IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Awad, 2013 NSPC 82

Date: 06092013
Docket: 2412225, 2471271-72 , 2496210-11, 2481984-85-86, 87, 88, 2395924-25, 2467399-400-401, 2330871-72, 2440366-67-68, 2428822-23, and 2399856
Registry: Sydney

Between:

Karim Mohamed Awad,
Brian Vincent Boudreau,
Catherine Nicole Haddad,
Philip Blair Lahey,
Joseph Matthew Nardocchio,
Kyle John Sakalauskas,
Derrick Silby Smith,
James Irving Warner

Applicants

-and-

Her Majesty the Queen

Respondent

DECISION
Application to Quash Informations

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: June 27, 2013

Oral Decision: September 6, 2013

Counsel: William Burchell, for the Applicants
Steve Drake, for the Crown

I. Introduction

[1.] As a result of cross-examination of a police officer in an unrelated matter, defence counsel subsequently pursued an issue regarding the practice followed by the Cape Breton Regional Police Service in swearing Informations.

[2.] Based on the information gathered, Mr. Burchell brought an application to quash nine Informations.

[3.] Defence counsel called Constable Mary Gibbons and Inspector Eugene MacLean as a witness. The Crown did not call any witnesses.

II. Issue:

[4.] Are the Informations a nullity or is there a "latent" defect because of non-compliance with Section 508?

[5.] If it is the latter, should the court exercise its jurisdiction and amend the defect?

III. Review of the Evidence

[6.] Constable Mary Gibbons is a 15 year veteran of the Cape Breton Regional Police Service and the Informant for the nine Informations before the court.

[7.] She testified that "swearing Informations" became part of her duties as early as 2009. She was directed to take the "court bag and get Informations sworn." She was not given any step by step instructions.

[8.] Prior to swearing the Information, she testified she did not review the Crown Sheet, Occurrence Reports or any Supplemental Reports; nor did she speak to the Investigating Officer. On most occasions, she did not know who that was. She relied on the process that went from Investigating Officer to Sergeant (in charge) to her.

[9.] Constable Gibbons testified she believed that the Investigating Officers had reasonable and probable grounds and if not, the Sergeant would have grounds even though she "hadn't seen the investigation."

[10.] Constable Gibbons testified she has no way of knowing how many Informations she has "sworn to" stating, "I don't know, there were a lot." The last time she swore an Information was in June, 2012.

[11.] On cross-examination Constable Gibbons testified that swearing Informations became a part of a number of duties she had because she was filling in for Adrian MacNamara.

[12.] She is of the belief that her duties were done properly and honestly. She always read the "Information and charges" and if something was wrong she brought it to the attention of the "ladies in records."

[13.] Inspector Eugene MacLean testified he has been employed as an Inspector for the last four years and a police officer for 33 years. The Records Department has a "civilian" manager, but he oversees the Department.

[14.] The Cape Breton Regional Police Service used to have police officers assigned as "court officers" but they are no longer on active duty and they were not replaced. Constable Gibbons was one of the officers directed to "take files to court."

[15.] The Inspector is unsure if Inspector Dalton gave any directive to Constable Gibbons. He himself did not speak to any officers. In November 2012 the practice was changed. Investigating Officers were told to attend and swear their own Informations and now Constable MacKinnon has the task and he has been directed to read the Crown Sheet and Information.

IV. **The Law**

[16.] Section 504 of the *Criminal Code*:

> **504.** Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged
>
> (*a*) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
>
> (ii) resides or is believed to reside,
>
> within the territorial jurisdiction of the justice;
>
> (*b*) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
>
> (*c*) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
>
> (*d*) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

[17.] Criminal proceedings commence when an Information is sworn before a justice, *R. v. Southwick* (1967), 2. C.R.N.S. 546 (Ont.C.A.)

[18.] An Information laid under this section may be in Form 2 and upon receipt the justice will follow Section 507 of the *Criminal Code* to determine whether or what process shall issue to compel the defendant's attendance in court. Sections 509-514 of the ***Criminal Code*** describe the forms of process, summons and warrant, as well as the manner in which each may be served or executed. Form 2

is also used under Section 788(1) to commence proceeds for summary conviction offences.

[19.] Section 505 of the ***Criminal Code*** states where:

> (*a*) an appearance notice has been issued to an accused under section 496, or
>
> (*b*) an accused has been released from custody under section 497 or 498,
>
> an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by him shall be laid before a justice as soon as practicable thereafter and in any event before the time stated in the appearance notice, promise to appear or recognizance issued to or given or entered into by the accused for his attendance in court.

