NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Awad*, 2015 NSCA 10

Date: 20150130
Docket: CAC 425207
Registry: Halifax

Between:

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

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Beveridge, Bryson and Scanlan, JJ.A.
Appeal Heard:	October 14, 2014, in Halifax, Nova Scotia
Held:	Leave to appeal granted. Appeal allowed, per reasons for judgment of Beveridge, J.A.; Bryson and Scanlan, JJ.A. concurring.
Counsel:	William Burchell, for the appellant Timothy O'Leary, for the respondent

Reasons for judgment:

INTRODUCTION

[1] In hundreds of cases, a police officer swore that she had reasonable grounds to believe that individuals named in informations had committed crimes. It was discovered that, in fact, she had no such belief.

[2] Eight of those individuals are the appellants. They asked a provincial court judge to quash the informations as being nullities. She did so. The Crown appealed to the Summary Conviction Appeal Court which ruled the judge had erred in law, and ordered the provincial court judge to allow the informations to be amended by re-swearing them.

[3] With all due respect to the learned Summary Conviction Appeal Court judge, I do not agree that the provincial court judge erred in law. I would grant leave to appeal, allow the appeal and reinstate the decision of the provincial court judge. To understand the issue, I will set out the necessary factual background and the difference in views in the courts below.

FACTUAL BACKGROUND

[4] An information is the formal document that commences, and subsequently governs, most criminal proceedings until their conclusion. Constable Mary Gibbons had numerous duties as an officer with the Cape Breton Police Service. One of them was to pick up informations that had been prepared by other officers and take them to the Courthouse. She would appear before a Justice of the Peace and swear she had reasonable grounds to believe that the persons named had committed the charges enumerated in the various informations.

[5] The problem was, Cst. Gibbons had no knowledge whatsoever about the charges against the individuals named in the informations. Nonetheless, she swore under oath, before a Justice of the Peace, that she did. Cst. Gibbons testified that she had followed this process hundreds of times from 2009 to June 2012.

[6] The eight appellants were among those individuals charged by Cst. Gibbons. Each appellant had been charged with dual or hybrid offences; in other words, the Crown had the right to elect to proceed by summary conviction or by indictment.

The Crown proceeded summarily. Not guilty pleas were entered, and trial dates set.

[7] When the defect became known, the appellants brought a motion to quash the informations as being nullities. The motion was heard by the Honourable Provincial Court Judge Jean M. Whalen on June 27, 2013. The appellants called two witnesses, Cst. Gibbons and Inspector Eugene MacLean.

[8] Cst. Gibbons confirmed what had been suspected, she had no personal knowledge or reasonable grounds to believe that any criminal offence had been committed. She swore the informations, relying on her belief that whoever the investigating officers were, either they had reasonable and probable grounds, or her superiors did.

[9] Judge Whalen was direct:

> [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.

[10] But Judge Whalen also recognized that the problem was more of a systemic nature rather than a rogue action by Cst. Gibbons. She wrote:

> [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.

[11] Inspector MacLean confirmed that directives had since been issued to ensure that any officer of the Cape Breton Police Service swearing an information had reasonable and probable grounds to believe that the accused named had committed the offences described.

[12] The Crown requested that they be permitted to amend the informations by having them re-sworn. Cst. Gibbons testified that she had now read most of the police files and could say that, as of the day of hearing before Judge Whalen, she had reasonable and probable grounds. For others, an adjournment would permit another officer to re-swear the informations.

[13] Oral reasons were delivered by Judge Whalen on September 6, 2013 (2013 NSPC 82). In thorough and clear reasons, she canvassed the relevant provisions of

the *Criminal Code*, and the leading authorities that have wrestled for decades with the legal consequences caused by the myriad of defects found in informations and associated processes.

[14] Judge Whalen summed up her view as to the current state of the law:

> [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.
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> [Emphasis in original]

[15] Although the informations appeared to be regular on their face, Whalen Prov. Ct. J. found that the appellants had, on a balance of probabilities, rebutted the presumption of regularity. She appropriately defined the key issue to be: are the informations defective and hence amendable, or nullities that should be quashed? She found the latter.

[16] The Crown appealed to the Summary Conviction Appeal Court. The Honourable Justice Frank C. Edwards heard the appeal. The same authorities and arguments were advanced by the parties. Justice Edwards concluded that Judge Whalen had erred in law by finding the informations to be nullities (2014 NSSC 44).

[17] Justice Edwards traced the error to what he viewed as her misplaced reliance on *Black's Law Dictionary* for the definition of a nullity, as opposed to the law set out by the Supreme Court of Canada in *R. v. Moore*, [1988] 1 S.C.R. 1097.

