C A N A D A

M U N I C I P A L
C O U R T O F
M O N T R É A L

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Case Nº:
116-089-269

JAGGI BIKRAMJIT SINGH

Applicant

- v -

THE QUEEN

Crown

REPRESENTATIONS on MOTION to not NOT REQUIRE FINGERPRINTS AND PHOTOS

A) SUMMARY

This motion, based on the legal rationale provided below, asks that the court 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;
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 independent 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.

B) PRELIMINARIES

1) The applicant wishes to go on the record that the British monarchy is oppressive, colonial and genocidal, and it's offensive that in 2016 anyone needs to be making reference to the "Crown", especially in Quebec. *Tiocfaidh ár lá!*

2) The applicant rejects any recognition of the monarchy, and rather acknowledges that we are on the traditional territory of the Kanien'kehá:ka. The Kanien'kehá:ka are the keepers of the Eastern Door of the Haudenosaunee Confederacy. The island called "Montreal" is known as Tiotia:ke in the language of the Kanien'kehá:ka. Beyond acknowledgements, the applicants puts into the record a commitment to resist colonialism and neo-colonialism in the many forms it takes, and in the diversity of forms that resistance can take too.

3) The applicant also acknowledges the inspiration of dozens of undocumented individuals and families in Montreal who survive and struggle in the face of the injustices of the immigration system and border imperialism. Their example, and experience was a direct motivation for the actions (alleged or otherwise) at the offices of the Canada Border Services Agency (CBSA) on May 3, 2016. *No One Is Illegal! Stop Deportations! Status for All!*

4) The applicant acknowledges the important research assistance provided by his McKenzie Friend, Richard Beaulieu, as well as the moral support and encouragement provided by members of *Contempt of Court: Legal Clinic By and For Social Movements*, and members of *Solidarity Across Borders*.

C) REFERENCES

This motion will make reference to the following documents:

1) Promise to Appear (May 3, 2016)
2) Information (June 30, 2016)
3) Identification of Criminals Act
4) Interpretation Act
5) R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570
6) R. v. Dudley, 2008 ABCA 73 (CanLII)
7) Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA)
8) R. v. Boutilier, 1995 CanLII 4169 (NS CA)
9) R. v. S.D., 1997 CanLII 14627 (NL CA)
10) R. v. Butchko, 2004 SKQB 140 (CanLII)
11) Re Abraca and the Queen 1981 57 C.C.C. (2d) 410 ONCA

D) STATEMENT OF FACTS

1) The applicant, Jaggi Singh, was arrested and charged on May 3, 2016, in relation to an anti-deportations protest at the offices of the Canada Border Services Agency (CBSA) in downtown Montreal.

2) The applicant was released the same day on a promise to appear.

3) The promise to appear required the applicant to appear at the Montreal police's Soutien Operationnel Sud at 980 rue Guy on June 17, 2016, as per the *Identification of Criminals Act*.

4) The promise to appear also required the applicant to attend court, specifically at Montreal's Municipal Court at 775 rue Gosford on June 30, 2016.

5) The applicant appeared for fingerprinting on June 17, 2016 at 980 rue Guy.

6) The applicant provided police officers with his promise to appear, which included his name, address and date of birth.

7) The applicant was asked by the police officers for his city of birth.

8) The applicant refused to answer the question, and indicated clearly and calmly to Montreal police that all relevant information was already on the promise to appear, and that he was ready for fingerprints and photographs.

9) The police escorted the applicant out of the station, without taking fingerprints and photographs.

10) The applicant subsequently studied the *Identification of Criminals Act* and related documentation. He realized that fingerprints and photographs cannot be compelled for summary charges.

11) The applicant appeared in court, self-represented, on June 30, 2016. At a hearing presided by Judge Randall Richmond, the applicant indicated that he would refuse to provide fingerprints and would make a motion to that effect.

12) At the hearing of June 30, 2016, the applicant also entered into the record, under oath, the substance of the facts stated above.

