COURT FILE No.: Old City Hall

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

AUDREY TOBIAS

Ms. Gaspar ..... **for the Crown**
Mr. Rosenthal ..... **for the accused, Audrey Tobias**

KHAWLY J.:

[1] Ms. Tobias is charged with a violation of the Statistics Act, a Federal Statute for failing to fill out and returning to the appropriate authorities the 2011 census form. Part of the penalty section for such a violation makes one liable on a summary conviction to a fine not exceeding $500 or imprisonment for a term not exceeding three months or to both. In other words, a violation is far reaching. It carries not only criminal sanctions but more importantly saddles one with a de facto criminal record coupled with the obvious adverse effects.

The Agreed Statement of Facts

[2] Counsel have filed with the Court a Statement of Agreement on the main factual underpinnings of the case. They are:

[3]

1. Lockheed Martin is a Canadian subsidiary of an American Company. It was engaged by Statistics Canada to develop and set up the software code for the 2011 Census.
2. Lockheed Martin, an amalgamation of Lockheed Aviation and Martin Marietta is a well known arms manufacturer.
3. On June 9, 2011 in the presence of a Statistics Canada employee, Ms. Tobias refused to complete and return the Census questionnaire.

The Road Map

[4] Both counsel, Ms. Gaspar for the Crown and Mr. Rosenthal for the Defence accept that the violation section comports a general intent requirement. In other words, not only must the Crown prove beyond a reasonable doubt the *Actus Reus* (the physical refusal) but it must similarly prove the *Mens Rea* (the voluntary intent) not to fill out the census form. That aspect is anchored by the words "Without Lawful Excuse" found in S.31 of the violation section.

[5] Counsel are further in agreement that if the Charter of Rights and Freedoms are engaged in this matter then the Court must decide if there is a breach of the Charter. In such eventuality, the Court must still determine whether such breach is not saved by the limitation to Charter rights enunciated in S.1 of the Charter.

[6] Counsel also concur that if the Charter is not engaged and the Defence fails to succeed on the Charter application, then the Court must still decide, based on the evidence before it, whether the Crown has proven every element of the offence before a finding of guilt would follow.

The Charter Argument – The Smoke Screen

[7] From the get go, the defence led with an elephant gun. It condemned Statistics Canada for giving Ms. Tobias nothing more than a perverse Hobson's choice. Succumbing to that choice would trumpet that Ms. Tobias supports Lockheed Martin's significant military weapons programme. For someone whose whole life was dedicated to Peace and the Peace movement, thunders the defence, are they not purposely forcing Ms. Tobias into civil disobedience?

[8] To the defence, that is not hyperbole as it would strike at the core of everything Ms. Tobias stands for to force her to complete this questionnaire. Implicit in that argument is the idea that if the Charter's protection does not encompass or envisage this type of situation, then the Charter truly offers no solace to the sanctity of an individual's moral and ethical beliefs. Therefore in large measure the Charter would amount to a toothless document and no better than the Bill of Rights statute of the 1950s.

[9] This could not have been the intention of Parliament and the provinces when the Charter was entrenched in the Constitution the defence bellows. It concludes that S.2(a) & (b), which deal with the Freedoms of Conscience, Religion, Thought, Belief, Opinion and Expression must have been intended to protect specifically the action or inaction of Ms. Tobias.

[10] It is an interesting argument and the type that I always relish, but unfortunately, a non-starter. I say this because logically those Freedoms are not readily engaged by the act Ms. Tobias was being mandated to perform. How can one credibly argue that the intent of the Freedoms above envisage and extend to that type of situation? I fail to see it.

[11] As Ms. Gaspar points out in her well documented, well thought out, well organized factum which I quote:

> *"While Ms. Tobias may articulate her refusal to complete the census form on the basis of her conscientious objections to Lockheed Martin, S. 2 of the Charter does not provide a broad license to disregard or disobey valid statutes on the basis of moral disapproval .... The rule of Law demands that citizens obey a lawful obligation found in valid legislation. Otherwise, everyone who disagreed with government policies and the expenditure of public monies in furtherance of these policies would be entitled to abandon their obligations as members of the community while continuing to receive the benefits of such membership."*

[12] Ms. Gaspar did not pull those comments out of thin air. She backed it up with a long line of cases that follow the same track. As the Supreme Court of Canada noted in *Syndicat Northcrest v Amselem* [2004] 2 S.C.R. 551:

> *"The Claimant must show that she sincerely believes in a practice or belief that has a nexus with religion or as in this case her conscience; a sincere belief in strongly held moral ideas of right and wrong not necessarily founded in any organised religious principles. The claimant must also demonstrate that the impugned conduct or legislative provision interferes in a way that is more than trivial or not insubstantial with her ability to act in accordance with that practice or belief."*

[13] There's the rub.

