SC CIV 78 002

~~NWTSC 65~~

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an Application by Wesley Grant Thompson for an Order of Prohibition

AND IN THE MATTER OF a trial or hearing being held by His Worship Chief Magistrate of the Northwest Territories, F. G. Smith, Q.C. pursuant to the Criminal Code of Canada being Chapter C-34 of the Revised Statutes of Canada 1970 and amendments thereto

BETWEEN:

HER MAJESTY THE QUEEN on the information of Gerald Allan Olson, a member of the Royal Canadian Mounted Police,

Respondent

- and -

WESLEY GRANT THOMPSON,

Applicant

---

pplication for an Order of Prohibition

eard at Yellowknife, N.W.T., October 31st, 1977

pplication dismissed

easons for Judgment filed January 24th, 1978.

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easons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

ounsel on the Hearing:

B. Fontaine, for the Crown, Respondent

B. Chivers, for the Applicant

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Applicant

Counsel:

B. Fontaine, for the Crown, Respondent

B. Chivers, for the Applicant

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE C. F. TALLIS

This is an application made by Notice of Motion for the following relief:

"An Order prohibiting His Worship Chief Magistrate F. G. Smith, Q.C., sitting at the Town of Hay River, Northwest Territories, or any other Magistrate or Justice of the Peace of the Northwest Territories from further proceeding with the trial or hearing under the Criminal Code of Canada in which the applicant

"herein has been charged that he:

on or about the 18th day of September, A.D. 1976, at Hay River in the North-west Territories:

Count #1: did without reasonable ex-cuse, fail to comply with a demand made to him by a Peace Officer to provide then or as soon thereafter as was practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, contrary to SEction 235 of the Criminal Code.

Count #2: did unlawfully drive a motor vehicle on a public highway while his ability to drive was impaired by alcohol or a drug, contrary to Section 234 of the Criminal Code."

The grounds upon which the application is made are as follows:

"The Respondent has lost jurisdiction over the said trial or hearing for reasons dis-closed in the Affidavit material filed herein."

Initially the material in support of the application consisted of the Affidavit of Barrie Chivers which reads as follows:

" I, BARRIE CHIVERS, of the City of Edmonton, in the Province of Alberta, Barrister and Solicitor, MAKE OATH AND SAY:

1. THAT I am the solicitor for the Applicant herein and as such have per-sonal knowledge of the matters herein-after deposed to except where stated to be upon information and belief.

2. THAT I am informed by the Appli-cant and verily believe that he did on

"the 24th of September, A.D. 1976, appear before Francis Hasey, Justice of the Peace for the Northwest Territories, and did enter a plea of not guilty to charges that he did drive a motor vehicle while his ability to drive was impaired and that he did refuse to provide a sample of his breath for analysis.

3. THAT now shown to me and annexed as Exhibit "A" to this my Affidavit is a certified true copy of the information and endorsements thereon relating to the said charges.

4. THAT the said information and endorsations disclose and I am informed by the Applicant and do verily believe that the Applicant did appear in answer to these charges on the 25th day of October, A.D. 1976 before His Worship F. G. Smith, Q.C., Chief Magistrate of the Northwest Territories and was at that time remanded to November 29, 1976 at 2.00 p.m. for trial.

5. THAT on the 29th of November, 1976 at 2.00 p.m. I did appear in Territorial Court as Counsel for the Applicant before His Worship J. R. Slaven, Magistrate of the Northwest Territories.

6. THAT at that time, rather than bringing the matter on for trial on the information before the Court, the Crown did seek leave to swear and bring before the Court a new information while the prior and identical information was extant as a means of enabling the Crown to serve the accused with a notice of previous convictions.

7. THAT at that time, the defence submitted that the conduct of the Crown constituted an abuse of the process of the Court.

8. THAT at that time, the Court entertained oral argument from the defence and the Crown.

" 9. THAT at that time, the Learned Territorial Magistrate directed Counsel to submit written argument and adjourned the matter to the 7th of February, A.D. 1977 at 2.00 p.m.

10. THAT subsequently Counsel for the Defence submitted written argument, a photocopy of which is now shown to me and marked Exhibit "B" to this my Affidavit.

11. THAT subsequently Counsel for the Crown submitted written argument, a photocopy of which is now shown to me and marked Exhibit "C" to this my Affidavit.

