EB-2011-0316

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., License Numbers ER-2010-0368 and GM-2010-0369, dated August 25th, 2011

(1 OF 2 COUNTERPARTS)
BOOK OF AUTHORITIES
OF SUMMITT ENERGY MANAGEMENT INC.

(Procedural Motion and Cross-Motion returnable March 20th, 2012)

Tab	Authority
1.	***R v. Winlow*** 2009 ONCA 643
2.	***R v. Irwin*** (1998) 38 O.R. (3d) 689 (Ont. C.A.)
3.	***R. c. Bois***, 2004 SCC 6
4.	***Elliott v. R. (No. 2)***, [1978] 2 S.C.R. 393
5.	***Regina v. Budget Car Rentals (Toronto) Ltd.*** (1981), 57 C.C.C. (2d) 201 at 207-8 (Ont. C.A.)

Tab	Authority
6.	***R. v. Falconbridge Nickel Mines Ltd.*** (1983), 7 C.C.C. (3d) 68 (Ont. Dist. Ct.)
7.	***R. v. Pierce Fisheries Ltd.***, [1971] S.C.R. 5
8.	***R. v. Sault Ste. Marie (City)***, [1978] 2 S.C.R. 1299
9.	***R. v. Stucky***, 2009 ONCA 151
10.	***Mississauga (City) v. Robson*** 2005 CarswellOnt 2067, 12 M.P.L.R. (4^{th}) 91 (Ont. S.C.)
11.	***R. v. Zwicker*** (1980), 53 C.C.C. (2d) 239 (N.S.C.A.)
12.	***R. v. McIvor***, 2006 BCCA 343
13.	***Hi Hotel Partnership v. Holiday Hospitality Franchising Inc.***, 2008 ABCA 276
14.	***Re Moir Estate*** [1942] 1 W.W.R. 241 (Alta. C.A.)
15.	***In re Long Estate***, [1936] P. 166, 1 All E.R. 435
16.	***Campbell v. MacDonald***, [1989 Carswell NS 152 (N.S.T.D.)

March 12th, 2012

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Stephen I. Selznick LSUC#: 18593C
Tel: 416.860.6883
Fax: 416.642.7147
Email: sselznick@casselsbrock.com

Lawyers for
Summitt Energy Management Inc.

TO: **Ontario Energy Board**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Attention: Kirsten Walli,
Board Secretary
Tel: 888.632.6273
Fax: 416.440.7656
Email: boardsec@oeb.gov.on.ca

AND TO: Justin Safayeni
Stockwoods LLP
77 King Street West
Suite 4130, P.O. Box 140
Toronto, Ontario, M5K 1H1
Tel: (416) 593-3494
Fax: (416) 593-9345
Email: justins@stockwoods.ca

TAB 1

2009 CarswellOnt 5208, 2009 ONCA 643, 86 M.V.R. (5th) 171, 99 O.R. (3d) 337, 265 O.A.C. 326

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2009 CarswellOnt 5208, 2009 ONCA 643, 86 M.V.R. (5th) 171, 99 O.R. (3d) 337, 265 O.A.C. 326

R. v. Winlow

Her Majesty the Queen Ex Rel. The Regional Municipality of York (Appellant) and Robert J. Winlow (Respondent)

Ontario Court of Appeal

John Laskin, E.E. Gillese, Paul Rouleau JJ.A.

Heard: January 14, 2009
Judgment: September 10, 2009
Docket: CA C48716

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Proceedings: affirming *R. v. Winlow* (2008), 2008 CarswellOnt 3031, 2008 ONCJ 240 (Ont. C.J.)

Counsel: Hans J. Saamen for Appellant

Adam Little -- Amicus Curiae

Subject: Public; Evidence

Motor vehicles --- Offences and penalties — Prosecutions — Information — Miscellaneous

Accused was caught speeding on highway — Police officer said accused was driving 30 km per hour over speed limit, but ticketed accused for only 15 km per hour over limit — Accused refused to pay fine and asked for trial — Before trial began, accused was told that prosecutor would seek amendment to charge accused with driving 30 km per hour over limit to conform to likely evidence of officer — Prosecutor offered accused adjournment to speak to counsel or agent, but accused refused — Justice of peace refused to amend charge and convicted accused of speeding 115 km per hour in 100 km per hour zone — Municipality unsuccessfully appealed justice of peace's decision — Municipality appealed — Appeal dismissed — Practice of "amending up" speeding charges was not inherently unfair — It was not inappropriate for police officer to use discretion to charge driver with speeding at rate less than actual rate — When driver decided to defend charge at trial, prosecutor had carriage of charge including discretion to ask court to "amend up" certificate — Before amendment is granted, four requirements of s. 34(4) of Provincial Offences Act must be considered to ensure that amendment power is not exercised in way that is unfair to defendant — Whether defendant's opportunity and ability to meet charge would be adversely affected by amendment must be considered in deciding whether defendant is misled or prejudiced by amendment — Amendment that would be unfair having regard to merits of case should not be granted — Municipality was seeking guidance and was not interested in obtaining greater fine for accused — Amendment lacked evidentiary basis since no finding was made that accused's rate of speed was 130 km per hour.

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Motor vehicles --- Offences and penalties — Penalties — Fine

Fines for speeding in s. 128(14) of Highway Traffic Act are fixed and derived by multiplying number of kilometres per hour over speed limit by appropriate dollar figure — Courts have no discretion to reduce these fines.

Cases considered by *John Laskin J.A.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Krieger v. Law Society (Alberta) (2002), 4 C.R. (6th) 255, 217 D.L.R. (4th) 513, 168 C.C.C. (3d) 97, [2003] 1 W.W.R. 193, 293 N.R. 201, 43 Admin. L.R. (3d) 167, [2002] 3 S.C.R. 372, 2002 SCC 65, 2002 CarswellAlta 1133, 2002 CarswellAlta 1134, 7 Alta. L.R. (4th) 1 (S.C.C.) — referred to

Minister of National Revenue v. Panko (1971), 71 D.T.C. 5255, [1971] C.T.C. 467, 20 D.L.R. (3d) 292, 1971 CarswellNat 286, [1972] S.C.R. 319, 1971 CarswellNat 375 (S.C.C.) — considered

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Ontario v. 974649 Ontario Inc. (2001), (sub nom. *R. v. 974649 Ontario Inc.)* 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, 47 C.R. (5th) 316, (sub nom. *R. v. 974649 Ontario Inc.)* 88 C.R.R. (2d) 189, (sub nom. *R. v. 974649 Ontario Inc.)* 159 C.C.C. (3d) 321, (sub nom. *R. v. 974649 Ontario Ltd.)* 56 O.R. (3d) 359 (headnote only), (sub nom. *R. v. 974649 Ontario Inc.)* 206 D.L.R. (4th) 444, (sub nom. *R. v. 974649 Ontario Inc.)* [2001] 3 S.C.R. 575, (sub nom. *R. v. 974649 Ontario Inc.)* 279 N.R. 345, (sub nom. *R. v. 974649 Ontario Inc.)* 154 O.A.C. 345 (S.C.C.) — referred to

Ontario (Ministry of Labour) v. NMC Canada Inc. (1995), 1995 CarswellOnt 1723, 25 O.R. (3d) 461, (sub nom. *R. v. NMC Canada Inc.)* 85 O.A.C. 232 (Ont. C.A.) — considered

R. v. Ali (August 13, 1993), J. Allan Prov. J. (Ont. Prov. Ct.) — referred to

R. v. Carter (2005), 2005 ONCJ 55, 2005 CarswellOnt 990 (Ont. C.J.) — referred to

R. v. Chu (2005), 2005 ONCJ 379, 2005 CarswellOnt 4063, 22 M.V.R. (5th) 104, (sub nom. *Her Majesty the Queen ex. rel. the Regional Municipality of York v. Chu)* 77 O.R. (3d) 380 (Ont. C.J.) — referred to

R. v. Dilorenzo (1984), 45 O.R. (2d) 385, 26 M.V.R. 259, 11 C.C.C. (3d) 13, 2 O.A.C. 62, 1984 CarswellOnt 3 (Ont. C.A.) — considered

R. v. Fraser (1944), 17 M.P.R. 291, 1944 CarswellPEI 3, 81 C.C.C. 114, [1944] 2 D.L.R. 461 (P.E.I. S.C.) — considered

R. v. Harrison (1924), [1924] 2 W.W.R. 563, 34 Man. R. 271, 42 C.C.C. 259, [1924] 3 D.L.R. 312, 1924

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CarswellMan 43 (Man. C.A.) — considered

R. v. Irwin (1998), 1998 CarswellOnt 716, 14 C.R. (5th) 338, 107 O.A.C. 102, 38 O.R. (3d) 689, 123 C.C.C. (3d) 316 (Ont. C.A.) — considered

R. v. Jamieson (1981), 64 C.C.C. (2d) 550, 1981 CarswellOnt 1105 (Ont. C.A.) — considered

R. v. Kuntz (2004), 2004 ONCJ 269, 2004 CarswellOnt 4640 (Ont. C.J.) — referred to

R. v. Morozuk (1986), 1986 CarswellAlta 713, [1986] 1 S.C.R. 31, 64 N.R. 189, (sub nom. *Morozuk v. R.*) 42 Alta. L.R. (2d) 257, (sub nom. *Morozuk v. R.*) 50 C.R. (3d) 179, (sub nom. *Morozuk v. R.*) 24 C.C.C. (3d) 257, (sub nom. *Morozuk v. R.*) [1986] 2 W.W.R. 385, (sub nom. *Morozuk v. R.*) 25 D.L.R. (4th) 560, 68 A.R. 241, 1986 CarswellAlta 1 (S.C.C.) — referred to

R. v. Rahil (2005), 21 M.V.R. (5th) 262, 2005 CarswellOnt 3004, 2005 ONCJ 229 (Ont. C.J.) — referred to

R. v. Robinson (1951), 12 C.R. 101, 100 C.C.C. 1, 1951 CarswellBC 2, [1951] S.C.R. 522 (S.C.C.) — considered

R. v. Smith (1923), 38 C.C.C. 327, [1923] 1 D.L.R. 820, 56 N.S.R. 72, 1923 CarswellNS 15 (N.S. C.A.) — considered

R. v. Wanamaker (2005), 2005 CarswellOnt 1549 (Ont. C.J.) — referred to

R. v. Weber (2003), 2003 CarswellOnt 1465, 39 M.V.R. (4th) 99, 64 O.R. (3d) 126 (Ont. C.J.) — referred to

R. v. Wu (2003), 113 C.R.R. (2d) 297, [2003] 3 S.C.R. 530, 2003 SCC 73, 2003 CarswellOnt 5099, 2003 CarswellOnt 5100, 182 O.A.C. 6, 16 C.R. (6th) 289, 180 C.C.C. (3d) 97, 313 N.R. 201, 234 D.L.R. (4th) 87 (S.C.C.) — referred to

Seenanan v. Ottawa (City) (2004), 47 M.P.L.R. (3d) 4, 2004 CarswellOnt 1069 (Ont. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 683(1)(g) — referred to

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

s. 8(2) — referred to

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s. 9(1) — referred to

s. 12 — referred to

s. 23(4) — referred to

s. 23(5) — referred to

s. 32(16) — referred to

s. 51 — referred to

s. 53 — referred to

s. 59(12) — considered

s. 70(4) — referred to

s. 77(2) — referred to

s. 79(5) — referred to

s. 82(9) — referred to

s. 99 — referred to

s. 105(3) — referred to

s. 124(6) — referred to

s. 128 — considered

s. 128(1) — considered

s. 128(1)(d) — considered

s. 128(7)(b) — considered

s. 128(14) — considered

s. 128(14)(a) — referred to

s. 128(14)(b) — referred to

s. 128(14)(c) — referred to

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s. 128(14)(d) — referred to

s. 172(2) — referred to

s. 187(4) — referred to

Income War Tax Act, 1917, S.C. 1917, c. 28

Generally — referred to

Justices of the Peace Act, R.S.O. 1990, c. J.4

s. 17(1) — referred to

Provincial Offences Act, R.S.O. 1990, c. P.33

Generally — referred to

s. 34 — considered

s. 34(1)(a) — considered

s. 34(1)(c) — considered

s. 34(2) — considered

s. 34(4) — considered

s. 34(4)(b) — referred to

s. 34(4)(c) — referred to

s. 34(4)(d) — referred to

s. 34(5) — considered

s. 131 — referred to

Regulations considered:

Highway Traffic Act, R.S.O. 1990, c. H.8

Speed Limits, R.R.O. 1990, Reg. 619

s. 1(a) — referred to

Sched. 123 — referred to

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APPEAL by municipality from judgment reported at *R. v. Winlow* (2008), 2008 CarswellOnt 3031, 2008 ONCJ 240 (Ont. C.J.).

***John Laskin J.A.*:**

A. Introduction

1 Ontario's *Highway Traffic Act* imposes a scale of fines for motorists convicted of speeding. The dollar amount of the fine increases for every kilometre per hour over the speed limit. This system of fines has given rise to a practice in some Ontario municipalities, which is reflected in the facts of this case.

2 Robert Winlow was caught speeding on Highway 400 in the Regional Municipality of York. The police officer who stopped him said that he was driving 30 kilometres per hour over the speed limit but ticketed him for only 15 kilometres per hour over the limit. However, when Mr. Winlow refused to pay the set fine and asked for a trial, the prosecutor sought an amendment to charge him with driving 30 kilometres per hour over the limit. The justice of the peace refused to amend the charge, and her decision was upheld on appeal in the Ontario Court of Justice.

3 The Regional Municipality of York appeals with leave to this court and asks us to rule on these questions:

> 1. Is the particular rate of speed an essential element of the offence of speeding?
>
> 2. Depending on the rate of speed, is the fine for speeding fixed or does the court have discretion to reduce the fine?
>
> 3. Did the courts below err in refusing to amend the charge, and, more broadly and importantly, is the practice of "amending-up" permissible?

B. The Legislation in Issue

4 The questions on this appeal turn on the interpretation and application of two legislative provisions: s. 128 of the *Highway Traffic Act*, R.S.O. 1990 c. H.8 ("*HTA*"); and s. 34 of the *Provincial Offences Act*, R.S.O. 1990 c. P.33 ("*POA*").

1. Section 128 of the HTA

5 Section 128(1) of the *HTA* makes speeding an offence. Mr. Winlow was charged under s. 128(1)(d), which states:

> (1) No person shall drive a motor vehicle at a rate of speed greater than ...
>
> (d) the rate of speed prescribed for motor vehicles on a highway in accordance with subsection ... (7)

6 Section 128(7)(b) stipulates that the Minister of Transportation may make regulations prescribing a rate of speed for any class or classes of motor vehicle driven on the King's Highway.

7 Section 1(a) and Schedule 123 of Regulation 619, R.R.O. 1990, taken together, stipulate that the rate of speed on Highway 400 is 100 km per hour.

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8 Section 128(14) of the *HTA* sets out the penalty for speeding with a sliding scale of fines: the greater the speed over the limit, the greater the fine. It reads as follows:

> (14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,
>
> (a) is less than 20 kilometres per hour over the speed limit, to a fine of $3 for each kilometre per hour that the motor vehicle was driven over the speed limit;
>
> (b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the speed limit, to a fine of $4.50 for each kilometre that the motor vehicle was driven over the speed limit;
>
> (c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the speed limit, to a fine of $7 for each kilometre that the motor vehicle was driven over the speed limit; and
>
> (d) is 50 kilometres per hour or more over the speed limit, to a fine of $9.75 for each kilometre per hour that the motor vehicle was driven over the speed limit.

2. Section 34 of the POA

9 Section 34 of the *POA* authorizes the amendment of an information or certificate of offence. The amendment power is broad, reflecting a legislative intent that *POA* charges be decided on their merits and not on technical grounds or procedural irregularities.

10 Section 34(2) permits the court, during the trial, to amend a certificate to conform to the evidence:

> (2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

In seeking to uphold the practice to which it subjected Mr. Winlow, the Regional Municipality of York relies on s. 34(2).

11 Section 34(4) states that in deciding whether to grant an amendment, the court shall take into account four considerations:

> 34(4) The court shall, in considering whether or not an amendment should be made, consider,
>
> (a) the evidence taken on the trial, if any;
>
> (b) the circumstances of the case;
>
> (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
>
> (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

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These four considerations and their application lie at the heart of the main question on this appeal: whether the prosecutor can "amend up".

12 Section 34(5) stipulates that the question whether an order to amend a certificate should be granted or refused is a question of law. Because the refusal of an amendment is a question of law, the decision of the appeal court judge was appealable to this court under s. 131 of the *POA*.

C. Background

1. The Facts

13 In the early evening of December 6, 2006, Mr. Winlow was driving north on Highway 400. The posted speed limit on the highway is 100 km per hour. A police officer stopped Mr. Winlow and charged him with speeding, contrary to s. 128 of the *HTA*. On the offence notice given to Mr. Winlow, the officer noted the speed at 115 km per hour in a 100 km per hour zone. The offence notice provided that Mr. Winlow could dispose of the charge by paying a set fine of $37.50 plus $5.00 for costs and a $10 victim fine surcharge - a total of $52.50. Mr. Winlow chose not to pay the fine; instead he asked for a trial.

2. The Trial Before the Justice of the Peace

14 The trial took place on August 16, 2007 before Justice of the Peace Hodson-Walker. Mr. Winlow represented himself.

15 Before the trial began, the prosecutor told Mr. Winlow that the police officer would likely testify Mr. Winlow was driving faster than 115 km per hour. The prosecutor also told Mr. Winlow that if that was the officer's evidence, the prosecutor would ask the court to amend the charge to conform to the higher rate of speed. Because a conviction at a higher rate of speed would mean a higher fine and, perhaps, other serious consequences, the prosecutor offered Mr. Winlow an adjournment to speak to a counsel or an agent.

16 Mr. Winlow refused an adjournment. He said that he wanted the trial to go ahead. Before the justice of the peace, the prosecutor asked Mr. Winlow if he was aware of the possibility that the charge could go up, to which he responded "I am". Mr. Winlow was arraigned on the certificate of offence - he was charged with the offence of speeding, 115 km per hour in a 100 km per hour zone. He pleaded not guilty.

17 The officer who had stopped Mr. Winlow on Highway 400 testified for the prosecution. He gave evidence that he followed Mr. Winlow and "paced" him. The officer was driving at a speed of 130 km per hour, and yet Mr. Winlow was pulling away from him. The officer used his discretion to write the offence notice at 115 km per hour.

18 After the officer's examination-in-chief, the prosecutor asked to amend the certificate of offence under s. 34(2) of the *POA* to conform with the evidence that Mr. Winlow was driving at 130 km per hour.

19 The justice of the peace refused to permit the amendment. She gave two reasons: if the certificate was amended, Mr. Winlow who "was not expecting this turn of events might feel coerced in pleading guilty"; and "the motion to amend is not compatible with the philosophy" of the Act - which "is to deal with matters in a quick, efficient and fair manner". Significantly, in refusing the amendment, the justice of the peace did not make a finding that Mr. Winlow was driving at 130 km per hour.

20 The trial continued. Mr. Winlow cross-examined the officer. He then testified. He said that he did not believe he was going any faster than the other traffic on the highway. But he acknowledged that he did not look at his

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speedometer, and did not know at what rate of speed he was driving.

21 At the conclusion of the trial the justice of the peace gave brief oral reasons. She rejected Mr. Winlow's evidence. She convicted him of speeding, 115 km per hour in a 100 km zone. She imposed a total fine of $60 - $45, the "statutory requirement" for that rate of speed, plus $5 in court costs and a $10 surcharge.

3. The Appeal in the Ontario Court of Justice

22 The Regional Municipality of York appealed to the Ontario Court of Justice. Mr. Winlow again represented himself. The Regional Municipality contended that the justice of the peace erred in law by refusing to amend the certificate of offence.

23 Justice Minard, the appeal court judge, dismissed the appeal. He said that the proposed amendment did not prejudice Mr. Winlow. He also acknowledged that had he been exercising his discretion at the trial, he would have granted the amendment. But he could not say that the justice of the peace had erred in law.

24 The Regional Municipality sought leave to appeal under s. 131 of the *POA*, which prescribes that leave may be granted on a question of law alone where it is essential in the public interest or for the due administration of justice that leave be granted. On April 18, 2008, the Chief Justice of Ontario granted leave to appeal to this court.

D. The Issues on the Appeal

First Issue: Is the particular rate of speed an essential element of the offence of speeding?

25 There appears to be a small debate among the justices of the peace and the Ontario Court of Justice judges over whether the particular rate of speed at which a defendant is charged with driving is an essential element of the offence of speeding or a particular relevant only to penalty. In the vast majority of cases, justices of the peace and Ontario Court of Justice judges have concluded that the offence is speeding contrary to s. 128(1) of the *HTA*, and that the actual rate of speed matters only on penalty. A few cases, however - see, for example, *R. v. Ali*, [1993] O.J. No. 4675 (Ont. Prov. Ct.) - suggest that the particular rate of speed is an essential element of the offence and thus, if the certificate is amended, the defendant is facing a different offence.

26 I agree with the majority. The offence provision for speeding is s. 128(1) of the *HTA*: "no person shall drive a motor vehicle at a rate of speed greater than" the statutorily prescribed rate. The actual rate of speed is a particular relevant to penalty under s. 128(14) of the *HTA*, because the amount of the fine increases as the rate of speed over the speed limit increases. Thus, to obtain a higher fine in a case such as the present one, the prosecutor must seek an amendment, and the court must make a finding of fact on the actual rate of speed. That fact must be proved beyond a reasonable doubt.

27 In the context of the court's amendment power, this debate has little significance. Even if an amendment to conform to the evidence disclosed at trial would mean that the defendant was facing a new offence, the court would still have the power to grant the amendment under s. 34(2) of the *POA* so long as it was supported by the evidence, and would not cause prejudice or an injustice to the defendant: see *R. v. Irwin* (1998), 38 O.R. (3d) 689 (Ont. C.A.).[FN1]

28 I now turn to an issue that has caused a much larger debate among justices of the peace and Ontario Court of Justice judges. This debate raises an important and difficult question.

Second Issue: Depending on the rate of speed, is the fine for speeding fixed or does the court have discretion to reduce the fine?

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29 For convenience, I reproduce s. 128(14) of the *HTA*, which sets out the fines for speeding:

> (14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,
>
> (a) is less than 20 kilometres per hour over the speed limit, to a fine of $3 for each kilometre per hour that the motor vehicle was driven over the speed limit;
>
> (b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the speed limit, to a fine of $4.50 for each kilometre that the motor vehicle was driven over the speed limit;
>
> (c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the speed limit, to a fine of $7 for each kilometre that the motor vehicle was driven over the speed limit; and
>
> (d) is 50 kilometres per hour or more over the speed limit, to a fine of $9.75 for each kilometre per hour that the motor vehicle was driven over the speed limit.

30 Mr. Winlow was found to have been driving at 115 km per hour in a 100 km per hour zone and was therefore fined under s. 128(14)(a). Was the justice of the peace required to impose a fine of $45 ($3 X 15) or did she have discretion to reduce the fine?

31 The justice of the peace imposed a fine of $45 (plus costs and a surcharge). She did not suggest that she had a discretion to do otherwise. The majority of justices of the peace and judges who have considered this issue agree that she did not have discretion to reduce the fine: see for example, *R. v. Weber* (2003), 64 O.R. (3d) 126 (Ont. C.J.), *R. v. Carter*, [2005] O.J. No. 654 (Ont. C.J.), and *R. v. Chu* (2005), 77 O.R. (3d) 380 (Ont. C.J.). They view s. 128(14) as a legislated exception to the usual principle that judges have discretion when sentencing an offender. In their view, s. 128(14) admits of no discretion. The amount of the fine is mandatory, and is derived from a simple mathematical calculation: the number of kilometres over the speed limit multiplied by the appropriate dollar figure.

32 Some justices of the peace and judges, however, have taken a contrary position: see for example, *R. v. Kuntz*, [2004] O.J. No. 4631 (Ont. C.J.). In their view, s. 128(14) of the *HTA* does not clearly remove the usual discretion given to sentencing judges. Any ambiguity in the interpretation of s. 128(14) must be resolved in favour of the offender.

33 Justices of the peace and provincial court judges belong to tribunals created by statute. Therefore, their jurisdiction to impose a penalty is limited by their authorizing legislation. Neither has any inherent power. The governing principle, now well established, is that justices of the peace and provincial court judges, have only the powers expressly or impliedly granted to them by the legislature: see *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.), at 589. See also s. 17(1) of the *Justices of the Peace Act*, R.S.O. 1990 c. J. 4. A corollary of this principle is that although sentencing judges ordinarily have a discretion to exercise, the legislature can limit that discretion or eliminate it altogether: see *R. v. Wu*, [2003] 3 S.C.R. 530 (S.C.C.).

34 Does s. 128(14) of the *HTA* eliminate the court's discretion to impose a lesser fine than the fine derived from multiplying the number of kilometres per hour over the speed limit by the specified dollar figure? The answer to this question turns on the meaning of the words "is liable ... to" in s. 128(14), words that my former colleague Robins J.A. aptly noted are not always free of ambiguity: see *R. v. Dilorenzo* (1984), 45 O.R. (2d) 385 (Ont. C.A.) at p. 396.

35 On one hand, some argue that these words connote a mandatory obligation. If the legislature had intended to

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give the sentencing judge a discretion to impose a lesser fine it would have used words such as "is liable ... to a fine of up to $3 for each kilometre per hour that the motor vehicle was driven over the speed limit", or "is liable ... to a fine of not more than $3".

36 On the other hand, some contend that the words "is liable ... to" mean "exposed to", but give the court discretion to impose a smaller fine. If the legislature had intended to remove the sentencing judge's discretion it would have used words such as "is liable ... to a fine equal to $3 for each kilometre per hour that the motor vehicle was driven over the speed limit", or simply declared that "the fine shall be $3".

37 The cases on the meaning of "is liable ... to" mirror this debate. They too are conflicting. For example, in *Minister of National Revenue v. Panko* (1971), [1972] S.C.R. 319 (S.C.C.), Judson J. held that a penalty for tax evasion under the *Income Tax Act* - providing that the tax payor is "liable to a penalty of 25 per cent of the amount by which the tax that would so have been payable is less than the tax payable by him for the year" - gave the Minister no discretion about the amount or the penalty: it was fixed at a flat 25 per cent.

38 Similarly, in the *R. v. Smith*, [1923] 1 D.L.R. 820 (N.S. C.A.), the Nova Scotia Supreme Court had to decide whether a section of the *Income War Tax Act* providing that a person failing to file a tax return "shall be liable on summary conviction to a penalty of $25 for each day during which the default continues" gave the magistrate discretion to impose a lesser fine. The majority held that the provision established a penalty in the fixed sum of $25 per day. In the words of Rogers J. at p. 825, "... the magistrate can no more reduce it than he can increase it. The words used, 'shall be liable ... to ...' convey to my mind only one meaning. They mean what they say; no more no less".

39 In a case decided a year later, *R. v. Harrison*, [1924] 3 D.L.R. 312 (Man. C.A.), Trueman J.A., writing for a unanimous five-member panel of the Manitoba Court of Appeal also concluded that this provision in the *Income War Tax Act* gave the magistrate no discretion to reduce the fine. In his view at p. 313, the "mandatory nature" of the words "be liable ..." are "beyond question".

40 By contrast, in *R. v. Robinson*, [1951] S.C.R. 522 (S.C.C.), Cartwright J., concurring, held that the meaning of the phrase "liable to" in a section of the *Criminal Code* stating that a person could not be found to be a "habitual criminal" unless three times previously "convicted of an indictable offence for which he was liable to at least five years' imprisonment" meant "exposed to". And, in *R. v. Fraser* (1944), 81 C.C.C. 114 (P.E.I. S.C.), Campbell C.J. held at p. 126 that a penalty provision of the federal *Fisheries Act* making a person "liable ... to a fine of one hundred dollars" gave the court discretion to impose "any fine not exceeding the maximum level of $100".

41 The exercise of determining the meaning of these words is an exercise in statutory interpretation. Two key elements that guide a court's interpretation of the words of a statute are context and legislative purpose. These two elements underlie Driedger's cardinal principle of statutory interpretation, repeatedly endorsed by the Supreme Court of Canada:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See, for example, *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983).

42 The apparently conflicting results in the cases I have summarized may simply reflect the different contexts and legislative purposes of the statutes in which these words appear. Although some have argued that the meaning of "is liable ... to" in s. 128(14) is ambiguous, the mere existence of different results does not create ambiguity. As Iacobucci J. said in *Bell ExpressVu* at para. 30, "[i]t is necessary, in every case, for the court charged with interpreting a provision

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to undertake the contextual and purposive approach set out by Driedger" to determine whether real ambiguity exists - that is, whether the provision is reasonably capable of more than one meaning.

43 Having undertaken this exercise, I have concluded that the meaning of the words "is liable ... to" in s. 128(14) of the *HTA* is not ambiguous. Especially in the light of their context and the legislative purpose of s. 128(14), in my view, they admit of only one meaning: they establish a statutory penalty regime that obliges courts to impose the fines specified in the section. Courts have no discretion to reduce these fines. Several considerations support this conclusion.

(i) Immediate context

44 The dictionary meaning of "liable" is "bound or obliged by law of equity, answerable at law ... bound in law to do": see the New Shorter Oxford Dictionary Vol. 1 (Clarendon Press: Oxford, 1993). The dictionary meaning of a word is not always the same as Driedger's "ordinary sense" of the word because words take their colour from their surroundings: see Iacobucci J. in *Bell ExpressVu* at para. 27, quoting Professor John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1.

45 However, here the immediate context in which the phrase "is liable ... to" occurs, s. 128(14) of the Act itself, strongly suggests that these words are meant to bind or oblige courts to impose the specified fines. Why else, I ask rhetorically, have a precise scale of fines where the dollar amount of the fine increases for every kilometre per hour over the speed limit by a specified amount depending on whether the rate of speed over the limit falls under ss. (a), (b), (c) or (d)?

(ii) Broader context

46 The broader legislative context of the other penalty provisions of the *HTA* further supports this conclusion. The Act is replete with specific fines for specific offences. Two things may be said about these fine provisions. First, the legislature consistently has used the words "is liable ... to" in setting out the fine that the court may impose.

47 Second, where the legislature intends to give courts discretion on the amount of the fine, it uses the words "not more than" and "not less than". Typical are the fine provisions where the legislature prescribes a minimum and a maximum fine, and gives the court discretion to impose an amount in between these limits. The fine under s. 8(2) for driving contrary to restrictions on one's permit is illustrative. On conviction, the offender is liable to a fine of not less than $100 and not more than $500. Similarly, on a conviction under s. 12 for defacing or altering a licence plate, an offender is liable to a fine of not less than $100 and not more than $1,000. Other analogous penalty provisions of the act include s. 9(1), s. 23(4) and (5), s. 32(16), s. 51, s. 53, s. 79(5), s. 99, s. 105(3), s. 124(6) and s. 172(2).

48 Perhaps more significant for this appeal, when the legislature prescribes only a maximum fine but intends to give the court discretion to impose a reduced fine below a stipulated maximum, it uses the words "not more than". The fine under s. 70(4) of the *HTA* for driving without tires that conform to prescribed specifications is an example. On conviction, the offender is liable to a fine of not more than $1,000. Other analogous provisions include s. 77(2), s. 82(9) and s. 187(4).

49 From this consistent statutory scheme, I infer that if the legislature had intended to give courts discretion to reduce the specified fines for speeding it would have used words such as "... is liable ... to a fine of not more than $3 for every kilometre per hour that the motor vehicle was driven over the speed limit ...". That the legislature did not do so powerfully supports the conclusion that the courts have no discretion to reduce the fines for speeding.

(iii) Legislative evolution and purpose

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50 The legislative evolution and purpose of the fines for speeding also support this conclusion. The legislative regime that now exists came into effect in 1969. Before that date the legislature specified a minimum and a maximum fine and gave courts discretion to impose a fine within those two limits. Section 59(12) of the 1960 *Highway Traffic Act* provided:

> 59(12) Every person who contravenes any of the provisions of this section or any by-law passed or regulation made under this section is liable, for the first offence to a fine of not less than $5 and not more than $50; for the second offence to a fine of not less than $10 and not more than $100, and in addition his licence or permit may be suspended for a period of not more than three months; and for any subsequent offence to a fine of not less than $20 and not more than $200, and in addition his licence or permit may be suspended for a period of not more than six months.

51 In 1969, s. 59(12) was repealed and replaced by the scheme now in place today - a sliding scale of fines depending on the rate of speed over the limit: see s. 42(2) of S.O. 1968-9, C. 45.

52 This amendment itself, revoking the previous statutory provision, signals the legislature's intent to remove the court's discretion. So too does the speech of the Minister of Transport introducing this new scheme. Ministerial comments in Hansard, although of limited weight, if reliable, are still relevant to an understanding of the background and purpose of the legislation: see *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 (S.C.C.) at para. 57. I take the Minister's speech in introducing the amending provision for fines for speeding to be both reliable and relevant. He told the legislature that this new penalty section for speeding was designed to "establish a more meaningful deterrent ... a uniform practice": see Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 28th Leg. 2nd sess. (31 March 1969) at p. 2866. By the idea of a uniform practice the Minister undoubtedly meant a reversal of the previous discretionary regime.

(iv) French version

53 The French version of s. 128(14) of the *HTA* uses the word "passible":

> 128(14) Quiconque contrevient au présent article, à un règlement ou à un règlement municipal pris en application du présent article est coupable d'une infraction et passible, sur déclaration de culpabilité, des amendes suivantes :
>
> > a) si la vitesse à laquelle le véhicule automobile circulait est inférieure à 20 kilomètres à l'heure au-delà de la vitesse maximale, 3 $ pour chaque kilomètre à l'heure où le véhicule automobile circulait au-delà de la vitesse maximale;
>
> . . . . .

"Passible ... des amendes suivantes ..." means "liable to the following fines". See *Le Robert & Collins Senior*, 6th ed. (2002). Therefore, the meaning of these words appears to be common to both the English and French versions of s. 128(14). This is yet another piece of evidence favouring my conclusion.

54 For all these reasons, in my view, the fines for speeding in s. 128(14) of the *HTA* are fixed and are derived simply by multiplying the number of kilometres per hour over the speed limit by the appropriate dollar figure. The courts have no discretion to reduce these fines.

Third Issue: Is the practice of "amending up" permissible?

1. Overview

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55 We were told by counsel that "amending up" of speeding charges is a common practice among Ontario's municipalities. The appellant, the Regional Municipality of York, is one of the municipalities that engages in this practice.

56 The facts of this case illustrate the typical use of this practice: a police officer clocks a person driving at 30 km per hour over the speed limit but uses discretion to write the ticket for 15 km per hour over the speed limit. If the driver pays the set fine on the offence notice, that amounts to a plea of guilty and a conviction, and disposes of the charge. A driver who does not pay the set fine, but instead goes to trial, risks a conviction for speeding at 130 km per hour. The prosecutor invariably will ask the court to "amend up" the certificate of offence from 115 km per hour to 130 km per hour to conform to the evidence given at trial. Even if the prosecutor does not seek an amendment, the court can order the amendment itself after hearing the evidence.

57 Some have expressed concern about the propriety of this practice. Likely it was this concern that prompted the Chief Justice of Ontario to grant leave to appeal to this court. In oral argument, the Regional Municipality of York said that it is less interested in the result of Mr. Winlow's case than in obtaining guidance from this court on the practice.

58 As a general conclusion, I see nothing inherently unfair about the practice itself. It seems to me that it seeks to achieve, or at least balance, two laudable objectives, both of which are in the public interest: to provide offending drivers with an incentive to settle out of court, thus disposing of many speeding charges quickly and efficiently; and to ensure that drivers who commit speeding offences are convicted at the actual rate of speed over the speed limit that they drive, thus promoting both specific and general deterrence.

59 The first objective is triggered when a police officer exercises discretion to charge at a reduced rate of speed over the limit. The second objective is triggered when the prosecutor asks for an amendment of the charge to conform to the evidence disclosed at trial.

60 Each case, however, turns on its own facts. Drivers - many of whom represent themselves in court - are protected by the four requirements of s. 34(4) of the *POA*. A speeding charge may be "amended up" only if the evidence at trial supports the amendment, the circumstances of the case warrant the amendment, the defendant is not prejudiced by the amendment and no injustice would be visited on the defendant by granting the amendment. Although, under s. 34(5) of the *POA*, the granting or refusal of an amendment is a question of law, the four requirements of s. 34(4) call for a fact-specific inquiry to be addressed by the court in each case.

2. Discussion

61 I do not consider it inappropriate when a police officer uses discretion to charge a driver with speeding at a rate less than the actual rate over the speed limit. In a sense it is a form of plea bargaining. Normally, the prosecutor engages in plea bargaining with the defence. If a police officer charged a person with speeding 30 km per hour over the speed limit, and the prosecutor said that the charge would be reduced by 15 km if the person pleaded guilty, no one could seriously object. Plea bargaining by the prosecution and the defence is as essential to the effective working of the provincial regulatory system as it is to the effective working of the criminal justice system.

62 In this case, the police officer, not the prosecutor, initiated the plea bargaining. Many offending drivers no doubt welcome receiving this "break" from the officer, without having to go to court to obtain it. Systemically, many cases can be disposed of without using valuable court time and resources. Indeed, I expect that the large number of speeding charges, the heavy volume of traffic cases before justices of the peace, and the desirability of finding an efficient way to deal with many of these cases has prompted the practice now before this court.

