MUNICIPAL COURT OF MONTRÉAL

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

FILE : 116-089-269

DATE : OCTOBER 14th, 2016

PRESIDED BY THE HONOURABLE RANDALL RICHMOND, J.M.C.M.

HER MAJESTY THE QUEEN

Prosecutor

v.

JAGGI SINGH

Defendant

DECISION ON A PRELIMINARY ISSUE

Me Alexander Tandel
for the prosecution

Jaggi Singh, on his own behalf

[1] Can a defendant be compelled to give his fingerprints after being charged with a hybrid offence taken summarily? Can the arraignment be delayed or adjourned for that purpose? The answers to these questions are not simple.

I. CONTEXT

[2] The defendant was arrested by police on May 3rd 2016 and released the same day on his promise to appear at a police station for fingerprinting on June 17th and at the Montreal Municipal Court on June 30th. On the promise to appear, it is written that the defendant is alleged to have commited the offences of mischief and assault, with reference to *Criminal Code* sections 430(1) and 265, but with no further details or precision.

[3] On June 6th, a justice confirmed the promise to appear, and a police liaison officer swore to an information charging the defendant with four *Criminal Code* offences: three hybrid offences taken summarily, i.e. by summary conviction procedure, and one offence (count 3) which is punishable by summary conviction procedure only.

[4] On the information, the charges were written as follows:

> CHEF 001 : Le 03 mai 2016, au 1010 Saint-Antoine ouest, district de Montréal, Jaggy SINGH (1971-05-29) a commis une détention par la force de : les locaux d'immigration canada, commettant ainsi l'infraction punissable sur déclaration de culpabilité par procédure sommaire prévue à l'article 73 a) du Code criminel.
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> CHEF 002 : Le 03 mai 2016, au 1010 Saint-Antoine ouest, district de Montréal, Jaggy SINGH (1971-05-29), volontairement, a commis un méfait en empêchant, interrompant ou gênant l'emploi, la jouissance ou l'exploitation légitime d'un bien, à savoir : les locaux d'immigration canada, la propriété de : gouvernement du canada, commettant ainsi l'infraction punissable sur déclaration de culpabilité par procédure sommaire prévue à l'article 430(1) c) (4) b) du Code criminel.
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> CHEF 003 : Le 03 mai 2016, au 1010 Saint-Antoine ouest, district de Montréal, Jaggy SINGH (1971-05-29) a participé à un attroupement illégal, commettant ainsi une infraction punissable sur déclaration de culpabilité par procédure sommaire prévue à l'article 66 du Code criminel.
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> CHEF 004 : Le 03 mai 2016, au 1010 Saint-Antoine ouest, district de Montréal, Jaggy SINGH (1971-05-29) s'est illégalement livré à des voies de fait sur la personne de Alain Mireault, commettant ainsi l'infraction punissable sur déclaration de culpabilité par procédure sommaire prévue à l'article 266 b) du Code criminel.
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> [emphasis added]

[5] On June 30th, the defendant appeared before me in room R.30 of the Montreal Municipal Court. Before a plea could be entered, the prosecutor stated that the defendant had not given his fingerprints and asked that the arraignment be delayed until the defendant gave his fingerprints. (There is a place set up for that purpose within the Municipal Court building, and fingerprints can be taken there immediately.)

[6] The defendant objected to this suggestion because, he said (after being sworn in), he had gone to the police station at the proper date and time, had shown to the officers his promise to appear (which indicated his name, address and date of birth) and was ready to give his fingerprints and be photographed, but was sent away by police after he refused to answer their request for his place of birth — a request that he considered illegal. The defendant therefore believes that he has complied with his obligation and cannot be compelled to do more.

[7] Secondly, the defendant said that it is illegal to compel him to give his fingerprints for summary conviction offences. He referred to s. 2 of the *Identification of Criminals Act*, R.S.C. 1985 c. I-1, which only allows for the fingerprinting of people charged with an indictable offence.

[8] I explained to the defendant that the suspension of an arraignment to allow defendants to give their fingerprints is a long-standing practice which, as far as I know, is done as a matter of courtesy to defendants — as an alternative to laying a new charge for failure to comply with the fingerprint obligation.

[9] I specifically explained this to the defendant, because he was not represented by counsel and I wanted to be sure that he made an informed decision with a full understanding of the risk of having to face an additional charge if he did not take advantage of the opportunity to provide his fingerprints before entering his plea. He replied unequivocally that he would rather face a charge of not appearing for fingerprints than give them now.

[10] Because the Crown was not expecting this issue to be raised, and because the prosecutor in court was only acting as a replacement for the prosecutor assigned to the case, I adjourned the matter *pro forma* to August 30th to allow the Crown to prepare its observations and to set a date to complete them.

[11] On August 30th, the defendant returned to court and filed additional written arguments. A new prosecutor, recently assigned to the case, appeared on behalf of the Crown and made some preliminary observations. I adjourned the matter to September 30th for completion of arguments on both sides. Before adjourning, I reiterated to the defendant the explanations I had given him on June 30th and the warning I had given him about the risk involved with declining to give his fingerprints before entering a plea. He maintained his decision not to do so.