[18] In answering the question, "Did the Learned Trial Judge err in declaring the Informations to be nullities?", Justice Edwards wrote:

> [8] With the greatest respect, the answer is yes. In **Moore** supra, at para. 16, the Chief Justice in dissent described the criteria necessary to establish a nullity:
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> > ... **it is no longer possible to say that a defective information is automatically a nullity** disclosing no offence [page 1109] known to law. **If the document gives fair notice of the offence to the accused, it is not a nullity and can be amended under the broad powers of amendment s. 529 gives to the courts. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the**

> **minimum test required by s. 510(2)(c).** A charge that is this defective would have to be quashed.
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> [Emphasis by Justice Edwards]

[19] After quoting from the majority in *Moore*, as to their concurrence with the Chief Justice about the conditions that govern the question whether an information is a nullity, Justice Edwards succinctly set out his reasoning:

> [10] In this case the Informations were all regular on their face and gave fair notice of the alleged offence to each of the Accused. They were therefore not nullities as described by **Moore**. The Trial Judge appears to have fallen into error by relying upon Black's Law Dictionary, rather than **Moore** for the definition of nullity.

[20] Once Edwards J. found that, as a matter of law, the informations were not nullities, he concluded the trial judge was obliged to allow the amendment of them by having them re-sworn.

[21] Although the appellants argue four grounds of appeal, the sole issue I need to address in this Court is: are the informations falsely sworn by the informant nullities? The Crown concedes that if the answer is yes, the informations cannot be amended. The concession is appropriate.

ANALYSIS

[22] Before turning to some of the authorities, there is first the question of leave to appeal. Section 839 of the *Criminal Code* permits appeals to this Court from the Summary Conviction Appeal Court on any ground that involves a question of law alone, and only by leave. Leave is not automatically granted on the showing of an arguable issue.

[23] Many of the identified considerations that can influence the granting of leave are set out in *R. v. Pottie*, 2013 NSCA 68. One of them is if the appeal involves issues that are significant to the administration of justice. The Crown essentially acknowledges the issue raised by this appeal is such a case. I would therefore grant leave to appeal.

[24] There have been no shortage of cases that have challenged the validity of improperly sworn informations. I will only refer to those that are relevant to the present circumstances.

[25] Very similar facts to the case at bar are found in *R. v. Kamperman* (1981), 48 N.S.R. (2d) 317 (S.C.). At the outset of a trial in provincial court, a motion was made to quash the information on the basis that the named informant, a Dartmouth City Police officer, did not have reasonable and probable grounds to believe that the accused had committed the named offence. As in this case, he had been doing so for more than two years. The motion was dismissed despite the clear evidence by the informant that he had no knowledge at all about the incident in question.

[26] The exact process undertaken to have the decision of the provincial court judge reviewed in the Supreme Court is not clear. Glube J., as she then was, apparently heard an application that challenged the provincial court decision. After referring with apparent approval to the decisions of *R. v. Peavoy* (1974), 15 C.C.C. (2d) 97 (Ont. H. Ct.) and *R. v. Pilcher and Broadberry*, [1981] M.J. No. 552 (Prov. Ct.), she concluded that the information was a nullity and quashed it.

[27] In *R. v. Ingraham*, (1988), 82 N.S.R. (2d) 421, [1988] N.S.J. No. 68 (C.A.), the facts were different, but also involved an information that had not been properly sworn. The respondent pled not guilty to impaired driving and refusal of a breathalyzer demand. His trial commenced, but was adjourned. On the return date, the Crown pointed out that the informant had sworn the information before W.B. Gillis. There was nothing to indicate what office, if any was held by Mr. Gillis. The trial judge dismissed the charges on the basis that the information was void. The Crown appealed.

[28] Jones J.A. wrote the unanimous reasons for judgment. Justice Jones referred to the *Criminal Code* provisions then in effect (ss. 723 and 724), [now ss. 788 and 789] which direct that summary proceedings shall be commenced by laying an information in Form 2. Jones J.A. reasoned:

> Section 723(1) is mandatory. Form 2 requires that the justice of the peace specify his territorial jurisdiction. It is clear from these provisions that an information to be valid must be sworn before a justice of the peace. The effect of the laying of the information is to institute criminal proceedings against an individual. The procedure has been specified by Parliament in the **Code** and must be followed. The information in this case does not specify that it was sworn before a justice and accordingly is a nullity. See **Criminal Procedure, Canadian Law and Practice** by Atiens, Burns and Taylor, Vol. 1, 1X-9.

[29] On its face, the information was not "sworn" before a Justice of the Peace. No mention was made that such an omission could be cured by evidence demonstrating that the named official was in fact a Justice of the Peace. Does it

make a difference where, as here, the informant knew at the time she swore the oath before the Justice of the Peace that it was patently false?