12. THAT on or about the 6th of February, A.D. 1977, His Worship Magistrate J. R. Slaven phoned to advise me that the matter would be adjourned on February 7th as the Court required additional time to prepare a written decision on the preliminary issues.

13. THAT on February 7th, A.D. 1977, the information and endorsements disclosed that His Worship J. R. Slaven adjourned the matter to the 14th of March, A.D. 1977.

14. THAT now shown to me and marked Exhibit "D" to this my Affidavit is a photocopy of a supplementary written submission forwarded to the Court and Crown Counsel on or about the 23rd day of February, A.D. 1977.

15. THAT the information and endorsements disclose and I am informed by the applicant and do verily believe that on the 14th day of March, A.D. 1977, the Applicant did appear in Territorial Court before His Worship F. G. Smith, Q.C., Chief Magistrate of the Northwest Territories and that the matter was adjourned to the 6th day of June, A.D. 1977 for a decision on the preliminary application and/or trial.

16. THAT on Monday, the 6th day of June, A.D. 1977 at 2.00 p.m. I did appear with the Applicant in Territorial Court before His Worship F. G. Smith, Q.C.

"17. THAT at that time, the Clerk could not locate the informations, that the informations were not present in Court and that no action of any nature whatsoever was taken by the Court on the charges.

18. THAT I am informed by the Applicant and do verily believe that subsequently in early July, 1977 he was summoned in respect of the said charges to appear in Territorial Court at Hay River on the 12th of July, A.D. 1977.

19. THAT Searle, Sigler, Barristers and Solicitors were retained as agents and were instructed to appear and object to the jurisdiction of the Court.

20. THAT on the 12th day of July, A.D. 1977, I am informed by my Agent, R.S. Kimmerly, Esquire, that he did appear before His Worship F. G. Smith, Q.C., Chief Magistrate of the Northwest Territories and did enter objection to the jurisdiction of that Honourable Court on grounds that jurisdiction over the accused and the offence had been lost.

21. THAT subsequently my agent, R. S. Kimmerly, informed me and I verily believe that the application had been dismissed and that he had obtained a transcript of the proceedings, a photocopy of which is now shown to me and marked Exhibit "E" to this my Affidavit.

22. THAT the transcript discloses and I am informed by my agent, R. S. Kimmerly, Esqire and do verily believe that on the 12th day of July, A.D. 1977, the Clerk of the Court did explain to the Court that the information was not in Court in Hay River on the 6th of June, A.D. 1977 but rather was with Magistrate Slaven in Yellowknife and had since been found.

23. THAT I MAKE this my Affidavit in support of an application by the applicant for an Order of prohibition prohibiting His Worship Chief Magistrate F. G. Smith, Q.C. sitting in the Town of Hay River, Northwest Territories

> "or any other Magistrate or Justice of the Peace in the Northwest Territories from further proceedings with the trial or hearing of the charges herein."

When this matter came on for hearing I pointed out to Counsel that an application for a Writ of Prohibition is a final application and accordingly an affidavit on information and belief cannot be used to prove the facts upon which such an application is based. This principle is clearly enunciated in the following, *inter alia*, authorities: *Beauchene and Peltier v. Gunson*, (1928) 2 W.W.R. 497; *Selch v. Baker*, (1922) 1 W.W.R. 785; *Block v. Schauerte*, 52 W.W.R. (N.S.) 548.

With the consent of learned Counsel for the Crown the factual underpinnings of this application were set forth in the Agreed Statement of Facts in writing which provide as follows:

> "1. THAT the Applicant did on the 24th day of September, A.D. 1976, appear on an information (a copy of which is attached as Exhibit "A" to the Affidavit of Barrie Chivers filed herein) before Frances Hasey, Justice of the Peace for the Northwest Territories, and did enter a plea of not guilty to charges that he did drive a motor vehicle while his ability to drive was impaired and that he did refuse to provide a sample of breath for analysis.
>
> 2. THAT the Applicant did appear in answer to these charges on the 25th day of October, A.D. 1976 before His Worship F.G. Smith, Q.C., Chief Magistrate of the Northwest Territories and was at that time remanded to November 29, 1976 at 2.00 p.m. for trial.

"3. THAT on the 29th day of November, 1976 at 2.00 p.m. Counsel for the Applicant did appear in Magistrate's Court in Hay River in the Northwest Territories before His Worship J.R. Slaven, Magistrate of the Northwest Territories.