[12] On September 26th, the defendant provided additional written argument in a document bearing the heading "REPRESENTATIONS on MOTION to NOT REQUIRE FINGERPRINTS AND PHOTOS". This "motion" was served on the prosecutor and filed in the court record. It asks the court to "affirm all of the following":

> 1) That it is illegal and improper for the Montreal police to take fingerprints and photos, and for the Crown to compel fingerprints and photos, in all cases before Montreal's Municipal Court;
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> 2) That all fingerprints and photos previously taken in relation to summary criminal charges at Montreal's Municipal Court are destroyed by the Montreal police, and confirmed to be destroyed by an independant third party;
>
> 3) That this court order that all fingerprinting and photographs in relation to summary criminal charges at Montreal's Municipal Court cease immediately;
>
> 4) That no fingerprints and photos can be compelled from the applicant, Jaggi Singh, in this matter.

[13] Upon resumption of the hearing on September 30th, I immediately informed the parties that, as a Municipal Court Judge, I do not have jurisdiction to rule on the first three requests made in the defendant's "motion". My jurisdiction does not go beyond the cases properly before me, and I cannot make decisions with regards to "all cases" before Montreal's Municipal Court or "all fingerprinting" — past, present and future — related to this Court. However, I do have jurisdiction to hear argument on the fourth issue raised, i.e. whether "no fingerprints and photos can be compelled from the applicant, Jaggi Singh, in this matter."

II. THE ISSUES TO BE DECIDED

[14] There are two questions that need to be answered:

1) Can a defendant be compelled to give his fingerprints after being charged with a hybrid offence taken summarily?

2) Can the arraignment be delayed or adjourned for that purpose?

III. THE POSITIONS OF THE PARTIES

THE PROSECUTION

[15] The prosecutor says that the answer to both questions is yes. He asks me to not receive a plea until the defendant has given his fingerprints, to tell the defendant that he must give his fingerprints, to order the defendant to give his fingerprints, to compel him to do so and, if necessary, to issue a warrant for the arrest of the defendant under s. 502 of the *Criminal Code*.

[16] The prosecutor confirms that prosecutors working at the Montreal Municipal Court do pre-charge screening, that they approve all criminal charges before the informations are drawn up, and that the case at bar is no exception. A police report led a prosecutor to authorize the charges against Mr. Singh, but, he says, "we do not elect the mode of procedure" at that time. The charge authorization, he says, is not a "final" election.

[17] When asked why the charges were drawn up they way they were (with the words "summary procedure" in each count, the corresponding paragraph numbers, and the inclusion of one count punishable only by summary procedure), the prosecutor answers: "because we believed that summary procedure was the proper way to proceed." However, he says, this choice is not yet "irrevocable." When asked at what point he believes the choice does become irrevocable, he answers: "at the verdict."

THE DEFENDANT

[18] The defendant pleads that it is illegal for police to take fingerprints and photographs in any case before the Montreal Municipal Court because, he says, this court has no jurisdiction for indictable offences, and s. 2 of the *Identification of Criminals Act*, R.S.C., 1985, c. I-1, limits its application to indictable offences.

[19] He relies on the Supreme Court of Canada's decision in *R. v. Dudley*, 2009 SCC 58, as authority for the proposition that "when the Crown elects to go summary, the offence is treated IN ALL RESPECTS as a summary conviction offence." He points out that the majority of the justices in *Dudley* specifically rejected the minority's affirmation that hybrid offences retain their indictable nature even after the decision is made to proceed summarily. And he says that there is no way to circumvent the clearly expressed words "in all respects" used by the majority.

[20] He pleads that Parliament must not have wanted fingerprints to be taken for summary conviction offences because, if it had, it could have said so in the *Identification of Criminals Act*.

IV. ANALYSIS

1) Can a defendant be compelled to give his fingerprints after being charged with a hybrid offence taken summarily?

[21] The defendant is right in saying that the *Identification of Criminals Act* applies only to indictable offences. Section 2 of the act spells it out clearly:

> **2** (1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:
>
> (a) any person who is in lawful custody charged with or convicted of
>
> (i) an indictable offence [...]
>
> (c) any person alleged to have committed an indictable offence [...] who is required pursuant to subsection 501(3) or 509(5) of the *Criminal Code* to appear for the purposes of this Act by an appearance notice, promise to appear, recognizance or summons [...]
>
> [emphasis added]

[22] There is no reference at all in the *Identification of Criminals Act* to summary conviction offences nor to hybrid offences.