13) At the hearing of June 30, 2016, the Crown lawyer confirmed that they had already elected to proceed summarily on all charges, and that all disclosure provided on that date was full and final.

14) The applicant subsequently appeared for another short hearing in front of Judge Richmond on August 30, 2016 and provided an earlier draft of this current motion.

15) The applicant indicated that he would provide a final draft of the motion to not require fingerprints or photos in advance of the hearing date on the motion, scheduled for September 30, 2016.

E) LEGAL ARGUMENTS

Summary

1. **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570** states that when the Crown elects to go summary, the offence is treated IN ALL RESPECTS as a summary conviction offence.

2. **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570** further states that the nature of an offence pursued by means of Summary Conviction is different from that pursued by Indictment.

3. In **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA)** the majority accepted that the accused no longer had to submit to be fingerprinted after pleading guilty to the hybrid offence by means of summary conviction.

4. In **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA),** the dissident judge found it ridiculous that a person when prosecuted by summary cannot be compelled to give fingerprints if the proceedings end with conviction, but may be so compelled prior to that in the proceedings.

5. Section 34(c) of the Interpretation Act is interpreted largely and liberally in **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA)** to indicate that after a conviction for a hybrid offence pursued by means of summary conviction, that a person may not be compelled to be fingerprinted because to do so would be to deem that this person was convicted by means of indictment. Thus, the record, the aftermath of the case must be the same as a person convicted for a pure summary offence. Otherwise, the majority would have called for Ms Lapointe to submit for fingerprinting or at the very least ruled that the Crown could have continued to insist upon this.

6. The dissident judge in **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA)** pointed out that if we interpret Section 34(c) of the Interpretation Act this way, we must apply the no fingerprinting rule as soon as the Crown elects to go summary. It is also implied that fingerprints taken before election would have to be destroyed... at the very least we should do as **Dudley** mandates, that is treat the procedures as being for a summary conviction offence in all respects.

7. In **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA),** the majority ruled that as the Attorney General may always intervene to make some sort of final decision as to election, that the Crown's election should be disregarded until then and we should continue to act as if the case is pursued by means of indictment. This notion was also rejected **in R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570.**, where they said further that they could re-elect if there was no injustice involved in the particular case, and thus proceed as if by indictment.

8. In **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA),** the majority ruled that as the Interpretation Act states that the mention of an offence on some criminal procedure document must be interpreted to be an indictable offence, that this somehow means that upon the summonses where it is specified the procedure is by summary conviction that it should be taken to somehow legitimise demanding upon the document submission of fingerprints after they have already elected to go summary. Again, this goes against what was decided **in R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570.**, as to the question of proceedings being by summary in all respects after the decision. This would seem to be based on this idea that the offence always retains its indictable nature even as they go summary... this is also rejected in **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570.** It suggests the mention of the offence upon documents in summary convictions proceedings is really to be interpreted that this is an indictable offence which is somewhat confusing and somewhat impossible.

9. In **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA),** the majority ruled that the nature of hybrid offences are always indictable, (though in practice not after conviction on summary conviction, thus, indicating that in their opinion the inability of the Attorney General to re-elect is what makes it so.. and the nature would change thus)... at any rate this idea of "indictable by nature" is not retained by **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570.**

10. In **R. v. Boutilier, 1995 CanLII 4169 (NS CA),** the Nova Scotia Court of Appeal affirmed a stay for abuse of process because the Crown elected to go by indictment to get around the six months statute of limitations, it was deemed that the nature of the offence was insufficient that it be treated as an indictable offence, indicating that this idea that the nature of hybrid offences are always to be indictable.