63 However, when drivers, as is their right, decide not to plead guilty and pay the set fine, but to instead defend the

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charge at a trial, different considerations come into play. The prosecutor then has carriage of the charge against the defendant. The prosecutor's carriage of the charge includes the discretion to manage the prosecution in accordance with the statute.

64 And, under s. 34(2) of the *POA*, the legislature has expressly authorized the court to amend a charge to conform to the evidence disclosed at trial. Defendants have no vested right to insist on a trial only on the charge named on the certificate of offence. The prosecutor may thus exercise discretion by asking the court to "amend up" the certificate. The legislation gives the prosecutor the right to do so: see *R. v. Irwin*. It is not for the courts to interfere with the exercise of prosecutorial discretion except in cases of flagrant impropriety: see *Krieger v. Law Society (Alberta)*, [2002] 3 S.C.R. 372 (S.C.C.).

65 However, before the amendment is granted, the court must consider the four requirements of s. 34(4) - the word "shall" makes the court's consideration mandatory. These requirements are intended to ensure that the court's amendment power, although broad, is not exercised in a way that is unfair to defendants.

> 34(4) The court shall, in considering whether or not an amendment should be made, consider,
>
> (a) the evidence taken on the trial, if any;
>
> (b) the circumstances of the case;
>
> (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
>
> (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

66 Although the court's consideration of these requirements will depend on the facts of each case, I offer the following general observations.

(i) The evidence taken at trial

67 Obviously the court can "amend up" a certificate only if the evidence supports the amendment.

(ii) The circumstances of the case

68 The particular circumstances of a case may well influence the court's decision whether to grant an amendment. For example, in *Ontario (Ministry of Labour) v. NMC Canada Inc.* (1995), 25 O.R. (3d) 461 (Ont. C.A.), this court ordered an amendment to an information that had charged a partnership with a workplace safety offence.[FN2] The amendment substituted for the partnership the two individual partners as defendants. One "circumstance of the case" strongly favouring the amendment was the seriousness of the charge: a workplace fatality. As a partnership is not a legal entity for the purpose of proceedings under the *POA*, without the amendment the charge could not proceed. See also *Seenanan v. Ottawa (City)* (2004), 47 M.P.L.R. (3d) 4 (Ont. C.A.) at paras. 24-29.

69 It is unwise to try to catalogue the various circumstances that might be considered under s. 34(4)(b) of the *POA*. These ought to be addressed case by case as the circumstances arise.

(iii) Whether the defendant has been misled or prejudiced in the defendant's defence by a variance

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70 The court must consider whether the defendant is misled or prejudiced by the proposed amendment. This is a key consideration in deciding whether to grant an amendment. Being misled or prejudiced under s. 34(4)(c), however, does not mean the prospect of facing more severe consequences because of the amendment. That a defendant may face a stiffer fine, more demerit points or increased insurance premiums is not a reason to refuse to amend the certificate to allege a higher rate a speed over the limit. To decide whether a defendant is misled or prejudiced under s. 34(4)(c), the court must consider whether the defendant's opportunity and ability to meet the charge would be adversely affected by the amendment. The court must ask: will "amending up" mislead or prejudice the defendant; and if so, can the misleading or prejudice be cured by, for example, an adjournment.

71 Justices of the peace and prosecutors should be especially sensitive to the question of prejudice. As they know better than most, many defendants who appear in traffic court are self-represented; many have little or no knowledge of the justice system; many are poorly educated or have but a rudimentary knowledge of English. As McKinnon A.C.J.O. said nearly 30 years ago, in words still true today, "the *Provincial Offences Act* is not intended as a trap for the unskilled or unwary": see *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.) at p. 552.

72 Special care must be taken to ensure that *POA* proceedings are fair to defendants. Where the prosecutor seeks to "amend up", the prosecutor and the court should ensure, at a minimum, that the defendant understands the amendment, understands the consequences of the amendment and is given a reasonable opportunity to make submissions on why the amendment should not be granted.

73 Under s. 34(2) of the *POA*, the amendment is to be made during the trial as disclosed by the evidence. An important question bearing on the fairness of the amendment is when the defendant receives notice of it. No special form of notice is required. Indeed, the notice need not even be in writing. But the timing matters.

74 Ideally, the defendant should receive notice of a proposed amendment before the day of trial. However, in *POA* proceedings this ideal will not always be practical. If, for practical reasons, notice of the amendment can only be given on the day of trial, then it would be far preferable that the notice be given before the trial begins and that the defendant then be given a reasonable opportunity to consider how to respond.

75 After notice is given, in most cases, the prosecutor and the court would be wise to do what was done in this case - offer the defendant an adjournment to consult counsel or an agent or just to have more time to consider whether to conduct the defence differently. Of course, if the defendant is represented by an agent, and notice of the motion to amend is not given until the day of trial, the case may necessarily have to be adjourned so that the agent can obtain instructions.

76 However, I would not lay down as an inflexible rule that on a request to amend up, an adjournment should always be granted if the defendant wants one. Some cases could no doubt go ahead even if the defendant objects. However, prosecutors and the court must take care not to pressure defendants into proceeding, but instead give them a fair opportunity to state their position. Despite a prosecutor's or the court's urge to proceed, an adjournment, if asked for or desired, may be the sensible course of action. By itself, it may cure even the possibility of prejudice.

77 The appeal court judge in the present case observed that if the practice of amending up will most often require an adjournment, then the practice is at odds with an important objective of *POA* proceedings: to deal with charges quickly, efficiently and inexpensively. He may well be right. However, as I have already said, the practice is not inherently unfair or impermissible. Municipalities and their prosecutors will have to decide whether this practice makes for the most efficient use of resources available for *POA* proceedings.

78 Although I have suggested that defendants be given notice of their potentially increased jeopardy before the trial begins, the broad amendment power in s. 34(2) of the *POA* does contemplate that notice of the amendment can be made during or even at the conclusion of the evidence. Still, the later during the proceedings that the defendant is given

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notice of the proposed amendment, the greater the risk of prejudice if the amendment is granted: see *R. v. Wanamaker*, [2005] O.J. No. 1581 (Ont. C.J.). Where notice to amend up is first given during the trial, defendants may well argue that they would have conducted their defence differently or even retained an agent had they known that they faced more serious consequences. In the face of these or other arguments, before granting an amendment, the court must consider whether prejudice will result and whether any resulting prejudice can realistically be cured.

79 Ordinarily, the prosecutor will ask the court to amend up. Yet the amendment power in s. 34(2) also contemplates that the court on its own initiative can amend up a certificate of offence: see, for example, *R. v. Morozuk*, [1986] 1 S.C.R. 31 (S.C.C.). I would not encourage justices of the peace to do so; certainly, they should be cautious before doing so. And, before deciding to exercise the amendment power on their own initiative, justices of the peace must give every defendant a fair opportunity to address the question of prejudice and make submissions why the amendment should be refused: see *R. v. Rahil* (2005), 21 M.V.R. (5th) 262 (Ont. C.J.). Again, before exercising this power, justices of the peace must consider whether the defendant is misled or prejudiced by the amendment, and whether any misleading or prejudice can be cured.

(iv) Whether, having regard to the merits of the case, the proposed amendment can be made without any injustice being done

80 Even if the defendant would not be prejudiced by the amendment, the court should still refuse to amend if doing so would cause an injustice. I take injustice to capture the general notion of unfairness. Thus, under s. 34(4)(d) of the *POA*, the court should not grant an amendment that would be unfair having regard to the merits of the case.

81 Two decisions of this court show the application of s. 34(4)(d). In *Ontario (Ministry of Labour) v. NMC Canada Inc.*, the proposed amendment of the information to substitute the two individual partners for the partnership caused no injustice. The two partners carried on business using a distinctive firm name; the accident happened at their firm's place of business; and in a practical, if not a legal sense, the worker who died was their firm's employee.

82 In *Seenanan v. Ottawa (City)*, the majority of this court concluded that an amendment would, indeed, cause injustice to the defendant. The defendant, a taxi driver, had been charged with contravening a City of Ottawa licensing by-law. Although he had pleaded guilty, on appeal in the Ontario Court of Justice his conviction was set aside and he was found not guilty. By then, the City had recognized that it had charged the defendant under the wrong licensing by-law. In this court, for the first time, the City sought to amend the certificate of offence to charge the defendant under a different city by-law.

83 Gillese J.A., writing for the majority, canvassed the requirements of s. 34(4) of the *POA*, and concluded that the amendment should be refused. On the requirement of injustice, she noted that the amendment would expose the defendant to a different charge from the charge he had faced in the courts below, and would in practice, preclude him from challenging the validity of the city's licensing regime. Thus, especially having regard to the merits of the case, the proposed amendment would cause an injustice.

84 These two cases illustrate the wide scope of the fourth requirement of s. 34(4) of the *POA*: whether the proposed amendment can be made without doing an injustice. This requirement must be canvassed on any request to amend up a certificate or when the court considers doing so on its own initiative.

85 I turn now from these general observations to the appeal before this court.

E. This Appeal

86 It is no doubt apparent from my discussion of the issues on this appeal that I do not fully subscribe either to the reasons of the justice of the peace or to the reasons of the appeal court judge.

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87 On this record, we have no evidence that the police officer misled Mr. Winlow or gave any undertaking that the Regional Municipality would not seek a conviction for a higher speed. We have no evidence that Mr. Winlow was prejudiced or coerced by the prosecutor's proposed amendment. We have no evidence that he was pressured into proceeding.

88 Indeed, before the trial began, Mr. Winlow was given the opportunity to adjourn the trial to seek the advice of a counsel or agent. He understood his jeopardy if the amendment were granted. Yet he chose to refuse the adjournment and proceed on the scheduled trial date. He did not say that he was pressured to do so. He did not claim that the proposed amendment had the effect of coercing him to plead guilty. He did not claim that he would be prejudiced in the conduct of his defence if the amendment were allowed. Nor did he claim that he would have to conduct his defence differently because of the proposed amendment.

89 Nonetheless, despite my reservations about the judgments of the justice of the peace and the appeal court judge, I would dismiss the Regional Municipality's appeal. I would do so for two reasons. First, counsel for the Regional Municipality candidly acknowledged that his client was not interested in obtaining a greater fine for Mr. Winlow. His client simply wanted some guidance from this court on the important issues raised by this appeal.

90 Second, having ruled that she would not grant the amendment, the Justice of the Peace did not make a finding that Mr. Winlow was driving at a speed of 130 km per hour. Equally, the Appeal Court Judge made no finding that Mr. Winlow's rate of speed was 130 km per hour. I do not consider it appropriate in this case for this court to make a finding that was not made either in the trial court or the first level appeal court. Thus, the amendment lacks an evidentiary basis.

91 For these reasons, I would dismiss the Regional Municipality of York's appeal.

E.E. Gillese J.A.:

I agree.

Paul Rouleau J.A.:

I agree.

> 34(1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,
>
> > (a) fails to state or states defectively anything that is requisite to charge the offence; ...
>
> (c) is in any way defective in substance or in form.

Appeal dismissed.

FN1 In that case, Doherty J.A. was considering the amendment power contained in s. 683(1)(g) of the *Criminal Code*.

FN2 The amendment was made under s. 34(1)(a) and (c) of the *POA*, which states:

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TAB 2

1998 CarswellOnt 716, 123 C.C.C. (3d) 316, 107 O.A.C. 102, 14 C.R. (5th) 338, 38 O.R. (3d) 689, [1998] O.J. No. 627

1998 CarswellOnt 716, 123 C.C.C. (3d) 316, 107 O.A.C. 102, 14 C.R. (5th) 338, 38 O.R. (3d) 689, [1998] O.J. No. 627

R. v. Irwin

Her Majesty The Queen, Respondent and Richard Irwin, Appellant

Ontario Court of Appeal

Catzman, Doherty, Austin JJ.A.

Heard: January 8, 1998
Judgment: February 13, 1998
Docket: CA C19684

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Counsel: *Wes Wilson*, for the appellant.

Jennifer Woollcombe, for the respondent.

Subject: Criminal

Criminal law --- Appeals — Appeal of conviction or acquittal — Indictable offence — Procedure on appeal — Amending indictment

During altercation with G, accused pushed G into innocent bystander complainant was seriously injured — Accused charged with assault causing bodily harm — Trial judge rejected defence of self-defence, found that accused applied force to G with intent to assault G, transferred intent from G to complainant, and convicted accused as charged — On appeal by accused, Crown sought to uphold conviction by proposing to amend indictment by substituting charge of unlawfully causing bodily harm for charge of assault causing bodily harm — Amendment granted and appeal dismissed — Section 683(1)(g) of Criminal Code empowers appellate court to amend charge to conform to evidence by substituting one charge for another — Amendment power can only be exercised if it would not prejudice accused in defence or appeal — Both initial and proposed charges required proof of same facts — Defence of self-defence available and would have operated in same way with respect to each — Elimination by proposed charge of argument relating to applicability of doctrine of transferred intent not prejudicial — While proposed charge required proof that bodily harm was objectively foreseeable result of accused's conduct, that requirement did not preclude amendment as foreseeability not a live issue on facts as found — Accused not prejudiced — Amendment would simply put new label on accused's culpable conduct leaving substance of allegation unchanged — Criminal Code, R.S.C. 1985, c. C-46, ss. 601, 683(1)(g).

The accused and G had got into an altercation on a crowded restaurant patio. The accused grabbed G, forcing him to

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move backwards across the patio and ultimately to hit the chair of the complainant, an innocent bystander. The complainant was knocked to the floor and suffered serious injuries. The accused was charged with assault causing bodily harm. Rejecting the accused's contention that he was acting in self defence when he applied force to G, the trial judge found that the accused intended to apply force to, and to assault G, and that the force he applied had caused the complainant's injuries. Transferring the accused's intention to apply force to G to the complainant, the trial judge convicted the accused as charged. The accused appealed on the basis that the trial judge had erred in applying the doctrine of transferred intent. The Crown sought to uphold the conviction on the basis of transferred intent. Alternatively, it contended that the court could and should amend the indictment to charge the accused with unlawfully causing bodily harm and dismiss the appeal.

Held: The indictment was amended to charge the accused with unlawfully causing bodily harm and the appeal was dismissed.

The application of the common law doctrine of transferred intent to the charge of assault causing bodily harm and to these facts raised difficult problems which could have been avoided had the accused been charged with unlawfully causing bodily harm. The court could amend the indictment to charge that offence.

Section 683(1)(g) of the *Criminal Code* provides that the court of appeal may, where it considers it in the interests of justice, amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal. This provision permits an appellate court, on appeal from conviction, to amend the indictment and dismiss the appeal. Although s. 683(1)(g), unlike s. 601 of the Code, does not set out the kinds of defects which may be cured by amendment, there is no reason why the scope of the power to amend on appeal should be different from the scope of the power to amend at trial. The power to amend on appeal, like the power given to trial judges by s. 601, reaches defects in substance or form, and variations between the evidence and the charge.

The power to amend to make a charge conform to the evidence includes the power to make amendments which materially change the charge, substitute one charge for another, or add additional charges. The limits on that amending power are found not in the nature of the change made to the charge by the amendment, but in the effect of the amendment on the proceedings, and particularly on the accused's ability to meet the charge. As long as prejudice to the accused remains the litmus test against which proposed amendments are judged, it is unnecessary to characterize the effect of the amendment on the charge itself. If the accused is prejudiced, the amendment cannot be made regardless of what it does to the charge. If no prejudice will result, it should not matter how the change to to the charge is described.

The amending power can be exercised only if the accused will not be misled or prejudiced in his defence or appeal. The nature of the proposed amendment and the stage of the proceedings at which it is sought will be important factors in determining whether an accused has been misled or prejudiced. The risk of prejudice is particularly great where it is proposed to materially amend an indictment on appeal and affirm the conviction on the basis of that amendment. While the court had the power to make the amendment proposed, its nature and timing demanded a cautious approach and thorough consideration of the potential prejudice to the accused. In deciding whether an amendment should be allowed, the court should consider whether the accused had a full opportunity to meet all issues raised by the charge as amended and whether the defence would have been conducted any differently had the amended charge been before the trial court. If the accused had a full opportunity to meet the issues and the conduct of the defence would have been the same no prejudice would result.

The charge as laid required that the Crown establish two facts. The Crown had to prove that the accused assaulted G and that B suffered bodily harm as a result of the assault. If the charge had been unlawfully causing bodily harm, it would have been incumbent on the Crown to prove the same two facts. The defence of self-defence would have been available to the accused and would have operated in exactly the same way as it did at trial. If the trial judge had a reasonable doubt as to whether the accused acted in self-defence, he would have been required to acquit the accused whether the charge was assault causing bodily harm or unlawfully causing bodily harm. Neither the conduct of the trial, nor the position of the defence would have been any different had the charge been unlawfully causing bodily

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harm.

While had the accused been so charged, there would have been no argument as to the applicability of the doctrine of transferred intent, the amendment, by rendering the applicability of the doctrine irrelevant, would not necessarily prejudice, and in fact did not prejudice, the accused. There is no vested right to any particular defence in a criminal proceeding. Were it otherwise, any amendment which removed a defence or legal argument in support of an acquittal would automatically be prejudicial, and it that were the law, the power to amend on appeal would be rendered almost nugatory.

The charge of unlawfully causing bodily harm requires proof that bodily harm was an objectively foreseeable consequence of the unlawful activity, a matter which was not specifically addressed at trial. That requirement did not, however, present an impediment to the amendment. Once it was accepted that the accused grabbed G and, while holding onto him, pushed him forcefully some distance backward across an area crowded with unsuspecting partiers, a finding that it was objectively foreseeable that one of those partiers could be struck and suffer bodily harm was so inevitable as to be beyond contention. Moreover, there was merit to the Crown's contention that the charge as laid also required proof that bodily harm was an objectively foreseeable consequence of the accused's conduct. The fact that the trial judge did not give separate consideration to the foreseeability of bodily harm in his reasons, and that the accused did not suggest any error in his failure to do so, was a testament to the non-viability of any argument denying foreseeability in the circumstances.

Cases where an amendment substituting a different offence for the offence charged at trial can be properly made on appeal will be few and far between. This was one of those rare cases where the amendment could be made. While the amendment changed the substantive offence from assault causing bodily harm to unlawfully causing bodily harm the amendment did no more than put a new label on the accused's culpable conduct. The substance of the allegation remained unchanged.

Cases considered by *Doherty J.A.*:

R. v. Bookman (1988), 28 O.A.C. 150 (Ont. C.A.) — referred to

R. v. Cohen (1912), 22 O.W.R. 456, 1912 CarswellOnt 351, 26 O.L.R. 497, 19 C.C.C. 428, 5 D.L.R. 437 (Ont. C.A.) — not followed

R. v. Deakin, 26 C.R.N.S. 236, [1974] 3 W.W.R. 435, 16 C.C.C. (2d) 1 (Man. C.A.) — referred to

R. v. Delaney (December 15, 1989), Doc. Yukon T.C. 89-01780 (Y.T. Terr. Ct.) — referred to

R. v. DeSousa, 15 C.R. (4th) 66, [1992] 2 S.C.R. 944, 11 C.R.R. (2d) 193, 9 O.R. (3d) 544 (note), 142 N.R. 1, 76 C.C.C. (3d) 124, 95 D.L.R. (4th) 595, 56 O.A.C. 109 (S.C.C.) — considered

R. v. Dupont (1958), 123 C.C.C. 386, 28 C.R. 146 (Que. Q.B.) — distinguished

R. v. Elliott, [1970] 2 O.R. 102, [1970] 3 C.C.C. 233 (Ont. C.A.) — distinguished

R. v. Elliott (1977), [1978] 2 S.C.R. 393, [1978] 1 W.W.R. 481, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485 (S.C.C.) — considered

R. v. Foley (1994), 30 C.R. (4th) 238, 90 C.C.C. (3d) 390, 120 Nfld. & P.E.I.R. 24, 373 A.P.R. 24 (Nfld. C.A.) — referred to

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R. v. Geauvreau (1979), 51 C.C.C. (2d) 75 (Ont. C.A.) — considered

R. v. Geauvreau, [1982] 1 S.C.R. 485, 28 C.R. (3d) 1, 135 D.L.R. (3d) 230, 66 C.C.C. (2d) 375, 41 N.R. 292 (S.C.C.) — referred to

R. v. Harden (1961), [1963] 1 Q.B. 8, [1962] 2 W.L.R. 553, [1962] 1 All E.R. 286, 46 Cr. App. R. 90 (Eng. Ct. of Crim. App.) — referred to

R. v. Johal (1972), [1973] 1 Q.B. 475, 56 Cr. App. R. 348, [1972] 2 All E.R. 449 (Eng. C.A.) — applied

R. v. Kerr (1922), 53 O.L.R. 228 (Ont. C.A.) — distinguished

R. v. Melo (1986), 15 O.A.C. 6, 29 C.C.C. (3d) 173 (Ont. C.A.) — considered

R. v. Miners Inc., [1949] O.W.N. 151, 7 C.R. 287, 93 C.C.C. 118 (Ont. C.A.) — distinguished

R. v. Moore, [1988] 1 S.C.R. 1097, [1988] 5 W.W.R. 1, 85 N.R. 195, 29 B.C.L.R. (2d) 1, 41 C.C.C. (3d) 289, 65 C.R. (3d) 1 (S.C.C.) — referred to

R. v. Moyer, 32 C.R. (4th) 232, 92 C.C.C. (3d) 1, [1994] 2 S.C.R. 899, 73 O.A.C. 243, 170 N.R. 1 (S.C.C.) — referred to

R. v. Nurse (1993), 61 O.A.C. 128, 83 C.C.C. (3d) 546 (Ont. C.A.) — considered

R. v. P. (M.B.), 165 N.R. 321, 29 C.R. (4th) 209, 89 C.C.C. (3d) 289, [1994] 1 S.C.R. 555, 70 O.A.C. 161, 113 D.L.R. (4th) 461, 21 C.R.R. (2d) 1, 17 O.R. (3d) 782 (note) (S.C.C.) — applied

R. v. St. Clair (1994), 69 O.A.C. 161, 88 C.C.C. (3d) 402 (Ont. C.A.) — considered

R. v. Symes (1989), 32 O.A.C. 102, 49 C.C.C. (3d) 81 (Ont. C.A.) — referred to

R. c. Tremblay, 23 C.R. (4th) 98, 156 N.R. 30, 106 D.L.R. (4th) 413, 84 C.C.C. (3d) 97, 57 Q.A.C. 161, [1993] 2 S.C.R. 932 (S.C.C.) — applied

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 265 — referred to

s. 267 — considered

s. 267(b) — referred to

s. 269 — considered

s. 601 — considered

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s. 601(2) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 123] — considered

s. 609(1)(b) — considered

s. 683(1)(g) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 144] — considered

Indictments Act, 1915 (5 & 6 Geo. 5), c. 90

s. 5 — considered

APPEAL by accused from conviction on charge of assault causing bodily harm.

The judgment of the court was delivered by *Doherty J.A.*:

I

1 The appellant and Ken Graham got into an altercation on the outdoor patio area of a restaurant in Port Perry. The patio was very crowded with people eating, drinking, and enjoying the Festival Day celebrations. The appellant and Graham grappled as they moved across the patio until they fell over Andrew Behling who was sitting at a nearby table with his wife. Mr. Behling was knocked to the floor and suffered serious injuries. It was common ground that Mr. Behling was an innocent bystander who had nothing to do with the altercation between the appellant and Graham, and that the appellant did not intentionally apply force to Mr. Behling.

2 The appellant was charged under s. 267 of the *Criminal Code* in these terms:

> Richard Irwin ... unlawfully did in committing an assault upon Andrew Behling cause bodily harm to him.

3 The appellant acknowledged that he and Graham fought and that Mr. Behling suffered bodily harm when he was knocked over by the appellant and Graham. The appellant contended that he was attacked by Graham and was acting in self-defence when he applied force to Graham. The trial judge rejected this position stating:

> This Court recognizes the difference in the evidence, but finds on the evidence that the accused, Richard Irwin, grabbed Kenneth Graham with an intentional application of force that would constitute an assault, that the accused, Richard Irwin, intentionally applied the force to Kenneth Graham, forced Kenneth Graham to move backwards a considerable distance, while the accused still hung on to Kenneth Graham.
>
> The force the accused applied to Kenneth Graham caused Kenneth Graham to hit the table and chair where the complainant, Andrew Behling, was sitting and knocked the table, the chair, and Kenneth Behling over thereby causing the complainant's injury.

4 In convicting the appellant, the trial judge applied the common law doctrine of transferred intent, saying:

> This Court finds that under these circumstances that there was a continuing application of force. The accused's intention to apply force to Kenneth Graham was transferred to the complainant, Andrew Behling and consequently, the accused, Richard Irwin, assaulted the complainant, Andrew Behling, causing the bodily harm previously described to Andrew Behling.

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Therefore, this Court finds that the accused, Richard Irwin, is guilty of the offence charged in the information.

II.

5 On appeal, counsel for the appellant argued that the doctrine of transferred intent had no application on the facts as found by the trial judge and furthermore, that the doctrine could not apply to a charge of assault causing bodily harm given the definition of assault in s. 265 and the language of s. 267(b) of the *Criminal Code*. The Crown countered with the submission that the doctrine does apply relying on *R. v. Deakin* (1974), 16 C.C.C. (2d) 1 (Man. C.A.). The Crown also argued that if the doctrine did not apply, the appropriate course was to amend the indictment from the charge of assault causing bodily harm to the charge of unlawfully causing bodily harm contrary to s. 269 of the *Criminal Code* and dismiss the appeal.

6 The application of the common law doctrine of transferred intent to the charge of assault causing bodily harm and to these facts raises difficult problems.[FN1] These problems could have been avoided had the appellant been charged with unlawfully causing bodily harm to Mr. Behling. That charge was clearly available in the circumstances of this case and the appellant's liability would not have required resort to the concept of transferred intent: *R. v. Delaney* (December 15, 1989), Doc. Yukon T.C. 89-01780 (Y.T. Terr. Ct.). As I regard unlawfully causing bodily harm as the more appropriate charge in these circumstances, I propose to first consider whether this court can amend the indictment to charge that offence. If it can do so, the court should make that amendment and dismiss the appeal.

III.

7 Section 683(1)(g) provides:

> **683(1)** For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,...
>
> > **(g)** amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.[FN2]

8 This provision permits an appellate court, on an appeal from conviction, to amend the indictment and dismiss the appeal: *R. v. Bookman* (1988), 28 O.A.C. 150 (Ont. C.A.); *R. v. Symes* (1989), 32 O.A.C. 102 (Ont. C.A.); *R. v. St. Clair* (1994), 88 C.C.C. (3d) 402 (Ont. C.A.); *R. v. Moyer* (1994), 92 C.C.C. (3d) 1 (S.C.C.). Although s. 683(1)(g), unlike s. 601, does not set out the kinds of defects which may be cured by amendment, I see no reason why the scope of the power to amend on appeal should be different from the scope of the power to amend at trial. The power to amend on appeal, like the power given trial judges by s. 601 of the *Criminal Code*, reaches defects in substance or form, and variations between the evidence and the charge.

9 Broad powers of amendment at the trial and appellate stages serve two important goals. First, they promote the determination of criminal cases on their merits. As Morden J.A. said in *R. v. Melo* (1986), 29 C.C.C. (3d) 173 (Ont. C.A.) at 183:

> ...justice requires that cases be determined by the application of the relevant substantive law to the proven facts in so far as this can be done consistently with procedural fairness.

10 Second, wide powers of amendment avoid a multiplicity of proceedings. Section 609(1)(b) provides that a plea of *autrefois acquit* or *autrefois convict* should succeed where it appears:

> **(b)** that on the former trial, if all proper amendments had been made that might then have been made, he might

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> have been convicted of all the offences of which he may be convicted on the count to which the plea of *autrefois acquit or autrefois convict* is pleaded. [Emphasis added.]

11 Broad powers of amendment expand the scope of the special pleas and avoid multiple trials arising out of a single event or transaction. By combining broad powers of amendment with an expanded availability of the special pleas, the criminal law declares a preference for results based on the merits and arrived at in a single trial where pleadings problems are fixed and not allowed to derail the proceedings: see *R. v. Moore* (1988), 41 C.C.C. (3d) 289 (S.C.C.), at 311-13.

12 The appellant accepts that the amendment powers in the *Code* are broad and designed to facilitate adjudication on the merits and avoid results predicated on deficiencies in the charging documents. He submits, however, that those powers do not go so far as to permit an amendment which changes the charge. The appellant contends that a purported amendment which changes the charge is in reality a substitution of one charge for another and not an amendment of the original charge. He submits that nothing in s. 601 or s. 683(1)(g) countenances the substitution of one charge for another.

13 There is support for this position. *R. v. Elliott* (1977), 38 C.C.C. (2d) 177 (S.C.C.) was concerned with a court of appeal's power to amend an indictment when it had allowed a Crown appeal from an acquittal and ordered a new trial. The amendment in *Elliott* had been made on appeal to make the charge conform with the evidence led at the first trial. Laskin C.J.C., in dissent (Spence and Dickson JJ. concurring), held that the proposed amendment amounted to the substitution of a different charge for the charge laid by the Crown. In deciding whether the court of appeal could make that amendment, the Chief Justice looked first at whether the trial court could have made the amendment. He concluded that the trial court had no such power stating at p. 182:

> ...Wide as was the power to amend reposed in the trial Judge, it did not extend to authorize him to substitute an offence different from the one charged....

14 The majority, per Ritchie J., at p. 201, decided that the proposed amendment did not substitute a different charge for the original charge, and did not consider whether an amendment which had that effect could be made.

15 *R. v. Elliott, supra*, like this case, involved a proposed amendment to make a charge conform to the evidence led at trial. In holding that the amendment could not be made if it substituted a different charge, the Chief Justice referred to four authorities. In three of those cases the proposed amendment did not arise out of a variation between the charge as laid and the evidence as led, but was said to cure a "defect" in the charge as laid. *R. v. Kerr* (1922), 53 O.L.R. 228 (Ont. C.A.) involved an amendment to cure a defect apparent on the face of the indictment. The phrase "without lawful excuse" had been omitted from the charge. After referring to the *Criminal Code* provision containing the power to amend to cure defects apparent on the face of the charge (present day s. 601(1)), Meredith C.J.O. said, at p. 231:

> The section does not, of course, authorise an amendment which substitutes a different offence for that intended to be charged or the addition of other offences. It is manifest from the indictment that it was intended to charge an offence under sec. 464(a), but there was a defect in the indictment by reason of the omission of the words "without lawful excuse," which, in my opinion, brings the case within the section.

Meredith C.J.O. was referring to the power to amend to cure facial defects. I see little difficulty in accepting the proposition that an amendment which substitutes one charge for another cannot be justified under a power which relates only to the curing of facial deficiencies in a charge.

16 *R. v. Dupont* (1958), 123 C.C.C. 386 (Que. Q.B) also involved an amendment made at the outset of the trial. The charge as initially laid was defective in substance in that it failed to charge an essential element of the offence, and the proposed amendment would have substituted an entirely different offence for the offence initially charged. In

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holding that the amendment could not be made, Rinfret J. pointed out, at p. 390, that the amendment would change both the transaction involved and the character of the offence alleged.

17 *R. v. Elliott*, [1970] 3 C.C.C. 233 (Ont. C.A.) at 237, the third authority referred to by Laskin C.J.C., also involved an amendment made at the outset of the trial. The accused was initially charged with breaking and entering and committing an indictable offence therein. Prior to the plea, and obviously before any evidence was led, the trial judge instructed the Crown to amend the charge to one of breaking and entering with intent to commit an indictable offence therein. On appeal, this court held that the trial judge had no authority to make such an amendment at the outset of the trial. Jessup J.A. said, at p. 227:

> I do not understand the respondent to contend that there is any power in a court under s. 510 (now s. 601) to amend an indictment so as to charge an offence completely different from that originally charged in it. All the authorities cited are to the contrary. While they have not specifically considered the extent of the jurisdiction given under s. 510(3)(b)(iii) [now s. 601(3)(b)(iii)], it is plain that jurisdiction only arises under that subsection where an indictment or count thereof "is in any way defective in substance." The count that was amended in this case was not defective either in form or in substance....

18 *Elliott* stands for the proposition that the court cannot substitute one charge for another under the guise of amending a defect in substance when the charge as initially laid was not defective in substance. *Elliott* does not address the question of the power to amend to make a charge conform to the evidence. That power of amendment is distinct from the other powers of amendment set out in s. 601 in that it is not premised on any defect in the language of the charge as initially laid, but rather on a divergence between the charge as laid and the evidence as led. Legitimate limitations on the power to amend to cure defects in the way the charge is worded cannot be imposed on a separate amendment power aimed at an entirely different kind of defect.

19 *R. v. Cohen* (1912), 19 C.C.C. 428 (Ont. C.A.), the final authority referred to in *Elliott* did involve an amendment made during the trial to make the charge conform to the evidence. In concluding that the amendment should not have been permitted because it substituted a different offence for the one charged, each of the three judges who provided reasons emphasized that as the law stood, an accused could only be tried for an offence for which the grand jury had returned a true bill. An amendment which changed the charge after the grand jury had returned a true bill deprived an accused of his right to have the grand jury pass on the merits of the charge. Meredith J.A. said, at p. 437:

> ...[I]t was his right to have that charge first dealt with by a grand jury; and not to be put in jeopardy without their consent;...

20 Magee J.A. observed that the grand jury expressly gave its consent only to amendments in matters of form, and prohibited the altering of any matter of substance in the charge. He said, at p. 439:

> The present section, 889, applies to a variance "between the evidence given and the charge in any count." This cannot fairly be interpreted to authorise the change to an entirely different charge from that in the count, but only to authorise the retention in substance of the same charge, though amending it in details so as to conform to the evidence. So long as an accused person is entitled to trial by jury, and every criminal accusation so to be tried is to be first passed upon by a grand jury, the basis upon which amendments should be made appears to me to be that stated by Lord Alverstone, as already quoted, and is expressed in effect by the formula of the grand jury, which gives its consent "that the Court may amend matters of form, altering no matter of substance in this bill."...

21 Limitations on the powers of amendment borne out of grand jury procedures are no longer of any relevance. *Cohen* must be read in its proper historical setting.

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1998 CarswellOnt 716, 123 C.C.C. (3d) 316, 107 O.A.C. 102, 14 C.R. (5th) 338, 38 O.R. (3d) 689, [1998] O.J. No. 627

22 In addition to the authorities cited by the Chief Justice in *Elliott*, there is the case of *R. v. Miners Inc.* (1949), 7 C.R. 287 (Ont. C.A.). The accused, a quarry operator, was initially charged with causing an explosion likely to endanger life on a specific day. During the trial, the Crown led evidence of several explosions caused by the accused over a three-month period. The information was amended to cover the three-month time period. The trial judge convicted on the amended indictment holding that the accused had caused many explosions which met the requirements of the section. The trial judge did not indicate whether the specific explosion referred to in the initial information was among those which fit the criteria of the section. On appeal, this court held that the magistrate had no jurisdiction to make the amendment and quashed the conviction. Roach J.A. said, at p. 288:

> ...the power of amendment contained in the *Code* under s. 889 [now s. 601] does not authorize the making of an amendment the effect of which is to charge a different offence from that originally charged.

23 I do not think Roach J.A. used the phrase "different offence" in the same way that the appellant used the expression in this case. Roach J.A. was referring to an amendment which fundamentally altered the factual transaction giving rise to the charge. This case involves an amendment which changes the substantive offence, but leaves untouched the transaction said to reveal the offence. An amendment made during the course of the trial which switches the factual focus of the inquiry to a different transaction than that contemplated by the initial charge must cause prejudice to the accused. While I take no issue with the result in *R. v. Miners Inc.*, *supra*, I think the characterization of the amendment as jurisdictional error is no longer appropriate given subsequent expositions of the broad powers of amendment found in s. 601: e.g. see *R. v. Moore, supra. R. v. Miners Inc.* is best understood as a case in which the amendment should not have been made because of the obvious prejudice it caused to the accused.

24 The authorities do not compel me to accept the submission that there is no power to make the amendment sought by the Crown. Nor does the language of s. 601(2) preclude an amendment which has the effect of changing the charge. The section reads in part:

> **601(2)** Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein ... to make the indictment, count or particular conform to the evidence,...

25 On a plain reading, the section contemplates any amendment which makes a charge conform to the evidence. The limits on that amending power are found, not in the nature of the change made to the charge by the amendment, but in the effect of the amendment on the proceedings, and particularly, on the accused's ability to meet the charge. The ultimate question is not what does the amendment do to the charge, but what effect does the amendment have on the accused?

26 I see no useful purpose in absolutely foreclosing an amendment to make a charge conform to the evidence simply because the amendment will substitute one charge for another. As long as prejudice to the accused remains the litmus test against which all proposed amendments are judged, it seems unnecessary to characterize the effect of the amendment on the charge itself. If the accused is prejudiced, the amendment cannot be made regardless of what it does to the charge. If no prejudice will result from the change, why should it matter how the change to the charge is described?

27 I can also find no reason for holding there is no power to amend to substitute one charge for another while at the same time acknowledging the power to amend based on a variation between the evidence and the charge where the amendment will materially change the charge: e.g. see *R. v. Geauvreau, supra*. It can be very difficult to distinguish between a change which substitutes one charge for another and a change which materially changes the initial charge. The difference seems to be more in the nomenclature used than in the substance or significance of the change. Some amendments which materially change the charge can have drastic effects on the case against the appellant. Some amendments which substitute one charge for another will amount to no more than placing a new label on exactly the same conduct.

