ONTARIO COURT OF JUSTICE

DATE: 2023 07 26
COURT FILE No.: St. Thomas 20-310

B E T W E E N :

MUNICIPALITY OF THE CITY OF ST. THOMAS

— AND —

KIMBERLY NEUDORF

Before Justice of the Peace Anna M. Hampson
Heard on February 14 and March 28, 2023
Reasons for decision on Charter Application released on July 26, 2023

J. Huber..... counsel for the prosecution
S. Kissick and J. Hunter……...co-counsel for the Intervenor, The Attorney General of Ontario, pursuant to Courts of Justice Act, s.109
R. Rumpal……...counsel for the defendant Kimberly Neudorf

JUSTICE OF THE PEACE HAMPSON:

[1] Kimberly Neudorf is charged with attending and hosting outdoor events on October 24, 2020, and November 7, 2020, in Aylmer in contravention of the regulations that were in place at that time under the Reopening of Ontario Act that placed limits on the number of attendees permitted at outdoor events. All of these restrictions and regulations are no longer in effect having been repealed. By way of written reasons release on February 14, 2023, I found that all the essential elements of all 4 offences have been proven. The defendant called these events “peaceful protests”. I found that a “peaceful protest”, “freedom march”, “freedom rally” is a public event as set out in the regulation. I found that the defendant attended at and was the organizer of the public events in Aylmer, Ontario on October 24, 2020, and November 7, 2020, that the there were 25 person

limitations for public outdoor events at the relevant time, and that there were more than 25 people at these events. Estimates for the October 24th event were between 100-300 people. The demonstrators gathered at the bandshell and then walked down the streets of Aylmer. Estimates for the November 7th event were between 1000-1500 people. The demonstrators gathered at the East Elgin Community Center and then walked down the streets of Aylmer causing roads to be closed. Pick up trucks, cars and tractors were also present. Significant additional police resources were required for both events. The defendant provided the routes for the march, advertised the events through various social media, spoke at the events and was fully aware of the gathering limitations in place at the relevant times. The defendant had not established any due diligence defence. I rejected the "officially induced error" argument finding that she was the one who used the words "peaceful protest" and was attempting to get the police to agree with her. The defendant also brought an application under the Charter for a stay of the proceedings due to an alleged breach of s. 2(b): freedom of expression, s. 2(c): freedom of peaceful assembly, and s. 2(d) freedom of peaceful association. The decision whether to stay or enter convictions was deferred until after the evidence, argument, and decision on the Charter application. The onus is on the defendant to establish that her rights have been violated on a balance of probabilities which includes the initial evidentiary burden. If so established, then the onus shifts to the prosecution/intervenor to demonstrate that the infringement was justified pursuant to s. 1 of the Charter.

[2] Ms. Rumpal on behalf of the defendant argues that the defendant's Charter Rights to freedom of expression (s. 2(b)), freedom of peaceful assembly (s. 2(c)) and freedom of peaceful association (s. 2(d)) were all engaged in these public events. She argues that each of these rights were violated by certain provisions of the Reopening of Ontario Act and in particular, regulation 364/20, namely the rules restricting the numbers of people who were allowed to gather at outdoor organized public events. The rules in place at the relevant time restricted the numbers to a maximum of 25 persons (hereinafter called the "gathering restrictions"). The defendant further argues that by applying the analytical framework, the gathering restrictions are not saved by s. 1 of the Charter. The analytical framework is set out in *R v Oakes*, 1986 CanLII 46 [1986] (SCC) 1 SCR 103 (the Oakes test).

[3] Mr. Kissick on behalf of the Intervenor, argues that the defendant has not established that her right to freedom of expression, peaceful assembly, and peaceful association were engaged or violated. He further argues that even if any of her rights were engaged by the outdoor gathering restrictions under the Regulation, no unjustified infringement of the *Charter* has been established. The temporary outdoor gathering restrictions would be justified by the extraordinary public health circumstances of a global pandemic of an infectious deadly disease. He further argues that a deferential approach ought to be taken and that applying

the Oakes test analytical framework, the gathering restrictions are saved by s. 1 of the Charter.

