*R. v. Tricoteux & Glowach,* 2005 NWTSC 33 Date: 2005 04 01
Docket: CR 2004000078

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN,
on the information and complaint of Raymond Bourget

Appellant

-and-

LORNE TRICOTEUX and ALEXANDER GLOWACH

Respondents

REASONS FOR JUDGMENT

[1] This is a Crown appeal from a Territorial Court Judge's decision that the prosecution of the Respondents is statute-barred as it was commenced outside the limitation period prescribed in s. 97 of the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4. For the reasons that follow, I find that the appeal must be dismissed.

Background

[2] On September 3, 2003, a 16 count information was sworn (the "September information") charging that the Respondents contravened s. 57(1)(a) of the *Wildlife Act* between September 21 and 23, 2002. The substance of the charges can be described as wasting caribou meat. Various amendments were made to the information regarding the year and the section of the *Wildlife Act* under which the Respondents were charged, resulting in the charge as I have just described it. Those amendments are not relevant to this decision, except insofar as the Crown says that they made the information difficult to read.

[3] The Respondents were summonsed to appear before the Territorial Court on October 28, 2003. Prior to that, on October 22, 2003, counsel for the Crown wrote to counsel for the Respondents, advising that the Crown intended to lay a replacement

information which would contain only one count. It was the Crown's position that the one count would cover the 16 offences charged in the September information, pursuant to s. 92 of the *Wildlife Act*. There is no evidence before me as to whether counsel for the Respondents replied to that correspondence.

[4] When the Respondents appeared before the Court on October 28, 2003, only the original 16 count September information was before the Court. Crown counsel advised the Court that a replacement information would be laid. The proceedings were adjourned to November 18, 2003.

[5] On October 28, 2003, an information was sworn (the "October information") charging the Respondents in one count that between September 21 and 23, 2002, they contravened s. 57(1)(a) of the *Wildlife Act*. This information was not before the Court on October 28, when the Respondents appeared in answer to the summons.

[6] At the next appearance in Court on November 18, 2003, the Crown withdrew the September information and placed the October information before the Court. The Respondents raised no objection at the time. The record does not indicate whether they were aware of the date the October information had been sworn and the date was not referred to by anyone present during the Court appearance.

[7] There was a further appearance on December 16, 2003 on the October information, at which time a trial was scheduled for June 2004. Prior to the trial, the Respondents brought an application in the Territorial Court which resulted in the decision now under appeal. The Respondents argued then, as they do now, that the prosecution cannot proceed based on the October information because that prosecution was commenced on October 28, 2003, more than one year after the September 21 to 23, 2002 dates on which the illegal acts are alleged to have occurred.

## The Grounds of Appeal

[8] There are three grounds set out in the notice of appeal. Because of the position taken by Crown counsel on the appeal (who was not counsel during the proceedings in the Territorial Court), I need not deal with the first ground of appeal in any detail but for clarity I will set out the Crown's position on all the grounds.

[9] The first ground of appeal is that the Territorial Court Judge erred in law when she determined that the October information was not an amended information. The Crown had argued before her that it was. On this appeal, counsel for the Crown took the position that the October information was not an amended information, but a replacement information.

[10] The second ground of appeal alleges that the Territorial Court Judge erred in law when she determined that the October information amounted to the commencement of a new prosecution within the meaning of s. 97 of the *Wildlife Act*. The Crown argues that the October information was simply a continuation of the prosecution initiated by the September information, and that in the unique circumstances of this case, the policy reasons behind the limitation period are not applicable. The Respondents take the position that when the September information was withdrawn, the prosecution based on it was terminated. They say that the prosecution based on the October information is statute-barred.

[11] The third ground of appeal is that the Territorial Court Judge erred in law when she determined that the defence had not consented or agreed to the proceeding. On this appeal, counsel for the Crown took the position that there is insufficient evidence of consent to bring this matter within s. 786(2) of the *Criminal Code*. He maintained, however, that the Respondents did consent to the proceedings continuing on the October information as a replacement information.

