COURT MARTIAL

Citation: *R. v. Tait*, 2021 CM 2007

Date: 20210415
Docket: 202040

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

Prosecutor
and
Responding Party

- and -

Sergeant C.A. Tait

Accused
and
Moving Party

Before: Commander S.M. Sukstorf, M.J.

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court orders that any information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON PROSECUTION'S MOTION TO SUMMARILY DISMISS THE ACCUSED'S APPLICATION SEEKING A REMEDY UNDER SECTION 52 OF THE *CONSTITUTION ACT, 1982* FOR A BREACH OF RIGHTS GUARANTEED UNDER SECTION 7 AND PARAGRAPH 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

Introduction

[1] On 22 September 2020, the Director of Military Prosecutions preferred one charge for an offence contrary to section 130 of the *National Defence Act* (*NDA*); that is, sexual assault, contrary to section 271 of the *Criminal Code* against the applicant.

[2] On 11 February 2021, the Court Martial Administrator convened a Standing Court Martial for the trial of the accused, the moving party in this application, to be held from 12 to 23 April 2021 in 4th Canadian Division Support Base Petawawa, Ontario.

[3] On 13 December 2018, Bill C-51 was enacted into law. Under Bill C-51, sections 278.93 and 278.94 of the *Criminal Code* amended the procedural protocols previously set out in sections 276.1 and 276.2 of the *Criminal Code.* In the case of *R. v. Darrach*, [2000] 2 S.C.R. 443, the Supreme Court of Canada (SCC) upheld the constitutionality of the earlier section 276 regime.

[4] On 12 March 2021, the accused filed a notice of constitutional question questioning the constitutional validity of the new protocol set out in sections 278.93 and 278.94 of the *Criminal Code*.

[5] On 12 March 2021, the accused also filed a notice of application seeking a declaration pursuant to section 52 of the *Constitution Act, 1982* that sections 278.93 to 278.94 of the *Criminal Code* are of no force or effect because they violate the applicant's *Charter* rights as guaranteed by section 7 and paragraph 11(*d*) of the *Charter* and/or any other relief this Court sees fit.

[6] On 23 March 2021, as the responding party, the prosecution filed a notice of motion asking this Court to summarily dismiss the accused's application.

Background

[7] Section 276 of the *Criminal Code* provides legislative protection for sexual assault complainants. In short, section 276 prohibits the admission of evidence that the complainant has engaged in other sexual activity (OSA) either with the accused or another person if the evidence is intended to support one of the "twin myths".

[8] The twin myths are: a woman who has consented to sexual activity in the past is more likely to have consented to it on this occasion; and secondly, an unchaste or sexually active woman is less worthy of belief.

[9] Even if the OSA is not being used to support any of the twin-myth inferences, OSA is not admissible unless a judge determines that the evidence is of specific instances of sexual activity; relevant to an issue at trial; and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[10] The moving party's application relates to the statutory procedure for the admissibility of evidence of OSA of the complainant. Step 1 of the process was not changed with Bill C-51. If an accused seeks to have OSA admitted, the accused must still make an application to the trial judge for a hearing pursuant to sub-section 278.93(1). The application must be in writing and set out detailed particulars of the evidence the accused wishes to adduce and the application must be served on prosecution and the Office of the Chief Military Judge at least seven days in advance or any shorter interval as ordered.

[11] Step 1 of the application is held *in camera* pursuant to subsection 278.93(3) and if the judge is satisfied that the application was made in accordance with subsection 278.93(2), the trial judge shall then hold a Step 2 hearing, also *in camera* under section 278.94 to determine whether the evidence is admissible under subsection 276(2).

[12] It is Step 2 that changed with Bill C-51. Although a complainant is not compellable to testify at the hearing, the amendments provide the complainant and the complainant's counsel with the right to make representations and submissions at the hearing (see subsections 278.94(2) and (3)).

[13] Further, to ensure that a complainant understands their full rights, the judge is required to inform a complainant of their right to be represented by counsel (see subsection 278.94(3)). After the hearing, the judge decides whether the evidence, or any part of it, is admissible and shall provide reasons (see subsection 278.94(4)).