[4] The evidence called on the voir dire on behalf of the defendant, included the defendant's affidavit sworn December 14, 2022, and an affidavit by Dr. Joel Kettner sworn January 10, 2023. The evidence called on behalf of the Intervenor/Prosecution included an affidavit by Officer C. Duckworth sworn January 16, 2023, an affidavit by Inspector N. Novacich sworn January 13, 2023, an affidavit by Officer D. Wikkerink sworn January 13, 2023, an affidavit by Dr. Matthew Hodge affirmed December 13, 2022, and a reply affidavit by Dr. Matthew Hodge affirmed January 17, 2023. Each of the witnesses was also cross-examined viva voce. Dr. Kettner was qualified as an expert in public health and epidemiology. Dr. Hodge was qualified as an expert in public health. I have reviewed the affidavits as well as the transcripts of the cross examination of the defendant and the two experts. I have also reviewed the defendant's Constitutional Question, the defendant's written submissions and the defendant's factum. I have also reviewed the intervenor's written submissions. Brief oral submissions to supplement the written material by both parties were also provided. The material was detailed, thorough and extensive.

[5] On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic as the number of cases outside China rapidly increased. On March 17, 2020, Ontario's Lieutenant Governor in Council declared an emergency pursuant to the provisions of section 7.0.1 of the *Emergency Management and Civil Protection Act* (the "EMCPA"). An "emergency" under the EMCPA is defined in s. 1 as a "situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise." The emergency was declared on the basis that "the outbreak of a communicable disease, namely COVID-19 coronavirus disease constitutes a danger of major proportions that could result in serious harm to persons." During this declared emergency, the Lieutenant Governor in Council issued various orders under the EMCPA, including the Regulation. The Regulation was initially made on July 13, 2020, pursuant to paragraphs 5 and 14 of subsection 7.0.2(4) of the EMCPA. It was continued, along with other emergency orders, under the ROA as a "continued s. 7.0.2 order" when that Act came into force on July 24, 2020. The ROA set out a regulatory framework by which the government could modify COVID-19 control measures across the province as needed to respond to the pandemic see: *R v. Adamson Barbeque Limited 2020 ONSC 7679; Ontario v Trinity Bible Chapel et al 2022 ONSC 1344, appeal dismissed 2023 ONCA, 134, seeking leave to appeal to SCC.*

[6] The defendant is married and is a stay-at-home parent to three children. They live in Aylmer. While initially abiding by the spirit of the declarations and

lockdowns in early 2020, she came to question the necessity of the lockdowns and was concerned with the decisions that were negatively impacting her family, small businesses, and the community at large. She signed petitions to MPPs and MPs and attempted to communicate with various municipal politicians. She questioned why big box stores were allowed to be open as being “essential”, yet small businesses were not essential and were thus closed. She believed that there were economic and health concerns for everyone, that the mandates were having negative impacts including isolating people and were being inconsistently enforced and arbitrarily not applied to different protests, some of which had nothing to do with the mandates. She participated in protests against restrictive COVID-19 measures in Toronto in September and October 2020. She believed there were over 4000 people at these events. She was not charged with anything for attending these events. She organized the two peaceful protests in Aylmer, did not demand or expect anyone to mask as she believed it was a personal decision, and did not demand or expect anyone to socially distance. People were free to sing, yell, chant, mingle as they would at any protest. She believed that what she was doing was protected under the Bill of Rights and the Charter as this was a fundamental way to speak to government.

[7] It must be remembered that the regulation in question did not define the words “public event” or “social gathering”, nor did it attempt to provide exceptions for the types of “public event” or “social gathering” that would not be governed by the gathering restrictions. Indeed, there were separate restrictions for weddings, funerals, and other religious rites. Thus, the fact that other protests mentioned by the defendant such as “Black Lives Matter”, or the “Pro Gun Activists” occurred without any charges according to the defendant, is of no merit to the defendant’s argument that her rights were violated. In my view, that is an issue of enforcement of the regulations.

[8] There is no doubt that COVID-19 is a respiratory disease that has killed millions of people around the world and has caused many others to experience chronic, sometimes debilitating health conditions. It is caused by the SARS-CoV-2 virus and its variations. It spreads between people when an infected person is in contact with another person through inhaling the infectious respiratory droplets when an infected person coughs, sneezes, sings, shouts or talks. Many people infected with the virus show no symptoms or experience several days between when they are infected and when they develop symptoms.

FUNDAMENTAL FREEDOMS AND INTERPRETATION

[9] The Canadian Charter of Rights and Freedoms sets out as follows

> s. 2 Everyone has the following fundamental freedoms:
>
> (a) freedom of conscious and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association

[10] Jurisprudence has established that Charter rights must be interpreted in a purposive and generous fashion having regard to "the larger objects of the Charter…to the language chosen to articulate the freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter": see *R v. Big M Drug Mart 1985 CanLII 69 (SCC) at para 117.*

FREEDOM OF EXPRESSION (s. 2(b))

[11] Freedom of expression guarantees that individuals have the right to express their views, opinions and beliefs including dissent or diverse perspectives. Section 2(b) protects activities that aim to convey meaning or that have expressive content. Expressive activity may only be excluded from s. 2(b) protection if its method or location clearly undermines the values such as democratic discourse, truth finding and self fulfilment, that underlie the guarantee: *Irwin Toy Ltd. v Quebec (Attorney General) [1989] 1 SCR 927 paras 52-55*. Freedom of expression is infringed only where the purpose or effect of the government action is to "control attempts to convey meaning through activity". It protects both listeners and speakers.

