COURT MARTIAL

Citation: *R. v. Stewart*, 2021 CM 5012

Date: 20210603
Docket: 202025

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Sailor 3rd Class J.G. Stewart, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander C.J. Deschênes, M.J.

RESTRICTION ON PUBLICATION

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as "A.R.", shall not be published in any document or broadcast or transmitted in any way.

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

(Orally)

Introduction

[1] The applicant is facing two charges of sexual assault, offences found at section 271 of the *Criminal Code* and laid pursuant to section 130 of the *National Defence Act*.

The particulars of the charges allege that on or about 9 August 2018, in Kingston, Ontario, the applicant did sexually assault the complainant A.R. Before the scheduled date of the trial, the applicant served an application challenging the constitutionality of sections 278.93 and 278.94 of the *Criminal Code* (referred to as the new statutory scheme). These provisions provide for an accused to make an application for a hearing in a two-stage procedure in order for a judge to determine whether evidence regarding sexual activity of the complainant, other than the one forming the basis of the charges, should be admitted at the trial. I heard counsel's positions regarding the constitutionality of the new statutory scheme during a hearing held on 14 May 2021. The reasons for my decision follow.

Context

[2] The charges against the applicant were preferred on 1 June 2020. The Court Martial Administrator convened a Standing Court Martial on 18 January 2021 for the trial to be held from 10 to 14 May 2021 in Kingston, Ontario. On 22 March 2021, the Court Martial Administrator received the application dated 19 March 2021 where the applicant challenges the constitutionality of the new statutory scheme. When filing his constitutional challenge, the applicant informed the Court that he intends to present an application seeking to adduce sexual activity of the complainant, other than the one forming the basis of the charge, during the cross-examination of the complainant at the trial. In response to the constitutional challenge application, the prosecution, the respondent in this instance, served a notice of application dated 1 April 2021 seeking to have the constitutional challenge summarily dismissed. The respondent contended that the applicant is first required to comply with section 278.93 of the new statutory scheme, commonly referred to as stage 1, in order to provide a factual foundation to his constitutional challenge. Because the applicant failed to do so, the respondent contended that the application is factually deficient and premature and should be dismissed. Alternatively, he contended that there was a pathway available to the trial judge that would resolve some if not all of the applicant's constitutional challenges, such as to allow stage 1 to occur mid-trial, and providing instructions regarding participatory rights of the complainant for stage 2. This request to dismiss was denied on 23 April 2021. I then ordered that this pretrial application be heard on 10 May 2021, and that, unless otherwise directed, the trial would commence the day after a decision is rendered on this application.

[3] A second application dated 2 May 2021 was served by the applicant, requesting a stay of proceedings because his right to make full answer and defence protected by section 7 of the *Charter* had been breached by the loss, destruction and failure to preserve evidence by the prosecution. The hearing of this application was held on 10 May 2021, in lieu of the constitutional challenge. I dismissed this motion on 14 May 2021, on the basis that there was no *Charter* breach since the applicant failed to prove that evidence was lost or destroyed. The hearing for the present application then proceeded immediately thereafter on 14 May 2021.

Issue

[4] Since the new statutory scheme requires the applicant to provide in advance the detailed particulars of the evidence that he seeks to adduce and the relevance of that evidence to an issue at trial, and since it provides the complainant with participatory rights, the Court must determine if the potential for deprivation of liberty flowing from sections 278.93 and 278.94 takes place in a manner that conforms to the principles of fundamental justice, in particular the applicant's right to make full answer and defence protected at section 7 of the *Charter*.

[5] Should I decide that section 7 is breached, I must then determine if the new statutory scheme can be saved by section 1 of the *Charter*. I must consider these issues in the context of the principle of judicial comity, as my colleague, Sukstorf M.J., in her decision *R. v. Tait*, 2021 CM 2009 has recently ruled on this constitutional challenge.

Position of the applicant

[6] The applicant alleges that the new statutory scheme violates his *Charter* rights guaranteed at section 7, which provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. He also contends that the new statutory scheme violates paragraph 11(*d*) of the *Charter* which guarantees the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[7] He further contends that, as stated in *Tait* at paragraph 25, where for the first time a decision was rendered on an application challenging the constitutionality of the new statutory scheme in the military justice system, the presiding judge recognized that courts across the country are divided on this issue. The applicant contends that because the Supreme Court of Canada (SCC) will hear appeals on this matter this fall, I should feel free to rule on this issue and consider the specifics of the case. In other words, I should not feel bound by my military colleague's decision on this issue.

[8] Essentially, he submits that section 278.93 of the *Criminal Code*, commonly referred to as stage 1, forces the accused to disclose his evidence and reveal his defence before the cross-examination of the complainant, infringing the accused's rights to be presumed innocent, to have a fair trial and to make full answer and defence. In particular, the obligation on the accused to provide a copy of his application to the prosecution and to the Court seven days in advance allow the prosecution to adjust its strategy, rendering the trial unfair.

