R. v. Kakfwi, 2017 NWTSC 43 S-1-CR-2017-000022

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HER MAJESTY THE QUEEN

 - v -

 TONY HOWARD KAKFWI

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 Transcript of the Oral Ruling delivered by The Honourable

 Justice L. A. Charbonneau, sitting in Yellowknife, in the

 Northwest Territories, on the 5th day of June, 2017.

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 APPEARANCES:

 Mr. J. Potter: Counsel for the Crown

 Mr. C. Davison: Counsel for the Accused

 (Charge under s. 244.2, 244.1, 264.1(1)(a) x2, 86(1), 88(1)

 and 85(1)(a) of the Criminal Code of Canada)

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 1 THE COURT: Mr. Kakfwi faces a number of

 2 charges, including one pursuant to Section

 3 244.2(1)(b) of the Criminal Code, for

 4 intentionally discharging a firearm while being

 5 reckless as to the life and safety of another

 6 person. If convicted of that offence, he will be

 7 subject to a mandatory minimum jail term,

 8 pursuant to Section 244.2(3) of the Criminal

 9 Code.

 10 The mandatory minimum penalty depends on the

 11 type of firearm used, as it is higher if the

 12 offence involves the use of a restricted or

 13 prohibited firearm or if the offence is committed

 14 for the benefit of a criminal organization. My

 15 understanding is that the allegations here are

 16 that those situations are not engaged. The

 17 applicable mandatory minimum penalty, if

 18 Mr. Kakfwi is convicted of the offence, would be

 19 four years' imprisonment pursuant to Section

 20 244.3(2)(b).

 21 Mr. Kakfwi has filed a Notice of Motion

 22 challenging the constitutional validity of that

 23 four-year mandatory minimum.

 24 There may be a typographical error on the

 25 Notice of Motion, Mr. Davison. I think you may

 26 have referred to ".2". I just noticed this this

 27 morning. I think we all know what the challenge

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 1 is about, but I thought I would mention it.

 2 MR. DAVISON: Thank you. I'll look into

 3 that.

 4 THE COURT: I am sure Mr. Green would not

 5 build his case around that, but I thought I would

 6 mention it.

 7 Mr. Kakfwi takes the position that this

 8 provision violates Section 12 of the Canadian

 9 Charter of Rights and Freedoms. Mr. Kakfwi is

 10 asking this Court to decide the constitutional

 11 challenge before he is required to enter his plea

 12 on the charge. The Crown objects to this and

 13 argues the constitutional challenge should be

 14 heard only after Mr. Kakfwi is convicted of the

 15 charge that triggers this mandatory minimum

 16 penalty.

 17 The Crown and defence agree that the legal

 18 framework that governs the issue as to when the

 19 constitutional challenge should be heard was the

 20 framework laid out by the Supreme Court of Canada

 21 in R. v. DeSousa, [1992] 2 S.C.J. 1997. They do

 22 not entirely agree about how that framework

 23 operates.

 24 Both sides agree that the Court has the

 25 jurisdiction to hear a constitutional challenge

 26 before trial and a discretion to do so. The

 27 Crown argues there is a strong presumption

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 1 against doing so and that the defence has not

 2 rebutted that strong presumption in this case.

 3 Defence takes issue with the Crown's

 4 position that the legal framework includes a

 5 strong presumption against hearing constitutional

 6 issues before trial. On that point, I agree with

 7 defence. The use of the term "presumption" may

 8 not be entirely accurate in this context. But,

 9 in the end, how the test is described does not

 10 make much of a difference to the outcome.

 11 On my reading of DeSousa, the key is that in

 12 deciding on the timing of the hearing of this

 13 type of motion, regard must be had to two policy

 14 considerations. The first is that it is

 15 desirable to avoid fragmentation of criminal

 16 proceedings. The second is that there is a need

 17 for a proper factual foundation in any

 18 constitutional litigation.

 19 Both of these policy considerations favour

 20 disposition of the type of application brought by

 21 Mr. Kakfwi after trial and not before, and, in

 22 the ordinary course of things, that is what

 23 happens. But the Court may depart from that

 24 usual approach. In DeSousa, the Supreme Court

 25 said that trial courts should not do so "unless

 26 there is a strong reason for doing so" in cases

 27 where the "interests of justice necessitate an

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 1 immediate decision". DeSousa, at paragraph 17.

 2 The Supreme Court went on to give examples

 3 of when that might be the case: where the Court

 4 itself is implicated in a constitutional

 5 violation; where substantial ongoing

 6 constitutional violations require immediate

 7 action; or where it might save time to decide the

 8 constitutional issue before trial. An example of

 9 when it might save time to hear a constitutional

 10 challenge ahead of time is when there is an

 11 apparently meritorious challenge to the law under

 12 which the accused is charged and the challenge

 13 does not depend on the facts to be elicited

 14 during the trial.

