

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

- v -

**JOYCE GAUTHIER, FATHI MOHAMED MAIE and
ABDULLAH OMAR MAYE**

**Transcript of the Reasons for Decision of the Honourable Chief
Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, on the 8th day of December, 2023**

APPEARANCES:

B. Wun:	Counsel for the Crown
E. McIntyre:	Counsel for the Defendant appearing via teleconference

Charges under s. 354(1), 95(1), 108(1)(b), 88(1), 94(1), 92(1), 90(1), 117.01(1) and
108(1)(b) of the *Criminal Code* and s. 5(2) of the
Controlled Drugs and Substances Act

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1 **(TELECONFERENCE COMMENCES)**

2 THE CLERK: Order. All rise. This sitting of the
3 Supreme Court of the Northwest Territories is now in
4 session, the Honourable Chief Justice Smallwood
5 presiding. Please be seated.

6 THE COURT: Good afternoon.

7 B. WUN: Good afternoon.

8 THE COURT: All right. Mr. McIntyre, I understand you
9 are on the line?

10 E. MCINTYRE: I am, Your Honour. Good afternoon.

11 THE COURT: Good afternoon. This is an application
12 by the Crown for *certiorari* and *mandamus* in relation to
13 Joyce Steinwand-Gauthier's discharge at preliminary
14 inquiry on seven offences. The Crown is seeking to
15 quash Joyce Gauthier's discharge on those seven
16 offences and is seeking an order of *mandamus*
17 requiring the Territorial Court to commit Ms. Gauthier to
18 stand trial on those charges.

19 Joyce Gauthier was charged along with
20 three co-accused, Dawson Tecomba, Fathi Mohamed
21 Maie and Abdulah Omar Maye on an Information with
22 11 offences, eight of which were applicable to Joyce
23 Gauthier: Count 1, section 354(1)(a) of the *Criminal*
24 *Code*, possession of property obtained by crime;
25 count 2, section 5(2) of the *Controlled Drugs and*
26 *Substances Act*, possession of a controlled
27 substance -- in this case cocaine -- for the purposes

1 of trafficking; count 3, section 95(1) of the *Criminal*
2 *Code*, possession of a loaded prohibited or restricted
3 firearm without a licence; count 4, section 108(1)(b) of
4 the *Criminal Code*, possession of a firearm with an
5 altered or defaced serial number; count 5, section 88(1)
6 of the *Criminal Code*, possession of a weapon for a
7 purpose dangerous to the public peace; count 6,
8 section 95(2) of the *Criminal Code*, being an occupant
9 of a motor vehicle in which they knew there was a
10 prohibited or a restricted firearm; count 7, section 92(1)
11 of the *Criminal Code*, unauthorized possession of a
12 prohibited or restricted firearm; and count 8,
13 section 90(1) of the *Criminal Code*, carrying a
14 concealed weapon.

15 All of these charges arose from a traffic
16 stop conducted by the RCMP on October 25, 2021, in
17 Yellowknife where Joyce Gauthier was the driver of a
18 motor vehicle along with the three co-accused who
19 were passengers. During a search of the vehicle, the
20 RCMP located cocaine, money alleged to be the
21 proceeds of crime, a loaded handgun and other items.

22 Ms. Gauthier and the three other
23 occupants of the vehicle were arrested and charged
24 with a number of offences. Ms. Gauthier elected trial
25 by judge and jury and requested a preliminary inquiry
26 which was held on November 22 and 23, 2022, and
27 December 20, 2022, in Territorial Court.

1 Following the preliminary inquiry, the
2 Territorial Court judge committed Ms. Gauthier to stand
3 trial on the *CDSA* charge, the possession for the
4 purpose of trafficking charge, which was count 2 on the
5 Information but discharged her on the *Criminal Code*
6 offences which were counts 1, 3 through 8 on the
7 Information.

8 In discharging the accused on the other
9 counts, the preliminary inquiry judge stated:

10 In a case like this if the evidence at the inquiry in
11 respect of the main transaction that the same
12 facts and witnesses cannot meet the low
13 threshold required for committal, it would be
14 contrary to the intent of Parliament, in my
15 opinion, to have these charges sent up to the
16 Superior Court involving further delay and a
17 second involvement of judicial resources and
18 time and effort, energy of witnesses and the
19 victims.

20 Where the charges are so related to the
21 plus-14 offences like the case here, I am of the
22 opinion that I have the power under 548(2) to
23 discharge where there is no sufficient case to
24 put the accused on trial, applying the test that
25 has been cited many times.