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28 English courts interpreting s. 5 of the *Indictments Act* 1915 which, like s. 601 contemplates very broad amendment powers, have resisted any attempt to distinguish between amendments which alter the charge and amendments which substitute one charge for another. In *R. v. Johal* (1972), 56 Cr. App. R. 348 (Eng. C.A.), the court held that prejudice to the accused was the sole criterion by which the propriety of any proposed amendment should be measured. The court specifically overruled an earlier decision (*R. v. Harden* (1961), 46 Cr. App. R. 90 (Eng. Ct. of Crim. App.)), which had held that an amendment could not be made if it substituted one charge for another. In rejecting that authority the court said, at p. 353:

> In the headnote to the report of this case [*R. v. Harden, supra*] in the *Criminal Appeal Reports* it is stated at p. 91: "An amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged." As a statement of principle, to be applied generally, this is, in the judgment of this Court, too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally charged, or for the purpose of adding a further charge, injustice would be caused to the accused by granting the amendment, but in some cases (of which the present case is an example) no such injustice would be caused and the amendment may properly be allowed. [Emphasis added.][FN3]

29 *R. v. St. Clair, supra*, also offers support for the view that it is the effect of the proposed amendment on the accused's ability to meet the charge, and not the effect of the proposed amendment on the charge itself which is determinative. In *St. Clair*, the accused was charged with aggravated assault arising out of a stabbing. The trial judge instructed the jury that assault with a weapon was an included offence in the charge of aggravated assault. The jury acquitted of aggravated assault and convicted of assault with a weapon.

30 On appeal, it was conceded that the aggravated assault charge as worded in the indictment did not include the offence of assault with a weapon and that the trial judge had erred in so instructing the jury. This court did not, however, allow the appeal. Instead, it amended the aggravated assault charge to add a reference to the use of a knife, thereby, making assault with a weapon an included offence in the aggravated assault charge. Osborne J.A. described s. 683(1)(g) as providing "broad" amendment powers and said, at p. 410:

> In the circumstances, if the amendment sought is granted, it will not result in the accused being misled or prejudiced. I would, therefore, amend the indictment to set out the means by which the appellant committed the alleged offence of aggravated assault.
>
> Having amended the indictment, the jury's verdict of guilt of the included offence established in s. 267(1)(a) [assault with a weapon] should be sustained.

31 If as *St. Clair* holds, s. 683(1)(g) is broad enough to permit an amendment which adds an offence to an indictment, it must be broad enough to permit an amendment which substitutes one charge for another. I would hold that s. 683(1)(g) permits an amendment on appeal where the amendment cures a variance between the charge laid and the evidence led at trial regardless of whether the amendment materially changes the charge, substitutes a new charge for the initial charge, or adds an additional charge.

32 In holding that the amendment power, even on appeal, can extend to the substitution of a different substantive offence, I must acknowledge the policy implication of that holding. As Laskin C.J.C. so clearly put it in *Elliott, supra*, at p. 199, it is the responsibility of the Crown and not the court to settle the charge which will be brought against the accused. While I accept the force of that observation, I am moved by a different policy consideration. If there is no power to make the amendment, even in the total absence of prejudice, there can be no impediment to a new prosecution on the substituted charge. That prosecution would involve a re-litigation of exactly the same issues on presumably exactly the same evidence. I see no value from the point of view of the due administration of justice in a second trial in

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those circumstances. Witnesses would be inconvenienced and resources spent for no purpose other than to give an accused a second chance to litigate issues which had been fully canvassed at the first trial. I go even a step further. I think the possibility of a different assessment of the same issues and the same evidence on a second trial does a disservice to the due administration of justice. In my view, denying the power to amend to substitute a new charge where the substitution could not prejudice the accused would be akin to ordering a new trial where there had been an error in law at trial which could not have caused any prejudice to the accused. In both situations, the result strikes me as an unwarranted windfall for an accused.

33 My conclusion as to the scope of the amending power addresses only the first of two issues which an appellate court must face in deciding whether to make an amendment. Having found that the power exists, the court must go on and determine whether it should be exercised in a given case. The amending power can be exercised only if the accused will not be "misled or prejudiced in his defence or appeal." The nature of the proposed amendment and the stage of the proceedings at which it is sought will be important factors in determining whether an accused has been misled or prejudiced. The risk of prejudice is particularly great where it is proposed to materially amend an indictment on appeal and affirm the conviction on the basis of that amendment. As Cory J. said in *R. c. Tremblay* (1993), 84 C.C.C. (3d) 97 (S.C.C.) at 114:

> It is, I think, an extraordinary step for an appellate court to amend the charge materially and then to enter a conviction on the basis of the charge as amended....

34 Therefore, while I am satisfied that this court has the power to make the amendment requested by the Crown, the nature and timing of the proposed amendment demand a cautious approach and a thorough consideration of the potential prejudice to the accused flowing from the amendment.

IV.

35 The charge as laid required that the Crown establish two facts. The Crown had to prove that the appellant assaulted Graham and that Mr. Behling suffered bodily harm as a result of the assault. Having proved those two facts, the Crown had to convince the court that in the eyes of the law, the assault on Graham constituted an assault on Mr. Behling. To do so, the Crown did not have to prove any additional facts, but relied on the applicability of the doctrine of transferred intent. The appellant's defence was that he did not assault Graham, but in fact was assaulted by Graham and acted in self-defence.

36 If the charge had been unlawfully causing bodily harm, it would have been incumbent on the Crown to prove the same two facts, that is that the appellant assaulted Graham and that Mr. Behling suffered bodily harm as a result of that assault. The defence of self-defence would have been available to the appellant and would have operated in exactly the same way as it did at trial. If the trial judge had a reasonable doubt as to whether the appellant acted in self-defence, he would have been required to acquit the appellant whether the charge was assault causing bodily harm or unlawfully causing bodily harm. I am unable to see how the conduct of the trial, or the position of the defence would have been any different had the charge been unlawfully causing bodily harm.

37 I am equally satisfied that on the findings of fact made by the trial judge, he would have inevitably convicted the appellant on a charge of unlawfully causing bodily harm. I do not accept that by rendering the applicability of the doctrine of transferred intent irrelevant, the amendment would necessarily prejudice the appellant. There is no "vested right" to any particular defence in a criminal proceeding: *R. v. P. (M.B.)* (1994), 89 C.C.C. (3d) 289 (S.C.C.), at 296-97. Were it otherwise, any amendment which had the effect of removing a defence or legal argument in support of an acquittal would be automatically prejudicial. Were that the law, the power to amend on appeal would be rendered almost nugatory.

38 Prejudice in the present context speaks to the effect of the amendment on an accused's ability and opportunity

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to meet the charge. In deciding whether an amendment should be allowed, the appellate court must consider whether the accused had a full opportunity to meet all issues raised by the charge as amended and whether the defence would have been conducted any differently had the amended charge been before the trial court. If the accused had a full opportunity to meet the issues and the conduct of the defence would have been the same, there is no prejudice: e.g. see *R. v. Foley* (1994), 90 C.C.C. (3d) 390 (Nfld. C.A.), at 400-403. As I see it, had the appellant been charged with unlawfully causing bodily harm, the trial would have proceeded exactly as it did save that there would have been no argument as to the applicability of the doctrine of transferred intent.

39 Counsel for the appellant made one submission in support of his position that the amendment would cause prejudice. He argued that the charge of unlawfully causing bodily harm required that the Crown prove that bodily harm was an objectively foreseeable consequence of the unlawful conduct. He further submitted that the foreseeability of bodily harm was never in issue or addressed at the appellant's trial and that prejudice must follow where a new constituent element of an offence is added by way of an amendment to a charge on appeal.

40 The charge of unlawfully causing bodily harm requires proof that bodily harm was an objectively foreseeable consequence of the unlawful activity: *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.) at 137. I do not, however, accept that this requirement presents an impediment to the proposed amendment. Once it was accepted that the appellant grabbed Graham and, while holding onto him, pushed him forcefully some distance backward across an area crowded with unsuspecting partiers, a finding that it was objectively foreseeable that one of those partiers could be struck and suffer bodily harm was so inevitable as to be beyond contention. The foreseeability of bodily harm once the underlying facts were established was simply not a live issue in this case.

41 There is also merit in the Crown's contention that the charge as laid (assault causing bodily harm), like the charge of unlawfully causing bodily harm, required that the Crown prove that bodily harm was an objectively foreseeable consequence of the appellant's conduct: *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.) at 555. The fact that the trial judge did not give separate consideration to the foreseeability of bodily harm in his reasons, and that the appellant did not suggest any error in the trial judge's failure to do so, is a testament to the non-viability of any argument denying the foreseeability of bodily harm in these circumstances.

V.

42 Cases where an amendment substituting a different offence for the offence charged at trial can be properly made on appeal will be few and far between. I think this is one of those rare cases where the amendment can be made. While the amendment changes the substantive offence from assault causing bodily harm (s. 267) to unlawfully causing bodily harm (s. 269), the amendment does no more than put a new label on the appellant's culpable conduct. The substance of the allegation remains unchanged. I would amend the indictment to charge the appellant with unlawfully causing bodily harm to Andrew Behling and dismiss the appeal.

Indictment amended accordingly; appeal dismissed.

FN1 The arguments against the application of the doctrine are persuasively marshalled by Professor Stuart: *Canadian Criminal Law*, 3rd ed. (1995), at pp. 223-227.

FN2 This provision was enacted by R.S.C. 1985, c. 27 (1st Supp) s. 144(1) in response to *R. v. Geauvreau* (1979), 51 C.C.C. (2d) 75 (Ont. C.A.) at 84, aff'd. (1982), 66 C.C.C. (2d) 375 (S.C.C.) at 381, where it was held that the power to amend an indictment and dismiss an appeal from conviction required "the clearest statutory basis."

FN3 *R. v. Johal* is accepted as an authoritative statement of the power to amend by the authors of *Archbold Criminal Pleading, Evidence and Practice* (1998) at pp. 55-57.

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1998 CarswellOnt 716, 123 C.C.C. (3d) 316, 107 O.A.C. 102, 14 C.R. (5th) 338, 38 O.R. (3d) 689, [1998] O.J. No. 627

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TAB 3

2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

R. c. Bois

Her Majesty The Queen, Appellant v. Claude Daoust and Éric Bois, Respondents and Attorney General of Canada and Attorney General of Ontario, Interveners

Supreme Court of Canada

Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: October 8, 2003
Judgment: February 12, 2004[FN*]
Docket: 29185

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Proceedings: affirming (2002), 2002 CarswellQue 318, 1 C.R. (6th) 127, (*sub nom. R. v. Daoust*) 165 C.C.C. (3d) 123 (Qué C.A.); reversing (2000), 2000 CarswellQue 2094, [2000] R.J.Q. 2754 (C.Q.); and affirming (2002), 2002 CarswellQue 322 (Qué. C.A.); reversing (2000), 2000 CarswellQue 2094, [2000] R.J.Q. 2754 (C.Q.)

Counsel: Louis Coulombe, Daniel Grégoire, for Appellant

Jean Asselin, Sophie Dubé, for Respondents

Bernard Laprade, Martin Lamontagne, for Intervener, Attorney General of Canada

John Corelli, Leanne Salel, for Intervener, Attorney General of Ontario

Subject: Criminal; Public

Criminal law --- Offences — Proceeds of crime — Laundering proceeds of crime — General

Accused charged with laundering proceeds of crime after purchasing items described as "hot" — English version of charging provision contained phrase "or otherwise deals with", capturing more activities associated with proceeds of crime in actus reus than did French version — Accuseds' conduct was not expressly captured by French version of charging provision — Accused were convicted, accuseds' appeals were allowed and accused were acquitted — Crown appealed to Supreme Court of Canada — Appeal dismissed — Parliament's intent to capture broad list of activities could not be used to contradict express terms of French version of charging provision legislative instrument — Court could not expand scope of criminal liability by reading in terms of English version — Buying or receiving stolen property did not constitute actus reus of offence charged in French version.

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2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

Statutes --- Interpretation — Role of court — Bilingual legislation

Accused charged with laundering proceeds of crime after purchasing items described as "hot" — English version of charging provision contained phrase "or otherwise deals with", capturing more activities associated with proceeds of crime in actus reus than did French version — Accuseds' conduct was not expressly captured by French version of charging provision — Accused were convicted, accuseds' appeals were allowed and accused were acquitted — Crown appealed to Supreme Court of Canada — Appeal dismissed — Where bilingual statutes are each clear but inconsistent, common meaning of terms of statute is properly used — In present case, narrower French version was common meaning — In any event, rules of penal construction barred court from expanding scope of criminal liability by reading in terms of English version.

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Indictable offence — Procedure on appeal — Amending indictment

Accused charged with laundering proceeds of crime in circumstances which may have admitted of attempt charge — Accused were not charged with attempting to launder proceeds of crime — Accused were convicted, accuseds' appeals were allowed and accused were acquitted — Crown appealed to Supreme Court of Canada — Appeal dismissed — Crown's request to amend indictment to charge attempt to launder proceeds of crime was denied — Crown did not assert attempt at trial — To permit amendment of indictment in Supreme Court at late date would force accused to defend entirely new charge and possibly be convicted without notice.

Droit criminel --- Infractions — Produits de la criminalité — Recyclage des produits de la criminalité — En général

Accusés ont été inculpés d'avoir recyclé des produits de la criminalité après avoir acheté des biens décrits comme étant « hot » — Version anglaise de la disposition sur laquelle était fondée l'accusation comportait l'expression « or otherwise deals with », laquelle incluait plus d'activités dans l'actus reus de l'infraction relative aux produits de la criminalité que ne le faisait la version française — Conduite des accusés n'était pas expressément incluse dans la version française de la disposition — Accusés ont été déclarés coupables; leur pourvoi a été accueilli et ils ont été acquittés — Ministère public a interjeté appel devant la Cour suprême du Canada — Pourvoi rejeté — On ne pouvait utiliser l'intention du législateur de viser une large liste d'activités pour contredire les termes exprès de la version française de la disposition — Cour ne pouvait élargir la portée de la responsabilité criminelle en faisant une interprétation large de la version anglaise — Achat ou réception de biens volés ne constituait pas l'actus reus de l'infraction dans la version française.

Lois --- Interprétation — Rôle du tribunal — Législation bilingue

Accusés ont été inculpés d'avoir recyclé des produits de la criminalité après avoir acheté des biens décrits comme étant « hot » — Version anglaise de la disposition sur laquelle était fondée l'accusation comportait l'expression « or otherwise deals with », laquelle incluait plus d'activités dans l'actus reus de l'infraction relative aux produits de la criminalité que ne le faisait la version française — Conduite des accusés n'était pas expressément incluse dans la version française de la disposition — Accusés ont été déclarés coupables; leur pourvoi a été accueilli et ils ont été acquittés — Ministère public a interjeté appel devant la Cour suprême du Canada — Pourvoi rejeté — Lorsque les lois bilingues sont incompatibles malgré que chacune d'elles soit claire, il est approprié d'utiliser le sens commun des termes de la loi — Dans ce cas-ci, la version française plus étroite représentait le sens commun — De toute façon, les règles d'interprétation en matière pénale interdisaient aux tribunaux d'élargir la portée de la responsabilité criminelle en faisant une interprétation large de la version anglaise.

Droit criminel --- Procédure après le procès — Appel à l'encontre d'une déclaration de culpabilité ou d'un acquittement — Acte criminel — Procédure en appel — Modification de l'acte d'accusation

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Accusés ont été inculpés de recyclage des produits de la criminalité dans le cadre de circonstances qui auraient pu aussi donner lieu à des accusations de tentative — Accusés n'ont pas été inculpés de tentative de recycler des produits de la criminalité — Accusés ont été déclarés coupables; leur pourvoi a été accueilli et ils ont été acquittés — Ministère public a interjeté appel à la Cour suprême du Canada — Pourvoi rejeté — Demande du ministère public afin de modifier l'acte d'accusation pour y inclure une accusation de tentative de recycler des produits de la criminalité a été rejetée — Ministère public n'a pas allégué la tentative au procès — Permettre la modification de l'acte d'accusation devant la Cour suprême si tardivement forcerait l'accusé à se défendre à l'égard d'une toute nouvelle accusation, et celui-ci pourrait être déclaré coupable sans aucun préavis.

The accused ran a pawn shop. On several occasions, undercover police officers attended upon the shop and offered to sell items to the accused. The officers intimated that the items were stolen property, describing them as "hot". The accused purchased the items anyway, but later advised the officers that they would not continue to help the officers steal.

The accused were charged with laundering proceeds of crime. They were not charged with attempting to launder proceeds of crime.The charging provision, Criminal Code s. 462.31(1), was different in its English and French versions. In the French version, the actus reus of the offence charged included the following conduct: it was an offence to "utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession" of proceeds of crime. In the English version, the actus reus of the offence charged was broader. While still capturing conduct where an accused "uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of" proceeds of crime, it went on to make it an offence where an accused "otherwise deals with" the proceeds of crime.

The accused were both convicted. Their appeals were joined in the Court of Appeal, which allowed the appeals and substituted acquittals. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Bastarache J. for the Court: Evidence as to the charging provision's legislative history established that Parliament intended that the offence charged capture the broader range of conduct prohibited in the English version of Criminal Code s. 462.31(1). However, Parliament's intent cannot override the plain and obvious meaning of its own legislative instrument. The French version is clearly less restrictive than is the English version, so under the rules of penal-law construction the French version must be preferred as courts may not properly broaden the criminal law to create offences which are not found in a penal statute. In any event, where bilingual statutes are clear but also contradictory or even irreconcilable, the version which is more reflective of common language is to be preferred. In the present case, the French version is the common language version, as the English version is less precise.

The accused were not guilty of laundering proceeds of crime. The actus reus of the offence charged, in the preferred French version, does not include any activities undertaken by a person who later obtains possession of proceeds of crime, but only by the person originally in possession of those proceeds who attempts, inter alia, to transfer possession of them. Purchasing something from a transferor does not amount to the purchaser herself transferring possession of that thing.

The mens rea of the offence charged requires that an accused "convert" the proceeds of crime. "Convert" is a term of clear legal meaning, and should be given its ordinary legal meaning in the context of the charging provision. To "convert" something does not require that one intend to conceal it or its nature "qua" proceeds of crime.

It was not appropriate to permit the Crown to amend the indictment to charge the accused with attempting to launder proceeds of crime. The Crown did not allege an attempt at trial, and in the present case to permit an amendment of that

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sort at a late stage would be tantamount to charging the accused with an entirely new offence and then convicting them without notice. That would be contrary to the principles of fundamental justice.

Les accusés exploitaient un magasin de prêts sur gage. Des policiers banalisés se sont rendus à plusieurs reprises au magasin et leur ont offert de leur vendre des objets. Les policiers ont sous-entendu que les objets étaient volés en les décrivant comme étant « hot ». Les accusés ont quand même acheté les objets; ils ont plus tard averti les policiers qu'ils ne les aideraient pas à continuer de commettre des vols.

Les accusés ont été inculpés d'avoir recyclé des produits de la criminalité. Ils n'ont pas été inculpés de tentative de recycler des produits de la criminalité. Les versions anglaise et française de la disposition sur laquelle était fondée l'inculpation, l'art. 462.31(1) du Code criminel, étaient différentes. Dans la version française, l'actus reus de l'infraction reprochée visait les agissements suivants: commet une infraction celui qui « utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — ... », les biens ou leurs produits étant des produits de la criminalité. En anglais cependant, l'infraction avait un actus reus beaucoup plus large. Bien qu'incluant les agissements où l'accusé « uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of » des produits de la criminalité, la version anglaise ajoutait que l'accusé commettait une infraction lorsqu'il « otherwise deals with » des produits de la criminalité.

Les accusés ont été déclarés coupables. Leurs pourvois ont été réunis devant la Cour d'appel, qui les a accueillis et a substitué des acquittements aux déclarations de culpabilité. Le ministère public a interjeté appel devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Bastarache, J., au nom de la Cour: L'historique législatif de la disposition mis en preuve établissait que le législateur voulait que l'infraction reprochée capte l'éventail plus grand d'agissements interdits par la version anglaise de l'art. 462.31(1). Cependant, l'intention du législateur ne pouvait passer outre au sens clair de son propre instrument législatif. Comme la version française est manifestement moins stricte que ne l'est la version anglaise, il faut, en vertu des règles d'interprétation en matière pénale, privilégier la version française, parce que les tribunaux ne peuvent élargir le droit criminel pour créer des infractions qui ne se trouvent pas dans les lois pénales. De toute façon, lorsque les lois bilingues sont claires mais contradictoires, voire incompatibles, il faut préférer la version qui se rapproche le plus du sens ordinaire. En l'espèce, la version française représentait le sens commun tandis que la version anglaise était moins précise.

Les accusés n'étaient pas coupables d'avoir recyclé des produits de la criminalité. Dans la version française, la version privilégiée, l'actus reus de l'infraction n'incluait aucune activité entreprise par une personne qui entre plus tard en possession de produits de la criminalité; il visait seulement la personne qui, à l'origine, a eu la possession de ces produits et qui a notamment tenté de la transférer. La personne qui acquiert un bien d'une personne qui le transfère ne devient pas par le fait même de cet achat une personne qui transfère la possession de ce bien.

La mens rea de l'infraction exigeait que l'accusé convertisse les produits de la criminalité. Le verbe « convertir » a un sens juridique clair et devrait recevoir son sens ordinaire dans le cadre de cette disposition. Le fait de convertir quelque chose n'exige pas d'avoir l'intention de dissimuler la chose ou le fait qu'il s'agit d'un produit de la criminalité.

Il n'était pas approprié de permettre au ministère public de modifier l'acte d'accusation pour inculper les accusés de tentative de recycler des produits de la criminalité. Le ministère public n'a pas allégué la tentative lors du procès; en l'espèce, permettre un tel amendement si tardivement équivaudrait à inculper les accusés d'une toute nouvelle infraction et de les déclarer coupables sans préavis. Cela serait contraire aux principes de justice fondamentale.

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Cases considered by *Bastarache J.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canada (Attorney General) v. Mossop (1993), 93 C.L.L.C. 17,006, 13 Admin. L.R. (2d) 1, 46 C.C.E.L. 1, 149 N.R. 1, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349, 1993 CarswellNat 1365, 1993 CarswellNat 1377 (S.C.C.) — considered

Chieu v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 3, 2002 CarswellNat 5, 2002 CarswellNat 6, 18 Imm. L.R. (3d) 93, 208 D.L.R. (4th) 107, 280 N.R. 268, 37 Admin. L.R. (3d) 252, [2002] 1 S.C.R. 84 (S.C.C.) — considered

Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co. (1956), [1956] S.C.R. 610, 56 D.T.C. 1060, 4 D.L.R. (2d) 1, 1956 CarswellNat 247 (S.C.C.) — considered

Gravel v. St. Leonard (City) (1977), [1978] 1 S.C.R. 660, 17 N.R. 486, 1977 CarswellQue 51, 1977 CarswellQue 51F (S.C.C.) — considered

Kwiatkowsky v. Canada (Minister of Manpower & Immigration) (1982), [1982] 2 S.C.R. 856, 45 N.R. 116, 142 D.L.R. (3d) 385, 1982 CarswellNat 491, 1982 CarswellNat 491F (S.C.C.) — considered

Montreal (City) v. ILGWU Centre Inc. (1971), [1974] S.C.R. 59, 24 D.L.R. (3d) 694, 2 L.C.R. 26, 1971 CarswellQue 61, 1971 CarswellQue 61F (S.C.C.) — considered

New Brunswick (Minister of Municipal Affairs) v. Canaport Ltd. (1975), [1976] 2 S.C.R. 599, 12 N.B.R. (2d) 277, 7 N.R. 367, 64 D.L.R. (3d) 1, 1975 CarswellNB 29, 1975 CarswellNB 29F (S.C.C.) — considered

Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise) (1975), [1977] 1 S.C.R. 456, 6 N.R. 440, 24 C.P.R. (2d) 195, 68 D.L.R. (3d) 9, 1975 CarswellNat 386, 1975 CarswellNat 386F (S.C.C.) — considered

Québec (Procureur General) v. Carrières Ste-Thérèse Ltée (1985), [1985] 1 S.C.R. 831, (sub nom. *P.G. Quebec c. Carrières Ste-Thérèse Ltée)* 13 Admin. L.R. 144, (sub nom. *Quebec v. Carrières Ste-Thérèse Ltée)* 59 N.R. 391, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 C.C.C. (3d) 408, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 D.L.R. (4th) 602, 1985 CarswellQue 85, 1985 CarswellQue 109 (S.C.C.) — considered

Québec (Procureur général) c. Laroche (2002), [2002] 3 S.C.R. 708, 2002 SCC 72, 2002 CarswellQue 2413, 2002 CarswellQue 2414, (sub nom. *Quebec (Attorney General) v. Laroche)* 169 C.C.C. (3d) 97, 219 D.L.R. (4th) 723, 6 C.R. (6th) 272, 295 N.R. 291, (sub nom. *Quebec (Attorney General) v. Laroche)* 99 C.R.R. (2d) 252 (S.C.C.) — considered

R. c. Bouchard (1995), 45 C.R. (4th) 55, 1995 CarswellQue 104 (Que. S.C.) — considered

R. c. Bouchard (2000), (sub nom. *Morielli c. R.)* [2000] R.J.Q. 364, 2000 CarswellQue 12 (Que. C.A.) — considered

R. v. Chartrand (1994), 31 C.R. (4th) 1, 116 D.L.R. (4th) 207, 170 N.R. 161, 91 C.C.C. (3d) 396, [1994] 2 S.C.R.

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864, 74 O.A.C. 257, 1994 CarswellOnt 83, 1994 CarswellOnt 1161 (S.C.C.) — referred to

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nom. *United States of America v. Dynar)* 44 C.R.R. (2d) 189, *(*sub nom. *United States of America v. Dynar)* [1997] 2 S.C.R. 462 (S.C.C.) — considered

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Statutes considered:

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Generally — referred to

s. 9 — referred to

s. 81 — referred to

s. 94 — referred to

Corruption of Foreign Public Officials Act, S.C. 1998, c. 34

s. 5 — referred to

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

s. 28 — referred to

s. 48 — referred to

s. 58 — referred to

s. 60 — referred to

s. 62 — referred to

s. 64 — referred to

Criminal Code, R.S.C. 1970, c. C-34

s. 420.11 [en. 1988, c. 51, s. 2 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — considered

Pt. XII.2 [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

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s. 25.1(8) [en. 2001, c. 32, s. 2] — considered

s. 141 — considered

s. 354(1) — considered

s. 462.3(1) "enterprise crime offence" [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

s. 462.3(1) "enterprise crime offence" (a)(xi) [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

s. 462.31 [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

s. 462.31(1) [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

s. 462.31(1)(a) [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — considered

s. 601(3) — considered

Criminal Code, the Food and Drugs Act and the Narcotic Control Act, Act to amend the, R.S.C. 1985, c. 42 (4th Supp.)

Generally — referred to

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

Generally — referred to

Excise Act, R.S.C. 1985, c. E-14

Generally — referred to

s. 126.2 [en. 1993, c. 25, s. 38] — considered

Food and Drugs Act, R.S.C. 1985, c. F-27

Generally — referred to

s. 163.2 [en. 1993, c. 25, s. 89] — considered

Narcotic Control Act, R.S.C. 1985, c. N-1

Generally — referred to

s. 19.2 [en. R.S.C. 1985, c. 42 (4th Supp.), Sched., s. 12] — considered

APPEAL by Crown from judgment reported at 2002 CarswellQue 318, 1 C.R. (6th) 127, *(sub nom. R. v. Daoust)* 165

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2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

C.C.C. (3d) 123 (Que. C.A.) and from judgment reported at 2002 CarswellQue 322 (Que. C.A.), allowing accused's appeals from conviction on charge of laundering proceeds of crime and substituting acquittals.

POURVOI du ministère public à l'encontre de l'arrêt publié à 2002 CarswellQue 318, 1 C.R. (6th) 127, *(sub nom. R. v. Daoust)* 165 C.C.C. (3d) 123 (C.A. Qué.) et de l'arrêt publié à 2002 CarswellQue 322 (C.A. Qué.), qui ont accueilli les pourvois des accusés à l'encontre des déclarations de culpabilité à l'égard d'accusations de recyclage de produits de la criminalité et ont ordonné l'acquittement des accusés.

***Bastarache J.*:**

I. Introduction

1 The most important issue raised in this appeal is that of the interpretation of divergent provisions of a bilingual statute. In the case before us, we are faced with two versions of s. 462.31 of the *Criminal Code*, R.S.C. 1985, c. C-46. Their meanings are clear, yet irreconcilable:

> **462.31** (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
>
> (*a*) the commission in Canada of an enterprise crime offence or a designated substance offence; or
>
> (*b*) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated substance offence. [Emphasis added.]
>
> **462.31** (1) Est coupable d'une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir sachant ou croyant qu'ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement:
>
> *a*) soit de la perpétration, au Canada, d'une infraction de criminalité organisée ou d'une infraction désignée;
>
> *b*) soit d'un acte ou d'une omission survenu à l'extérieur du Canada qui, au Canada, aurait constitué une infraction de criminalité organisée ou une infraction désignée.

2 The Attorney General of Canada submits that this situation is due to an error and that the Court should give priority to the English version of the *Code*, whose meaning is broader than that of the French version. The Attorney General argues that the legislative history shows that the English version reflects Parliament's true intent. There are several reasons why I cannot accept this position. First, the Court cannot use the history of a clearly drafted statute as a basis for changing it or completely disregarding its meaning. On the contrary, the legislative intent revealed by the statute's history must be one that could reasonably be supported by the text of the statute. Second, under the rules of contextual interpretation, words that could effectively broaden the scope of a penal statute cannot be read in. An accused should be able to read the applicable legislative provisions in each of the two official languages and derive from them an understanding of the limits of his or her liability. Third, the rules of bilingual statutory interpretation prescribe an approach that favours the common meaning of the two versions of an enactment. The common meaning of s. 462.31 *Cr. C.* must be the narrower of the two versions, which is the French version in this particular case. It is therefore the French version that must initially be analysed in relation to Parliament's intent.

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II. Facts

3 In December 1997, the Quebec City police conducted an investigation of second-hand store owners suspected of selling stolen merchandise. As part of the investigation, investigators Tremblay and Gagné were ordered to set up an operation using an undercover officer codenamed "Agent 008" who would offer merchandise he claimed to be stolen to selected merchants.

4 The respondent Claude Daoust owns three pawn shop/second-hand stores, including Argent Comptant, a business located in Quebec City. The respondent Éric Bois is the manager of this establishment. Between December 2 and 5, 1997, the undercover officer went to Argent Comptant on four different occasions to offer merchandise to the respondents Daoust and Bois. The undercover officer would hint he had criminally obtained goods to sell. Disguised so as to give the impression he was a financially disadvantaged person, he approached the respondents on four occasions, offering to sell them two new video cassette recorders, a slightly used video cassette recorder, two new telephones and a new alarm clock. He received a total of $60 for the goods.

5 As none of the merchandise offered and sold by the undercover officer was actually stolen, but had instead come from a merchant who had agreed to lend the goods to the police for the purposes of their investigation, the objective of the operation was to establish if the respondents were laundering merchandise as part of their normal commercial activities while believing, if not knowing for certain, that the goods were stolen. The undercover officer was supposed to offer the merchandise while mentioning that it was "hot" or indicating as much in similar terms such that there could be no doubt that the goods were illegally obtained.

6 According to the officer's notes, the first "sale", that of a used Sony video cassette recorder with remote control, unfolded as follows:

> [TRANSLATION]
>
> -Daoust: "Does it work? "(referring to the video equipment).
>
> -008: "I don't know. It's not mine. It's hot. I have to unload it."
>
> -Daoust: (staring closely at the undercover officer and smiling faintly) "You got any I.D.?"
>
> -008: "Yeah, but don't call the police. I don't want any trouble, O.K.?"
>
> -Daoust: "Well, I can't give you $50 for stuff like that. I'll give you $20 if it works."
>
> -008: "Come on. Give me at least $30. I need the money."
>
> -Daoust: "If it's stolen, $20 and not a penny more."

7 Similar meetings leading to sales occurred over the next three days. The last transaction, one involving a new Sony video cassette recorder, ended with the merchandise being accepted for $5. At that time, the respondent Daoust told the undercover officer that this was the last time they would do business together, to which the respondent Bois added, [TRANSLATION] "We can't always be helping you to steal."

8 In accordance with Quebec City municipal by-law 755, which requires that all transactions be recorded in a register, the transactions between the undercover officer and the respondents were entered in the shop's computer.

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However, the copy of the contract normally given to the client was deliberately torn up, while the respondents kept the originals in their files.

9 Shortly after the final transaction, that is, during the afternoon of December 5, 1997, police officers went to the shop and executed a search warrant to recover the goods from the previous transactions. In two separate cases, the respondents were charged under ss. 141 and 462.31(1)(*a*) *Cr. C.* with compounding an indictable offence and laundering proceeds of crime. The evidence presented at the respondent Daoust's trial, including his testimony, was introduced with consent at the trial of the respondent Bois, who chose not to testify.

III. Judicial History

10 On July 3, 2000, Judge Dionne of the Court of Québec acquitted the respondents of compounding an indictable offence, stating that he was unable to conclude that the respondents had conspired with the undercover officer to conceal an indictable offence they knew or believed had been committed, as required under the offence. The respondents were nevertheless found guilty of laundering proceeds of crime under s. 462.31 *Cr. C.* According to Judge Dionne, the transfer of possession of the property, as evidenced by the respondents' receiving, registering, taking possession of and storing the property, constituted the *actus reus* of the offence.

11 With respect to the *mens rea*, Judge Dionne held that the offence of laundering includes the intent to conceal or convert property, as well as the knowledge or belief that the property was obtained illegally. With regard to the meaning of the word "convert", Judge Dionne stated that the word must be given its ordinary meaning and does not require evidence of stealth (at p. 21):

> [TRANSLATION] We would have expected Parliament to use words such as "disguise", "conceal" or "place beyond reach" rather than "convert" if it had intended to reaffirm the element of stealth. Why should the mental element necessarily be surreptitiousness when changing ill-gotten property already includes a mental element of making the detection of such property difficult?

12 Judge Dionne concluded by affirming that the Crown had proved that the respondents knew or believed that the property had been obtained or derived as a result of the commission of an offence. He drew the following conclusion (at p. 28):

> [TRANSLATION] The evidence as a whole persuades us that the two accused were prepared to accept items for a ridiculously low price despite the dubious origins of the goods. The court is convinced that, under the apparent protection of a by-law requiring them to specify the identity of items purchased, the two accused smelled a bargain and closed their eyes to the dubious origins of the property. [Footnote omitted.]

13 The Quebec Court of Appeal allowed the respondents' appeal and ordered that acquittals be substituted for the convictions entered against the respondents Daoust and Bois ((2002), 165 C.C.C. (3d) 123 (Que. C.A.)).

14 Fish J.A. ruled that the *actus reus* had not been made out in this case, as the respondents, in purchasing the property from the undercover officer, had not transferred the possession of the property they believed to be stolen. In Fish J.A.'s opinion, s. 462.31 is aimed at individuals who, having control or possession of proceeds of crime, commit one of the prohibited acts with the requisite knowledge and intent (at para. 15):

> The Crown's case against Daoust and Bois is that they acted as principals, not as accessories. Thus, while "008" doubtless transferred the possession of the purportedly "hot" property when he sold it to Daoust and Bois, the Crown does not allege that Daoust and Bois thereby aided and abetted "008" in the commission *by him* of an offence under s. 462.31 of the *Criminal Code*. Nor could the Crown do so: "008" committed no offence under that section, since he neither knew nor believed that the property was stolen — indeed, he knew that it was not.

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15 Having concluded that the *actus reus* had not been made out, Fish J.A. nevertheless went on to consider the *mens rea*. With regard to the meaning of the word "convert", he said, at paras. 24-25:

> In its ordinary sense, to "convert" is to "change in form, character or function": *The Canadian Oxford Dictionary*, 1998, p. 309.
>
> That definition corresponds, in my view, to the evident objectives of s. 462.31 of the *Code*: to prevent those who commit enterprise crime offences and designated drug offences from placing the proceeds of their crimes beyond reach or recognition — or difficult to trace, identify or recover — and to punish those who help them to do so.

16 Having adopted this definition of "convert", Fish J.A. could not conclude that the respondents intended to change, transform or alter the merchandise they had purchased, as he was of the opinion that the respondents' intent was to sell the goods, rather than to cover up the crime that supposedly had been committed.

IV. Analysis

A. Particulars of the Indictment

17 Before I begin my analysis, I would like to point out that some of the parties' arguments before this Court concern elements that could have been alleged in the indictment, but were not, and more importantly were not raised at trial or in the Court of Appeal. The Court must, in these circumstances, focus on what in fact was alleged, since the issues are circumscribed by the earlier debate, which dealt exclusively with the fact that the accused allegedly committed the offence of laundering proceeds of crime provided for in s. 462.31 *Cr. C.* and not that they allegedly attempted, aided or abetted that offence.

18 The indictment brought against the accused reads in part as follows:

> [TRANSLATION] 2. In the month of December 1997, at Quebec City, District of Québec, the accused did, in any matter and by any means, transfer the possession of property with the intent to conceal or convert that property, knowing or believing that all or a part of that property was obtained directly or indirectly as a result of the commission in Canada of an enterprise crime offence or a designated substance offence, thereby committing an offence under s. 462.31[(1)](*a*) of the *Criminal Code*.