[14] Since the coming into force of the new provisions, the courts have been divided on whether some or all of the amended provisions pass constitutional scrutiny. In cases *R. v. Reddick*, 2020 ONSC 7156, *R. v. Anderson*, 2019 SKQB 304, *R v. A.M.*, 2019 SKPC 46, *R. v. D.L.B.*, 2020 YKTC 8; and *R. v. J.S.*, [2019] A.J. No. 1639 (Q.B.), the courts found the provisions to be unconstitutional.

[15] Conversely, in cases such as *R. v. Barakat*, 2021 ONCJ 44, *R. v. C. C.*, 2019 ONSC 6449, *R. v. A.C.*, 2019 ONSC 4270, *R. v. F.A.*, 2019 ONCJ 391, and *R. v. Whitehouse*, 2020 NSSC 87 the courts found no *Charter* violation flowing from the new provisions.

[16] Interestingly, in *R. v. R.S.*, 2019 ONCJ 645, and *R. v. J.J.*, 2020 BCSC 29, the courts found the provisions to be constitutional if read in a manner that allow an accused to make the application once the complainant had testified in chief.

[17] The case of *J.J.* was granted leave to appeal directly to the SCC by the *Her Majesty the Queen v. J.J.*, SCC No. 39133 [23 July 2020]. The case of *R. v. Reddick* has now joined *J.J.*, in the appeal to the SCC. It is anticipated that the SCC will adjudicate on the following issues, among others, that flow from the amended section 276 regime:

(a) the appropriate time for an accused to apply to introduce evidence of OSA under section 276 of the *Criminal Code*; and

(b) the extent to which the prosecution is entitled to consult with the complainant and/or her counsel at any stage of the application.

Issue

[18] The Court must decide whether to allow evidence and argument on the accused's notice of application seeking a declaration that sections 278.93 and 278.94 of the *Criminal Code* are of no force or effect because they violate the applicant's *Charter* rights as guaranteed by section 7 and paragraph 11(*d)* of the *Charter* and/or any other relief this Court sees fit.

Positions of the parties

Moving Party (Accused)

[19] The applicant challenges the constitutionality of the new procedural regime that came into force under Bill C-51 on 13 December 2018. More specifically, he challenges sections 278.93 and 278.94 (the "impugned provisions") of the *Criminal Code* which permit a complainant to appear, make submissions, be represented by counsel, and cross-examine the accused at a hearing determining the admissibility of OAS under section 276 of the *Criminal Code*.

[20] The applicant argues that the constitutional breach arises from the cumulative effect of the following factors:

(a) the significant burden that the accused must meet in order to introduce evidence under section 276;

(b) the extent of evidence and trial strategy that the accused must reveal in order to meet the burden established by section 276;

(c) the advance notice requirement contained at subsection 278.93(4) which obliges the accused to reveal important aspects of his defence well in advance of the complainant's testimony at trial;

(d) the expanded definition of sexual activity at subsection 276(4), which now includes any communication made for a sexual purpose or whose content is sexual in nature;

(e) the involvement of the complainant at the admissibility hearing to actively participate in the hearing and be represented by counsel; and

(f) the degree to which the complainant's involvement in the admissibility hearing undermines the vital role of the prosecution.

[21] In response to the Prosecution's motion seeking the court to summarily dismiss the application, the accused submits that the notice of constitutional question before the Court does not require adjudicative facts, and can be decided on the basis of "imaginable circumstances" as per the SCC decision in *R. v. Mills*, [1999] 3 SCR 668 at paragraph 41.

[22] The accused further argues that requiring him to establish a factual foundation through Step 1 of the application process is counterproductive given the substance of the constitutional issues he raises.

Responding Party (prosecution)

[23] The prosecution asks this Court to summarily dismiss the accused's application because in their view, the accused's notice is premature. It is their position that prior to embarking on a constitutional review of the impugned provisions, the accused is required to provide sufficient factual foundation to demonstrate that the evidence he intends to adduce is capable of being admissible at his trial.

