ONTARIO COURT OF JUSTICE

CITATION:
DATE: 2023·01·31
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 December 15-16, 2022; January 31, 2023
Reasons for Judgment released on February 14, 2023

J. Huber .... counsel for the prosecution
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. There is no dispute that the outdoor attendee limits at the relevant time was 25 and that anyone attending such an event were to comply with the public health guidelines on physical distancing. The prosecution argues that all of the essential elements of all of the offences have been proven beyond a reasonable doubt and that the defendant has not established a due diligence defence nor has she established a defence of "officially induced error". The defendant argues that she has not committed an offence since the events in question were not "gatherings" but were in "peaceful protests" and as such, they were not subject to the limitations in place. In addition, she argues that she relied upon the information provided to her by Aylmer police officers that peaceful protests were protected by the Charter and thus she has established a defence of "officially induced error". The

defendant has 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. Given that this court does not have any declaratory jurisdiction, the Charter application has been deferred until a decision on the merits has been determined. For the following reasons, I find that the prosecution has proven beyond a reasonable doubt all of the essential elements of all of the offences and that the defendant has not established a due diligence defence on a balance of probabilities. I also reject the defendant's defence of "officially induced error". The decision whether to enter convictions is deferred until after the evidence, argument, and decision on the Charter application.

THE EVIDENCE

[2] I have reviewed the evidence in its entirety. I do not intend to simply recite the evidence in these reasons. In my view, the evidence is overwhelming with respect to where these events took place (within the City of Aylmer), when they took place (October 24 and November 7, 2020), and that there were more than 25 people at the 2 events. Several police officers testified as to their involvement, including some who met with the defendant before and after the events, and to their firsthand observations of what they saw on October 24th and November 7th. In addition, numerous photographs, a video, copies of newspaper articles, copies of posters from social media, and a video were accepted into evidence and unchallenged. Each of the witnesses was thoroughly cross examined. The defendant testified on her own behalf. She was also cross examined.

[3] It was conceded that no one took an actual count of the number of people in attendance at either event. In my view that would have been impossible given the fluid nature of individuals walking around. Obviously, no tickets were sold or collected. They were public events and described as such as "Lawful Public Freedom March" (exhibit 1), "Local Freedom March" (exhibit 2), "Freedom March" (exhibit 3), "Freedom March and Rally" (exhibit 19). Anyone could attend and everyone was invited. They were not private events. Estimates were provided of between 100-150 at the October 24th event. Even the defendant in her video (Exhibit 14) expressed that there were 300 people at that event with only 24 hours notice. Exhibit 4 is a picture of well over 25 people standing around in front of the bandshell where the speeches were taking place on October 24th. None of them are masked. They are not socially distanced (ie 6' apart). With respect to the November 7th event, estimates put the number of attendees at 1000-1500. Exhibits 6,7,9,10,11, and 12 are photos of the numerous attendees standing on the sidewalks, marching on the road in amongst cars, pickup trucks, tractors, and standing in front of the East Elgin Community Center. Again, it is clear and obvious that significantly more

than 25 people are in attendance. Again, none appear to be masked, nor are they socially distanced within the crowd.

[4] I find that the defendant was also in attendance at both events. Exhibit 2, 8,11, 13 are all pictures of the defendant. Exhibit 14 is a video recording of the defendant speaking at the November 7th event. The defendant also admitted to her attendance in her evidence.

[5] I also find that the defendant was the organizer of the two events. With respect to the October 24th event, exhibit 3 is a map of the proposed "Freedom March" for October 24th that has the defendant's name on it and from which was taken from her social media account-Facebook. Exhibit #19 is a correction in a media report wherein it indicates that Kimberly Charlton Neudorf contacted the Aylmer Express to correct the record about the event from October 24th that "I planned, organized and hosted this Freedom March and Rally. I only asked Terry Neudorf to be one of the speakers. Let's give credit where credit is due!".