11. As the context may determine the Crown election, that a case is tried before municipal court means that this is an election to go summary: **R. v. S.D., 1997 CanLII 14627 (NL CA).**

12. The decision **R. v. Butchko, 2004 SKQB 140 (CanLII)** shows us that the *stare decisis* rule does not apply to the final decision so much as to the *ratio decidendi*, the rationale for the decision. If part of the *ratio decidendi* for a decision is contradicted by a higher court, as **Dudley** contradicted the heart of both **Connors 1998** and the majority in **Lapointe**, so we must follow **Dudley** in its somewhat more vague yet unmistakeable pronouncement that following the Crown's election that proceedings be by way of summary conviction, that in all respects it

should be so treated as a summary proceeding, that the nature of the offence does not always remain indictable, the Interpretation Act does not make this so. "All respects" includes anything provided for by the Identification of Criminals Act.

13. It thus follows that as we must take Section 34(c) of the Interpretation Act in a large and liberal manner, that this was even done in **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA),** that therefore we must proceed, as **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570** mandates, in all respects as if the offence is a summary offence after the Crown has elected to go summary, and that the aftermath, the record of the proceedings must reflect this after a person has been convicted of a hybrid offence by means of summary conviction, including that any fingerprints taken before election be destroyed. That we must accept that the nature of summary conviction offences is different from those pursued by means of indictment in the case of hybrid offences as stated in **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570**, to the point that abuse of process may be found if an act clearly that does not rise to the seriousness of an indictable offence is treated as one to get around a statute of limitations as found in **R. v. Boutilier, 1995 CanLII 4169 (NS CA).** That proceeding in a municipal court indicates that the offence is not taken as rising to that serious nature which means that this should in all senses be treated as a summary offence, including with regards to fingerprinting, meaning that they should not be taken.

Details

14. In **R. *v.* Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570**, it states

Where the Crown elects to proceed by way of summary conviction, the hybrid offence is treated **in all respects as a summary conviction offence** and the proceedings must be instituted within six months unless the parties otherwise agree. Where the trial has proceeded before a summary conviction court without an express election by the Crown, it will be presumed that the Crown has elected to proceed summarily.

At paragraph 2, J. Fish states:

[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**.

[3] Where t**he trial has proceeded before a summary conviction court without an express election** by the Crown, it will be presumed that the Crown has elected to proceed summarily. Where it is discovered before adjudication on the merits that the proceedings were instituted more than six months after the offence is alleged to have been committed, a mistrial should be declared unless the parties agree to waive the limitation period (or "prescription").

15. Thus, it is clear that as far as the issue of prescription is concerned, the six months applies as in the case of summary offences, and that this would cause a mistrial. If the nature of the offence was always that it be indictable, as was judged in all the decisions where they ruled the

Identification of Criminals Act applies after the Crown elects to go summary, then there would be no statute of limitations. In fact, that was the view of the dissenting judges in this case.

16. This would be so if we take mention of the offence upon official documents pertaining to the proceedings as referring to an indictable offence and that be decisive of the matter as the majority in the **Lapointe** decision did.

17. The Crown cited **Lapointe v. Lacroix (1981) 22 C.R. (3d) 311 (QCA)**. This was a divided decision. Notable though is that at the start, speaking for the majority, Lajoie J.A. states:

The appeal was academic for the parties, as **the accused had pleaded guilty to the summary** conviction charge and therefore **could no longer be compelled to submit to the taking of fingerprints.**

18. Nowhere does the majority claim this to be unusual or wrong, they accept the notion that when the procedures are over and the conviction is entered for a hybrid offence by means of summary conviction, there is no way fingerprints may be taken. In his dissenting opinion, Beauregard J.A. points out the absurdity of this on page 320:

...on ne peut interpréter la loi comme si, d'une part, elle signifiant qu'une personne qui est de fait inculpée en vertu des dispositions de la Partie XXIV du Code criminel (même si l'infraction avait également pu être pousuivie par voie de mise en accusation) doit se soumettre à des mesures d'identification et, d'autre part, elle signifiant que cette même personne, une fois déclarée coupable de cette même infraction, n'est plus obligée de se soumettre aux mêmes mesures d'identification.

Effectively, the majority has stood for the idea that indeed what is now Art. 34(c) of the Interpretation Act is to be given a large and liberal interpretation, as stated in the Act...

