CITATION: R. v. Lepp, 2020 ONSC 3435
NEWMARKET COURT FILE NO.: CR-20-2145-00BR
DATE: 20200603

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	P. Westgate, for the Crown
	)	
– and –	)	
	)	
ROBERT LEPP	)	Self-Represented
	)	
	)	
	)	
	)	**HEARD:** May 22, 2020 by Teleconference

DAWE J.

[1] Robert Lepp has been before the criminal courts for a number of years facing a variety of charges, some of which have now been tried or resolved and some which are still ongoing. The charges all arise directly or indirectly out of disputes between Mr. Lepp and various persons associated with the Town of Aurora park system.[1] Mr. Lepp is also involved in ongoing civil litigation with these same persons and others, both as a plaintiff and a defendant.[2] During most of these court proceedings he has represented himself.

[2] Mr. Lepp seeks to vary the terms of his current judicial release order, which was imposed by Justice of the Peace Premji on March 6, 2020 and was subsequently varied on consent by the Crown on May 13, 2020.

[3] In order to understand the context in which this order was made it is necessary to set out the procedural history of Mr. Lepp's criminal matters in some detail, to the extent that I can do so with only the somewhat limited information about his case that was provided to me.

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[1] A partial history of the proceedings against Mr. Lepp is set out in the trial delivered by Harpur J. of the Ontario Court of Justice on December 6, 2019 (unreported). Harpur J. found Mr. Lepp not guilty of certain charges and guilty of others, but has not yet ruled on an application by Mr. Lepp to have these latter charges stayed as remedy for an alleged breach of his s. 11(*b*) *Charter* right to a speedy trial.
[2] See, *e.g., Town of Aurora v. Lepp*, 2019 ONSC 5430; *The Corporation of the Town of Aurora v. Lepp*, 2019 ONSC 6041; *Eddie v. Lepp*, 2019 ONSC 6946.

I. Events leading up to the March 6, 2020 release order

[4] The record before me indicates that Mr. Lepp has been subject to some form of judicial interim release since at least May 2018.[3] However, I was not provided with the full history of his release terms or how they have evolved over time.

[5] At least since August 2018, his bail recognizance included a term providing that he was:

> … not to mention Helen Clarke, Jaclyn Solomon, Mandie Eddie or the TIME 4 PAWS dog walking business in any on-line media.

Ms. Clarke is the owner of the "Time 4 Paws" dog walking business. She and Mr. Lepp were at one time both volunteers who were involved in the operations of an Aurora leash-free dog park, but in or around late 2016 they had a falling out. Among other things, this eventually led to Ms. Clarke making a series of criminal complaints against Mr. Lepp, alleging that he was harassing her, and to Mr. Lepp making complaints to Aurora town officials about her use of the town dog park for business purposes.[4] Mr. Lepp has also brought a civil action against Ms. Clarke and others.

[6] Ms. Solomon is a paralegal whom Ms. Clarke retained to represent her in her defence against Mr. Lepp's civil suit. Ms. Solomon has also made criminal complaints of her own against Mr. Lepp. He in turn has added her as a defendant to his civil suit.

[7] Ms. Eddie is a former Town of Aurora by-law enforcement officer who in June 2017 issued a ticket to Mr. Lepp for having his dogs off leash in a park. He apparently then posted a number of entries on his blog complaining about her conduct, which led to her making a criminal complaint against him and also suing him for defamation.[5] Mr. Lepp in turn has named Ms. Eddie as a defendant to his own civil suit. The criminal charge against Mr. Lepp based on Ms. Eddie's complaint appears to have been stayed in November 2017, but the civil litigation between them is ongoing.

[8] In addition to the various charges Mr. Lepp faces or has faced based on complaints from Ms. Clarke, Ms. Solomon and Ms. Eddie, he has also been charged multiple times with breaching the terms of his bail and/or probation orders.

[9] Two sets of criminal charges against Mr. Lepp have previously gone to trial in the Ontario Court of Justice. On December 4, 2019, Rose J. found Mr. Lepp guilty of breaching the term of the bail order that was in force in March 2019 that prohibited Mr. Lepp from "mention[ing]" the complainants' names "in any on-line media". Specifically, Rose J. found that in March 2019 Mr. Lepp had violated this term by posting on his blog a copy of his civil

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[3] As discussed in *Eddie v. Lepp, supra,* Mr. Lepp seems to have also been charged criminally in the summer of 2017, but these charges were apparently stayed in November 2017.

[4] The history of Mr. Lepp and Ms. Clarke's relationship and the events that led to the charges against him is summarized by Harpur J. in his December 6, 2019 trial decision.

[5] See *Eddie v. Lepp, supra* at paras. 1-9.