[24] The prosecution further submits that the applicant's proposed approach to the *Charter* application precludes this Court's ability to properly exercise its gatekeeping role and is not consistent with the direction provided by the SCC requiring constitutional litigation to be supported by a proper factual foundation. In their view, this Court should refrain from spending time and resources to adjudicate the merits of complex constitutional issues until the applicant has demonstrated a sufficient factual foundation upon which he can support an alleged infringement of his rights.

Assessment of the application for summary dismissal

The applicable law

Reasonable prospect of success

[25] In considering the prosecution's motion for the Court to summarily dismiss the accused's application, the accused bears the onus of advancing sufficient evidentiary foundation and legal argument to show that his application has a reasonable prospect of success.

[26] In assessing whether the Court may summarily dismiss all or portions of the accused's application, the facts and grounds relied upon by the accused in his notice as well as the verbal and written submissions are assumed to be true.

Analysis

Is the applicant required to satisfy Stage 1 of the section 276 process prior to bringing forward a constitutional challenge on sections 278.93 and 278.94?

[27] The respondent argues that the applicable law on the conditions of admissibility has not changed and the substantive aspect of section 276 is not contested by the applicant in this case. He further argues that prior to engaging in *Charter* litigation, sufficient adjudicative facts are required and such facts must be relevant to an issue at trial and capable of being admissible. To support this position, he relies upon the Ontario Court of Appeal decision in *Darrach*. In *Darrach*, the accused was charged with a single count of sexual assault. By way of an application filed, the defence challenged the constitutionality of several *Criminal Code*

provisions relating to sexual assault prosecutions, which included paragraph 276.1(2)(a) (see *Darrach* at paragraphs 6 and 7).

[28] In *Darrach*, the trial judge ruled that the constitutional challenge was premature, as there was insufficient factual foundation to determine the issues raised since the defence had not filed an application under section 276.1. Consequently, the trial judge directed that the prosecution commence the presentation of their case and advised defence that if it chose to do so, it could file a section 276.1 application. However, in rendering its decision in *Darrach*, the SCC was silent on whether or not this particular position taken by the trial judge was correct.

[29] In response, the applicant asserts that given the nature of the notice provided, demanding that he comply with step 1 undercuts the very issues he raises in his notice of constitutional question. The applicant further highlights that the SCC has already agreed to adjudicate on issues relevant to the actual question of timing for a section 276 application.

[30] The various court challenges contend that there is an adverse effect to an accused's defence flowing from the updated 2018 legislative regime due to the combined effect of the advanced notice requirement and the right of a complainant to participate and be represented at the hearing. In addition, the applicant questions the permissible degree of consultation and sharing of the defence's materials between the prosecution and the complainant.

[31] Step 1 requires an accused to provide an affidavit that sets out the detailed particulars of the evidence he seeks to adduce and question the complainant on as well as an explanation of its relevance to the proceedings. Although the complainant does not have standing at this first step, if the trial judge decides that the application should proceed to an *in camera* hearing on the merits, it is the proposed timing of this hearing that underpins the accused's concerns. At Step 2, the detailed information submitted by the accused must be provided to the complainant and the complainant's counsel to permit them to make submissions regarding its content. The accused is troubled by the fact that when this unfolds prior to the trial, the complainant is provided pre-testimony access to his defence materials which will include their theory of the case.

[32] However, the question to be answered at this stage is simply whether there is a sufficient factual basis to permit the Court to consider the constitutional question raised by the applicant and to adjudicate the issues raised.

[33] The respondent argues that the applicant's proposed approach is not consistent with the direction provided by the SCC with respect to litigation contesting the constitutionality of legislation. He relies upon the SCC decision of *Danson v. Ontario (Attorney General),* [1990] 2 SCR 1086 at 1099 to argue that a factual foundation is a pre-requisite to *Charter* litigation.

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack.

[34] The respondent also relies upon Cory J. in *Mackay v. Manitoba*, [1989] 2 SCR 357, at page 361, to caution against deciding *Charter* issues in a vacuum:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[35] In his representations, the respondent sought to distinguish the cases relied upon by the applicant because they all relate to the admissibility of records and do not relate to OSA. However, the Court notes that sections 278.93 and 278.94 of the *Criminal Code* are the procedural provisions which deal with the determination of the admissibility of evidence of both the:

(a) sexual activity of the complainant other than the sexual activity that forms the subject matter of the charge; and

(b) records relating to the complainant in which she has a reasonable expectation of privacy.