[23] The reason why, for decades, fingerprints have been routinely taken for hybrid offences, is the interpretation given by courts to s. 2 of the *Identification of Criminals Act* through the application of s. 34(1) of the *Interpretation Act* (R.S.C., 1985, c. I-21), which reads as follows:

> 34 (1) Where an enactment creates an offence,
>
> (a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
>
> (b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
>
> (c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.
>
> [emphasis added]

[24] Section 34(1)(a) of the *Interpretation Act* has led courts to accept that hybrid offences retain their character as indictable offences during the early stages of

procedures, such as the arrest of a suspect by a peace officer and the peace officer's subsequent release of an arrested person with an appearance notice, promise to appear, or recognizance. In these early stages of criminal procedure, police officers can — and usually do — act independently, i.e. without any intervention by prosecutors. In these early stages, it is not necessary to decide whether the charges will be taken summarily or by indictment. In the absence of a decision by a prosecutor to proceed summarily, it is still true to say that "the offender may be prosecuted for the offence by indictment".

[25] Consequently, the combination of s. 2 of the *Identification of Criminals Act* and s. 34(1)(a) of the *Interpretation Act* has led courts to accept that, during these early stages of procedures, hybrid offences retain their character as indictable offences for the purpose of fingerprinting. Because the alleged offender may still be prosecuted for the offence by indictment, he can also be required to give his fingerprints in application of s. 2 of the *Identification of Criminals Act.*

[26] The promise to appear signed by the defendant Jaggi Singh, including the obligation to go for fingerprinting, was perfectly legal when it was drawn up by police and signed. The decision by police to write on the promise to appear that Jaggi Singh must appear in Municipal Court was not an election of mode of prosecution and did not bind the Crown to make an election for summary procedure. In fact, it did not even bind the Crown to prosecute the case in Municipal Court. It was still open to the Crown to transfer the case to the Court of Quebec.

[27] At some point, however, a decision must be made with regard to a hybrid offence. At some point, someone must decide whether it will be prosecuted by indictment or by summary procedure, because the procedural route it will follow depends on that choice. The person who makes that choice is the representative of the Crown. As Justice Fish pointed out in *Dudley* (at par. 1) : "The choice in Canada is the Crown's."

[28] At what time is that choice made? The answer to that question has varied, but Justice Fish (at par. 19) clearly expressed his preference for the decision to be made and announced before an accused is asked to plead:

> To avoid uncertainty and the misunderstanding of which much unnecessary litigation is born, I think it best for the Crown to declare explicitly whether it is proceeding on a hybrid offence summarily or by indictment *before the accused is asked to plead.*

[29] Although Justice Fish limited his reasons for this preference to the avoidance of uncertainty, misunderstanding and unnecessary litigation, I can add other good reasons for making this decision and announcing it before the accused is asked to plead.

[30] Firstly, the accused person needs to know exactly what he is charged with and what the possible consequences are before he decides whether or not to retain the services of a lawyer. If he knows he might be facing several years in jail, he will probably be more inclined to hire a lawyer.

[31] Secondly, the accused person has a right to know exactly what he is charged with and what the possible consequences are before he decides whether to plead guilty or not guilty. This right has been entrenched in s. 606(1.1)(b)(ii) *Cr.C.* which says that a court may accept a plea of guilty only if it is satisfied that the accused understands "the nature and consequences of the plea".

[32] Thirdly, if the Crown chooses to proceed by indictment and the offence is not in the absolute jurisdiction of a provincial court judge (which I am not), the accused must be put to his election of mode of trial in the words of *Cr.C.* s. 536, and that includes informing him that he may ask for a preliminary enquiry; the accused should not be called upon to enter a plea at his appearance, and the arraignment will not take place until the indictment is preferred, after the preliminary enquiry.

[33] Finally, considering the limited jurisdiction of the Montreal Municipal Court, if the Crown chooses to proceed by indictment, it will be necessary at some point to transfer the court file to the Court of Quebec.

[34] In sum, a great number of important decisions must be made as a result of the Crown's decision to proceed summarily or by indictment. It cannot be left up in the air.

Has the Crown made its election in the case at bar?

[35] In the case at bar, the Crown has taken the position that the Municipal Court prosecutor who did the pre-charge screening and approved the charges before the information was drawn up, did "not elect the mode of procedure" at that time or, at least, it was not a "final" election. The Crown says that its decision to draw up the charges with the words "summary procedure" in each count, with the corresponding paragraph numbers for summary procedure only, and the inclusion of one count punishable only by summary procedure, was made "because we believed that summary procedure was the proper way to proceed." But, he says, this choice is not yet "irrevocable." The choice does not become irrevocable, he says, until the verdict.

[36] With the greatest of respect, I have to say that this position is untenable. It would be an abuse of process to lead a defendant through criminal court procedures, all the time leading him to believe that he is being prosecuted by summary conviction and then, just before the verdict, announce that the Crown is re-electing for indictment, with all the consequences involved, including the higher penalty.

[37] The only way such an upgrading of procedures could possibly be done would be by withdrawing the charges laid initially and laying new charges by indictment at the Court of Quebec. This would amount to starting over again, and it would at least have the advantage of returning to the accused all of the options and choices that he may have made differently if he had been charged by indictment from the beginning.