[20.] This section describes the procedure to "confirm the process" by which the defendant has been released by a peace officer or an officer in charge (ss. 496-498).

[21.] An Information relating to the offence alleged in the release form to have been committed by a defendant, or an included or other offence, must be laid before a justice "after the form of release has been issued to, given, or entered into by a defendant."

[22.] A defect in the process by which a defendant is brought to court, unless of a jurisdictional nature, has no affect on the court's jurisdiction….. Failure to meet the mandatory requirement that the Information be laid as soon as practicable is not of a jurisdictional nature, hence does not affect the validity of the Information. (***R. v. Gougeon*** (1980), 55 C.C.C. (2d) 218 (Ont. C.A.).

[23.] Section 506 of the ***Criminal Code*** states:

> "An information laid under section 504 or 505 may be in Form 2. (Form 2 is required in summary conviction proceeds under Section 788(1).)"

[24.] The form includes reference to the territorial division in which it is laid and requires the name and occupation of the informant, as well as *disclosure whether the informant has personal knowledge of the offence or believes, on reasonable grounds, that the specified offence has been committed* (emphasis added).

[25.] Section 507 of the ***Criminal Code*** states:

> **507.** (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,
>
> (*a*) hear and consider, *ex parte*,
>
> (i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(*b*) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(*a*) take the evidence on oath; and

(*b*) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

(5) A justice shall not sign a summons or warrant in blank.

(6) A justice who issues a warrant under this section or section 508 or 512 may, unless the offence is one mentioned in section 522, authorize the release of the accused pursuant to section 499 by making an endorsement on the warrant in Form 29.

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 499, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 145(5), to have been confirmed by a justice under section 508.

> (8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing.

[26.] An Information that is a nullity cannot be converted into an effective instrument for commencing legal proceedings (***Buchbinoer v. Venner*** (1985), 47 C.R. (3d) 135.

[27.] Section 508 of the ***Criminal Code*** states:

> **508.** (1) A justice who receives an information laid before him under section 505 shall
>
> (*a*) hear and consider, *ex parte*,
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so;
>
> (*b*) where he considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice, promise to appear or recognizance or to an included or other offence,
>
> (i) confirm the appearance notice, promise to appear or recognizance, as the case may be, and endorse the information accordingly, or
>
> (ii) cancel the appearance notice, promise to appear or recognizance, as the case may be, and issue, in accordance with section 507, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance

> notice, promise to appear or recognizance, as the case may be, has been cancelled; and
>
> (*c*) where he considers that a case is not made out for the purposes of paragraph (*b*), cancel the appearance notice, promise to appear or recognizance, as the case may be, and cause the accused to be notified forthwith of the cancellation.
>
> (2) A justice who hears the evidence of a witness pursuant to subsection (1) shall
>
> (*a*) take the evidence on oath; and
>
> (*b*) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

[28.] If the defendant attends court and there is a properly sworn Information, the court has jurisdiction to proceed, notwithstanding the failure to confirm the appearance notice.

[29.] In ***R. v. Vanstone***, 1982 Carswell Alta. 626 at para. 30, Girgulus, J., stated:

> "…when the validity of the Information is attacked on the basis that it was not sworn in accordance with the Criminal Code:
>
> 1. There is a presumption that the Information, regular on its face, is valid;
>
> 2. There is no obligation on the Crown to go behind such an Information and to demonstrate to the court that the procedures were regular; [*page274]
>
> 3. The onus is on the party challenging such an Information to show that it is subject to a latent defect;
>
> 4. Since the attack is on the Information itself, in view of the presumption of validity, the onus is to establish the defect on a balance of probabilities;
>
> 5. Where a defect is established, it cannot be allowed to stand but must be corrected within the provisions of the Code (in the case

> of a summary conviction offence, pursuant to s. 732). Any necessary amendment must be made before the conclusion of the trial."

[30.] In ***R. v. Kamperman***, 48 N.S.R. (2d) at para. 9, Madam Justice Glube stated:

> "There is a presumption that the information is valid on its face and the onus is upon the accused to rebut that presumption (R. v. Peavoy, 15 C.C.C.(2d) 97). The words reasonable and probable grounds must not only have some meaning, but must also require that the informant has put his mind to the document's contents before swearing on oath."