[6] With respect to the November 7th event, exhibit 20 is an email from the defendant to Aylmer police office Novacich outlining the details of the event for November 7th, including the times at the EECC (East Elgin Community Center) for speeches and when the march would begin, as well as the proposed route. Exhibit 1 is a screen shot of a poster from the defendant's social media account advising of the "Lawful Public Freedom March" on November 7 with the address and time. Exhibit 23 is the letter from the defendant to the Aylmer police referencing the November 7th event. It was provided after the meeting with the defendant and officers. In it she indicates she is "stepping up with planning and organization", suggesting a new venue as the Fairgrounds, asking the police to "block off or site and provide free access for us", that "I have assembled a large network of volunteers that will have the capacity to help with organization" and included a map of the route for the march. Ex 11 is a picture of the defendant on the stage, while Exhibit 14 is the video. In the video, the defendant can be seen on the stage. In her speech, she comments on the large number of people there as being "unbelievable" and "amazing", thanks them for coming to her hometown, expresses the reasons for the event, advises that there will be other speakers, and gives thanks to some organizations and specific individuals for "taking time to support her through these last few weeks".

[7] Of significance in determining that the defendant was the organizer, were the meetings she had with officers. She attended the Aylmer police department on October 23 where she met with Officer Wikkerink. She advised there was going to be a planned event. It was a march, a "Million Mothers March" starting at the bandshell with speeches, a march down some streets

and then back to the bandshell. They would be carrying signs and were in disagreement over the mandates. He cautioned her about the gathering limits in place and that they needed to be in compliance. She was aware of the limits. He didn't recall it being discussed as a "protest" although she could have described it that way. She was polite. He not ask any clarification questions about the protest or the messages being conveyed. She wanted to be upfront and had some advice to let the police know so they could be prepared for the traffic.

[8] Deputy Chief Novacich had a telephone conversation with the defendant on November 4th. It was to clarify what was in her letter about the November 7th event (Exhibit 23) that was dropped off. He was attempting to clarify what was expected to happen on November 7th to adequately prepare for the number of officers. He asked for her to send an email with the updates. The defendant sent this later that afternoon (Exhibit 20). He responded to her email reminding her about the gathering limits as well as traffic expectations for the march route (Exhibit 21).

[9] Constable Fisher met with the defendant twice at her residence on November 3rd. The first time was at 8:41 am when he attended with Constable Shaw. They were trying to get more information about the November 7th event. PO Shaw read to the provisions of s. 63 of the Criminal Code (unlawful assemblies) and the outdoor gathering limits. They went back again at 12:31 p.m. at the request of the Chief to clarify. She indicated that information was being compiled and made arrangements to attend at the station later that afternoon. At that meeting she advised that it was going to be at the EECC, that it was too late to cancel. In cross examination, he agreed that the defendant called it a "peaceful protest", that he didn't specifically recall describing it as a "peaceful protest", that he recalled telling her that no matter what it was called, it is still a "gathering", that she used the words "rights" under the "charter". He agreed there was a bit of discrepancy or debate over the use of the words "gathering" and "peaceful protest".

Peaceful Protest or Gathering- Statutory Interpretation

[10] Much of the cross examination of the various police officers and the defendant's evidence in chief concerned the defendant's attempt to establish that she was not organizing a "gathering" and that she did not attend a "gathering". The defendant's evidence is that she was organizing a "peaceful protest" and not a "gathering". The issue of whether this was a "gathering" as set out in the regulations is a matter for this court to decide in terms of whether the prosecution has proven its case beyond a reasonable doubt. It is a matter of statutory interpretation. Just because the defendant regularly called it a "peaceful protest" with the police and with this court, does not mean

that it was not a gathering or a public event. As the defendant rightly pointed out in her evidence, which at times was a speech and not evidence as well as not answering questions, this is an issue of words and the interpretation or meaning of words.

[11] As has been repeatedly stated, today there is only one principle or approach to the interpretation of statutes, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at para 21, *R. v. Hutchinson*, 2014 SCC 19 at para 16.