[38] In *Dudley* (at par. 5), Justice Fish considered it possible to upgrade charges from summary to indictment after an appeal has been granted and a summary conviction set aside on the grounds that it was "statute-barred and conducted without consent." However, he said that this amounts to proceeding "afresh" and would not be possible "where the court is satisfied that this would amount to an abuse of process."

[39] At par. 31 of *Dudley*, Justice Fish also mentioned the possibility of upgrading the mode of procedure from summary to indictment in the following situation :

> A hybrid offence that can no longer be prosecuted summarily without the defendant's consent may nonetheless, absent abuse of process, be prosecuted by indictment, whether or not the Crown initially elected to proceed summarily — except of course, where the accused was acquitted by a summary conviction court pursuant to the Crown's initial election.
>
> [emphasis added]

[40] But I think it is implicit in this statement that such an upgrading of charges would have to be done by starting "afresh", i.e. by withdrawing the initial charges and laying new ones.

[41] In the absence of a withdrawal of the charges and the laying of new ones, or the consent of the defendant, the Crown cannot upgrade charges already laid from summary to indictment; its decision to proceed by summary conviction is final, and the defendant can act upon it with full confidence that it will not be upgraded in a surprise about-face by the Crown.

[42] Even if I am wrong on this last statement, the question as to whether the Crown can upgrade charges already laid from summary to indictment is moot in the case at bar, because the Crown has neither asked to do so nor indicated an intention to do so.

[43] In the case at bar, the Crown made its decision to proceed by summary conviction at the pre-charge approval stage, which must have been before the information was sworn in front of a justice on June 6th, because the information was drawn up in such a way as to clearly express that decision. Not only are the three hybrid offences written up as offences "punishable on summary conviction", but an additional count for an offence which can only be prosecuted by summary procedure was included in the same information. I

cannot imagine how it would have been possible for the Crown to express its election for summary procedure any more clearly than that.

Did the Crown's election to proceed summarily obviate the fingerprint obligation?

[44] Does this Crown election to proceed summarily preclude the Crown from now requiring the defendant to give his fingerprints?

[45] The Crown has relied on *Lapointe c. Lacroix*, [1981] C.A. 497, 22 C.R. (3d) 311, a decision of the Quebec Court of Appeal, as authority for the proposition that a defendant can still be required to give his fingerprints even after an information charging him with a hybrid offence by summary conviction has been drawn up, sworn in front of a justice of the peace, and served on the defendant, as long as he has not yet been convicted or acquitted of that summary conviction offence.

[46] Indeed, in the case of *Lapointe c. Lacroix*, the majority of the judges (Lajoie and Bernier) came to that conclusion, despite the compelling reasons of the dissenting Justice Beauregard. However, the majority opinion, written by Justice Lajoie, was premised on the fact that there was no evidence that the Attorney General had participated in the decision to proceed by summary conviction. According to Justice Lajoie, it was not possible to assume that the choice of summary procedure had been the choice of the Attorney General. Consequently, the Attorney General still had the power to elect to proceed by indictment:

> 19. S'il n'apparaît pas du dossier que le Procureur général ne participa pas au choix du moyen de poursuite de l'accusation, il n'y apparaît pas non plus qu'il y participa. Nous ne pouvons donc tenir pour acquis que le choix fut celui de la dénonciatrice ou celui du Procureur général; mais la loi prévoit que quelqu'ait été le premier choix, le Procureur général peut toujours et encore choisir de poursuivre l'infraction par voie de mise en accusation.
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> [emphasis added]

[47] This means that the Attorney General's choice trumps an initial choice made by the informant. The informant is the person who swears to the information; the informant can be anyone, but is usually a police officer. If the informant acts without prior approval of the Attorney General and attempts to elect the mode of prosecution, that decision can be revised by the Attorney General. But if the informant makes an initial choice on the instruction of the Attorney General, that choice is the Attorney General's choice, and there is nothing in *Lapointe c. Lacroix* to suggest that the Attorney General's choice can be modified once it is declared, except with the consent of the accused or by withdrawing the charges and laying new ones.

[48] Things have changed greatly since *Lapointe c. Lacroix* was decided in 1981. At that time, the vetting of charges by Attorney General's prosecutors was not consistently practiced across Canada. Indeed, in some places it was non-existent. Today, however, prior approval of criminal charges by prosecutors is standard practice in the Province of Quebec. Since the adoption in 2005 of the *Loi sur le Directeur des poursuites criminelles et pénales*, RLRQ, c. D-9.1.1, the prosecutorial powers of the Attorney General of Quebec, including the power to authorize prosecutions, are exercised by the Director of Criminal and Penal Prosecutions. This function is formally recognized at s. 13 :