[31.] In ***R. v. Peavoy***, 15 C.C.C. (2d) 97 at para. 19, Henry, J., stated:

> "The question with which I am faced is whether the Crown must positively demonstrate, in the discharge of an onus upon it, that the proceedings before the Justice of the Peace were regular in the sense that the oath taken by the informant was true and that the Justice of the Peace was not otherwise misled in reaching the conclusion that he should endorse the information."

[32.] And at para. 18, Henry, J., stated:

> "It goes without saying that in swearing an information the deponent is not relieved of the obligation, which lies on any citizen, to swear truthfully; he must not swear to a falsehood. Moreover, in appearing before the Justice of the Peace he must not only be truthful, but he must not mislead that judicial officer."

[33.] Further at paras. 31 and 38, Henry, J., stated:

> (31.) The Crown's obligation is to place before the Court an information that is regular on its face and that is not to its knowledge otherwise defective. Where a defect exists, section 732 of the Code is applicable. It provides:
>
> - "732. (1) An objection to an information for a defect apparent on its face shall be taken by motion to quash the information before

the defendant has pleaded, and thereafter only by leave of the summary conviction court before which the trial takes place.

(2) A summary conviction court may, upon the trial of an information, amend the information or a particular that is furnished under section 729, to make the information or particular conform to the evidence if there appears to be a variance between the evidence and

(a) the charge in the information, or

(b) the charge in the information
(i) as amended, or
(ii) as it would have been if amended in conformity with any particular that has been furnished pursuant to section 729.

(3) A summary conviction court may, at any stage of the trial, amend the information as may be necessary if it appears

(a) that the information has been
(i) under another Act of the Parliament of Canada instead of this Act, or
(ii) under this Act instead of another Act of the Parliament of Canada; or

(b) that the information
(i) fails to state or states defectively anything that is requisite to constitute the offence
(ii) does not negative an exception that should be negatived, or
(iii) is in any way defective in substance, and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the trial; or

(c) that the information is in any way defective in form.

(4) A variance between the information and the evidence taken on the trial is not material with respect to

(a) the time when the offence is alleged to have been committed, if it is proved that the information was laid within the prescribed period of limitation, or

(b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the summary conviction court that holds the trial.

(5) The summary conviction 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 his defence by a variance, error or omission mentioned in subsection (2) or (3), and

(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(6) Where in the opinion of the summary conviction court the defendant has been misled or prejudiced in his defence by an error or omission in the information, the summary conviction court may adjourn the trial and may make such an order with respect to the payment of costs resulting from the necessity of amendment as it considers desirable.

(37.) Since on the view that I take of the matter the information if regular on its face is presumed to be valid in accordance with the Legislation, until it is proved otherwise, the onus of showing that it is subject to a latent defect is on the person challenging it, namely the accused. Where he alleges that the informant did not have personal knowledge or "reasonable and probable grounds to believe and did believe" or that he had no knowledge of any facts or grounds whatever, he is alleging that the informant has falsely sworn and he must demonstrate it to the satisfaction of the Court on

> the balance of probabilities. I therefore answer question 1 in the negative.
>
> (38.) …. What is lacking here is the evidence of Constable Clark himself, whom the accused did not see fit to call." [Informant]

[34.] In ***R. v. Gill***, 2009 Carswell Alta. 2079, at para. 26, Prov.Ct. J. Redman stated:

> "… nor do I accept that it is a correct proposition of law that the Informant must reach the same conclusion as the investigating officer on whether there exists reasonable and probable grounds. The law is clear that someone other than the investigating officer can swear the Information. This person must be at liberty to reach his or her own conclusion on the sufficiency of the evidence. They may be informed by the opinion of the investigating officer but they must reach their own conclusion based upon their review of all the information provided to them."

[35.] Later at para. 32:

> …it is also important for the Courts not to quash Informations unless there is a solid evidentiary foundation to do so.

[36.] In ***R. v. Pilcher and Broadberry***, 1981 CarswellMan 76, Prov. J. Minuk held that:

> The police officer's belief in the truth of what he was told by his superiors was not sufficient to establish reasonable and probable grounds for believing that the accused committed the offences charged. As the police officer merely read the information without apprising himself of the circumstances giving rise to the charges, the accused discharged the onus of proving on a preponderance of evidence that the police officer failed to satisfy the mandatory requirements for swearing an information. (*headnote)*

[37.] Section 601 of the ***Criminal Code*** states:

> **601.** (1) An objection to an indictment preferred under this Part or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused enters a plea, and, after the accused has entered a plea, only by leave of the court before which the proceedings take place. The court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.
>
> (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
>
> (*a*) a count in the indictment as preferred; or
>
> (*b*) a count in the indictment
>
> (i) as amended, or
>
> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
>
> (3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
>
> (*a*) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
>
> (*b*) that the indictment or a count thereof
>
> (i) fails to state or states defectively anything that is requisite to constitute the offence,
>
> (ii) does not negative an exception that should be negatived,
>
> (iii) is in any way defective in substance,

and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or

(*c*) that the indictment or a count thereof is in any way defective in form.