Statement of Claim in which Ms. Clarke, Ms. Solomon and Ms. Eddie are named as defendants. Rose J. also found Mr. Lepp not guilty of a second bail breach charge based on a different blog post.

[10] Rose J. suspended the passing of sentence and placed Mr. Lepp on probation for three years. This probation order includes a term stating that Mr. Lepp is:

> Not to mention, that is speak, write, email, post or mention in any other manner or by any method on social media, online media, video, printed blog, online blog, or otherwise mention in any other manner or by any method Helen CLARKE, Jaclyn SOLOMON, Mandie EDDIE or the Time for Paws dog walking business in any online media, Except in a court room or on court documents in a courtroom or through a member of the Law Society for purposes of matters before the court.

While the record before me is not entirely clear, Rose J. appears to have copied the wording of this term from the bail recognizance that was in force against Mr. Lepp in December 2019. Mr. Lepp advised me that this term was first added to his bail in or around May 2019 in place of the earlier version that prohibited him from mentioning the listed names "in any on-line media". I was not given any information about the circumstances that led up to Mr. Lepp's release terms being varied in this way.

[11] It should be noted that Mr. Lepp is appealing Rose J.'s conviction and sentencing decisions, but his appeal has not yet been heard.

[12] On December 6, 2019, two days after Rose J.'s decision, Mr. Lepp was also found guilty by Harpur J. on three out of six further charges. Mr. Lepp's trial before Harpur J. had started some months earlier,[6] and the charges before Harpur J. all pre-dated the charges that were tried by Rose J.

[13] Harpur J. found Mr. Lepp guilty of two counts of breaching the bail term that prohibited him from "mentioning" the complainants or Ms. Clarke's business "in any on-line media",[7] by: (i) posting a response to a "Google review" in August 2018 in which he had mentioned Ms. Clarke's first name and referred to her connection to the dog park; and (ii) by posting links on his blog in August 2018 to various documents relating to this dog park in which her name appeared.

[14] Harpur J. also found Mr. Lepp guilty of a charge under s. 372(3) of the *Criminal Code* of unlawfully repeatedly communicating with Ms. Clarke with the intent to harass her. This charge was based on his having sent a series of emails to her and others between July 2017 and May 2018 in which he complained about her use of the dog park in connection with her

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[6] The trial before Harpur J. began in June 2019 and continued non-continuously over seven days in June, July, September and October 2018.

[7] This term had the same wording as the term that gave rise to the charges tried by Rose J., but was from an earlier version of Mr. Lepp's recognizance of bail.

dog-walking business. However, Harpur J. acquitted Mr. Lepp of a further charge of criminal harassment (*Criminal Code* s. 264(3)) relating to these same emails. He also found Mr. Lepp not guilty of a further charge under s. 372(3) relating to Ms. Solomon, as well as of a third bail breach charge.

[15] Mr. Lepp has made a post-verdict application to Harpur J. to have the charges on which he was found guilty stayed as a remedy for an alleged breach of his s. 11(*b*) *Charter* right to a speedy trial. Harpur J.'s decision on this application is currently under reserve. Accordingly, Mr. Lepp has not yet been formally convicted or sentenced for any of the charges on which Harpur J. found him guilty.

[16] On the same day that Harpur J. released his judgment, Mr. Lepp was charged with breaching both his bail and the terms of Rose J.'s probation order by posting an entry on his blog on December 5, 2019 in which he had mentioned Ms. Eddie's name. He pleaded guilty to the breach of probation charge on December 9, 2019 and received a fine. The related bail breach charge was withdrawn by the Crown. Mr. Lepp is apparently appealing this conviction.

[17] On December 11, 2019 I varied Mr. Lepp's bail to delete references to charges and complainants that were no longer before the courts. This resulted in Ms. Solomon and Ms. Eddie's names being removed from the terms of Mr. Lepp's bail recognizance. However, their names remained in Rose J.'s probation order.

[18] On January 8, 2020, Mr. Lepp brought an application before me to vary the terms of his probation. I held that I had no jurisdiction to do so in advance of his summary conviction appeal being heard, and also held that I was not satisfied on the record before me that the interests of justice required that I suspend the operation of the probation order pending the hearing of the appeal.[8]

[19] On March 4, 2020 Mr. Lepp was arrested and charged with two counts of breaching the terms of his probation and one count of breaching the terms of his bail recognizance. Specifically, it is alleged that on March 2, 2020 Mr. Lepp made a blog post in which he mentioned Ms. Clarke, Ms. Solomon and Ms. Eddie by name. This has resulted in a charge of breaching the term of his probation that prohibits him from mentioning any of these names, as well as a charge of breaching the term of his bail, which as varied in December 2019 only prohibited him from mentioning Ms. Clarke's name.