> **13.** Le directeur a pour fonctions:
>
> 1° d'agir comme poursuivant dans les affaires découlant de l'application du Code criminel (Lois révisées du Canada (1985), chapitre C-46), de la Loi sur le système de justice pénale pour les adolescents (Lois du Canada, 2002, chapitre 1) ou de toute autre loi fédérale ou règle de droit pour laquelle le procureur général du Québec a l'autorité d'agir comme poursuivant;
>
> 2° d'agir comme poursuivant dans toute affaire où le Code de procédure pénale (chapitre C-25.1) trouve application.
>
> Le directeur exerce également les fonctions utiles à l'exécution de sa mission, y compris pour autoriser une poursuite, pour porter une affaire en appel ou pour intervenir dans une affaire à laquelle il n'est pas partie lorsque, à son avis, l'intérêt de la justice l'exige. Enfin, il exerce toute autre fonction qui lui est confiée par le procureur général ou le ministre de la Justice.
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> [emphasis added]

[49] Section 18 of the same law provides that the Director of Criminal and Penal Prosecutions issues the instructions that guide the activity of all provincial prosecutors, including those of municipalities acting in municipal courts:

> **18.** Le directeur établit à l'intention des poursuivants sous son autorité des directives relativement à l'exercice des poursuites en matière criminelle ou pénale. Ces directives doivent intégrer les orientations et mesures prises par le ministre de la Justice et le directeur s'assure qu'elles soient accessibles au public.
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> Ces directives s'appliquent, avec les adaptations nécessaires établies après avoir pris en considération le point de vue des poursuivants désignés, dont les municipalités, à tout procureur qui agit en poursuite en matière criminelle ou pénale, y compris devant les cours municipales. Le directeur publie alors un avis à la *Gazette officielle du Québec* indiquant la date à laquelle la directive s'applique à un ou plusieurs de ces poursuivants désignés. Par la suite, si le directeur doit intervenir en ces matières en raison d'un défaut de conformité à ces directives, il le fait aux frais du poursuivant concerné. [...]
>
> [emphasis added]

[50] Pursuant to that authority, the Director has issued many instructions, including one (first adopted in 2001) specifically aimed at the decision to proceed summarily or by indictment. *Directive ACC 5* is entitled "*ACCUSATION - INFRACTIONS HYBRIDES*" (www.dpcp.gouv.qc.ca/documentation/directives-

directeurs.aspx). It specifically states that it applies to all municipal courts as well as the Court of Quebec. Sections 1 and 2 of the *Directive* set out in detail the criteria that a prosecutor must consider before deciding to proceed summarily or by indictment. Section 3 applies specifically to municipal prosecutors and states that when a municipal prosecutor sees that a hybrid offence could be taken by indictment, he must transfer the charge request to the chief provincial prosecutor in his region:

> 3. [Cours municipales] - Un procureur municipal qui constate qu'une infraction hybride pourrait être poursuivie par voie de mise en accusation selon les critères énoncés aux paragraphes 1 et 2 doit transférer la demande d'intenter des procédures au procureur en chef des poursuites criminelles et pénales de la région où se trouve la cour municipale.
>
> [emphasis added]

[51] This duty to choose the appropriate method of procedure at the pre-charge authorization stage is consistent with what Justice Fish said in *Dudley* (at par. 54):

> In screening proposed prosecutions, Crown counsel are expected to determine whether charges are justified and, in the case of hybrid offences, whether they should be prosecuted summarily or by indictment.

[52] Consequently, it is no longer possible to speculate that a criminal information sworn by a police officer in the province of Quebec was not previously authorized by a prosecutor, nor that the decision to proceed by summary conviction was not made by a prosecutor exercising authority delegated by the Attorney General.

[53] And in the case at bar, the Crown has admitted that pre-charge screening was done by a prosecutor prior to the information being drawn up and sworn. Consequently, there can be no doubt that the decision to proceed summarily was made by a prosecutor acting with the authority delegated to him by the Attorney General.

[54] Had there been no *Directive ACC* 5, the prosecutor who authorized the charges against Mr. Singh might have been able to temporarily reserve the Crown's election of mode of prosecution for the three hybrid offences. But that would have required two things not present in this case. First, the hybrid offence charges would have to be written without the specific references to summary procedure in each count. Second, the hybrid offence charges would have to be laid separately in two different informations, both distinct from the information for the charge of unlawful assembly (*Cr.C.* s. 66) which can only be prosecuted summarily and cannot ever be prosecuted by indictment. The mischief charge would have to be put in an information of its own because it is in the absolute jurisdiction of a provincial court judge, whereas the forcible detainer and assault charges, when taken by indictment, allow for both a preliminary enquiry and a trial by jury.

[55] By authorizing that all charges be laid in the same information, by specifically indicating "summary procedure" in each count, by specifically indicating only the summary conviction sub-sections of the *Criminal Code* (73**a)**, 430(1)c)**(4)b)**, and 266**b)**), and by including in the same information a count for an offence punishable only on summary conviction, the municipal prosecutor who authorized these charges clearly expressed a decision to proceed by summary conviction.

[56] In addition, by not transferring the charge-approval request to the region's chief provincial prosecutor at the Montreal Court House, the municipal prosecutor confirmed that this was not a case where the circumstances warranted that it be prosecuted by indictment.

