

CANADA / JUDGMENT

R. v. Sasano

2022 BCSC 712

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Supreme Court of British Columbia

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2022 BCSC 712 R. v. Sasano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sasano,

2022 BCSC 712

Date: 20220429

Docket: 70994

Registry: Chilliwack

Regina

v.

Jeff Luke Rigear, Roy Makoto Sasano, Nicholas Steven George Schafer and Amy Elysia Soranno

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment re: Application for Stay of Proceedings - Lost Evidence - Voir Dire No.
2

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Place and Date of Voir Dire:

New Westminster, B.C.

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I. Introduction

[1] The four defendants apply for a stay of proceedings in respect of counts 1, 2 and 3 on the indictment, contending that their s. 7 Charter rights were breached when the Abbotsford Police Department ("APD") failed to preserve relevant video evidence located on SD cards seized from the scene of the alleged offences.

[2] For purposes of these reasons, I adopt the background facts set out in my reasons for judgment in relation to the application heard in voir dire number 1, and the background facts set out in my previous reasons for judgment regarding voluntariness of the statements of the accused Amy Soranno, indexed at 2022 BCSC 566.

[3] For convenience, I reiterate the indictment, as follows:

Count 1

Jeff Luke RIGEAR, Roy Makoto SASANO, Nicholas Steven George SCHAFER and / et Amy Elysia SORANNO, from the 9th day of February, 2019 to the 10th day of February, 2019, inclusive, at or near Abbotsford, in the Province of British Columbia, did break and enter a barn located at 33133 Harris Road and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code.

Count 2

Nicholas Steven George SCHAFER and ! et Amy Elysia SORANNO, on or about the 5th day of March, 2019, at or near Abbotsford, in the Province of British Columbia, did break and enter a barn located at 33133 Harris Road, and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code.

Count 3

Jeff Luke RIGEAR, Roy Makoto SASANO, Nicholas Steven George SCHAFER and! et Amy Elysia SORANNO, from the 901 day of February, 2019 to the 22nd day of March, 2019, inclusive, at or near Abbotsford, in the Province of British Columbia, did commit mischief by wilfully obstructing, interrupting or interfering with the lawful use, enjoyment, or operation of the property a barn located at 33133 Harris Road, contrary to Section 430 of the Criminal Code.

Count 4

Roy Makoto SASANO, Nicholas Steven George SCHAFER and / et Amy Elysia SORANNO, on or about the 28th day of April, 2019, at or near Abbotsford, in the Province of British Columbia, did break and enter a barn located at 33133 Harris Road, and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code.

Count 5

Roy Makoto SASANO, Nicholas Steven George SCHAFER and ! et Amy Elysia SORANNO, on or about the 28th day of April, 2019, at or near Abbotsford, in the Province of British Columbia, did commit mischief by wilfully obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property, the premises at 33133 Harris Road, contrary to Section 430 of the Criminal Code.

Count 6

Jeff Luke RIGEAR, Roy Makoto SASANO, Nicholas Steven George SCHAFER and / et Amy Elysia SORANNO, on or about the 10th day of February, 2019, at or near Chilliwack, in the Province of British Columbia, did break and enter a barn located at 47595 Chilliwack Central Road, and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code.

Count 7

Nicholas Steven George SCHAFER and / et Amy Elysia SORANNO, on or about the 3rd day of March, 2019, at or near Abbotsford, in the Province of British Columbia, did break and enter a barn located at 1285 Clearbrook Road and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code.

II. Additional Background Facts

- [4] As previously noted, the APD lost the SD cards that recorded the video (and presumably audio) on the hidden cameras that the Crown alleges were placed by the defendants on February 9 and 10, 2019, at the Excelsior Hog Farm on Harris Road in Abbotsford. All four defendants are accused in respect of Counts 1 and 3. The defendants Schafer and Soranno are accused in respect of Count 2.
- [5] As previously noted, there were either two or three cameras and associated SD cards seized by Constable L. Taylor when she attended the farm on March 22, 2019, in response to a report from the owners of the Excelsior Hog Farm, the Binnendyk family.
- [6] The Binnendyks found the cameras on the evening of March 21. On the following morning, March 22, before Constable Taylor attended in response to their report, they viewed, in part, the contents of one or more of the SD cards.
- [7] The SD cards themselves were very small. Calvin Binnendyk's son came up with an SD card adapter from a video game player, to allow the contents of the SD cards to be viewed on a computer. Ray Binnendyk testified that his two brothers, Jeff and Calvin, along with one of their spouses, were watching the videos that morning. He came into the room and saw only about 20 seconds of the video. He saw nothing of interest. He described the contents as "boring". He had better things to do with his time, he said. Jeff Binnendyk testified that he watched for 5 or 10 minutes but saw nothing of interest. Calvin Binnendyk testified that he watched for a few minutes. He saw "a few clips". He said that these were "just clips of the barn". He testified that nothing of note was shown on the video, from his perspective.
- [8] Constable Taylor was shown where the cameras were found by the Binnendyk brothers, namely, inside the barn and at a loading dock. She concluded that a break and enter had occurred. The Binnendyks told her what they had seen of the video. The video they saw was date stamped March 15, 2019. The Binnendyks told her that the camera footage primarily showed pigs. They were concerned that images of some of their children were captured. The brothers speculated that a representative of PETA may have set up the cameras in order to monitor the farm's treatment of the animals.

