Citation: *R. v. Hozack, et al.,* 2010 YKTC 59

Date: 20100608
Docket: 09-00572A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

JERRID JAMES HOZACK, CHEYENNE BLUE BATTAJA
and LINO AARON BATTAJA

Appearances:

Judy Bielefeld	Counsel for the Crown
Keith D. Parkkari	Counsel for Jerrid James Hozack
David Christie	Counsel for Cheyenne Blue Battaja
Lino Aaron Battaja	Appearing on his own behalf

REASONS FOR JUDGMENT

Overview

[1] Jerrid Hozack, Cheyenne Battaja and Lino Battaja have been charged with possession of Cannabis Marihuana and Cannabis Resin for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, as well as possession of property obtained by crime contrary to s. 354 of the *Criminal Code*. Cheyenne Battaja has further been charged with having committed two breaches of a probation order, contrary to s. 733.1(1) of the *Code*.

[2] The matter came before me for trial on May 6, 2010. A fourth accused, Tyler Smith, had not been located and the trial was set to proceed in his absence. The trial did not proceed as scheduled on May 6 and was adjourned to a future date.

[3] Argument was made, however, with respect to the sufficiency of notice of *Charter* issues provided to the Crown by Mr. Parkkari, who is defence counsel for Mr. Hozack. Mr. Christie is counsel for Cheyenne Battaja and Lino Battaja is representing himself. While no notice of a *Charter* issue was provided to the Crown by Mr. Christie or Lino Battaja, it was conceded that if a breach of a *Charter* right is found to have occurred, any remedy would apply to all three accused.

[4] Crown counsel's position was that, had the trial commenced as scheduled on May 6, defence counsel would have been precluded from raising *Charter* issues as a result of a lack of adequate notice. Although the trial has been adjourned for reasons not solely related to the issue of *Charter* notice, Ms. Bielefeld nonetheless maintains that the *Charter* notice continues to be inadequate as it does not disclose enough for her to adequately prepare the Crown case for trial. Without further disclosure of the details of the *Charter* argument by defense counsel, the matter should not proceed to trial. As such, setting a trial date without knowing the extent of the *Charter* argument is premature.

[5] Mr. Parkkari's position is that he has complied with all that is required in the Yukon with respect to *Charter* notice.

[6] At the conclusion of argument I ruled that defence counsel can raise ss. 7, 8, and 10(b) *Charter* issues at trial and can seek a remedy under s. 24(2). These are my reasons for that decision and, due to Crown counsel's position that she still does not have sufficient notice of the *Charter* issues, my reasons with respect to whether Mr. Parkkari has an obligation in this case to provide further details of his *Charter* application prior to trial.

Notice Provided

[7] This matter was before the Court on December 11, 2009 to fix a trial date. Mr. Parkkari stated on the record that there would be *Charter* issues and two days would be required for the trial as a result. Crown counsel, who was not trial counsel, does not appear to have noted Mr. Parkkari's statement about there being *Charter* issues at trial on the Crown file. The fixing of a trial date was adjourned to January 8, 2010 and, on that date, the May 6 and 7, 2010 trial date was set.

[8] On March 2, 2010, Mr. Parkkari wrote to the Whitehorse branch of the Public Prosecution Service of Canada and stated the following:

> Trial of this matter has been scheduled for May 6 and 7, 2010. Please note as a part of Mr. Hozack's defence will be raised the issue of the violation of Mr. Hozack's Section 8 Charter rights and his Charter right against self-incrimination and right to counsel under sections 7 and 10 of the Canadian Charter of Rights and Freedoms.

[9] On April 15, 2009, Ms. Bielefeld replied by letter as follows:

> Thank-you for your letter of March 2nd indicating your intent to make a section 7, 8 and 10(b) Charter Application in the above matter. Please

> provide details of the grounds you are basing your application upon and the case law you will be relying on.

[10] On April 28, 2010 Ms. Bielefeld sent the following e-mail to Mr. Parkkari:

> Please also note my letter sent to you as an email attachment on April 15th, below, requesting details of the grounds you are basing your ss. 7, 8, 10(b) Charter application on, and the case law you will be relying on.