[12] In the current circumstance, the issue to be determined is the meaning of the words **"public event"** or "**social gathering**" found in Schedule 3 s.1(2) of Ontario Regulation 364/20-Rules for Areas in Stage 3. Although the specific regulations in force at the time of these offences have now been repealed, they contained the exact same phrase:

> *(2) The following rules apply to an organized* ***public event*** *or* ***social gathering*** *held at a place described in subsection (2.1):*
>
> 1. *No person shall attend an organized* ***public event*** *held at the place of more than,*
>
>   *ii. 25 people if the event is held outdoors*
>
> 2. *No person shall attend a* ***social gathering*** *held at the place of more than,*
>
>   *ii. 25 people if the gathering is held outdoors*.

[13] There is no definition of "public event" or "social gathering" in the legislation. It is clear that the Reopening of Ontario (A Flexible Response to COVID-19) Act is a public welfare act whose object is the safety and health of Ontarians. Likewise, so are the various regulations thereunder. The scheme of the act and the regulations was to provide for rules for the public to follow during the COVID-19 pandemic. When used in the context of a public welfare offence, the term "public" means to "all of the people in a community". The term "event" means an occurrence or activity. Thus, the common or ordinary meaning of "**public event**" is an activity or occurrence that is open everyone in the community. No formal invitations addressed to specific individuals would be required. In contrast, a "private event" would be limited to those individuals who were specifically invited to such an event.

[14] Given that the term "social" has several meanings, it must be

interpreted in the context of public welfare and the purpose of this regulation. In the regulation, it is used to describe “gathering” so that the entire phrase of “social gathering” needs to be interpreted together. A gathering is the coming together of a group of people, meeting, or assembly. For something to be “social”, it would be relating to or involving activities in which people spend time talking to each other or doing enjoyable things with each other. I find that the common meaning of a “**social gathering**” is a coming together of people in a group for an activity where they spend time talking to each other or doing enjoyable things with each other.

[15] Given that the word “or” is used in the regulation, and that there are specific references (2) 1-public event and (2) 2-social gathering, I find that this is disjunctive and thus it is **either** a “public event” **OR** a “social gathering” that is regulated by the restrictions to no more than 25 people. I find that a “peaceful protest”, “freedom march”, “freedom rally” is a public event as set out in the regulation. Indeed, there are fewer examples of a “public event” than a “peaceful protest” given that it was open to the public, everyone was invited and the people attending such an event shared common beliefs. I find that the defendant on October 24th attended a “public event” that she called a “peaceful protest”. I find that the defendant was the organizer of this “public event” that she called “peaceful protest”. I find that there were more than 25 people at this “public event” that the defendant called a “peaceful protest”. I also find that the defendant on November 7th attended a “public event” that she called a “peaceful protest”. I find that the defendant was the organizer of this “public event” that she called a “peaceful protest”. I find that there were more than 25 people at this “public event” that the defendant called a “peaceful protest”.

OTHER FINDINGS OF FACT

[16] I find that these public events that the defendant caused disruption to the Aylmer community and necessitated additional police resources. I find that the October 24th public event that the defendant organized caused the Aylmer police to increase its’ usual enforcement of 2 police officers on any given day, to 4 Aylmer police officers, including deputy chief Novacich, 2 auxiliary officers, and 4 officers from the municipal enforcement unit which is a contract-based law enforcement unit available to different municipalities.

[17] I find that the November 7th public event the defendant organized caused significant disruption to Aylmer and again necessitated additional police resources. Firstly, the Aylmer City Counsel declared a state of emergency on November 2nd, that provided for access to additional police resources. Additional police resources were required to manage the unknown numbers of people who would be attending the event given that everyone was