19 The present discussion must therefore be limited to determining whether the offence was committed by means of a transfer of possession. The Crown was free to particularize the charge differently or to describe it generally, but it was bound by its choice. In Fish J.A.'s opinion, at para. 13, the Crown's specific theory at trial might result from the difference between the English and French versions of 462.31, which I mentioned earlier:

> The English version thus makes it an offence to perform any of the enumerated acts in relation to property that is known or thought to be proceeds of crime *or to otherwise deal with it in any manner and by any means*. The French version, on the other hand, makes it an offence in any manner *to perform the enumerated acts*. This difference can only be harmonized by adopting the narrower French version. And it is perhaps for this reason that the Crown, in drafting the indictments that concern us here, felt constrained to allege one of those enumerated acts — that Daoust and Bois *had transferred* possession of the property sold to them by "008". On the particular facts, I would have expected the Crown, if it felt free to do so, to allege instead, in virtue of the English-language basket clause, that Daoust and Bois *had otherwise dealt with the property in any manner and by any means*. [Underlining added; italics in original.]

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20 Based on the French version of s. 462.31, the Crown was limited with respect to the *actus reus* of which it accused the respondents, as the French version *prima facie* limits the material element of the offence to the acts enumerated therein. According to Fish J.A., if the Crown had wanted to define the alleged offence in a general manner, it should have done so in English, since the French version of s. 462.31, being more narrowly constructed, does not lend itself to the Crown's arguments.

21 Given that the Crown chose to accuse the respondents of transferring the possession of the property, the respondents submit that the Crown must prove that the offence was committed by this means, not by any other. They rely on the decision in *R. v. Saunders*, [1990] 1 S.C.R. 1020 (S.C.C.), in which McLachlin J. (as she then was) wrote, at p. 1023:

> It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in the charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence was thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.

22 It is a well-established legal principle that an accused need only answer the charges as they appear in the indictment and that the Crown has the burden of proving them unless it requests an amendment, which in this case was not done in time. Pursuant to s. 601(3) *Cr. C.*, a court may amend a count in an indictment at any stage of the proceedings provided it is a particular of the offence that is amended: *R. v. Morozuk*, [1986] 1 S.C.R. 31 (S.C.C.) (*per* Lamer J., as he then was); *R. v. Elliott* (1977), [1978] 2 S.C.R. 393 (S.C.C.), at p. 427 (*per* Ritchie J.). However, an amendment to the indictment we are concerned with would not constitute a change in the particulars of the offence. Rather, it would amount to laying a different charge from the one originally brought. At any rate, this Court is certainly not prepared to amend the indictment at this stage of the proceedings.

23 Our analysis should therefore be limited to what is alleged in the indictment and was pleaded at trial. The subject matter of this case, in relation to the *actus reus*, is thus limited to whether the respondents effectively participated in a transfer of possession within the meaning of s. 462.31 *Cr. C.*

B. Actus Reus

24 In light of the inconsistency in the two versions of s. 462.31 with respect to the *actus reus* of the offence, it would be appropriate at this point to briefly address the question of bilingual statutory interpretation. A clarification of the principles of interpretation would help us to better understand the scope of s. 462.31 and the expression "transfers the possession of".

25 Fish J.A. recognized that the English and French versions of s. 462.31 offer differing descriptions of the elements of the offence. In his view, this difference could only be resolved by adopting the French version, which is more restrictive. However, Fish J.A. does not explain his reasons for choosing the French version over the English and does not apply any of the principles of bilingual statutory interpretation enshrined in recent decisions of this Court. It is to this that I will now turn my attention.

(1) Principles of Bilingual Statutory Interpretation

26 The Court has on several occasions discussed how a bilingual statute should be interpreted in cases where there is a discrepancy between the two versions of the same text. For example, in *Schreiber v. Canada (Attorney General)*,

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[2002] 3 S.C.R. 269, 2002 SCC 62 (S.C.C.), at para. 56, LeBel J. wrote:

> A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred; see: Côté, *supra*, at p. 327; and *Tupper v. The Queen*, [1967] S.C.R. 589. Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning: see Côté, *supra*, at p. 327; *R. v. Dubois*, [1935] S.C.R. 378; *Maurice Pollack Ltée v. Comité paritaire du commerce de détail à Québec*, [1946] S.C.R. 343; *Pfizer Co. v. Deputy Minister of National Revenue for Customs and Excise*, [1977] 1 S.C.R. 456, at pp. 464-465; and *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 669.

As well, in *R. v. Mac*, [2002] 1 S.C.R. 856, 2002 SCC 24 (S.C.C.), at para. 5, I stated the following:

> The *Criminal Code* is a bilingual statute of which both the English and French versions are equally authoritative. In his *Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327, Pierre-André Côté reminds us that statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions.

I would also draw attention to the two-step analysis proposed by Professor Côté in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 324, for resolving discordances resulting from divergences between the two versions of a statute:

> Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.

27 There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles: see Côté, *supra*, at p. 327. A purposive and contextual approach is favoured: see, for example, *Bell ExpressVu Ltd. Partnership*, *supra*, at para. 26; *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 8, 2002 SCC 3 (S.C.C.), at para. 27; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), at para. 33.

28 We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 29 (*per* Iacobucci J.). If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions: Côté, *supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: Côté, *supra*, at p. 327; see *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 (S.C.C.), at p. 614; *Kwiatkowsky v. Canada (Minister of Manpower & Immigration)*, [1982] 2 S.C.R. 856 (S.C.C.), at p. 863.

29 If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: *Gravel v. St. Leonard (City)* (1977), [1978] 1 S.C.R. 660 (S.C.C.), at p. 669; *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)* (1975), [1977] 1 S.C.R. 456 (S.C.C.), at pp. 464-65. Professor Côté illustrates this point as follows, at p. 327:

> There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

30 The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent: Côté, *supra*, at pp. 328-329. At this stage, the words of

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Lamer J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1071, are instructive:

> First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

31 Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment. As Iacobucci J. wrote in *Bell ExpressVu Ltd. Partnership*, *supra*, at para. 28: "Other principles of interpretation — such as the strict construction of penal statutes and the *Charter* values presumption — only receive application where there is ambiguity as to the meaning of a provision."

(2) Application to this Case

32 In this case, it is quite simply not possible to say, as the appellant would have us do, that the English text is more consistent with Parliament's intent. In this appeal, we must apply the rules of statutory interpretation to determine whether or not there is an apparent discordance, whether there is a common meaning and, finally, how consistent the common meaning, if there is one, is with Parliament's intent.

(a) Discordance

33 Each version of s. 462.31 *Cr. C.* presents a variation of the offence of laundering proceeds of crime. While the French version simply lists the acts constituting the *actus reus* of the offence, that is, "*utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits - ou en transfère la possession-*", the English version lists these same acts and adds a prohibition against any other dealings with respect to the property or its proceeds. The addition in the English version of the expression "or otherwise deals with" would appear, in effect, to leave the door open to other acts of laundering, thus avoiding the need to provide an exhaustive list.

34 Although the two versions are obviously irreconcilable, given the complete enumeration of the elements of the *actus reus* in the French version and the non-exhaustive enumeration in the English version, both versions taken individually are nevertheless clear, inasmuch as they are not reasonably capable of more than one meaning. Given that the versions are irreconcilable but not individually ambiguous, the next step is to consider their common meaning.

(b) Common Meaning

35 As I have already mentioned, when one of the two versions of a provision of a bilingual statute has a broader meaning than the other, the common meaning of the two versions is normally the one that is derived from the version with a more restricted meaning. This rule is especially relevant in a criminal context, as the accused may, depending on which version he or she reads, form a different conception of the elements of the offence in question.

36 Here, the only possible common meaning is the most restrictive one. This common meaning is easily derived, as the two versions list similar prohibited acts, with the exception of the added phrase which appears in the English version only. Since the English version cannot represent the common meaning, the French version must. Thus, we are restricted to the elements of the *actus reus* enumerated in the French version.

37 As mentioned earlier, it is important to ensure that all accused persons, regardless of the official language in which they read s. 462.31, have the same understanding of the elements of the offence of laundering proceeds of crime. The two versions must therefore publicize exactly the same description of the offence. It would not be fair to propose an interpretation whereby in one language the elements of the *actus reus* would be met, but not in the other. If we adopted the English version, which is broader than the French one, this Court would be making an undue judicial amendment of the statute. For these reasons, the Court must favour the French version.

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(c) Compatibility of the Common Meaning with Parliament's Intent

38 The intervener the Attorney General of Canada argues that the divergence between the two versions of s. 462.31 is the result of a mere oversight on the part of Parliament. According to the Attorney General, the legislative history shows that Parliament's true intent is reflected in the English version of the provision. It is therefore important that our analysis include a brief examination of the provision's legislative history.

39 Section 462.31 *Cr. C.* (formerly s. 420.11) was originally part of Bill C-61, which was enacted by Parliament on January 1, 1989 (S.C. 1988, c. 51 (now R.S.C. 1985, c. 42 (4th Supp.)), s. 2). This provision created, for the first time in Canada, an offence of "laundering proceeds of crime". Bill C-61 also added provisions to the *Narcotic Control Act*, R.S.C. 1985, c. N-1, and the *Food and Drugs Act*, R.S.C. 1985, c. F-27, which both contained separate offences covering the laundering of proceeds of crime in situations in which property or the proceeds of property were derived by committing offences under these Acts. The new provisions of these two Acts mirror the relevant portions of s. 420.11 *Cr. C.* Consequently, the English and French versions of these provisions were not perfectly consistent with each other, that is, the English version contained the expression "or otherwise deals with, in any manner and by any means", while the French version had no equivalent expression. The relevant parts of the two versions of the above-mentioned provisions read as follows (emphasis added):

> **462.31 [420.11]** (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds...
>
> **462.31 [420.11]** (1) Est coupable d'une infraction quelconque - de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir [...]

40 In 1993, the *Excise Act*, R.S.C. 1985, c. E-14, and the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), were amended to add provisions creating an offence of laundering proceeds of crime to cover cases in which the proceeds were derived from the commission of offences under those Acts (S.C. 1993, c. 25, ss. 38 and 89). These provisions were drafted differently from those of the other three Acts and the English and French versions were more consistent with each other. The English version contained the expression "or otherwise deal with, in any manner or by any means", while the French version prohibited the following: "*d'effectuer toutes autres opérations à leur égard*". The relevant portions of s. 126.2 of the *Excise Act* and s. 163.2 of the *Customs Act* read as follows (emphasis added):

> No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner or by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds...
>
> Il est interdit à quiconque d'utiliser, d'envoyer, de livrer à une personne ou à un endroit, de transporter, de modifier ou d'aliéner des biens ou leur produit — ou d'en transférer la possession — ou d'effectuer toutes autres opérations à leur égard, et ce de quelque façon que ce soit, dans l'intention de les cacher ou de les convertir [...]

41 In 1997, the *Narcotics Act* was repealed, as was the part of the *Food and Drugs Act* that contained the offence of laundering proceeds of crime: S.C. 1996, c. 19, ss.94 and 81. They were replaced by the *Controlled Drugs and Substances Act*, which itself included a provision forbidding the laundering of proceeds of crime. As it had done in 1993, Parliament drafted the provision in such a manner as to ensure that the English and French versions were consistent with each other.

42 In 1998 and 2000, Parliament enacted s. 5 of the *Corruption of Public Officials Act*, S.C. 1998, c. 34, and s. 28

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of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. Here again, the English and French versions are concordant.

43 Finally, in 2001, Parliament amended Part XII.2 of the *Criminal Code* (in which s. 462.31 appears), specifically to give the Attorney General of Canada the power to prosecute the laundering of proceeds of crime obtained or derived from a "designated offence". The five other provisions allowing the Attorney General of Canada to prosecute the laundering of proceeds of crime were therefore repealed, namely s. 9 of the *Controlled Drugs and Substances Act*, s. 163.2 of the *Customs Act*, s. 126.2 of the *Excise Act*, s. 5 of the *Corruption of Public Officials Act*, and s. 28 of the *Crimes Against Humanity and War Crimes Act*: S.C. 2001, c. 32, ss. 48, 62, 64, 58 and 60. However, s. 462.31(1) was not amended, so the discrepancy between the English and French versions of this provision remained.

44 We can conclude from the legislative history of the enactments pertaining to the laundering of proceeds of crime that Parliament's true intent was to criminalize all acts ("or otherwise deal with") in relation to the proceeds of crime where the intent is to conceal or convert them. This intent is explicit in the English version of s. 462.31. Nevertheless, the legislative intent revealed by the history must be one that could reasonably be supported by the text of the statute. Such is not the case here. Parliament did not achieve what it intended when it drafted s. 462.31. For this reason, the French version, the one with the narrower meaning, must be favoured. Here, we are concerned with discovering not only the intent that Parliament was pursuing, but also the intent it expressed: *R. v. Cremascoli* (1979), [1980] 1 S.C.R. 976 (S.C.C.), at pp. 994-95.

45 The two versions of s. 462.31 are divergent because of an error or an omission on the part of Parliament, but that does not give this Court the authority to amend a clearly drafted enactment: *R. v. Gaysek*, [1971] S.C.R. 888 (S.C.C.), at p. 895; *Montreal (City) v. ILGWU Centre Inc.* (1971), [1974] S.C.R. 59 (S.C.C.), at p. 66. If this Court did have such authority, an accused could not know the limits of his or her liability.

46 The appellant submits that in *R. v. Tejani* (1999), 138 C.C.C. (3d) 366 (Ont. C.A.), the Ontario Court of Appeal recognized that Parliament's intent in enacting s. 462.31 was to catch every facet of the laundering of proceeds of crime. *Tejani* concerned s. 19.2 of the *Narcotic Control Act*, a provision corresponding to s. 462.31 *Cr. C.*, but in the context of property obtained through the perpetration of drug offences. In that case, Laskin J.A. remarked on the very broad nature of Parliament's purpose: "I think it evident from Bill C-61's origin and purpose, and from the broad language of s. 19.2 [of the *Narcotic Control Act*], that Parliament intended to cast a wide net over the laundering of the proceeds of illicit drug dealing" (para. 26) However, it should be noted that Laskin J.A. referred only to the English version of s. 19.2 of the *Narcotic Control Act* when he inferred the purpose of Bill C-61; he did not attempt to derive a common meaning from the English and French versions. The analysis used in *Tejani* is therefore of no assistance on this issue, in that *Tejani* dealt only with the English version.

47 It therefore follows that the text to be analysed here is the one that allows us to establish the common meaning, that is, the more restrictive of the two versions. Since the two versions are identical, with the exception of an addition in the English version, the French version must prevail for the purposes of this analysis.

(3) Was the Purchase a "Transfer of Possession" Within the Meaning of s. 462.31?

48 The following question now arises: does one "transfer the possession" of property in the context of laundering proceeds of crime if one buys the property with the intention of converting it? The Court of Appeal answered this question in the negative, and I believe its interpretation is the correct one in this case. The Court of Appeal held that s. 462.31, as drafted, does not apply to the receiver of the property (at para. 14):

> Read as a whole, s. 462.31 appears to me to be aimed at the person who, having the control or possession of the proceeds of crime, carries out any of the prohibited activities — uses the proceeds, transfers their possession, transports them, alters them or disposes of them — with the prohibited knowledge and intent, to which I shall

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return presently. [Emphasis added.]

49 Section 462.31 contains a list of acts that are essentially unilateral ones. The "transfer of possession" is the act of the person who has the control or possession of the object and then tries to pass it on to another. This interpretation is compatible with the ordinary meaning of the word "transfer/*transfert*", that is, [TRANSLATION] "[a]ct whereby a person transmits a right to another": *Le Nouveau Petit Robert, dictionnaire alphabétique et analogique de la langue française* (2002); [TRANSLATION] "[t]ransmission of a right from one holder to another": Gérard Cornu, ed., *Vocabulaire juridique* (8th ed. 2000); "[a]ny mode of disposing of or parting with an asset or an interest in an asset": *Black's Law Dictionary* (7th ed. 1999). Although "transfer/*transfert*" necessarily implies a relationship between two persons and that a beneficiary of the transfer is an essential element of carrying it out, the offence is not aimed at the beneficiary. This is demonstrated by the text of s. 462.31 itself, which criminalizes the act of "deliver[ing] to any person or place". This clarification highlights the fact that Parliament intended that this provision apply only to the party originally having control of the property, rather than both parties.

50 The word "transfer" (*transfert*) must therefore be given its ordinary meaning, this despite the presence of the expression "in any manner and by any means" (*de quelque façon que ce soit*) in s. 462.31. The appellant argues that the inclusion of this expression demonstrates Parliament's intent that the terms in s. 462.31, including the word "transfer", be given a large and liberal interpretation. I cannot accept this argument. The words "in any manner and by any means" do not add to the number of activities constituting a transfer of possession. Rather, they qualify the methods by which it is possible to execute the transfer, leaving unanswered the question as to whom this provision is intended to apply. For example, within the meaning of s. 462.31, the transportation of property could include any mode of transportation, be it boat, airplane, car or any other ("in any manner and by any means"). In other words, one of the elements of the *actus reus* enumerated in s. 462.31 must be present, but the manner in which this element is carried out is unimportant. The activities criminalized by this provision all concern the same person, that is, the person who originally has the object in his or her possession and seeks to dispose of it.

51 The appellant also argued that both versions of s. 462.31 show an unequivocal intent to encompass all positive acts committed in relation to criminally obtained property for the purpose of converting or concealing it. However, upon examining the list of prohibited acts in this provision, it would appear that all these acts are of the same nature or category and apply only to the person with control over the property. For example, the verbs "sell" (*vendre*), "give" (*donner*), "exchange" (*échanger*) and "dispose of" (*se départir*) are close in meaning to the enumerated acts. However, the word "purchase" (*achat*) has an altogether different meaning, so this Court could not interpret a series of terms as including that word when it does not share their common meaning. For this reason, buying or receiving property or similar acts involving the person who accepts or acquires the property do not constitute elements of the offence of laundering proceeds of crime. This is an application of the *noscitur a sociis* rule. According to that rule, the meaning of a term may be revealed by its association with other terms where the latter may not be read in isolation: Côté, *supra*, at p. 313, and *New Brunswick (Minister of Municipal Affairs) v. Canaport Ltd.* (1975), [1976] 2 S.C.R. 599 (S.C.C.), at p. 604.

52 This interpretation is supported by a reading of s. 354 *Cr. C.*, which already prohibits the possession of criminally obtained property:

> **354**. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from
>
> (*a*) the commission in Canada of an offence punishable by indictment; or
>
> (*b*) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

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This provision is aimed specifically at persons who receive or accept property despite knowing it to be of illicit origin. It would thus be redundant to interpret the word "*transfert*" in s. 462.31 as including the act of purchasing or possessing property when another provision of the *Criminal Code* already prohibits that act. Although a statute may be redundant, the contrary is presumed: Côté, *supra*, at p. 278; *R. v. Chartrand*, [1994] 2 S.C.R. 864 (S.C.C.). It must therefore be presumed that s. 462.31 criminalizes different behaviours, since Parliament does not speak in vain: *Bell ExpressVu Ltd. Partnership*, *supra*, at para. 37; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at p. 617; *Québec (Procureur General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831 (S.C.C.), at p. 838.

53 In the present case, the evidence shows that the respondents bought the merchandise believing it to be stolen. However, in light of the foregoing, the act of purchasing this merchandise is not the equivalent of "transfers the possession of", which is the element of the offence specified in the indictment and which the Crown must prove. For this reason, it is my opinion that the respondents did not transfer the possession of the property within the meaning of s. 462.31.

(4) Enterprise Crime

54 Section 462.31, as it read at the time the respondents were charged, required proof that an offence referred to in a paragraph had been committed, namely, an "enterprise crime offence" or a "designated substance offence". Since, at the time charges were brought against the respondents, "designated offence" only included offences under the *Controlled Drugs and Substances Act*, the respondents argue that the final element of the *actus reus* of which they stand accused must be laundering property or proceeds of property derived from an enterprise crime offence. Therefore, they submit not only that the property or its proceeds must come from the commission of an offence, but also that the offence must have been committed by a criminal organization.

55 Here, the respondents advance the same argument that was rejected by the trial judge, who was of the opinion that an "enterprise crime offence" does not incorporate the element of organization implied by the words "*criminalité organisée*" and therefore does not necessarily have to be committed by a criminal organization. The respondents' argument was also rejected by the Court of Appeal, which explained its reasoning as follows:

> Some might think it curious, bearing in mind its French equivalent ("une infraction de criminalité organisée") that "enterprise crime offence" should include, as it does pursuant to s. 462.3 of the *Code*, any one of more than 50 different offences, even if committed only by a single offender acting alone. And the specified offences range from paying or accepting secret commissions to murder, theft, fraud and uttering forged documents. *In addition*, "entreprise crime offence" includes any indictable offence under any Act of Parliament "committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is imprisonment for five years or more". [Emphasis in original.]

At the time, s. 462.3 of the *Criminal Code* specifically identified offences deemed to be "enterprise crime offences". Since theft was one such offence (see s. 462.3 "enterprise crime offence" (*a*)(xi)), the statutory conditions were met in this case, regardless of whether the activity was related to a criminal organization or not.

C. Mens Rea

(1) Does the Term "Convert" Require Intent to Conceal?

56 The *mens rea* of the offence of laundering proceeds of crime has two elements: (1) intent to conceal or convert property or proceeds of property, and (2) knowledge or belief that the property or proceeds were derived from an enterprise crime offence or a designated substance offence. The issue raised in the present case hinges on the meaning of the word "convert".

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57 The respondents rely on the following conclusions of the Court of Appeal to argue that proof of intent to conceal the proceeds is required to establish *mens rea* (at para. 25):

> That definition corresponds, in my view, to the evident objectives of s. 462.31 of the *Code*: to prevent those who commit enterprise crime offences and designated drug offences from placing the proceeds of their crimes beyond reach or recognition — or difficult to trace, identify or recover — and to punish those who help them to do so. [Emphasis added.]

In this Court, the parties pointed out that the Court of Appeal held that an intent to disguise must be proved to establish *mens rea* under s. 462.31 *Cr. C.* This seems to be in keeping with the trend in Quebec case law, according to which "intent to convert", like "intent to conceal", requires an element of concealment or transformation for the purpose of making the proceeds undetectable. I am not convinced that Fish J.A. really adopted this point of view since he does not refer to the intent to conceal when he deals with the question in para. 26 of his reasons. Be that as it may, given the uncertainty with respect to the Court of Appeal's conclusions and the divergent interpretations the courts have given to this expression, I shall first examine the case law concerning the interpretation of the expression "intent to convert".

(a) Quebec Court of Appeal: Bouchard

58 In *R. c. Bouchard*, [2000] R.J.Q. 364 (Que. C.A.), the Quebec Court of Appeal ruled that "intent to convert" requires an element of concealment or transformation. More specifically, it held that [TRANSLATION] "for the actions of the police to have been illegal, it would have to have been shown that there was an intent to hide the criminal origins of the currency" (para. 60).

59 It is helpful to examine the context in which the decision in *Bouchard* was rendered to fully understand the reasoning behind it. Unlike the present case, which concerns charges of laundering the proceeds of an individual's crime, *Bouchard* dealt with an application brought by the accused in relation to the illegality of a police investigation in which police officers operated a currency exchange office to identify criminal organizations engaged in importing and trafficking in narcotics. In *Bouchard*, proof of an intent to hide the criminal origins of the converted money had been presented to exclude the possibility that the police involved in the operation were not in turn found guilty. I note in this regard that amendments have since been made to s. 25.1(8) of the *Criminal Code* authorizing, on certain conditions, the commission of "an act or omission — or ... directing the commission of an act or omission ... — that would otherwise constitute an offence".

60 The interpretation given to the word "convert" by the Court of Appeal in that case was supported by the decision in *R. c. Bouchard* (1995), 45 C.R. (4th) 55 (Que. S.C.), in which Pinard J. of the Quebec Superior Court dealt with Mr. Morielli's preliminary application for a stay of proceedings. At para. 29, Pinard J. tried to relate "intent to covert" to "intent to conceal" to arrive at a common intent to conceal the origin of the property:

> [TRANSLATION] In every dictionary, the usual meaning of the word "convert" is to change something into something else or transform it. In relation to the word "conceal", and in the general context of this section, the word "convert" could only mean to transform property so as to hide its origins.

It is true that the *noscitur a sociis* rule, which we applied earlier, allows us to determine the meaning of a term through its relation to other terms. However, this principle is normally applied when interpreting terms in an enumeration: Côté, *supra*, at p. 313; see also *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.), at para. 195.

61 In the present case, the words "conceal" and "convert" are not part of a list. On the contrary, they are two distinct terms with distinct meanings. This is demonstrated by Parliament's use of the expression "with intent to

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conceal or convert", as the use of the word "or" shows an intent to distinguish the two terms from each other. For this reason, these two terms should not be read together, and the *noscitur a sociis* rule does not apply.

(b) Ontario Court of Appeal: Tejani

62 In *Tejani*, *supra*, the Ontario Court of Appeal ruled that the term "convert" does not require intent to conceal or disguise the illicit origin of property. According to the Court of Appeal, the courts should not read into the *mens rea* of the offence of money laundering an intent that is required only in the case of someone accused of having acted with an "intent to conceal". Laskin J.A, was of the opinion, at paras. 28 and 30, that the term "convert" does not have the same meaning as the word "conceal":

> The words "conceal" and "convert" are not synonymous. Conceal does mean to hide. But convert has a broader meaning; it means to change or transform.
>
> . . . . .
>
> Absent a good reason, I do not think that the court should read words into a criminal statute. I do not find any good reason to read the word "disguise" into s. 19.2. The section is not ambiguous and, as drafted, gives effect to what I consider to be Parliament's obvious intention.

It would be redundant for the expression "convert" in s. 462.31 to mean "conceal", as that term is already found in the wording of the provision. Moreover, as Peter M. German points out in *Proceeds of Crime: The Criminal Law, Related Statutes, Regulations and Agreements* (1998), a parliamentary committee responsible for studying Bill C-61 had rejected a proposal to replace the words "conceal or convert" with "disguise".

63 I am therefore of the opinion that the interpretation given to "intent to covert" by the Ontario Court of Appeal in *Tejani*, *supra*, is the correct one. The verb "to convert", in my view, cannot be given the meaning of "disguise" or "conceal" unless there is an express indication to that effect in the enactment. Absent this, the term "convert" must be given its ordinary, literal meaning. While Parliament might have, in enacting s. 462.31, intended to prohibit acts to disguise or conceal the illicit origins of property or its proceeds, this was only a secondary purpose that was part of a much broader one, that is, to ensure that crime does not pay: *Québec (Procureur général) c. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72 (S.C.C.), at para. 25. Section 462.31 has a broad deterrent effect, in that it is designed to prevent offenders from profiting from their crimes or from engaging in illegal activities, an objective that has nothing to do with disguising the origins of property or its proceeds.

64 Moreover, to read an intent to disguise into "convert" would mean that the offence of laundering proceeds of crime would apply only to clandestine transactions, while leaving the same acts, if committed openly, unpunished. This would be an unreasonable result, particularly in this case, where the evidence shows, as the Court of Appeal recognized at para. 21, that the respondents did not attempt to conceal or disguise the property they had purchased:

> ...the Crown concedes that there is no basis whatever for concluding that Daoust and Bois intended to "conceal" what they had bought. On the contrary, it appears that they intended to sell it openly in their pawnshop.

Given that the respondents bought the merchandise believing it to be stolen and made no attempt to disguise its origins, even recording the purchases in their register, the Court of Appeal concluded that they did not have the intent required to commit the offence of laundering proceeds of crime. Despite the air of legality the respondents gave to the transactions by recording the date of the purchase, as well as the name and address of the seller, in the register in compliance with municipal by-laws, the acts committed are nonetheless as illegal as if they had tried to conceal them. Even if, as the trial judge had indicated, the respondents did not [TRANSLATION] "intend to camouflage a crime" (p. 15 (emphasis added)), they still intended to commit it.

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2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

65 In short, I believe Parliament's choice of words is indicative of its intention to forbid "conversion" pure and simple, thereby ensuring that those who convert property they know or believe to have illicit origins, regardless of whether they try to conceal it or not, do not profit from it. I am therefore of the opinion that Parliament's intent and purpose in enacting s. 462.31 favours an interpretation of the word "convert" that does not include an intent to disguise. The interpretation given by the Quebec Court of Appeal to the term "convert" is too narrow and excludes from the scope of s. 462.31 activities that Parliament intended to prohibit.

D. Attempting, Aiding and Abetting

66 The appellant asks this Court, in the event it decides that the purchase does not constitute a "transfer of possession" within the meaning of the *actus reus* under s. 462.31, to substitute a verdict of guilty of attempting to commit the offence of laundering proceeds of crime under s. 462.31 *Cr. C.*, thereby finding that the respondents had the required *mens rea* for the offence of laundering in buying property they believed to be stolen with the intent to convert it. We cannot assent to that request.

67 As I mentioned at the beginning of my analysis, this Court's analysis is limited in the present case by the theory advanced by the Crown at trial. As Fish J.A. remarked, the Crown had, at trial, argued that the accused were the principals to the offence of laundering. The Crown had not alleged that a crime had been committed because the respondents aided the seller, not had it asked that a conviction for attempted laundering be substituted. As Fish J.A. stated, at paras. 15-16:

> The Crown's case against Daoust and Bois is that they acted as principals, not accessories. Thus, while "008" doubtless transferred the possession of the purportedly "hot" property when he sold it to Daoust and Bois, the Crown does not allege that Daoust and Bois thereby aided and abetted "008" in the commission *by him* of an offence under s. 462.31 of the *Criminal Code*. Nor could the Crown do so: "008" committed no offence under that section, since he neither knew nor believed that the property was stolen — indeed, he knew that it was not.
>
> Moreover, the Crown has not asked us to consider a conviction for attempt.

68 If Fish J.A. had examined the question of attempt, he would have faced two problems. The first problem is the type of attempt alleged by the appellant, that is, whether the respondents committed an attempted laundering of proceeds of crime or an attempt to aid or abet the seller's own commission of the offence. The second problem is one of proximity, that is, whether the acts committed by the respondents were "act[s] more than merely preparatory taken in furtherance of the attempt" (*United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), at para. 50) and formed part of the same transaction as the main offence: *R. v. Poole*, [1997] B.C.J. No. 957 (B.C. C.A.), at para. 35. The appellant submits that, notwithstanding these problems, because of the evidence that the respondents bought the property, there should be a presumption of fact to the effect that the respondents would inevitably resell the property, making them at the very least guilty of attempt.

69 As I have already said, however, if attempt were to be considered in this Court, it would have to be considered in light of the wording of the charge, that is, an attempt to "transfer the possession" of the property. But none of the arguments put forward by the parties at trial or in the Court of Appeal address this issue. The Court may not, now, explore alternative theories of guilt. Since attempt was not alleged and was not pleaded by the parties, this Court cannot fall back on a new charge that has never been supported by an analysis or arguments until now. It was only before this Court that the appellant, for the first time, suggested an amendment to the indictment. I have already explained why this Court cannot amend the indictment at this stage of the proceedings.

70 I would point out in closing that the most important point to remember in this regard is that s. 601(3) *Cr. C.* only permits a court to amend a count in relation to a particular of the offence: *Morozuk*, *supra*; *Elliott*, *supra*, at p. 427

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2004 CarswellQue 138, (sub nom. R. v. Daoust) 2004 SCC 6, 180 C.C.C. (3d) 449, 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, 316 N.R. 203, [2004] 1 S.C.R. 217, REJB 2004-53612, J.E. 2004-449

(*per* Ritchie J.). Amending the count in the present case, which referred specifically to the transfer of possession, it must be recalled, to substitute attempt to commit an offence not specified or defined in accordance with the English version of the provision, would not be a change in particulars, but rather of the act itself of which the respondents stand accused. To allow the Crown to make out a different offence would infringe on the accused's right "to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial": *R. v. Côté* (1977), [1978] 1 S.C.R. 8 (S.C.C.), at p. 13. When, as in the present case, the indictment refers to a specific offence, the accused must not be misled.

V. Conclusion

71 I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

FN* A corrigendum issued by the court on February 13, 2004 has been incorporated herein.

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TAB 4

1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

Elliott v. R. (No. 2)

Elliott v. R. (No. 2)

Supreme Court of Canada

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpre JJ.

Judgment: December 20, 1977

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Proceedings: reversed *R. v. Elliott*, 1976 CarswellBC 176, [1976] 4 W.W.R. 285, 40 C.R.N.S. 261 ((B.C. C.A.))

Counsel: *P.C.P. Thompson* and *J.A.D. Bohun*, for appellant.

S.M. Froomkin, Q.C., and *R. Leclaire*, for the Crown.

Subject: Criminal

Criminal Law --- Defences — Res judicata.

Criminal Law --- Compelling appearance of accused — Indictment — Motion to amend indictment — Powers of court.

Criminal Law --- Compelling appearance of accused — Indictment — Motion to amend indictment — Grounds — Where proposed amendment charging different offence.

Criminal Law --- Appeals — Appeal of indictable offence — Appeal of conviction or acquittal — Procedure on appeal — Amending indictment.

Criminal law — Amendment of indictment — Court of appeal having power to amend and direct new trial on amended charge — The Food and Drugs Act, R.S.C. 1970, c. F-27, ss. 40, 42, 43 — The Criminal Code, R.S.C. 1970, c. C-34, ss. 496, 529 [am. 1974-75-76, c. 105, s. 29], 605(1)(a), 610(3), 613(4) [am. 1974-75-76, c. 93, s. 75], (8).

The appellant appealed from a judgment of the British Columbia Court of Appeal, which had amended an indictment, set aside an acquittal and directed a new trial on the charge as amended. The appellant was charged with conspiracy to traffic in a restricted drug (MDA), trafficking in a restricted drug (MDA), and having in his possession a restricted drug (MDA). He was acquitted on the first and third counts and convicted on the second. He appealed his conviction on the second count and was acquitted by the British Columbia Court of Appeal [[1976] 4 W.W.R. 285] on the ground

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that the substance in his possession was not MDA but a salt of MDA, the Court of Appeal being satisfied that in law, under s. 40 of the Food and Drugs Act, trafficking in the salt constituted a separate offence, which had not been charged in the indictment. The Crown did not request an amendment of the indictment.

Six weeks later a differently composed British Columbia Court of Appeal heard the Crown's appeal of the acquittal on the charge of possession. The Court of Appeal, holding that there had been a failure to allege a particular of the offence which was capable of being added by amendment, ordered the amendment of the charge to include the words "a salt of" MDA. The accused was convicted, and he appealed on the ground, inter alia, that the Court of Appeal had no power to amend an indictment so as to conform with the evidence.

Per Ritchie J. (Martland, Judson, Pigeon, Beetz and de Grandpre JJ. concurring):

Held, the appeal was dismissed. The powers granted by s. 613(8) of the Criminal Code were not to be narrowly construed, and the power to "make any order, in addition, which justice requires" meant to make any additional order which justice required whether or not the order for a new trial was dependent upon the additional order. The amendment did not charge a new offence as it was no more than a particularization of an ingredient of the main charge which was made necessary by the evidence which the court had already accepted and which had in great measure been conceded by the accused; the accused was not in any way misled by the fact that the salt was not mentioned in particulars. *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 referred to.

Laskin C.J.C. (dissenting) (Spence J. concurring, Dickson J. concurring in part):

The specification of a particular drug in the charge made proof thereof an essential element of the offence, and the amendment, in substituting another drug, amounted to a charge of a different offence. Neither s. 610 nor s. 613(8) gave a court of appeal the power to order an accused to be retried on a charge different from the one originally laid and on which he was originally charged. The proper course was to leave it to the trial judge on a new trial to decide whether an amendment should be made. It is only when a direction of an acquittal or of a new trial has make "any order, in addition, as justice requires." *Kienapple v. R.*, supra; *R. v. Lacelle* (1905), 6 O.W.R. 911, 1905 CarswellOnt 673, 11 O.L.R. 74, 10 C.C.C. 229 (Ont. C.A.); *R. v. Kerr* (1922), 53 O.L.R. 228 (C.A.); *Yanovitch v. R.* (1958), 28 C.R. 220 (Que. C.A.); *Dupont v. R.* (1958), 28 C.R. 146, 123 C.C.C. 386 (Que. C.A.); *R. v. Elliott*, [1970] 2 O.R. 102, [1970] 3 C.C.C. 233 (Ont. C.A.); *R. v. Cohen* (1912), 22 O.W.R. 456, 1912 CarswellOnt 351, 26 O.L.R. 497, 19 C.C.C. 428, 5 D.L.R. 437 (Ont. C.A.) ; *R. v. Hollman* (1962), 37 W.W.R. 337, 37 C.R. 208, 132 C.C.C. 257 (Alta. C.A.); *R. v. Robinson*, [1917] 2 K.B. 108, 12 Cr. App. R. 226; *R. v. Burns* (1920), 20 S.R. (N.S.W.) 351; *R. v. Danyleyko* (1962), 39 W.W.R. 271, 38 C.R. 175, 133 C.C.C. 224 (Y.T. C.A.); *R. v. McNutt*, 41 W.W.R. 143, 39 C.R. 338, [1963] 3 C.C.C. 150 (C.A.); *R. v. More* (1959), 28 W.W.R. 562, 31 C.R. 59, 124 C.C.C. 140 (B.C. C.A.); *R. v. Austin*, [1955] O.W.N. 882, 22 C.R. 269, 113 C.C.C. 95 (C.A.); *R. v. Wixalbrown*, 43 W.W.R. 449, 41 C.R. 113, [1964] 1 C.C.C. 29 (B.C. C.A.); *Kissick v. R.*, [1952] 1 S.C.R. 343, 14 C.R. 1, 102 C.C.C. 129; *R. v. Breland*, 47 W.W.R. 558, 43 C.R. 335, [1964] 3 C.C.C. 370 (B.C. C.A.); *Morin v. R.* (1966), 48 C.R. 303 (Que. C.A.); *R. v. Pearson* (1972), 6 C.C.C. (2d) 17 (Que. C.A.); *R. v. Christiansen* (1973), 23 C.R.N.S. 229, 13 C.C.C. (2d) 504, 6 N.B.R. (2d) 810 (C.A.); *R. v. Hunt* (1973), 16 C.C.C. (2d) 382 (B.C. C.A.); *R. v. Major* (1976), 25 C.C.C. (2d) 62, 10 N.S.R. (2d) 348, reversed [1977] S.C.R. 826, 27 C.C.C. (2d) 239, 8 N.R. 210, 14 N.S.R. (2d) 704; *R. v. Leclair*, [1956] O.W.N. 336, 23 C.R. 216, 115 C.C.C. 297 (C.A.); *R. v. Côté*, [1977] 2 W.W.R. 174, 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752, 3 N.R. 271, reversing [1975] W.W.D. 59, 21 C.C.C. (2d) 474; *R. v. Vallee*, 67 W.W.R. 449, 6 C.R.N.S. 62, [1969] 3 C.C.C. 293 (B.C. C.A.); *Welch v. R.*, [1950] S.C.R. 412, 10 C.R. 97, 97 C.C.C. 177, [1950] 3 D.L.R. 641; *R. v. Pascal*, [1949] 2 W.W.R. 849, 8 C.R. 437, 95 C.C.C. 288 (B.C. C.A.); *R. v. Kelso*, [1953] O.R. 413, 16 C.R. 263, 105 C.C.C. 305 (C.A.); *R. v. Robertson*, [1954] O.W.N. 164, 18 C.R. 7, 107 C.C.C. 400 (C.A.); *R. v. Popoff* (No. 2) (1960), 33 W.W.R. 400, 34 C.R. 230, 129 C.C.C. 250 (B.C. C.A.); *R. v. Gibson* (1889), 16 O.R. 704; *R. v. Garland* (1869), 11 Cox. C.C. 224; *R. v. Rooney* (1962), 132 C.C.C. 190, 43 M.P.R. 193; *Budovitch v. R.* (1969), 8 C.R.N.S. 280, [1970] 4 C.C.C. 156, 1 N.B.R. (2d) 825 (C.A.) referred to.