[57] All of this suggests that the majority opinion expressed by Justice Lajoie in *Lapointe c. Lacroix*, while it may still be good law, is not applicable to the case at bar. On the contrary, the reasoning of Justice Beauregard finds its full application in the facts of the present case, for he based his decision on the premise that, absent evidence to the contrary, he could assume that the Attorney General had made the choice to proceed summarily.

The consequences of the Attorney General's election to proceed summarily

[58] Once the Attorney General decides on the method of procedure and makes the election, there are consequences. If that choice is to pursue by summary conviction, the hybrid offense is no longer considered or treated as indictable. This was clearly stated by Justice Fish in *Dudley* at paragraphs 18, 21, 22 and 39:

> [18] Pursuant to s. 34(1)(*a*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, an offence is presumed indictable "if the enactment provides that the offender may be prosecuted for the offence by indictment". **Hybrid offences are therefore treated as indictable — unless the Crown elects, or is deemed to have elected, to try them summarily** [...]
>
> [21] As mentioned earlier, **hybrid offences are deemed to be indictable unless and until the Crown elects to proceed summarily**. Thus, speaking for the Nova Scotia Court of Appeal in *R. v. Paul-Marr*, 2005 NSCA 73, 199 C.C.C. (3d) 424, at para. 20, Cromwell J.A. (as he then was) explained that "where an offence may be prosecuted by either indictment or on summary conviction at the election of the Crown, **the offence is deemed to be indictable until the Crown elects to proceed by way of summary conviction**". Likewise, in *R. v. C. (D.J.)* (1985), 21 C.C.C. (3d) 246, at p. 252, MacDonald J., speaking for the Prince Edward Island Supreme Court, Appeal Division, stated that "**in the case of a hybrid offence once the Crown elects to proceed by way of summary conviction the offence is no longer deemed to be an indictable offence**". And in *Canada (Attorney General) v. Trueman, P.C.J.* (1996), 83 B.C.A.C. 227, at para. 13, once more for a unanimous court, McEachern C.J.B.C. held that **hybrid offences "are deemed** by s. 34 of the *Interpretation Act* ... **to be indictable [and] remain indictable unless the Crown elects to proceed by summary conviction**". (Emphasis added throughout.)

> [22] Other appellate courts across the country have reached the same conclusion: *Trinidad and Tobago v. Davis*, 2008 ABCA 275, 233 C.C.C. (3d) 435, at para. 14; *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.), at p. 328; *Mitchell*, at para. 4; *R. v. Gougeon* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), at p. 234; *R. v. Tontarelli*, 2009 NBCA 52, 348 N.B.R. (2d) 41, at para. 55; *R. v. D. (S.)* (1997), 119 C.C.C. (3d) 65 (Nfld. C.A.), at para. 34; *R. v. O'Leary* (1991), 64 C.C.C. (3d) 573 (Nfld. C.A.), at p. 575; *R. v. Shiplack* (1993), 109 Sask. R. 311 (C.A.), at para. 9. See also *Ahmed v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 672, 81 Imm. L.R. (3d) 116, at para. 40. [...]
>
> [39] In virtue of s. 34 of the *Interpretation Act*, **hybrid offences are deemed indictable unless and until the Crown has elected to proceed summarily**.
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> [emphasis by underlining in the original; bold print added by me]

[59] When a hybrid offence is no longer deemed indictable, it is treated in all respects as a summary conviction offence. This was clearly and unequivocally stated by Justice Fish in *Dudley* at par. 2:

> Where the Crown elects to proceed by way of summary conviction, or "summarily", the hybrid (or "dual procedure") offence is treated in all respects as a summary conviction offence.
>
> [emphasis added]

[60] At par. 18, Justice Fish reaffirmed this by approving a doctrinal statement to that effect in *Manning, Mewett & Sankoff : Criminal Law* (4th ed. 2009) at p. 44:

> In these cases, it is the prosecution that first decides how to proceed. If it chooses to proceed by indictment, the offence is treated in all respects as an indictable offence and the accused has the normal rights of election; if it chooses otherwise, the case proceeds in all respects as a summary conviction offence.
>
> [emphasis added]

[61] The repeated use of the words "in all respects" leaves little room for exceptions. However, it is arguable that Justice Fish left the door open for a fingerprint exception in par. 23:

> Justice Charron cites *R. v. Connors* (1998), 121 C.C.C. (3d) 358 (B.C.C.A.), for the proposition that "dual procedure offences retai[n] their character as indictable offences in the context of the *Identification of Criminals Act*" (para. 73). As my colleague points out, the *Identification of Criminals Act* is not before us on this appeal. For present purposes, it will therefore suffice to emphasize that *Connors* stands alone in this regard. Other courts have reached the opposite conclusion. See, for example, *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.), at p. 413.
>
> [emphasis added]

[62] That very small crack left open in the door is the only thing that gives any chance of success to the Crown's position in the case at bar. In *Dudley*, the justices of the Supreme Court of Canada did not deal with the *Identification of*