invited. In total, on November 7th, there were at least 25 officers deployed to this event-all Aylmer full time and auxiliary police officers including deputy chief Novacich, and 8-9 OPP officers, much of which resulted in overtime for the officers. This was reasonable given that the role of the police to keep the public safe, including those attending the public event and those protesting the event, and to manage traffic. Secondly, although there may have been some “counter protesters” who were present as well, their numbers were insignificant compared to number of people attending the “peaceful protest”. Realistically, it doesn’t matter how many counter protesters were present, I find that they were there due to the presence of the significantly large number of people attending the public event the defendant called a “peaceful protest”. Thirdly, hockey was cancelled at the EECC. Fourthly, several roads, including parts of Talbot Street- a main thoroughfare and also known as #3 Highway, were closed to traffic for safety reasons due to the upwards of 1500 people present walking on the roads along with the pickup trucks, other motor vehicles, tractor. As the defendant set out in Exhibit 20 (her email of November 4th), “We will walk east in the right hand lane all the way through town to King Street in which we turn right and then right onto Sydenham where we will stop at the bandshell…there will be a motorcade in which we are encouraging people to drive normally on the right hand side and not to ride in the back of trucks, nor will there be a hay wagon ride”. This is a clear intention on behalf of the defendant as the organizer to have people walk in the right lane of the highway which would obviously impact traffic. The defendant’s expectation was to only occupy half of the road. In exhibit 23, the defendant is advising of a change in venue to the fairgrounds. In it she says “I need an organizing liaison to communicate with and traffic control liaison to communicate with my traffic and safety volunteer…my traffic and safety volunteer can communicate our traffic and safety plan that allows for proper redirection of traffic control around our new route” along with a map. Again, it is clear and obvious that the defendant as the organizer is planning for traffic disruptions while asking for police assistance. I find that all these disruptions were the direct consequences of these public events that the defendant organized.

DUE DILIGENCE and OFFICIALLY INDUCED ERROR

[18] I find that this is a strict liability regulatory offence. As such, a due diligence defence is available that must be established by the defendant on a balance of probabilities. I do not find that the defendant has established any due diligence. There is no evidence that the defendant took any, let alone all, reasonable steps to avoid the commission of the offence. These were planned and organized by the defendant. I also find that the defendant has not established on a balance of probabilities that she reasonably believed in a mistaken set of facts, which if true, would have rendered the act innocent.

There were no mistaken facts that the defendant relied upon. She was organizing public events that she called a "peaceful protest".

[19] The defence of "officially induced error" is a separate and distinct concept that can arise in a regulatory offence. If established, it results in a stay of the proceedings. It arises in circumstances where the commission of the offence has been established beyond a reasonable doubt, as found in this case, and that there has not been a due diligence defence established on a balance of probabilities, also as found in this case. The Supreme Court of Canada in ***Levis (City) v. Tetreault; Levis (City) v. 2629-4470 Quebec Inc [2006] 1 SCR 420***, confirmed that "officially induced error" can apply in regulatory offences and set out the test in paragraphs 26-27 as follows:

> *25 Lamer C.J. equated this defence with an excuse that has an effect similar to entrapment. The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal (Jorgensen, at para. 37).*
>
> *26 After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six elements:*
>
> > *(1) that an error of law or of mixed law and fact was made;*
> >
> > *(2) that the person who committed the act considered the legal consequences of his or her actions;*
> >
> > *(3) that the advice obtained came from an appropriate official;*
> >
> > *(4) that the advice was reasonable;*
> >
> > *(5) that the advice was erroneous; and*
> >
> > *(6) that the person relied on the advice in committing the act.*
> >
> > *(Jorgensen, at paras. 28-35)*

> *27 Although the Court did not rule on this issue in Jorgensen, I believe that this analytical framework has become established. Provincial appellate courts have followed this approach to consider and apply the defence of officially induced error (R. v. Larivière (2000), 2000 CanLII 8295 (QC CA), 38 C.R. (5th) 130 (Que. C.A.); Maitland Valley Conservation Authority v. Cranbrook Swine Inc. (2003), 2003 CanLII 41182 (ON CA), 64 O.R. (3d) 417 (C.A.)). I would also note that, in this appeal, neither the prosecution nor the intervener, the Attorney General of Canada, has questioned the existence of this defence in Canadian criminal law as it presently stands. At most, the Attorney General of Canada has suggested another condition in addition to those enumerated by Lamer C.J., namely that the act was committed contemporaneously with the reception of the information. I do not think this addition is necessary. The Attorney General of Canada's concerns relate more to the need to demonstrate that the advice was reasonable and that the accused relied on it. It should be noted, as the Ontario Court of Appeal has done, that it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice (R. v. Cancoil Thermal Corp. (1986), 1986 CanLII 154 (ON CA), 27 C.C.C. (3d) 295; Cranbrook Swine). Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (Cancoil Thermal, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.*

[20] The Supreme Court of Canada in ***La Souveraine, Compagnie D'Assurance Generale v. Autorite des Marches Financiers [2013] 3 SCR 765*** also affirmed that the defence of "officially induced error" is available in regulatory offences and went on to say at paragraph 76 that there is no general defence of reasonable mistake of law.

