Citation: *R. v. Le Diuzet*, 2021 YKTC 29

Date: 20210728
Docket: 20-11032
20-00743A
21-00154
21-00171
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

ADRIEN CHRISTOPHER LE DIUZET

Appearances:
Benjamin Eberhard — Counsel for the Crown
Gregory Johannson — Counsel for the Defence

RULING ON APPLICATION

[1] Adrien Le Diuzet has been charged with having committed offences on several Informations as follows:

- Information 20-11032, sworn January 5, 2021: offence date May 28, 2019 to February 25, 2020, (summons) (first in court January 11, 2021)

  Count 1 – 380(1)(a)

- Information 20-00743, sworn January 8, 2021: offence date January 7, 2021, (ICY – "in custody in Yukon") (first in court January 8, 2021) (*withdrawn April 26, 2021 and replaced by 21-00050 with process transferred*)

Count 1 - 5(2) *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*") (co-accused Courtney Alfred)
Count 2 - 354(1)(a)

- Information 20-00744, sworn January 8, 2021, offence date January 7, 2021, (ICY), (first in court January 8, 2021) (*withdrawn April 26, 2021 and replaced by 21-00050 with process transferred*)

  Count 1 - 5(2) *CDSA* (co-accused Christine Denechezhe, Paul Middleton, Havanna Papequash)

- Information 20-00842, sworn February 26, 2021, offence date February 25, 2021, (ICY), (first in court February 26, 2021) (*withdrawn June 16, 2021 and replaced by 21-00154 with process transferred*)

  Count 1 - 5(2) *CDSA*
  Count 2 - 354(1)(a)
  Count 3 - 88(2)
  Count 4 - 91(1)
  Count 5 - 145(5)(a)
  Count 6 - 88(2)

- Information 21-00050, sworn April 19, 2021: offence date January 7, 2021 (NPI) (first in court April 22, 2021) (*replaces 20-00743, 20-00744*) (*withdrawn June 7, 2021 and replaced by 21-00171 with process transferred*)

  Count 1 - 5(2) *CDSA* (co-accused Denechezhe, Middleton, Papequash)
  Count 2 - 5(1) *CDSA* (co-accused Denechezhe, Middleton, Papequash)
  Count 3 - 354(1)(a) (co-accused Denechezhe, Middleton, Papequash)

- Information 20-00743A, sworn April 22, 2022: offence dates April 15 and 22, 2021 (ICY) (first in court April 22, 2021)

  Count 1 - 145(5)(a)
  Count 2 - 145(5)(a)

  There is a problem with this Information due to the error in the jurat as to the date it was sworn.

- Information 21-00154, sworn May 25, 2021: offence date February 25, 2021 (NPI) (first in court May 27, 2021) (*replaces 20-00842*)

Count 1 - 5(2) *CDSA* (co-accused Angeline Carlick)
Count 2 - 354(1)(a) (co-accused Angeline Carlick)
Count 3 – 88(2)
Count 4 – 91(1)
Count 5 – 145(2)(a)
Count 6 – 88(2)

- Information 21-00171, sworn May 31, 2021: offence date January 7, 2021 (no process) (first in court June 7, 2021) (*replaces 21-00050*)

Count 1 - 5(2) *CDSA* (co-accused Denechezhe, Middleton, Papequash)
Count 2 - 5(1) *CDSA* (co-accused Denechezhe, Middleton, Papequash)
Count 3 - 354(1)(a) (co-accused Denechezhe, Middleton, Papequash)
Count 5 - 5(2)

[2] Mr. Le Diuzet was first released from custody on a consent release on January 12, 2021, on Informations 20-11032, 21-00743, and 20-00744.

[3] He was then before the Court on March 1, 2021, on Informations 20-11032, 20-00743, 20-00744, and 20-00842. A s. 524 application was granted. He was detained in custody after show cause. On March 19, 2021, Mr. Le Diuzet was released after review of bail under s. 520.

[4] Mr. Le Diuzet was back before the Court on April 22, 2021. The Informations before the Court at that time were: 20-11032, 20-00743, 20-00744, 20-00842, 21-00050, and 20-00743A. These matters were put over to April 26, 2021. On that date, a s. 524 order was made and process was transferred from Informations 20-00743 and 20-00744 to Information 21-00050. Informations 20-00743 and 20-00744 were withdrawn.