Criminals Act, because it was not the issue before them. However, everything else in the majority opinion in *Dudley* goes diametrically against the decision of the British Columbia Court of Appeal in *Connors*. It is therefore likely that *Connors* can no longer be considered good law. As Chief Justice Bauman of the Supreme Court of British Columbia said in *R. v. McCartie*, 2012 BCSC 928 (at par. 41), it may well be that *Dudley* has overtaken *Connors*:

> Charges under *ITA* sections 239(1)(a) and (d) and of evasion under the *ETA* are hybrid offences. The Crown points to the decision of the Court of Appeal in *R. v. Connors* (1998), 49 B.C.L.R. (3d) 376 (CA) as authority for the proposition that hybrid offences are "indictable offences" for the purposes of s. 2(1)(c) of the *ICA*. In general, I am in agreement with this position. However, where *Connors* holds that hybrid offences are "indictable" for the purposes of the *ICA* even when the Crown has already elected to proceed summarily, it may well be that *Connors* has been overtaken by the decision of the majority of the Supreme Court of Canada in *R. v. Dudley*, 2009 SCC 58 (CanLII) (at paras. 18-23). Where the offence in issue is a hybrid offence and the Crown has elected to proceed by summary conviction, the charged offence may not be an "indictable offence" for the purposes of the *ICA*. I need not decide this point, as in the case at bar, neither the information nor the summons states what the Crown's election is, and the Crown submissions indicate that this election has yet to be made (para. 63 of Crown argument). Accordingly, s. 2(1)(c) of the *ICA* was properly invoked.
>
> [emphasis added]

[63] I agree. Justice Fish made a point of emphasizing that "*Connors* stands alone" in regard to the *Identification of Criminals Act* while "[o]ther courts have reached the opposite conclusion", including the Court of Appeal for Ontario in *Abarca*. It is useful to note that in this latter decision, Justice Lacoursière said: "Once the Crown elects to proceed by way of summary conviction, it cannot compel the appearance of an accused for fingerprinting."

[64] In *Dudley*, the majority's acceptance of the reasoning of Justice Fish, including his use of the words "in all respects", and the clear rejection of Justice Charron's minority opinion (which relied on *Connors*) lead me to conclude that *Dudley* has indeed overtaken *Connors*.

[65] But even if I am wrong on this point, I am bound by the decision of the Quebec Court of Appeal in *Lapointe c. Lacroix*, not by the decision of the British Columbia Court of Appeal in *Connors*. And for the reasons I stated earlier, I am not departing from the reasoning used by all three judges in *Lapointe c. Lacroix*. I am simply applying that reasoning to a new set of facts.

[66] I do not wish to be understood as saying that fingerprinting can never be required for hybrid offences. I am only saying that, once the Crown has made its election to proceed summarily, it can no longer require fingerprinting unless it withdraws the charges and lays new ones.

[67] It could be argued that fingerprinting is necessary to determine whether an alleged offender has a criminal record, and that the criminal record is an

important factor to be considered by the Crown in its decision to elect procedure by indictment or by summary conviction. There is authority for this proposition in *R. v. Beare; R. v. Higgins*, (1988) 2 S.C.R. 387, at par. 22. However, it is also important to note that in this same decision (at par. 47), one of the reasons invoked by the Supreme Court of Canada for its conclusion that the *Identification of Criminals Act* does not violate the *Charter of Rights* is the fact that it requires fingerprinting only of people charged with the most serious of criminal offences:

> The impugned provisions, therefore, operate only with respect to indictable offences which, obviously, constitute the most serious category of criminal offences.
>
> [emphasis added]

[68] If, in a particular case, the result of the fingerprinting (i.e. the defendant's criminal record) is an essential factor in the Crown's decision to elect procedure by indictment or by summary conviction, the Crown always has the option to do as it did in *Abarca*: reserve its election until the fingerprints are given voluntarily or elect to proceed by indictment. It can also ask a justice to issue an arrest warrant under s. 502 *Cr.C.* before making its election or before drawing up the information.

[69] However, there are many cases where, no matter what the criminal record may contain, the Crown will still elect to proceed by summary conviction procedure, because the facts simply don't warrant a prosecution by indictment. In the case at bar, the decision to proceed summarily was made by the Crown in spite of the fact that fingerprints had not been taken. Consequently, I must conclude that the existence of a criminal record for the defendant Jaggi Singh was not considered an essential factor for the decision-making process. If it had been considered essential, the prosecutor could have delayed his authorization of the charges and asked a justice to issue an arrest warrant under s. 502 *Cr.C.* All that was required to do so was that the promise to appear be confirmed by a justice. It was not necessary to authorize the charges, draw up an information and have it sworn in front of a justice.

[70] Consequently, I am convinced that the fingerprinting of the defendant Jaggi Singh was not important to the Crown when it decided what charges to authorize and what mode of prosecution to elect. Regardless of what kind of record the fingerprinting might have revealed, the Crown would still have made the same election for summary conviction procedure.