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1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

Ritchie J. **(*Martland, Judson, Pigeon, Beetz* and *de Grandpre JJ.* concurring):**

1 The appellant and one Arthur James Williams were charged together on an indictment dated 22nd October 1974 with the following offences:

> 1. THAT in or about various places in the County of Nanaimo, and elsewhere, in the Province of British Columbia, between on or about the 23rd day of August, A.D. 1972 and on or about the 21st day of December, A.D. 1973, they and Stuart Hunter Elliott, Lois Phoebe Elliott, Jerry Dean Elliott, Myron Zarry, Shirley Ferguson, Ingrid Elliott, unlawfully did conspire together the one with the other or others of them, and persons unknown to commit the indictable offence of trafficking in a restricted drug, to wit, 3, 4, Methylenedioxyamphetamine (MDA) contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.
>
> 2. THAT in or about various places in the County of Nanaimo, and elsewhere, in the Province of British Columbia, between on or about the 23rd day of August, A.D. 1972 and on or about the 21st day of December, A.D. 1973 they did unlawfully traffic in a restricted drug, to wit; 3, 4, Methylenedioxyamphetamine (MDA) contrary to the form of statute in such case made and provided and against the peace of our Lady, the Queen and her Crown and Dignity.
>
> 3. THAT in the County of Nanaimo, Province of British Columbia on or about the 17th day of December A.D. 1973 they did unlawfully have in their possession a restricted drug, to wit; 3, 4 Methylenedioxyamphetamine (MDA) for the purpose of trafficking contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

2 At the trial before Cashman Co. Ct. J., both accused were acquitted on the first count of this indictment; the appellant alone was convicted on the second count, but acquitted on the third. The learned trial judge entered the latter acquittal on the ground that he had already convicted the appellant of "trafficking" on the second count and that the offences charged in these two counts were so intermingled that he could not distinguish the one from the other; he therefore invoked the judgment of this court in *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322, and thus concluded that the matter was res judicata.

3 When the appellant appealed his conviction on the second count, the Court of Appeal directed an acquittal on the ground that, although it had been proved that the appellant had substantial quantities of a salt designated MDA hydrochloride in his possession for the purpose of sale and distribution, it was not shown that he was in possession of MDA itself for the purpose of trafficking or otherwise [[1976] 4 W.W.R. 285].

4 All the counts in the indictment were laid under the provisions of the Food and Drugs Act, R.S.C. 1970, c. F-27, s. 40 of which defines a "restricted drug" as including "methylenedioxyamphetamine (MDA) or any salt thereof." The Court of Appeal, being satisfied that trafficking in the salt constituted a separate offence which was not charged in the indictment, allowed the appellant's appeal.

5 In appealing the verdict of acquittal on the third count, the Crown applied to amend the charge by adding the words "a salt of" prior to the words "3, 4, Methylenedioxyamphetamine" so that the allegation would comply with the facts as disclosed by the evidence and found by the Court of Appeal in the appeal against conviction on count 2. This application was granted and the court ordered "that the appeal against acquittal be allowed, the acquittal set aside and a new trial ordered on the indictment as amended." Judgment on this application was rendered on behalf of the court by Maclean J.A., who had presided at the appeal from the conviction on the second count, and, as I have said, it is clear that the Court of Appeal in disposing of that count treated the charge of being in possession of MDA and being in possession of a salt thereof as two separate charges, although McIntyre J.A., speaking for the majority of the court, clearly indicated that he regarded the designation of "MDA" in the charge as a "particular," and would have considered

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an amendment appropriate after hearing the appeal, had one been sought.

6 In considering the third count, however, the Court of Appeal, differently constituted, appears to have recognized that the charge was that the accused "did unlawfully have in their possession a restricted drug ... for the purpose of trafficking" and that the failure to allege possession of "a salt of MDA" constituted a failure to allege "a particular" of the offence which was capable of being added by way of amendment in order to conform to the evidence which the court had accepted in disposing of count 2.

7 The latter amendment did not, in my opinion, have the effect of charging a new offence as it did no more than specify a particular of the offence which had already been charged. If I thought the amendment to be tantamount to the charge of a different offence from that contained in the original count, other considerations might apply; but what we have here is a particularization of an ingredient of the main charge which was made necessary by the evidence which the court had already accepted and which had in fact been in great measure conceded by the appellant.

8 Maclean J.A.'s judgment on this application is very brief, and I reproduce it in full:

> In this case the Crown applies for an amendment of the indictment some considerable time after conclusion of the trial, applying to this court rather than to the court below.
>
> In my view the ends of justice require that the amendment in this case be granted and, in my view, no substantial wrong would be suffered thereby by the accused person.
>
> I would accordingly allow the amendment of the third count in the indictment, allow the appeal of the Crown, set aside the acquittal and direct a new trial on the third count as amended.

9 It is from this decision and the order granted pursuant thereto that the appellant now appeals alleging

> (1) That, as the trial judge had found count 3 to be indistinguishable from count 2, it followed that by acquitting the appellant with respect to count 2 the Court of Appeal had necessarily disposed of the Crown's appeal on count 3 and that the Court of Appeal lacked jurisdiction to entertain the Crown's appeal on this count (*Kienapple v. R.*, supra, was cited in support of this contention);
>
> (2) That proceedings by way of appeal relating to several counts in an indictment which had been tried together cannot be severed by the Crown in the court of appeal;
>
> (3) That there is no power in the court of appeal to amend an indictment so as to conform with the evidence, this power being limited to the trial court by reason of ss. 529 [am. 1974-75-76, c. 105, s. 29], 610 and 613 [am. 1974-75-76, c. 93, s. 75] of the Criminal Code, R.S.C. 1970, c. C-34.

10 In acquitting the appellant on count 2, the Court of Appeal did not, in my view, dispose of the third count; it did, on the other hand, dispose of the reason given by the trial judge for his acquittal on that count. It will be observed that the gravamen of the offence under these counts is in the one case that the accused did "unlawfully traffic in a restricted drug" and, in the other, that they did "unlawfully have in their possession a restricted drug for the purpose of trafficking." The whole gist of the decision in the Court of Appeal on count 2 was that, although the appellant was guilty of having possession of a restricted drug (a salt of MDA) for the purpose of trafficking, the salt was not a drug specified in the particulars of the indictment. It remained for the Crown to seek an order amending count 3 of the indictment so as to conform to the evidence. Far from having been disposed of by the appellant's acquittal by the Court of Appeal on count 2, the Crown's appeal from the acquittal on count 3 had not then been heard by the court, and it was open to the Crown to pursue it.

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11 Having found that the appellant was in fact in possession of a restricted drug (a salt of MDA) for the purpose of traffick ing, Maclean J.A. indicated that he would have been disposed to allow an amendment to the second count of the indictment even after the hearing of the appeal. The fact that the Crown did not seek such an amendment in no way precluded it from applying to amend count 3 so as to conform to the evidence described in McIntyre J.A.'s reasons for judgment. The case of *Kienapple* does not appear to me to have any application in this situation as that case was concerned essentially with the proposition that an accused cannot be convicted twice for the same offence.

12 The second ground of appeal advanced on behalf of the appellant to the effect that counts in an indictment cannot be severed in the court of appeal appears to me to overlook the course of proceedings at trial in the present case. Here the learned trial judge disposed of the first and second counts by a judgment rendered on 31st january 1975 and only then proceeded to consider the third count against Elliott alone (a stay of proceedings having been entered with respect to Williams). The third count was thus effectively severed from counts 1 and 2 by the trial judge, who proceeded to consider that count separately and to dispose of it by a judgment dated 24th February 1975.

13 In so doing, the learned trial judge purported to act in accordance with s. 43 of the Food and Drugs Act, and it therefore appears to me to be desirable to consider the following provisions of that statute:

> 42.(1) No person shall traffic in a restricted drug or any substance represented or held out by him to be a restricted drug.
>
> (2) No person shall have in his possession any restricted drug for the purpose of trafficking ...
>
> 43.(1) In any prosecution for a violation of subsection 42(2), if the accused does not plead guilty, the trial shall proceed as if the issue to be tried is whether the accused was in possession of a restricted drug contrary to subsection 41(1).
>
> (2) If, pursuant to subsection (1), the court finds that the accused was not in possession of a restricted drug contrary to subsection 41(1), he shall be acquitted, but, if the court finds that the accused was in possession of a restricted drug contrary to subsection 41(1), he shall be given an opportunity of establishing that he was not in possession of the restricted drug for the purpose of trafficking and thereafter the prosecu tor shall be given an opportunity of adducing evidence to the contrary.

14 In purported compliance with these provisions, Cashman Co. Ct. J. made the following statement in his judgment on the third count:

> As required by s. 43 of the Food and Drugs Act ... I made a finding that the accused Elliott was in possession of MDA on 17th December 1973.
>
> It was then agreed by counsel that I should make findings on counts 1 and 2 with respect to each accused on these counts before the accused Elliott be given an opportunity to establish that he was not in possession of MDA for the purpose of trafficking.

Later in his judgment the learned trial judge reasoned as follows:

> If the accused was before me on a charge of possession for the purpose of trafficking in MDA and that was the only charge before me, then in the circumstances in which the MDA was found I would have no difficulty in concluding it to be a fair inference from the evidence that the accused had that quantity of MDA for the purpose of physically making MDA available to other persons.

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15 And he went on to say:

> The question is not whether the accused can be convicted of possession for the purpose of trafficking in MDA in the circumstances of this case but whether he should as a matter of law be convicted of that offence, he having been convicted on the same evidence of trafficking in MDA.

16 He then concluded:

> In my opinion the two offences charged here in counts 2 and 3 are so intermingled that I cannot say that one is distinct from the other.
>
> It is my view that in the circumstances here, were I to convict the accused of both offences, I would in reality be convicting the accused twice of the same offence.
>
> In *Kienapple v. R.*, at p. 7, Laskin J. said this:
>
> > In my view, the term res judicata best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences.'
> >
> > Accordingly I find that I cannot convict the accused Elliott on count 3 and I make that finding notwithstanding that during the course of the trial pursuant to s. 43 I found the accused to be in possession of MDA. My inability to convict the accused Elliott is not due to a matter of fact but rather to a matter of law for the reasons stated above.

17 As I have pointed out, the Court of Appeal has found that the appellant was in possession of a restricted drug (a salt of MDA) within the meaning of s.41(1) of the Food and Drugs Act, and the effect of the amendment granted by Maclean J.A. is to give the appellant "an opportunity of establishing that he was not in possession of the restricted drug for the purpose of traficking" as provided by s.43(2) of the Food and Drugs Act.

18 In my opinion the only issue before this court on the present appeal is whether the Court of Appeal exceeded its powers when it amended the third count of the indictment in such fashion as to conform to the evidence by adding a particular which had not been included in that count as originally drawn, upon which the appellant had been acquitted. Having regard to the extensive activities which the appellant was found to have been conducting in the manufacture of MDA hydrochloride, I do not think that it can be suggested that the appellant was in any way misled by the fact that that salt was not mentioned in the particulars. He knew in any event that he was being charged with possession of a restricted drug for the purpose of trafficking.

19 In directing a new trial, Maclean J.A. incorporated the amendment to the information in his order as he felt that the ends of justice required him to do.

20 In granting this order it seems to me to be plain that the Court of Appeal was acting pursuant to the provisions of s. 613(4)(*b*) and (8), which provides as follows:

> (4) Where an appeal is from an acquittal the court of appeal may ...
>
> (*b*) allow the appeal, set aside the verdict and
>
> (i) order a new trial ...

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> (8) Where a court of appeal exercises any of the powers conferred by subsection ... (4) ... it may make any order, in addition, that justice requires.

21 It was contended on behalf of the appellant that the order for a new trial could not have been made unless the amend ment had been granted and that the amendment was therefore not an order "in addition" to the exercise of the court's power under subs. (4)(*b*)(i), but rather that it was a prerequisite to the granting of a new trial.

22 In my view, when Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to "make any order, in addition, which justice requires," it must be taken as having authorized that court under those circumstances to make *any additional order* which the ends of justice require whether the order for a new trial is dependent upon the additional order or not. I do not think that the wide powers conferred on the Court of Appeal by s. 613(8) are to be narrowly construed, but rather that they are designed to ensure that the requirements of the ends of justice are met and are to be liberally construed in light of that overriding consideration.

23 In ordering a new trial it would normally be undesirable to comment on the evidence, but I think that in this case the concessions made by the appellant on his appeal are relevant as indicating the material of which the court must have been aware in determining that the ends of justice required a new trial on the third count.

24 In the course of his reasons for judgment in the appeal on the second count, McIntyre J.A., with whom all members of the court agreed, had this to say [pp. 286-87]:

> The appellant conceded that the police had found MDA hydrochloride, a salt of MDA, upon the premises, and conceded that it had been manufactured by the appellant. Indeed, even in the absence of such a concession there was positive proof that MDA hydrochloride had been manufactured in substantial quantities and that it was intended for sale and distribution.

25 Seized with knowledge of this evidence, it is small wonder that Maclean J.A. considered the ends of justice to require the amendment which he granted and that no substantial wrong was done to the appellant by granting it. I fully agree with this conclusion and would affirm the order that implemented it.

26 In the course of the argument in this court reference was made to other cases in which provincial courts of appeal have granted amendments to an indictment as to which there was no complaint made at trial, but the circumstances disclosed in each of these cases differ materially from the situation disclosed in this appeal and I prefer to base my conclu sion on the broad ground that the ends of justice required the amendment which was here granted. It follows that I find it unnecessary to express any view as to the submission that the authority of the Court of Appeal to grant an amendment stems from the provisions of s. 610(3) of the Criminal Code, which authorize the court to exercise powers "that may be exercised by the court of appeals in civil matters...." In my view a final determination of this question can be appropriately considered when it is an essential element in the disposition of the appeal.

27 In the course of the argument reference was made to the provisions of s. 529 of the Criminal Code, which bears the heading "Amending Defective Indictments or Counts" but in my view the only mandatory language in that section is contained in subs. (1), which provides for "An objection to an indictment or to a count in an indictment or a defect apparent on the face thereof," and requires such objection to be taken before plea or thereafter by leave of the court or a judge. In the present case we are not concerned with a defect apparent on the face of the indictment and this subsection accordingly has no application to the present circumstances. In my view there is no other language in the section which can be read as curtailing the power of the Court of Appeal to make an order under s. 613(8) which has the effect of amending the indictment so as to conform to the evidence where the ends of justice require it.

28 For all these reasons I would dismiss this appeal.

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Laskin C.J.C. **(dissenting) (*Spence J.* concurring):**

29 This case raises an important issue in the administration of the criminal law. The issue, briefly stated, is whether a court, in particular an appellate court, has the power to raise a charge against an accused and to direct that he be tried on that charge, not being the one laid or sought to be laid by the Crown and not being an included offence in that respect. I should have thought that the answer must be emphatically "no," but the British Columbia Court of Appeal resolved the issue in the affirmative under what, in my view, was a misconception of the problem that it faced. A recital of the facts makes this clear.

30 The appellant and another were tried on an indictment containing three counts, namely, (1) conspiring to traffic in a restricted drug, methylenedioxyamphetamine, more conveniently called "MDA"; (2) trafficking in MDA; and (3) having MDA in possession for the purpose of trafficking. They were both acquitted of the conspiracy charge; the appellant alone was convicted on the second charge, of trafficking, but he was subsequently acquitted on the third charge, of possession for the purpose of trafficking, the acquittal being based on an application by the trial judge of res judicata and of the principle in *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322. Proceedings against his coaccused on the third count were stayed.

31 The Crown appealed the acquittals on counts 1 and 3, and the accused appealed his conviction on count 2. The conspiracy appeal was dismissed by the British Columbia Court of Appeal on 26th November 1975 and is of no concern here. The appellant's appeal from his conviction of trafficking in MDA was heard on 4th to 6th February 1976 by a bench composed of Maclean, Seaton and McIntyre JJ.A. The latter delivered the principal judgment of the court on 26th March 1976 [[1976] 4 W.W.R. 285], whereby the conviction was set aside and an acquittal entered because the evidence disclosed that the accused trafficked in a salt of MDA but not in MDA itself. The court concluded that since the Crown had charged the appellant with trafficking in a specific drug, MDA, proof of MDA was an essential element of the offence. The court rejected the contention that the relevant provisions of the statute, the Food and Drugs Act, R.S.C. 1970, c. F-27, listing among the restricted drugs "MDA or any salt thereof," embraced any salt of MDA in a charge that specified MDA only. In its opinion, the trial judge had erred in making interchangeable references to MDA and salt of MDA.

32 McIntyre J.A. concluded his reasons for judgment as follows [p. 291]:

> This is a case where in my view an amendment to the indictment, even after the hearing of the appeal, would have been appropriate. Had the Crown sought an amendment I would have been disposed to allow it. However, no application having been made I feel obliged for the reasons given above to consider that this appeal should be allowed and an acquittal entered.

33 Seaton J.A., who wrote brief concurring reasons, noted that although the expert evidence was to the effect that MDA and salt of MDA were the same drug — a view accepted by the trial judge — the question was one of law, turning on the interpretation of the relevant provisions of the Food and Drugs Act, and particularly Sched. H. Under the Act they were not the same drug and, since the Crown did not seek an amendment, an acquittal had to be entered.

34 The issue now before this court arises from the disposition by the British Columbia Court of Appeal of the Crown's appeal against the acquittal of the appellant on the third count, namely, possession for the purpose of trafficking. In approaching the issue, I take no position on the correctness of the decision of the Court of Appeal that the Narcotic Control Act, R.S.C. 1970, c. N-1, created two distinct offences, one relating to MDA and the other to a salt of MDA. That differentiation must stand for present purposes. The appeal by the Crown from the acquittal of the appellant on the third count, of possession for the purpose of trafficking, came on for hearing on 12th May 1976, some six weeks after the provincial Court of Appeal had disposed of the appellant's appeal on the second count favourably to him. The court was differently constituted, consisting of Maclean, McFarlane and Branca JJ.A. The Crown, on the

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appeal, applied to "amend" the third count to charge possession of a salt of MDA for the purpose of trafficking. In short reasons with which the other members of the court agreed, Maclean J.A. allowed the "amendment", allowed the Crown's appeal, set aside the acquittal and directed a new trial on the third count as amended. He said only this:

> In my view the ends of justice require that the amendment in this case be granted and, in my view, no substantial wrong would be suffered thereby by the accused person.

35 It is thus clear that judges of the British Columbia Court of Appeal who made up the different benches that heard the appeals on the second and third counts were in no doubt of the court's power to "amend" an indictment so as to charge a different offence from the one on which the accused was tried. This is not the view of my brother Ritchie, whose reasons in this appeal I have had the advantage of reading, because he speaks not of an "amendment" to charge a different offence but of an amendment "to conform to the evidence by adding a particular which had not been included in [the third] count as originally drawn." Since for the purposes of this case, as I have already noted, it must be taken that the specification of a particular drug in the charge made proof thereof an essential element of the offence, the substitution in the wording of the charge of another drug amounts to a charge of a different offence, even though the other essential elements, namely, possession for the purpose of trafficking, are the same in either situation. Indeed, counsel for the Crown conceded that in this case he must accept as a fact that different offence were involved in the indictment as laid and as altered by the Court of Appeal.

36 Does then a court of appeal have the power to order an accused to be retried on a different charge from that originally laid and different from that on which he was originally tried? It is one thing to amend, so as to rectify an imperfect charge or indictment of an offence where the charge or indictment is not itself a nullity; it is another thing to substitute a charge of a different offence. Supplying an omitted essential averment of a charge which is clearly indicated is one thing; changing a charge to allege a different offence is something else.

II

37 Three issues are raised by the order of the Court of Appeal in the present case. They are, first, whether a court of appeal has power to amend an indictment; second, if so, whether that power can be exercised so as to provide a basis for ordering a new trial; and, third, whether a court of appeal has power to substitute a charge different from the one laid and upon which the appeal has proceeded. I think it relevant to these issues to begin with a consideration of the powers of a trial judge to amend an indictment.

38 Those powers are now set out in s. 529 [am. 1974-75-76, c. 105, s. 29] of the Criminal Code, R.S.C. 1970, c. C-34. It is unnecessary in this case to trace its history, other than to note that it goes back not only to the original Criminal Code of 1892 (see s. 723), but beyond that Code to the Criminal Procedure Act, 1869 (Can.), c. 29, s. 70. Although there was originally some doubt whether the power to amend extended beyond the amendment of formal defects, statutory clarification and ensuing judicial decisions settled that question in favour of an extended power, including a power to supply an essential averment of the offence charged as well as power to make changes in the assertions of the charge to conform with the evidence as to any such details: see *R. v. Lacelle* (1905), 11 O.L.R. 74, 10 C.C.C. 229 (Ont. C.A.); *R. v. Kerr* (1922), 53 O.L.R. 228 (C.A.); *Yanovitch v. R.* (1958), 28 C.R. 220 (Que. C.A.). Wide as was the power to amend reposed in the trial judge, it did not extend to authorize him to substitute an offence different from the one charged. This was asserted more than 50 years ago in the *Kerr* case, supra, at p. 231, where Meredith C.J.O. said, referring to the provision for amendment of an indictment, that "[it] does not, of course, authorise an amendment which substitutes a different offence for that intended to be charged or the addition of other offences." The same view was taken more recently by the Quebec Court of Appeal in *Dupont v. R.* (1958), 28 C.R. 146, 123 C.C.C. 386 at 390, and re-affirmed by the Ontario Court of Appeal in *R. v. Elliott*, [1970] 2 O.R. 102, [1970] 3 C.C.C. 233 at 237. An earlier authority to the same effect is *R. v. Cohen* (1912), 26 O.L.R. 497, 19 C.C.C. 428, 5 D.L.R. 437 (C.A.).

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39 I am not unmindful of s. 496 of the Criminal Code, which relates to the preferring of an indictment by the Crown and to the inclusion of counts of offences disclosed by the evidence taken on the preliminary inquiry, even if the accused was not committed for trial thereon. Although this provision does not touch the powers of the trial judge, it indicates that it is left to the prosecution to determine, in the defined circumstances, whether to add or substitute a charge other than that set out in the information. The farthest that the courts have gone in respect of the substitution of offences is to permit the Crown to ask for an amendment to that effect of an information upon which an accused has elected trial before a magistrate; but in such case the accused must be allowed to re-elect: see *R. v. Hollman* (1962), 37 W.W.R. 337, 37 C.R. 208, 132 C.C.C. 257 (Alta. C.A.). I do not pass on the correctness of this view of a court's power. The substance of the matter appears to be a withdrawal of one information by the Crown and the laying of another, and this is open to the Crown in respect of indictments.

40 Coming then to the powers of a court of appeal in respect of amendments or substitutions, I find no provision of the Criminal Code which gives a court of appeal greater powers in these respects than are given to a trial judge; and, indeed, there is no provision which expressly gives any power relating to indictments to a court of appeal. Neither bench of the British Columbia Court of Appeal discussed or even referred to any provision of the Criminal Code which supported the power it asserted, but during the argument before this court ss. 610 and 613(8), as well as s. 529, were brought to the fore.

41 I shall deal first with s. 610, which reads as follows:

> 610.(1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> (*a*) order the production of any writing, exhibit, or other thing connected with the proceedings;
>
> (*b*) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
>
> (i) to attend and be examined before the court of appeal, or
>
> (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
>
> (*c*) admit, as evidence, an examination that is taken under subparagraph (*b*)(ii);
>
> (*d*) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
>
> (*e*) order that any question arising on the appeal that
>
> (i) involves prolonged examination of writings or accounts, or scientific or local investigation, and
>
> (ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal, be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal; and
>
> (*f*) act upon the report of a commissioner who is appointed under paragraph (*e*) in so far as the court of appeal thinks fit to do so.

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(2) In proceedings under this section the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(*e*), are entitled to be present during the inquiry and to adduce evidence and to be heard.

(3) A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court that no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.

42 Although I have reproduced the entire section for context, the only terms thereof relevant here are the opening words of subs. (3), namely, "A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters ...."

43 Section 610 first appeared as s. 1021(1) of the Criminal Code, enacted by 1923, c. 41, s. 9, and was taken from s. 9 of the English Criminal Appeal Act, 1907, c. 23. The concern of the English courts with this provision does not appear to have gone beyond reliance on it to permit fresh evidence to be admitted on appeal: see *R. v. Robinson*, [1917] 2 K.B. 108, 12 Cr. App. R. 226. A similar provision was at issue in the New South Wales case of *R. v. Burns* (1920), 20 S.R. (N.S.W.) 351, to support the power of an appeallate court to amend an indictment. In that case an indictment charged the accused with obtaining a travel document by a false pretence to one N. with intent to defraud, but the evidence did not show a false pretence to N. but rather to another, and it was held that the provision was not ample enough to empower an appellate court to make the amendment. Although dissenting on the ground that there was no substantial wrong or miscarriage of justice in the conviction of the accused, Chief Justice Cullen was nonetheless of the same opinion as his colleagues in declaring that the provision comparable to our now s. 610(3) did not enable an appellate court to make an amendment to an indictment which had been finally dealt with by the trial judge; and he added (at p. 356): "So drastic a power, if it had been the intention of the Legislature to confer it, one would expect to have seen expressed in plain words."

44 Section 610(3) was considered in a series of British Columbia cases, which I wish to examine. *R. v. Danyleyko* (1962), 39 W.W.R. 271, 38 C.R. 175, 133 C.C.C. 224, may be put to one side because there the British Columbia Court of Appeal, sitting as the Yukon Territory Court of Appeal, relied on s. 610(3) and on the provincial Court of Appeal Act, R.S.B.C. 1960, c. 82, to support its right to send a stated case back to a magistrate for amendment; it does not, therefore, touch the issue in question here. In *R. v. McNutt*, 41 W.W.R. 143, 39 C.R. 338, [1963] 3 C.C.C. 150 (C.A.), an issue arose as to proof of the territorial jurisdiction of a magistrate under an indictment charging an assault in place H., whereas it occurred in place W., both being within the territorial jurisdiction. No amendment was made or sought before the magistrate. A new trial was ordered by the majority in view of the course of the proceedings below (the dissenting judge concluded that territorial jurisdiction had not been proved), but Davey J.A. in obiter also adverted to what is now s. 610(3) as being broad enough to empower the Court of Appeal to make an amendment to prevent a miscarriage of justice. This statement was induced, however, by doubt whether the British Columbia Court of Appeal was right in an earlier case, *R. v. More* (1959), 28 W.W.R. 562, 31 C.R. 59, 124 C.C.C. 140 (Davey J.A. being a member of the court), which held that an allegation of the commission of an offence at a defined place was an essential averment, and where the evidence showed its commission at a different place and no amendment was made at trial, the Court of Appeal could not itself amend but must quash the conviction. However, it was held that it was open to the court to order a new trial in the interests of justice, and it would be for the trial judge to decide whether an amendment was necessary and, if so, whether it should be made. In the *McNutt* case, Wilson J.A. was content to apply the *More* case in this respect while also agreeing with Davey J.A. that a new trial was warranted in *McNutt* because of the course of proceedings there.

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45 Among the authorities relied on in the *More* case was *R. Austin*, [1955] O.W.N. 882, 22 C.R. 269, 113 C.C.C. 95, where the Ontario Court of Appeal held that, on a charge of robbing a named person, proof that the person robbed was the one named was essential, and that in the absence of an amendment at trial to make the indictment conform to the evidence the Court of Appeal could not remedy the defect because it had no power to amend, and that consequently an acquittal must be entered. There was no such additional ground in the *Austin* case as there was in the *More* case to warrant a new trial; there was simply failure of proof at trial of an essential averment, and the Court of Appeal did not think it should enter the lists and do for the Crown what was open to it to do and what it failed to do for itself, namely, seek an amendment at trial.

46 This brings me to the later judgment of the British Columbia Court of Appeal in *R. v. Wixalbrown*, 43 W.W.R. 449, 41 C.R. 113, [1964] 1 C.C.C. 29, in which the force of *R. v. More* was eroded and in which the majority of the five-man bench concluded that (to use the words of Davey J.A. at p. 39) "this Court may in appropriate cases exercise the powers of amendment conferred by the Code upon trial Judges," but it was a power to be exercised with greatest care. Davey J.A. did not himself indicate the provisions of the Criminal Code giving this asserted power to a court of appeal. It is clear from his words that he was purporting to exercise the powers of a trial court under what is now s. 529. At the same time, he based his conclusion on adoption of the reasons of Wilson J.A., who invoked what is now s. 610(3), pointing out that there was no reference to that provision in the *More* case and holding that s. 529 did not extend to a court of appeal.

47 I should say at this point that the decision in *Wixalbrown* cannot be justified by reliance on s. 529 which, by its own words, is restricted to matters at trial. It is included in Pt. XVII of the Criminal Code — Procedure by Indictment — while the powers of the court of appeal are set out in Pt. XVIII — Appeals — Indictable Offences — and there is no incorporating reference.

48 What Davey J.A. said on the question of a court of appeal's power to amend, speaking also for Bird and Tysoe JJ.A., with Sheppard J.A. dissenting on this point, was an alternative ground of decision, having regard to the facts of the case. The two accused were charged with breaking and entering certain premises at a specified time and committing an indictable offence, to wit, theft. The charge was laid under what is now s. 306(1)(*b*) (then s. 292(1)(*b*)), which concluded with the word "therein" in defining the offence, but that word was not included in the indictment nor was objection taken to the omission at the trial, which proceeded on the basis that the alleged theft was committed in the specified premises. The word "therein" had been included in the information upon which the preliminary inquiry was conducted, which resulted in the committal for trial. On appeal from conviction, counsel for the accused took for the first time two objections; first, that there were no or no sufficient particulars of the alleged offence of theft, as was a requisite under s. 492 (now s. 510), and, second, that the omission of the word "therein" was an omission of an essential averment and hence the accused was convicted of an offence not known to the law.

49 Davey J.A. disposed of the first objection by agreeing that if theft alone had been charged the indictment would have been fatally defective (relying on *Brodie v. R.*, [1936] S.C.R. 188 at 199, 65 C.C.C. 289, [1936] 3 D.L.R. 81), but, theft being alleged as part of a compound offence and there being sufficient particularity to enable the accused to meet the charge, the objection failed. As to the second objection, the omission of the word "therein" from the indictment, Davey J.A. took alternative positions. He held, first, that as a matter of con text (purporting to distinguish this court's judgment in *McNeil v. R.*, [1931] S.C.R. 505, 55 C.C.C. 253, [1931] 3 D.L.R. 762, with, in my opinion, questionable success) there was not an omission of an essential averment but rather an imperfect allegation of such an averment which caused no substantial wrong or miscarriage of justice. His alternative position, agreeing for this purpose that there was omission of an essential averment, was that in principle (to quote him, at p. 39):

> ...no person ought to stand convicted or be imprisoned on a charge that totally omits an essential averment required to constitute an offence known to the law. That in itself is a substantial wrong. I can see no difference in principle between a conviction for a charge that lacks one averment necessary to constitute a crime, and a conviction for one that is totally unknown to the law. To allow the former to stand would open the door to grave abuses, the end of which cannot be foreseen.

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50 He went on to say, however, that "that objection can be met by amendment if we have the power." He concluded, as I have already noted, that a court of appeal "may in appropriate cases exercise the powers of amendment conferred by the Code upon trial judges." He did not say whence comes this power — it could only be given by statute — and I can only infer from Davey J.A.'s reliance on Wilson J.A.'s reasons that in Davey J.A.'s view it derived from what is now s. 610(3) of the Criminal Code. However, s. 610(3) speaks of the power of a court of appeal in civil matters and it is impossible to find authorization in it for the exercise of powers conferred by the Criminal Code upon trial judges.

51 Sheppard J.A. met the issue of the omission of an essential averment to which no objection was taken at trial by invoking the principle laid down in *R. v. Leclair*, [1956] O.W.N. 336, 23 C.R. 216, 115 C.C.C. 297 (C.A.), namely, that when an accused has failed to move to quash before pleading to an indictment and has failed as well to object during the trial, the court of appeal may refuse to allow him to raise the matter there unless it is of opinion that the accused has been in some way prejudiced or misled. In *Leclair*, although an essential averment was omitted, the section of the Code under which the offence was charged was referred to and this, it seems to me, must have some bearing on the statement of principle which, otherwise, would appear to contradict Davey J.A.'s opinion, quoted above, that omission of an essential averment itself is a substantial wrong. I do not need, however, to dwell on this point here, but pass to Sheppard J.A.'s observation on whether there is a power in a court of appeal to amend an indictment. He said this on the point (at p. 44):

> The Court of Appeal has not power to make the amendment of the indictment and conviction by adding the word 'therein' as requested by the Crown. By reason that Parliament has expressly conferred on the trial court the power to amend indictments subject to certain restrictions (s. 510 [now s. 529]) there is difficulty in construing other sections of the Code as impliedly conferring upon another Court, such as the Court of Appeal, the power to amend the indictment and conviction, either subject to the same restrictions on the trial court or without any restriction. Moreover, the primary question for the Court of Appeal is whether or not substantial wrong or miscarriage of justice has occurred (s. 592(1)(*b*) (iii) [now s. 613(1)(*b*) (iii)]); if not the appeal would be dismissed and the matter thereby ended. If substantial wrong or miscarriage of justice has occurred the appeal would be allowed and the conviction quashed, with the direction of an acquittal, or of a new trial (s. 592(2) [now s. 613(2)]). Only in the event of a new trial would any amendment be required and the power to make such amendment has been given to the trial court where the accused would have an opportunity to plead thereto and to meet the issue raised thereby. It would follow that the Court of Appeal has not the power to amend the indictment and conviction as requested for the Crown.

52 I have reviewed the *Wixalbrown* case at some length because it has spawned other decisions to the same effect on the power to amend. Certain observations must be made about it. In the first place — and central to the present case — it does not deal with the substitution of a charge of a different offence from that sought to be alleged. Second, Wilson J.A. did not say what Davey J.A. said he did. Wilson J.A. noted that a court of appeal could not found a power to amend an indictment on the now s. 529, that provision being limited to trial judges, but it could be founded on the now s. 610(3) as giving the same power to amend as the court of appeal had in civil cases.

53 I am unable to accept the view that s. 610(3) confers any power upon a court of appeal to amend an indictment. That subsection takes its context from the preceding provisions of s. 610, which concern evidentiary questions. The opening words of s. 610(3) show its limited range; they provide that "A Court of Appeal may exercise ... any powers not mentioned in subsection (1) that may be exercised on appeals in civil matters." The subsection cannot, therefore, be read as if it was a detached and separate provision. Although Wilson J.A. purported to find support for his view in this court's judgment in *Kissick v. R.*, [1952] 1 S.C.R. 343, 14 C.R. 1, 102 C.C.C. 129, that case was concerned with an issue as to admissibility of evidence, and thus related to the very subject matter of s. 610. Still less can s. 610(3) be relied upon to authorize a court of appeal to substitute a different charge from the one on which the case came before it.

54 *Wixalbrown* was invoked by the British Columbia Court of Appeal in *R. v. Breland*, 47 W.W.R. 558, 43 C.R.