(4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider

(*a*) the matters disclosed by the evidence taken on the preliminary inquiry;

(*b*) the evidence taken on the trial, if any;

(*c*) the circumstances of the case;

(*d*) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and

(*e*) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to

(*a*) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or

(*b*) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.

(5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

> (6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.
>
> (7) An order to amend an indictment or a count therein shall be endorsed on the indictment as part of the record and the proceedings shall continue as if the indictment or count had been originally preferred as amended.
>
> (8) A mistake in the heading of an indictment shall be corrected as soon as it is discovered but, whether corrected or not, is not material.
>
> (9) The authority of a court to amend indictments does not authorize the court to add to the overt acts stated in an indictment for high treason or treason or for an offence against any provision in sections 49, 50, 51 and 53.
>
> Definition of "court"
>
> (10) In this section, "court" means a court, judge, justice or provincial court judge acting in summary conviction proceedings or in proceedings on indictment.
>
> (11) This section applies to all proceedings, including preliminary inquiries, with such modifications as the circumstances require.

[38.] There has been through case law and amendments to what is now Section 601, a gradual shift from requiring judges to quash to requiring them to amend. Now there remains little discretion to quash. Section 601 read in its entirety, gives the trial judge absent absolute nullity, very wide powers to cure any defects in a charge by amendments.

[39.] If the defect to be cured by amendment has misled or prejudiced the accused, the judge must determine whether the prejudice may be reviewed by an

adjournment. The information may be quashed only if the required amendment cannot be made without injustice. (***R. v. Perry***, 1989 CarswellBC 1498)

[40.] In ***R. v. Ingraham***, 1988 CarswellNS 319 at paras. 12 and 13, Jones, J., writing for the Nova Scotia Court of Appeal stated:

> As the information was a nullity it could not be amended….
>
> The information would have to be resworn before it would comply with the provisions of the Code.

[41.] In ***R. v. Moore***, 1988 CarswellBC 265 (S.C.C.) Lamar, J., writing for the majority stated at para. 69:

> My understanding of s. 529, when read in its entirety, is that it commands the following to the trial judge: absent absolute nullity and subject to certain limits set out in subs. (9), the judge has very wide powers to cure any defect in a charge by amending it; if the mischief to be cured by amendment has misled or prejudiced the accused in his defence, the judge must then determine whether the misleading or prejudice may be removed by an adjournment. If so, he must amend, adjourn and thereafter proceed. But, if the required amendment cannot be made without injustice being done, then and only then the judge is to quash. Therefore, a judge must not quash a charge, and it is reversible error of law if he does, unless he has come to that conclusion, namely that "the proposed amendment" cannot "be made without injustice being done". However if having determined, as a matter of law (see subs. (6)), that an amendment cannot be made without causing irreparable prejudice, his quashing of the charge at the trial is then, in my view, tantamount to an acquittal. This is equally true whether, to terminate the proceedings under s. 529, the judge uses the word "quash", "dismiss", "discharge" or "acquit". With respect, this to me is obvious, because relaying before another judge an amended charge would be

> no less prejudicial to the accused than the amendment of the first one by the previous judge. Sections 529(4) and (5) would then be a useless exercise of judgment.

[42.] In ***R. v. Miller***, 1989 CarswellOnt 3513 (Ont.C.A.), Code, J., stated at para. 26:

> The contrary line of authority is exemplified by *R. v. Oliveira*, *supra* at para. 30, where the relevant passage is also agreed to be *obiter dicta*. Doherty J.A. (Simmons and Gillese JJ.A. concurring) stated:
>
> > The purpose of the promise to appear is to secure the initial attendance of the accused in court. Subsequent court attendances are pursuant to court orders. A defect in the promise to appear, or the process required to confirm a promise to appear, will not affect the validity of the information charging the offences referred to in the promise to appear. Nor will those defects affect the Crown's ability to proceed on the charges referred to in the promise to appear, or the ultimate disposition of those charges: see *Criminal Code*, ss. 485(2),(3). In short, after the first appearance of an accused, the promise to appear is largely irrelevant to the criminal process. [Emphasis added.]