[9] He further submits that stage 2 of this procedure, found at section 278.94 of the *Criminal Code*, breaches his constitutional rights by allowing the complainant to become a party to the trial, which includes receiving, in advance, a copy of the application provided for at stage 1. This gives the complainant the opportunity to tailor her evidence and weakens the effectiveness of the cross-examination by the accused, particularly when the reliability and the credibility of the witness is at play. In support of his arguments, he

cites *R. v. R.S.*, 2019 ONCJ 645, a decision where the trial judge seized with a constitutional challenge of the new statutory scheme concluded that a statutory provision that compels disclosure of impeachment material to a complainant, in advance of her cross-examination, compromises the fairness of the trial. The applicant contends that the complainant's privacy right cannot trump the constitutional rights of the accused. In fact, relevant evidence should not be excluded because of the complainant's discomfort.

[10] Relying on the decision of *R. v. Reddick*, 2020 ONSC 7156, he views the complainant's participatory rights as usurping, or undermining, the prosecution's role. Those participatory rights violate section 7 of the *Charter*, since the complainant is allowed to be present and cross-examine the accused. The new statutory scheme is causing an important prejudice to the accused. Should a section 7 *Charter* right be found to be breached, the onus is on the prosecution to demonstrate that the law is justifiable. He contends the new statutory scheme cannot be upheld because it violates principles of fundamental justice.

[11] He requests as remedy, that subsection 278.93(4) of the *Criminal Code* be read down so that the accused may provide a copy of the application to the prosecutor just before the accused intends to use the other sexual activity evidence in cross-examination. This would remedy the *Charter* violations in relation to stage 1. In relation to the obligation to disclose the application to the complainant, and the complainant's participation in the admissibility hearing at stage 2, the applicant requests that the Court declare that subsections 278.94(2) and 278.94(3) of the *Criminal Code* are unconstitutional and, as such, these provisions will not be imported and applied in the court martial proceedings. In the alternative, the applicant requests that the Court declare these subsections to be unconstitutional and of no force or effect pursuant to section 52 of the *Constitution Act, 1982*.

Position of the respondent

[12] The respondent asks this Court to uphold the constitutionality of the sections 278.93 and 278.94 regime as it represents a necessary and incremental legislative change aimed at ameliorating the corrosive issue of sexual violence in Canadian society while respecting the rights of the accused. The respondent explained the legislative landscape of the contentious *Criminal Code* provisions, contending that the new statutory scheme captures extrinsic sexual activity and is very similar to the prior section 276 regime. This prior regime, which is based on common law, was deemed constitutional in the SCC decision *R. v. Darrach*, 2000 SCC 46. In fact, the respondent contends stage 1 of the new statutory scheme is the same as under the prior regime ruled constitutional in this SCC decision. Furthermore, the additional participatory rights of the complainant at stage 2 align with the framework for adducing third party records not in the hands of the accused (sections 278.1 to 278.91 of the *Criminal Code*), deemed constitutional in *R. v. Mills*, [1993] 3 S.C.R. 668. The respondent further contends that the majority of court decisions, which includes the *Tait* decision, has ruled that these provisions were respectful of the accused's *Charter* rights.

[13] The respondent submits that Parliament's intent in enacting stage 2 of the new statutory scheme was to give complainants a voice in the determination of what evidence of their past sexual history is admissible. Its purpose was to both protect the privacy rights of the complainant and to protect and support the criminal justice system. Indeed, this legislative approach also aims at preventing underreporting of sexual crimes.

[14] The respondent contends that the new statutory scheme provides flexibility in both stages of the process, since the *Criminal Code* specifically gives judges discretion to decide, for example, to shorten the seven-days' notice. In this regard, the SCC recognized the evidentiary gatekeeping role of trial judges in *R. v. Goldfinch*, 2019 SCC 38.

[15] Consequently, judicial discretion extends to imposing limits on the complainant's participatory rights. She also contends that the protection of the complainant's privacy rights is even more significant in the context of the military justice system, where the complainant, like the accused, is part of a small community and has a strong interest in not having intimate details of her life be exposed unnecessarily in the courtroom. The respondent suggests, as a result, that I can use my general service knowledge to conclude that such a situation would impact unit morale and cohesion.

[16] Additionally, the respondent contends that, as stated by the SCC, principles of fundamental justice do not entitle the accused to "the most favourable procedures that could possibly be imagined". She also submits that the principle of fundamental justice protected at section 7 of the *Charter* should be examined with a wide lens, as these principles extend beyond the rights of the accused. Competing rights, such as the right of the accused to make full answer and defence versus the complainants' rights to equality, privacy and dignity, should be balanced. She further explains that there is a presumption of constitutionality, thus it falls on the applicant to demonstrate that the new statutory scheme is unconstitutional.