[20] The second count of breaching the terms of probation is based on an allegation that on February 14, 2020, when Mr. Lepp and Ms. Solomon were both at the Newmarket courthouse "in regards to a civil matter", he approached her and spoke to her while the court was not in session, thereby allegedly contravening a term in his probation order that prohibits him from communicating with Ms. Clarke, Ms. Solomon or Ms. Eddie.

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[8] See ss. 683(5) and 822(1) of the *Criminal Code.*

[21] On March 6, 2020, two days after his arrest, Mr. Lepp was brought before Justice of the Peace Premji for a bail hearing. Although Mr. Lepp has usually represented himself in both his criminal and his civil matters, on this occasion he was represented by counsel.

[22] Justice of the Peace Premji ultimately made a new bail order that replaced Mr. Lepp's previous bail order and applied to all of the charges that are still before the courts. The release order lists twelve charges, including the three new charges that were laid against Mr. Lepp on March 4, 2020.[9] However, this list includes the three charges on which Mr. Lepp was found not guilty on December 6, 2019 by Harpur J., as well as three additional charges from 2018 – two counts of failing to comply with a recognizance and one of obstructing justice – that as best as I can determine are also no longer before the courts.[10] On the record before me, it appears that the only charges before Mr. Lepp that actually remain outstanding against him are the three new breach charges that were laid in March 2020, and the three charges on which he has been found guilty by Harpur J. but has not yet been formally convicted or sentenced.

[23] Justice of the Peace Premji's release order named Mr. Lepp's wife as his surety in an amount of $15,000. The terms of release included a house arrest condition (Term 3) that required Mr. Lepp to remain in his residence at all times except when in the company of his wife or in the event he experienced a medical emergency. It also included non-contact and non-attendance terms in relation to Ms. Clarke, Ms. Solomon and Ms. Eddie (Terms 4 and 5), as well as a term stating that Mr. Lepp is:

> Not to mention, that is speak, write, email, post or mention in any other manner or by any method on social media, online media, video, printed blog, online blog, or otherwise mention in any other manner or by any method Helen CLARKE, Jaclyn SOLOMON, Mandie EDDIE or the TIME FOR PAWS dog walking business in any online media, EXCEPT in a court room or on court documents in a courtroom or through a member of the Law Society for purposes of matters before the court.

This latter term, Term 6, is identical to Term 10 of Rose J.'s probation order. Finally, Term 7 of Justice of the Peace Premji's bail order directed that Mr. Lepp:

> … not possess or use any computers or any other device that has access to the Internet or other digital network.

[24] Mr. Lepp has applied under s. 520 of the *Criminal Code* to have Justice of the Peace Premji's release order reviewed by a judge of the Superior Court of Justice. On May 13, 2020, nine

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[9] The list contains only eleven entries, but the two new breach of probation charges are listed as "breach of probation order (×2)".

[10] These charges were included in the list of charges in Mr. Lepp's September 1, 2018 bail order, but were not included in the list of still active charges that was provided to me when I varied Mr. Lepp's bail on December 11, 2019.

days before the scheduled bail review hearing took place, the Crown consented to vary the terms of Mr. Lepp's release order by:

(i) Deleting the house arrest condition (Term 3) entirely;

(ii) Deleting the term prohibiting Mr. Lepp from using or possessing any computers (Term 7) and replacing it with the following revised term:

> 7. Do not access or use the internet or email or text messages except in the direct continuous presence of your surety or an adult over the age of 21 as approved by your surety and only for the purposes of employment with Goggle[11] [*sic*] maps street view photography, remote P.C. support and website development.

The consent variation also corrected an error in the street number of Mr. Lepp's home in the clause requiring him to reside with his surety (Term 1).

II. Analysis

A. Reviewability of the release order under *St-Cloud*

[25] In his reasons for the Supreme Court of Canada in *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, Wagner J. (as he then was) held (at para. 6):

> Since a decision whether to order the pre-trial release of an accused involves a delicate balancing of all the relevant circumstances, the power of a judge hearing an application under s. 520 or 521 Cr. C. to review such a decision is not open-ended. I conclude that exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate.

[26] In the case at bar, Mr. Lepp was represented by counsel at his bail hearing, and the terms of release that were ultimately imposed by the presiding Justice of the Peace were essentially ones that Mr. Lepp's own counsel had proposed to the court. Justice of the Peace Premji noted:

> [T]he proposed plan is … one of the most stringent plans anyone could come up with. You are under house arrest with the exception of being in the direct company of your surety. You have no access to any modern-day technological devices that would give you an opportunity to breach what you are already on probation for, for the terms and conditions that you've already agreed to, save

[11] It is undisputed that this is a typographical error and that this word should have been "Google".

> using a landline or using that old traditional method of writing letters to individuals.