[5] On April 28, 2021, Mr. Le Diuzet was detained after show cause.

[6] Then, on June 7, 2021, Crown counsel withdrew Information 21-00050, indicating that they were proceeding on Information 21-00171. Process was transferred to Information 21-00171.

[7] On June 16, 2021, Information 20-00842 was withdrawn.

[8] Mr. Le Diuzet is now before the Court on Informations: 20-11032, 21-00743A, 21-00154, and 21-00171.

[9] Counsel for Mr. Le Diuzet has applied for a new bail hearing under s. 523. It is his position that in laying replacement Informations 21-00154 and 21-00171, the Crown has re-opened the right of Mr. Le Diuzet to apply for bail.

[10] Crown counsel disagrees with the position of defence counsel.

[11] In order to resolve the question of jurisdiction, an analysis of the provisions of s. 523, in particular subs. (1.1) and (2) is required.

[12] Section 523, with headings, reads:

> **Period for which appearance notice, etc., continues in force …**
>
> 523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part, the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,
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> > (a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3), until his trial is completed; or

(b) in any other case,

(i) until his trial is completed, and

(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

When new Information is received

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, section 507 or 508, as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information.

When direct indictment preferred

(1.2) If an accused is charged with an offence, and an indictment is preferred under section 577 charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment.

Order vacating previous order for release or detention

(2) Despite subsections (1) to (1.2),

(a) the court, judge or justice before whom an accused is being tried, at any time,

(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or

(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other justice,

(ii) where the accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or

(iii) the court, judge or justice before which or whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

Provisions applicable to proceedings under subsection (2)

(3) The provisions of sections 517, 518 and 519 apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2), except that subsection 518(2) does not apply in respect of an accused who is charged with an offence listed in section 469.

[13] The relevant portions of ss. 507 and 508 of the *Code* read:

Justice to hear informant and witnesses — public prosecutions…

507 (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General’s agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

Justice to hear informant and witnesses…

508 (1) A justice who receives an information laid before him under section 505 shall

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so;

(b) if the justice considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice or undertaking or to an included or other offence,

(i) confirm the appearance notice or undertaking and endorse the information accordingly, or

(ii) cancel the appearance notice or undertaking and issue, in accordance with section 507, either a summons or a warrant for the arrest of the accused to compel the accused to attend before the justice or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice or undertaking has been cancelled; and

(c) if the justice considers that a case is not made out for the purposes of paragraph (b), cancel the appearance notice or undertaking and cause the accused to be immediately notified of the cancellation.

[14] It is important to consider the process Mr. Le Diuzet is currently on in order to unravel the somewhat complex application of s. 523. With respect to Informations 20-11032 and 21-00743A, Mr. Le Diuzet is detained pursuant to the s. 524 applications made and orders granted on March 1, 2021, and again on April 26, 2021.

[15] It is Mr. Le Diuzet's status on Informations, 21-00154 and 21-00171 that is at issue here.

[16] Information 21-00154 contains the exact same counts in respect of Mr. Le Diuzet as are set out in Information 20-00842. The only difference is that Angeline Carlick has been added as a co-accused on Information 21-00154.

[17] Therefore, it would appear that by virtue of s. 523(1.1), the detention order made April 28, 2021, would continue to be in effect with respect to this Information as Mr. Le Diuzet is charged with the same offences.

[18] Information 21-00171 contains the exact same counts as are set out in Information 21-00050, with one exception. Count 5 has been added, which alleges a s. 5(2) *CDSA* offence committed January 7, 2021, on which he is accused alone, unlike Counts 1 to 3 in which he is a co-accused with Ms. Denechezhe, Mr. Middleton, and Ms. Papequash.

[19] Looking at Information 20-00743, Mr. Le Diuzet was facing a s. 5(2) *CDSA* charge with which he was co-accused with Courtney Alfred. On Information 20-00744, he was facing a s. 5(2) *CDSA* charge with which he was co-accused with

Ms. Denechezhe, Mr. Middleton, and Ms. Papequash. Both of these s. 5(2) *CDSA* offences were alleged to have occurred on January 7, 2021.