[17] The respondent's position is that participatory rights of the complainant found at stage 2 do not violate the accused's *Charter* rights. In light of the SCC decisions referred to, and aligning with the *Canadian Victims Bill of Rights*, complainants are given a voice and, as such, can raise their concerns in relation to an application that pertains to their sexual activities directly with the judge. Their involvement, however, is limited to the admissibility hearing. Further, there is no shift in law with respect to the right to counsel. This right has always existed, but was simply codified as a recognized right for victims of sexual violence in the context of these types of applications. Additionally, the complainant has no right at stage 1 of the new statutory scheme, therefore there is no prejudice to the accused at this stage. The respondent, nevertheless, suggests that there is no prejudice with holding stage 1 mid-trial.

[18] Finally, referring to the *Tait* decision, the respondent advocates the principle of judicial comity. She contends that the ruling in this decision is sound; however, the remedy provided, if any, should be fact-driven. Therefore, she explains that I am not bound by the remedy provided by the *Tait* decision. In conclusion, the respondent asks this Court to uphold the constitutionality of the sections 278.93 to 278.94 regime.

The evidence adduced at trial (the record)

[19] The notice of application dated 19 March 2021, with the respondent's memorandum of fact and law, were marked as exhibits. I have reviewed the material provided by both parties. I have also considered the detailed and relevant submissions provided by both counsel at the hearing. In addition, I was informed that the complainant has already retained counsel.

Analysis

Section 7 of the Charter

[20] The constitutional challenge pertains to sections 278.93 and 278.94 of the *Criminal Code*. It is not disputed that these provisions have the capacity to deprive a person of their liberty. A person convicted of sexual assault may be sentenced to imprisonment. Insofar as the new statutory scheme may affect conviction, it may deprive a person of their liberty. Therefore, the question is whether the potential for deprivation of liberty flowing from these provisions takes place in a manner that conforms to the principles of fundamental justice.

Twin myths

[21] At the outset, evidence that the complainant has engaged in extrinsic sexual activity with the accused or with a third party is inadmissible in accordance with section 276 of the *Criminal Code* if it is to be adduced to draw an inference that, because the complainant has engaged in other sexual activity, she is less worthy of belief, or is more likely to have consented to the sexual activity that forms the basis of the charge. These two prohibited inferences are commonly referred to as "twin myths". Section 276 of the *Criminal Code* is a codification of the common law and sets out conditions of admissibility for this evidence, one of which is that it cannot be adduced to infer one of the twin myths. This section also lists considerations that the judge must take into account if seized with an application to adduce this evidence.

Section 278.93 of the Criminal Code - stage 1

[22] The constitutional challenge pertains to the procedure established for section 276 evidence, found at sections 278.93 and 278.94 of the *Criminal Code*, which set out a two-stage process that allows an accused to make an application to a judge to determine whether evidence of the complainant's extrinsic sexual activity can be adduced at the trial. Section 278.93 sets out stage 1 of the procedure. Subsection 2 provides for the format and content required for the application:

> An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

[23] The application is considered with the jury and the public excluded. If the judge is satisfied that the application meets the requirements of subsection 2, that a copy of the application was given to the prosecutor and to the court at least seven days prior to the hearing, and that the evidence is capable of being admissible in accordance with section 276, the judge shall grant the application and hold a hearing under section 278.94. The provision is silent as to the time the application must be provided, only that it be given to the prosecutor and the court seven days before the hearing, although the judge may decide to shorten the seven-day requirement in the interests of justice. Stage 1 does not require an in-depth analysis; the application needs to meet, on its face, the requirements set out at section 278.93.

Section 278.94 of the Criminal Code - stage 2

[24] If the judge is satisfied that the requirements of stage 1 are met, a hearing is held in accordance with section 278.94. This section provides that the jury, if any, and the public, are excluded from the hearing. The complainant may appear and make submissions. The judge shall inform a complainant, who participates in the hearing, of their right to be represented by counsel. Although not codified, the complainant's right to appear and make submissions implies that they receive a copy of the application before the hearing so they can make an informed decision in relation to whether they wish to participate, the extent of their participation and the substance of their submissions if any, and whether they should retain counsel for the hearing. The possibility of a complainant to be involved at stage 2 of the process constitutes participatory rights that were not codified before December 2018. Section 278.94 of the *Criminal Code* does not create a right for the complainant to retain counsel for the hearing; it simply formally recognizes this right in the context of the admissibility hearing, by imposing on the judge the obligation to ensure that complainants are aware of their rights in this regard. Parliament's intent in implementing these participatory rights at stage 2 was to further protect the dignity and privacy of complainants in allowing them to be part of the process while preserving the right of an accused to make full answer and defence. The effects of the new statutory scheme, like the prior one, is to filter out irrelevant evidence, while governing the admissibility of evidence pertaining to the complainant's sexual history with specific criteria requiring judicial oversight.