[14] That said, let's deal next with Freedom of Expression. The Supreme Court of Canada in a number of cases *[1] has confirmed that Freedom of Expression captures "compelled expression". The Defence believes it is their life line. I do not agree. While it does apply to any particular message the aggrieved individual is compelled to voice or accept, it is not readily apparent that answering the short biographical census questions amounts to forcing a message on Ms. Tobias. Moreover the questions themselves fail to impose any expressive or ideological conformity on Ms. Tobias.

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*[1] See

1. Irwin Toy Ltd V. Quebec [1989], 1 SCR 927;
2. Slaight Communications Inc. v. Davidson [1989], 1SCR 1038;
3. Lavigne v. Ontario Public Service Employees Union [1991], 2 SCR 211)

[15] As Ms. Gaspar cogently signals:

> *"Completion of the census form does not call for nor does it amount to an expression of support by Ms. Tobias for the Federal Government, census operations, or for the contractors retained by Statistics Canada to carry out census operations. Otherwise every regulatory scheme whereby the state requires the production of answers or the filing of reports could be challenged as 'forced expression' – which would be untenable and inconsistent with the recognized meaning of forced expression."*

[16] By way of contrast and tellingly, the Defence failed to point to any cases that follow a different track under either the Rubric of Freedom of Religion or Expression.

[17] The reason for that is simple enough. The tract the defence is on leads nowhere as it lacks any NEXUS between Ms. Tobias' conscientious beliefs nor her freedom of expression and the legal requirement to complete the census questionnaire. Hence this Court rules that the Defence has failed to meet the minimum threshold for the engagement of an analysis under S.2 (a) & (b) of the Charter.

The Charter Argument – The Hail Mary Pass

[18] The argument under S.2 of the Charter was really only the opening volley and the veil for the fork on the road that the Defence wanted the court to take. In other words, the defence well knew that the facts and the law were against them but they were hoping for a Hail Mary pass, to use Football parlance, to coax the court into adding new unspoken and unspecified protection into the Charter.

[19] Ms. Gaspar may have had the law on her side and she may have impressively parried and laid waste to any arguments that the Defence could martial but Mr. Rosenthal is a wily fox who never believes it is over until the judge bangs his gavel. Sure enough through sheer luck or otherwise, he managed to spring a trap on the prosecution with the Crown's own witness, no less.

[20] While testifying, Mr. Yves Beland, the Director of Census Operations for Statistics Canada, volunteered as an aside laced with pride that 13 million Canadians responded to the census questionnaire amounting to a 98% success rate. That is impressive and deserving of the pride he showed. I would think that any organization would find this to be an enormous achievement, to be justly proud of it and then to rest on their laurels. To Statistics Canada's credit, as Mr. Beland tells us, they did not. They went back instead to the drawing board. They sifted through the 3,700 refusals. They evaluated them through the filter of three criteria:

1. the number of refusals by each,

2. the level of understanding of the request, and
3. the appreciation of the consequences of non response.

[21] That analysis, Mr. Beland went on, led them to purge the list to a more manageable level of some 330 + individuals which included Ms. Tobias. Those remaining targets were subjected to further evaluation to determine which ones where the most deserving of prosecution. Lo and behold, someone in their wisdom thought that Ms. Tobias was exactly the type of individual of which an example should be made of for violating the law. She was corralled with 53 others for prosecution.

[22] It is clear that just because an arm of the government recommends a prosecution does not mean that the Department of Justice will necessarily go along with it. They make their own evaluations. They weigh many factors ranging from the point of law at issue, the precedent setting aspect of the case, the seriousness and aggravating features of the violation, budgetary pressures, and not least of all the public interest in prosecuting the matter.

[23] As Justice sifted through those factors, it could not have escaped them that Ms. Tobias was in her late 80s, had been a model citizen, had served with the Women's Reserve Naval Service in WW2, was a long time passionate Peace Activist, did not object to the census itself but rather to the Company that had been engaged to create the software. Yet somehow, for reasons known only to them they agreed with Statistics Canada that this case cried out for prosecution. As the file then made its way toward the day of prosecution, various actors could have and should have re-evaluated the case but if they did they sure are tone deaf to the way the world works.