[30] In my view, it is just as much a failure to comply with the mandates of the *Code* for the informant to falsely swear before the proper judicial officer that she has reasonable grounds to believe a named individual has committed certain offences, as it is to have such a belief, but purport to swear to those matters before someone who is not a properly designated judicial officer.

[31] In *Ingraham*, Jones J.A. quoted with approval the decision of the Ontario Court of Appeal in *Re Regina and Village of Bobcaygeon* (1974), 17 C.C.C. (2d) 236. That decision is instructive. An information was sworn charging a defendant with a provincial summary offence. The Justice of the Peace issued a summons. When the defendant appeared, it moved to quash the information on the basis that the date of the jurat only referred to the month the information was sworn, but not the day. There was therefore no basis to know if the offence alleged occurred within the limitation period of six months. But the informant was present in court and offered to testify to establish the date the information was sworn (presumably within the limitation period).

[32] The Provincial Court Judge declined to hear the informant, and quashed the information. A motion for mandamus to compel a judge of the provincial court to proceed with the trial was refused. The Ontario Court of Appeal dismissed the appeal, commenting that the power to amend a defective information did not include or extend to adding, after the fact, the date upon which it was sworn.

[33] Here, it was found as a fact, and is undisputed, Cst. Gibbons knowingly swore a false oath. An information based on a false oath is just as much a nullity as if an informant swore an information before someone who is not a justice of the peace, or a crucial date is left out, or where the name of the informant is left blank (*R. v. Rafuse*, [1991] N.S.J. No. 675 (Co.Ct.))[1].

[34] The Summary Appeal Court found otherwise. Justice Edwards did not refer to *Ingraham*. In relation to *Kamperman*, he sought to distinguish it on the basis that there had been no motion to amend (see 2014 NSSC 44 at para. 6).

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[1] See also: *R. v. Welsford*, [1969] S.C.R. 438, where the Supreme Court expressly adopted the reasoning of the Ontario Court of Appeal that the information was a nullity where the Justice of the Peace had used a rubber stamp to affirm the oath of the informant.

[35] The sole basis upon which the learned Summary Conviction Appeal Court Judge found the informations not to be nullities was *R. v. Moore, supra*. It is to that case I turn.

[36] *Moore* was not a case about an improperly sworn information. It was about the legal consequences when a judge wrongly declines to amend defective wording in an information; in particular, whether the plea of *autrefois acquit* is available to preclude a conviction at a subsequent trial. The facts in *Moore* are succinctly set out in the reasons of Dickson C.J.C.

[37] The appellant (and others) were charged in an eight-count information with the indictable offences of theft and possession of stolen property. The counts charging possession of stolen property were defective. For example, Count # 6 alleged:

> The informant also says that he has reasonable and probable grounds to believe and does believe that Barry Graham MOORE, on or about the 27th day of February A.D., 1981, at or near the Town of Williams Lake, County of Cariboo and Province of British Columbia, did UNLAWFULLY have in his possession, automobile parts, the property of Zora Enterprises Ltd. of a value exceeding two hundred dollars,
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> CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED
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> pp. 1101-2

[38] It is obvious that the count was flawed. It did not include an allegation that the accused knew that the property had been obtained from the commission in Canada of an indictable offence. Nonetheless, Mr. Moore elected to be tried in provincial court, and entered pleas of not guilty.

[39] At the outset of the trial, the trial judge asked for submissions or comment on the information. None were forthcoming. The judge then pointed out the defect. Defence counsel moved to quash the counts pursuant to s. 529 [now s. 601] of the *Criminal Code* as disclosing no offence known to law. The Crown sought to amend, also relying on s. 529 of the *Code*. Defence counsel convinced both the Crown and the trial judge that because the counts failed to allege an offence at all, rather than one improperly, it was not possible to amend. The defective counts were quashed.

[40] A new information was subsequently laid. At the new trial, Moore entered pleas of *autrefois acquit* on the possession counts. The plea was unsuccessful at trial on the basis that because there had never been a valid allegation of criminal misconduct, he had not been in peril of conviction. A conviction was entered on Count # 6.

[41] Mr. Moore appealed to the British Columbia Court of Appeal. That Court was unanimously of the view that the trial judge had erred in law in quashing the defective counts. They were not nullities, and therefore, the accused had been in jeopardy at the first trial. However, the Court split as to the consequences.

[42] Anderson J.A., for the majority, concluded that there had been a final disposition of the charges, and allowed the appeal. Craig J.A. dissented on the basis that the quashing of the counts did not amount to a disposition equivalent to an acquittal, and therefore *autrefois acquit* did not apply to bar the subsequent prosecution.