Brief history of the new statutory scheme

[25] Historically, common law rules had little regard to the challenges experienced by complainants of sexual assault testifying in court. Corroboration of the witness's testimony (in practical terms, the witness was generally the complainant) was required pursuant to section 131 of the 1955 *Criminal Code*. There were little limits to the evidence that the defence could adduce to impeach the credibility of a complainant in sexual offences cases. In fact, it was fair game to prove the reputation of a complainant, or to adduce evidence of her past sexual activities, because an unchaste woman was deemed less worthy of belief, or would be seen to have a propensity to consent to sexual activity in general. The SCC, on several occasions in decisions such as *R. v. Seaboyer*

[1991] 2 S.C.R 577, *Darrach*, *Goldfinch*, and *R. v. Barton*, 2019 SCC 33 to name a few, has highlighted the issue of the presence of twin myths in court, and the need to protect the privacy and dignity of complainants while ensuring that trial judges make their determination of guilt or innocence of accused persons based solely on relevant evidence. Indeed, the SCC recognized that any evidence adduced that calls for an inference pertaining to the twin myth is inadmissible because it is both irrelevant and prejudicial. It detracts from the issues of the case that truly matter.

[26] Prior to *Seaboyer*, Parliament changed the common law rules of admissibility of evidence pertaining to a complainant's sexual history and amended the *Criminal Code* by incorporating an absolute exclusion for the accused to adduce evidence of sexual activities of a complainant regardless of its use. It enacted the now old regime under section 276 of the *Criminal Cod*e, commonly known as the "rape-shield" provisions. In *Seaboyer*, the SCC examined an appeal of the constitutional challenge of this regime, ruling that the impugned provisions infringed the accused's section 7 and paragraph 11(*d*) *Charter* rights. Justice McLachlin, as she then was, struck down the general prohibition on the basis that there may be cases where this evidence could be relevant for a specific purpose, and where the probative value outweighs its prejudicial effect, as long as an inference based on the twin myths is not sought. She provided examples of admissible evidence of prior sexual activities, such as to prove a motive to fabricate. The accused might also attempt to adduce this evidence to explain the physical condition of a complainant who claimed force was used by the accused, or to support a defence's claim that the complainant sustained injuries during sexual activities with a third party.

[27] Nevertheless, the SCC purposely and unequivocally established that the evidence is inadmissible in all cases if the purpose of adducing the evidence is to infer one or both of the twin myths. The Court also stated that an accused does not have a constitutional right to adduce irrelevant evidence. In a nutshell, the approach of the SCC in *Seaboyer* recognized as a general rule that evidence of the sexual history of the complainant is generally inadmissible because it is both irrelevant and prejudicial. However, there could be exceptions that would allow an accused to adduce such evidence, but the onus is on him to demonstrate that the evidence is not to draw one of the two prohibited inferences, that its use fits within fact-driven exceptional cases, and that its probative value outweighs its prejudicial effect. If the accused does pass this threshold, and the evidence related to the complainant's sexual activity is deemed relevant and admissible, the trier of fact must issue a clear warning to the jury against misuse of this evidence.

[28] The modifications to the *Criminal Code* that followed *Seaboyer* constituted a codification of the rules and proposed procedure advanced by the SCC. The principle that evidence of a complainant's sexual history cannot be adduced to infer one of the twin myths was reintroduced in the amendments. This prior scheme involved a two-stage process. Stage 1 imposed an obligation on the defence to provide an application with "detailed particulars" of the evidence it sought to adduce. A copy of the application was to be given to the prosecutor and to the clerk of the court seven days prior to the application being heard. Should the accused succeed in meeting these requirements, the trial judge would move the matter onto the second stage and an in camera hearing was

held to determine the admissibility of the evidence. If a hearing is granted, the trial judge is required to issue written reasons to explain why the evidence was admitted or not, having regard to the factors set out in subsection 276(3) of the *Criminal Code*.

[29] Following another constitutional challenge on this prior scheme, the SCC upheld the constitutionality of these rules in *Darrach*. In further explaining when this evidence could be admitted, the SCC stated at paragraph 35 of the decision that, "If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted." Regarding the requirement imposed on the defence in paragraph 276.1(2)(a) of the *Criminal Code* to enter an affidavit with "detailed particulars" of evidence it seeks to adduce, the SCC decided that this requirement did not infringe the accused's *Charter* rights. In fact, the SCC stated at paragraph 55 of *Darrach*:

> Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. For the reasons given above, the accused is not forced to embark upon the process under s. 276 at all. As the trial judge found in the case at bar, if the defence is going to raise the complainant's prior sexual activity, it cannot be done in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush. The Crown as well as the Court must get the detailed affidavit one week before the *voir dire*, according to s. 276.1(4)(*b*), in part to allow the Crown to consult with the complainant. The Crown can oppose the admission of evidence of sexual activity if it does not meet the criteria in s. 276. Neither the accused's s. 11 (*c*) right not to be compelled to testify against himself nor his s. 11 (*d*) right to be presumed innocent are violated by the affidavit requirement. This is borne out by the way in which the admissibility procedure operates.