4. THAT at that time, the Learned Magistrate directed Counsel to submit written argument on a preliminary objection and adjourned the matter to the 7th of February, A.D. 1977 at 2.00 p.m. THAT subsequently Counsel for the Defence and Counsel for the Crown submitted written arguments, photocopies of which are annexed as Exhibits "B", "C" and "D" to the Affidavit of Barrie Chivers filed herein.

5. THAT on or about the 6th day of February, A.D. 1977, Magistrate J. R. Slaven phoned to advise Counsel for the Applicant that the matter would be adjourned on February 7th as the Court required additional time to prepare a written decision on the preliminary issues.

6. THAT on February 7th, A.D. 1977, the information and endorsements disclosed that His Worship J.R. Slaven issued a bench warrant for the arrest of the accused with discretion.

7. THAT on the 14th day of March, A.D. 1977, the Applicant did appear in Magistrate's Court before His Worship F.G. Smith, Q.C., Chief Magistrate of the Northwest Territories and that the matter was adjourned to 2.00 p.m. on the 6th day of June, A.D. for a decision on the preliminary application and/or trial.

8. THAT on Monday, the 6th day of June, A.D. 1977 at 2.00 p.m. the Applicant appeared with Counsel in Magistrate's Court before His Worship F.G. Smith, Q.C.

9. THAT at that time, the Clerk could not locate the informations, that the informations were not present in Court and that no action of any nature whatsoever was taken by the Court on the charges.

"10. THAT the Applicant was subsequently in early July, 1977, summoned in respect of the said charges to appear in Magistrate's Court at Hay River on the 12th day of July, A.D. 1977.

11. THAT on the 12th day of July, A.D. 1977, R.S. Kimmerly, Esquire, did appear on instructions from the Applicant and Counsel for the Applicant before his Worship F.G. Smith, Q.C., Chief Magistrate of the Northwest Territories and did enter objection to the jurisdiction of that Honourable Court on grounds that jurisdiction over the accused and the offence had been lost and a copy of the transcript of that application is attached as Exhibit "E" to the affidavit of Barrie Chivers filed herein.

12. THAT the information was not in Court in Hay River on the 6th day of June, A.D. 1977 but rather was with Magistrate Slaven in Yellowknife and had since been found and such explanation was given to the Court by its Clerk on the 12th day of July, 1977.

13. THAT service upon the Respondent and Magistrate Smith is admitted."

This application raises an issue that is of fundamental importance in the Magistrate's Court of the Northwest Territories. In this particular case the information in Magistrate's Court was not available because the Clerk or Deputy Clerk of the Magistrate's Court failed to bring it to Hay River. However in the Northwest Territories it is not unusual for the presiding magistrate at a sittings to be delayed due to inclement weather for flying with the result that the presiding magistrate is not able to attend at the time scheduled for the trial or proceeding in

question. Accordingly some of the rules with respect to loss of jurisdiction were not conducive to the proper administration of justice in this jurisdiction. This is particularly so where the so-called loss of jurisdiction occurs under circumstances where a limitation period has intervened.

At first blush I find it somewhat anomalous that under similar circumstances the Supreme Court of the Northwest Territories would not lose jurisdiction over the indictment before it. Furthermore in jurisdictions having a County or District Court it would appear that a District Court judge on a trial *de novo* may adjourn *sine die* for judgment and will have jurisdiction on proper notice to the parties to deliver judgment at a future day to be appointed by him or to hand down written reasons for judgment which may form the basis for a final order: *Hawryluk v. McLellan*, 3 C.R.N.S. 66 at p. 72.

Historically there may have been valid reasons for the strict rules that were applied with respect to the question of jurisdiction of inferior Courts such as Magistrate's or Justices of the Peace. However it should be pointed out that a magistrate appointed under the *Magistrate's Court Ordinance*, R.O.N.W.T. 1974 C. M-1 has jurisdiction throughout the whole of the Northwest Territories and is not limited to any particular area or district. The officers of the Magistrate's Court are appointed pursuant to Section 23 of the *Magistrate's Court Ordinance* which provides:

"23. (1) The Commissioner shall appoint a Clerk of the Magistrate's Court.

(2) Such officers and employees as are deemed necessary shall be appointed for the Magistrate's Court under the *Public Service Ordinance*."