 15 Unlike some of the cases referred to by

 16 defence, such as R. v. Haldenby 1994 CarswellOnt

 17 1096, for example, the provision that Mr. Kakfwi

 18 seeks to challenge is not the one that creates

 19 the offence that he is charged with. It is not

 20 as though dealing with the constitutional issue

 21 now would avoid the need for a lengthy and

 22 complex trial which may fall apart because the

 23 charging provision ends up being found

 24 unconstitutional. There is no suggestion that

 25 hearing the matter ahead of trial would save

 26 resources or court time.

 27 There is also no suggestion that at this

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 1 point the Court itself is implicated in a

 2 constitutional violation.

 3 But Mr. Kakfwi says that one of the things

 4 evoked in DeSousa, the fact that the challenge

 5 does not depend on facts to be elicited at trial,

 6 does apply to his situation.

 7 Mr. Kakfwi's position must be considered

 8 against the backdrop of the legal framework that

 9 applies to a Section 12 challenge. That

 10 framework is set out in R. v. Nur, [2015] 1 SCR

 11 773 and R. v. Lloyd 2016 SCC 13. When a

 12 mandatory minimum sentence is challenged on the

 13 basis that it contravenes Section 12 of the

 14 Charter, there are two avenues for arguments.

 15 The first is that the mandatory minimum will

 16 result in cruel and unusual punishment for the

 17 accused who is before the Court. The second is

 18 that for other persons in other situations, the

 19 mandatory minimum punishment would result in

 20 cruel and unusual punishment. One argument rests

 21 on the situation of the accused who is actually

 22 before the Court, the other rests on a

 23 hypothetical situation that could reasonably

 24 arise.

 25 In a case where the first line of argument

 26 is being pursued, the facts of the case will

 27 necessarily matter. Arguably, in cases based

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 1 solely on the "reasonable hypothetical" line of

 2 argument, the facts of this specific case will

 3 have little bearing on the issue.

 4 In submissions, the Crown pointed out that

 5 some facts would necessarily need to be

 6 established for this constitutional challenge

 7 even if it were to be based exclusive on the

 8 "reasonable hypothetical" situation because the

 9 mandatory minimum penalty that applies depends on

 10 the type of firearm used. I do not think that

 11 would present much of an obstacle if it were the

 12 only issue because that one fact is very narrow

 13 and specific, most likely non-contentious, and,

 14 as defence counsel pointed out, could easily be

 15 the subject of an admission for the purposes of

 16 the constitutional challenge.

 17 The greater problem, as I see it, is that it

 18 is not certain that the challenge will, in this

 19 case, rest solely on the "reasonable hypothetical"

 20 branch of the test.

 21 In describing the nature of the challenge

 22 that he expects to put forward, Mr. Kakfwi's

 23 counsel states at paragraphs 15 and 16 of his

 24 written submissions:

 25 In the particular circumstances of

 Tony Kakfwi, it is anticipated

 26 that the challenge will be based

 completely upon the "reasonable

 27 hypothetical" line of argument.

 Given the principles at play in

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 1 Section 12 litigation, a four year

 sentence of imprisonment - while

 2 longer than what the defence will

 argue is appropriate in his case -

 3 would likely not rise to the level

 of being "cruel and unusual"

 4 punishment in the case of

 Mr. Kakfwi.

 5

 Thus, the outcome of this

 6 challenge will not depend upon the

 facts of the case at bar but

 7 rather will, instead, depend upon

 the court's consideration of

 8 "reasonable hypothetical"

 situations which will be described

 9 and offered during argument. This

 is accordingly not a situation in

 10 which the Court would need an

 evidentiary or factual foundation

 11 of the sort usually contemplated

 when the Supreme Court has urged

 12 courts to avoid making rulings in

 factual vacuums.

 13

 14 But, importantly, there is a footnote at the end

 15 of that paragraph which reads:

 16 All of this is not to say that no

 evidence or facts would be placed

 17 before the Court if the need

 arises. While it is presently

 18 intended to argue the challenge on

 the basis of "reasonable

 19 hypotheticals" as outlined above,

 if there is a need for more of a

 20 factual foundation to be provided

 to the Court that can, in any

 21 event, be undertaken as necessary

 and appropriate in the

 22 circumstances.

 23 Counsel used equally careful language during

 24 the oral submissions. That is understandable

 25 because, as counsel acknowledged, new facts, new

 26 evidence, about Mr. Kakfwi 's personal situation

 27 could well come to counsel's attention between

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 1 now and the time of sentencing if this case ever

 2 reaches that stage. Those new facts could affect

 3 whether an argument should be made about the

 4 impact of the impugned provision in his own

 5 personal circumstances.

 6 The bottom line is that Mr. Kakfwi is not

 7 ruling out, and probably cannot rule out, the

 8 possibility that the constitutional challenge

 9 could be decided on the basis of a different

 10 factual matrix than what would ultimately be

 11 established through a trial and/or sentencing

 12 hearing process. If that were to happen, the

 13 constitutional issue would have to be revisited.

 14 In that event, not only the trial process would

 15 be fragmented but the actual constitutional

 16 challenge would be as well. That is not an

 17 efficient use of resources.