[27] In many situations it will be difficult for a defendant who has obtained his or her release by proposing a very stringent bail plan to later complain that a justice who has adopted the proposed terms "erred in law" or made a "clearly inappropriate" decision. However, in *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509 at para. 68, Wagner J. noted:

> [I]t often happens that the Crown and the accused negotiate a plan of release and present it on consent. Consent release is an efficient method of achieving the release of an accused, and the principles and guidelines outlined above do not apply strictly to consent release plans. Although a justice or a judge should not routinely second-guess joint proposals by counsel, he or she does have the discretion to reject one. Joint proposals must be premised on the statutory criteria for detention and the legal framework for release.

In the case at bar, Crown counsel who appeared at the bail hearing (not Mr. Westgate) described the bail hearing as "partially contested", explaining that his only concern was with the suitability of Mr. Lepp's wife as his proposed surety, and that "if another surety had proposed this plan, I think it would have been a consent release, frankly".

[28] In my view, *Antic* permits a defendant who has agreed to restrictive terms in order to limit the scope of the Crown's objection to his or her release to later seek to have these terms reviewed on the basis that they are inconsistent with "the statutory criteria for detention and the legal framework for release". In this case, however, I am also satisfied that there are additional factors that would be sufficient on their own to permit me under *St-Cloud* to conduct a *de novo* reassessment of the terms of Mr. Lepp's release.

[29] First, the Crown has already consented to substantial changes to the bail terms that were set by the Justice of the Peace, deleting the house arrest condition entirely and substantially loosening the restrictions on Mr. Lepp's ability to use computers and the internet. As a result, Mr. Lepp's current release order can no longer be accurately characterized as reflecting a judicial officer's "delicate balancing of all the relevant circumstances".[12] Rather, the current terms of Mr. Lepp's bail have effectively been set by the Crown. Accordingly, in my view, no judicial deference to these terms is warranted.

[30] Indeed, by agreeing to eliminate or relax some of the very stringent restrictions the Justice of the Peace placed on Mr. Lepp's liberty, the Crown is effectively acknowledging that these restrictions are no longer necessary or appropriate, if they ever were. As I see it, this opens the door to the other terms that were imposed by the Justice of the Peace also being judicially reassessed.

[31] There has also been a potentially material change of circumstance, insofar as Justice of the Peace Premji released his decision a week before the courts were shut down in response to

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[12] *St-Cloud*, *supra* at para. 22.

the COVID-19 public health crisis. As I will explain, the COVID-19 shutdown would have made it necessary for me to reassess the severe restrictions Justice of the Peace Premji placed on Mr. Lepp's ability to use computers and the internet (Term 7), even if the Crown had not already opened the door to judicial review of this term by agreeing to substantially vary this condition.

B. Reassessment of the current terms of Mr. Lepp's release

1. The need for a surety

[32] Mr. Lepp directed most of his objections at the restrictions placed by the current version of Term 7 on his ability to use a computer and the internet, and raised a specific concern about the requirement that his internet usage be supervised by a surety or another adult approved by her. I will address Term 7 later in my reasons.

[33] However, Mr. Lepp also argued that the Justice of the Peace should not have ordered that he be placed under the supervision of a surety at all, and should not have raised the monetary amount of his bail from $7,500 to $15,000.

[34] In my view, the Justice of the Peace's decision to order Mr. Lepp's release on a surety bail was not "clearly inappropriate". Mr. Lepp has apparently been under the supervision of a surety since September 2018, after attracting multiple charges for breaching his previous non-surety recognizance,[13] some which have subsequently resulted in convictions or findings of guilt. Mr. Lepp has also been found guilty of one count of making harassing telecommunications contrary to s. 372(4) of the *Criminal Code*, although this charge seems to have been based on conduct before his arrest in May 2018, when he was presumably not subject to any bail recognizance. Mr. Lepp also has a recent conviction following a guilty plea for failing to comply with the terms of his probation order, and is now facing three new charges of failing to comply with the terms of court orders, one relating to his bail recognizance and two to his probation order.

[35] In these circumstances, I am satisfied that there was a reasonable basis for the Justice of the Peace to have concerns about whether Mr. Lepp could be trusted to comply with the terms of a release order if he were not put under the supervision of a surety. As Justice of the Peace Premji stated in his reasons, he "really ha[d] no confidence in [Mr. Lepp], specifically based on [his] actions." In my view, this was fact-driven conclusion the justice was entitled to reach, and which attracts "the usual deference to the first judge's findings of fact": *St-Cloud, supra* at para. 103.

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[13] While Mr. Lepp was also subject to bail conditions prior to September 1, 2018, I was not provided with copies of these bail recognizances or any specific information about whether they were also surety releases. However, when Mr. Lepp's wife testified at his March 6, 2020 bail hearing her evidence was that she recalled that she had first been named his surety in "September of 2018", to which Crown counsel (not Mr. Westgate) replied: "I'm honest, I can't recall, but that sounds accurate."