<u>The applicable statutes</u>

[12] Under s. 91 of the *Wildlife Act*, a contravention of s. 57(1), the prohibition against wasting caribou meat, is a summary conviction offence.

[13] Section 97 of the *Wildlife Act* provides:

> 97. A prosecution for an offence under this Act or the regulations may not be commenced after one year from the time when the offence was committed or was alleged to have been committed.

[14] This is in contrast to the general rule that summary conviction proceedings must be commenced within 6 months of the date of the alleged offence. That rule is found in s. 786 of the *Criminal Code*, which provides as follows:

> 786(1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.
>
> (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.

[15] No argument was made that there is any difference between a prosecution being commenced (s. 97 *Wildlife Act*) and proceedings being instituted (s. 786(2) *Criminal Code*).

[16] It is common ground between the parties that the provisions of the *Criminal Code* generally apply to the prosecution of summary conviction offences created by territorial statute by virtue of the *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15. Sections 2(1) and 3 of that *Act* read as follows:

> s. 2(1) The provisions of the Criminal Code relating to summary conviction offences apply, with such modifications as the circumstances require, to all offences created by an enactment or municipal by-law, except to the extent that the enactment or municipal by-law or this Act or the regulations otherwise provides.
>
> s. 3 Except where otherwise provided in an enactment, proceedings may not be commenced after six months from the time when the subject matter of the proceedings arose.

[17] It is also common ground between the parties that the *Wildlife Act* does "otherwise provide" a limitation period of one year. Since the Crown concedes that there is insufficient evidence of consent in this case, I need not decide whether the *Wildlife Act* also "otherwise provides" in relation to the limitation period not being applicable where the prosecutor and the defendant so agree as permitted by s. 786(2) of the *Criminal Code*.

<u>The significance of the Crown's withdrawal of the September 3 information</u>

[18] The Crown's prerogative to withdraw an information is not found in the *Criminal Code* but is a long-accepted practice. The effect of a withdrawal is clear: it ends the proceedings, the prosecution. In *Regina v. Leonard, Ex Parte Graham* (1962), 133 C.C.C. 230 (Alta. S.C.) [affirmed (1962), 133 C.C.C. 262 (Alta. C.A.)],

the consequences of withdrawing a charge were described this way: "When a charge has been withdrawn, there is no charge on record, and in order to continue the prosecution a new charge would have to be laid. Withdrawing a charge has the effect of ending the proceedings." The same principle applies to an information as it is the information that contains the charge.

[19] By withdrawing the September information, the Crown put an end to the proceedings based on that information. The Crown may have been mistaken as to the legal effect a withdrawal would have, but there is no suggestion that the withdrawal was not intentional.

The significance of proceeding on the October 28 information

[20] Pursuant to s. 2 of the *Summary Conviction Procedures Act*, reference must be made to the *Criminal Code* to determine how a prosecution is commenced. Section 788(1) of the *Criminal Code*, which deals with Part XXVII, Summary Convictions, provides that "Proceedings under this Part shall be commenced by laying an information in Form 2". The sworn information is the formal complaint under oath, accepted by the judicial officer, usually a justice of the peace. The use of "commenced" in s. 788(1) as opposed to "instituted" in s. 786(2) makes it obvious that the two words mean the same thing.

[21] When the Crown withdrew the September information, the prosecution on that information ended, as I have noted above. At that point there was no prosecution. When the Crown put the information sworn on October 28 before the Court, it commenced another prosecution, one that was commenced after expiry of the one year limitation under the *Wildlife Act*. The law is well-established that when a prosecution is commenced out of time, the Court has no jurisdiction to entertain the information and a conviction on such an information must be quashed: *Keddy et al. v. the Queen* (1961), 130 C.C.C. 226 (N.S.S.C.).

[22] The Crown argues, however, that there was a link between the September and October informations because the process, the summons that had been issued to the Respondents when the September information was laid, continued on the October information. In my view, however, the process is irrelevant. The process is merely the method by which the accused person is compelled to come before the Court. The

information is the document that confers jurisdiction on the Court to deal with the charge or charges.

