of the nation's capital for many weeks this past winter.

[124] Fundamentally, I agree with the applicant's submissions that the alleged breach was not rationally connected to the underlying concerns raised by Phillips and Johnson JJ. for the specific terms imposed on the applicant in order to prevent the re-occurrence of the protests. She had satisfied her onus and had been released with a surety by both of my Superior Court colleagues. Notwithstanding, the evidence adduced at this hearing, I accept that the applicant can be trusted to abide by the terms and be supervised by the proposed surety. I say this even with the challenge presented by the Crown with respect to the "freedom pendant" and related questions about the posting of photographs on social media by other individuals. While her appearance before me was brief, I was impressed with the surety's candour in response to questions posed by the Crown attorney. This is consistent with my review of the evidence presented at prior hearings from both the applicant and surety.

[125] Even with the additional evidence of the text message in item 17 regarding the reference to "gridlock", which cannot be condoned, the uncertainty about Ms. Lich's ultimate level of responsibility and culpability makes it a challenge to say that she is so liable on conviction of one or more offences and to be subject to a potentially lengthy period of imprisonment, that detention is necessary to maintain public confidence in the administration of justice.

[126] In my opinion, a reasonable member of the community, informed of the principles of fundamental justice and *Charter* values and who appreciates the presumption of innocence and the constitutional right to reasonable bail would not view Ms. Lich's release with great shock and indignation. The proffered release plan will provide that the risk of re-offence in relation to the essential core of the alleged offences is sufficiently low and public confidence would be maintained in the administration of justice.

Disposition:

[127] I am satisfied on a balance of probabilities that the applicant has discharged her onus to show cause under s. 515(10) of the *Criminal Code* equal to the task of countering the secondary/tertiary ground concerns.

[128] The bail review application is granted. Judicial interim release is ordered on terms to be furnished to the parties in court.

A.J. GOODMAN J.

Date: July 28, 2022

CITATION: R. v. Lich, 2022 ONSC 4390
COURT FILE NO.: CR-22-8171BR
DATE: 2022-07-28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

– and –

TAMARA LICH

RULING ON APPLICATION FOR BAIL REVIEW - SECTION 520 OF THE *CRIMINAL CODE*

A.J. Goodman J.

Released: July 28, 2022