3(2) **The provisions of this Act apply to the interpretation of this Act.**

12 Every enactment is deemed remedial, and shall be given such fair, **large and liberal construction and interpretation** as best ensures the attainment of its objects.

As for Art. 34(c) it reads...

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.**

19. If a hybrid offence always is considered to be an indictable offence according to the Interpretation Act, the only exception being in the narrow case that officially, a person convicted by way of summary conviction was not considered convicted of an indictable offence, then we must continue to force this person to have fingerprints taken even though convicted through summary, as the only thing that is meant by this provision is that she is not considered to have been convicted by indictable in the narrowest sense. In a wider sense, it is taken to mean

that in terms of the aftermath, of the legacy of the trial, it must fit that of a pure summary conviction offence, that there is no record suggesting that the accused was convicted of an indictable offence. That means, no fingerprints. This is the only way one can understand Ms Lapointe not having to submit to taking prints after conviction.

20. If indeed this is so, then her fingerprints would have to be destroyed had they been taken and had they proceeded by summary. This then makes taking the prints somewhat useless when they know they shall proceed by summary. The moment they know, they need to proceed in every way as if it is a summary conviction offence, as **R v Dudley 2009** states... The dissent in **Lapointe** recognises this:

Si par l'application du par. (c) de l'art. 27 de la Loi d'interprétation, précitée, une personne qui a été déclarée coupable d'une infraction après déclaration sommaire de culpabilité (même si au départ il s'agissait d'une infraction "hybride") n'est pas obligée de se soumettre à des mesures d'identification, il faut en conclure que la même exception existe avant le prononcé de la déclaration de culpabilité ,mais après que le poursuivant a choisi la procédure prévue à la Partie XXIV du Code criminel.

21. The majority in **Lapointe** base their decision on the notion that it is accepted that the nature of hybrid offences are that they are always indictable, even when proceeded summarily, a notion that was rejected in **Dudley**. Another argument made was that the Attorney General may intervene to go by indictable at any time... and this somehow makes these cases always considered indictable at all times. Since this decision however, people have won Abuse of Process motions when the Crown went indictable in order to get around the statute of limitations for summary offences, based on the nature of the offence (**R. v. Boutilier, 1995 CanLII 4169 (NS CA),** .

22. Moreover, **Lapointe**'s majority, by accepting that the petitioner could not be compelled to submit for fingerprinting after the end of the trial by summary conviction, suggests that as the Attorney General can change the means of trial at any point, that no election really happens until the trial is over. Thus, despite the proceedings being by means of summary conviction, this remains an indictable case to the moment that guilt is pronounced. That election never really happened at all as the decision may always be changed. That was certainly not accepted in **Dudley**... but if we were accept **Dudley** in that the nature of the proceedings are summary after election, that there really is a decision that means something, then the logic of the Lapointe majority points to not permitting fingerprinting during the time this is considered a summary proceeding!

23. The **Lapointe** dissent also points two other things that are very important:

1 . En matière s de dispositions qui touchent à des droits fondamentaux, il faut, comme l'a encore rappelé récemment la Cour Suprême du Canada dans Colet c. R., 19 C.R. (3d) 84, 21 C.R. (3d), 1981 ,2 W.W.R.. 472, 119 D.L.R. (3d) 521, 35 N.R. 227, interpreter les textes d'une façon stricte et au profit de l'accusé.

2. Si, à l'article 133(8) [abrogé et remplacé par S.R.C. 1970, c. 2 (2e Supp.) art. 4] du Code criminel, le législateur a spécialement prescrit qu'une personne inculpée ou déclarée coupable d'une infraction punissable après déclaration sommaire de cupabilité doit se soumettre aux mesures d'identification s'il agit d'une infraction prévue à l'art. 133 du Code criminel, la Loi sur l'identification des criminels, précitée, n'a pas d'application lorsqu'une personne est inculpée d'une infraction "hybride" qui est prévue dans un autre article du Code criminel.