[43] The Crown appealed to the Supreme Court. The panel of seven justices split in result. Lamer J., as he then was, wrote for the majority, dismissing the appeal. Dickson C.J.C., (Wilson and L'Heureux-Dube JJ. concurring) dissented. The only point of departure was with respect to the consequences of the refusal of the first trial judge to amend the defective wording in Count # 6.

[44] The majority upheld the conclusion that the appellant had been in jeopardy at the first trial, and that there had been a final disposition of the charge in Moore's favour. The dissent agreed that the appellant had been in jeopardy at the first trial, but parted ways on the issue whether there had been a final disposition in those earlier proceedings. Dickson C.J.C. summarized his reasons as follows:

> In summary, not every judicial decision that stems the trial process will support a plea of *autrefois acquit*. A court has broad powers to remedy defective process, but when it decides that the errors cannot be remedied the decision on that procedural point does not necessarily block a further prosecution, subject to concerns about abuse of process and prejudice to the accused.
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> The defect in the information in this case was of a technical nature. Although it related to the elements of the offence charged, the reason for the quashing in no way was an adjudication on the legal or factual issues raised by the information. The first trial judge made no comment on the accused's legal liability, or even addressed his mind to the issue. Without making any adjudication on the accused's guilt, the trial judge simply held that the Crown had not correctly started the trial and the allegations could not be properly heard at that stage. Nor can it be

> said that the accused was prejudiced by the defect. He was not caught by surprise nor had he built his defence around it. The technical error was caught at a very early stage in the trial, before the Crown had even led evidence. While it may be the case that technical errors in an information can sometimes prejudice the accused so that a quashing amounts to an acquittal, it is not the case here.
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> …
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> In this case, and in summary, the information was quashed for technical reasons, at an early stage of the proceedings. That disposition did not relate to the substantive legal and factual issues raised by the charge. There was no prejudice to the accused. The Crown had the power to re-lay the charges and the plea of *autrefois acquit* should be rejected. The appeal should be allowed, the judgment of the Court of Appeal set aside, and the conviction restored.
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> pp. 1124-5

[45] The majority agreed that the sole issue to be decided was "… whether quashing an information, after plea, for failure to allege a material averment constitutes a verdict of acquittal for the purpose of pleading *autrefois acquit* to a new information." After quoting the relevant *Criminal Code* provision (s. 529) that permits amendments, Justice Lamer addressed the general principles that govern (p. 1128):

> Since the enactment of our *Code* in 1892 there has been, through case law and punctual amendments to s. 529 and its predecessor sections, a gradual shift from requiring judges to quash to requiring them to amend in the stead; in fact, there remains little discretion to quash. **Of course, if the charge is an absolute nullity, an occurrence the conditions of which the Chief Justice has set out clearly in his reasons, no cure is available as the matter goes to the very jurisdiction of the judge. In such a case, the doctrine of *autrefois acquit* is never a bar to the relaying of the charge because the accused was never in jeopardy and the disposition of the charge through quashing was for lack of jurisdiction. Also, if and when a charge is laid before that or another judge, it will be the first time the accused is in jeopardy before a judge having jurisdiction on the accused and the subject matter.** There was nothing to be acquitted of, and for this reason, there is no "*autrefois*", as there was no offence, and no "*acquit*" as there was no jurisdiction to acquit or convict. But, if the charge is only voidable, the judge has jurisdiction to amend. Even failure to state something that is an essential ingredient of the offence (and I am referring to s. 529(3)(b)(i)) is not fatal; in fact, it is far from being fatal, as the section commands that the judge "shall" amend.
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> [Emphasis added]

[46] What was it that Dickson C.J.C. said in his reasons about when an information is a nullity? After referring to two cases where convictions were upheld by the Supreme Court of Canada despite the absence of an essential averment in the wording of the informations, Chief Justice Dickson commented:

> The result of these two cases is that it is no longer possible to say that a defective information is automatically a nullity disclosing no offence known to law. If the document gives fair notice of the offence to the accused, it is not a nullity and can be amended under the broad powers of amendment s. 529 gives to the courts. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the minimum test required by s. 510(2)(c). A charge that is this defective would have to be quashed. *R. v. Hunt, Nadeau, and Paquette* (1974), 16 C.C.C. (2d) 382 (B.C.C.A.) provides an example of a defective charge of this sort. The accused was apparently charged with intimidation by blocking a highway, but it was not clear from the information who was alleged to have blocked the highway nor did the charge refer to a *Code* section. The Court of Appeal held that the charge was so defective it could not be amended.
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> pp. 1108-09

[47] It is clear that there was no issue with the *wording* of any of the counts in the informations in the cases involved in this appeal. If that had been the substance of the complaint, then the provisions of s. 601 and the principles set out in *Moore* would govern.