- [9] Constable Taylor testified that she received the materials in a typical plastic grocery bag. She was aware that the SD cards from the cameras had been removed and were inside the bag. She noted two SD cards. Ray Binnendyk testified that the SD cards were placed into a Ziploc plastic bag. Constable Taylor did not mention this. It makes sense that the SD cards, being very small, would have been placed into a separate smaller bag, like a Ziploc bag, in order to secure them. However the details about this are unclear.
- [10] Constable Taylor placed the grocery bag containing the cameras, associated batteries, wires, and the SD cards, into the trunk of her police vehicle.
- [11] Constable Taylor went to the APD station, where she gave the plastic bag containing the seized materials to Constable J. Wilding. At the time, Constable Wilding was an auxiliary police officer, titled an "Operational Support Officer" ("OSO"), whose duties included dealing with police evidence. Constable Taylor and Constable Wilding testified that Constable Taylor gave the plastic bag to Constable Wilding in the parking lot of the APD station. Constable Wilding placed the bag in the trunk of her own vehicle, intending to retrieve it at some later time, and place the items properly into evidence then. This would have involved taking the contents and placing them into a sealed tamperproof plastic bag or pouch of some sort. After taking care of some other administrative duties, Constable Wilding returned to her vehicle, retrieved the bag, and processed the contents. Constable Wilding testified that she "glanced" inside the bag when she obtained it from Constable Taylor, but was unaware that the material included SD cards.
- [12] When Constable Taylor gave the grocery bag containing the materials to Constable Wilding, she said that the contents had "no evidentiary value" in that the Binnendyks had handled the cameras and equipment, and therefore there was no point in forensically analysing the material. Constable Wilding was instructed to retain the material for 90 days.
- [13] Constable Taylor testified that on the following day, Sgt. Klaver suggested that she ought to look at the contents of the SD cards. She could not find the cards. She and Constable Wilding searched for the SD cards, including searching the trunks of their police vehicles. The SD cards were never located.
- [14] Much later on, Constables Wilding and Taylor were asked by members of the APD Major Crimes Unit to explain the circumstances surrounding the loss of the SD cards. In her statement, Constable Wilding suggested that the SD cards may have been somehow lost among other debris in the trunk of her car, and discarded at some point, with the other debris.

III. Legal principles

- [15] In *R. v. Neidig*, 2015 BCCA 489, at para. 33, the Court of Appeal adopted the summary of legal principles set out by the Nova Scotia Court of Appeal in *R. v. F.C.B.*, 2000 NSCA 35, at paras. 10-11 regarding remedies for police loss of evidence. That summary is as follows:

- [10] The basic principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in *R. v. La*, supra, commencing at para. 16. Those principles derived from *R. v. Stinchcombe* (No.1), [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Stinchcombe* (No. 2), supra; *R. v. Chapman*, [1995] 1 S.C.R. 727; *R. v. O'Connor*, supra; and, *R. v. Carosella*, supra, and further developed in *La*, are:
- (1) The Crown has an obligation to disclose all relevant information in its possession.
 - (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
 - (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
 - (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
 - (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
 - (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
 - (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
 - (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in *O'Connor*.
 - (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
 - (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.
- [11] The *O'Connor* criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of *O'Connor*:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[16] The principles relating to imposition of a stay of proceedings on the ground of abuse of process were further discussed by the Supreme Court of Canada in *R. v. Babos*, 2014 SCC 16 [Babos], at paras. 30-47.