24. For the second point, indeed, why would the legislator have bothered providing that a specific hybrid offence, when pursued by summary, requires fingerprinting, if this is so for all such offences. It would necessarily follow that this is not so.

25. Another argument advanced by the majority in **Lapointe** is that a provision in the Interpretation Act states that a hybrid offence mentioned in the summons must be interpreted as indictable, even if it states clearly that they are proceeding by summary conviction, that this summons can include an order to be fingerprinted. Though if they know they are going summary they cannot do that no matter how the mention on the offence upon the summons is intepreted. This sort of logic was rejected in **Dudley**. Moreover, there is no reason why, if the Attorney General has cause to, and intervenes to go indictable, that they may not take fingerprints then. This idea that the Crown has not really decided until the Attorney General has is certainly not accepted in **Dudley.**

26. This was certainly not accepted in the contemporaneous **Re Abraca and the Queen 1981 57 C.C.C. (2d) 410 ONCA,** where the Ontario Court of Appeal took as self-evident that

... once the Crown elected to proceed by summary conviction, it could not compel the appearance of the accused for fingerprinting.

In this particular case, the Crown had yet to elect and insisted that fingerprints be taken before election. She refused, so the Crown decided to pursue the case upon indictment.

The appellant... submits that the election to proceed by way of indictment was for the purpose of obtaining fingerprint identification and this was a purpose irrelevant to those purposes for which discretion was given by the Criminal Code.

27. Thus, the question of this case was, did the Attorney General have the right to go by means of indictment for the sole purpose of taking fingerprints, which would be impossible to do after proceeding by summary conviction.

The Crown Attorney, when exercising the discretion to prosecute by way of indictment, is acting as an officer of the Crown and performing a function inherent in the office of the Attorney-General whose agent he is for this purpose.. The appellant in her refusal to be fingerprinted was in breach of the law and we are not prepared to say that the Crown Attorney was not entitled to consider that breach a factor in exercising his discretion.

28. This near absolute discretion conferred to the Crown in such matters since has been eroded after the promulgation of the Canadian Charter of Rights and Freedoms (as shown in **R. v. Boutilier, 1995 CanLII 4169 (NS CA))...**

29. **Dudley** has further advanced the idea that 34(c) of the Interpretation Act must be taken largely and liberally to mean that as soon as the Crown goes summary, the entire procedure must be done as a summary procedure. Also, **Dudley** establishes that an offence prosecuted by summary conviction is of a different nature from one prosecuted by indictment.

30. If we take the logic of **Lapointe** with the acceptance by the majority as well as the dissident, that Ms Lapointe did not have to take fingerprints after having pleaded guilty to the offence by means of summary conviction, that 34(c) must be taken to mean that if at the end of proceedings, a person is convicted of the offence through summary conviction, the record, the aftermath, this must reflect a summary case, meaning no fingerprints on file. If these were taken, they must be destroyed. Thus, it follows that if they choose to go summary, then they should not waste their time and take fingerprints as they must be destroyed to fit the logic of Section 34(c) of the Interpretation Act as interpreted in a liberal and large manner.

31. In **R. v. Dudley, 2008 ABCA 73 (CanLII)**, the Alberta Court of Appeal stated as to 34(c)...

[28] ... S. 34(1)(c) simply operates to remove the deeming of indictableness created by this section from a conviction following a summary conviction trial. As such, the language of legislation such as the *Criminal Records Act*, the *Immigration and Refugee Protection Act*, the *Corrections and Conditional Release Act* and other legislation which triggers special consequences arising from convictions for indictable offences is not engaged by the conviction.

Thus, at the end of proceedings, no fingerprint records should exist also.

32. The **Dudley** judgement acknowledges that summary offences possess a different nature from those pursued by indictment. In **R. v. Boutilier, 1995 CanLII 4169 (NS CA),** the Nova Scotia Court of Appeal was seized on an appeal of a granting of an abuse of process motion regarding the decision of the Crown to prosecute by way of indictment to get around the statute of limitations for prosecuting summary offences.