One of the basic questions that falls to be considered on this application is whether or not Judges of the Magistrate's Court of the Northwest Territories are still haunted by somewhat cumbersome and troublesome rules or provisions that can result in a loss of jurisdiction under circumstances over which they have no control or are not in any way blameworthy.

In this particular case nothing occurred on June 6, 1977 at Hay River, Northwest Territories because the Clerk of the Court did not bring the information that was to be placed before the learned Chief Magistrate who was presiding. Subsequently the accused was resummoned on this information (which was later found at Yellowknife) and on the return date of the summons the accused objected to the jurisdiction of the presiding Magistrate.

On this application learned Counsel for the applicant submits that what occurred results in a loss of jurisdiction over the information in question and that the information thereafter is to be treated as if it had never been laid. In support of his submission learned Counsel for the Applicant relied upon the following, *inter alia*, authorities: *Doyle v. The Queen*, 35 C.R.N.S. 1 (S.C.C.); *Re Trenholm*, (1940) S.C.R. 301, 73 C.C.C. 129;

Regina v. Light, 5 C.R.N.S. 118; *Regina v. Stedelbauer Chevrolet Oldsmobile Ltd.* (1974) 6 W.W.R. 362. Reference was specifically made to the judgment of Moir, J.A. in *Regina v. Stedelbauer Chevrolet Oldsmobile Ltd. (supra)* at p. 366 where he says:

> " The question for determination is largely dependent upon the interpretation one places upon what occurred in Court. If the summary conviction charges were adjourned until 9.30 a.m. on the 4th February 1974, and nothing was done with them on that date then the Court will have lost jurisdiction over both the person of the accused and the offence: *Trenholm. v. A.G. Ont.*, [1940] S.C.R. 301, 73 C.C.C. 129, [1940] 1 D.L.R. 497 (sub nom. *Re Trenholm*), and *Regina v. Light*, 65 W.W.R. 1, 5 C.R.N.S. 118, [1969] 1 C.C.C. 46 (B.C.).
>
> On the other hand, if the adjournment was made for a period of more than eight days, without the consent of the accused, or in the absence of the accused or if it were an adjournment sine die, jurisdiction may have been lost over the person but not over the offence: *Regina v. Bence; Ex parte Regina Oral Arts Ltd.*, [1970] 2 C.C.C. 151 (Sask. C.A.), and *Regina v. Born*, [1972] 2 W.W.R. 467, 17 C.R.N.S. 331, 6 C.C.C. (2d) 70 (sub nom. *Re Regina and Born*) (Man. C.A.).
>
> The real importance of the question is that of limitations as the last date on which action on the part of the respondent was alleged was 6th July 1973. More than six months had elapsed by 5th February 1974. The result is that s. 721(2) of the Criminal Code, R.S.C. 1970, c. C-34, would apply, which provides:
>
> > '(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose.' "

Further reference was also made to the judgment of Mr. Justice Ritchie in *Doyle v. The Queen* (supra) at pp. 11 - 14 where the learned Justice stated:

> " In the present case there was not only no trial but no election as to the forum in which the trial was to take place and in my view there are no provisions in the Criminal Code which authorize a justice or a magistrate to adjourn a case under such circumstances for more than eight days without the consent of the accused. I am accordingly of the opinion that Scott, Magistrate, exceeded his power when he adjourned the case on 1st April and that jurisdiction over the person of the accused was accordingly lost and that the recognizance entered into by the appellant before O'Neill, Magistrate, on 11th December 1973 is thereby voided.
>
> This latter finding is sufficient to dispose of the application giving rise to this appeal, but it was also contended before this Court that the error to which I have referred involved not only loss of jurisdiction "over the person" but also "over the offence".
>
> Somewhat different conclusions have been reached in varying provincial courts as to the effect of such an error on the jurisdiction of a magistrate. These differences have been occasioned in large degree by differing factual situations, but in my opinion the principle governing the present case is to be derived from the judgment of this Court in *Trenholm v. A.G. Ont.*, [1940] S.C.R. 301, 73 C.C.C. 129, [1940[1 D.L.R. 497, where the date to which the appellant had been remanded had passed with nothing having been done and it was held that the information lapsed and no further process could be taken pursuant to it. Kerwin J., speaking for himself and Duff C.J., observed at p. 308 that "after the expiry of the remand there was no criminal cause or charge in existence" and Davis J., in a separate opinion,

"said at p. 313: 'But when a remand has expired without any further hearing or appearance the justice becomes *functus*'. In the present case, if the Magistrate had granted an adjournment for eight days and then done nothing, the situation would have been exactly within the *Trenholm* decision and I cannot see that the affirmative violation of the Code by adjournment for more than eight days which occurred here affords any distinction in principle from the acquiescence in allowing an eight-day adjournment to expire which is what occurred in *Trenholm*.