[17] As to whether the Crown has presented a satisfactory explanation, see: *R. v. La*, [1997] 2 S.C.R. 680, 1997 CanLII 309 (S.C.C.) [La], where the court stated as follows:

21 In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

IV. Analysis

[18] The police do not suggest that they were unaware that the contents of the video cards had evidentiary value at the time the SD cards were seized. Constable Taylor was aware that there must have been a break-in. The Binnendyks had suggested the possibility of animal rights activists secretly recording the animals and farm activities. APD Sgt. Klaver asked Constable Taylor to examine the contents of the SD cards on the following day, presumably because they could contain evidence relevant to potential break and enter charges.

[19] Clearly, the evidence should have been preserved. The police conduct in failing to secure the evidence was not reasonable.

[20] As Constables Taylor and Wilding acknowledge, the evidence was not handled properly. It is quite obvious that the seized materials ought to have been properly secured, from the very outset, when Constable Taylor took the material from the Binnendyk family. Constable Taylor took no particular steps to properly secure the material at the scene, the hog farm. Handing the bag over to Constable Wilding in the parking lot, from the trunk of one vehicle to another, without taking any particular steps to secure the material, was inexcusably sloppy. In the words of the authorities, the manner in which the evidence was handled constitutes unacceptable negligence.

- [21] As the Crown cannot satisfy its burden to explain that the evidence has not been destroyed or lost owing to unacceptable negligence, the Crown's duty to disclose the evidence has been breached, and the s. 7 Charter rights of the applicants have been violated.
- [22] The applicants argue, further, that the failure to disclose the evidence amounts to an abuse of process. I do not accept this. Notably, the loss of evidence was not, quite clearly, due to deliberate destruction by the police of known relevant evidence. While I have characterized the loss of evidence as being unacceptable, and sloppy, in all of the circumstances, the degree of negligence is not so high that it itself amounts to an abuse of process.
- [23] The applicants contend that the police conduct after the loss was discovered supports a finding of abuse of process. They argue that the police explanation for the loss of the SD cards is a fabrication.
- [24] However, Constable Wilding readily conceded that the suggestion that the SD cards were somehow lost or misplaced when the bag was put in the trunk of her vehicle, and that the cards were then discarded, is nothing more than speculation, without any real factual support. This is quite obvious. In this case, the police did not manufacture an explanation in order to excuse the loss of evidence. They do not pretend that the explanation offered is anything more than conjecture. They concede that they failed in their duty to properly secure and maintain the evidence.
- [25] It is troubling that the police did not document the loss of the SD cards at the time it was discovered. It appears clear that more senior officers of the APD required constables Taylor and Wilding to document an explanation well after the fact. I agree with the applicants that the police did not make themselves look better by doing so, when no real explanation was available. However, the clumsy effort of the APD to explain the loss does not elevate the loss of evidence to an abuse of process. In summary, I decline to find that the loss of the SD cards, and conduct of the police in that respect, constitutes an abuse of process.
- [26] The applicants seek a stay of proceedings. As noted in La, para. 27:

The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence

- [27] As explained in Babos, para. 30, a stay of proceedings is "the most drastic remedy a criminal court can order". A stay of proceedings is granted rarely, and only in "the clearest of cases" when a stay of proceedings for an abuse of process is warranted (Babos, para. 31). These cases fall into two categories (Babos, para. 31):
1. where state conduct compromises the fairness of an accused's trial; and
 2. where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process.

[28] In any case, the test is as follows (Babos, para. 32):

The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

[29] At this stage, at least, I am far from satisfied that a stay of proceedings is warranted.

[30] At this stage, I do not accept there is any serious risk to trial fairness and the rights of the defendants to make full answer and defence as a result of the loss of the SD cards.

[31] There is some evidence as to the contents of the cards. It is evident that they were intended to capture images of farm operations, and did so. The Binnendyks viewed some of the material and confirmed the general nature of the contents. Their description makes sense.

[32] The applicants argue that the video evidence might have provided exculpatory evidence. How exactly this might be so is not explained.

[33] The applicants argue that the video evidence could have been material in relation to the well-being of the animals at the hog facility, which is said to be a key issue at trial.

[34] In response, the Crown contends that evidence concerning the well-being of the animals on the farm is not relevant to the issues at trial.

[35] The Crown states that it is not alleging that the actions of the accused caused actual harm to any animals. However, the Crown plans to adduce evidence from a veterinarian, Dr. Dykshorn, who was present during the protest on April 28. Those events are relevant to Counts 4 and 5 on the indictment, not the counts in issue on this application. Dr. Dykshorn is expected to testify that the presence of numerous persons in the barn facility caused some signs of distress in the animals, and could have presented a biosecurity hazard. This evidence appears to have little or no connection to Counts 1 to 3, in issue here.