If the Crown proceeds in a court with summary conviction jurisdiction but does not specify the mode of procedure, it is deemed to have elected to proceed summarily. See **R. v. Robert** (1973), 13 C.C.C. (2d) 43 (Ont. C.A.); **R. v. Bee** (1976), 28 C.C.C. (2d) 60 (B.C.C.A.) and **R. v. Dosangh** (1977), 35 C.C.C. (2d) 309 (B.C.C.A.).

Fairness to the accused is a consideration in every case. There can be no doubt that proceedings by way of indictment are more prejudicial to an accused person than summary proceedings, if for no other reason than that the respondent in the present case would be liable to imprisonment for five years on indictment instead of a maximum sentence of six months in jail and a fine of $2,000 for a summary conviction offence. The additional procedural safeguards for indictable offences, the preliminary inquiry, and the right to a jury trial, attest to their seriousness and confront the accused with greater expense and delay. Indictable offences carry a greater stigma, of potential relevance to foreign travel, future employment, security clearance, and

in the event of a subsequent offence. A pardon can be sought three years after conviction for a summary offence, but only after five years for an indictable offence. It would be callous to suggest the respondent's position has not worsened substantially if proceedings are not to be summary but by indictment. If the stay imposed by the trial judge is set aside, the respondent would be required to bear serious consequences flowing not from his own alleged misdeeds but merely from the Crown's, that is, the judicial system's, own inadvertence.

In **Parkin**, most but not all of the period during which sexual assaults were alleged fell outside the limitation period. Thorson, J.A., speaking for the Ontario Court of Appeal, said at p. 255 (C.C.C.):

The election made by the Crown in this case was clearly a considered one and the product of a deliberate choice. At the opening of the trial on September 20, 1984, counsel for the Crown advised the court that the Crown would be proceeding by summary conviction for reasons which, he indicated, he had discussed with the complainant's mother earlier that day. Thereafter, the appellant's plea was taken, the trial began and the complainant gave her evidence.

The election, therefore, must be taken to signify that the Crown was prepared to treat the charge against the appellant as not being sufficiently grave to warrant proceeding with it by indictment. In brief, it was willing to go ahead with the trial on the understanding that, if convicted, the appellant would be exposed to a less severe punishment than if the charge was proceeded with by indictment. The original information was sought to be withdrawn solely because counsel for the Crown came to realize, soon after the commencement of the trial, that he had a problem as a result of the limitation period in s. 721(2), and the second information was presented solely to get around that problem. No other reason was advanced for counsel's request to be allowed to withdraw the original information and "start again". That problem, of course, was one of the Crown's own making, in view of the election it made as to how it wished to proceed.

33. The stay was granted and upheld... the attempt to circumvent six months statute of limitations was met with an abuse of process decision. This is because of the different nature of a summary offence.

34. In **Dudley**, when deciding on the question of the Interpretation Act, that no, it does not make hybrid offences always treated as indictable offences, the majority pointed out that no, this was not a decision as to the Identification of Criminals Act. The absence of a judgement on this question must be seen not as upholding the idea that it is appropriate to fingerprint people for summary offences, but rather the contrary. The main pillar of the decisions claiming such a police right smashed, any examination that a court may make in future needs to try to make this case without claiming that Section 34 of the Interpretation Act makes it so. So far, this has not happened.

35. When the proceedings are taking place in a municipal court in Quebec, this is tantamount to a Crown election that the proceedings are by summary conviction. As described by the Newfoundland Court of Appeal in **R. v. S.D., 1997 CanLII 14627 (NL CA)**, the context may decide the matter...