[36] The applicant relies upon the SCC decision in *Mills* as upholding his right to raise notice of a constitutional question regarding a statutory regime without having to first go through the process of admitting those records. The applicant contends that while the regime that applies to the admission of records is not identical to the regime for admitting OSA, at paragraph 26, the SCC in *Darrach* acknowledged that:

> The use of these records in evidence is analogous in many ways to the use of evidence of prior sexual activity, and the protections in the *Criminal Code* surrounding the use of records at trial are motivated by similar policy considerations.

[37] Based upon that position, the applicant relied upon paragraphs 35 to 42 of *Mills* where the SCC addressed the type of argument put forth by the prosecution based upon prematurity:

> 35 The appellant the Attorney General for Alberta ("Alberta") submitted that Belzil J.'s finding of constitutional invalidity was premature and lacked an adequate factual foundation. Alberta argued that as no application for records had been made by the respondent under the new provisions, it is unclear what records, if any, would be denied to the respondent. Several lower courts have endorsed this reasoning. For example, see *R. v. Weeseekase* (1997), 161 Sask. R. 264 (Q.B.); *R. v. G.C.B.*, [1997] O.J. No. 5019 (QL) (Gen. Div.); *R. v. Fiddler*, [1998] O.J. No. 5819 (QL) (Prov. Div.); *R. v. D.H.C.* (1998), 163 Nfld. & P.E.I.R. 116 (Nfld. S.C.T.D.); *R. v. O'Neill* (1998), 172 Nfld. & P.E.I.R. 136 (Nfld. S.C.T.D.); *R. v. E.M.F.*, [1997] O.J. No. 4828 (QL) (Gen. Div.). However, other courts have adopted Belzil J.'s reasoning in the court below: see, e.g., *R. v. Lee* (1997), 35 O.R. (3d) 594 (Gen. Div.); *R. v. E.H.*, [1998] O.J. No. 4515 (QL) (Gen. Div.); *R. v. G.J.A.*, [1997] O.J. No. 5354 (QL) (Gen. Div.).
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> 36 The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice, as s. 52 of the *Constitution Act, 1982*, declares a law to be of no force or effect to the extent that it is inconsistent with the Constitution. [Emphasis in original.]

37 However, accepting that the respondent may challenge the general constitutionality of the impugned legislation does not answer the question of whether the respondent must first apply for, and be denied, the production of third party records before bringing a constitutional challenge. The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. As Sopinka J. stated for the Court in *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 955, when discussing the general rule that constitutional challenges should be disposed of at the end of a case: "An apparently meritorious *Charter* challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial may come within this exception to the general rule" [Emphasis in original.].

38 This Court has often stressed the importance of a factual basis in *Charter* cases. See, for example, *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68, *per* Dickson C.J.; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *DeSousa*, *supra*, at p. 954; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 15. These facts have been broken into two categories: legislative and adjudicative. In *Danson*, *supra*, at p. 1099, Sopinka J., for the Court, outlined these categories as follows:

> These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p. 391; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 318.

39 The argument that the present appeal is premature rests on the contention that there are few adjudicative facts before the Court. Two points may be made in response.

40 First, it is not clear what further adjudicative facts would arise if the respondent had gone through the impugned procedure and been refused production. Although, pursuant to s. 278.8(1) of the *Criminal Code*, the trial judge must provide reasons for refusing to order production of any record, or part of any record, presumably these reasons could not divulge much about the content of the records in question for that would defeat the very purpose of the new provisions.

41 Second, the record contains sufficient facts to resolve the issues posed by the present appeal. Indeed, no argument was made that the adjudicative facts, sparse as they may be, are insufficient. Moreover, a determination that the legislation at issue in this appeal is unconstitutional in its general effect involves an assessment of the effects of the legislation under reasonable hypothetical circumstances. In *R. v. Goltz*, [1991] 3 S.C.R. 485, Gonthier J. stated, for the majority, at pp. 515-16:

> It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter* (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.
> [Emphasis in original.]