[24] No matter the precedent setting aspect here on the Charter issue, which I readily acknowledge, could they not have found a more palatable profile to prosecute as a test case? I mean really, could the defence have scripted anything better for their cause? Did no one at justice clue in that on a public relation perspective, this was an unmitigated disaster. Are they that myopic that they could not see the train wreck ahead? This is the very type of case that draws the media like bees to honey.

[25] It got worse, Ms. Tobias is photogenic, presents and speaks well and the camera loves her. There and then Mr. Rosenthal, without really lifting much of a finger to catch the pass, had his 'Hail Mary'. Ms. Tobias was a martyr in the making. Anyone in Justice who had not seen that coming should be ushered immediately into an introductory marketing course.

[26] At this point, armed with Mr. Beland's gift, it became for the defence like shooting fish in a barrel. How could anyone not succumb to this marketer's dream? It struck at the core of what we always hope is the goodness in all of us. It, non-coincidentally, spoke to the very areas the defence wanted the Charter to add new protection. How could the Charter not be available as a shield to protect this type of civil disobedience, one based on long term and principled beliefs running afoul of a ham fisted, mean spirited prosecution?

[27] That turned the tables.

[28] Ms. Gaspar and the prosecution were, by now, left flat-footed and had a debacle in the making. I sat back and marvelled at this unexpected twist in the case. Nor was I by any means immune to the resulting siren song of the defence.

[29] Only once I paused long enough, did the reality of giving in to this invitation hit me. Rational thought replaced emotion. To accede to the defence view struck me as even more disturbing than Justice's lack of sensitivity and feel for picking their battles.

[30] For the Court to be swayed by this PR exercise would make for very bad law. To call it a slippery slope does not even begin to define the resulting free for all that would follow. The likely ramifications are clear and obvious. It is not for this court to temper with the law as decreed by the Constitution no matter the consequences on one particularly sympathetic individual. No reasonable interpretation of the Charter can justify finding favour for the Defence. This is an area best left to Parliament and the Provinces, not to the Judiciary.

[31] Accordingly without reservation and without trepidation, this Court rules that the Charter is not available to absolve Ms. Tobias of her obligation to fill out the census form. Hence, the Charter motion must fail.

THE TRIAL

Introduction

[32] The Defence well knew that if the Charter gambit failed and this matter proceeded to trial on its merits, it was holding a losing hand.

[33] The idea of "lawful excuse" evaporated with the Charter loss and the "Agreed Statement of Facts" basically conceded the Crown's case at trial. I mean what more does the Crown need when the Defence agrees that Ms. Tobias "refused to complete and return the 2011 census questionnaire?"

[34] Let's face it, with the Charter no longer in play, that concession appears conclusive for the Crown's case. Granted, the Defence did not go so far as to say that Ms. Tobias intended her physical act of refusal. Fair enough but short of any other evidence on intent, it is no stretch for Ms. Gaspar to successfully argue that a physical act is normally a by-product of intention.

[35] Is this the end then? The answer is no. This case continues to surprise and is akin to an onion. The more one peels off layers, the more unexpected layers reveal themselves.

The Unusual Defence Tactic

[36] The totally unexpected layer here is Mr Rosenthal's decision to have Ms. Tobias' evidence on the Charter application apply to the Trial proper. In other words, any comments/answers that she gave during the Charter application was also evidence at the trial.

The Judge, as the trier of fact was therefore entitled to weigh it along with all other evidence properly before it.

[37] I must say that I was taken aback by this brazen if not fool hardy gamble of the Defence. I simply saw no percentage in it. If anything, it would simply allow Ms. Gaspar to gingerly add the final nails to the coffin of conviction. She wasted no time doing just that. During a cross-examination so gentle as to be reminiscent of two old friends catching up on each other's news, Ms. Tobias blithely allowed that she well knew that she was under a legal obligation to complete the form. But for her conscientious beliefs she confided to Ms. Gaspar, she would certainly have filled it.

[38] End of story.

[39] Ms. Gaspar was handed what "appeared" to be a gift wrapped conviction. Note however, that I am careful with my wording here by my use of the word "appeared".