[30] Parallel to this constitutional challenge, the SCC upheld the constitutionality of a similar legislative framework which deals with the procedure governing the production of third party records of complainants to accused persons facing charges of a sexual nature in *Mills*. Similar to the new statutory scheme, subsections 278(1) to 278.9(1) of the *Criminal Code* involve a two-stage procedure. An application for production of the records is served upon the prosecution, the person who controls the records and the complainant. An in camera hearing is held to determine whether the record should be produced to the judge for review. The complainant may make submissions at the hearing. If the requirements of stage 1 are met to the satisfaction of the judge, he or she examines the records to determine whether they should be produced to the accused.

New statutory scheme – current rules

[31] Following *Darrach*, the *Criminal Code* was once more amended and the new statutory scheme was enacted in December 2018. It essentially has the same two-stage procedure, with enhanced participatory rights for the complainant. Indeed, at stage 2 of the new statutory scheme, complainants of sexual offences have a right to appear at the admissibility hearing and make submissions. The judge shall also inform the complainant of their right to be represented by counsel.

Recent constitutional challenges

[32] Soon after its enforcement in December 2018, the new statutory scheme was the subject of several constitutional challenges before courts of criminal jurisdictions. Most courts throughout Canada have upheld the new statutory scheme, whether the challenge is made in the context of applications for adducing records, or evidence of extrinsic sexual activities like the case at bar (see *R v. B.G.*, 2021 ONSC 2299; *R. v. C.C.*, 2019 ONSC 6449; *R. v. Green*, 2021 ONSC 2826; *R. v. F.A.*, 2019 ONCJ 391; *R. v. A.C.*, 2019 ONSC 4270; *R. v. A.M.*, 2020 ONSC 8061). Applications to the highest court of this country were granted to hear appeals of two judgments of superior courts of justice ruling that the new statutory scheme was unconstitutional: (see *R. v. A.R.S.* 2019 ONCJ 877 and *Reddick*; and *R. v. J.J.*, 2020 BCSC 29).

[33] In the case of *Reddick*, the judge found that disclosure to the complainant of the evidence the accused seeks to adduce affected the fairness of the trial because the complainant would then have an opportunity to tailor her evidence. The judge viewed that this could significantly weaken the effectiveness of her cross-examination conducted by the accused. The judge also found that the impugned provision elevated the complainant from her role as a witness in the Crown's case to that of party who was entitled to receive advance disclosure of records pertaining to the accused's line of questioning and to his defence. He further found that the complainant would be entitled to participate in the admissibility hearing, question the accused and make submissions to exclude evidence deemed relevant in impeaching her credibility. This participation violated the accused's *Charter* rights and could not be saved by section 1 of the *Charter*. As a result, the new statutory scheme was declared unconstitutional by the judge in this case.

[34] In *J.J.*, the judge found that the seven days' notice requirement at stage 1 of the admissibility of records application constituted a violation of the accused's fair trial rights under section 7 of the *Charter*, since the notice requirement compelled disclosure of defence evidence which "unduly truncates the right to make full answer and defence by providing the complainant and the Crown with an advance preview of defence evidence and tactics before [the complainant's] examination-in-chief is completed and a case to meet has been established."

[35] In other cases, such as *R. v. A.M.*, *R. v. Anderson*, 2019 SKQB 304, *R. v. D.L.B.* 2020 YKTC 8 and *R. v. J.S.*, [2019] A.J. No. 1639 (A.B.Q.B.), there was a communal determination that disclosure of evidence by the defence through an application under the new statutory scheme impaired the ability of the accused to make full answer and defence in part because the cross-examination of the complainant would be rendered ineffective.

Judicial comity

[36] Judges are generally bound to follow precedents of higher courts as per the doctrine of *stare decisis*, which is predicated on the principle that courts should stand by things already decided. Absent a decision from a higher court on the constitutional challenge pertaining to the new statutory scheme, courts of the same jurisdiction should

extend mutual courtesy in recognition of one another's decisions. Referred to as the principle of judicial comity, its rationale is similar to the doctrine of *stare decisis*: it is to ensure "consistency, certainty and predictability in the law and it enhances the legitimacy and repute of the common law" (see *R. v. Chan*, 2019 ONSC 783). Therefore, courts should be informed and follow the relevant decisions of their own jurisdiction unless there are compelling reasons that justify departing from earlier rulings.