[12] In *Montreal (City) v. 2952-1366 Quebec Inc, 2005 SCC 62 at para 56*, the Supreme Court of Canada set out a three-part test to determine whether an activity is protected by s. 2(b). Does the activity have expressive content? Does the location or method of the activity remove it from protection? Does the challenged law infringe that protection in purpose or effect?

[13] I find that these public events, or peaceful demonstrations, did contain expressive content and conveyed meaning. Those in attendance were expressing their disagreement and dissatisfaction with the mandates. Although these events occurred on public property and on public streets and the defendant organized these events with full knowledge of the restrictions, I do not find that this location or method removed it from protection. With respect to the third question, I find that the outdoor gathering restrictions were content neutral and were only an attempt to place content-neutral, time limited and flexible limits on the size of in person outdoor public events or gatherings, and not to limit what was being expressed or how it was being expressed. Lastly, s. 2(b) does not guarantee any particular means of expression: see *Baier v. Alberta 2007 SCC 31 at para 23*.

[14] I therefore conclude that the defendant's s. 2(b) Freedom of Expression right was not engaged in this matter.

FREEDOM OF PEACEFUL ASSEMBLY (s. 2(c))

[15] Freedom of assembly is a right essential to a democratic society. It is "speech in action". It is a collective right incapable of individual performance: see *Mounted Police Association of Ontario v. Canada (Attorney General) [2015] 1 SCR 3 para 64* and protects the physical gathering together of people. It guarantees access to and use of public spaces, including public parks, squares, sidewalks, roadways, bridges, and buildings around which public life unfolds: see *Hussain v. Toronto (City) 2016 ONSC 3504 at paras 38 and 44*. I find in these circumstances, that the defendant's right to peaceful assembly is engaged in this matter and was infringed by the gathering restrictions.

FREEDOM OF ASSOCIATION (s.2(d))

[16] Freedom of association includes the freedom of individuals to interact with, support, and be supported by their fellow humans in the varied activities in which they choose to engage: see *Reference Re Public Service Employee Relations Act (Alta.) [1987] 1 SCR 313*. As was noted by the Supreme Court of Canada in *Mounted Police Association of Ontario v. Canada 2015 SCC 1*, freedom of association recognizes the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends and guarantees the right to join with others and form associations as well as the right to join others in the pursuit of other constitutional rights. However, as set out *Harper v Canada [2004] 1 R.S.C.*, the Supreme Court of Canada "*Section 2(d) will be infringed where the State precludes activity because of its associational nature, thereby discouraging the collective pursuit of common goals; see Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 16. It is only the associational aspect of the activity, not the activity itself, which is protected; see Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157, at para. 104".*

[17] The size of gatherings was indeed limited due to the public health risks presented by people gathering in close proximity to each other during the global pandemic. It is the associational aspect of the gathering of people and not the demonstration itself that is protected. Thus, in the current circumstances, I find that the defendant's right to freedom of association was engaged and was infringed by the gathering restrictions.

SECTION 1 ANALYSIS- THE OAKES TEST

[18] As numerous courts have found, the COVID-19 pandemic is a public health emergency, see: *Spencer v Canada (Health) 2021 FC 621(Can LII); Taylor v Newfoundland and Labrador, 2020 NLSC 125; Ontario v Trinity Bible Chapel et al 2020 ONSC, 1344 as confirmed 2023 ONCA 134, leave to appeal pending*. The courts have also found that it is not the court's role to engage in *"a re-weighing of the complex and often difficult factors, considerations and choices that must be evaluated by [authorities] during a pandemic" see Sprague v. HMQ in right of Ontario, 2020 ONSC 2335; The Fit Effect v. Brant County Board of Health, 2021 ONSC 3651; Trinity Bible supra.*

[19] In addition, the Supreme Court of Canada has held that a deferential approach by the court is required when reviewing government measures designed to address "complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives" see *Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC; Canada (Attorney General) v. JTI-Macdonald Corp, 2007 SCC 30*. The Ontario Court of Appeal in *Trinity Bible* found that Justice Pomerance in *Trinity Bible,* was not excessively deferential to the government and that deference is contextual. The OCA stated at paragraph 102: "In this case, the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts. That context not only informs the degree of deference owed to government as the crisis shifted on the ground in real time, but also the heightened importance of vigilance by all branches of government over fundamental rights and freedoms during such times of crisis".