[36] In particular, the applicants argue that the treatment of the animals as might have been shown in the videos, could be relevant to potential defences at trial, as follows:

1. Defence of necessity; and

2. Challenging the question of whether the Excelsior Farm was in "lawful use, enjoyment or operation" of property, within the meaning of s. 430(1)(c) and (d) of the Criminal Code, R.S.C., 1985, c. C-46 [Code].

A. Defence of Necessity

[37] I place no weight on the argument that the contents of the videos could potentially ground a defence of necessity.

[38] The Court of Appeal recently considered the defence of necessity in the context of protests, see: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255. The Court there observed:

[3] The necessity defence excuses criminal conduct based on the principle that "morally involuntary conduct should not be penalized": *R. v. Nwanebu*, 2014 BCCA 387 at para. 55. Canadian criminal law accepts that "a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience": *R. v. Latimer*, 2001 SCC 1 at para. 26, citing *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 248.

[]

[27] In *Latimer*, the Supreme Court affirmed that the necessity defence, as defined in *Perka*, has three essential elements: "First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided" (at para. 28).

[]

[69] This Court recently canvassed the elements of the necessity defence in *Nwanebu*. After setting out the three requirements, the Court noted that the first two are assessed applying a modified objective lens. The third requirement, proportionality, attracts a purely objective assessment (at paras. 56, 64).

[70] In *Latimer*, the Supreme Court explained what it means to apply a modified objective lens. The subjective perceptions of the accused are relevant to the first and second elements of the necessity defence, but they are not determinative. A modified objective test requires that those perceptions be reasonably held, taking into account the situation and personal characteristics of the accused:

32 A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person.

[Emphasis in the original.]

- [71] Because of the modified objective test, a subjectively perceived harm will only constitute a clear and imminent peril under the first element of the necessity defence if the accused reasonably believes that the harm is "on the verge of transpiring and virtually certain to occur". Where the perceived harm "should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril" (Nwanebu at para. 59, citing Latimer at para. 29). The Court acknowledged in Nwanebu that the necessity defence is not restricted to "immediate threats of harm". Threats of "future harm can cause a person's behaviour to be morally involuntary". However, there must be a "sufficiently close enough connection between the threat and the harm such that immediate pressure is placed on the person to act, negating [their] ability to act freely" (at para. 62; emphasis added).
- [72] On the second element of the defence, an accused must reasonably believe, at the time of the wrongful act, that they faced "a situation of imminent peril that [left] no reasonable legal alternative open" to disobeying the law: Nwanebu at para. 65, citing Latimer at para. 33 (emphasis added). The factual existence of one or more legal alternatives will logically inform the assessment of whether that belief was objectively reasonable: Perka at 259. As will the "quality and imminence" of the perceived harm: R. v. Keller, 1998 ABCA 357 at para. 32.
- []
- [78] What these cases tell us is that the necessity defence presents unique and potentially insurmountable challenges where the wrongful conduct is rooted in purposeful defiance of a court order and a public display of disagreement with the lawfulness of the impeded activity, or dissatisfaction with government's policy choices in authorizing that activity.
- []
- [80] Consistent with this rationale, the defence is restricted to "violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable": Perka at 250. As a result, in applying the defence, the trier of fact must ask whether "the wrongful act was truly the only realistic reaction open to the actor or whether [that actor] was in fact making what in fairness could be called a choice. If [the actor] was making a choice, then the wrongful act cannot have been involuntary in the relevant sense": Perka at 251 (emphasis added).
- [81] A significant impediment to application of the necessity defence in the context of planned protest activity, which was the case here, is the deliberate nature of the conduct that grounds the offence. Theoretically, and factually, it is difficult to reconcile this type of conduct with the fundamental premise underlying the defence, namely, that it excuses wrongfulness only for those "who, although morally blameworthy, acted in a morally involuntary manner": Ryan at para. 23.

[Emphasis in original].

[39] Here, on the allegations of the Crown, the defendants placed cameras in order to obtain evidence to further their animal rights agenda. That is what in fact occurred. Secretly recorded video was released to the media and posted on the internet. There is no serious argument that the circumstances involved imminent peril or danger, or that the defendants had no reasonable legal alternative, such that that their ability to act freely was negated. The alleged conduct was intentional, voluntary, and for specific purposes, not amounting to any kind of emergency. The video could not assist the applicants in advancing a defence that is plainly inapplicable.