[37] In *Re Hansard Spruce Mills*, [1954] 4 DLR 590, Wilson J. stated that he would only go against a judgment of another judge of the same Court if:

> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[38] The principle of judicial comity has been recognized and applied at courts martial, in *R. v. Caicedo*, 2015 CM 4018. In other words, although there are indeed conflicting decisions within the criminal justice system at large and I should be informed of them, courts martial, or a military judge acting in his or her judicial capacity, are bound by the ruling of military judges on similar issues unless there are compelling reasons that justify departing from the earlier ruling. In *R. v. D'Amico*, 2020 CM 2002, the principle of judicial comity was described as critical in the military justice system, due to the ad hoc nature of courts martial. Indeed, courts martial are statutory courts that preside over service offences; offences that are either criminal or disciplinary in nature. Courts martial are distinct from courts of other jurisdictions, they operate with a different set of rules in a different reality. The military judiciary is a small bench currently composed of only four judges. In consideration of courts martial unique composition, structure and jurisdiction, I concur with the premise that judicial comity is even more important at courts martial.

Recent decision within the military justice system

[39] Shy of just a few weeks ago, a first decision regarding a constitutional challenge of the new statutory scheme was rendered by my colleague Sukstorf M.J. in *Tait*. Although the application before her was broader in scope, the arguments in support of the constitutional challenge of the new statutory scheme were essentially the same as in the case at bar. In a nutshell, Sukstorf M.J. found that the new statutory scheme does not infringe the accused's *Charter* rights because the procedure set out for the determination of the admissibility of evidence of extrinsic sexual history can be applied by the trial judge in a manner consistent with the principle against self-incrimination, the right to a fair trial and the complainant's rights to privacy and equality. As part of the judge's trial management authority, Sukstorf M.J. found that there is sufficient statutory discretion for a trial judge to conduct the necessary balance of ensuring that the application is heard at a time that preserves all the participatory rights intended by Parliament while still ensuring

an accused's right to a fair trial (see *Tait* at paragraph 112). In her decision, she recognized that stage 1 of the new statutory scheme has not changed since the SCC rendered its decision in *Darrach*. She also recognized that there may be circumstances when it is appropriate to reopen and reconsider an application on the admissibility of prior sexual activity because new information can be gleaned during the trial that could legitimately prompt the accused to revisit this evidence.

[40] When she rendered her decision, she applied the relevant legislation, thoroughly reviewed the relevant case law that formed the jurisprudential basis of her approach, and no subsequent decisions have affected the validity of her judgment. Consequently, I see no compelling reasons to go against the ruling of my colleague on this issue in the decision of *Tait*. On the contrary, I agree with and adopt her detailed reasons. Although I do not intend to repeat her reasons in providing my instructions tailored to this specific case, I feel compelled to add or emphasize the following points.

Disclosure of evidence through the application

[41] The communal reason courts provided when granting these applications ruling that the new statutory scheme was unconstitutional, lays with the argument that the complainant's cross-examination by the defence may be rendered ineffective because the complainant would receive in advance disclosure of evidence the defence seeks to adduce, leading to the complainant tailoring her evidence. This argument is also invoked by the applicant in the case at bar.

[42] It is well recognized that section 278.93 of the *Criminal Code* is the legislative update to the prior regime, which was deemed constitutional by the SCC in *Darrach*. The seven-day notice at stage 1 was recognized as being a *Charter*-compliant approach. This interval was, in part, to provide time for the Crown to consult the complainant regarding the evidence the accused was seeking to adduce. That said, *Darrach* was rendered prior to the enactment of the new statutory scheme, when complainants did not have any participatory rights at stage 2, nor was their right to retain counsel formally recognized. It is true that the right to retain counsel has always existed; however, the new statutory scheme formally recognizes it by imposing an obligation on the judge to inform the complainant of their right to retain counsel in the context of the admissibility hearing.

[43] Now that this right is embedded into statute specifically for complainants of sexual violence, and now that they can formally participate at stage 2 if they so wish, the seven days required for the purpose of consulting the complainants at stage 1 does not entail that they are entitled to the application and supporting documents before the application for an admissibility hearing is granted. Since complainants' participatory rights only exist if the process moves to stage 2, the application and supporting documents should be provided to the complainant in sufficient time before the admissibility hearing, in order for them to make an informed decision regarding whether they wish to retain counsel, and whether they wish to exercise their participatory rights and to what extent.

[44] In other words, receiving the application and supporting documents at stage 2 in sufficient time before the admissibility hearing allows the complainant the opportunity to provide a meaningful response to the accused's application. Otherwise, the complainant would be denied the proper exercise of her participatory rights, rendering their existence futile. This latter scenario is not what Parliament intended. At stage 1, the involvement of the complainant is practically non-existent, limited to the prosecution's discretion to choose to inform the complainant of the forthcoming application. This does not entail the provision of a copy of the application and supporting documents.