[36] Accordingly, I would not interfere with the Justice of the Peace's decision to order a surety release. In the absence of any evidence from the surety that the heightened monetary amount of the current release order is causing her any difficulties, I am also not prepared to vary the dollar figure of $15,000 set by Justice of the Peace Premji.

2. The prohibition on Mr. Lepp "mentioning" the complainants' names

[37] As noted above, Term 6 of the current release order provides that Mr. Lepp is:

> Not to mention, that is speak, write, email, post or mention in any other manner or by any method on social media, online media, video, printed blog, online blog, or otherwise mention in any other manner or by any method Helen CLARKE, Jaclyn SOLOMON, Mandie EDDIE or the TIME FOR PAWS dog walking business in any online media, EXCEPT in a court room or on court documents in a courtroom or through a member of the Law Society for purposes of matters before the court.

[38] In my view, this term is problematic in at least three different respects. First, the wording is opaque and extremely difficult to interpret. In particular, it is far from clear whether the term is meant to only restrict Mr. Lepp's ability to "mention" the named persons and the business online, or whether the restriction is meant to apply more broadly to <u>all</u> uses of these names by him out of court or outside of court documents. Different aspects of the wording of Term 6 point in different directions. On the one hand, the phrase:

> … speak, write, email, post or mention in any other manner or by any method on social media, online media, video, printed blog, online blog, or otherwise mention in any other manner or by any method …

can be read as modified by the subsequent limiting expression "in any online media", with the result that the term as a whole only applies to Mr. Lepp's "mentioning" these names online. However, on this comparatively narrow reading of the term the complexity and breadth of the earlier phrase make little sense, as does the exception permitting Mr. Lepp to "mention" these names "in a courtroom or on court documents". This latter exception would seem to be completely unnecessary if the term as a whole is understood as only applying to Mr. Lepp's online communications.

[39] The reference to a "printed blog" as something apparently distinct from an "online blog" is also puzzling, since in ordinary usage a "blog" is by definition something that appears online.[14]

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[14] The term "blog" is a contraction of the term "web log", and is defined by the Merriam-Webster Dictionary to mean "a website that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer".

[40] Mr. Lepp advised me that he understands Term 6 to mean that he "cannot say or write the [four] names unless he is in a court room", and I am unable to say that his broad reading of the term is plainly wrong.

[41] Trotter J.A., one of the leading Canadian authorities on the law of bail, notes extrajudicially in his text *The Law of Bail in Canada* that "[t]he most important feature of conditions of release is that they must be certain. That is, they must be understandable to the accused."[15] In my view, Term 6 of Mr. Lepp's bail utterly fails to meet this very basic threshold requirement for any proper bail condition.

[42] A second problem with Term 6 as worded is that it includes Ms. Solomon and Ms. Eddie's names, which I specifically ordered on December 11, 2019 should be removed from Mr. Lepp's bail order because he was no longer facing any charges in which they were the complainants. Crown counsel who appeared before me on December 11, 2019 (again, not Mr. Westgate), and who opposed my order removing Ms. Solomon and Ms. Eddie's names, also appeared at Mr. Lepp's March 6, 2020 bail hearing. He presented Justice of the Peace Premji with a draft release order that re-inserted these names, without informing the Justice of the Peace that I had previously deleted them from Mr. Lepp's previous bail. While it would have been open to Crown counsel to argue to the Justice of the Peace that there had been material changes of circumstance that allowed the Justice of the Peace to depart from my ruling and re-insert these names, he was not entitled to simply ignore my previous order as he did.

[43] The third and most fundamental problem with the Term 6 condition is that regardless of whether it is interpreted broadly or narrowly, it is not carefully tailored to advance legitimate bail objectives. In *Antic, supra,* Wagner J. explained (at para. 67(j)):

> Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person.

In Mr. Lepp's case, the Crown has relied exclusively on the secondary ground in s. 515(10)(*b*) of the *Criminal Code* as a reason to put restrictions on his liberty. This section provides:

> 10. For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> …
>
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of

[15] G. Trotter, *The Law of Bail in Canada*, at §6.5(b)(ii).

> 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; …

Accordingly, any bail condition that is imposed on Mr. Lepp must be directed at "the protection or safety of the public" and must be demonstrably necessary to achieve these objectives.