B. Lawful Use

[40] Although I have not heard full submissions on the point, in my view it is highly unlikely that the question of "lawful use" will in fact be an issue at the trial. The argument is essentially that the farm's treatment of animals could be of such a nature that the defendants could argue the farm was not being used lawfully. This would likely be a question of law.

[41] The applicants acknowledge that the Excelsior Hog Farm, and the Binnendyks, are not on trial. This point was made by Justice Parfett in *R. v. Klimowicz*, 2021 ONSC 2589 [Klimowicz], at para. 22. The case has some factual similarity to the present case. In *Klimowicz*, the accused broke into a mink farm and took videos of the mink in the sheds. He then prepared a complaint to the Ontario SPCA, and posted the video online. He was charged with breaking and entering with intent to commit the indictable offence of mischief, contrary to s. 348(1) (a) of the Code, the same charge as is set out in Counts 1 and 2 in this case.

[42] In *Klimowicz*, the court stated:

20 A lot of evidence was led at trial concerning whether Mr. Freeman complied with the Code of Practice in relation to mink farming and/or the requirements of the Ontario Society for the Protection of Cruelty to Animals Act. There was insufficient evidence at this trial to conclude that Mr. Freeman had knowingly breached any of the requirements of the Code of Practice. Even if he had, there was no evidence that such a breach would render his use of his property unlawful.

21 In any event, as was noted by the Crown, where other sanctions for unlawful use are available, such as a complaint to the OSPCA, breaking and entering is not a reasonable alternative. Moreover, I agree with Crown counsel, that Mr. Klimowicz could not have known when he entered on the property that its use was unlawful (assuming it was). He may have suspected that was the situation, but that expectation is not enough to justify the unlawful entry.

22 It is not Mr. Freeman who is on trial and the treatment of mink on his farm is not relevant to this trial.

[Emphasis added, footnotes omitted].

[43] In my view, these same comments are likely to be applicable in the case before me.

[44] Similarly, in *R. v. Janusas*, 2010 ONSC 2068 (leave to appeal ref'd: 2011 ONCA 742), Justice Lederer rejected an argument that the accused could obstruct a laneway being used as a residential driveway, when the laneway was too narrow to be used as a driveway pursuant to the applicable municipal bylaw. Lederer J. stated:

22 To put it simply, s. 430 of the Criminal Code says that mischief is caused by interference with "the lawful use" of the property. The Crown does not fail to satisfy this element of the offence because the accused can demonstrate he was interfering with an unlawful use. Stanley Janusas is not permitted to obstruct the lawful use of the laneway because Giuseppe Pileggi made a particular use of it that was not in compliance with the by-law. There are sanctions available when a by-law is breached. An individual interfering with the lawful use of the laneway is not one of them.

[45] Justice Lederer distinguished *R. v. Kirchner*, 2005 ONCJ 45. In that case, the charge of mischief involving the accused interfering in the lawful enjoyment of his neighbours' property by playing his music so loudly that it was impossible for her to sleep. However the zoning did not permit residential use of the complainant's property. The court held that the complainant's residential use of the property was not lawful, and the accused was acquitted.

[46] Similarly, in *R. v. Manoux*, 2017 ONCJ 58, the court rejected the argument that the complainants were not in lawful occupancy of the apartment, when the rules of the condominium and their landlord's lease prohibited leases or subleases. The complainants were using the apartment for a lawful purpose, as a residence.

[47] In the case before me, there is no suggestion that the Binnendyks and Excelsior farm were not entitled to use the property as a pig farm. Just as in *Klimowicz*, a breach of a farm Code of Practice would not transform their lawful use into an unlawful use.

[48] In my view, it is highly unlikely that mistreatment of the animals that might have been shown on the video (of which there is no indication) could assist the defendants.

[49] In *Klimowicz*, the court dismissed the charge on the ground that the Crown had not established mischief. The videotaping did not interfere with any activities on the farm, and there was no evidence that the mink were disturbed, or suffered any harm. Similar issues may be in play at this trial. The absence of the video evidence from the SD cards is more likely to hinder the Crown rather than the defendants.

V. Conclusion

[50] In summary, at this stage at least, the grounds for a stay of proceedings are not established and I decline to make such an order on the basis of the lost SD cards.

[51] However, as the authorities note, the ruling is often best deferred until all the evidence is heard. Therefore this ruling is provisional.

"Verhoeven J."

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