[11] Mr. Parkkari was out of the jurisdiction with limited access to his office between mid-April and May 3, 2010. He was, however, able to reply by e-mail on April 30 as follows:

> As for your request for more details on the charter issue everything from the phone call from the grandmother to the seizure of the drugs and other exhibits will be at issue. The actual argument will depend on the evidence at trial. If you want more detail please provide me with your legal authorities that the accused is required to disclose his defence to the crown prior to trial. I will provide you with our authorities concerning the charter issue in due course. The starting point is of course the SCC case of Grant.

[12] Ms. Bielefeld responded by e-mail on May 3 as follows:

> I have requested particulars on what appears to be a very broad Charter application you will be making in the above matter. I am attaching some authorities in support of my request for such specifics.
>
> I would like an opportunity to talk with you about this—obviously as soon as possible. Please advise once you are able to do this.

[13] The authorities provided were ***R.*** v. ***Bull***, 2010 ABPC 68, ***R.*** v. ***Dwernychuk*** (1992), 135 A.R. 31 (C.A.), ***R.*** v. ***Morin***, [1995] Y.J. No. 67 (S.C.) and ***R.*** v. ***Bunbury***, 2005 YKTC 51.

[14] Mr. Parkkari responded later that day by e-mail as follows (I note the right hand margin in the copy I received is cut off, thus eliminating some words):

> I will be back in my office Tuesday. Perhaps I missed it but I don't see where your authorities require the a…
> …advise the crown of the details, but rather only to advise the crown of the intention to make the application. …
> …will be that the accused's section 8 charter rights have been violated through the search of his resident [sic], both b…
> …the issuing of the search warrant, and therefor the evidence obtained through the search should be exclud…
> …24(2) of the Charter.
> I will be advising the Court of the Charter application prior to the evidence being admitted, in accordance w…
> …you provided.

[15] There were no further discussions between Mr. Parkkari and Ms. Bielefeld regarding the nature of the *Charter* issues that are of any particular relevance to my decision.

Nature of the Case

[16] Counsel advised me that this case involves an initial "sniff" by a police officer that contributed to an application for a warrant and the pursuant search of Mr. Hozack's residence. Mr. Hozack provided the RCMP a single statement. Everything regarding the search took place over the course of several hours on one day. It was not clear to me when the statement was provided.

Law

[17] There are no rules or practice directives in the Yukon Supreme or Territorial Courts regarding the form and content of the notice that defence counsel is required to

provide to the Crown when seeking a remedy as result of a *Charter* breach. There is also no applicable territorial legislation. At present a committee, which includes a representative from the Federal Crown's office, is in the process of preparing a procedure which will at some point be implemented in the Yukon Territorial and Supreme Courts.

[18] At present, then, the obligation to provide reasonable notice is governed by case law, including the ***Dwernychuk*** case cited above. The purpose of providing reasonable notice is to expedite the trial process and avoid unnecessary delay, including delay caused by adjournments that could have been avoided had reasonable notice been given.

[19] As stated in ***Dwernychuk*** at p. 7(Q.L.)

> …when it comes to an issue of the exclusion of the evidence where there has been an infringement of a *Charter* right, no similar established rule exists. The reasonable person would expect that defence counsel would make known to the prosecution, either before or at the commencement of the trial, that he or she intends to allege that there has been an infringement of a specific *Charter* right and to apply for exclusion of evidence. Such advance notice would enable Crown counsel and the court to plan and decide how and when best to call witnesses; whether witnesses should be called whose evidence would be relevant to the issue raised and who otherwise would not be called; the order in which witnesses should be called; what questions should be asked; and whether and when witnesses, once they have testified, may be released. It enables Crown counsel to prepare legal submissions in advance rather than hastily and on the spur of the moment. It enables the judge, with the help of both counsel, to begin to read relevant cases and to put his or her thoughts in order, rather than becoming aware of the existence and nature of a *Charter* issue only after he or she has heard the evidence without realizing what he or she should be listening for and without being able to exercise his or her limited right to ask questions of witnesses. If such notice is given, the judge is better able to reach a rational decision which

> is based on a calm reading and serene appreciation of the law, rather than having to research a decision, perhaps without due consideration, because of the inexorable pressure of his or her docket.