[23] In *R. v. Southwick, Ex parte Gilbert Steel Ltd.* [1968] 1 C.C.C. 356 (Ont. C.A.), the Court was faced with the question whether, in summary conviction proceedings, the issuance of a summons by a justice of the peace, other than the justice before whom the information was sworn, was contrary to the provisions of the *Criminal Code*. In finding that the procedure was not contrary to the *Code*, the Court said the following:

> ... A complaint by an informant which complies with the conditions prescribed by s. 439 becomes a completed information when it is reduced to writing and sworn to before a Justice of the Peace. This is the commencement of proceedings. The next step is the inquiry referred to in s. 440. This is a judicial determination of the question, whether to issue a summons or a warrant against the person alleged to have committed the offence charged in the information.
>
> The laying of an information which is really the completion of the complaint under s. 439 is separate and distinct from the inquiry contemplated by s. 440. *The former deals with jurisdiction requirements* while the latter is concerned with the issuance of a judicial process to compel the attendance of the alleged offender. (Emphasis added)

[24] Sections 439 and 440, referred to in the quote above, are in essence the same as sections 504 and 507 of the current *Criminal Code*.

[25] In *Southwick*, the Ontario Court of Appeal also stated, "On the swearing of the written complaint the information is "laid" and becomes the first step or commencement of criminal proceedings."

[26] Based on the above reasoning, it is clear that after the September information was withdrawn, the October information commenced a second set of proceedings and was the document that gave the Court jurisdiction to deal with the charge set out in that information. The process by means of which the Respondents were compelled to be before the Court does not have jurisdictional stature and therefore has no impact on the issue before me.

The October information as a replacement information

[27] The Crown argues that the October information was a "replacement" information, the legal effect of which amounted to a continuation of the prosecution commenced with the swearing of the September information. "Replacement" information was the term used by Crown counsel in advising the Respondents' counsel that a new information would be laid and in telling the Territorial Court how the Crown intended to proceed.

[28] The term "replacement" information is not found in the *Criminal Code*. I accept that the use of what are called replacement informations has become routine in the criminal courts. A mere practice cannot, however, supplant the jurisdictional requirements of the *Criminal Code*. This was recognized by Stone J. in *R. v. Mikkelsen* (2003), 58 W.C.B.J. (2d) 602 (Ont. Ct. Jus.), where he commented as follows:

> A practice has arisen, which the defence would contend is a loose practice, of on occasion bringing a replacement information before the court in order to gather together outstanding charges which might be on various informations or, indeed, to sometimes lay a new charge which is in replacement of an old charge but is a different charge altogether. That is to say that while the word "replacement" is used rather loosely, it is not truly a relaying of exactly the same charge.

[29] Stone J. also recognized, however, "... that basic principle that even though a practice may be helpful to both Crown and defence, it must be one which is mandated with law and it must comply with law in the way it is carried out."

[30] In essence, the Crown's argument is that one piece of paper, the October information, simply replaced another piece of paper, the September information, and since it was all one continuing prosecution commenced by the September information which was laid within the one year time limit, the date the October information was sworn is irrelevant. However, this argument fails to take into account the fact that the September information was withdrawn by the Crown. The Crown's right of withdrawal carries with it very specific consequences, as I have noted.

[31] The Crown relies in particular on the following cases and submits that they involve circumstances similar to this one.

[32] The first case is *R. v. Ross* (1949), 94 C.C.C. 150 (Ont. C.A.). The information charging the accused with a summary conviction offence was sworn within the limitation period applicable at the time. Subsequently, the information was amended and re-sworn by the officer who originally swore it. The accused argued that the re-sworn information was a new information and that, under the legislation at the time, a new summons to compel him to appear before the Court would be out of time. The Court of Appeal held that there was no need to issue a new summons as the accused was already before the Court. It found that the re-sworn information did not amount to the initiation of a new proceeding or the laying of a new charge and, in substance, the proceeding commenced by the original information was continued throughout. The Court characterized what had happened as an amendment of the original information. It appears from the case report that it was the date of issuing the summons that was at issue, not the date of re-swearing the information.