[45] The consultation with the complainant by the prosecution in advance when a 276 application is received, and the existence of participatory rights at stage 2, do not infringe the applicant's right to make full answer and defence. The SCC did establish that "[t]he right to make full answer and defence does not include the right to defend by ambush" as mentioned earlier (at paragraph 55 of *Darrach*). The SCC also recognized that an accused has no constitutional right to lead irrelevant evidence. Further, the right to cross-examine is not unlimited (*R. v. Lyttle*, 2004 SCC 5; *R. v. Osolin*, [1993] 4 S.C.R. 595; and *Seaboyer*). Cross-examination questions must be relevant, and their prejudicial effect must not outweigh their probative value.

Time to give the application

[46] The statute is silent as to when the application must be given within the court proceedings. Since there may be circumstances when it is appropriate to reopen and reconsider an application on the admissibility of prior sexual activity following new information gleaned during the trial that could legitimately prompt the accused to revisit this evidence, I agree that an accused could submit his application mid-trial. I accept that the approach of presenting the application of stage 1 once the complainant's examination-in-chief is concluded would eliminate any risk that they would, intentionally or not, tailor their evidence during their examination-in-chief. It would also mitigate the risk of having to deal with more than one application, ensuring the efficiency of the proceedings. The new statutory scheme does provide trial judges with the discretion to shorten the seven-day requirement if it is in the interests of justice, a discretion that could be used to ensure the efficiency of the proceedings and prevent unnecessary delays, particularly when the complainant has already retained counsel as in the case at bar.

[47] That said, I reject the applicant's contention that the obligation to provide his application seven days in advance allows the prosecution to adjust its strategy, rendering the trial unfair. The prosecutor is an officer of the court, bound by their ethical code. If exculpatory evidence comes to their attention that would no longer support a reasonable prospect of conviction of the case against the accused person, they have an ethical obligation to reassess the evidence and withdraw the charges as the case may be.

[48] Additionally, contrary to his contention, the accused is not forced to disclose his evidence, as he is not obliged to make an application to adduce evidence of the complainant's extrinsic sexual activity. He must gauge this evidence to determine if it is worth putting one of his cards on the table before going ahead with his application, and in

doing so he must weigh the advantage, and his chance of success, that an admissibility hearing would give him in comparison to the price of providing a parcel of evidence he is required to share in engaging in the process of the new statutory scheme. Consequently, I reject the argument that the accused is forced to advance the disclosure of his defence strategy.

Stage 2

[49] Furthermore, the participatory rights found at section 278.94 do not make complainants party to the case and do not have the effect of undermining the prosecution's role. These rights of complainants are limited in scope, since they exist solely if the judge grants the admissibility hearing. The participation of the complainant is circumscribed to responding to the specific evidence the accused seeks to adduce, not to the entirety of his defence. The purpose of the new statutory scheme is to allow complainants to have a say in regards to whether the evidence pertaining to intimate details of their sexual life, evidence presumed inadmissible, should be admitted at the trial, in open court. Outside the narrow scope of the admissibility hearing, complainants only fulfill the role of witnesses at the trial.

[50] As for the disclosure of the defence through the cross-examination of the affiant, this step would be conducted by the prosecution. Should the complainant seek to cross-examine the affiant, it would generally be their counsel who would proceed, and their questions would be limited to aspects not explored by the prosecution's cross-examination that are relevant to the purpose of the admissibility hearing. The judge has the discretion, as part of his or her trial management authority, to further limit the cross-examination as required and intervene as necessary.

Balancing the accused's Charter rights with the complainant's rights

[51] The new statutory scheme seeks to create conditions that encourage the reporting of sexual offences. In doing so, it aims to protect the complainant's privacy, by allowing the trial judge to examine in advance, through a specific process held in camera where a publication ban shall be imposed, intimate details of the complainant's sexual life. Because complainants are directly concerned and have an intimate knowledge of the evidence, their participation at the admissibility hearing assists the judge in arriving at the appropriate determination regarding the admissibility of the evidence while ensuring that the complainant's dignity is somewhat preserved.

[52] I accept the prosecution's contention that these provisions have a particularly significant meaning in the military justice system, where complainants, when they are Canadian Armed Forces members, and accused persons, both of whom typically come from a small community, and where members of their mutual or respective unit(s), as applicable, are most likely aware of these proceedings, and where morale and unit cohesion could be impacted by the proceedings. The need to protect the privacy and dignity of complainants is paramount in the military context.