[20] On the 21-00050 Information, which replaced Informations 20-00743 and 20-00744, Mr. Le Diuzet was charged with having committed only one s. 5(2) *CDSA* offence. Ms. Alfred was added as a co-accused on this Information, with s. 5(1) *CDSA* and 354(1)(a) offences being alleged against her, in addition to the s. 5(2) *CDSA* offence she was originally charged with on Information 20-00743.

[21] Now, Information 21-00171, an additional s. 5(2) *CDSA* offence, alleged to have been committed on January 7, 2021, has been added to the charges Mr. Le Diuzet faces.

[22] Submissions were made before me on July 14, 2021. The matter was set over to July 22, 2021, to fix a date for decision. However, after reviewing the history of Mr. Le Diuzet's files and the case law that was submitted, I had counsel attend before me on July 22, 2021, to answer some questions I had with respect to the circumstances, legislation, and jurisprudence.

[23] Crown counsel confirmed, as I suspected, that the addition of Count 5 to Information 21-00171 was intended to correct an oversight when Information 21-00050 was sworn, by including the previously inadvertently withdrawn s. 5(2) *CDSA* offence on Information 20-00743. Information 21-00050 was intended to capture both s. 5(2) *CDSA* offences that Mr. Le Diuzet was charged with having committed on January 7, 2021, with different co-accused, on Informations 20-00743 and 20-00744. The addition

of Count 5 on Information 21-00171 was intended to correct the unintended withdrawal of this charge.

[24] I note that on May 19, 2021, Ms. Courtney entered a guilty plea to the s. 5(2) *CDSA* offence and was sentenced.

[25] The result is that while Information 21-00171 is a true replacement Information with respect to Counts 1 to 3, and therefore within s. 523(1.1), the same is not true with respect to Count 5. There was no judicial oversight with respect to the issuance of process on this charge, contrary to the requirements of ss. 507 and 508. As such, it would appear that Mr. Le Diuzet cannot be said to be detained with respect to Count 5.

[26] Therefore, Information 21-00171 is not a pure replacement Information, in that it does not consist of only the same or included offences, and, as such, s. 523(1.1) would not appear to apply to Count 5.

[27] However, how s. 523 has been applied in circumstances such as this does not appear to be without issue.

[28] In ***R.*** v. ***Trafiak***, 2019 BCPC 321, Brecknell J was considering circumstances where, after Mr. Trafiak had been detained following a show cause hearing, the Crown laid a new Information that included all the original charges, but also added new allegations that were unrelated to the original allegations. Both Informations were before the Court on the same date, and the warrant was executed on the new Information, causing Mr. Trafiak to be put into detention on these charges. Mr. Trafiak

consented to his remand. It appears that the original Information was subject to a stay of proceedings, although the court record was unclear as to exactly what happened.

[29] New counsel for Mr. Trafiak subsequently sought a review of Mr. Trafiak's detention status in the provincial court.

[30] Brecknell J. summed up the issue before the Court as follows:

> 9 In this case, of course, we start with the provision that Mr. Trafiak was detained after a bail hearing, remains in custody by his own consent after being arrested on a warrant, and the issue is, does the old detention order continue or, alternatively, are we in a new situation where Mr. Trafiak wishes to have bail because the old detention order ceased to exist when the new information was sworn, he was arrested, and agreed to be remanded in custody.

[31] In considering the application of s. 523(2)(c)(iii), in para. 10, he cites ***R.*** v. ***Aucoin***, 2006 ABQB 895, paras. 37 and 38:

> [37] The second set of scenarios arises upon application by the either the Crown or the accused without the consent of the other party. However, a party can only move unilaterally if the prior Part XVI order they seek to vacate would otherwise have been given continued effect by s. 523(1.1). Therefore, a party can only move without the consent of the other side if the laying of the new information would have triggered the operation of ss. 507 or 508. If not, neither the Crown nor the defence can apply to have the prior Part XVI order vacated without the consent of the other party. Therefore, if the prior Part XVI order would have continued to operate by virtue of s. 523(1.1), an application to vacate that prior order could be brought unilaterally by either party:
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> (i) before the justice who granted the original order, or any other justice, but only if the accused is not charged with an offence listed in s. 469; or
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> (ii) if the accused is charged with a s. 469 offence, only before a judge or justice of the