[33] In my view, *Ross* has to be distinguished because the original information was not withdrawn and so the process at issue had no effect from the point of view of the Court's jurisdiction.

[34] In the second case, *R. v. St. Stephen Woodworking Ltd.* (1972), 8 C.C.C. (2d) 377 (N.B.S.C. App. Div.), the information charging a summary conviction offence did not allege an offence date. The accused entered a plea of not guilty without objecting to the defect. On a subsequent appearance, on application by the prosecutor and with the consent of the accused, the information was amended to allege an offence date. At the insistence of counsel for the accused, the information was also re-sworn. That step occurred after expiry of the six month limitation period. The accused later argued that the re-sworn information was a new information and therefore statute-barred. The Court of Appeal held that it was not necessary to re-swear the information after amending it and the amendment to include the date did not amount to a new information. It noted that the trial judge acquired jurisdiction over the offence by taking, or having laid before him, the original information within the six month limitation period.

[35] In *St. Stephen*, unlike the case now at issue, the original information was not withdrawn. Again, there was no question of jurisdiction as there is in this case.

[36] For the reasons given, I find that neither *Ross* nor *St. Stephen* assist the Crown's position. Nor does the Crown argue that what happened here was really an amendment. The Crown cannot unilaterally amend an information once it is before the Court and in the proceedings below, the Crown did not seek leave of the Court to amend. As I have noted earlier in these reasons, counsel for the Crown indicated on this appeal that he was not taking the position that the October information was an amendment of the September information.

[37] When this appeal was argued, the Alberta Court of Appeal had not yet released its decision in *R. v. Chern*, 2005 ABCA 28. Counsel declined to make further submissions after the decision was released. *Chern* was a case where the Crown had elected to proceed summarily on a number of assault charges, some dating back several years. The Court of Appeal found that the accused had consented pursuant to s. 786(2) of the *Code* to the matters proceeding summarily notwithstanding the expiry of the summary conviction limitation period and that consent applied to subsequent informations sworn to consolidate a number of earlier informations. Since the Crown concedes that evidence of consent is lacking in this case, the decision in *Chern* does not assist.

[38] When the *Chern* summary conviction appeal was before the Alberta Court of Queen's Bench ([2003] A.J. No. 331), the summary conviction appeal court Judge described the last information sworn, which consolidated earlier informations, as merely an administrative matter which did not institute new proceedings. That description appears to me to have been linked to the fact that the accused had already agreed under s. 786(2) to having the charges proceed summarily despite the expiry of the limitation period. The consent was considered to have been carried over to the final information. That is not the situation in this case. I am also unable to find any reference in *Chern* as to whether any earlier informations were withdrawn and that issue does not appear to have been considered. Although, in the circumstances in *Chern*, the last information sworn might appropriately be described as an administrative matter which did not institute new proceedings, I am not persuaded that the same can be said of the October information in this case for the reasons I have already referred to.

[39] In this case, on one level, one could say that the proceedings commenced by the September information were continued throughout. After the October information was laid before the Territorial Court, the parties did not go back and revisit the steps that had been taken between the time the September information was laid and the time the October information was put before the Court. However, the fact is that when the September information was withdrawn, the underpinning of the Court's jurisdiction to deal with the prosecution based on it was lost. And since the October information was laid outside the one year time limit, the Court did not re-gain jurisdiction.