[43.] Later at para. 28, Code, J., stated:

> ...*Oliveira* decided the point correctly and it should be followed.

[44.] In ***R. v. Whitmore***, 1989 CarswellOnt 998 (Ont.C.A.), at para. 6, Grange, J. upheld the trial judge when he agreed that "prerogative relief" should not be granted prior to the Crown conducting a preliminary inquiry. The court found "no

ground upon which the informant could be found to lack reasonable and probable grounds."

[45.] In ***R. v. Jones***, 1971 CarswellPEI 17 (PEI S.C.), Nicholson, J., found that the informant had no knowledge and should not have sworn to the Information in the form it was in as the wording presented in Form 2. Nicholson, J., agreed with Wilson, J., in ***Lepage,*** *supra* and went on to state at para. 6:

> "…there has been a failure to comply reasonably with the provisions of the Statute and in my opinion the Information is defective and should be quashed."

[46.] In ***R. v. Canadian Industries Ltd.,*** 1982 CarswellNB 213, the N.B.C.A. held at para. 7:

> The first issue to be decided, therefore, is whether an information, sworn by an informant who states or implies he has personal knowledge when in fact he had not or may have only reasonable grounds to believe that the defendant committed the offence alleged therein, is a nullity or merely defective. In my opinion such an information is merely defective and therefore amendable under s. 732 of the Code. The onus of proving the defect rests on the defendant, who must prove it by a preponderance of evidence during the course of the trial. When so proved the onus of seeking an amendment to remedy the defect rests on the prosecution, and the power to decide whether an amendment should be allowed must be exercised by the trial judge under s. 732(5) and (6).

[47.] Later at para. 12:

> In the present case no fault can be found as to the sufficiency of the charge; the objection is as to the means of alleging it. Therefore, in

> applying the test which I have accepted, I must conclude that the defect is one of form and not of substance.

[48.] And at para. 13:

> The principle to be deduced from the cases which I have examined is that an information in a summary conviction proceeding which was merely defective in form is not void ab initio and consequently is amendable under the powers conferred by s. 732(3)(c) on a summary conviction court.

V. **Analysis**

[49.] Based on the evidence before me, I find the following:

(1.) There are nine (9) Informations comprising this application for the following defendants:

- (a.) Joseph Matthew Nardocchio
- (b.) Catherine Nicole Haddad
- (c.) James Irving Warner
- (d.) Philip Blair Lahey
- (e.) Karim Mohamed Awad (x2)
- (f.) Kyle John Sakalauskas
- (g.) Derrick Silby Smith
- (h.) Brian Vincent Boudreau

(2.) Each Information is on the proper Form 2.

(3.) Each has been signed by an Informant (Constable Mary Gibbons).

(4.) Each has been sworn before a Justice of the Peace who dated, signed and stamped the *jurat*.

(5.) Each Information has all the essential "averments" which advise the defendant of charges.

(6.) Each Information appears valid "on it's face."

(7.) Each Promise to Appear appears to be completed properly and valid on it's face which required each defendant to appear in court and atone to the court's jurisdiction.

(8.) Prior to signing or swearing the Information(s):

(a.) Constable Mary Gibbons did not read the Crown Sheet, Occurrence Report, Supplementary Report or the Investigating Officer's notes;

(b.) Constable Mary Gibbons did not speak to the Investigating Officer or any other officer involved in the investigation;

(c.) Constable Mary Gibbons was not involved in the investigation(s) in any way.

(d.) Constable Mary Gibbons did not receive any specific instructions regarding the swearing of Informations.

(9.) Constable Mary Gibbons was "directed" as part of her duties to "take the court bag and get Informations sworn."

(10.) Constable Mary Gibbons had no personal knowledge nor reasonable and probable grounds to believe an offence had been committed by each of the defendants prior to swearing the Information(s).

(11.) Constable Mary Gibbons relied on a "process"; that is she believed the Investigating Officer or the Sergeant who had the file prior to her had reasonable and probable grounds.

(12.) Constable Mary Gibbons cannot say how many Informations she dealt with in this way: "I don't know; there were a lot."

[50.] An Information which appears to be regular on its face is perceived to be valid. When the defendant challenges the procedure by which it was sworn, the Crown bears no burden of proof. The defendant must rebut the presumption.

[51.] The onus is on the accused to satisfy the court, on a balance of probabilities, that the Information is defective (***R. v. Peavoy***, *supra*; ***R. v. Vanstone***, *supra)*.

[52.] Based on my finding above regarding the Informant, Constable Mary Gibbons, I find the applicants have rebutted the presumption of regularity on the balance of probabilities.