[48] But that is not the case. The Crown did not seek to amend any of the words in the informations. In the guise of asking for an amendment, it sought an opportunity for the informant to once again swear that she had reasonable and probable grounds to believe that the appellants had committed the enumerated offences.

[49] The swearing of an information is the act that commences the prosecution of an accused (see *R. v. Southwick* (1967), 2 C.R.N.S. 46 (Ont. C.A.)). Such an act should not be relegated to being merely part of the paperwork. In *R. v. Peavoy*, *supra*, the evidence fell short of establishing that the informant did not have the requisite reasonable and probable grounds. Henry J. wrote about the importance of the act of swearing an information (p. 106):

> 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.
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> [Emphasis added]

[50] O Hearn Co. Ct. J., one of this province's most preeminent criminal law jurists, also in a case where the evidentiary record did not clearly establish the absence of reasonable and probable grounds, nonetheless felt compelled to say:

> 12 This objection while technical is important, as it concerns the liberty of the subject. It was in the 1955 Criminal Code s. 696(1)(a) that the law first expressly required an information in summary proceedings to be in writing and under oath. This was an indication that Parliament, at that time, considered it important that a person should not be put in peril even with respect to summary proceedings offences, unless some person was willing to take the responsibility of swearing to his guilt, either from personal knowledge or based on reasonable and probable grounds, with all that that would entail in the way of possible legal repercussions. That is to say, people were not to be officiously charged with offences.
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> 13 I doubt that the fact that an accused has been arrested by a police officer who has subsequently drawn up an information to be sworn by someone else would, in most cases, justify another police officer in swearing to that information on the basis that the arrest and the drawing up of the information constituted reasonable and probable grounds. There might be cases to the contrary, but the general case obviously is one constituting a mere formality of the oath, which in my opinion is precisely what it was not supposed to be. Ordinarily such a case does not permit the swearing officer to exercise any judgment as to the facts, he merely accepts the implication that the arresting officer felt he had grounds for the arrest and that the facts are those broadly described in the information. In most cases, as in this,

> the facts set out in the information follow in the most general way the description of the offence in the statute, with a minimum of circumstances of time and place sufficient to identify the transaction. I do not see how, ordinarily, such a recital could justify the swearing officer in saying that he had reasonable and probable grounds to believe that the accused had committed the offence. The arresting officer could be acting quite officiously, a word used more than once by Sir James F. Stephen in his History of the Criminal Law of England to castigate conduct by justices of the peace and constables that amounted to meddling where they had no cause to do so.
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> [...]
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> 15 I have gone into the question thus far, because viewed in this light it is important as a question of civil liberties, but the question was not pursued before the learned trial judge in any way that would justify interfering with his decision. Defence counsel at no time made a motion to quash the information, nor can I find anything in his closing argument that would raise the question of the validity of the information otherwise. His cross-examination of Constable Doucette pointed in the direction of invalidity, but the evidence was left in a very inconclusive state with respect to what sources the swearing officer actually did have available. **The information is regular on its face, and it is clear that the burden is on the defendant to demonstrate by a balance of probabilities that the swearing officer did not, in fact, have reasonable and probable grounds to believe and did not believe in the guilt of the accused, although this may be demonstrated in various ways.** While the decision would be for the learned trial judge to make on the weight of the evidence, had the matter been raised clearly before him, the evidence of the invalidity of the information is sufficiently deficient that it might be questionable had he acted on it in the defendant's favour. Accordingly, the result reached by the learned trial judge does not constitute any basis for an appeal, or any miscarriage of justice.
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> [Emphasis added]
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> (*R. v. Field*, [1981] N.S.J. No. 107 (Co.Ct.))

[51] This is not a situation where there is some defect in the process by which an accused is brought to court (see *R. v. Millar*, 2012 ONSC 1809; *R. v. Oliveira*, 2009 ONCA 219; *R. v. Ladouceur*, 2013 ONCA 328). Such defects have no impact on the court's jurisdiction to try the offence, but the exposure of a fatal flaw in the swearing of the information does.

[52] An information that is valid upon its face remains so, unless it is established on a balance of probabilities that it is not. In this case, the trial judge found that the informant knowingly did not have reasonable and probable grounds to permit the informations to be validly sworn. There is no excuse for that occurrence. It is just as serious as if the person administering the oath was not a justice of the peace.

[53] As unanimously expressed in *Moore*, if an information is a nullity, it cannot be amended under s. 601 of the *Code*. The Crown concedes this issue. Of course, this does not mean that if an accused has successfully challenged an information as being a nullity that the Crown is without remedy. If nullities, the appellants were never in jeopardy of being convicted. Therefore, there is no juridicial bar, subject to considerations of abuse of process, to the Crown proceeding on a valid information, whether re-sworn by Cst. Gibbons or another officer having the requisite grounds to do so (see *R. v. Dudley*, 2009 SCC 58 at paras. 31, 44).