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335, [1964] 3 C.C.C. 370, where essential averments were omitted from a charge but no objection was taken at trial. The majority judgment proceeded on alternative bases, relying, first, on the principle of *R. v. Leclair*, supra, that where no objection is taken at trial the accused will not be allowed to take it on appeal unless he has been misled or prejudiced; and, second, on the principle allegedly derived from the judgment of Davey J.A. in *Wixalbrown* that, even if the accused has been misled or prejudiced, the court of appeal may amend and affirm the conviction under s. 529 of the Criminal Code if there has been no substantial wrong or miscarriage of justice. I have doubts whether *Wixalbrown* goes this far (and the dissenting judgment of Whittaker J.A. supports my doubt), since Davey J.A. was mistaken as to what Wilson J.A. said in that case but, in any event, I need not pursue this because we are not dealing, in the *Breland* case, with the substitution of a different charge but only with the perfection of an imperfect one.

55 There is another line of cases represented by *Morin v. R.* (1966), 48 C.R. 303 (Que. C.A.), and by *R. v. Pearson* (1972), 6 C.C.C. (2d) 17 (Que. C.A.), which take a strict approach against the Crown where an essential particular of a charge is not proved and no application to amend is made by the Crown to the trial judge.

56 In the *Morin* case, there was a charge of illegal possession of goods on a stated date, but the evidence showed possession at a later date. The Crown did not move to amend, but a conviction was entered at trial. The Quebec Court of Appeal held that the offence charged was not proved and that it had no power to rectify the matter, citing *R. v. Volaine*, [1951] O.W.N. 582 (C.A.). This class of case differs from those where an essential averment or some particular is omitted; the charge is good in all respects but as in the *Volaine* case, it alleges an offence committed on a specific date and the evidence does not show any of the prohibited acts to have been committed on that date. No rectification having been effected at the trial, it was held in *Volaine* that the Court of Appeal had no power to rectify the mistake, with the result that a conviction on the charge could not stand and an acquittal had to be ordered.

57 In the *Pearson* case, supra, there was a variance between the statement in the charge and the evidence that was adduced as to the place of commission of an offence, that but no application was made to amend. On appeal, a majority of the Quebec Court of Appeal held that the conviction must be quashed and an acquittal entered because the Court of Appeal had no power to amend the charge to conform to the evidence. Owen J.A. dissented in an extensive review of the authorities, preferring to follow and to apply, in respect of a variance as to the place of commission of an offence, a line of cases, having their source in English case law, holding that a variance as to date was not fatal to a conviction because the place, like the date, was not an essential averment, and that since the accused was not misled or prejudiced the conviction should stand. He added this (at p. 26):

> In view of this conclusion I do not deem it necessary to discuss whether this Court, in the present case, had the power to amend the indictment so as to conform to the proof.

58 One further point may be noted, arising from the judgment of the New Brunswick Court of Appeal in *R. v. Christiansen* (1973), 23 C.R.N.S. 229, 13 C.C.C. (2d) 504, 6 N.B.R. (2d) 810. That court was unanimous in holding that a charge of trafficking in narcotics by distributing was not supported by the evidence and, further, that an attempt to commit the offence was not established. However, it divided on the consequences of its holding. Since it appeared that the evidence supported a finding of trafficking by giving, the question was whether the trial judge should have amended the indictment suo motu and whether, not having done so, this was a reversible error. Hughes C.J.N.B. held on the authorities that there was no duty on the trial judge to amend the indictment to conform to the evidence when the Crown did not seek an amendment, and hence would have dismissed the Crown's appeal against an acquittal. Ryan J.A. was content to dismiss the appeal on the ground that the offence charged was not proved. Only Limerick J.A., who dissented, viewed s. 610(3) as giving the Court of Appeal power to amend the indictment but, apparently, only by reason of the trial judge's error in law in failing to make the amendment. It followed, in his view, that a new trial should be directed on an amended indictment, invoking in this respect s. 613(8) of the Criminal Code.

59 I cannot subscribe to Limerick J.A.'s proposition that a trial judge has a duty to amend an indictment to conform to the evidence when the Crown has not sought an amendment, and hence the basis on which he asserted an amending power in the Court of Appeal under s. 610(3) disappears. Indeed, if he is correct in imposing such a duty on

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a trial judge there is no need to invoke s. 610(3) since the issue then becomes merely one of correcting an error of law below. I do not find the *Christiansen* case of any assistance on the issues in the present case.

60 It is, of course, the fact that, with the power given to a trial judge to amend to add an omitted essential averment, the line between a charge which is a nullity and one which is merely imperfect has become more difficult to draw. *R. v. Hunt* (1973), 16 C.C.C. (2d) 382, is an illustration, the British Columbia Court of Appeal holding there that there was no offence disclosed in the charge, which was thus not amendable. In *R. v. Major* (1976), 25 C.C.C. (2d) 62, 10 N.S.R. (2d) 348, reversed [1977] S.C.R. 826, 27 C.C.C. (2d) 239, 8 N.R. 210, 14 N.S.R. (2d) 704, MacKeigan C.J.N.S. considered both *R. v. Leclair* and *R. v. Wixalbrown* and, speaking for the majority, laid it down (at p. 65) that:

> ...the omission of what used to be considered an essential averment is not now sufficient to prevent a charge being cured by amendment, even at the Court of Appeal level, so long as the accused is reasonably informed and not misled and especially where the offence is correctly identified by section number.

61 The source of this power must have been s. 529 because MacKeigan C.J.N.S. said that he respectfully agreed with Davey J.A. in *Wixalbrown*.

62 The issue for MacKeigan C.J.N.S. in the *Major* case was whether the charge was an unamendable nullity or was amendable despite its imperfection, and he concluded that it was amendable by supplying an omitted essential averment but that it was necessary to see if the matters covered by the missing averment were in fact proved in order to decide whether the amendment should be made and whether the accused should have been convicted. It was on the point of whether there was such evidence that Cooper J.A. dissented from the majority and would, unlike them, have allowed the amendment and affirmed the conviction, which the majority quashed.

63 Insofar as the Nova Scotia court's decision in the *Major* case stands for the proposition that a court of appeal may exercise the powers of a trial judge under s. 529 to amend a charge of an indictable offence to supply an essential averment it is, in my opinion, wrong in law, and this is very clear from a mere reading of s. 529. The appeal to this court was disposed of in short oral reasons at the conclusion of the hearing whereby Cooper J.A.'s assessment was preferred and the conviction was accordingly restored.

64 The *Major* case was considered by this court in its recent decision in *R. v. Côté*, [1977] 2 W.W.R. 174, 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752, 3 N.R. 271, reversing [1975] W.W.D. 59, 21 C.C.C. (2d) 474, which was a Crown appeal from acquittal on an information charging an offence under s. 235(2) [since re-en. 1974-75-76, c. 93, s. 16(2)] of the Criminal Code, the information referring to the section but omitting from the particulars of the charge the words "without reasonable excuse." No objection was taken by the accused to the omission either at first instance or on the trial de novo, nor did he object in his notice of appeal that the charge did not disclose an offence. However, leave to amend the notice of appeal to raise this objection was given by the Saskatchewan Court of Appeal which, in the result, quashed the summary conviction on that ground. The case was brought here on the question of the applicability of ss. 732(1), (3) and 755(4) (as it stood at that time [since re-en. 1974-75-76, c. 93, s. 94]) of the Criminal Code. Whether s. 732, which refers to the powers and position of a summary conviction court, has any relevance to an issue arising in an appellate court is, at best, doubtful, and I have grave doubt as well whether s. 755(4) has any application to a court of appeal since it is a provision referring to an "appeal court," defined in s. 747 [am. 1972, c. 17, s. 2(2); 1974-75, c. 19, s. 1] as being the court for trials de novo, whereas the further appeal to a court of appeal is dealt with in s. 771. However, neither s. 732(1), (3) nor s. 755(4) was necessary to the determination of the Crown's appeal (which was allowed in this court) since both de Grandpré J., who wrote for the majority, and Spence J., who wrote in concurrence, were agreed that the information was sufficient and did not need amendment.

65 However, in deference to the arguments advanced by counsel on the question on which leave was given to bring the case to this court, de Grandpré J. went on to discuss the *Major* case, pointing out (and in this Spence J. agreed) that we were concerned, on the appeal here, only with the question whether there was sufficient evidence to

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prove an element of the offence charged, and we supported the dissenting view of Cooper J.A. in the Nova Scotia Court of Appeal that there was such evidence. The further observation and conclusion of de Grandpré J. on the effect of ss. 732(1), (3) and 755(4) (and I have already indicated my doubt of their applicability to a court of appeal) that (p. 358) "It was an error on the part of the [Saskatchewan] Court of Appeal to fail to consider the application of the relevant provisions of s. 732 and s. 755 ... in the circumstances of the case and to hold that the information did not disclose an offence known to the law" has no relevance for the issue under consideration in the present case.

66 This observation and conclusion was prefaced by the words (referring to the *Major* case) that "this recent decision of our Court settles the matter with the result that the question of law defined in the order granting leave [in the *Côté* case] must be answered in the affirmative." Whatever be the view taken of our decision in the Major case, nothing in it touches the power of a court of appeal to substitute a charge of a different offence, and it must be assumed that MacKeigan C.J.N.S.'s reference to the court of appeal's power to amend can only have been a reference to s. 529, although no Criminal Code provision was identified by him.

67 Since it is established — and a recent illustration is seen in *R. v. Vallee*, 67 W.W.R. 449, 6 C.R.N.S. 62, [1969] 3 C.C.C. 293 (B.C.C.A.) — that a charge or an indictment which fails to disclose an offence — one which is a nullity — is not amendable by the trial judge even given the wide powers of amendment reposed in him by s. 529, and that no power to breathe life into a nullity rests in a court of appeal, it would be astonishing if on appeal a court of appeal could exercise power to substitute a different charge when a trial judge cannot do so. There is no express power to do so; indeed there is not even any express power in a court of appeal to amend as there is in New Zealand under s. 392(1) of the Crimes Act, 1908, No. 32, and it would seem that the proper course for the court of appeal to adopt, if it decides to order a new trial and not apply the *Leclair* doctrine to foreclose the accused on any objection to the indictment, is to leave it to the trial judge to decide whether an amendment should be made.

III

68 I turn now to s. 613(8) of the Criminal Code and, in order to provide a context for its consideration, I reproduce as well s. 613(4) as that provision stood at the time of the proceedings in this case in the British Columbia Court of Appeal. (it was amended and re-arranged by the Criminal Law Amendment Act, 1975, 1974-75-76 (Can.), c. 93, s. 75, effective 26th April 1976, but without any change in substance). The two subsections read as follows:

> (4) Where an appeal is from an acquittal the court of appeal may
>
> (*a*) dismiss the appeal; or
>
> (*b*) allow the appeal, set aside the verdict and
>
> (i) enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or
>
> (ii) order a new trial ...
>
> (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

69 I supplement these provisions to make the short point here that this court's power to entertain the accused's appeal from the setting aside of his acquittal is found in s. 618(2) (*a*), which gives him a right of appeal in such circumstances on a question of law, here the question of the proper construction and application of s. 613(4), (8).

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1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

70 Grammatically and as a matter of common sense construction, a court of appeal, seized of a Crown appeal against an acquittal, looks to s. 613(4) for the powers it may exercise on such an appeal, and it is only where (in the words of s. 613 (8)) "a court of appeal exercises any of the powers conferred by subsection ... (4) [that] it may make any order, in addition [*to that exercise*] that justice requires". The provision in s. 613(8) for "any order in addition that justice requires" is sequential to the exercise of the power to order a new trial under s. 613(4). It does not, in my view, enable a court of appeal to make an order upon which to found a direction for a new trial, and certainly not when that order does not relate to the charge on which the accused has been acquitted and to an error of law in respect of that charge. This is, I think, rather obvious when reference is had, as it must be, to s. 605 (1)(*a*), upon which the Crown must base its right to appeal an acquittal. There is a statutory framework, and only a statutory framework, for appeals, and the limitations which have been placed by Parliament on Crown appeals are clear. A court of appeal, limited to questions of law arising out of the indictment on which an accused has been tried and acquitted, cannot, so to speak, pull itself up by its own bootstraps to exercise its power to order a new trial but must find a basis for doing so in respect of the charge as laid and considered at trial. It is only that charge which an accused must be prepared to defend (saving included offences) and fairness to him, which the Criminal Code purports to express in accordance with the fundamental conceptions residing in the presumption of innocence, dictates that he not be taken beyond the bounds of what the Crown has chosen to lay against him.

71 What is now s. 613(8) was considered by Fauteux J., as he then was, in *Welch v. R.*, [1950] S.C.R. 412, 10 C.R. 97, 97 C.C.C. 177, [1950] 3 D.L.R. 641, where he spoke for the majority of the court on an issue arising from a conviction on a charge of manslaughter upon a second trial of the accused, who had first been charged with murder and convicted of manslaughter. The first verdict was set aside for misdirection and the Ontario Court of Appeal either failed or refused to order a new trial or to direct an acquittal, contenting itself with saying that although the conviction would be set aside the accused was not acquitted. The second trial followed. In the result, the majority of this court allowed the accused's appeal, quashed the conviction on the second trial and ordered his discharge.

72 What this court was concerned with in the *Welch* case was the incomplete judgment of the Ontario Court of Appeal in the first proceeding and, hence, with the statutory powers of courts of appeal on appeals in criminal cases. The explanation of the Court of Appeal's unusual decision neither to convict nor to acquit nor to order a new trial was the assumed impossibility under the Criminal Code of the Crown laying a second indictment for manslaughter where the accused had been acquitted on an indictment charging murder: see *R. v. Pascal*, [1949] 2 W.W.R. 849, 8 C.R. 437, 95 C.C.C. 288 (B.C.C.A.).

73 In the course of his reasons and adverting obviously to what is now s. 613(8) Fauteux J. said this (at p. 426):

> ...I fail, I must say with deference, to appreciate the alleged obstacles standing in the way of the Court of Appeal to exercise its authority if, as suggested, the majority judges wanted to direct a new trial only on this sole undisposed of part of the indictment, that is, the lesser charge of manslaughter. Legal and sufficient it would have been to direct a new trial on the offence of manslaughter exclusively and to further order that the original indictment of murder be, to that end, amended. Thus, on this new trial, the accused could only be found guilty or not guilty of manslaughter. The language of the statute is broad enough to embrace the authority to make such 'other order', if the justice of the case suggests no other. And I know of no principles of law which could have then been violated by such order. I must, therefore, conclude that the exercise of the statutory authority given to the Court of Appeal, under section 1014(3), to direct an acquittal to be entered or to direct a new trial and in either case, to make such other order as justice requires, is not permissive but mandatory.

74 This application of s. 613(8) does not touch the present case but it clearly gives sensible subject matter to the provision in respect of the substitution of convictions for included offences or orders for a new trial in respect of such offences.

75 A reference to what is now s. 613(8) is also made in the dissenting reasons of Taschereau J., as he then was, Rinfret J. concurring. The dissent was on another point, but as to s. 613(8) the learned justice said this (at p. 416):

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> I had the advantage of reading the reasons for judgment of my brother Fauteux, and I agree with him, that when the Court of Appeal allows an appeal against a conviction, in a case like the one at bar, it has only two alternatives. It may quash the conviction and direct a verdict of acquittal, or direct a new trial, and it is only when one of these two courses has been followed that it *may* make such other order as justice requires. It is however *imperative* and not only *permissive*, that there should be an acquittal or that a new trial should be directed.
>
> I entertain no doubt that the Court of Appeal had power by virtue of section 1014(3) of the *Cr. C.*, after having quashed the conviction, to direct a new trial limited exclusively to the charge of manslaughter. This would have clearly been an order authorized by the concluding part of section 1014(3) *Cr. C.*

76 I subscribe fully to this view and would emphasize Taschereau J.'s words that "it is only when one of these two courses [direction of an acquittal or of a new trial] has been followed that [the Court of Appeal] *may* make such other order as justice requires."

77 The *Welch* case appears to have been applied in *R. v. Kelso*, [1953] O.R. 413, 16 C.R. 263, 105 C.C.C. 305 (C.A.), where the accused, on an indictment for rape, was convicted of attempted rape, and where in ordering a new trial because of misdirection the court felt it could properly order the new trial to proceed on the charge of attempted rape — not a very surprising conclusion — and, indeed, it may be doubted whether in the circumstances of the *Kelso* case there was any need to rely on s. 613(8): see also *R. v. Robertson*, [1954] O.W.N. 164, 18 C.R. 7, 107 C.C.C. 400 (C.A.). However, such reliance in case of an included offence (as to which see *R. v. Popoff* (No. 2) (1960), 33 W.W.R. 400, 34 C.R. 230, 129 C.C.C. 250 (B.C.C.A.)) is a long way from the issue confronting this court, here.

78 Assuming, however, that s. 613(8) gives a court of appeal a wider power than that which I think its terms confer when considered alongside s. 613(4) and s. 605(1)(*a*), the relevant question here is whether the words "make any order in addition that justice requires" empower the court of appeal to direct a new trial on a different offence from that on which the appeal was taken. It would be incongruous to me if the court of appeal, under the relevant words of s. 613(8), could do what the trial judge could not do under the wide amending powers given him under s. 529. That aside, a consideration of the history of the words in question in their original setting and in their present one does not lead to the conclusion reached by the British Columbia Court of Appeal in this case.

79 I begin the historical canvass with a statute of pre-Confederation Canada, An Act for the Further Amendment of the Administration of the Criminal Law, 1851 (U.C.), c. 13, providing for the reservation of questions of law arising in a criminal trial for the opinion of a superior court. The question or questions of law were to be submitted by a stated case and

> ...the Justices of either of the said Superior Courts shall thereupon have full power and authority to hear and finally determine the said questions, and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Justices the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session of Oyer and Terminer or Gaol Delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require.

80 This statute by its terms was in force only in Upper Canada.

81 Similar provision for stating a case on a reserved question of law is found in the Statutes of Lower Canada: see C.S.L.C. 1860, c. 77, s. 58. The Court of Queen's Bench was authorized to reverse, amend or affirm any judgment on the indictment in question, to avoid or arrest judgment or "to make such other order as justice requires." Section 3 of the Consolidated Statutes of Upper Canada, 1859, c. 112, was in similar terms, and so was s. 101 of the Revised

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Statutes of Nova Scotia, 1864 (3rd series), c. 171, and to the same effect was s. 23 of the Revised Statutes of New Brunswick, 1854, c. 159. These provisions were virtually a reproduction of English legislation, 1848, c. 78, and were similarly entitled. When the statutes of Canada were first revised after Confederation, the foregoing common provisions were superseded by s. 261 of the Criminal Procedure Act, R.S.C. 1886, c. 174, which was as follows:

> 261. The justices of the court for Crown cases reserved, to which the case is transmitted, shall hear and finally determine such question, and reverse, affirm or amend any judgment given on the trial wherein such question arose, or shall avoid such judgment or order an entry to be made on the record, that in the judgment of such justices the person convicted ought not to have been convicted, or shall arrest the judgment, or if no judgment has been given, shall order judgment to be given thereon at some future session of the court before which the person was convicted, or shall make such other order as justice requires.

82 The new Criminal Code of 1892 (Can.), c. 29, retained provision for the reserving of questions of law arising during a trial but to be considered by courts of appeal upon a case stated: see s. 743. The Code improved upon the previous law governing appeals in criminal cases by the enactment of a composite provision, s. 746, reading as follows:

> 746. ...the Court of Appeal may —
>
> (*a.*) confirm the ruling appealed from; or
>
> (*b.*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new tria; or
>
> (*c.*) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or
>
> (*d.*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or
>
> (*e.*) direct a new trial; or
>
> (*f.*) make such other order as justice requires: Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted.
>
> 2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.

83 Section 746 of the original Code came down in subsequently revised form to the present s. 613, and s. 613(8) may be looked upon as a transformed version of s. 746(*f*).

84 The case law on the pre-Confederation and post-Confederation legislation cited above, at least until it was

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1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

subsumed under the new Criminal Code, established that, although the sufficiency of an indictment was a question that could be reserved in arrest of judgment (see *R. v. Gibson* (1889), 16 O.R. 704, holding, however, that the sufficiency of an indictment could not be challenged on a motion to quash), there was no power on the consideration of a reserved question to amend the indictment: see *R. v. Garland* (1869), 11 Cox C.C. 224. The court said in the *Garland* case, at p. 227, that "our powers do not extend to amending the indictment. We can only deal with the judgment; and if we amend the judgment here the record will be wrong." A fortiori, there was no power to direct the substitution of a different charge.

85 I referred earlier in these reasons to the judgment of the British Columbia Court of Appeal in *R. v. More* and, risking repetition, I wish to mention again what was there decided. The court took a cautious approach to the question of its power to direct a new trial on an amended indictment involving an essential averment, namely, the place of commission of the offence of unlawful possession of stolen property. After considering the *Welch* case and some others, the majority concluded that it had no power to amend the indictment in that respect but, in the special circumstances, it could order a new trial, leaving it to the trial judge to determine whether an amendment to the charge was necessary and whether it should be made. The dissenting Desbrisay C.J. agreed that the Court of Appeal had no power to amend, and would have entered an acquittal.

86 The Nova Scotia Supreme Court en banc applied *More* in *R. v. Rooney* (1962), 132 C.C.C. 190, 43 M.P.R. 193, to deny to an appellate court the power to amend an indictment. In the result in that case, which involved a conviction on a charge of obtaining money by false pretences but where the proof did not go higher than showing that the accused had obtained a cheque by false representations, the majority of the court ordered a new trial because, in the words of MacDonald J. for the majority at p. 196, "it appears that evidence does exist by which a case may be proved properly, with or without amendment of the charge by the Magistrate." The opposing view was put by Ilsley C.J. in dissent (Currie J. concurring), namely, that this was not a case where, because of some mistake in the conduct of the trial, the conviction could not stand although there was evidence to convict on a proper trial, but rather it was a case where the Crown had failed to prove guilt of the offence charged and "for this Court to order a new trial would be to place again the appellant in jeopardy ... in order to give the Crown another opportunity to secure his conviction on an amended charge" (at p. 192).

87 I refer to one more decision, that of the New Brunswick Court of Appeal in *Budovitch v. R.* (1969), 8 C.R.N.S. 280, [1970] 4 C.C.C. 156, 1 N.B.R. (2d) 825. It involved a conviction for fraudulently failing to pay over or account for money, the charge alleging the offence to have been committed in Fredericton. The evidence showed that, if committed, it was in Saint John. On appeal, a new trial was ordered on a charge which alleged an offence in Saint John, the majority purporting to invoke what is now s. 613(8) in directing the amendment to be made at the new trial. Hughes J.A., as he then was, would, following the *Rooney* case (as holding there was no power to amend the indictment on appeal), have ordered a new trial, leaving it to the trial judge to make the appropriate amendment under what is now s. 529, pointing out there was uncontradicted evidence of a theft in New Brunswick.

88 Although *Budovitch* goes beyond *More* and beyond *Rooney* in directing a new trial on an amended charge, it is nonetheless simply a case where the amendment was within the trial judge's power, relating as it did to an essential particular in the charge but not to a different charge, and, moreover, a particular on which evidence had been adduced, that is, as to the place of commission of the offence.

89 I do not find anything in the case law and certainly nothing in applicable legislation to authorize a court of appeal to do what the British Columbia Court of Appeal did here — something which the trial judge himself could not do. There is here a usurpation of the function of the Attorney General and of the Crown. It is for them to decide, the existing charge not being proved, whether to lay the different charge which the court felt should have been brought against the accused. It is not for a court to take an ad hominem view in a case like the present one and to do violence to the separate functions of court and Crown lest a person guilty of an offence — but not the one charged — escape punishment.

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1977 CarswellBC 586, [1978] 1 W.W.R. 481, [1978] 2 S.C.R. 393, 40 C.R.N.S. 257, 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16, 18 N.R. 485

90 I would allow the appeal, set aside the order of the British Columbia Court of Appeal and restore the acquittal.

Dickson J. **(dissenting):**

91 I agree with the conclusion reached by the chief justice in this appeal and the reasons therefor, with one reservation. I would like to leave open the issue as to whether s. 529(1) or s. 732(1) of the Criminal Code, R.S.C. 1970, c. C-34, prevents initial objection being taken in the court of appeal to a defect on the face of the indictment or information, and the effect of the judgment in *R. v. Leclair*, [1956] O.W.N. 336, 23 C.R. 216, 115 C.C.C. 297.

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TAB 5

1981 CarswellOnt 41, 20 C.R. (3d) 66, 31 O.R. (2d) 161, 9 M.V.R. 52, 15 M.P.L.R. 172, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201

1981 CarswellOnt 41, 20 C.R. (3d) 66, 31 O.R. (2d) 161, 9 M.V.R. 52, 15 M.P.L.R. 172, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201

R. v. Budget Car Rentals (Toronto) Ltd.

R. v. BUDGET CAR RENTALS (TORONTO) LIMITED

Ontario Supreme Court, Court of Appeal

Howland C.J.O., Arnup, Martin, Zuber and Thorson JJ.A.

Heard: February 6, 1981
Judgment: March 9, 1981

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Counsel: *M. D. Segal*, for the Crown.

R. M. Dash, for respondent.

Subject: Criminal; Public

Motor Vehicles --- Offences and penalties — Prosecutions — Information — Formal validity.

Motor vehicles — Offences and penalties — Liability of owner — Owner of vehicle convicted of offence when vehicle illegally parked by another person in violation of municipal by-law.

Statutes — Governing principles — Construction — Strict construction requiring that conduct clearly fall within prohibition, not application of more stringent rule of construction.

The corporation was charged in an information as the owner of a motor vehicle unlawfully parked, in violation of a municipal by-law passed pursuant to s. 460(8)(*b*) of the Municipal Act. Prior to plea, the corporation's counsel moved to quash the information, asserting that it disclosed no offence known to law, since s. 460(8)(*b*) simply made the owner liable for the penalties incurred by other drivers of the vehicle, rather than creating an offence. The justice of the peace agreed, and quashed the information. On an appeal by way of stated case, a Supreme Court Judge held that the justice of the peace had erred in law in quashing the information, and remitted the matter for hearing and ultimate disposition on the merits. The Divisional Court reversed the decision of the Supreme Court Judge and restored the decision of the justice of the peace. The Attorney General of Ontario appealed to the Court of Appeal, seeking a determination of the following questions, stated by the summary conviction court:

(1) Did I err in law in holding that Section 460.8(b) of *The Municipal Act*, which creates owner liability for breach of By-Law 139-67, merely provides that the owner may become liable for penalties incurred by other drivers of his vehicle, but does not create an offence with which the owner could be charged?

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1981 CarswellOnt 41, 20 C.R. (3d) 66, 31 O.R. (2d) 161, 9 M.V.R. 52, 15 M.P.L.R. 172, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201

(2) Did I err in law in quashing the information in the instant case as disclosing no offence known to law?

Held:

Appeal allowed; order of Supreme Court Judge restored.

The question was whether s. 460(8)(*b*) created an offence for which the owner of a motor vehicle could be convicted and, secondarily, whether, even if the owner could not be convicted of an offence, he could still be made subject to an order for the payment of the penalty.

Subject to the saving provision, s. 460(8)(*b*) made the owner liable to any penalty provided under a by-law passed under the section, just as it made the non-owner driver liable to the penalty. To enforce the penalty under the Summary Convictions Act, an information stating the offence charged, in compliance with the provisions of Criminal Code s. 510(1), had to be laid. The same procedure could be used if the owner had committed an offence.

The object of the enabling legislation, s. 460(8) of the Municipal Act, was the control of parking on highways by the use of meters, as authorized by law. The subject by-law, prohibiting parking in a parking space on certain designated streets without using the appropriate parking meter and depositing the parking fee, as part of this control, required payment of a penalty by those who violated it. The driver of the vehicle parked in contravention of the by-law was the one who violated its terms but, due to the administrative burden of monitoring breaches of parking by-laws, s. 460(8)(*b*) adopted the only sensible solution to the problem, namely, making the owner vicariously liable for the penalty.

The principle that a penal statute must be construed "strictly" means that, where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held accountable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct proscribed by the statute. The principle does not mean that the language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" or applied more stringently than the ordinary rules of statutory construction.

In the phrase "liable to any penalty" in s. 460(8)(*b*), "liable" meant "responsible, bound in law to do something which may be enforced by action", and "penalty" is defined as "a punishment imposed for breach of law, ... a loss, disability or disadvantage of some kind [either] fixed by law for some offence ..." Although there is a close connection between the concept of being liable to a penalty and being guilty of an offence, it is not every penalty that is imposed for an offence, and the particular legislation must be examined. Reading the relevant statutory enactments together, the only reasonable conclusion was that the owner might be found guilty of the offence committed by the driver when the motor vehicle was illegally parked. While it was true that the corporation should have had the benefit of an interpretation which would not have subjected it to penalty if the statute were open to two equally reasonable interpretations, the construction placed upon the legislation, making the by-law unenforceable for all practical purposes, was not a reasonable one. The corporation, as owner of a motor vehicle, could be convicted of an offence when the vehicle was illegally parked by another, and could be made liable for payment of the fine.

Cases considered:

A.G. v. Carlton Bank, [1899] 2 Q.B. 158 — *considered*

Collins v. A.G. Ont., [1970], 1 O.R. 207, 6 C.R.N.S. 82, (sub nom. *R. v. Deacon; Ex parte Collins)* [1970] 1 C.C.C. 305 (H.C.) — *referred to*

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Coogans v. MacDonald, [1954] S.L.T. 279 (H.C.) — *considered*

London County Council v. Aylesbury Driving Co., [1898] 1 Q.B. 106 (D.C.) — *considered*

Pountney v. McWilliam, Ont. H.C., Craig J., 31st July 1980 (not yet reported) — *considered*

R. v. Anderson, [1960] O.W.N. 189 (Co. Ct.) — *referred to*

R. v. Estrin (1973), 1 O.R. (2d) 163, 14 C.C.C. (2d) 27 (H.C.) — *considered*

R. v. Gauthier (1977), 36 C.C.C. (2d) 420 (Ont. H.C.) — *not followed*

R. v. Greenfield, [1954] O.W.N. 292, 18 C.R. 85, 108 C.C.C. 107 (H.C.) — *considered*

R. v. Justice of the Peace; Ex parte Fells, [1971] 2 O.R. 14, 2 C.C.C. (2d) 484 (H.C.)*considered*

R. v. Kutz, [1972] O.R. 312, 6 C.C.C. (2d) 282 (H.C.) — *considered*

R. v. Lockie, [1950] O.W.N. 589, 10 C.R. 447 (sub nom. Lockie v. McGuire), 97 C.C.C. 212, [1950] 4 D.L.R. 443 (H.C.) — *considered*

R. v. Webb (1961), 36 C.R. 252, 36 W.W.R. 431, 131 C.C.C. 276 (B.C.S.C.) — *referred to*

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, ss. 510, 720(1) "information", "order", 722(2), 723(1), 729(1), 736, 745 [am. 1974-75-76, c. 93, s. 88].

Highway Traffic Act, R.S.A. 1970, c. 169, s. 197 [Act repealed 1976, c. 51, s. 1].

Highway Traffic Act, C.C.S.M., c. H60, s. 204(1).

Highway Traffic Act, R.S.O. 1970, c. 202, ss. 140(1)(*a*), 147(1) [am. 1972, c. 1, s. 1; 1976 (2nd Sess.), c. 37, s. 18; since re-en. 1980, c. 37, s. 20].

Interpretation Act, R.S.C. 1970, c. I-23, s. 11.

Interpretation Act, R.S.O. 1970, c. 225, s. 10.

Motor Vehicle Act, R.S.N.B. 1973, c. M-17, ss. 270(1) [am. 1979, c. 43, s. 9], 361.

Municipal Act, R.S.O. 1950, c. 243, s. 486(7).

Municipal Act, R.S.O. 1970, c. 284, ss. 352(58)(*b*), 460(8), 466 [am. 1972, c. 124, s. 17].

Summary Convictions Act, R.S.O. 1970, c. 450, ss. 2(*b*), 3, 6(5).

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Authorities considered:

Bouvier's Law Dictionary (1914), "liability".Driedger, The Construction of Statutes (1974), pp. 148, 154.Shorter Oxford English Dictionary, 3rd ed. (1944), "penalty".Williams, Textbook of Criminal Law (1978), pp. 926-27.**Words and phrases considered:**

liable

penalty

Appeal by the Attorney General of Ontario from a decision of the Divisional Court, 8 M.V.R. 218, reversing a decision of the High Court of Justice, 7 M.V.R. 72, and restoring an order of the summary conviction court quashing an information under a municipal by-law.

The judgment of the court was delivered by *Howland C.J.O.*:

1 This is an appeal, pursuant to leave granted by this court, from the order of the Divisional Court [8 M.V.R. 218], which in turn allowed an appeal from the order of Pennell J. [7 M.V.R. 72] on a case stated by Breen, Justice of the Peace, and restored the decision of the said justice of the peace quashing the information.

2 The principal issue on this appeal is whether the owner of a motor vehicle can be convicted of an offence when the motor vehicle has been illegally parked by another person contrary to a municipal by-law passed under s. 460(8)(*b*) of the Municipal Act, R.S.O. 1970, c. 284.

3 After a parking ticket was issued, the respondent, Budget Car Rentals (Toronto) Limited, was charged in an information that on 20th March 1979 it:

> ... [was] the owner of vehicle, licence number NVK 391, which was parked unlawfully on Parliament Street near 441, and did allow said vehicle to remain parked in the parking space controlled by parking meter No. 1007, beyond the maximum parking period permissible for such parking space, at 12:40 P.M. contrary to by-law 139-67 and amendments of the Corporation of the City of Toronto.

4 By-law 139-67 was passed pursuant to s. 460(8)(*b*) of the Municipal Act, which provided, in part, as follows:

> 460. The councils of all municipalities may pass by-laws: ...
>
> 8. For erecting, maintaining and operating on any highway or portion of a highway automatic or other mechanical meters or devices, with the necessary standards for the same, for the purpose of controlling and regulating the parking of any vehicle on the highway and measuring and recording the duration of such parking, for requiring drivers of every vehicle parked on such highways to make use of such meters or devices, and to pay for parking such vehicle on the highway a fee according to the amount or scale prescribed by the by-law and as measured by the meter or device, and for prohibiting parking of vehicles on such highway or portion of a highway unless such meter or device is made use of and such fee is paid, and for limiting the right of parking of vehicles on such highway to such drivers as do make use of such meters or devices and pay such fees ...
>
> (*b*) The driver of a vehicle, not being the owner, is liable to any penalty provided under a by-law passed under this paragraph and the owner of the vehicle is also liable to such a penalty unless at the time the offence was committed the vehicle was in the possession of a person other than the owner or his chauffeur without the owner's

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consent.

5 Section 466 [am. 1972, c. 124, s. 17] in Pt. XXI of the Municipal Act, entitled "Penalties And Enforcement of By-Laws", authorized the passing of by-laws for the imposition and recovery of fines, as follows:

> 466. — (1) By-laws may be passed by the councils of all municipalities ... for imposing fines of not more than $1,000, exclusive of costs, upon every person who contravenes any by-law of the council ... passed under the authority of this Act.
>
> (2) Every such fine is recoverable under *The Summary Convictions Act*, all the provisions of which apply ...

Section 3 of by-law 139-67 and Sched. A to the by-law provided for the erection, maintenance and operation of parking meters on various streets, including Parliament Street. Section 4 stipulated that:

> 4. Notwithstanding the provisions of any other By-law, where parking meters have been erected under the authority of section 3 hereof, no person shall park any vehicle in a parking space on any road-way, at the side and between the limits set out respectively in Columns 1, 2 and 3 of the said schedule 'A' hereto during the days and hours set out in Column 4 of the said Schedule unless the parking meter controlling such parking space is used and a fee is deposited therein in accordance with the rate set out in Column 5 of the said Schedule, and the parking meter is set in operation in accordance with instructions attached thereto.

6 The penalties for violation of the by-law were contained in s. 11(1) of the by-law:

> 11. (1) Any person violating any of the provisions of this By-law shall be subject to a penalty of not more than Ten Dollars ($10.00) for the first offence and not more than Twenty-five Dollars ($25.00) for every subsequent offence, exclusive of costs.

7 Under s. 3 of the Summary Convictions Act, R.S.O. 1970, c. 450, Pt. XXIV of the Criminal Code, R.S.C. 1970, c. C-34, except where inconsistent with the Act, applied mutatis mutandis to every case to which the Act applied, as if the provisions thereof were enacted in and formed part of the Act. This would include s. 723(1) of the Code, which provides:

> 723.(1) Proceedings under this Part shall be commenced by laying an information in Form 2.

8 The charge came before Breen, Justice of the Peace, on 10th December 1979. Before a plea was taken, a motion was made by counsel for the respondent to quash the information on the basis that it disclosed no offence known to law. It was contended by counsel for the respondent that s. 460(8)(*b*) simply made the owner liable for the penalties incurred by other drivers of the vehicle, subject to the saving provision in the statute. The justice of the peace agreed with this submission, and quashed the information.

9 At the request of the Attorney General of Ontario, Breen, Justice of the Peace, stated a case, and submitted the following questions for the judgment of the Supreme Court of Ontario:

> 1. Did I err in law in holding tht Section 460(8)(b) of *The Municipal Act*, which creates owner liability for breach of By-Law 139-67, merely provides that the owner may become liable for penalties incurred by other drivers of his vehicle, but does not create an offence with which the owner could be charged?
>
> 2. Did I err in law in quashing the information in the instant case as disclosing no offence known to law?

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10 On 23rd July 1980 Pennell J. allowed the appeal, answered the two questions in the affirmative and remitted the matter to the justice of the peace for hearing and ultimate disposition on the merits. On 16th January 1981 leave to appeal to the Divisional Court was granted, the appeal was allowed, and the decision of Breen, Justice of the Peace, was restored.