[34] The starting point is s. 34(l)(a) of the **Interpretation Act** which deems a hybrid offence to be indictable. There are at least two limitations to this presumption, however. The first is the obvious one that if the Crown, in accordance with its rights under the **Criminal Code,** elects to proceed by way of summary conviction, the presumption will then cease. See R. v. **O'Leary** (T.J.) (1991), 1991 CanLII 6852 (NL CA), 97 Nfld. & P.E.I.R. 314; 308 A.P.R. 314; 64 C.C.C.(3d) 573 (Nfld. C.A.), per Gushue, J.A., at p. 575.

[35] The second limitation on s. 34(l)(a) has been developed in the case law. Where the Crown fails to make an election and the case inadvertently proceeds as if it were being tried by summary conviction, the Crown will be deemed to have elected to proceed on a summary conviction basis: **R. v. Robert** (1973), 13 C.C.C.(2d) 43 (Ont. C.A.); **R. v. Bouchard** (1976), 10 Nfld. & P.E.I.R. 409; 17 A.P.R. 409 (Nfld. C.A.). This will follow from the fact that the case proceeds and is dealt with in a summary conviction court since, in the absence of an election by an adult accused under s. 536(2) of the **Criminal Code** to have an indictable offence tried in a summary conviction court (in cases where an accused election applies), the only way in which trial could be had in such a court is if the matter is treated as a summary conviction offence. In such a circumstance, reality is recognized and the unspoken assumptions of the parties as demonstrated by their subsequent actions are given effect. By contrast, it was held in **R. v. Coupland** (1978), 14 A.R. 1; 45 C.C.C.(2d) 437 (C.A.), that where the Crown made no election with respect to a hybrid offence but the accused was nevertheless given his election under s. 536(2), wherein he elected trial by judge alone, a preliminary enquiry was held resulting in his committal for trial and he was finally tried and convicted, the Crown was deemed to have elected to have proceeded by indictment because it was clear at all times that the proceedings were conducted on that basis.

[36] Thus, the presumption in s. 34 of the **Interpretation** Act can be displaced where it is clear from what subsequently happens that it was intended to proceed by one way or the other, and the parties acted accordingly.

36. As when in municipal court, the cases are not in the Cour du Quebec with the possibility of proceeding in Superior Court and a decision by the accused as to that, the mere presence in municipal court must be considered as an election to go by summary conviction. In this particular case election was shown to be made before the demand for fingerprints.

37. That the pure summary charge of Unlawful Assembly is to be tried with the other counts in this case can also be said to decide that this is to be a summary proceeding: (**R. v. Bee (1976), 28 C.C.C. (2d) 60 (B.C.C.A.)**).

38. Another point: The Criminal Code used to create offences prosecuted by summary or indictment in one provision. For example, the 1925 Criminal Code describes Section 242.3 as follows...

Everyone is guilty of an offence and liable upon indictment, or on summary conviction to a fine of five hundred dollars, or to one year's imprisonment, or to both...

These days, separate provisions correspond to the offence created upon summary conviction and that upon indictment. For example...

i.

430 (1) Every one commits mischief who wilfully

b. (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property;

c. (4) Every one who commits mischief in relation to property, other than property described in subsection (3),
d. (b) is guilty of an offence punishable on summary conviction.

39. This formulation describes a summary conviction offence only and not an indictable offence and so long as that is the charge, no fingerprints may be taken as this is not an indictable offence.

40. The last point has to do with *stare decisis*. They may argue that this principle demands the application of the Lapointe majority's decision. **R. v. Butchko, 2004 SKQB 140 (CanLII)** describes what actually is meant by stare decisis that means that as a key pillar of that decision was contradicted by a decision by a higher court, that the logic of that higher court must prevail, specifically the Dudley decision.