> superior court of criminal jurisdiction in the province; or
>
> (iii) before the court, judge or justice who will be presiding over the accused's trial.
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> [38] In the result, if an accused's trial has not yet begun, and that accused is charged with an offence listed in s. 469, and either the Crown or the accused seeks to vacate a prior Part XVI order to which s. 523(1.1) does not apply, the party seeking to vacate that order must have the consent of the other party before the application to vacate can be heard. If the requisite consent is not forthcoming, the party seeking to vacate the order has no choice other than to proceed through the regular channels of review. In the case of an Order made under s. 522(2), the regular channel of review is to the Court of Appeal via ss. 522(4) and 680(1).

[32] Brecknell J. then goes on to conclude in paras. 11 and 12:

> 11 In my view, after reviewing s. 523, ss. (1.1) does apply, in other words, that going from the K-1 to the KC-2 information, the existing detention order would continue with respect to the new information because it has already been determined the new information is not a lesser information. It is equal to or even more serious than the previous one and, in my view, (1.1) applied.
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> 12 That being the case, when we go to ss. (2) and apply *Aucoin*, ss. (2)(c)(iii), would allow the matter to be brought before the court to vacate any previous order made without the consent of the other party, but with regard to that further hearing, in my view, the burden of proof would lie on the person bringing the application to vacate, which means it would be Mr. Gagnon's requirement to show cause on behalf of Mr. Trafiak why he should be released, as opposed to the Crown having to show cause as to why he should be detained.

[33] This conclusion seems somewhat at odds with what is stated in s. 523(2)(c)(iii).

[34] The right of a party to unilaterally apply, without the consent of the other party, for a review of an order for interim release or detention under this section requires that the

prosecutor or the accused is applying "…to vacate an order that would otherwise apply pursuant to subsection (1.1)…".

[35] However, subsection (1.1), in plain language, would apply to allow for the transfer of process only if the charges on the new Information are the same or an included offence. How then, can an Information that adds charges not in the original Information be said to be charging only the same or an included offence? New offences are neither. They are new and, as Bricknell J. states with respect to the facts in ***Trafiak***, potentially more serious. They have not been subject to ss. 507 and 508. Therefore, it would seem that an application under s. 523(2)(c)(iii) should be able to be made without the consent of the other party, as process cannot be transferred under subsection (1.1).

[36] Then there are the comments in paras. 28 to 30 of ***Aucoin***, where Wachowich J. states:

> 28 In my view, subsection (1.1) must be interpreted so that it applies only in situations where the manner in which the replacement information was laid would otherwise have obligated the justice to receive information according to either of ss. 507 or 508. In ***R. v. T. (G.J.),*** *supra*, Cameron J.A. held [at para. 57] that:
>
> > [s]ections 507 and 508, which are referred to in subsection (1.1), require the justice who receives an information to follow a certain procedure. Section 523(1.1) relieves the justice of those obligations if the information is a new one charging the same or an included offence and declares that the order of interim release or detention of the accused made in respect of the initial information applies in respect of the new information.
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> 29 Likewise, in ***R. v. Vukelich***, [1993] B.C.J. No. 3076, Wood J.A. of the British Columbia Court of Appeal held [at para. 14] the effect of subsection (1.1) is:

> that s. 507 and s. 508 are inapplicable to the situation described in s. 523(1), where a new information containing the same or an included offence is laid within the same proceedings. Sections 507 and 508 authorize a justice to issue a summons or a warrant, as the circumstances require, to compel the accused to attend before the court in answer to a charge contained in an information laid before the court. Such process is clearly unnecessary in the circumstances described in s. 523(1).

> 30 As such, subsection (1.1) would seem to apply only in circumstances where the replacement information was received in such a manner that either of ss. 507 or 508 were triggered into operation. Thus, if a replacement information was brought before a justice in such a manner that either ss. 507 or 508 would normally apply, subsection (1.1) dispenses with those sections and automatically applies the original document compelling the accused's appearance in court or the prior order detaining or releasing the accused from custody to the new information.