[44] Term 6 places sweeping restrictions on Mr. Lepp's ability to "mention" the complainants' names, without regard to the content of his communications or to their surrounding context. As discussed above, the extent of these restrictions is unclear, since the Term 6 condition can be understood broadly as applying to all communications that take place outside a courtroom or in court documents, but can also be read more narrowly as applying only to Mr. Lepp's communications on the internet. On either reading, however, the term captures a vast range of expressive activity that is not likely to cause any identifiable harm to anyone, including the persons named in the order. While protecting these named persons from being harassed by Mr. Lepp would be a legitimate secondary ground objective, a term that bars Mr. Lepp from simply "mentioning" their names in any and all circumstances seems on its face to be somewhat like trying to swat a fly by shooting at it with a blunderbuss. The potential overbreadth remains striking even if Term 6 is interpreted as being limited to Mr. Lepp's online communications.

[45] In my view, Term 6 could only be found to be "necessary for the protection or safety of the public" if there were some cogent reason for believing that no more carefully crafted restrictions could be devised that would be effective at stopping Mr. Lepp from harassing the complainants.

[46] The evidence before me falls well short of the mark. While Mr. Lepp has been found guilty of one count of sending "harassing telecommunications" to Ms. Clarke, this charge was laid in May 2018, at a time when Mr. Lepp does not appear to have been facing any criminal charges or to have been subject to any bail orders. There is no evidence before me that he has ever engaged in any similar conduct after he was charged.[16]

[47] The record before me also contains no evidence that Mr. Lepp has ever blogged about the complainants in a way that might raise legitimate concerns about their psychological health or personal safety. I recognize that when Rose J. sentenced Mr. Lepp for breaching the earlier version of this bail term, he described Mr. Lepp as having "engaged in a pattern of online postings, which constitute bullying" and declared that the bail term at issue had been imposed "to prevent him from online blogging in a manner which is hurtful and demeaning to Ms. Eddie, Ms. Clarke and Ms. Solomon". These conclusions may very well have been justified on the evidence that was before Rose J. However, the problem I face is that they are not supported by the record that has been put before me. To the contrary, the only specific

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[16] Mr. Lepp was charged with sending harassing emails to Ms. Solomon in July 2018, but was acquitted of this charge by Harpur J.

information I have been given about Mr. Lepp's blogging and other online activity is that he has "mentioned" the complainants' names by posting documents from his civil case and other documents relating to the operations of the dog park, and once when responding to a negative "Google review" that attacked him personally. Nothing about the content of these posts as they have been described in the materials before me would appear to raise any secondary ground concerns.

[48] Mr. Westgate argues that since any "mention" by Mr. Lepp of the complainants' names captured by Term 6 would now also be a breach of the identically-worded term of the probation order imposed by Rose J., Term 6 can now be seen as directed towards preventing the commission of further criminal offences under s. 733.1 of the *Code* (fail to comply with a probation order). I do not accept this argument, for two main reasons. First, probationary terms, unlike terms of a bail order, can properly be crafted "to change an accused person's behaviour or to punish an accused person". I do not think the restrictions *Antic* places on including such terms in a bail order can be circumvented simply by pointing to the presence of a similar term in a probation order. Second, the existence of a "substantial likelihood that the accused will … commit a criminal offence" is only one of the factors bearing on the key question of whether a bail condition is "necessary for the protection or safety of the public". In my view, conduct by Mr. Lepp that does not in and of itself pose any substantial risk of harm to the complainants or to the public will not give rise to a genuine secondary ground concern merely because it has already been prohibited by the terms of his probation. If Mr. Lepp violates these latter terms he can be charged and prosecuted for the breach whether or not the terms are duplicated in a bail order.

[49] Mr. Westgate submitted further that if I am not satisfied that the Term 6 order as it is currently worded is properly supportable as a bail condition, I should vary it to make it more closely resemble the term that was included in several of Mr. Lepp's previous bail orders, which provided that he was:

> Not to mention Helen CLARKE, Jaclyn SOLOMON, Mandie EDDIE or the TIME 4 PAWS dog walking business in any on-line media.

Mr. Westgate suggests that the wording of the term should be modified to specify that it includes "social media, online media, video, printed blog or online blog".

[50] While varying Term 6 along these lines would address some of the vagueness concerns that I discussed earlier,[17] it would not deal with the more fundamental problem of overbreadth. While I appreciate that the judicial officers who previously barred Mr. Lepp from even "mentioning" the complainants' names online likely had some reason for taking this approach, I simply do not know what this reason was. I do not know when this term was first added to Mr. Lepp's bail conditions, who first imposed it, or why he or she did so. Moreover,

[17] I remain puzzled by the proposed reference to a "printed blog" as something distinct from an "online blog".

it is of some potential significance that this term may have been first added to Mr. Lepp's bail at a time when he was facing much more serious charges than he now faces.[18]

[51] On the record before me, I am unable to conclude that a bail term with the sweeping reach the Crown proposes is justifiable under *Antic* as "necessary for the protection or safety of the public". Moreover, the necessity of such a bail term as a practical matter is made even more questionable by the fact that Mr. Lepp is currently under a probation order that replicates the language of the existing Term 6. Accordingly, striking Term 6 from Mr. Lepp's bail entirely will have no immediate impact on his permitted online activities. If the charges against Mr. Lepp to which the bail order applies are still before the courts when his probation order expires or is varied or set aside on appeal, this will in my view constitute a material change of circumstance for the purposes of *St-Cloud, supra* that will allow the prosecution to apply to have the terms of Mr. Lepp's bail reviewed under s. 521 of the *Code*. The Crown can then seek to present a proper evidential record to support its contention that an order prohibiting Mr. Lepp from even "mentioning" the named persons online or elsewhere is necessary for the protection or safety of the public.