[71] For all of the reasons mentioned above, I conclude that a defendant cannot be compelled to give his fingerprints for a hybrid offence after the Crown has made an election to proceed summarily.

2) Can the arraignment be delayed or adjourned for the purpose of compelling a defendant to give his fingerprints?

[72] Because the prosecutor has told me that the defendant did not give his fingerprints, it is arguable that *Criminal Code* s. 502 gives me the power to issue an arrest warrant:

> 502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge or another peace officer to appear at a time and place stated therein for the purposes of the Identification of Criminals Act does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which the accused is charged.
>
> [emphasis added]

[73] Because of the word "may" in s. 502, the decision to issue an arrest warrant under s. 502 is discretionary. Oddly though, s. 502 mentions no threshold or standard for establishing that the accused did not "appear at [the] time and place stated therein". Contrary to a bench warrant issued by a justice who personally observes the absence of the defendant in court, the justice called upon to issue an arrest warrant under s. 502 is not able to make the observation himself. He must rely on someone else's word. In the case at bar, no evidence was given to me by the Crown to support the allegation that the defendant did not comply with his fingerprint obligation. No witness was heard; no sworn document was submitted; not even an unsworn but signed document was adduced. All I was given by the Crown was hearsay, which did not even include the name of the person who provided the information.

[74] The defendant Jaggi Singh has told me under oath that he did go on the required time and place and was ready to give his fingerprints, but was turned away. Am I to reject the sworn testimony of the defendant in favour of hearsay from an unsworn and unidentified source? I think not. Am I to order that a person who always shows up for his court dates be arrested and detained on such flimsy, unsubstantiated evidence? I don't think so!

[75] Considering the explanations given under oath by the defendant (i.e. that he did go on the date and time required, but was asked a question he considered illegal and refused to answer and was sent away by the police officers), and considering that the defendant has assiduously attended court at every date, I will use my discretion to not issue an arrest warrant.

[76] Can the arraignment nonetheless be adjourned? Other than the arrest warrant mentioned in s. 502, I can find nothing in the *Criminal Code* that suggests another option for the judge when it is alleged that the defendant did not go

and give his fingerprints. In particular, there is no mention of adjourning the arraignment until the fingerprints are given.

[77] As I mentioned earlier in this decision, arraignments are very frequently delayed or adjourned to allow defendants to go and give their fingerprints. But this is done by consent, and often with the consent of defence counsel who properly advise their clients that it is best they do so if they want to avoid the risk of being charged for failure to attend at the time and place mentioned in their release document.

[78] A justice also has discretion to adjourn any hearing for a valid reason, particularly when, as is the present case, an issue is raised and must be decided before continuing.

[79] Other than that, I know of no authority that allows me to adjourn an arraignment when a summarily prosecuted defendant appears in court and wants to enter his plea.

[80] If the Crown wishes to prosecute the defendant for failing to appear for fingerprinting, it has the option of laying a charge under s. 145(5) *Cr.C.* If that happens, the judge presiding a trial for that charge can decide, after hearing all of the evidence, whether or not Mr. Singh failed to comply with his obligation. In particular, that judge can decide whether or not the question allegedly asked by the police officer was "approved by order of the Governor in Council" as mentioned in s. 2 of the *Identification of Criminals Act*. The judge can also decide whether or not there was still an obligation to give fingerprints after the Crown chose to proceed by summary conviction on June 6th. If the judge decides that Mr. Singh failed to comply with his promise, he can then decide whether Mr. Singh had a lawful excuse. But the decision whether to lay a charge under s. 145(5) *Cr.C.* is not mine to make. That decision belongs to the Crown alone.

[81] I also point out that s. 145(5) *Cr.C.* creates a hybrid offence. So the Crown is not without any options as a result of my decision today.

[82] Section 801 *Cr.C.* says that in summary matters, when the defendant appears, the substance of the information laid against him shall be stated to him and he shall be asked whether he pleads guilty or not guilty. There is no provision in the *Criminal Code* for adjourning the arraignment. Section 803(1) allows for the adjournment of the trial, but there is no provision for the adjournment of an arraignment.

[83] As I stated earlier, adjourning the arraignment is usually done by consent, as a courtesy to defendants: it avoids them being arrested in the execution of a warrant issued under s. 502 *Cr.C.*, and it avoids them being subjected to a new charge under s. 145(5) *Cr.C.* That is why defence lawyers regularly encourage their clients to take advantage of this opportunity. However, I can find nothing

in the law that requires the defendant to consent to this, and nothing that gives me the power to compel him to do so.

[84] Because Mr. Singh has made a fully-informed choice to not go now and give his fingerprints before entering his plea, I will delay the arraignment no further. Consequently, the charges will be read to him, and he will be called upon to enter his plea.

RANDALL RICHMOND, J.M.C.M.

Dates of the hearing: June 30th, August 30th, and September 30th 2016