[37] It is somewhat difficult to understand what is stated here. Logically, it would seem that if s. 523(1.1) applies, then that would mean that process would transfer. No further judicial oversight for the purpose of issuing process is required (***R.*** v. ***Sharma***, 2021 ONSC 3435, at para. 39). This is what Brecknell J. states in para. 11 in saying that the detention order transfers.

[38] However, if all that has happened is that process has transferred because the new Information contains only the same or an included charge(s), which charge(s) has or have already had process issued pursuant to ss. 507 and 508, why should there now be a right to apply to have an accused’s judicial interim release or detention order vacated. There has been judicial oversight from the swearing of the Information through to the conclusion of the judicial interim release hearing. Nothing has changed. It is illogical that by the laying of a new Information that perhaps simply, for example, adds or deletes a co-accused, and does not alter the charges, a prior release or detention

order can be subject to a Crown or defense application to be vacated, and a new bail hearing held. That would be contrary to the efficient and expeditious administration of justice, and to the interests of justice.

[39] As stated by Code J. in ***R.*** v. ***Codina***, 2016 ONSC 7305 at para. 19:

> Section 523 of the *Criminal Code* is a very practical provision that is frequently utilized. It provides that an existing bail order "in respect of an offence ... applies in respect of the new information," provided the "new information" charges "the same offence or an included offence." This means that bail proceedings do not have to be repeated every time the Crown amends counts in an Information, or files a replacement Information that charges the same offences. The Crown has relied on this provision in the proceedings before Ray J., respecting the second set of charges, by filing new Informations. The new Information on which Codina was arraigned charges the same offences as the original Information on which bail was denied. However, it varies the time frames of the offences and amends the precise terms used to describe the alleged breaches of the prior bail orders. In other words, the new Information varies the particulars alleged but it continues to charge the same offences.

[40] It would seem to make more sense to say that, where the charges are not the same and perhaps more serious, s. 523(1.1) applies only to the extent that it makes it clear that it does <u>not</u> allow for the transfer of process. This is somewhat an application of an exclusionary approach to the interpretation of subsection (1.1).

[41] If the Information includes a different charge or charges that are not included within the original charge or charges, or includes more serious charges, there is no process on these charges, as the charge or charges have not been subject to judicial scrutiny under ss. 507 or 508.

[42] In ***R.*** v. ***Dougan***, 2012 YKSC 88, McIntyre J. considered the application of s. 523(1.1) to circumstances where a new Information adding additional charges is laid, stating in paras. 18 to 20:

> 18 I turn to the new counts on the information. Subsection 523(1.1) of the *Criminal Code* deals with a new information charging the same offence. As noted above, pursuant to ss. 9(3) of the *Act* the complaint shall be dealt with as if it were an information. Subsection 523(1.1) provides, amongst other things, that when a new information is received charging the same offence or an included offence, the existing summons applies to the new information. Thus, at least for count 1 on the information, the endorsement that previous process applies is an accurate reflection of the law. The other counts on the information, however, were not the same offence or an included offence. They are related offences. But the section does not speak of related offences. Case law and commentary suggest that the Crown cannot add additional charges without serving process.
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> 19 In Ewaschuk E.G., *Criminal Pleadings and Practice*, 2nd ed., looseleaf (Aurora: Canada Law Book, 1987) at 10:3105 - "Duplicative (replacement) information", Ewaschuk J. says *Criminal Code* s. 523 (1.1) does not allow the Crown to tack on new offences as of right. However, should the accused appear before a court which has jurisdiction to hear the charges, the court has jurisdiction to proceed even without new process. Authority for this proposition is found in *R. v. McCarthy*, [1998] B.C.J. No. 2812, 131 C.C.C. (3d) 102 (S.C.) where at para. 37, Melnick J cites *R. v. Whitmore*, (1987) 41 C.C.C. (3d) 555, aff'd 51 C.C.C. (3d) 294 (Ont. C.A.). In *Whitmore*, Ewaschuk J., held that when an accused and a new information are before the court, the court has jurisdiction to deal with the information since the accused is already before the court. At paragraph 10:3105 of *Criminal Pleadings and Practice*, Ewaschuk J. comments on *McCarthy*, noting that McCarthy had attorned to the jurisdiction of the court.
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> 20 The proposition that when an accused and a new information are before the court, the court has jurisdiction to deal with the information since the accused is already before the court is clearly supported in *R. v. Lindsay*, [2006] B.C.J. No. 636, 2006 BCCA 150. Newbury, J.A., writing for the Court, stated at paragraph 20: "I agree with the Chambers judge that the weight of Canadian authority is to the effect that jurisdiction will not be affected by the manner in which the accused is brought before the court, assuming the charging document is not defective."