[20] The full wording of s. 1 of the Charter is: ***The Canadian Charter Rights and Freedoms guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*** The Supreme Court of Canada in *R. v Oakes 1986 CanLII 46, [1986] 1 SCR 103* set out a four-part test to determine whether the gathering limitations can be justified under s. 1 with the onus on the government to establish that the limitations were reasonable and demonstrably justified. Is the objective of the gathering limitations pressing and substantial? Is there a rational connection? Were the limitations minimally impairing? Were the effects of the limitations proportional to the objective?

TRINITY BIBLE CHAPEL CASES

[21] Justice R. Pomerance's decision in Ontario v Trinity Bible Chapel et al 2022 ONSC 1344 was released on February 28, 2022. Justice Pomerance found that the various applicants' right to freedom of religion (s. 2(a)) had been infringed by the gathering restrictions in place however, the restrictions were reasonable and

demonstrably justified in a free and democratic society. The court declined to make a separate s. 1 analysis for the applicants interests in freedom of expression, peaceful assembly, and association as these had been subsumed within the analysis of religious freedom. This decision was upheld by the unanimous decision of Justice L. Sossin of the Ontario Court of Appeal on March 1, 2023. When the final arguments were made before me on March 28th, I gave counsel the opportunity to present arguments as to how I could distinguish the Court of Appeal's decision since the defendant's factum, written submissions, and oral argument did not address either Trinity Bible case. Ms. Rumpal argued that the Trinity Bible cases were distinguishable on the facts such as that it was religious freedom, that the churches involved tried to make a distinction between religious gatherings and retail places which was not argued by the defendant, that the churches were disputing the science but that the defendant was not disputing the science per se, that the attendees at the church gatherings were stationary while at a protest they were moving around and marching, that the frequency of the protests were far less than weekly church gatherings etc. Mr. Kissick in his written and oral submissions argued that the Trinity Bible Cases were not distinguishable, even on the facts, and that the case was persuasive if not binding on me. I am aware that an application for leave to appeal to the Supreme Court of Canada has been filed with the written material provided to the court for consideration. No decision has been as of today. The Court of Appeal decision is still applicable and has not been stayed.

[22] In my view, the Trinity Bible Cases are not distinguishable from the case before me. At best, there could be a distinction based on breach of freedom of peaceful assembly and freedom of association given that the Superior Court declined to conduct a separate analysis for these claims and the Court of Appeal agreeing that it was not necessary to consider the other freedoms. While the specific right may be different, the s.1 analysis is the same. The Court of Appeal found no errors in Justice Pomerance's s.1 analysis. The role of the court is not to resolve scientific debates or any controversy about COVID-19. The question is whether it was open to the government to act the way it did based on the scientific knowledge at the time and not through the lens of hindsight, see: *Trinity Bible appeal decision, paras 52-57*; *Beaudoin v. British Columbia (Attorney General),* 2022 *BCCA 427 at para 268*. I also note that Justice Pomerance, in addition to the expert evidence of Dr. McKeown, also relied upon the expert evidence of Dr. Hodge who was also the expert in the case before me. I also accept the evidence of Dr. Hodge presented before me. The arguments and submissions by counsel for the defendant relied upon the expert evidence of Dr. Kettner as what "should" have been considered. I disagree that this is the test and therefore reject the submissions. Again, it is not the role of the court to resolve these scientific debates.

PRESSING AND SUBSTANTIAL OBJECTIVE

[23] I find that the objective of the gathering restrictions was to reduce COVID-19 transmission, hospitalization, and death, and to mitigate threats to the integrity of the health care system see: *Trinity Bible appeal decision at paragraph 90 accepting Trinity Bible decision by Justice Pomerance.* This was also supported by the expert evidence of Dr. Hodge's affirmed December 13, 2022: see paras 10-13. The gathering restrictions were different depending upon whether the gathering was indoors or outdoors, however, the pressing and substantial objective was the same.

RATIONAL CONNECTION

[24] At this step, the government need only establish that "it is reasonable to suppose that the limit may further the goal, not that it will do so" see: *Hutterian Brethren at para 48; Beaudoin v. British Columbia, 2021 BCSC 512 at para 229*. In it not particularly onerous to establish a rational connection: *see JTI-MacDonald at para 40*. I find that there is a rational connection between the gathering restrictions and reducing the harms of COVID-19. COVID-19 is transmitted from person to person with the risk in outdoor activities being lower than in indoor activities. However, even a low probability of transmission can generate a large number of new infections depending upon the number of people, how close they gather, whether they wear masks, weather conditions, the rate of infection already in the community, the activities involved such as shouting see Dr. Hodge's December 13, 2022 affidavit, paras 31-35. It is only logical that preventing infection in one place impacts the rate of infection elsewhere, see Trinity Bible decision by Justice Pomerance at paras 134-136 and Trinity Bible appeal at paras 94-96.