[17] Given the divergent interpretations of *stare decisis* and comity and their legal effect, a brief review of the essential character of each is attempted. *Stare decisis,* and comity to a lesser extent, form part of the rules of precedent. These rules contemplate that like cases should be decided alike. *Halsbury's Laws of England*, 4th ed., vol. 26 (London: Butterworths, 1979), describes the use of precedent at para. 573:

The use of precedent is an indispensable foundation upon which to decide what is the law and its application to individual cases; it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. **The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent.** This underlying principle is **called the ratio decidendi, namely the general reasons given for the decision** or the general grounds upon which it is based, detached or abstracted from the specific particularities of the particular case which gives rise to the decision. ***What constitutes binding precedent is the ratio decidendi***, and this is almost always to be ascertained by an analysis of the material facts of the case, for a judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration.

The concrete decision alone is binding between the parties to it, but **it is the abstract ratio decidendi**, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, **which alone has the force of law** and which, when it is clear what it was, is binding; but, if it is not clear, it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it. . . . [citations omitted]

A more comprehensive statement as to the meaning of *ratio decidendi* is tbe found in *Pretoria City Council v. Levison,* [1949] 3 S.A. 405 at 417:

As I understand the ordinary usage in this connection, where a single judgment is in question, **the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule**, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts and (c) (this may cover (a)) **that they were necessary for the decision**, not in the sense that it could not have been reached along other lines, **but in the sense that along the**

lines actually followed in the judgment the result would have been different but for the reasons.

41. The *ratio decidendi* of **Lapointe** and of **Connors 1998** each include the vital pillar being that assertion that the Interpretation Act ensures that hybrid offences are always considered to be indictable offences, that the nature of these offences is always that of indictable offences... (though in Lapointe it seems that as soon as the Attorney General no longer can re-elect, taken to be after a judgement of guilt in a summary conviction case, the nature becomes that of a summary offence) that pillar was knocked out decisively with **Dudley**, which states that in all respects, the proceedings must be as those of a pure summary offence after the Crown has made this election. That is what must be applied so as to respect *stare decisis*.

42. In the end, an offence that may be prosecuted by way of indictment or by summary conviction, considering this widespread notion that "by nature" the offence always is indictable, is such that if a person is convicted no matter how, and there are fingerprints on file, or any other indicators that the person may have been convicted of an indictable offence, this creates the impression that the person was convicted of an indictable offence when convicted through summary conviction. That contradicts Section 34(c) of the Interpretation Act. Thus, for the sake of consistency, the following must happen:

1) As soon as the Crown elects to go summary, no fingerprints may be taken, following **Dudley** in its mandate that as soon as the Crown elects to go summary, in all respects the procedures must be those of summary conviction.

2) If fingerprints are taken before election, but the Crown elects to go summary, the fingerprints must be destroyed for if acquitted or convicted, the existence of fingerprints suggests either a person charged with or convicted of an indictable offence in the case of an acquittal, or the conviction of a person for an indictable offence in the case of a conviction, and neither are acceptable. Any record that exists consistent with conviction for an indictable offence must not exist.

3) If the case is sent to municipal court in the province of Quebec, this is presumed to be an election for summary conviction and thus no fingerprints may be taken as long as the file is being adjudicated in municipal court. If the attorney general intervenes and re-elects the case to the Cour du Quebec for indictable proceedings, if justified by the nature of the offence that it may correspond to an indictable offence and thus not an abuse of process, the fingerprints may be taken after that decision is made.

43. In the end, the mandate of **Dudley** that in all respects the proceedings must be of a summary conviction offence must be respected following an election to go summary.

44. Moreover, all criminal cases at the Municipal Court of Montreal, and similar courts all over Quebec and Canada, are deemed to be summary conviction courts, and can never compel fingerprints or photographs, as per the Identification of Criminals Act, at any stage of the legal process.

ON THESE GROUNDS THE APPLICANT ASKS THE COURT:

TO ACCEPT the present request;

TO DECLARE 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;

TO ORDER 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 independent third party;

TO ORDER that all fingerprinting and photographs in relation to summary criminal charges at Montreal's Municipal Court cease immediately;

TO ORDER that no fingerprints and photos can be compelled from the applicant, Jaggi Singh, in this matter.

Submitted on September 26, 2016 by Jaggi Singh, self-represented defendant and the applicant.