In conformity with the *Trenholm* decision, the courts of Quebec appear to have treated an error such as the one here found as going to the question of jurisdiction "over the offence" (see *Latraverse v. Wilson; Dupras Ltd. v. Bouchard*, 42 Que. K.B. 199, 47 C.C.C. 324, [1927] 3 D.L.R. 399, and *St. Pierre v. The Queen* (1966), 47 C.R. 213 (Que. C.A.)) and the courts of British Columbia appear to adopt the same approach (see *Regina v. Peters*, 24 C.R.N.S. 214, [1973] 4 W.W.R. 110, 23 C.C.C. (2d) 559, where Maclean J.A., speaking for the Court of Appeal, had occasion to say (pp. 215-16): 'When Davis J. held, in the *Trenholm* case, that the Magistrate was 'functus' I take it to mean that he was functus with regard to any proceeding sought to be taken on the original information'.

In the recent case of *Re Kuhn and The Queen* (1974), 19 C.C.C. (2d) 556, the Court of Appeal of Ontario was considering a case where counsel for the accused had consented to an adjournment for a period of more than eight days in the absence of the accused himself and it was held that this technical breach involved only loss of jurisdiction over the person which was regained by the subsequent appearance of the accused before the Magistrate. In this regard Dubin J.A. speaking for the Court, noted that [p. 558]:

> ' It is to be observed that the provisions of s. 465 of the *Criminal Code* do not specifically require that the accused be present when the inquiry is to be adjourned.'

Similarly, in *Regina v. Born*, 17 C.R.N.S. 331, [1972] 2 W.W.R. 467, 6 C.C.C. (2d) 70, Dickson J.A., as he then was, rendered judgment on behalf of the Court of Appeal of Manitoba under like circumstances where the absence of the accused at the time of an adjournment of his case was due to his incarceration in the penitentiary. In finding that there was loss of jurisdiction over the person only and not over the offence, Dickson J.A. observed [p.73] that if the absence of the accused were to deprive the magistrate of jurisdiction over the offence "an accused could cause a Magistrate to lose jurisdiction by the simple expedient of failing to appear unless the Magistrate resorted to the use of a Bench warrant."

The *Born* case is clearly not an authority governing the present circumstances and Dickson J.A. was careful to say in the course of his reasons for judgment that [p. 72]:

> ' Many of the cases dealing with loss of jurisdiction arose when the adjournment was *sine die* or for a period exceeding eight days. That is not the present case.'

Much of the difficulty in this area has, I think, been occasioned by the use of the phrase "jurisdiction over the offence". In my opinion the word "offence" as used in this phrase must be construed as meaning the "information" charging the accused with the offence, and the result of an error such as occurred in the present case is, in my view, that the information is to be treated as if it had never been laid. This in no way affects the jurisdiction of the court in relation to the "offence" itself so as to preclude the laying of

> "another information in the same jurisdiction charging the same offence. This result, I think, follows from the case of *Trenholm v. A.G. Ont.*, supra.

Based on the decision in the *Doyle* case and earlier authorities the applicant puts forward a strong argument. However, during the course of oral argument I invited learned Counsel for the applicant and the Crown to address me on the effect if any, of Section 440.1 of the *Criminal Code* which came into force on April 26, 1976. Leave was granted to file written argument on this issue and written submissions have recently been filed with the court.

Section 440.1 reads as follows:

> "440.1 (1) The validity of any proceeding before a court, judge, magistrate or justice is not affected by any failure to comply with the provisions of this Act relating to adjournments or remands, and where such failure has occurred and an accused or a defendant does not appear at any such proceeding or upon any adjournment thereof, the court, judge, magistrate or justice may issue a summons or, if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.
>
> (2) Where, in the opinion of the court, judge, magistrate or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, magistrate or justice may adjourn the proceeding and may make such order as it or he considers proper.

" (3) The provisions of Part XIV apply *mutatis mutandis* where a summons or warrnat is issued under subsection (1)."