26 In 2019 the *Criminal Code* was amended to restrict the
27 availability of preliminary inquiries to offences

1 punishable by 14 years or more of imprisonment. Of
2 the offences that Ms. Gauthier was charged with, the
3 *Criminal Code* offence is punishable by less than
4 14 years of imprisonment, the *CDSA* offence
5 punishable by imprisonment for more than 14 years.

6 The issue is not whether the preliminary
7 inquiry judge made the correct decision to discharge
8 the accused on the seven other offences, but it is
9 whether the preliminary inquiry judge had jurisdiction to
10 inquire into the other offences which were on the
11 Information, that is, the offences for which the
12 maximum punishment was imprisonment for less than
13 14 years.

14 For the reasons that follow, I conclude
15 that the preliminary inquiry judge did not have
16 jurisdiction to inquire into those offences and he
17 exceeded his jurisdiction by doing so.

18 As mentioned, in 2019 the *Criminal Code*
19 was amended to restrict the availability of preliminary
20 inquiries. The relevant provisions of the *Criminal Code*
21 are section 535 of the *Criminal Code* which now states:

22 If an accused who is charged with an indictable
23 offence that is punishable by 14 years or more
24 of imprisonment is before a justice and a request
25 has been made for a preliminary inquiry under
26 subsection 536(4) or 536.1(3), the justice shall in
27 accordance with this Part inquire into the charge

1 and any other indictable offence in respect of the
2 same transaction founded on the facts that are
3 disclosed by the evidence taken in accordance
4 with this Part.

5 Section 536(4) of the *Criminal Code* states in part:

6 If an accused referred to in subsection (2) elects
7 to be tried by a judge without a jury or by a court
8 composed of a judge and jury, the justice shall
9 on the request of the accused or the prosecutor
10 hold a preliminary inquiry into the charge.

11 Under section 548(1) of the *Criminal Code* when all of
12 the evidence has been taken, the judge shall either:

- 13 a) if in his opinion there is sufficient evidence to put
14 the accused on trial for the offence charged or any
15 other indictable offence in respect of the same
16 transaction order the accused to stand trial or
17 b) discharge the accused if in his opinion on the
18 whole of the evidence, no sufficient case is made
19 out to put the accused on trial for the offence
20 charged or any other indictable offence in respect
21 of the same transaction.

22 If there is sufficient evidence to put the
23 accused on trial, the preliminary inquiry judge must
24 commit the accused to stand trial. At a preliminary
25 inquiry the Crown must present some evidence against
26 the accused on every essential element of the offence
27 in order for the accused to be committed to stand trial.

1 The preliminary inquiry serves as a
2 screening purpose to ensure that there is sufficient
3 evidence to commit the accused to stand trial. It also
4 allows the accused to discover the Crown's case and to
5 assess the nature and strength of the Crown's case,
6 but it is not meant to decide the accused's guilt or
7 innocence. *R v Russell*, 2001 SCC 53 at paragraph 20.

8 A preliminary inquiry is a process
9 conducted by a statutory court that can only exercise
10 the power that has been granted by the *Criminal Code*.
11 There is no constitutional or stand-alone right to a
12 preliminary inquiry. *R v R.S.*, 2019 ONCA 906 at
13 paragraphs 48 to 50.

14 With respect to preliminary inquiries in
15 *R v Sazant*, 2004 SCC 77, the Supreme Court of
16 Canada considered the application of *certiorari* in the
17 context of preliminary inquiries, stating at paragraph 14:

18 The purpose of the preliminary inquiry is to
19 ensure that there is sufficient evidence to
20 commit the accused to trial. The preliminary
21 inquiry is therefore a pretrial screening
22 procedure that also serves as a discovery
23 mechanism to the accused. Guilt or innocence
24 is determined at trial.

25 The preliminary inquiry judge's decision
26 to discharge or commit the accused to trial
27 cannot be appealed. While the decision can be

1 challenged by way of *certiorari*, the reviewing
2 court should only intervene where the
3 preliminary inquiry judge committed a
4 jurisdictional error.

5 The scope of review on *certiorari* is limited and is
6 mainly limited to jurisdictional review by a superior
7 court. *Certiorari* permits review only where a lower
8 court or tribunal has acted in excess of its statutory
9 jurisdiction. *Russell* at paragraph 19.