[54] In this case, the Crown took the position in its written argument to the Summary Conviction Appeal Court that it had proceeded by summary conviction, and it would not proceed again by way of indictment. In doing so, it urged:

> Therefore, the quashing of the eleven Informations is tantamount to an acquittal and subject to appeal to this court.

[55] In his reasons, Edwards J. seemed to rely on the perceived consequent absence of remedy. He commented:

> [2] Each case proceeded by way of summary proceedings. Section 786(2) of the Code requires such proceedings to be instituted within six months after the time when the subject-matter of the proceedings arose. That time has long since passed. The only potential curative amendment is therefore a re-swearing of the Informations.

[56] With all due respect to the Summary Conviction Appeal Court Judge, I am unable to agree. As noted earlier, these charges were not straight summary, but were dual or hybrid offences, entitling the Crown to elect to proceed by indictment or by summary conviction. The Crown would not be bound by its earlier election, as those proceedings had no legal effect.

[57] Furthermore, as discussed in *R. v. Dudley*, the six month limitation period in s. 786(2) is no longer absolute, so long as the prosecutor and defendant both agree. It provides:

> (2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

[58] Failing agreement, the Crown could elect to proceed by indictment. If it were to choose not to do so out of reasons of fairness, practicalities, or fear of a

prospective *Charter* challenge, it does not mean we should bend the law to permit an 'amendment' by a re-swearing of these informations.

[59] However, because the learned SCAC Judge was directing that the informations be amended by re-swearing them more than six months after the various events in question, he felt it necessary to address the issue whether such an amendment would amount to new proceedings or a continuation of the proceedings under the original informations. If the former, then he must have feared the informations would be out of time, absent an informed consent by the accused. He found it would be the latter, and hence no impediment to the Crown continuing as if the proceedings were summary.

[60] In support of his conclusion, he referred to *R. v. Canadian Industries Ltd.* (1982), 41 N.B.R. (2d) 631 (N.B.C.A.), [1982] N.B.J. No. 288, and *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.); aff'd 51 C.C.C. (3d) 294 (Ont.C.A.).

[61] Although it is not strictly necessary to address what happened in those cases, I will nonetheless do so.

[62] In *Canadian Industries*, an officer of Environment Canada swore an information containing 14 counts, alleging that on separate days Canadian Industries had violated the *Fisheries Act*, by depositing a deleterious substance into the Restigouche River. The wording of the information suggested that the informant had personal knowledge of these offences. The charges were summary conviction, with a two year limitation period.

[63] An unnamed provincial court judge heard the trial. At the end of the Crown's case, the defendant called the informant as a witness. The informant acknowledged that he was not present on the premises of Canadian Industries on any of the dates mentioned in the 14 counts. This led the defendant to make a motion to dismiss on the basis that the informant lacked personal knowledge.

[64] The Crown argued that the defendant Canadian Industries had written reports (apparently to Environment Canada) setting forth facts amounting to proof that the offences had occurred. This amounted to personal knowledge for the informant. In the alternative, the Crown requested the information be amended pursuant to s. 732(3) [now s.601(3)] of the *Criminal Code*. The trial judge initially agreed with the Crown that the information was valid on its face, and there was insufficient information to permit him to find that the informant did not have

personal knowledge. The motion to quash was dismissed, and there was no amendment made to the information under s. 732(3) of the *Code*.

[65] The defence called no other evidence. The trial judge reserved. He later ruled that the information was defective and should be quashed, and even if he permitted the information to be amended by re-swearing the information, he would dismiss the charges as the re-swearing would be outside the limitation period.

[66] The Crown appealed by way of stated case directly to the New Brunswick Court of Appeal on the basis that the trial judge erred in failing to amend the information pursuant to s. 732(3)(c) [now s. 601 (3)(c)] of the *Criminal Code*; and in ruling that the information would have to be re-sworn at all.