[52] Accordingly, I am directing that Term 6 be struck from Mr. Lepp's release order in its entirety.

3. The restrictions on Mr. Lepp's ability to use the internet

[53] As discussed above, Justice of the Peace Premji prohibited Mr. Lepp from possessing or using any computer or device with internet or any network capabilities (Term 7 of the release order). However, the Crown has subsequently agreed to vary this term to allow Mr. Lepp to use internet-connected devices for work when he is under the direct supervision of his surety or another adult whom she has approved. In its amended form, Term 7 now reads:

> 7. Do not access or use the internet or email or text messages except in the direct continuous presence of your surety or an adult over the age of 21 as approved by your surety and only for the purposes of employment with Goggle[19] [*sic*] maps street view photography, remote P.C. support and website development.

[54] In my view, both the original and amended versions of Term 7 have two serious defects. First, they take no account of Mr. Lepp's status as a self-represented litigant who is currently defending himself against multiple criminal charges, as well as dealing with multiple civil actions both as a plaintiff and as a defendant. Neither version of Term 7 permits Mr. Lepp to use the internet for purposes relating to his various court cases. While I have considerable difficulty imagining how entirely barring Mr. Lepp from doing online legal research or using the internet to communicate with court staff and opposing counsel could have ever been justified, these severe restrictions have become entirely untenable in the current landscape

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[18] The charges listed in Mr. Lepp's September 1, 2018 bail recognizance include one count of extortion, which is a straight indictable offence punishable by life imprisonment. The term prohibiting Mr. Lepp from "mentioning" the complainants' names online was added to Mr. Lepp's bail at some point prior to August 23, 2018.

[19] It is undisputed that this is a typographical error and that this word should have been "Google".

created by the COVID-19 public health crisis, which has closed the law libraries and is likely to shift most court hearings onto online platforms for the foreseeable future. In my view, Mr. Lepp's *Charter*-protected rights to reasonable bail and to make full answer and defence now require that his bail terms allow him to use the internet for legal research, for serving and filing documents and for appearing in virtual online court hearings, as well as for communicating with his counsel if he should choose to retain one.

[55] However, even if Term 7 were amended to permit Mr. Lepp to use the internet for litigation and court purposes as well as "for the purposes of employment" while he was under the immediate supervision of his surety or her designate, I am not satisfied that such a term would be reasonable in the circumstances here. Limiting Mr. Lepp's ability to do internet legal research and other work relating to his court cases to such times as his surety or another adult is willing and able to supervise him would significantly interfere with his right to make full answer and defence. In my view, in order to justify this interference, there would need to be very compelling reasons to think that constant supervision of Mr. Lepp's internet usage was "necessary for the protection or safety of the public".

[56] On the record before me I am not persuaded that such stringent limits on Mr. Lepp's internet access have been demonstrated to be necessary. Unlike cases where there is a concern that the defendant will use the internet to commit offences covertly, the only apparent secondary ground concern with Mr. Lepp is that he might use the internet to harass the complainants overtly. Although the record before me indicates that over the past two years Mr. Lepp has not fully complied with his bail conditions, none of the internet-related breaches that have been alleged or proved against him seem to have involved him sending any harassing communications to the complainants. Rather, as discussed above, all of his alleged and established breaches have involved him making blog posts in which he "mentioned" the complainants' names, most often by posting documents from his civil suit that contains their names in the style of cause.

[57] Moreover, for at least some part of the time Mr. Lepp has been on bail he was allowed to use the internet without supervision. Between September 2018 and March 2019 he was barred from using the internet entirely by a term that provided that he was "[n]ot to access or use the Internet or email or any form of electronic communication". While he was never directly charged with breaching this term, Rose J. found Mr. Lepp guilty of having breached a different bail term in March 2019 by posting a copy of his statement of claim that mentioned the complainants by name on his blog, which necessarily implies that Mr. Lepp must have "access[ed] or us[ed] the internet".

[58] However, at some point between March and December 2019 Mr. Lepp's bail restrictions on using the internet were relaxed, so that as of December 11, 2019 his bail specified that he was:

> Not to access the Internet or email except in the direct continuous presence of an adult over 21 or except for work purposes including Google Street view photography approved by Google and IT support for new and existing clients.