[40] Why do I say this? In our system of justice, it is for the Court sitting as the trier of fact to decide what part of Ms. Tobias' evidence it accepts and what part it rejects, if any. It therefore brings us to this. Do I find Ms. Tobias credible? Absolutely. Do I find her evidence reliable? On that, I am not convinced.

[41] Let me explain. At trial, I enjoy a significant advantage over both the Crown and the Defence in taking a witness' measure. While both counsel are knee deep in formulating questions or taking copious note on the hope of later advantage, I have the luxury of spending significant periods of time forming an impression of the witness. I get to gage inflections in voice, rapidity, pauses and delay in responses. I get to look for ability to marshall coherent and cogent responses, pattern in thought processes, consistency and clarity of affirmations or denials, reasonableness of averments, clues to buttress credibility and last but not least powers of recollection.

[42] Just as importantly in this matter, I had the benefit of a relatively long period of time to observe Ms. Tobias which assisted to a great degree in evaluating her evidence.

Recollection v. Reconstruction

[43] As I said earlier, Ms. Tobias' powers of recollection are of concern to this Court. But that would be so in any case where the witness is trying to recall something that took place almost two and a half years ago. Even discounting her quip, when asked her age, that she has seen better days, the passage of time, by necessity, has dimmed her memory, if she is anything like the rest of us.

[44] I must therefore query whether Ms. Tobias is actually recalling what effectively transpired that day in June 2011 or rather, is her memory hostage to significant events that flowed from that day? She is served with documents stating that she is facing charges of refusal. She sees a lawyer to help her deal with that. She is ordered to Court on it. She must, I assume, have read media reports highlighting that very refusal. Finally she finds herself in Court having to meet the very same accusation.

[45] As a result, have the subsequent events merely served to refresh her memory of the events of June 2011, or have they instead taken a life of their own and replaced what she can no longer remember? In other words, is her memory of June 2011 strictly informed by her memory, or is it a mix of her memory and the influence of subsequent events, or at worse is it all the latter?

Segments of Ms. Tobias' Evidence

[46] Let us look at some segments of her evidence to see if that assists. Initially it is well focused, centered on her peace principles and reflected in her decision to not be seen doing business indirectly with Locheed Martin. Later there is a perceptible change. The connection between her principles and LM take turns that render that connection more and more tenuous.

[47] While one can grasp what she was trying to connect with the F35 Joint Strike Fighter, it becomes much more difficult when we enter into the world of a late 50s early 60s aircraft. The Locheed Aviation fighter/Interceptor - the F 104 - dubbed by some as the 'widow maker' becomes a target of her concerns. The link became even more faint when she digressed into the significant percentage of Luftwaffe pilots who lost their lives piloting the F104. Nor does it assist that many of the things she takes as fact are arguably disputable.

[48] From there, she moved on to the long form census questionnaire. I watched her closely as she stated: *"I am disappointed by the long form having disappeared."* Following a longer than expected pause, she added in an almost wistful tone: *"But that is another issue."*

[49] Two things loom large here. Is she implicitly telling us that had she been offered the long form, she would have filled it? I do not know but it sure sounds suspiciously like a competing reason for her refusal. Moreover how do you square that with her palpable concern that LM may surreptitiously lift her data and provide it to US authorities? One cannot. It is internally inconsistent. One would normally have a much greater concern if the data in the long form were to be lifted as it contained much more pertinent and invasive information. Fears to one's privacy in that context should be magnified not minimized.

Conclusion

[50] In sum, has this snapshot of her evidence helped in resolving whether she is recalling or reconstructing that June 2011 refusal? Hardly. Rather it raises significant new questions and do not by any measure add certainty to her evidence.

[51] As a trier of fact, how can I filter out this troubling background from her bold words of refusal and axe a conviction on that refusal? In the circumstances as I have described them, to base a conviction on her evidence is dangerous.

[52] Accordingly what am I left with? A hefty reasonable doubt as to her intent at the time of refusal is the inevitable answer. This brings me back to my earlier comment that the Crown 'appeared' to have a gift wrapped conviction. Yes it most certainly was, but with the caveat that the Crown had proven the intent beyond a reasonable doubt. They have not. Therefore I must acquit.

[53] Ms Tobias is found not guilty.

Released: October 9, 2013

Signed: "Judge R. Khawly"

Note: Unofficial release. Official transcript must be obtained from the Court Reporters' office at Old City Hall