[67] Hughes C.J.N.B. wrote the unanimous reasons for judgment. He concluded that the trial judge erred in law in finding the information to be a nullity. Rather, where an informant states or implies that he has personal knowledge, when in fact he may only have reasonable grounds to believe, the information is merely defective in form. He reasoned:

> 7 We are not here concerned with the question whether the informant did or did not have personal knowledge that the defendant committed the 14 offences alleged in the information since the trial judge found that he did not have such personal knowledge and that finding was not brought into question in this appeal. 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)**.
>
> [Emphasis added]

[68] After referring to a number of authorities, Chief Justice Hughes concluded that the trial judge had erred in finding the information to have been a nullity, rather it was a defect in form and amendable under s.732(3)(c) (para. 13); therefore, there was no requirement for a fresh information, nor did the existence of the limitation period amount to a sound reason to refuse the amendment sought by the Crown. He wrote as follows:

> 14 **In my opinion the trial judge erred in finding the information in the instant case was a nullity, and therefore could not be amended. An amendment could have been made to allege the substance of the offence on the information and belief of the informant if such were the fact. Such an amendment would not have constituted the initiation of a new proceeding notwithstanding that the information had been resworn but rather the continuation of the proceeding under the original information as amended**: see *Regina v. Peacock* (1954), 108 C.C.C. 129 (Ont. H.C.). See also *R. v. Baldassara* (1973), 11 C.C.C.(2d) 17 (Ont. H.C.), where it was held a defective information, not void for duplicity in the sense of being a complete nullity incapable of rectification but only in the sense that it could not sustain a conviction, could be amended and resworn after the limitation period had expired and that subsequent proceedings including the conviction based on this amended information were valid. The *Baldassara* case was applied by this court in *R. v. Neville* (1980), 31 N.B.R.(2d) 171; 75 A.P.R. 171, at 174 and an appeal against that decision was dismissed by the Supreme Court of Canada in *R. v. Neville* (1981), 40 N.R. 1; 37 N.B.R.(2d) 716; 97 A.P.R. 716.
>
> [Emphasis added]

[69] As a consequence, the appeal was allowed, and the case remitted to the trial judge to consider the motion to amend the information in accordance with the powers set out in s. 732 [now s.601] of the *Code*.

[70] A similar scenario and result is seen in *R. v. Wildefong* (1970), 1 C.C.C. (2d) 45, [1970] S.J. No. 259 (Sask. C.A.), a case considered in *Canadian Industries*, and cited in *R. v. Whitmore, supra*.

[71] In *Wildefong*, the appellant was convicted at trial in provincial court of impaired driving. After the close of the Crown's case, the appellant called the informant, who admitted that he had no personal knowledge of the facts set out in the information. The appellant submitted this evidence mandated a dismissal of the information. The Crown asked that the information be amended as a defect in substance, to conform to the evidence under s. 704(3)(b)(iii) of the *Code* [now s. 601(3)(b)(iii)]. The judge agreed. The information was amended by adding the words "he [the informant] has reasonable and probable grounds to believe and does believe that". The information was then re-sworn by the informant.

[72] The appeal to the Saskatchewan Court of Appeal was by way of stated case. Culliton C.J.S. delivered the judgment of the Court. He agreed that the information ought to have been amended, not as a defect in substance, as believed by the provincial court judge, but as a defect in form and hence amendable under s. 704(3)(c) [now s. 601(3)(c)].

[73] In both of these cases, the informant clearly had the requisite legal basis to swear the information, but had mistakenly alleged personal knowledge, rather than reasonable and probable grounds. In this case, Cst. Gibbons had absolutely no basis to swear to anything. As previously discussed, the Crown did not seek to change or amend the information in any way. It simply sought the opportunity for the informant to again re-swear the informations. There is no reason the informant could not do so, but it is patently not an amendment under s. 601 of the *Code*.

[74] Edwards J. quoted Justice Ewaschuk from *R. v. Whitmore, supra*, as follows:

> [14] …**Mr. Manning's point is that an information laid by an informant who lacks reasonable and probable grounds is void *ab initio*. I disagree**. An information laid in such circumstances remains valid provided it is valid on its face. In fact, the failure of a justice to conduct a pre-inquiry prior to issuing process does not affect jurisdiction to proceed with the charges: *R. v. Pottle* (1978), 49 C.C.C. (2d) 113 at 119 (Nfld. C.A.). Furthermore, the swearing to an information on personal knowledge when the informant has only hearsay knowledge is likewise not fatal to jurisdiction. **Such information may be amended even after a limitation period has passed:** *R. v. Canadian Industries Ltd.* (1982), 69 C.C.C. (2d) 533 and *R. v. Wildefong* (1970), 1 C.C.C. (2d) 45 (Sask. C.A.).
>
> **[**Emphasis by Justice Edwards]

[75] I do not doubt the correctness of any of these cases, including that of *Whitmore*, but I fail to see how it governs or influences the result here. In *Whitmore*, the applicants sought prerogative relief in the Ontario High Court. An information had been sworn alleging 17 indictable offences against the Church of Scientology and other accused. The applicants were named as the accused in two of those counts.

[76] The informant and five other witnesses gave evidence before the justice of the peace conducting an inquiry to determine if he should issue process compelling the accused to appear in court. Summons were subsequently issued. The accused appeared from time to time for election and plea. Two years elapsed. No preliminary inquiry had yet been held when Whitmore and his co-accused on the two counts brought a motion to quash the summons and information, and to prohibit any further proceedings against them.