MINIMAL IMPAIRMENT

[25] Minimal impairment does not mean the least intrusive choice or measure: *see JTI-MacDonald at para 43; Irwin Toy at 99; Affleck v Ontario 2021 ONSC 1108 at para 98*. As noted by the Court of Appeal in Trinity Bible at para 102: *In this case the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts. That context not only informs the degree of deference owed to government as the crisis shifted on the ground in real time, but also the heightened importance of vigilance by all branches of government over fundamental rights and freedoms during such times of crisis*. The Court of Appeal in Trinity Bible at paras 110-115 accepted the application of the cautionary principle by Justice Pomerance. This precautionary principle "*recognizes that where there are threats of serious, irreversible damage, lack of full scientific certainty is not a reason to postpone harm reduction strategies, that it was not necessary to wait for scientific unanimity on the properties of the pandemic before taking steps to prevent illness and death".* As the Court of Appeal

in Trinity Bible stated at para 13:

> *This observation is equally if not more apposite when considering the complex regulatory scheme of Ontario's COVID-19 response. In Grandel v. Saskatchewan, 2022 SKKB 209, the Saskatchewan Court of King's Bench found the precautionary principle was "essential" in the s. 1 context when reviewing the government's response to COVID-19 where "some cause and effect relationships are not fully established scientifically": at para. 84.*

[26] I find that the gathering restrictions were minimally impairing and were not overbroad simply because other alternatives may have been available to address the ongoing threat of the pandemic. As the Ontario Court of Appeal in Trinity Bible noted in paras 121-125, other cases across Canada have considered similar restrictions at this stage of the Oakes test: *see Taylor (travel restrictions), Gateway Bible Baptist Church et al v. Manitoba et al, 2021 MBQB 219, 497 CRR (2d) 164 appeal heard and reserved December 13, 2022 (gathering restrictions) and Beaudoin v. British Columbia (Attorney General) 2022 BCCA 427 (gathering restrictions).*

PROPORTIONALITY

[27] The final step in the Oakes test requires "a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitations" see Hutterian Brethren at para 77. It is a consideration of whether the societal benefits of the restrictions outweigh the deleterious effect on freedoms of peaceful assembly and association. As Justice Pomerance did in Trinity Bible, I also accept Dr. Hodge's expert evidence that the temporary limits in Ontario, including the outdoor gathering restrictions, translated to thousands fewer people dead (at para 37), that the strictest gathering limits corresponded to the time when the rate of COVID-19 transmission in Ontario and the burden on the Ontario healthcare system were at their highest levels (para 42), and that the risk of transmission at a gathering was particularly high in October and November 2020 as COVID-19 cases were at their highest since the start of the pandemic and were increasing, and that COVID-19 hospitalizations were also increasing during this time and thus there was a risk of overwhelming the health care system (para 46). Justice Pomerance in Trinity Bible found at para 159: "*this is a crisis of the highest order, requiring early and effective intervention by public officials. Ontario was entitled to impose restrictions in the interests of public health and the public was entitled to have those restrictions imposed"*. The Court of Appeal in Trinity found no error in this characterization.

[28] I find that the salutary public health benefits of the gathering restrictions, which were indeed temporary and evolved over time, outweigh the deleterious impact on the defendant's freedom of peaceful assembly and association. It must be remembered that there was never a complete ban on the defendant's right to freedom of peaceful assembly or association.

[29] Pursuant to the Oakes test, Ontario has met its burden to establish that the gathering limitations set out in the regulation are reasonable limits, demonstrably justified in a free and democratic society.

CONCLUSION

[30] The defendant's rights to freedom of peaceful assembly and freedom of association were infringed by the gathering limitations. However, pursuant to s. 1 of the Charter, the limitations were reasonable and demonstrably justified in a free and democratic society. The defendant's Charter application for a stay of the proceedings is dismissed. Convictions will be registered for all four offences. The matter had been adjourned to July 26th at 2:30 pm for this decision on the Charter application. These written reasons will be provided to the parties forthwith. As a result, the matter will proceed to sentencing on July 26th at 2:30 pm.

[31] Released: July 17, 2023

Signed: Justice of the Peace Anna M. Hampson