 18 I understand fully why Mr. Kakfwi cannot

 19 commit to limiting his challenge to the

 20 "reasonable hypothetical" branch of the test. It

 21 would be problematic for counsel to make that

 22 commitment for the reasons I have already

 23 referred to. But it raises these potential

 24 disadvantages and issues as far as the

 25 possibility of hearing the constitutional

 26 challenge ahead of plea.

 27 Mr. Kakfwi also relies on another distinct

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 1 argument. He argues that it is in the interests

 2 of justice to allow the challenge to be heard

 3 before plea so that he can know, before he

 4 pleads, the penalty he will face. He argues that

 5 he is entitled to know his jeopardy before he

 6 pleads. In support of that position, he relies

 7 on a number of things which he says apply by

 8 analogy.

 9 For example, he refers to notice

 10 requirements that arise in other areas of our

 11 criminal law. The first example is the

 12 requirement for the Crown to give an accused

 13 notice of its intention to seek a greater penalty

 14 on a subsequent offence, as provided for in

 15 Section 727 of the Criminal Code. The second

 16 example he gives is the requirement for the Crown

 17 to give notice to a young person of its intention

 18 to apply to have that young person sentenced as

 19 an adult if convicted. Mr. Kakfwi argues that

 20 similarly, he is entitled to know the extent of

 21 his jeopardy more specifically in relation to

 22 this charge, before he pleads

 23 I understand the argument, but I think it

 24 overlooks the fundamental qualitative difference

 25 between those examples and the situation here.

 26 In my view, there is a fundamental difference

 27 between the Crown being required to provide

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 1 advance notice on how it will exercise its

 2 discretion, and the Court being asked to decide

 3 whether it will declare a law contrary to the

 4 Charter. Those are two very different things.

 5 The logical extension of Mr. Kakfwi's

 6 position is that anyone who wishes to challenge a

 7 sentencing provision, or any provision of the

 8 Criminal Code for that matter, would be entitled

 9 to a ruling on the issue before plea. That

 10 would, in my view, represent a major departure

 11 from the general principles outlined in DeSousa.

 12 Mr. Kakfwi also gave the example of the

 13 requirements of publicity for Parliamentary

 14 proceedings in the enactment of laws and the

 15 requirement for laws to be published in the

 16 Canada Gazette. Again, I do not find those

 17 examples particularly helpful to his argument

 18 because they arise in a very different context

 19 than the one we are dealing with here.

 20 In addition to other policy reasons that

 21 militate against entertaining this type of

 22 application before trial, delay is another

 23 concern. Every court across the country is

 24 acutely aware of the Supreme Court of Canada in

 25 R. v. Jordan, [2016] 1 SCR 631. That decision

 26 has not made delay less of a consideration in the

 27 general landscape of the administration of the

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 1 criminal justice system in our country. On the

 2 contrary, it has placed it at the forefront more

 3 than ever before. That factor does not assist

 4 Mr. Kakfwi's position.

 5 Defence counsel is quite correct in pointing

 6 out that this case has proceeded very

 7 expeditiously up until now. The events giving

 8 rise to the charge arose in November 2016. The

 9 matter is now before this Court. We are a long

 10 ways away from the presumptive ceiling of 30

 11 months established in Jordan. At the same time,

 12 it is very clear that proceeding now to schedule

 13 the hearing of the constitutional challenge will

 14 create additional pre-trial delays. We can never

 15 predict what factors may have a further impact in

 16 the future on the scheduling of this trial.

 17 The resources of this Court are already very

 18 stretched. We are a circuit court that only has

 19 four resident judges. We have a heavy caseload,

 20 not just in criminal matters but also in civil

 21 and family matters. There continue to be a very

 22 high rate of jury trial elections in this

 23 territory. There currently are a number of

 24 pending cases, including several homicides and

 25 other cases, that are expected to require several

 26 weeks of court time. Under these circumstances,

 27 the Court must be careful in how it uses its time

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 1 and resources, and it must be careful in

 2 exercising its discretion in a matter that will

 3 inevitably add several months of pre-trial delay

 4 on a case that, on its face, involves serious

 5 allegations.

 6 So, in summary, I disagree with the

 7 defence's position that the interests of justice

 8 entitle Mr. Kakfwi to know before plea whether he

 9 will be subject to the mandatory minimum jail

 10 term in the event of a conviction. I am not

 11 persuaded that, to use the words of DeSousa, that

 12 this is a case where there is a strong reason to

 13 depart from the usual practice, that the

 14 constitutional challenge to the penalty section

 15 should be entertained at the sentencing stage. I

 16 am not persuaded that the interests of justice

 17 necessitate an immediate decision, and, for those

 18 reasons, I will not entertain the constitutional

 19 challenge to Section 244.2(3) at this stage.

 20 That issue should be decided if and when

 21 Mr. Kakfwi is convicted of the offence that gives

 22 rise to that mandatory minimum sentence.

 23 .................................

 24 Certified Pursuant to Rule 723

 of the Rules of Court

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 Jane Romanowich, CSR(A)

 27 Court Reporter

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