[21] In the current circumstances, the defendant argues that she relied

upon the statements made to her by various police officers in her interactions with them on October 23, and then again on November 4-6. She argues that the officers advised her that this was a “peaceful protest” and that this right was protected under the charter and that they used the words “peaceful protest”. She argues as well that the officers agreed with her that this was going to be a “peaceful protest” and that she had the right to have a “peaceful protest” under the Charter. She argues that she relied upon their advice that this was a “peaceful protest” and that she had the right to have a “peaceful protest”. She also argues that none of the officers told her she would be charged with a violation of the limits. She further argues that she was not charged with anything at the time of the 2 events.

[22] I do not believe the defendant’s evidence that she relied upon what the officers said. I also do not believe the defendant’s evidence that it was the officers who advised her that this was a peaceful process. I find that it was the defendant who used the words “peaceful protest” and that she was the one who was attempting to get them to agree with her. I find that there is no air of reality to the defendant’s assertions that she relied upon the officers’ use of the words “peaceful protest” to her detriment or followed their advice. I reject the argument that this amounted to an “officially induced error”. Firstly, the evidence is clear that regardless of whether any police officer used the words “peaceful protest” or even agreed with her that there was such a right under the charter, none of them advised her that a ‘peaceful protest” was exempt from the gathering limitations in place at the time. Secondly, I find that Officers Sabol, Wikkerink, and Novacich all told her that the gathering limits were at 25 persons. Thirdly, I find that the defendant was well aware of the 25-person limit prior to any of her meetings with the officers-she admitted this. Fourthly this 25- person limitation was also made absolutely clear to her in exhibit 21 the email from Officer Novacich of November 5, 2020. Fifthly, it was the defendant who used the words “peaceful protest” and attempted to get the officers to use these words as well. The defendant in her meetings with the police attempted to clarify what was going to happen and to try and convince them that what was going to happen was allowed due to the charter and that she was simply exercising her right to protest, and to gather with others to protest. I accept that she was not trying to get them to agree with the purpose of the “peaceful protest”. Sixthly, none of the officers were providing her with any advice. Nothing that the officers said amount to any “advice” let alone whether it was reasonable or erroneous or that the defendant relied upon it. No advice was given. Lastly, I also find that it was not necessary for the officers to advise the defendant that she would be charged with the violation of the limits. It is simply irrelevant whether there was any mention of charges for violations of the limits. Similarly, it is irrelevant that no one, including the defendant, was issued a provincial offence notice at the time of the events. So

long as the Informations were laid within the limitation period, there is no merit to this argument. In the current circumstances, the Informations were laid within the general 6 month limitation period pursuant to s. 76 of the Provincial Offences Act applies. I, therefore, reject the “officially induced error” argument.

CONCLUSION

[23] I am satisfied beyond a reasonable doubt that all of the essential elements of all 4 offences have been proven. I find that the defendant attended at and was the organizer of the public events in Aylmer, Ontario on October 24 and November 7, 2020, that the there were 25 person limitations for public outdoor events at the relevant time, and that there were in excess of 25 people at these events. The defendant has not established any due diligence defence. I rejected the “officially induced error” argument.

[24] The matter will now proceed to the voir dire on the defendant’s charter applications. If the charter applications are granted, then the charges will be either stayed or dismissed. If the charter applications are dismissed, convictions will register for all 4 offences and the matter will then proceed to the sentencing phase.

Released: February 14, 2023

Signed: “Justice of the Peace Anna M. Hampson”