The first question which arises is whether Section 440.1 applies to summary conviction proceedings. After carefully reviewing Part XII of the *Criminal Code* I am satisfied that this Part (which includes Section 440.1) applies to summary conviction proceedings. I am fortified in this view by the fact that this section uses the terminology of "an accused or a defendant". An examination of the *Criminal Code* reveals that the term 'defendant' is primarily used with reference to summary conviction proceedings whereas the term 'accused' is basically used with respect to proceedings by way of indictment.

I also find support for the proposition that section 440.1 applies to summary conviction proceedings in the recent unreported judgment of the Supreme Court of Canada in *Fred Batchelor v. Her Majesty the Queen* (December 20, 1977). I refer with respect to the first two paragraphs of the judgment of Chief Justice Laskin wherein the learned Chief Justice states as follows:

" This Court is concerned in this appeal with the main ground on which the appellant has challenged the decision of the Ontario Court of Appeal affirming, without written reasons, the judgment of O'Driscoll J. dismissing three motions by the appellant for prohibition directed to certain Provincial Court Judges and seeking also orders quashing informations charging offences under ss. 234 and 236 of the *Criminal Code*. That ground relates to the effect of service of such a motion as aforesaid, made pursuant to Rules 4 and 5 of the *Ontario Criminal Rules*, upon the jurisdiction of a Provincial Court Judge to proceed with pending charges, and

> "to the effect upon his jurisdiction of his failure to make a return forthwith to the Registrar's Office of the Supreme Court of Ontario, as prescribed by Rule 7 of the *Criminal Rules*.
>
> The appellant raised other issues in this appeal, including a contention that a Provincial Court Judge was powerless to grant more than one adjournment under s. 738(1) of the *Criminal Code*, as it stood at the time of the proceedings herein, but this Court did not call upon the respondent Crown to deal with them, being unanimously of the opinion that they were without merit in the present case. I would add, parenthetically, that an amendment to the *Criminal Code*, enacted by 1974-75-76 (Can.), c. 93, s. 43 as s. 440.1, and which came into force on April 26, 1976, after the proceedings in this case commenced, now provides that there is no loss of jurisdiction by a failure to comply with the provisions of the *Criminal Code* relating to adjournments or remands."

(The underlining is mine).

The further question arises as to whether or not Section 440.1 applies to the present factual situation where no adjournment or remand was made with respect to the proceedings covered by the information because it wasn't before the learned Chief Magistrate.

In dealing with this matter I am not unmindful of the provisions of Section 11 of the *Interpretation Act* R.S.C. 1970 Chapter I-23 which reads as follows:

> "11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

I find myself in respectful agreement with the approach of Wilson J.A. in *Regina v. Parkway Chrysler Plymouth Ltd.*, 32 C.C.C. (2d) 116 at pages 118-119 where he says:

> "In *Re McIntyre Porcupine Mines Ltd. and Morgan* (1921), 49 O.L.R. 214; 62 D.L.R. 618, the issue under appeal was the interpretation put by the Ontario Railway and Municipal Board on the word "concentrators" in s. 40(4) of the *Assessment Act*, R.S.O. 1914, c. 195. An appeal lay to the Court of Appeal only upon questions of law. The word "concentrators" was susceptible of a narrow interpretation to describe a specific piece of machinery used to concentrate ore or a wider interpretation to encompass the building and plant in which the concentration of the ore took place. The Court of Appeal (at p. 219) applied the rule laid down in the *Interpretation Act*, R.S.O. 1914, c. 1, s. 10, that statutes are to "'receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof'".

A similar approach has been taken with respect to provisions of the *Criminal Code* and in this connection particular reference should be made to the observations of Mr. Justice Bayda in *R. v. Dunn*, 1977 38 C.R.N.S. 383 at 399.

In my opinion it is clearly the intention of Parliament, as evidenced by the language of Section 440.1 of the *Criminal Code*, to provide that jurisdiction over the information would not be lost by reason of any failure to comply with the provisions of the *Criminal Code* relating to formal adjournments. In my opinion the defect alleged in this case can be cured by the

learned Chief Magistrate invoking the provisions of Section 440.1 and resummoning the defendant (Applicant) as was in fact done. The natural or ordinary meaning of the language of Section 440.1 in its context in the *Criminal Code* Indicates that Parliament intended to provide curative provisions so that jurisdiction would not be lost in circumstances such as in the case at bar.