> Likewise, given the nature of the statutory framework, where the accused and the Court remain unaware of the contents of the records sought, many of the arguments by necessity focus upon such "imaginable circumstances".
>
> 42 Given these considerations, we are satisfied that there is an appropriate factual basis in this case and that the application is therefore not premature.

[38] The applicant's notice asserts that he intends to seek the introduction of evidence of OSA of the complainant and that the details of that evidence will be provided in an application under section 276 and 278.94 of the *Criminal Code* following the determination of this application. In *Mills*, the Court relied simply upon the defence's belief that third party records would contain evidence relevant to its defence and did not require further substantiation prior to hearing the constitutional issue. Consequently, in his application, the accused asks this Court to rely on his intention to apply to have evidence of OSA admitted.

[39] Although the cases of *C.C.* (paragraphs 21 to 24) , *J.J.* (paragraph 7) and *Whitehouse* (paragraph 13) all relate to records, this Court notes that in each of those cases, there was no evidence filed nor a step 1 equivalent complied with.

[40] In light of the jurisprudence on the issue of the constitutionality of sections 278.93 and 278.94 of the *Criminal Code*, in this particular case, the Court finds no rationale to support the contention that Step 1 must be completed prior to the Court considering the constitutional notice submitted by the applicant.

[41] The onus is on the applicant to establish that the new provisions make the section 276 scheme unconstitutional. As in *Mills*, the accused can establish that the legislation is unconstitutional in its general effects (see paragraph 36 of *Mills*). I agree that forcing the applicant to go through the step 1 hurdle defeats the purpose of the challenge.

[42] It is asserted that the complainant's right to participate in the hearing elevates the complainant to the status of a party with his or her own individual interests being advocated. As such, I also find that in order to ensure that there is fair representation for the consideration of the constitutional issues from the position of the complainant, it is conceivable that a complainant will request standing on the issue.

[43] In this case, I find that the Court has sufficient facts to consider the constitutional issues raised. The Court can rely on reasonable hypothetical or imaginable circumstances to evaluate the effects of the law. I find that the constitutional challenge like the one before the Court relies more on legislative facts which on their own, permit the Court to assess the constitutionality of the effect of the impugned legislation.

Is the Court's gatekeeper function engaged?

[44] In support of its motion requesting the Court summarily dismiss the accused's notice of application, the prosecution relied upon paragraph 38 of *R. v. Cody*, 2017 SCC 31, where the SCC emphasized the importance of judges as gatekeepers:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

[45] The respondent asserts that the applicant's proposed approach on the *Charter* application impedes this Court's ability to exercise its gatekeeping role. I do not find that the consideration of the constitutional issue prior to the disclosure of OSA compromises anything other than the potential timeline of this trial, which to some extent is very likely to be delayed due to the severity of the ongoing pandemic. In light of the other cases that may also be affected by the same challenge, it is prudent for the Court to address this issue at the earliest opportunity.

[46] Following the SCC decision in *R. v. Barton*, 2019 SCC 33, at paragraph 68, there should be no ambiguity that the procedure in section 276 is mandatory and the ultimate responsibility for enforcing compliance with the statutory regime lies squarely with the trial judge. It is a continuing duty that begins at the pre-trial application stage and continues through the life of a trial. In the event that any evidence surfaces or is later considered important by the defence, it must be dealt with appropriately and in a timely manner. Subsection 276(1) of the *Criminal Code* applies irrespective of which party seeks to lead the evidence of OSA. Importantly, there is also no bar to reconsidering a section 276 application where there is a material change in circumstances that is presented by the evidence (see *R. v. R.V.*, 2019 SCC 41).

Conclusion

[47] I conclude that the Court has sufficient factual information to hear the accused's application.

FOR THESE REASONS, THE COURT:

[48] **DENIES** the respondent's motion to quash.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh and Major L. Langlois, Prosecutors and Counsel for the Responding Party

Major F. Ferguson, Defence Counsel Services, Counsel for Sergeant C.A. Tait, and Moving Party