[20] The defence bears the burden of proving, on a balance of probabilities, the infringement of the *Charter* right and the subsequent entitlement to a *Charter* remedy. The Crown is not required to anticipate every possible *Charter* argument that could be made and have all available witnesses present and ready to testify at trial, just in case the witnesses' evidence is relevant, or to research every area of case law that may be argued and present the court with briefs in respect of each and every possible *Charter* issue.

[21] Therefore, in certain cases it may not be sufficient for defence counsel to simply state that there will be a section 8 argument and leave Crown counsel to figure out which particular aspect of the case will attract *Charter* scrutiny. The form and content of the required notice will vary depending on the complexity of the case. Certainly, in a case involving several wiretaps and search warrants, numerous searches, and a number of statements, it may not be enough for defence counsel to simply state that ss. 7, 8 and 10(b) *Charter* issues are going to be raised. In such a case, sufficient notice may require that defence counsel identify the particular wiretaps, warrants, searches and statements that are at issue so as to narrow the focus of the *voir dire*, to identify the required witnesses (generally RCMP) whose evidence is relevant to the *Charter* issue, and to define the area of law which will require research and filing of authorities.

[22] While defence counsel is generally not required to disclose the defence, there is an obligation on defence counsel to provide reasonable notice of a *Charter* application, and, to some extent, as the onus rests with the defence in such an application, the accused's basic right to maintain silence with respect to his or her defence is altered.

[23] In those cases in which Crown counsel takes the position that the *Charter* notice provided is insufficient, it may be necessary to have the matter sorted out through a pre-trial process, either Chambers or open court, as the case may be. Certainly, it is far from ideal when the issue is raised at the commencement of trial. This is a general statement, and I note that in the present case, Crown counsel did attempt to arrange a pre-trial in the week or two before the trial date but, due primarily to Mr. Parkkari's unavailability, the pre-trial could not take place.

Application to this Case

[24] Mr. Parkkari provided early notice that *Charter* issues would be argued at trial and, two months prior to the trial date, specific notice as to which sections of the *Charter* he was going to argue. While the correspondence of March 2 did not specifically refer to his intention to seek a *Charter* remedy under s. 24(2), I find that it is implicit in the circumstances that he would be doing so.

[25] The circumstances of this case appear to be straightforward. There is one warrant and search of the residence, which resulted from what could perhaps, as I do not know all the circumstances, be an initial "sniff" search. There is one statement made by Mr. Hozack. There do not appear to be a significant number of police officers

or other witnesses involved. I find that the basis for making ss. 7, 8, 10(b) and 24(2) *Charter* arguments should be fairly obvious. The notice of *Charter* issues provided by Mr. Parkkari to the Crown is certainly sufficient to allow for the trial date to be set. It also appears, in these circumstances, to be sufficient to allow the Crown to identify the issues and to properly prepare its case. I find, on the information I have before me, that there is no obligation for Mr. Parkkari to further disclose to Crown counsel the nature and content of his *Charter* application.

[26] This said, as a general rule, there is much to be gained through defence and Crown counsel acting cooperatively with respect to identifying as narrowly as possible the issues to be argued, the required witnesses, and the area of law that applies. The current practice in the Yukon with respect to *Charter* issues at trial is for the Crown to call the RCMP witnesses in a *voir dire*, and allow defence counsel to cross-examine them. The evidence of an RCMP officer in the *voir dire* can often include the officer's evidence on issues beyond the *Charter* issue and is admitted into the trial proper, after, of course, any exclusion as a result of the decision in the *voir dire*. From a practical standpoint, this practice is quite efficient and benefits both counsel and the court.

[27] In the end, it is defence counsel's job to ensure that the required witnesses to establish a *Charter* breach are available to testify, not the Crown's. If defence counsel expects an RCMP officer to provide evidence relevant to a *Charter* issue, defence counsel must ensure that witness is available, as the witness may not have been required to provide evidence otherwise relevant to the case the Crown must prove. Cooperation with Crown counsel and a more full and frank discussion of the *Charter*

issues to be argued can be of considerable assistance to all counsel and to the court in expediting fair trials.

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COZENS T.C.J.