11 The Divisional Court concluded that, while the owner of a motor vehicle may be liable for the penalty, the penalty cannot be collected under the Summary Convictions Act.

12 The primary question which has to be determined by this court is whether s. 460(8)(*b*) creates an offence for which the owner of a motor vehicle can be convicted. A secondary issue is whether, even if the owner cannot be convicted of an offence, he can still be made subject to an order for the payment of the penalty.

13 Subject to the saving provision, s. 460(8)(*b*) makes the owner liable to any penalty provided under a by-law passed under the section, just as it makes the driver who is not the owner liable to the penalty. In order that the penalty can be enforced under the Summary Convictions Act, an information must be laid. The information must state the offence. Under s. 510(1) of the Code, each count in an indictment is to contain a statement that the accused committed an indictable offence therein specified. By s. 729(1) of the Code, s. 510 applies mutatis mutandis to informations in respect of proceedings under Pt. XXIV. The procedure under the Summary Convictions Act can be used if the owner has committed an offence. Counsel for the respondent contends that being liable to the penalty provided by the by-law does not constitute an offence.

14 Under s. 10 of the Interpretation Act, R.S.O. 1970, c. 225:

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In my opinion, the object of s. 460(8) is the control of parking on highways by the use of meters, as authorized by by-law. By-law 139-67 in turn prohibited parking in a parking space on certain designated streets without using the appropriate parking meter and depositing the parking fee. Part and parcel of this control was the payment of a penalty in accordance with s. 11(1) of the by-law. The penalty was payable by any person violating the by-law. The violation arose through the parking of a motor vehicle in a paying space without paying the required parking fee. As the driver would be the person parking the motor vehicle, he or she would be the one who violated the by-law. Administratively, the burden of monitoring breaches of parking by-laws by drivers is a monumental task. To maintain vigilance on every street so that charges could be laid against the drivers is obviously impractical. The only sensible solution was to make the owner vicarously liable for the penalty. Consequently, para. (*b*) was added to s. 460(8) in 1961, following the decision in *R. v. Anderson*, [1960] O.W.N. 189 (Co. Ct.). There the accused had been convicted, as owner, of having illegally parked a motor vehicle alongside a parking meter in which the necessary money had not been deposited, contrary to Peterborough by-law 1958-3. This by-law had been passed under s. 486(7) of the Municipal Act, R.S.O. 1950, c. 243, which was the predecessor of s. 460(8) and required the owner, operator, manager or driver of a motor vehicle to deposit money in the meter on entering the parking space alongside the meter. On appeal, Kennedy Co. Ct. J. declared the relevant section of by-law 1958-3 ultra vires and quashed the conviction. He stated [paraphrased in O.W.N. at p. 191]:

> The municipality was only given power by s. 486(7), to require drivers to make use of parking meters and to limit the right of parking vehicles to such drivers as made use of the parking meters. There could not be found in the express language of s. 486(7), or by implication therefrom any power given to the municipality to extend its jurisdiction beyond drivers of vehicles so as to include the owners of vehicles.

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15 Paragraph (*b*) was added to s. 460(8) at the next session of the legislature, by 1960-61 (Ont.), c. 59, s. 23. See also Horsley and Foster, Manual of Motor Vehicle Law, 2nd ed. (1974), p. 324.

16 Paragraph (*b*) was nearly identical to s. 388(1), item 108a(*c*) of the 1950 Municipal Act as enacted by 1958 (Ont.), c. 64, s. 29(5). Under s. 388(1), item 108a, by-laws could be passed by the councils of local municipalities for prohibiting the parking or leaving of motor vehicles on private property without authority from the owner or occupant of such property and providing for the removal and impounding of any vehicle at the expense of the owner. Section 388(1), item 108a(*c*) now appears as s. 354(1), item 112(*c*) [re-en. 1978, c. 101, s. 4(4)] of the present Municipal Act. It is also interesting to note that s. 377(54) of the Municipal Act, R.S.O. 1960, c. 249, which gave the councils of all municipalities power to pass by-laws prohibiting vehicles being used on sidewalks or boulevards, was similarly amended by 1964 (Ont.), c. 68, s. 9(1), by adding a provision identical to s. 460(8)(*b*), except that it referred to a "motor vehicle" rather than to a "vehicle". This provision is now included in the present Municipal Act as s. 352(58)(*b*).

17 In the course of argument, counsel for the respondent has directed us to a number of principles governing the construction and interpretation of statutes which, he argued, supported his contention that the legislation in question ought not to be construed as creating an offence by the owner of a vehicle for which, upon proof that the vehicle has been parked in contravention of the by-law made pursuant to the legislation, the owner will be answerable, subject, of course, to the statutory defence available to him.

18 Among these principles is the often-quoted principle that a penal statute must be construed "strictly". That this is so is surely beyond dispute, but it is important that it should be clear what the principle really means and what it does not mean. What it does mean is that, where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is proscribed by the statute. What the principle does *not* mean is that, because a statute is "penal", or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" than, or is to be applied more stringently than, the ordinary rules which apply to determine the meaning to be given to language used in statutes.

19 A person who is charged with, or sought to be made answerable for, conduct to which penal consequences are attached by a statute is therefore entitled to insist that the impugned conduct be shown to the required degree of certainty to be conduct which, in fact and in law, renders him liable under the statute to the penalty prescribed therefor. In my view, however, he is not entitled to insist that, merely because the statute can accordingly be described as "penal", its true meaning and intent must be ascertained by applying to it different (i.e., "stricter") principles of construction and interpretation than those which govern the construction and interpretation of statutes generally.

20 At one time, as remarked by E. A. Driedger in his recent work entitled the Construction of Statutes (1974), p. 148, statutes were regarded as falling into one of two broad classes, "penal" and "remedial". On this basis, penal statutes (which were taken to include not only statutes imposing penalties for violations but also revenue statutes and statutes interfering with the liberty or property of the subject) were to be construed strictly, and remedial statutes were to be construed liberally. Against this background, the language used in s. 10 of the Interpretation Act of Ontario and in s. 11 of the Interpretation Act of Canada, R.S.C. 1970, c. I-23, deeming every Act or enactment to be remedial, takes on a special and obvious significance.

21 I think it is worth repeating here the words of Lord Russell C.J. in *A.G. v. Carlton Bank*, [1899] 2 Q.B. 158 at 164:

> I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in

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> my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.

22 Where the court is concerned with a penal statute, it has been said that the defendant in the proceedings will not be liable to a penalty if, upon one of two equally reasonable readings of the statute, the penalty is incurred but on the other reading he is "let out". This has been expressed in another way by Wright J. in *London County Council v. Aylesbury Dairy Co.*, [1898] 1 Q.B. 106 at 109 (D.C.), where he stated his understanding of the rule to be that:

> ... where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it.

Again, as Driedger stated at p. 154:

> One might ask whether one ought ever 'to do violence' to language, but, in any case, 'doing violence' would be placing an unreasonable construction on language, and, clearly, a reasonable construction that does not impose a penalty is preferred to an unreasonable construction that does.

23 In support of his contention that s. 460(8)(*b*) did not create an offence on the part of the owner, counsel for the respondent referred to a number of cases where the owner's liability under various provisions of the Highway Traffic Act, R.S.O. 1970, c. 202, had been considered. Among these provisions was s. 147(1) [am. 1972, c. 1, s. 1; 1976 (2nd Sess.), c. 37, s. 18; re-en. 1980, c. 37, s. 20], which, prior to its amendment in 1980, to which I will refer later, provided:

> 147. — (1) Subject to subsection 2, the owner of a vehicle shall incur the penalties provided for any contravention of this Act or of any regulation made by the Lieutenant Governor in Council or of any municipal by-law for regulating traffic unless at the time of the contravention the vehicle was in the possession of some person other than the owner or his chauffeur without the owner's constent, and the driver or operator of a vehicle not being the owner shall also incur the penalties provided for any such contravention.

It was not contended that by-law 139-67 of the city of Toronto, which was the basis of the parking violation in this appeal, was a municipal by-law for regulating traffic, within the meaning of s. 147(1).

24 The wording of s. 147(1) and its predecessor sections remained substantially unchanged from 1929 until 1980, except that prior to 1967 (1967 (Ont.), c. 35, s. 14) the word "violation" was used, instead of "contravention". In considering the cases dealing with s. 147(1), the important question is whether the words "shall incur the penalties" are sufficient to create an offence.

25 In *R. v. Lockie*, [1950] O.W.N. 589, *(*sub nom. *Lockie v. McGuire)* 10 C.R. 447, 97 C.C.C. 212, [1950] 4 D.L.R. 443 (H.C.), the accused, who was the owner of a motor vehicle, was charged as the driver with a violation of s. 27(1) of the Highway Traffic Act, R.S.O. 1937, c. 288, in driving without due care and attention. On an appeal by way of stated case, Wells J. (as he then was) held that the magistrate did not have the power to convict a person as owner under the predecessor of s. 147(1) of the present Highway Traffic Act where the charge was laid against him as driver. While the section extended liability to owners, it did not automatically make them liable on charges against drivers. It would appear to be implicit in the judgment of Wells J. that the liability of the owner to the statutory penalties constituted an offence for which the owner could be convicted. At p. 216 he stated:

> Here, while the owner is liable to the penalties of the statute under certain conditions, the *offence* of the owner is clearly a different one from that of the driver of a motor vehicle, and must arise from his allowing someone to operate a motor vehicle on the highway. While the Act of Parliament is the same, the *offence* is essentially dif-

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ferent.

(The italics are mine.) *R. v. Lockie* was applied by Wells J. in *R. v. Greenfield*, [1954] O.W.N. 292, 18 C.R. 85, 108 C.C.C. 107 (H.C.), in concluding that the owner of a motor vehicle which was driven carelessly in contravention of s. 29(1) of the then Highway Traffic Act could not be convicted under the predecessor of s. 147(1), as he had not been charged as owner. Again, there was no suggestion that the owner would not have been guilty of an offence if he had been charged as owner under the predecessor of s. 147(1). The main point in *R. v. Lockie* and *R. v. Greenfield* was that a person must be specifically charged as owner, so that he appreciates the nature of the offence and the defences open to him. See also *R. v. Webb* (1961), 36 C.R. 252, 36 W.W.R. 431, 131 C.C.C. 276 (B.C.S.C.).

26 In *Collins v. A.G. Ont.*, [1970] 1 O.R. 207, 6 C.R.N.S. 82, (sub nom. *R. v. Deacon; Ex parte Collins)* [1970] 1 C.C.C. 305 (H.C.), Addy J. concluded that s. 54(1) of the 1960 Highway Traffic Act, read in conjunction with s. 148(1) (now s. 147(1)) constituted a statutory offence, for which any owner whose motor vehicle was on a highway carrying an excess load, contrary to the then s. 54(1), could be prosecuted.

27 In *R. v. Justice of the Peace; Ex parte Fells*, [1971] 2 O.R. 14, 2 C.C.C. (2d) 484 (H.C.), the accused was charged that he was "stopped unlawfully on or over a sidewalk", contrary to a by-law of the city of Toronto passed pursuant to s. 377 of the Muncipal Act, R.S.O. 1960, c. 249. The by-law provided that any person violating the relevant provisions should be subject to a penalty. As I have already pointed out, para. (*b*) had been added to this section in 1964, in identical words to s. 460(8)(*b*), except that it referred to a "motor vehicle" rather than to a "vehicle". Fraser J. held that the by-law in question was not a by-law passed subject to the Highway Traffic Act for regulating traffic on the highways, and consequently was not subject to the procedural requirements applicable to charges under the Highway Traffic Act. He distinguished the case from *Lockie*, supra, by stating at p. 488: "The accused has been charged as owner, but no evidence has been heard, much less has any conviction been made." There was no indication that he would not have been prepared to register a conviction because s. 460(8)(*b*) made the owner liable to a penalty rather than guilty of an offence.

28 In *R. v. Kutz*, [1972] O.R. 312, 6 C.C.C. (2d) 282 (H.C.), Morand J. found a charge under what is now s. 147 of the Highway Traffic Act to be defective because it did not make specific reference to that section and merely referred to the section under which the driver would be liable. At p. 283 he stated that, if the accused was "to be convicted" under what is now s. 147, he must be charged under that section. The use of the words "to be convicted" would appear to contemplate that a conviction of the owner, and not merely his liability to penalties, was possible.

29 In *R. v. Estrin* (1973), 1 O.R. (2d) 163, 14 C.C.C. (2d) 27 (H.C.), Van Camp J. took a different view. She upheld under s. 147 of the Highway Traffic Act a charge against an owner for illegal parking contrary to a municipal by-law for regulating traffic, approved by the department, even though the charge did not refer specifically to s. 147. After referring to Lockie, supra, *Collins v. A.G. Ont.*, supra, *R. v. Justice of the Peace; Ex parte Fells*, supra, and *R. v. Kutz*, supra, she said at p. 31:

> None of the foregoing cases held that if the accused were to be *convicted* under s. 147, he must be charged specifically thereunder.

(The italics are mine.)

30 It was not until the decision in *R. v. Gauthier* (1977), 36 C.C.C. (2d) 420 (Ont. H.C.), that there was any judicial support for the proposition that incurring the penalties provided for any contravention of the Act did not consitute the commission of an offence by the owner for which a conviction could be registered. Even then, the support was only by way of obiter dicta. Pursuant to s. 147(1), the accused was charged as owner of a vehicle of which the driver had failed to remain at or immediately return to the scene of the accident, contrary to s. 140(1)(*a*) of the Highway Traffic Act. Maloney J. held that the summons was issued for a contravention of s. 140(1)(*a*) rather than of s.

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1981 CarswellOnt 41, 20 C.R. (3d) 66, 31 O.R. (2d) 161, 9 M.V.R. 52, 15 M.P.L.R. 172, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201

147(1) and therefore did not have to be served within 21 days of the contravention, as it fell within the exempion in s. 6(5) of the Summary Convictions Act. After referring to *Lockie*, supra, and to *Collins*, supra, Maloney J. stated as obiter dicta at p. 425:

> I would concur with Wells, J., to the extent that he refused to allow the accused to be penalized as owner under s. 147(1) where he had been given no notice that he would be expected to put forward a defence in that regard. However, I find myself at variance with the view expressed by Wells, J., in both decisions to the effect that s. 147(1) creates an 'offence' for which the owner of the vehicle may be held liable. Section 147(1) says that the owner of a vehicle *shall incur the penalties* provided for a contravention of the Act by the driver of his vehicle; it does not say the owner is guilty or can be convicted of an offence under the Act. In the absence of clearly expressed legislative intent, a person should not be saddled with a record of a conviction when he did not actually himself commit the offence in question. It is one thing to call upon an owner to satisfy the obligations imposed upon a driver, but it is quite another to impose upon him the stigma attributable to misconduct in which he did not personally engage.

And at p. 426 he concluded by stating:

> However, although the question is not directly before me, I would further express the opinion (given my views as to the effect of s. 147(1)) that the information quoted above discloses no offence of which the accused, as owner, might properly be convicted.

In this appeal, the dicta of Maloney J. were relied upon by Breen, Justice of the Peace, and were also adopted by the Divisonal Court. Pennell J., on the other hand, concluded that the owner of the motor vehicle could be found guilty of an offence upon proof that the motor vehicle was illegally parked.

31 After the decision of Pennell J. in this case, and before the decision of the Divisional Court, Craig J. delivered judgment in *Pountney v. McWilliam*, Ont. H.C., 31st July 1980 (not yet reported). The accused had been charged, as the owner of a motor vehicle, with parking at a fire hydrant, contrary to a traffic by-law of the city of Owen Sound. Craig J. considered that the by-law was passed to regulate traffic and accordingly s. 147(1) of the Highway Traffic Act was applicable. Craig J. agreed with the reasoning and conclusion reached by Pennell J. in the case before this court. He held that liability attached to the owner upon proof of the illegal parking, and that the justice of the peace should not have dismissed the information.

32 In its reasons for judgment, the Divisional Court referred to legislation in other provinces comparable to s. 147(1) of the Highway Traffic Act, namely, the Highway Traffic Act of Alberta, R.S.A. 1970, c. 169, s. 197 [Act repealed 1976, c. 51, s. 1], the Highway Traffic Act of Manitoba, C.C.S.M., c. H60, s. 204(1), and the Motor Vehicle Act of New Brunswick, R.S.N.B. 1973, c. M-17, ss. 270(1) [am. 1979, c. 43, s. 9] and 361, which clearly state that the owner of a motor vehicle is guilty of an offence or violation of the Act or may be found guilty of the offence. The attention of the court was also called to the 1980 amendment to s. 147(1), which came into force on 19th June 1980, subsequent to the time when the charge before the court was laid. It is as follows:

> 147. — (1) Subject to subsection 2, the owner of a vehicle *may be charged with and convicted of an offence* under this Act or the regulations or any municipal by-law regulating traffic for which the driver of the vehicle is subject to be charged unless, at the time of the *offence*, the vehicle was in possession of some person other than the owner without the owner's consent and *on conviction* the owner is liable to the penalty prescribed for the offence.

(The italics are mine.) These statutory provisions have really no relevance to the issue before the court, which must be determined on the basis of the statutory provisions which were in force at the time when the offence was committed.

33 The major issue is whether the words "liable to any penalty" in s. 460(8)(*b*) created an offence. I am in

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agreement with the meaning ascribed by Pennell J. to the word "liable". He adopted the definition in Bouvier's Law Dictionary (1914) that "liability" means "responsibility; the state of one who is bound in law ... to do something which may be enforced by action". The word "penalty" is defined in the Shorter Oxford English Dictionary, 3rd ed. (1944), as:

> A punishment imposed for breach of law, rule, or contract; a loss, disability, or disadvantage of some kind, either fixed by law for some offence, or agreed upon in the case of violation of a contract ...

The definition of "penalty" was considered by the High Court of Justiciary of Scotland in *Coogans v. MacDonald*, [1954] S.L.T. 279. The accused was convicted of a contravention of the Road Traffic Act, 1930 (20 & 21 Geo. 5), c. 43. The sheriff imposed a fine and disqualification from holding a driving licence for two years. The Criminal Justice (Scotland) Act, 1949 (12, 13 & 14 Geo. 6), c. 94, required that the accused be served with a notice setting out the penalties to which he might be liable if convicted. The notice set out the fine or term of imprisonment, but no reference was made to any possibility of disqualification from holding a driving licence. The issue in the case was whether a disqualification from holding a licence was a penalty for which notice must be given. Lord Justice-General Cooper stated at p. 281:

> I consider that the word 'penalty' falls to be read in a wide popular sense, which is the sense the recipient of such a notice would naturally give it; and I select two definitions as adequately conveying that sense. The late Mr. Roberton Christie (*The Encyclopaedia*, Vol 11, page 204) said: 'Penalty in the broad sense may be defined as any suffering in person or property by way of forfeiture, deprivation or disability, imposed as a punishment by law or judicial authority in respect of ... an act prohibited by statute'. *The Oxford Dictionary* echoes the same wide conception by referring to 'a loss, disability or disadvantage of some kind ... fixed by law for some offence'.

Applying this broad definition, the court concluded that disqualification from holding a licence was a penalty. It will therefore be seen that there is a close connection between the concept of being liable to a penalty and being guilty of an offence.

34 It is not every penalty, however, that is imposed for an offence. In some cases the penalty may be a debt to be recovered by civil action. Accordingly, it is necessary to examine the particular legislation. Here, s. 466 of the Municipal Act, which is in Pt. XX1, entitled "Penalties and Enforcement of By-laws", authorizes by-laws to be passed imposing fines upon persons who contravene a by-law, and for such fines to be recoverable under the Summary Convictions Act. The specific fines for violation of by-law 139-67 were set forth in s. 11(1) of the by-law.

35 Section 722(2) of the Code provides:

> (2) Where the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a period of not more than six months.

Consequently, it would seem reasonable to conclude that the liability of the owner to any penalty provided under by-law 139-67, where that penalty is to be enforced by an information under the Criminal Code, could follow only as the result of the commission of an offence.

36 I think it is particularly significant that para. (*b*) of s. 460(8) purported to make the driver who was not the owner, and the owner, both liable to the penalty provided by the by-law. The same language is used to impose liability on the driver and the owner. It also refers to an offence being committed. While the fine provided for a violation of s. 11(1) of by-law 139-67 was authorized by s. 466 of the Municipal Act, para. (*b*) of s. 460(8) made the owner of the motor vehicle equally liable for the fine. In my opinion, s. 460(8) must be read in conjunction with s. 466 and by-law

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139-67. The driver of the motor vehicle is made liable for the fine, by s. 466(1) and s. 11(1) of the by-law. The owner of the motor vehicle, who is not the driver, is made liable for the penalty imposed on the driver, by s. 460(8)(*b*). Section 466(2) provided a remedy for the recovery of the fine under the Summary Convictions Act. When these provisions are read together, no other reasonable conclusion can be reached based on the wording of the provisions but that the owner may be found guilty of the offence which was committed by the driver when the motor vehicle was illegally parked. It was not necessary for the legislature to provide in express words that the owner could be charged with and convicted of an offence.

37 I have pointed out earlier that if a penal statute is open to two equally reasonable interpretations then the respondent should have the benefit of the interpretation which will not subject it to the penalty. However, s. 460(8)(*b*) would not appear to be capable of two equally reasonable interpretations. If the appellant's interpretation is adopted, that the words "liable to any penalty provided under a by-law" are wide enough to create an offence by the owner, then the result is consistent with the object of the legislation, which is to control parking on highways by the use of meters. On the other hand, if the respondent's interpretation is accepted, that s. 460(8)(*b*) does not create an offence by the owner, then the only way in which the penalty could be enforced against the owner, other than by amending the statute, would be for the appellant to endeavour to recover the penalty in Small Claims Court. This would be a highly impractical remedy. The tremendous volume of parking tags issued, coupled with the need for street-by-street surveillance to obtain the driver's name, would make the by-law unenforceable for all practical purposes. In short, the interpretation favourable to the respondent is not an equally reasonable one.

38 Maloney J. in *R. v. Gauthier*, supra, expressed his concern about the owner of a motor vehicle incurring the stigma of a conviction for an offence which he did not actually commit. It is questionable whether the word "stigma" can appropriately be applied to a conviction for illegally parking a motor vehicle. If so, it is certainly minimal compared with the stigma of a conviction for failing to remain at the scene of an accident, with which Maloney J. was concerned in *R. v. Gauthier*. To hold that the owner of a vehicle has committed a parking offence where the vehicle is illegally parked by another to whom he has entrusted the vehicle is not ethically repugnant. Glanville Williams, in his Textbook of Criminal Law (1978), after pointing out that personal responsibility is the general rule of English criminal law and that normally a person is not liable for the act or fault of another, states at pp. 926-27:

> In at least one case, however, an extension of liability is justified. The registered owner of a vehicle is made liable by statute [the Road Traffic Act, 1974 (Eng.), c. 50, ss. 1-5] in respect of certain offences committed in respect of a stationary vehicle, namely certain fixed-penalty offences and excess parking charges, even though the fault was that of some other person (other than a person in possession of the vehicle without the owner's consent). The reason is that it was found too burdensome for the police to trace the actual offender, when offences were so numerous and so trivial.

In any event, having reached the conclusion that, on a proper interpretation of s. 460(8)(*b*), the owner of the motor vehicle was guilty of an offence, the question of the stigma of the conviction is not of further consequence.

39 The interpretation of s. 460(8)(*b*) which I have concluded to be the correct one does not place any strain on the words of the statute or require the addition of any words to para. (*b*) of s. 460(8). It gives effect to attaining the object of the legislation according to its true intent, meaning and spirit. In short, the respondent, as owner of a motor vehicle, can be convicted of an offence when the motor vehicle was illegally parked by another person, and can be made liable for payment of the fine which is imposed.

40 Counsel for the appellant raised a secondary ground of appeal. He contended that, even if the court should conclude that the owner did not commit an offence but was merely liable to the penalty under the by-law, an order could still be made against the respondent pursuant to the information which was laid.

41 Under s. 466(2) of the Municipal Act, every fine recoverable under a by-law passed pursuant to s. 466(1) is

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recoverable under the Summary Convictions Act. Section 2(*b*) of the Summary Convictions Act provides:

> 2. Subject to any special provision otherwise enacted with respect to such offence, act or matter, this Act applies to ...
>
> (*b*) every case in which an information is laid before a justice in relation to any matter over which the Legislature has legislative authority and with respect to which the justice has authority by law to make an order for the payment of money or otherwise.

As already stated, under s. 3, and except where inconsistent with the Act, Pt. XXIV of the Criminal Code, as amended or reenacted from time to time, applied mutatis mutandis to every case to which the Act applied, as if the provisions thereof were enacted in and formed part of the Act.

42 Proceedings under Pt. XXIV are to be commenced by laying an information in Form 2. Under s. 720(1):

> 720.(1) In this Part ...
>
> 'information' includes ...
>
> (*b*) a complaint in respect of which a justice is authorized by an Act of the Parliament of Canada or an enactment made thereunder to make an order;
>
> 'order' means any order, including an order for the payment of money.

Under s. 736:

> 736.(1) Where the defendant appears, the substance of the information shall be stated to him, and he shall be asked ...
>
> (*b*) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.
>
> (2) Where the defendant pleads guilty or does not show sufficient cause why an order should not be made against him, as the case may be, the summary conviction court shall convict him or make an order against him accordingly.

Cousel for the appellant took the position that the information in question was in relation to a matter over which the legislature had legislative authority and with respect to which the justice had authority by law to make an order for the payment of the penalty.

43 I am not persuaded that there is merit in this submission. Section 460(8)(*b*), by virtue of which the owner is liable for the penalty provided under the by-law, does not authorize the making of an order authorized under the Summary Convictions Act or Pt. XXIV of the Code, except where a person is convicted of an offence. In other instances, such as s. 745 [am. 1974-75-76, c. 93, s. 88] of the Code, the justice is given express authority to make an order, and it is specifically provided that an information may be laid. Furthermore, the information which was laid purports to charge the respondent with an offence, and does not contain the appropriate words which would be required if the information were to be the basis of an order for the recovery of the penalty which the owner was liable to pay.

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44 Accordingly, the appeal is allowed, paras. 2 and 3 of the order of the Divisional Court are set aside, and the order of Pennell J. is restored. In the circumstances, there will be no order as to the costs of the appeal to the Divisional Court, of the application for leave to appeal to this court and of this appeal.

Appeal allowed.

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TAB 6

1983 CarswellOnt 1336, 7 C.C.C. (3d) 68, 12 C.E.L.R. 137

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1983 CarswellOnt 1336, 7 C.C.C. (3d) 68, 12 C.E.L.R. 137

R. v. Falconbridge Nickel Mines Ltd.

R. v. Falconbridge Nickel Mines Ltd.

Ontario District Court

Loukidelis Dist.Ct.J.

Judgment: September 12, 1983
Docket: None given.

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Proceedings: Affirmed, (1982), 11 C.E.L.R. 136 (Ont. Prov. Ct.)

Counsel: *L.C. McCaffrey, Q.C.*, for the Crown - respondent

P.B. Keaney, for the appellant

Subject: Criminal; Environmental; Criminal; Environmental

Environmental Law --- Statutory protection of the environment — Environmental offences — Discharge of pollutants into environment — Water — Effluent.

Environmental Law --- Statutory protection of the environment — Environmental offences — Required approvals not obtained.

***Loukidelis Dist.Ct.J.*:**

1 This is an appeal brought by the appellant, Falconbridge Nickel Mines Limited, from the decision of Michel Prov. Ct.J., dated May 19th, 1982, in which convictions were entered on five counts, laid under section 32(1) [now section 16(1)] of the *Ontario Water Resources Act*, R.S.O. 1970, c.332 [now R.S.O. 1980, c.361], representing offences under the section committed from January 18th to 22nd, 1981, both inclusive [reported at (1982), 11 C.E.L.R. 136].

2 The appellant had originally been charged under 19 counts under section 32(1) [now section 16(1)], 19 counts under section 32(3) [now section 16(3)] and 1 count under section 42(1) [now section 24(1)] of the *Ontario Water Resources Act*.

3 The appellant was found not guilty on 14 other counts under section 32(1) and of the charge under section 42(1)

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of the *Act*. There was a finding of guilty, in addition, on the 19 counts under section 32(3) of the *Act*.

4 The issues on this appeal have been considerably narrowed as the appellant has accepted all findings of fact and law made by the trial judge, save one. The issue in dispute is whether the discharge of mine water directly into Fecunis Lake may impair the quality of water in the lake.

5 The appellant carries on large-scale mining operations in the District of Sudbury, including the operations of the Fecunis Mine, located approximately four miles from the Town of Onaping Falls in this District. In this, as in other mining operations of this kind, water accumulates within the mine which originates from two sources, namely; ground water infiltration and water introduced into the mine and used in conjunction with various mining operations.

6 Without a means of removing this mine water, flooding would inevitably result. At this mine, water accumulates in the shaft bottom and from there it is pumped to the 3400 foot level and then to the 1650 foot level and finally to the surface. Once the surface is reached, the mine water enters the headframe and thence is pumped up a 200 foot high hill, through a 1600 foot, eight inch diameter metal pipe. At the crest of the hill, the water is discharged into a tailings pond.

7 The raising of the water is done by sump pumps which are triggered by the water levels in the collection areas reaching a certain level. There is therefore not a continuous flow, but a periodic raising of the mine water to the tailings pond. This normally occurs several times a day.

8 Adjacent to the mine is found Fecunis Lake which has an average depth of one metre and is said to contain not only debris and rubble, but eleven million gallons of water. On the evidence, it is clear that the lake is grossly polluted or impaired. A study made in 1977 showed that the only organism found at the sole outlet of the lake was a resistant organism referred to as a mite, or blood worm or blood fly. In the lake, as well, are found certain plants that have been found to be tolerant to extremely high concentrations of nickel. On a scale known as a diversity index, one is considered to mean severely stressed and this lake would be scaled at less than one.

9 The reason for this paucity of living organisms and plants is due to the chemical contamination caused by the high nickel, copper and sulphate concentrations.

10 In the early days of January, 1981, two unhappy events coincided. The heaters in the headframe were not working and a very severe cold spell began on the night of January 3-4th. On January 3rd, 1981, the mean temperature in the area was -33.9° Celsius. The high was -31° Celsius and the low was -36.8° Celsius. This was the coldest temperature recorded in at least 27 years.

11 During the early morning hours of January 4th, a warning light was activated at the mine, showing that the level of mine water was unusually high and was at an unacceptable level. Further investigation revealed that the water in the exposed metal pipeline bringing the water to the tailings pond was frozen. Faced with this emergent situation, mine officials took the decision to open a valve in the headframe to allow the mine water to be discharged from the mine. This water found its way to the lake through a culvert and a ditch.

12 In addition to this response, a local company called Heist, was called in and instructions were given to clear the line but not to its full diameter. Using their equipment, a hole four inches in diameter was punched through. This operation took ten hours of time for two Heist employees extending over two days. This work commenced on January 5th and was completed on the following day.

13 During the testing of the line by Falconbridge employees in this continuing cold weather, the line again froze. This time the decision was taken to do the remedial work, using a steam jenny operated by Falconbridge personnel. This is an equally acceptable method of alleviating this condition. Unfortunately, the progress of this work was hampered by certain complications. One of the two burners in the steam jenny was not working, although the trial

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judge was uncertain whether the speed of the work was affected by this. Secondly, two men worked on this task only on regular days and no weekend or overtime work was ever scheduled. The work went on to completion on the 23rd of January and the line was operational on the following day.

14 The trial judge also found that the pH level and the nickel concentration levels in the lake were more deleterious than the mine water that was introduced. At page 5 [page 138 C.E.L.R.], he made the following findings:

> The pH in 1977 was found in Fecunis Lake to be 4.3 and 4.6, and at the relevant times according to some tests that were taken to be 4.9. The evidence disclosed that the average mine water being discharged into Fecunis Lake had a pH level of approximately 6.5. The nickel concentrations in Fecunis Lake, I am satisfied, were in the area of 12.5 parts per million. The mine water concentrations that were being spilled into Fecunis Lake were at 7.8 parts per million. The mine water copper concentrations, I am satisfied, were in the area of .12 parts per million.
>
> The question of loading was a matter that was argued. Mr. Gerry Myslik, regional biologist for the Ministry of the Environment, estimated that at 7.8 parts per million, assuming 156,000 imperial gallons of flow per day, 12 pounds of nickel would have been added to Lake Fecunis per day.
>
> Mr. R.E. Michelutti, environmental biologist with the defendant company, calculated or estimated that the loading from the mine water into Fecunis Lake would have been 7.57 pounds per day.
>
> The Court is satisfied at the relevant times Lake Fecunis was more contaminated *per se* than the mine water *per se*.

15 The significance of these findings relates to the presence of metal concentrations and acidity which was referred to in the evidence of the witnesses for the Crown and the accused.

16 The evidence is not in dispute that the higher the concentrations of metal like nickel and copper, the lower the diversity of the aquatic community. Thus, exposure to nickel brings many forms of toxic action to the enzyme system. The Ministry guidelines speak of acceptable concentrations to protect aquatic life for nickel as not exceeding 0.25 milligrams per litre. For example, the water flea, one of the first organisms in the food chain has poor reproductive success in nickel concentrations over .03 milligrams per litre. Algae are also affected at about the Ministry guideline level of .025 [*sic*].

17 Copper is considered to be much more toxic than nickel and the objectives set for that metal are .005 milligrams per litre because fish and plants are affected in the ranges of .05 to 2.3 milligrams per litre of copper.

18 As to acid stress or a pH level, within a level of 5.5 down to 4, the evidence shows that one can find an eventual wiping out of aquatic life. Mr. Myslik, the Ministry biologist said that generally 80% of fish are still found even in pH ranges of 6.5 to 8.5 but that below 6.5 the numbers drop off.

19 In this situation, there is another complicating factor and that was that natural leaching of these metals and acid-bearing substances which find their way into the water of the lake from the rock formations surrounding the lake.

20 Throughout the evidence one meets continuously the expressions, 'load and concentration' which form the battleground for this appeal. There is no doubt that the Ministry guidelines on acceptable levels are expressed in terms of concentration. By concentration the witnesses mean the amount of a substance in a given volume of water. Load or loading is used to mean the amount of a substance expressed in terms of a unit of weight.

21 In the mining industry and in relation to copper and nickel, the expression of the presence of a substance is

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defined in terms of concentration and not by load. Load, however, determines ultimately what the concentration in a given body of liquid will be. Thus, it is the concentration that impairs the water. However, concentration must come through the load of metal that gets into a body of water. The effect on aquatic life, while expressed in terms of concentration, depends on the load, the amount of which determines the concentration. At the same time, concentration has to be determined in relation to the volume of the liquid. While the load may be high in terms of pounds or by some other unit of weight, the concentration can be lower when there is a larger volume of the liquid.

22 Toxicity is not determined by load but by concentration. Loading by itself can say nothing to the issue whether a given body of water is toxic in quality.

23 In the month of January, 1981, the mine water released into the lake had a nickel, copper and pH concentration as did the lake. It is equally true that the concentration of the substances in the mine water was less in all cases to that of the lake water. Further, the introduction of this mine water would have the effect of lowering the concentrations of the same substance in the lake, albeit on a minor scale. Mr. Myslik went on to say that the dilution would not have been measurable.

24 Mr. Michelutti, in his evidence for the appellant, viewed these concentrations in the mine water as having no adverse effect on aquatic life. Since the evidence is that only blood flies have been found at the outlet, as well as some plants in the lake, there is virtually nothing in the lake that would suffer any adverse effect.

25 Mr. Myslik's calculations were that the mine water added some 12 pounds of nickel to the water per day over and above the nickel that was finding its way into the lake from the water introduced into the lake in the regular mining process and through leaching. Once in the lake, he concluded that the added nickel and copper had to come out although the better quality mine water would have the initial effect of some dilution of nickel and copper concentrates and the raising of the lake pH level.

26 The position of the Crown is that the increase in the total loading of nickel and copper into the lake created additional stress and prolonged any kind of recovery of the lake. Dr. Sprague, one of the appellant's witnesses, agreed that a reduction in the loading would be beneficial to the lake. Conversely, he was also of the opinion that it was not a good thing to discharge mine water into any body of water because it would be toxic to aquatic life. That proposition is evident as the mine water in Falconbridge's process, has to be treated by remaining in a tailings pond before being released into the lake. At the same time this argument is countered in part by the fact that the spill was for a relatively short period of time.

27 The offences charged here are founded on the then section 32(1) of the *Ontario Water Resources Act* (now section 16) which reads as follows:

> Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on conviction is liable on first conviction to a fine...

28 Under the then section 30 of the same *Act* (now section 14) a deeming provision was included which is said to apply to four different sections of the *Act* including the now section 16. This section reads in part as follows:

> ...the quality of water shall be deemed to be impaired if, notwithstanding that the quality of the water is not or may not become impaired, the material deposited or discharged or caused or permitted to be deposited or discharged or any derivative of such material causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in

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contact with the water.

29 In respect of an offence under section 16, the Crown must prove beyond a reasonable doubt, that the discharge complained of has the ability to impair the water quality and, it might have done so. The Crown need not prove that the discharge did in fact impair the water quality. *Regina v. Matspeck Construction Co. Ltd. et al.* (1965), 8 Crim. L.Q. 455 at 460; *Regina v. The City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373, 7 C.E.L.R. 53.