10 The availability and scope of a
11 preliminary inquiry is determined by the wording of the
12 relevant provisions of the *Criminal Code*. On a review
13 of the wording of section 535, it is clear that a
14 prerequisite to requesting a preliminary inquiry is that
15 the accused be:

16 Charged with an indictable offence that is
17 punishable by 14 years or more of
18 imprisonment.

19 An accused person who is charged with an indictable
20 offence that is not punishable by 14 years or more of
21 imprisonment is not entitled to request a preliminary
22 inquiry. That is apparent on a plain reading of this
23 section and is something that has been confirmed by a
24 number of courts across Canada since the
25 amendments to the *Criminal Code*. See, for example,
26 *R v C.T.B.*, 2021 NSCA 58 and *R.S.* at paragraph 14.

27 The legislative amendments with respect

1 to preliminary inquiries have been considered by a
2 number of courts in a variety of factual circumstances.
3 In this case the accused has been charged with
4 multiple offences on the same Information, one of
5 which is eligible for a preliminary inquiry, as it is an
6 offence for which the maximum punishment is 14 years
7 or more, and there are also seven offences, which are
8 not eligible for a preliminary inquiry because their
9 maximum punishment is not 14 years imprisonment or
10 more.

11 This is the same issue that was faced in
12 *R v Davis*, 2019 ONCJ 679 where the accused was
13 charged with 16 offences pursuant to both the *Criminal*
14 *Code* and the *CDSA*. Four of those offences had a
15 maximum punishment of 14 years or more, while the
16 remaining 12 counts had a maximum punishment of
17 less than 14 years.

18 In *Davis* the Court held that “the charge”
19 referred to in section 536(4) referred to the charge in
20 subsection (2), namely, an indictable offence
21 punishable by 14 years or more and at section 536(4)
22 did not refer to an inquiry into the Information as a
23 whole. This supported an interpretation where the
24 preliminary inquiry is restricted to offences which are
25 punishable by imprisonment of 14 years or more.

26 I agree that a plain reading of
27 section 536(4) requires a judge to hold a preliminary

1 inquiry into the charge which is an indictable offence
2 punishable by 14 years or more imprisonment. That
3 is not in issue here; the issue is the scope of that
4 inquiry.

5 The defence argues that because
6 section 548 was not amended by Parliament in 2019,
7 that section gives a preliminary inquiry justice
8 jurisdiction to discharge the accused on “any other
9 indictable offence in respect of the same transaction.”

10 The argument is that once a preliminary
11 inquiry is requested on an indictable offence punishable
12 by 14 years or more of imprisonment, the preliminary
13 inquiry judge can then inquire into all of the counts on
14 the Information in respect of the same transaction,
15 whether they are eligible for a preliminary inquiry or not.
16 This was the reasoning of the preliminary inquiry judge.

17 He viewed the plain reading of
18 section 548(1) as granting him the authority to
19 discharge on the other offences. The preliminary judge
20 in his decision reviewed the other relevant sections of
21 the *Criminal Code* as well as the case law which had
22 been provided to him before ultimately concluding that
23 if there was not sufficient evidence for committal on the
24 other offences:

25 It would be contrary to the intent of Parliament,
26 in my opinion, to have these charges sent up to
27 the superior court.

1 In my view, that statement was an error. The issue was
2 not whether there was sufficient evidence but whether
3 he had the jurisdiction to consider those offences at the
4 preliminary inquiry stage. The preliminary inquiry judge
5 went on to conclude that he did have jurisdiction,
6 stating:

7 Where the charges are so related to the plus-14
8 offences like the case here, I am of the opinion
9 that I have the power under 548(2) to discharge.

10 The wording in section 548 is similar to the wording in
11 section 535, which also refers to an inquiry into the
12 charge and:

13 Any other indictable offence in respect of the
14 same transaction.

15 Section 535 differs in that it goes on to limit the inquiry
16 to:

17 Founded on the facts that are disclosed by the
18 evidence.

19 Section 535 directs an inquiry into both the 14-plus
20 charge and any other indictable offence in respect of
21 the same transaction as the 14-plus offence. Section
22 548 also mandates that the justice consider committal
23 and discharge on the 14-plus charge but also in respect
24 of any other indictable offence in respect of the same
25 transaction.

26 This could mean that the scope of the
27 inquiry would extend beyond the 14-plus offences and

1 include any other indictable offences in respect of the
2 same transaction, including other indictable offences on
3 an Information which are not 14-plus offences. That is
4 a plausible reading of these provisions.

5 This would require the Crown to call
6 sufficient evidence on not just the 14-plus offence or
7 offences but for all other indictable offences in respect
8 of the same transaction. So instead of the Crown
9 calling evidence on just the offence or offences for
10 which a preliminary inquiry was available, they would
11 have to call evidence relating to all of the charges on
12 the Information in order to ensure committal.