The effect of Section 440.1 has been considered by Mr. Justice Murray in *R. v. Susan Irene Daoust* (unreported December 3, 1976 - Vancouver, B.C.). In the course of his judgment (page 5 of written reasons) Mr. Justice Murray stated as follows:

> " I now turn to the second ground advanced by the Applicant, namely, that the Provincial Court Judge lost jurisdiction over not only the person of the Applicant but also over the second information by reason of the adjournment from June 3, 1976 to July 15, 1976 without the consent of the Applicant. Based on the decision in the *Doyle* case this contention is undoubtedly sound. However on April 26, 1976, Section 440.1 of the *Criminal Code* came into force. It appears to me that the result in the *Doyle* case would have been different if this section had been operative at the material time. The section reads as follows:
>
> > '440.1 (1) The validity of any proceeding before a court, judge, magistrate or justice is not affected by any failure to comply with the provisions of this Act relating to adjournments or remands, and where such failure has occurred and an accused or a defendant does not appear at any such proceeding or upon any adjournment thereof, the court, judge, magistrate or justice may issue a summons or, if it or he considers it necessary in the public

" 'interest, a warrant for the arrest of the accused or defendant.

(2) Where, in the opinion of the court, judge, magistrate or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, magistrate or justice may adjourn the proceeding and may make such order as it or he considers proper.

(3) The provisions of Part XIV apply *mutatis mutandis* where a summons or warrant is issued under subsection (1). 1974-75-76, c. 93, s. 43.'

Counsel for the Applicant urged upon me that I must read this section as a whole and that when so read I should find that the section was not designed to cover the defect existing in the case at bar. I cannot agree. In a decision handed down on May 4, 1976 headed *In The Matter of The Extradition Act and In The Matter of Leonard Peltier* my brother Schultz, sitting as an Extradition Judge, was faced with an argument that jurisdiction had been lost be reason of an adjournment in excess of eight days without consent. In holding that Section 440.1(1) was a complete answer to that argument he said:

'The effect of Section 440.1)1) is that jurisdiction is not lost over either the person or the offences ...'

and it is to be noted that his decision was recently upheld by the Federal Court of Appeal in a judgment as yet unreported."

In my opinion this reasoning applies to the present application.

I have also considered the judgment of Collins, Prov. J. in *Regina v. Thompson* 1976 W.W.D. 150. An application for prohibition was launched by the accused Thompson and the same was dismissed by Mr. Justice Shannon of the Alberta Supreme Court. In this particular case the accused who was charged with common assault had been remanded for trial to March 11, 1976. On that date Court was not held because of a snow storm. The accused was told by members of the local R.C.M.P. Detachment to return in two weeks. At trial the defence raised a preliminary objection to the proceedings and contended that jurisdiction over the "information" had been lost. It was held that Section 440.1 was an answer to the objection and that the Court did not lose jurisdiction.

I adopt with respect the approach of Collins, Prov. J. (and affirmed by Shannon, J.) and hold that the learned Chief Magistrate did not lose jurisdiction over the information and the accused in these proceedings.

In addition to the above cases I have also considered the following, *inter alia*, authorities: *R. v. Danny Fok* (O'Driscoll, J. unreported January 18, 1977 [W.C.B. (1977) 148]); *R. v. Lawrence Aiello* (Morden, J. January 20, 1977 [15 W.C.B. (1977) 2]), (1977 Ont. S.C.); *Fred Batchelor v. Her Majesty the Queen* (Supreme Court of Canada - unreported December 20, 1977).

This application is accordingly dismissed without costs. I delayed delivering judgment in this matter to enable counsel to make full submissions in writing. There was a substantial delay in placing these submissions before the Court.

This has resulted in a much longer delay than is warranted in applications of this kind. I would also add that a perusal of the record in the court below indicates that quite a number of adjournments took place prior to this application. In matters of this kind, as in all criminal matters, every effort should be made to promptly bring cases on for trial. I would also suggest with respect, that the written reasons for judgment of Chief Justice Laskin in *Fred Batchelor v. The Queen* (supra) contain some very helpful observations and directions for the assistance of magistrates and provincial judges presiding over matters of this kind.

Dated at Yellowknife, Northwest Territories this 24th day of January, 1978.

C. F. Tallis

C. F. Tallis, J.S.C.