30 The operative words in the section appear to be "may impair". What are their precise signification in the context of section 16? These words have been considered in *Regina v. Sheridan* (1973), 10 C.C.C. (2d) 545 at 556-7 where Vannini, Dist.Ct.J. adopts the words of Baxter, Prov.Ct.J. in *Regina v. Matspeck (supra)*:

> One other matter in connection with the wording of this charge that gave me concern was that the word "may" as used in this context can be taken to mean "could" or "has the ability to" or implying something occurring in the future. The word "impair" according to the various dictionaries I consulted, appears to have several meanings such as to "make worse, less valuable or weaken", to "lessen injuriously", to "damage", to "injure".
>
> Another definition was "diminish in quantity, value or excellence", "cause to become less or worse", "deteriorate". The combination, therefore, of the two words "may impair" would appear to mean, in the context in which they are used, that as a result of the entry into the water of a certain material there was the possibility that the water might become diminished in quality. In other words it would appear from a consideration of this phrase that it was not incumbent upon the prosecution to satisfy the court beyond a reasonable doubt that the material did in fact impair, but rather that it had the ability to do so and might have done so....

31 In this situation, the trial judge found that the waters of Fecunis Lake were already impaired. Does that condition mean that any additional impairment (if such be the case here) cannot come within the purview of the section because the waters of the lake are already impaired? I think not. Otherwise it would mean that once there was evidence of impairment, there could be no remedy so long as the receiving body of water was more impaired than the new waters injected into it. In my view the section covers any impairment, whether it be to a body of water that is in pristine condition or has already suffered from the effects of any discharge impairing its quality. Vannini, Dist.Ct.J., in *Regina v. Sheridan (supra)* at 550 has held to the same effect.

> Early in the course of the hearing I ruled, and I still hold, that there is no onus on the prosecution as was suggested by the defendant to prove or to show that the quality of the waters of Silver Creek and Hibbard Bay were unimpaired prior to the time in question...

32 We next come to the equally important words of the section "the quality of the water". Quality is defined in the Oxford dictionary to mean "a degree of excellence, relative nature, general excellence, attribute, trait, faculty...". How is the word "quality" applied to this lake where the discharge of the waters over the days in question, albeit polluted, were less polluted than the waters already found in the lake. The contaminants were introduced by means of 156,000 gallons per day of mine water and that discharge may have marginally improved the concentration of the metals and the acidic quality of the lake.

33 The argument is made for the accused that quality has to be determined by the concentration of contaminants in the water and not by load. The Ministry in its guidelines uses the former measurement rather than the latter. Load also is meaningless without knowing the size of the body of water in which it is found. In this respect then, the appellant argues that the trial judge erred in concluding in his reasons for judgment (at page 8) [page 140 C.E.L.R.]:

> I accept this as the situation here, and that by the extra loading of pollutants by the contents of the mine water, that more time will be necessary to bring the Fecunis Lake back to its pristine state and therefore the adding of less polluted waters into more polluted waters still may impair the quality of the water as foreseen by the *Ontario*

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Water Resources Act.

34 As the appellant conceives the problem, this is a situation where there are two choices to be made in answering the question whether the quality of the lake was impaired and there are two choices of standards to be made when determining whether the quality of the waters of the lake may be impaired. Because the section imposes penalties, it must be considered to be a penal statute and the principles outlined by the Supreme Court of Canada in *Winnipeg Film Society v. The Queen on the Information of Webster*, [1964] 3 C.C.C. 6 at page 12 apply.

The relevant rule governing the construction of penal statutes is well summarized in 36 Hals., 3rd ed., p. 415:

> It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

At page 12, as well, Ritchie, J. held:

> ...if the two interpretations could both be sustained, the penal character of the statute would entitle the appellant to the benefit of the construction more favourable to it.

35 The appellant also relies on *Regina v. Mansour* (1979), 47 C.C.C. (2d) 129 at page 137. In that case the accused had had his licence suspended by virtue of provincial legislation (namely the *Highway Traffic Act* of Ontario) and the accused was found driving in a parking lot adjacent to an apartment building. He was charged under the then section of the Code 238(3) which made it an offence for anyone to drive a motor vehicle in Canada while disqualified or prohibited from driving by reason of the legal suspension or cancellation in any province of his permit or licence. Estey, J. concluded that a person is not driving a motor vehicle in Canada while disqualified from driving if the driving is not within the part of the country in respect of which a licence is required. While acknowledging that it was possible to interpret the section to include all persons whose licences are suspended whether or not they are driving in a place where a licence is required, the section should not be given an expansive interpretation because it is criminal legislation. At page 137 he summarized this conclusion as follows:

> This is, of course, criminal legislation, and its interpretation and application should not be given an expansive interpretation in order to draw within its net actions of an accused not affected by the section when given a literally correct interpretation. It has been cast more broadly by the learned authors of *Maxwell on Interpretation of Statutes*, at p. 246:
>
> > ...where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.

36 While the provisions of the *Ontario Water Resources Act* attract penalties for breaches of a number of sections, this does not mean that it must be characterized as a penal statute as the *Criminal Code* undoubtedly is. There is no doubt that governments have enacted legislation that has a remedial purpose. This question was considered by our Court of Appeal in the decision of *Regina v. Budget Car Rentals (Toronto) Ltd.* (1981), 57 C.C.C. (2d) 201 at 207-208. This case, *inter alia*, discussed the issue of penal statutes and the question of interpretation.

> Among these principles is the often-quoted principle that a penal statute must be construed "strictly". That this is so is surely beyond dispute, but it is important that it should be clear what the principle really means, and what it does not mean. What it does mean is that where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be

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held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is proscribed by the statute. What the principle does *not* mean is that because a statute is "penal" or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" than, or is to be applied more stringently than, the ordinary rules which apply to determine the meaning to be given to language used in statutes.

A person who is charged with, or sought to be made answerable for, conduct to which penal consequences are attached by a statute is, therefore, entitled to insist that the impugned conduct be shown to the required degree of certainty to be conduct which, in fact and in law, renders him liable under the statute to the penalty prescribed therefor. In my view, however, he is not entitled to insist that, merely because the statute can, accordingly, be described as penal, its true meaning and intent must be ascertained by applying to it different (*i.e.*, stricter) principles of construction and interpretation than those which govern the construction and interpretation of statutes generally.

At one time, as remarked by E.A. Driedger in his recent work entitled *The Construction of Statutes* (1974), p.148, statutes were regarded as falling into one of two broad classes, "penal" and "remedial". On this basis penal statutes (which were taken to include not only statutes imposing penalties for violations, but also revenue statutes and statutes interfering with the liberty or property of the subject) were to be construed strictly, and remedial statutes were to be construed liberally. Against this background the language used in s. 10 of the *Interpretation Act* of Ontario and in s.11 of the *Interpretation Act* of Canada, R.S.C. 1970 c. I-23, as amended, deeming every Act or enactment to be remedial, takes on a special and obvious significance.

I think it is worth repeating here the words of Lord Russell in *Attorney-General v. Carlton Bank*, [1899] 2 Q.B. 158 at p. 164:

> I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.

Where the Court is concerned with a penal statute, it has been said that the defendant in the proceedings will not be liable to a penalty if, upon one of two equally reasonable readings of the statute, the penalty is incurred, but on the other reading he is "let out". This has been expressed in another way by Wright J. in *London County Council v. Aylesbury Dairy Co. Ltd.*, [1898] 1 Q.B. 106 at p. 109, where he stated his understanding of the rule to be that: "...where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it...". Again, as Driedger stated at p. 154:

> One might ask whether one ought ever "to do violence" to language, but in any case, "doing violence" would be placing an unreasonable construction on language, and, clearly, a reasonable construction that does not impose a penalty is preferred to an unreasonable construction that does.

37 The plain fact is that the water of the lake before the mine water was introduced was impaired. The mine water that was introduced into the lake was also impaired by reason of the presence of nickel, copper and those other chemicals that made the water acidic. Notwithstanding the fact that the mine water was less impaired in its quality than that already in the lake [this] does not affect the ultimate result when the less impaired mine waters were introduced into the more impaired lake. While the additional waters may even have marginally reduced the concentration in the lake, the mine waters that were impaired were added to waters in the lake that were impaired and this has added to the load of these minerals in the lake.

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38 In the result then, the introduction of the mine waters, even with their lesser concentrations of metals and chemicals, have added to the metals and chemicals already in the lake thereby coming within the prohibition found in section 16(1) formerly section 32(1). Accordingly, the appeal from the conviction by the learned Provincial Court Judge is dismissed.

39 Having dealt with the appeal against conviction, I must now deal with the appellant's and the Crown's appeal against sentence.

40 The Crown takes the position that the sentence imposed [reported at (1982), 12 C.E.L.R. 135] is manifestly inadequate and represents an error in principle.

41 The position is that, this spill was caused by a lack of diligence in its original cause in not seeing that the mine head heaters were operational which caused the freezing of the main line as the two inch back drain pipe having frozen allowed water to sit in the main pipe and freeze.

42 There was a lack of diligence as well in the speed and alternatives used in clearing the main eight inch 1600 foot line. The situation is said to have been exacerbated by the fact that people who had cleared the line in two days, Heist were not called on this one, and the company decided to rely on its own work forces. Furthermore it was said that the steam jenny that was used was not one that could do the job adequately because it was only partly functional. Finally, there was a question of the number of workers and the fact that in doing this work no week-end or overtime work was used.

43 There were actions taken although defensively that contributed to the ultimate high outflow to the lake.

44 It was argued that the penalties imposed could hardly deter, but would rather draw one to a conclusion of approbation by the Court of this spill. In setting the amount, counsel submits that the Court relied on the economic and financial situation of the company, and the ultimate effect of a heavy fine on the community.

45 The basic error that is raised is that the judge concluded that the frozen pipe was an act of God for which the company cannot be held responsible. The argument is made that but for the frozen two inch drainage outlet, the full effect of the extreme cold would have been obviated.

46 The flow into the lake had its proximate cause in the decision of the company or its employees to open a way from the ditches and culverts to the lake as mine water that had been released because of the frozen pipe, was flooding the road and creating a dangerous condition for the roadway near the site. This mine water was released into the ditches when its regular path to the tailing ponds through the long pipe was blocked by the pipe which was frozen for its whole length. There were two episodes of freezing. The first was on January 3 - 4 and this was partially cleared by Heist; at least to a diameter of three inches. In the testing, the line re-froze again and a second blockage had to be dealt with. If the first blockage could be said to have been from a non-functioning caused by mine head heaters not protecting the pipe, could it be said that this was the cause of the second blockage which was said to have become frozen during the testing? In my view, the extreme cold was a good contributory cause and can be said to be natural event over which the company had no control. There was a human event in the first 14 hour blocking if the main line freezing was caused by the two inch drain pipe freeze-up. Could it be said that the second major freeze-up had the same cause? However, the evidence spoke of a freeze-up during testing.

47 It is said that the company's actions after this in correcting this situation showed a lack of diligence. For example, the company could have at least suspended part of its mining operations in not having any back-filling, a source of much of the mine water that is introduced during the mining operation process. Secondly, it is said that the company could have stopped mining altogether. Thus there would have been no water contributed from the mining process, but

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that does not prevent the introduction of the ground water and would still have required the company to remove that water in order to prevent the flooding of the mine. The third had to do with the steam jenny. It is said that the Heist method of clearing the three to four inch hole was more expeditious. At the same time, the trial judge found and the evidence so indicates that the use of the steam jenny is equally acceptable for the company to use. This method is at least equally acceptable to the water jet system of the Heist. The added use of the steam jenny ultimately was able to clear most of the line for its whole diameter. The one problem with the steam jenny that was in use by the employees of Falconbridge was, that it was only partly operational because one of the two burners was not functioning. The trial judge found that that the fact that only one burner was operating did not make any appreciable difference in the length of time that it took by this method to free the line. The next complaint is that the company did not put the necessary work forces to work using the steam jenny to clear the line to its whole length. There is no evidence that the number of each work crew was not adequate. It is, however, argued that they were operating under difficult conditions on the side of a hill in the extreme cold which necessitated numerous breaks so that they could warm themselves. That company, at the same time, did not schedule round the clock shifts using emergency lighting, nor did they schedule any week-end work. In that respect, the trial judge could find that they did not proceed with all reasonable haste. The judge had in mind the escaping water was less toxic than that found in the lake. This is a factor that ought to be considered only in dealing with penalty, but also having regard to the overall necessity for the state to protect the environment and the public who may be affected. It is not enough to say that you put contaminants in the water, but we didn't put it in the same degree as that would ordinarily be found in the mining process, nor could we have done anything but improve the quality of the water in the lake.

48 Another mitigating factor in relation to all charges, and not the reported ones alone, is the fact that Falconbridge's environmental group reported the spill to the Ministry immediately when it came to their attention.

49 In relation to the reporting offences, the Crown took the position before the trial judge that the 19 offences should be treated as one in relation to penalty. This the trial judge evidently did. The Crown now changes its position, and asks that each be treated and punished as separate offences.

50 In my view, the trial judge did not err in fixing the penalties complained of by the Crown. At the same time, I cannot accept the conclusion that the penalties reflect an error in principle. While the water that went in was less toxic, the water had the capability of impairing the lake water. In its lack of a system heater inspection and its failure to schedule the work at all speed, the company did not respond acceptably in the emergency situation that faced it. Accordingly, in my view, the trial judge not having erred in the penalties imposed, the appeals against sentence by Crown and accused are dismissed.

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TAB 7

1970 CarswellNS 11, 12 C.R.N.S. 272, [1971] S.C.R. 5, 12 D.L.R. (3d) 591, [1970] 5 C.C.C. 193

1970 CarswellNS 11, 12 C.R.N.S. 272, [1971] S.C.R. 5, 12 D.L.R. (3d) 591, [1970] 5 C.C.C. 193

R. v. Pierce Fisheries Ltd.

Regina v. Pierce Fisheries Limited

Supreme Court of Canada

Cartwright C.J.C., Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

Heard: November 13, 1969
Judgment: June 26, 1970
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Counsel: *J.A. Scollin, Q.C.*, for the Crown.

G.T.H. Cooper, for respondent.

Subject: Criminal; Public

Fish and Wildlife --- Offences — Illegal possession — Fish — Undersized fish.

Fisheries — Possession of undersized lobsters — Whether mens rea ingredient of offence — Criminal and statutory offences distinguished — Whether Regulation in question creating new crime — Lobster Fishery Regulations, P.C. 1963-745 as amended, s. 3(1)(b), made pursuant to the Fisheries Act, R.S.C. 1952, c. 119, s. 2, s. 34, as re-enacted by 1960-61, c. 23, s. 5.

The accused was charged with having possession of undersized lobsters, contrary to Regulations made pursuant to the Fisheries Act. There was an acquittal by the Provincial Magistrate followed by an appeal by way of stated case to the Appeal Division. That Court was asked for its opinion as to whether mens rea was an essential ingredient of the offence alleged. The answer was in the affirmative and the Crown appealed to the Supreme Court of Canada with the leave of that Court.

Held (Cartwright C.J.C. *dissenting*), the appeal should be allowed, the question answered in the negative and the case remitted to the Magistrate for disposition.

Per Ritchie J. (Fauteux, Abbott, Martland, Judson, Hall, Spence and Pigeon JJ. concurring):

There was a presumption at common law that mens rea was an essential ingredient of all criminal cases. A study of the case law indicated, however, that there was a wide category of statutory offences which was not subject to such presumption. The statutes in question were ones which regulated individual conduct in the interests of health, convenience, safety and general public welfare. Whether the presumption arose in a case involving a statute of that type

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was dependent upon the words of the statute and the subject matter. As pointed out by Stephen J. in *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207, it was necessary "to look at the object of each Act ... to see whether and how far knowledge is of the essence of the offence created". The Court was greatly assisted by the dictum of Dixon J. in the Australian case, *Proudman v. Dayman* (1941), 67 C.L.R. 536, to the effect that if the purpose of a statute were to create a new crime, it was natural to suppose that the doctrine of mens rea would be applicable but that it was otherwise if the Legislature adopted penal measures to fix the individual with responsibility for acting in a manner that would not prejudice the general welfare. The purpose of the Regulations in question was to protect the lobster beds from depletion thereby conserving the source of supply for an important fishing industry. That was a matter of general public interest. These Regulations did not create a new crime and an accused who was convicted of a breach thereof would not be thought of as a criminal offender. No such phrase as "without lawful excuse" or "with intent" was to be found in the Regulation, whereas such phrases did appear in various sections of the Act which created offences of which mens rea was an essential ingredient. The majority opinion in *Beaver v. The Queen*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129, to the effect that where the essence of an offence was possession there could be no conviction in the absence of knowledge of the nature of the prohibited substance, had no application to statutory offences which were not criminal in any real sense. The case at bar was very similar to *Regina v. Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, a case involving possession by a dealer of adulterated tobacco, in which there was a conviction.

Per Cartwright C.J.C. (dissenting):

The rule in *Beaver*, supra, was applicable to the case at bar. Furthermore, there was no evidence that for a lobster dealer to occasionally have some undersized lobsters on its premises would create such a danger to the lobster-catching industry as to necessitate, in the public interest, the conviction of a criminal offence of one who was blameless of any intentional wrongdoing.

Appeal against the judgment of the Supreme Court of Nova Scotia, Appeal Division, dismissing an appeal by way of stated case from the accused's acquittal upon a charge of having possession of undersized lobsters.

***Cartwright C.J.C.* (*dissenting*):**

1 This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Supreme Court of Nova Scotia, Appeal Division, dismissing an appeal from the acquittal of the respondent, before Rand P.M. of the charge that it in the County of Shelburne at or near Lockeport in the said County of Shelburne, in the Magisterial District of the Province of Nova Scotia, on or about 29th April 1968, in Lobster Fishing District No. 4, did without lawful excuse have in possession lobsters of a length less than three and three sixteenths inches, the minimum length specified in the schedule for that district, contrary to s. 3(1)(b) of the Lobster Fishery Regulations, P.C. 1963-745 as amended, made pursuant to s. 34 of the Fisheries Act.

2 The appeal came before the Appeal Division by way of a stated case, which reads in part as follows:

> From the evidence three main facts stand out:
>
> 1. There were undersized lobsters in the possession of Pierce Fisheries Limited on April 29, 1968.
>
> 2. The evidence does not show that any officer or responsible employee of Pierce Fisheries Limited had any knowledge, factually or inferentially, that the said undersized lobsters were on the said premises.
>
> 3. There is evidence that the President of Pierce Fisheries Limited had specifically instructed other officers, responsible employees and dealers not to buy undersized lobsters for Pierce Fisheries Limited.

3 The learned Magistrate stated that the evidence showed that on the day in question the respondent would have

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bought and brought to its plant, by truck and by boat, 50,000 to 60,000 pounds of lobsters, and amongst these a Fishery Officer found 26 undersized lobsters.

4 The questions stated for the opinion of the Appeal Division were:

> 1. Is mens rea an essential ingredient to be established by evidence on a charge of violating Sub-Section (1)(b) of Section 3 of the Lobster Fishery Regulations?
>
> 2. Was I correct in applying the decision in R. v. D'Entremont Fisheries Limited to R. v. Pierce Fisheries Limited and in holding that I was bound by the decision in the former case?

5 The Appeal Division answered both questions in the affirmative but pointed out that having so answered the first question it was scarcely necessary to answer the second.

6 The answer to the question which we have to decide depends on the construction of the words used in the Fisheries Act and the Lobster Fishery Regulations.

7 On the facts as found by the learned Magistrate the question is whether, it being proved that amongst 50,000 to 60,000 pounds of lobsters purchased by and on the premises and under the control of the respondent there were 26 short lobsters, it must be convicted of the offence charged although none of its officers or responsible employees had any knowledge of that fact and specific instructions had been given to its officers, responsible employees and dealers not to buy undersized lobsters.

8 The applicable rule of construction is not in doubt. In *Company of Proprietors of Margate Pier v. Hannam et al.* (1819), 3 B. & Ald. 266 at 270, 106 E.R. 661, Lord Coke is quoted as having said:

> Acts of Parliament are to be so construed as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.

9 The rule has recently been restated by the House of Lords in *Sweet v. Parsley*, [1969] 2 W.L.R. 470, 53 Cr. App. R. 221, [1969] 1 All E.R. 347. While different words were used in the speeches there was no disagreement as to the substance of the rule. It was put as follows by Lord Reid at p. 473:

> Our first duty is to consider the words of the Act: if they shew a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.

And at p. 474:

> ...it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

10 It is unnecessary to multiply quotations on this point, for counsel for the appellant rightly conceded in his factum that the applicable rule was correctly stated by Lord Goddard in *Harding v. Price*, [1948] 1 K.B. 695, [1948] 1 All E.R. 283, in the following words at p. 284:

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> ...unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

11 In *Sweet v. Parsley*, supra, Lord Morris of Borth-y-Gest points out that little is to be gained by a survey of the numerous cases in which the question has arisen whether a particular statutory enactment creates an absolute offence. He says at p. 478:

> There have been many cases in recent periods in which in reference to a variety of different statutory enactments questions have been raised whether absolute offences have been created. Some of these cases illustrate the difficulties that are created if Parliament uses language or phrases as to the meaning of which legitimate differences of opinion can arise. I do not propose to recite or survey these cases because, in my view, the principles which should guide construction are clear and, save to the extent that principles are laid down, the cases merely possess the interest which is yielded by seeing how different questions have, whether correctly or incorrectly, been decided in reference to varying sets of words in various different statutes.

12 In my view a principle of construction of a statute which makes possession of a forbidden substance an offence was laid down by this Court in *Beaver v. The Queen*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129, where it was said by the majority at p. 541:

> The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

13 Applying this principle to the words of the charge against the respondent in the case at bar, it appears to me that the express finding of fact that the respondent had no knowledge, factually or inferentially, that any of the lobsters on its premises and under its control were undersized necessarily leads to a finding of not guilty.

14 The appellant submits that the relevant words of s. 2(*g*) of the Fisheries Act and of s. 3(1) of the Lobster Fishery Regulations show, by necessary implication, that it was intended to create an absolute offence. These read as follows:

15 Section 2 of the Fisheries Act:

> 2. In this Act,
>
> (*g*) 'lawful excuse' means
>
> (i) ability to prove that fish in possession during the close time therefor at the place of possession, were legally caught; or
>
> (ii) the unintentional or incidental catching of any fish that may not then be taken, when legally fishing for other fish;

16 Section 3 of the Lobster Fishery Regulations:

> 3.(1) No person shall, in any district or portion of a district,
>
> (a) during the closed season specified in the Schedule for that district or that portion of a district

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(i) fish for, catch or kill any lobster,

(ii) have any lobster in possession without lawful excuse, or

(iii) leave lobster pots in the water on lobster fishing grounds; or

(b) at any time fish for, catch, kill or have in possession any lobster of a length less than that specified in the Schedule for that district or that portion of a district.

17 It is obvious that the definitions of "lawful excuse" could have application in the case of charges under s. 3(1)(a) of the Lobster Fishery Regulations but not in the case of a charge under s. 3(1)(b). In my view the defence of the respondent is not that it had a lawful excuse for doing the prohibited act of having undersized lobsters in its possession but rather that as a matter of law it had not committed that offence at all since the essential ingredient of guilty knowledge was lacking. The wording of s. 2(*g*) of the Fisheries Act does not assist the appellant.

18 A further argument of the appellant is put as follows in his factum:

However, even if the language used in the Regulations is found to be equally consistent with the intention that *mens rea* is an essential ingredient of the offence as Mr. Justice Roach of the Ontario Court of Appeal said in *Rex v. Pee-Kay Smallwares Ltd.*, [1947] O.R. 1019, 6 C.R. 28, 90 C.C.C. 129, at page 137, [1948] 1 D.L.R. 235:

> ...the question may be solved by looking at the nature of the subject matter of the legislation. That legislation may so vitally affect the public interest or the interest of the State, that the inference is irresistible that the Legislator intended that the mere doing of the act thereby forbidden should constitute the offence regardless of the intention of the doer.

19 There is no evidence before the Court as to whether a dealer in lobsters in the position of the defendant having occasionally, without fault or knowledge on its part, undersized lobsters on its premises and under its control would create so serious a danger of the destruction of the lobster-catching industry as to render it necessary in the public interest that, on the facts as found in this case, one blameless of any intentional wrongdoing and without any guilty mind must be convicted of a criminal offence, albeit not one involving grave moral turpitude. Assuming that the case of *Rex v. Pee-Kay Smallwares Ltd.* was rightly decided it does not appear to me to govern the case before us.

20 Parliament could, of course, provide by apt words that anyone having in fact an undersized lobster on his premises and under his control should be guilty of an offence although he had no knowledge that such lobster was undersized but, in my opinion, no such words have been used, and no such intention can be implied from the words which have been used considered in the light of all relevant circumstances.

21 The argument in the appellant's factum concludes with the following paragraph:

It is submitted that, if this case is not one where strict liability was intended, it is unlikely that such a case can be found in the absence of the legislators saying so specifically.

22 This suggests the question whether it would not indeed be in the public interest that whenever it is intended to create an offence of absolute liability the enacting provision should declare that intention in specific and unequivocal words.

23 I would dismiss the appeal with costs in this Court; I would not interfere with the decision of the Appeal Division not to award costs of the proceedings in that Court.

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***Ritchie J.* (*Fauteux, Abbott, Martland, Judson, Hall, Spence* and *Pigeon JJ.* concurring):**

24 I have had the advantage of reading the reasons for judgment of Cartwright C.J.C. in which he has recited the main facts giving rise to this appeal and reproduced a great many of the relevant statutory provisions. I will endeavour to avoid repetition except in so far as I find it necessary in order to illustrate my meaning.

25 The question to be determined on this appeal was stated for the opinion of the Appeal Division of Nova Scotia by Rand P.M. in the following terms:

> Is mens rea an essential ingredient to be established by evidence on a charge of violating Sub-section (1)(b) of Section 3 of the Lobster Fishery Regulations?

26 The relevant subsection reads as follows:

> 3.(1) No person shall, in any district or portion of a district,
>
> (b) at any time fish for, catch, kill or have in possession any lobster of a length less than that specified in the Schedule for that district or that portion of a district.

27 Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption. Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject matter with which it deals.

28 In the case of *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207, the appellant had been convicted of selling liquor to a person who was drunk, contrary to s. 13 of the Licensing Act, 1872 (Imp.), although he was unaware of the drunkenness. In affirming this conviction, Stephen J. clearly indicated that in 1884 the presumption of mens rea had already ceased to have general application in statutory offences. He said at p. 210:

> In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg. v. Prince* (1875), L.R. 2 C.C.R. 154, and *Reg. v. Bishop* (1880), 5 Q.B.D. 259, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created.

29 The case most frequently cited as illustrating the limits of the presumption that mens rea is an essential ingredient in all offences and the exceptions to it, is *Sherras v. De Rutzen*, [1895] 1 Q.B. 918, where Wright J. said at p. 921:

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: ...

30 The learned Judge then went on to say:

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> ...the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in *Davies v. Harvey* (1874), L.R. 9 Q.B. 433, are not criminal in any real sense, *but are acts which in the public interest are prohibited under a penalty*. (The italics are mine).

31 The two other classes of exceptions to which Wright J. referred were public nuisances and proceedings which, although criminal in form, are really only a summary mode of enforcing a civil right.

32 In considering the full effect to be given to Wright J.'s definition of the first class of exception, i.e., acts which are not criminal in any real sense but rather "acts which in the public interest are prohibited under a penalty", I derive great assistance from the dictum of Dixon J. in the High Court of Australia in *Proudman v. Dayman* (1941), 67 C.L.R. 536 at 540, to which reference was made in this Court in *Regina v. King*, [1962] S.C.R. 746 at 760, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386, where he said of the presumption of the existence of mens rea as an essential ingredient in criminal offences:

> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. *If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered.* But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one. (The italics are mine).

33 The same thought was expressed by Lord Reid in the recent case of *Sweet v. Parsley*, [1969] 2 W.L.R. 470, 53 Cr. App. R. 221, [1969] 1 All E.R. 347, where he said at p. 474, speaking of the first class of exception referred to by Wright J. in *Sherras v. De Rutzen*, supra:

> It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma.

34 In the case of *Regina v. King*, supra, this Court found that the enactment of s. 223 of the Criminal Code did "add a new crime to the general criminal law" and I think it must be assumed that in the case of *Beaver v. The Queen*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129, the Court considered that the offence created by s. 4(1)(*d*) of the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, also constituted a crime in the "real sense". In the course of the reasons for judgment which he delivered on behalf of the majority of the Court in that case, Cartwright J. (as he then was) had occasion to say [at p. 539]:

> ...I can discern little similarity between a statute designed, by forbidding the sale of unsound meat, to ensure that the supply available to the public shall be wholesome, and a statute making it a *serious crime to possess or deal in narcotics*; the one is to ensure that a lawful and necessary trade shall be carried on in a manner not to endanger the public health, the other to forbid altogether conduct regarded as harmful in itself. (The italics are mine).

35 The scope and purpose of the Regulations here at issue are in my view to be determined by a consideration of the provisions of s. 34 of the Fisheries Act, which provide that:

> 34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in

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particular, but without restricting the generality of the foregoing, may make regulations

(*a*) for the proper management and control of the sea-coast and inland fisheries;

(*b*) respecting the conservation and protection of fish;

(*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish; ...

36 I agree with the submission made on behalf of the appellant, which appears to have received qualified approval in the reasons for judgment rendered on behalf of the Appeal Division by the Chief Justice of Nova Scotia, that the Lobster Fishery Regulations are obviously intended for the purpose of protecting lobster beds from depletion and thus conserving the source of supply for an important fishing industry which is of general public interest.

37 I do not think that a new crime was added to our criminal law by making Regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations. The case of *Beaver v. The Queen*, supra, affords an example of provisions of a federal statute other than the Criminal Code which were found to have created a truly criminal offence, but in the present case, to paraphrase the language used by the majority of this Court in the *Beaver* case, I can discern little similarity between a statute designed, by forbidding the possession of undersized lobsters, to protect the lobster industry, and a statute making it a serious crime to possess or deal in narcotics.

38 In view of the above, it will be seen that I am of opinion that the offence created by s. 3(1)(b) of the Regulations falls within the first class of exceptions referred to by Wright J. in *Sherras v. De Rutzen*, supra, and that it should be construed in accordance with the language in which it was enacted, free from any presumption as to the requirement of mens rea.

39 In considering the language of s. 3(1)(b) it is significant, though not conclusive, that it contains no such words as "knowingly", "wilfully", "with intent" or "without lawful excuse", whereas such words occur in a number of sections of the Fisheries Act itself which create offences for which mens rea is made an essential ingredient.

40 In this latter regard, the outstanding example is s. 55, by subs. (1) of which it is made an offence for any person who has not got a licence from the Minister: (a) to leave any port or place in Canada *"with intent to fish"* or to cause any other person to fish with a vessel that uses an "otter" or other trawl of a similar nature; and (b) to *"knowingly"* bring into Canada any fish caught beyond the territorial waters of Canada with any vessel that uses an "otter" or other trawl of a similar nature. Finally, s. 55(6) provides that:

55.(6) The burden of proving absence of intent or knowledge, when intent or knowledge is necessary to constitute an offence under this section, lies upon the person accused, and intent or knowledge shall be presumed unless negatived by proof.

41 This appears to me to be a clear indication of the fact that in making provision for offences under the Fisheries Act, Parliament was careful to specify those of which it intended that guilty knowledge should be an essential ingredient.

42 The learned Chief Justice of Nova Scotia adopted the view that the governing intention of the Fisheries Act was to be found in s. 18 thereof which reads:

18. No one, without lawful excuse, the proof whereof lies on him, shall fish for, buy, sell or have in his possession

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any fish, or portion of any fish, at a place where *at that time fishing for such fish is prohibited by law*. (The italics are mine).

43 It is significant, however, as has been pointed out in the reasons for judgment of Cartwright C.J.C. that the words "lawful excuse" are given a very limited meaning by s. 2(*g*) of the Fisheries Act which reads:

2. In this Act,

(*g*) 'lawful excuse' means

(i) ability to prove that fish in possession *during the close time* therefor at the place of possession, were legally caught; or

(ii) the unintentional or incidental catching of any fish that may not *then* be taken, when legally fishing for other fish; (The italics are mine).

44 Section 18 appears to be the only section of the Fisheries Act itself in which the words "lawful excuse" occur and I think that when that section and the definition section are read together, there is a clear inference that they refer to fish caught during the close season.

45 This appears to me to be borne out by the provisions of s. 3(1)(a) of the Lobster Fishery Regulations which immediately precede the regulation here in question and read:

3.(1) No person shall in any district or portion of a district, ...

(a) during the closed season specified in the Schedule for that district or that portion of a district

(i) fish for, catch or kill any lobster,

(ii) have any lobster in possession *without lawful excuse*, or

(iii) leave lobster pots in the water on lobster fishing grounds; or ... (The italics are mine).

46 The offence of violating the prohibition contained in s. 3(1)(a)(ii) is therefore not one of strict liability, in that proof of lawful excuse in the limited sense defined in the Act constitutes a defence and the fact that there is no provision for such a defence in the subsection which immediately follows (i.e., s. 3(1)(b)) is, in my view, another strong indication of the fact that the offence here charged is one of strict liability.

47 It is said, however, that all enactments which make "possession" of a forbidden substance an offence are to be construed in accordance with the view adopted by a majority of this Court in the *Beaver* case, where it was said at p. 541:

The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

48 This appears to me to be another way of saying that guilty knowledge is an essential ingredient wherever possession is made the essence of an offence, but it is to be remembered that the statement was made in relation to what was found in that case to be a truly criminal offence and I do not think that it applies to statutory offences which are not "criminal in any real sense".

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49 In the present appeal we are, of course, bound by the facts as set forth in the case stated by the learned Provincial Magistrate which include a finding that: (see ante, p. 273).

50 I think that the finding of these main facts must be read in light of the following circumstances to which the learned Provincial Magistrate refers in the stated case:

> On April 29th, 1968 in his capacity as a Fishery Officer Mr. Mason went to Pierce Fisheries Limited to check specifically for lobsters. He found 26 undersized lobsters. *Some of these were in crates ready for shipment and others were in boxes from which lobsters were being taken preparatory for packing. Four or five plant employees were present when Mr. Mason carried out his investigation.* The lobsters were seized from crates and boxes in a building known as the outside shed where fish is weighed and packed, which shed forms a part of the premises of Pierce Fisheries Limited....
>
> Mr. Ernest Pierce, who is President of Pierce Fisheries Limited, said that his company buys lobsters from various areas and sources through its dealers and that about April 29, 1968 that Company would have bought and brought to the plant 50,000 to 60,000 lbs. They came to the plant by truck and by boat. Mr. Pierce denied that he had any knowledge of undersized lobsters being on company property on April 29, 1968.

51 These circumstances, taken together with the first of the three "main facts" stated by the learned Magistrate, make it clear beyond any question that the respondent was in physical possession of 50,000 to 60,000 pounds of lobsters, some of which were undersized, but it is contended that because there was no evidence to show that "*any officer or responsible employee*" of the Company had any knowledge of the presence of these undersized lobsters, they were therefor not in the respondent's possession as a matter of law.

52 This is not a case where a quantity of lobsters, some of which turned out to be undersized, was "planted" on the premises of Pierce Fisheries Limited by a trick, nor did the 50,000 or 60,000 pounds of lobsters come to the respondent's plant by mistake or otherwise without its knowledge. The respondent was a dealer in lobsters and it purchased this great quantity in the course of its business. It cannot be suggested that no officer or responsible employee of Pierce Fisheries Limited had knowledge of the fact that a big shipment of lobsters was being packaged on the premises on the day in question, but it was not proved that any of these people knew that there were any undersized lobsters in the shipment. As employees of the company working on the premises in the shed "where fish is weighed and packed" were taking lobsters from boxes "preparatory for packing" in crates, and as some of the undersized lobsters were found "in crates ready for shipment", it would not appear to have been a difficult matter for some "officer or responsible employee" to acquire knowledge of their presence on the premises.

53 This case appears to me to fall into the same category as that of *Regina v. Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, to which Wright J. referred in the *Sherras* case, where the accused, a dealer in tobacco, was charged with having adulterated tobacco in his possession. He had a quantity of tobacco on his premises but he did not know that any of it was adulterated. In the course of his reasons for judgment Pollock C.B. observed at p. 912:

> It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.

54 And Alderson B. in the same case said at p. 913:

> I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was

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> in an adulterated state, but he knew he had it in his possession; and the question of 'knowingly', it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, there fore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

55 In this case the respondent knew that it had upwards of 60,000 pounds of lobsters on its premises; it only lacked knowledge as to the small size of some of them, and I do not think that the failure of any of its responsible employees to acquire this knowledge affords any defence to a charge of violating the provisions of s. 3(1)(b) of the Lobster Fishery Regulations.

56 If lack of knowledge by any responsible employee constituted a defence for a limited company to a charge under s. 3(1)(b) of the Regulations, then I think it would in many cases be virtually impossible to secure a conviction.

57 The language used by Roach J.A. in *Rex v. Pee-Kay Smallwares Ltd.*, [1947] O.R. 1019, 6 C.R. 28, 90 C.C.C. 129, appears to me to be pertinent in this regard. The learned Judge there said at p. 137:

> ...If on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

58 With the greatest respect for those who may hold a different view, I am of opinion that the offence of violating s. 3(1)(b) of the Lobster Fishery Regulations is an offence of strict liability of which mens rea is not an essential ingredient.

59 I would accordingly allow this appeal and direct that the question of law stated by the learned Provincial Magistrate, upon which leave to appeal to this Court was granted, be answered in the negative and that the case be remitted to the Provincial Magistrate to be dealt with in accordance herewith.

60 Under the circumstances there will be no order as to costs.

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