This amended condition remained in force until March 2020, when his previous bail was rescinded and replaced by the current release order, in which Term 7 has now been replaced by the amended version consented to by the Crown.

[59] There is no evidence before me that Mr. Lepp ever took advantage of the opportunity he had until March 2020 to use the internet without supervision to send harassing communications to the complainants. Rather, the only evidence of any breach of this bail condition is the recent allegation that in March 2020 he breached a different term of his bail by "mentioning" Ms. Clarke's name in a blog post. Mr. Lepp maintains that this post consisted of an uploaded image of his Statement of Claim, and the Crown did not suggest otherwise. His surety testified at the March 6, 2020 bail hearing that she was unaware of this blog post, implying that Mr. Lepp must have made the post when she was not supervising him on the internet. If so, this would have been contrary to Term 7 of his bail, which permitted him to use the internet unsupervised only for work purposes.

[60] This history suggests that allowing Mr. Lepp to have unsupervised access to the internet may well lead to him making similar blog posts that breach the current terms of his probation by "mentioning" the complainants' names, and that he is not likely to be deterred from doing this by the knowledge that his blog posts will be scrutinized by the police. However, this same history also suggests that Mr. Lepp is not likely to try to communicate directly with the complainants. Further, at least on the record before me I cannot conclude that the prospect of Mr. Lepp blogging in breach of his probation presents such a substantial a risk of public harm to make it "necessary" for his internet usage to be restricted in a manner that would significantly interfere with his right to make full answer and defence.

[61] In my view, an appropriate balance would be struck by permitting Mr. Lepp to use the internet without supervision for the purpose of employment, as his bail did prior to March 2020, and to expand this exception to also permit him to use the internet without supervision for purposes relating to his criminal and civil court cases. I also see no compelling reason to prevent him from using the internet for other purposes, including sending emails, when he is supervised by his surety or her designate.

[62] I would accordingly vary what is now Term 7 of Mr. Lepp's release order as follows (changes underlined):

> Do not access or use the internet or email or text messages except <u>(i)</u> in the direct continuous presence of your surety or an adult over the age of 21 as approved by your surety; <u>(ii)</u> for the purposes of employment with Google maps street view photography, remote P.C. support and website development; <u>or (iii) for purposes relating to your ongoing court proceedings, including conducting online legal research, serving and filing electronic documents, communicating with your own and other counsel, and attending virtual online court hearings.</u>

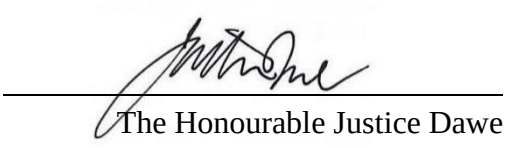
III. Disposition

[63] For the reasons given above, Mr. Lepp's bail review application is allowed. I would vary his current bail by striking Term 6 in its entirety and varying Term 7 as set out above.

[64] I would also vary the non-contact and non-association terms, Terms 4 and 5, to take into account my December 11, 2019 order that deleted Ms. Solomon and Ms. Eddie's names from the equivalent terms of Mr. Lepp's previous bail recognizance. In this regard, I note that the situation with Ms. Solomon has changed since I made my previous order, in that she is now the complainant in one of the new March 2020 charges that has been laid against Mr. Lepp. I am satisfied that this is a material change that justifies re-introducing her name into the non-contact and non-association terms of Mr. Lepp's release order.

[65] However, there has been no similar change in relation to Ms. Eddie. She is not a complainant in any of the outstanding charges against Mr. Lepp, and he is already barred from contacting or communicating with her or going to places he knows to be associated with her by the terms of Rose J.'s probation order. As best as I can determine from the record before me, the charges against Mr. Lepp in which she was the complainant were stayed in the fall of 2017. In these circumstances I continue to be of the view, as I was in December 2019, that it is no longer necessary or appropriate for non-contact and non-association terms relating to her to be included in Mr. Lepp's bail order. Accordingly, Terms 4 and 5 will also be varied by deleting Ms. Eddie's name from these conditions.

[66] Finally, since Term 3 (house arrest) was previously deleted from Mr. Lepp's release order on the Crown's consent, and since what was previously Term 6 is now also to be deleted, the remaining terms should now be renumbered, so that what are currently Terms 4 and 5 will become Terms 3 and 4 of the new release order, and the amended version of Term 7 set out above will become the new Term 5.



The Honourable Justice Dawe

Released: June 3, 2020

CITATION: R. v. Lepp, 2020 ONSC 3435

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

ROBERT LEPP

REASONS FOR JUDGMENT

The Honourable Justice Dawe

Released: June 3, 2020