Alleged prejudice

[53] As for the contention that the applicant would suffer a prejudice if the new statutory scheme is applied to his case, when denying the request to summarily dismiss this application, I accepted that the applicant did not have to go through stage 1 prior to presenting his constitutional challenge. The issue now is that I have no information regarding the evidence the applicant wishes to adduce. Therefore, other than the particulars of the charges, I am unable to conduct a case-specific analysis. Consequently, I cannot see how the applicant has suffered, or will suffer any prejudice when complying with the new statutory scheme.

[54] For these reasons, should the accused wish to pursue his application, and with the understanding that both counsel recommended this course of action, and since the complainant in this case has already retained counsel, the accused shall serve his notice to the Court and to the prosecution no later than at the conclusion of the complainant's examination-in-chief. The application must include sufficiently detailed particulars to satisfy stage 1. The complainant's legal counsel will have an opportunity to listen to the complainant's direct testimony. In accordance with subsection 278.93 (4) of the *Criminal Code*, I may allow, in the interests of justice, any shorter interval than the seven days required for the applicant to give a copy of his application to the prosecutor and the Court. I will hear submissions regarding whether the seven-day interval should be shortened before the hearing takes place.

[55] Should I be satisfied that the applicant has met the requirements of stage 1 and grant the admissibility hearing, the complainant will be provided with both the application and supporting material as the case may be, with sufficient time to prepare meaningful submissions.

Conclusion

[56] In conclusion, in the circumstances of the specific constitutional challenges raised by the applicant, for the reasons above and for the reasons provided in *Tait*, I find that sections 278.93 and 278.94 do not contravene section 7 and paragraph 11(*d*) of the *Charter*.

FOR THESE REASONS, THE COURT

[57] **DENIES** the application.

Counsel:

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Sailor 3rd Class J.G. Stewart, Counsel for the applicant

The Director of Military Prosecutions as represented by Major A. Dhillon and Major C. Walsh, Counsel for the respondent

The Court attaches to its present decision an annex to *R. v. Stewart*, 2021 CM 5012, for informational purposes only, showing differences in *Criminal Code* provisions pre- and post-amendment.

Annex A to
R. v. Stewart, 2021 CM 5012

Criminal Code of Canada R.S.C., 1985, c. C-46	**PRE-BILL C-51** **<u>Past Version</u>** **Past version: in force between September 19, 2018 and October 16, 2018**	**POS- BILL C-51** **<u>Current Version</u>** **Current version: in force since March 17, 2021**
Stage 1	**Application for hearing** 276.1 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).	**Application for hearing — sections 276 and 278.92** 278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
	Form and content of application (2) An application referred to in subsection (1) must be made in writing and set out (a) detailed particulars of the evidence that the accused seeks to adduce, and (b) the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.	**Form and content of application** (2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.
	Jury and public excluded	**Jury and public excluded**

	(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.	(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
	Judge may decide to hold hearing (4) Where the judge, provincial court judge or justice is satisfied (a) that the application was made in accordance with subsection (2), (b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and (c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).	**Judge may decide to hold hearing** (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2). 2018, c. 29, s. 25
Stage 2	**Jury and public excluded** 276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury	**Hearing — jury and public excluded** 278.94 (1) The jury and the public shall be excluded from a hearing to determine whether

	and the public shall be excluded.	evidence is admissible under subsection 276(2) or 278.92(2).
	Complainant not compellable (2) The complainant is not a compellable witness at the hearing.	**Complainant not compellable** (2) The complainant is not a compellable witness at the hearing but may appear and make submissions. **Right to counsel** (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
	Judge's determination and reasons (3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and (a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted; (b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and (c) where all or any part of the evidence is to be admitted, the reasons must	**Judge's determination and reasons** (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted; (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is

	state the manner in which that evidence is expected to be relevant to an issue at trial.	expected to be relevant to an issue at trial.
	Record of reasons (4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing. • 1992, c. 38, s. 2.	**Record of reasons** (5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing. • 2018, c. 29, s. 25
	Publication prohibited 276.3 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following: (a) the contents of an application made under section 276.1; (b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2; (c) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and	**Publication prohibited** 278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following: (a) the contents of an application made under subsection 278.93; (b) any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94; (c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and (d) the determination made and the reasons provided under subsection 278.94(4), unless

	(d) the determination made and the reasons provided under section 276.2, unless (i) that determination is that evidence is admissible, or (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.	(i) that determination is that evidence is admissible, or (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.
	Offence (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. • 1992, c. 38, s. 2; • 2005, c. 32, s. 13.	**Offence** (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. • 2018, c. 29, s. 25
	276(3) Factors	
276(3) Factors	**Factors that judge must consider** (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (a) the interests of justice, including the right of the accused to make a full answer and defence; (b) society's interest in encouraging the reporting of sexual assault offences;	**Factors that judge must consider** (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (a) the interests of justice, including the right of the accused to make a full answer and defence; (b) society's interest in encouraging the reporting of sexual assault offences;

	(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant.	(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant.
		Interpretation (4) For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.