13 This would have the effect of lengthening
14 preliminary inquiries and this is not a situation which
15 would be rare or unique. It is not uncommon for
16 multiple offences to be charged on an Information and
17 for offences which have a maximum term of
18 imprisonment of 14 years or more and offences with
19 less than 14 years imprisonment to be on the same
20 Information.

21 This approach would seem to be contrary
22 to the wording of section 536(4), which states that the
23 preliminary inquiry is into "the charge." It would also
24 seem contrary to common sense that an accused
25 person could be discharged for an offence for which
26 they were not entitled to a preliminary inquiry in the
27 first place.

1 In *R.S.*, the Ontario Court of Appeal
2 stated at paragraph 13 that:

3 The jurisdiction to conduct a preliminary inquiry
4 depended not only on the election for trial in a
5 superior court but also on the requirement that
6 the charge be punishable by 14 years
7 imprisonment or more.

8 It would also seem to be contrary to Parliament's
9 intention, which was stated in the legislative
10 backgrounder for Bill C-75, the bill which amended the
11 preliminary inquiry provisions as being to restrict the
12 availability of preliminary inquiries to offences liable to a
13 maximum term of imprisonment of 14 years, which
14 would greatly reduce the number of preliminary
15 inquiries and free up court time while alleviating the
16 burden on some witnesses and victims by preventing
17 them from having to testify twice.

18 As stated in *Davis* at paragraph 39:

19 In restricting preliminary inquiries, Parliament
20 sought to expedite proceedings, to protect
21 vulnerable witnesses from being examined and
22 cross-examined twice and to preserve the
23 screening and disclosure functions of the
24 preliminary inquiry for the most serious offences.
25 All of those purposes are advanced by
26 restricting the scope of preliminary inquiries only
27 to offences punishable by 14 years or more.

1 It does not seem that Parliament's intent was to permit
2 preliminary inquiries in some situations for offences
3 which would not be otherwise eligible for a preliminary
4 inquiry. That would not accord with Parliament's stated
5 intention to reduce the number of preliminary inquiries
6 and to free up court time.

7 If Parliament wanted to proceed in that
8 manner, then that exception could have been stated in
9 section 536. The interpretation advanced by the
10 defence would not comply with section 536(4), which
11 requires that the preliminary inquiry be held into the
12 charge, and it does not meet Parliament's objective of
13 restricting the availability of preliminary inquiries to
14 14-plus offences.

15 Restricting the availability of preliminary
16 inquiries to the offences which are punishable by
17 14 years or more imprisonment reflects Parliament's
18 decision that certain indictable offences which carry a
19 maximum penalty of less than 14 years are no longer
20 subject to the screening function of a preliminary
21 inquiry. That is Parliament's choice to make.

22 In order to meet the requirements of the
23 *Criminal Code* and the legislative intent of Parliament, I
24 find that the scope of the preliminary inquiry is limited to
25 14-plus offences, and this includes where there is an
26 Information which includes both 14-plus offences and
27 offences which have a maximum punishment of less

1 than 14 years.

2 As such, the Crown's application for
3 *certiorari* is granted, and the discharge on counts 1, 3
4 through 8 on the Information is quashed and the matter
5 is remitted to the Territorial Court with an order of
6 mandamus requiring the Territorial Court to commit the
7 accused to stand trial on those charges.

8 So that concludes the decision. I know
9 that --

10 E. MCINTYRE: Thank you, Your Honour.

11 THE COURT: Thank you. I know there is a pretrial
12 conference set for Monday I think afternoon on this
13 matter. I do not know if there is anything else that
14 needs to be addressed at this time, Mr. Wun?

15 B. WUN: No, thank you.

16 THE COURT: Okay. Thank you. Mr. McIntyre?

17 E. MCINTYRE: Nothing for the defence at this time.
18 Thank you.

19 THE COURT: Okay. Thank you. All right. So we will
20 adjourn. Thank you, counsel, for your submissions on
21 this matter.

22 E. MCINTYRE: Have a good day.

23 THE COURT: Thank you.

24 THE CLERK: All rise.

25 **(TELECONFERENCE CONCLUDES)**

26 **(PROCEEDINGS ADJOURNED TO DECEMBER 11, 2023,**
27 **YELLOWKNIFE)**

1 **CERTIFICATE OF TRANSCRIPT**

2 Veritext Legal Solutions, Canada, the undersigned, hereby
3 certify that the foregoing pages are a complete and accurate
4 transcript of the proceedings transcribed from the audio
5 recording to the best of our skill and ability. Judicial
6 amendments have been applied to this transcript.

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9 Dated at the City of Toronto, in the Province of Ontario, this
10 11th day of January, 2024.

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