[53.] Is the Information merely defective and amendable, or is it a nullity that should be quashed?

[54.] ***Black's Law Dictionary*** *(5th ed.)* defines the following:

(1.) Defect: The want or absence of some legal requisite; deficiency; imperfection; insufficiency.

(2.) Defective: Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.

(3.) Defect of form: An imperfection in the style, manner, arrangement, or non-essential parts of a legal instrument or indictment.

(4.) Defect of Substance: An imperfection in the body or substantive part of a legal instrument, plea, indictment, consisting of the omission of something which is essential to be set forth.

(5.) Nullity: Nothing, no proceeding, an act…which has absolutely no legal force or effect.

[55.] An Information is the first step taken to set in motion the entire process of bringing a defendant before the court. It is sworn before a Justice of the Peace as:

> "…a safeguard for the citizen to prevent his harassment by the irresponsible laying of charges which would have the result unjustly of bringing him before the Courts to answer a charge to which there is no substance."

[56.] That Information must be sworn truthfully. The Informant must not swear to a falsehood. He/she must not mislead the Justice of the Peace.

[57.] This procedure is not a routine function that should be taken lightly:

> "…but rather must be undertaken with care and with the full knowledge that the swearing of an Information commences a course of action that brings the full weight of the state against an individual and ultimately may effect his or her reputation and liberty." (***R. v. Gill***, *supra*, para. 31)

[58.] Constable Gibbons had no personal knowledge, nor reasonable and probable grounds to believe an offence had been committed. She swore a "false information" and by doing so misled the Justice of the Peace.

[59.] This finding is not meant to impugn the reputation of Constable Gibbons. Based on her testimony and demeanor, I believe she felt she was following a proper "process". She did not receive any directions from her supervisors to say otherwise.

[60.] However, Constable Gibbons should bear in mind that it is her oath that is being committed, not the oath of a senior officer, supervisor or investigating officer. And, while she may not have personal knowledge of the allegations to which she deposes, she must have reasonable and probable grounds to believe those allegations were true.

[61.] Constable Gibbons should not blindly follow the instructions of a superior. At the same time, those superior officers who issue instructions for Informations to be laid should bear in mind the obligation they are imposing upon the informant and should provide them with all of the information they need. (R. v. Larence, [1990] M.J. No. 722)

[62.] The relevant sections the ***Criminal Code***:

> …contemplates a situation where an informant, acting in a prudent and cautious manner, apprises himself of the relevant circumstances surrounding the case which he reasonably and in good faith believes to be true and concludes with a genuine conviction that the person to be charged is probably guilty of the crime.
>
> [63.] By merely reading what appears in an information given to him by others, an informant could not be informed in such a manner in which he is obliged to be informed, in order to protect an accused person from frivolous or foundationless accusations. (***R. v. Pilcher,*** *supra*, paras. 50-51)

[64.] Based on all of the above, I find each Information before me is a nullity and is quashed.

[65.] Finally in conclusion, let me close by quoting Henry, J., in ***R. v. Peavoy***, *supra*, at para. 39:

> Recognizing that the pressure of duties and administration upon police forces may quite naturally cause them, when under pressure, to manage the laying of informations as a form of routine "paperwork", I feel obliged to add the following comments. A person swearing an information, particularly a law enforcement officer, is not at liberty to swear the information in a perfunctory or irresponsible manner with a reckless disregard as to the truth of his assertion. To do so is clearly an affront to the Courts and is at variance with the right of the citizen to be left alone by the authorities unless there is reasonable and probable grounds for invading his liberty by compelling his attendance before the Courts. The police officer who does not satisfy himself that he can personally swear to the truth of the information according to its terms (i.e. personal knowledge or reasonable and probable grounds), yet does so, jeopardizes his personal position and also does a disservice to the upholding of law in the community. His oath must be beyond reproach. He need not, of course, have personal knowledge of all the facts or even most of the facts that support the allegation; indeed much of what would be available to him will, so far as he is concerned, be hearsay. He must however, be satisfied, even if it be on the basis of reliable reports made by other persons in the course of an investigation, that there is some evidence to support the charge, that that evidence in fact constitutes reasonable and probable grounds for believing that the accused committed the offence and that he believes that the accused did so. Moreover, he must be prepared to so satisfy the Justice of the Peace

who, in turn, has an obligation judicially, not arbitrarily, to hear and consider the allegations before endorsing the information.

_____

The Honourable Judge Jean M. Whalen