[40] Even if it could be said that the Respondents acquiesced in the prosecution continuing on the October information by failing to object earlier than they did, that acquiescence cannot cure the jurisdictional problem arising from the procedure used by the Crown. I use the term acquiescence here since, in my view, there is no basis in the record upon which to find actual consent. And further, bearing in mind that the Crown concedes that there is insufficient evidence of consent pursuant to s. 786(2) of the *Criminal Code*, I do not see how there could still be consent on some other basis. Since the September information was no longer before the Territorial Court, the only thing the Respondents could agree to, or not, was proceeding on the October information, sworn after expiry of the limitation period. To say that they agreed to proceed on the October information as a replacement information is no different in substance than saying they agreed to waive the limitation period. Yet the Crown concedes that there is insufficient evidence of any agreement.

[41] In my view, characterizing the October information as a replacement information is of no significance since the term replacement information is not one defined by law, only by practice, which may vary from time to time and place to place. That practice cannot displace statutory and jurisdictional requirements.

The policy reasons for limitation periods

[42] The Crown also submits that the policy reasons for limitation periods do not apply in the circumstances of this case. The Crown points out that the setting of a limitation period, whether six months or one year or something else, is a matter of legislative choice, which may change from time to time. Indeed, it appears that when the *Wildlife Act* was first enacted in 1978, the limitation period was six months and it was not extended to twelve months until an amendment in 1983.

[43] As the Territorial Court Judge said in her reasons, a statutory limitation period "affords a protection to members of the public; it ensures that summary offences will be dealt with in a timely fashion". Similarly, in *R. v. Chausse*, (1986) 51 C.R. (3d) 332, the Quebec Court of Appeal referred to "the salutary rule, common to most if not all penal statutes, under which any person, after the stipulated time, is free from prosecution or conviction in respect of minor offences".

[44] There is no question that in this case the Respondents knew within the stipulated time of one year that they were not free from prosecution or conviction. There is no suggestion that they suffered any prejudice or were disadvantaged in their defence as a result of the October information being brought before the Court when it was. There is also no question that the public has an interest in the effective enforcement and prosecution of public offences.

[45] But no matter how one characterizes what happened in the Territorial Court, the fact remains that the September information was withdrawn and the October information was sworn outside the one year limitation period. The applicable statutes give the Court no power to disregard or extend the limitation periods, even if the reasons behind them seem inapplicable to a particular case. As indicated above, the procedure used by the Crown in this case created a jurisdictional problem. Policy considerations cannot confer jurisdiction where there is none.

Analogy to civil procedure

[46] Counsel for the Crown drew an analogy to the civil rules of procedure, particularly Rule 136(1)(a) of the *Rules of Court*, which permits amendment of a pleading by filing a reprint or fresh copy of it when the extent of the amendments would make the original pleading difficult or inconvenient to read. Rule 5 of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* states that where a matter is not provided for in the *Criminal Code* or the *Rules*, the procedure may be determined by analogy to the civil rules.

[47] Crown counsel submits that the many amendments endorsed on the September information and the change from 16 counts to one would make the September information difficult to read and therefore, by analogy, a fresh copy was appropriate in the form of the October information.

[48] In my view, the analogy must fail, if only because the civil rules do not contemplate a party discontinuing the action in which the original pleading, for example a statement of claim, was filed and starting anew with the reprint or fresh copy. As I read Rule 136, it contemplates that the original statement of claim and the action based on it, remain in existence. In this case, the September information did not remain in existence because the Crown withdrew it.

Conclusion

[49] The problem created by the procedure used by the Crown is one of jurisdiction. The Territorial Court had jurisdiction over the prosecution initiated by the September information so long as that information was before it. Upon the Crown withdrawing that information, that prosecution ended and the Court no longer had jurisdiction to do anything with it. When the Crown placed the October information before the Court, a new prosecution was initiated. Since it was initiated outside the one year limitation prescribed by the *Wildlife Act*, it was statute-barred. The Respondents cannot be convicted on the October information, which is the only information still in existence. To hold otherwise would be to ignore the clear language and requirements of the applicable legislation.

[50] For the above reasons, I find that the Territorial Court Judge did not err and therefore the appeal must be dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 1st day of April, 2005.

Counsel for the Appellant: M. David Gates, QC
Counsel for the Respondents: Robert Davidson, QC