[77] Justice Ewaschuk articulated a variety of bases upon which he declined to grant the relief being sought. It is unnecessary to review them individually. I mention but two. At the outset, Ewaschuk J. concluded that he would exercise his

discretion not to grant prerogative relief as the application was an attack on preliminary steps in a criminal proceeding, even though framed as potential *Charter* violations (p. 559-60).

[78] Nonetheless, Ewaschuk J. embarked on a review of the legal landscape that makes up the process issuing procedure described in the *Code*, and the duties on a justice and other officials. After that review, Justice Ewaschuk was satisfied that the informant in fact had reasonable and probable grounds to believe that the applicants had committed the offences described (p. 570).

[79] The applicants appealed. The appeal was dismissed by the Ontario Court of Appeal in oral reasons, delivered by Grange J.A. He agreed with Justice Ewaschuk's decision not to exercise his discretion to hear the application for prerogative relief, and his resolution of the particular issues. Grange J.A. said:

> We agree with the learned trial judge's disposition of the preliminary question and with his resolution of the individual issues. In our view, the facts of this prosecution do not justify interference at this early stage. There is no clear defect in the information as was found in *Re Buchbinder and Venner* (1985), 47 C.R. (3d) 135 (Ont. C.A.). The justice of the peace received an information valid on its face which he was bound to do and proceeded with the hearing as he was entitled to do under the *Code*. Short of some clear departure from or excess of jurisdiction, we can see no ground for prerogative relief so early in the proceedings.
>
> We also agree with the views of the learned judge on the particular issues. We can see no ground upon which the informant could be found to lack reasonable and probable grounds. In any event, the duty of the justice of the peace is, first, to determine if the information is valid on its face and secondly, to determine whether it discloses or there is disclosed by the evidence a *prima facie* case of the offences alleged. In our view, the transcript does disclose such *prima facie* case.
>
> p. 296

[80] It is therefore clear that the informant had reasonable and probable grounds to swear the information. It was valid on its face, and the proceedings invoked to attack its validity failed to demonstrate otherwise.

[81] That is not the case here. All of the informations appeared to be valid on their face, but on motion by the appellants, it was demonstrated on a balance of probabilities that the informations were defective. The informant had neither personal knowledge nor reasonable grounds to believe that any of the appellants had committed any offence. Once this was demonstrated, the informations were no longer valid.

[82] To ask a slightly different question: what was the intent of Parliament in mandating that to institute a criminal proceeding, an informant must swear before a justice of the peace that he or she have personal knowledge or, at a minimum, reasonable grounds? The Crown would say it is a mere technicality that can be cured by "amending" the information if and when an accused successfully demonstrates that the informant swore a falsehood. With respect, I am unable to agree.

[83] As set out in *R. v. Kamperman*, an information sworn without reasonable grounds is a nullity. It is neither a defect in form nor in substance, and cannot be amended under s. 601 of the *Code*.

[84] I have earlier taken some pains to emphasize (see paras. 53-58 above), this conclusion is not, by any means, a free pass enabling an accused to escape the reach of the criminal law. New informations could have been re-sworn at the discretion of the authorities. In Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd Ed.) (Toronto: Canada Law Book, 2014), the learned author writes of this requirement:

> **9:12320 Resworn if nullity**
>
> Where an information discloses no offence or is otherwise a nullity, it must (when amended) be resworn with the result that it has validity only from the date of reswearing.
>
> *R. v. McNutt* (1896), 3 C.C.C. 184 (N.S.S.C.)
> *R. v. Davis* (1912), 20 C.C.C. 293 , 7 D.L.R. 608 (Alta. S.C.)
> *R. v. Perron* (1922), 38 C.C.C. 121 , 68 D.L.R. 392 (B.C. Co. Ct.)
> *R. v. Oeullette* (1931), 55 C.C.C. 389 (N.B. Co. Ct.)

[85] In the circumstances of this case, more than six months had elapsed since the subject matter of the proceedings occurred. The Crown could nevertheless have sought the agreement of the accused to proceed by summary conviction on a new information (see s. 786(2) of the *Code*). If the accused declined to agree, the Crown would have to decide whether to proceed by indictment or not to proceed at all.

[86] Instead the Crown decided to label the decision of Whalen Prov. Ct. J. as being tantamount to an acquittal and hence appealable to the Summary Conviction Appeal Court and, as set out in para. 54 above, informed the appellants and the SCAC that it would not proceed again by indictment.

[87] I see no error in law in Judge Whalen's conclusion that these informations were nullities. I would grant leave to appeal, allow the appeal and reinstate the decision of the provincial court judge.

Beveridge J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.