> [See also ***R.*** v. ***McCarthy*** (1998), 131 C.C.C. (3d) 102 (S.C.), paras. 24 to 31]

[43] In ***R.*** v. ***Millar***, 2012 ONSC 1809, an earlier decision of Code J., he rejects defence counsel's arguments that adding a new charge excluded the operation of s. 523(1.1) to transfer process, stating in paras. 21 and 22 that:

> 21 …He [defense counsel] submits, however, that s. 523(1.1) has no application because the replacement Information was not "a new information charging the same offence or an included offence". Where the new Information adds some further offence like the impaired driving count in this case, that is not "the same offence or an included offence", Mr. Little submits that it is no longer "a new information" within the meaning of s. 523(1.1). I do not accept this construction of s. 523(1.1). In effect, Mr. Little is adding the word "only" into the section so that it reads, "a new information charging <u>only</u> the same offence or an included offence". There is no substantive reason to require a count in an Information, that has already gone through the s. 508 process once, to go through that process a second time. Adding the word "only" into the text of s. 523(1.1) is, therefore, illogical. A more purposive reading of s. 523(1.1) is that it applies to counts in a new Information that charge "the same offence or an included offence". I note, in this regard, that the s. 785 definition of "information" includes "a count in an information" and that the s. 2 definition of "indictment" includes "information or a count therein".
>
> 22 I am therefore satisfied that the learned trial judge erred in quashing count one in the replacement Information. Even if the *Gougeon* line of authority governs, there was only a failure to comply with s. 507 or s. 508 in relation to count two in the replacement Information, which charged the added offence of impaired driving. At most, the learned trial judge should have held that there was a lack of jurisdiction in relation to count two but not in relation to count one.

[44] In ***Millar***, Code J. was dealing with a two-count Information at trial alleging a refusal and an impaired driving charge. The impaired driving count had been added by the filing of a new Information, without following the procedures set out in ss. 507 and 508. Crown counsel did not proceed with the impaired driving charge at trial.

[45] Defense counsel's argument was related to the validity of the new Information at all, not whether a right of review under s. 523(2)(ii) was triggered. What Code J. did was hold that the ss. 507 and 508 procedures that had been followed with respect to the refusal count were still in effect, and that s. 523(1.1) applied to transfer process with respect to that count.

[46] He does, however, state that limiting the application of subsection (1.1) in a way that reads the word "only" into the section, is wrong. He then goes on to consider the ss. 507 and 508 procedures to speak of a count that has already been through these procedures not logically being required to go through these procedures a second time.

[47] With all due respect, while I agree with the dispensing of the necessity of repeating the ss. 507 and 508 procedures, it cannot be said that an added charge has done that, if it has simply been added and no process issued on it.

[48] Further, in the event that a new Information is laid that no longer charges an accused with a particular offence, again subsection (1.1) would apply only to the extent that it means that process does not automatically transfer. The jeopardy of the accused that he or she faced at the judicial interim release hearing may have changed in favour of the accused, thus perhaps impacting the threshold for release. The converse is true. If a more serious or additional charge or charges are laid, the change in the accused's jeopardy may be altered in a way that perhaps would lean towards detention rather than release.

[49] This, I believe, is the rationale for allowing either the prosecutor or the accused to apply under s. 523(2)(c), without consent, to vary any release or detention order previously made.

[50] In conclusion, I appreciate that I may not be fully understanding and stating the approach taken by judges in some of the cases that I have referred to. This said, I intend to take a pragmatic approach to the issue, resolving it in a way that, to me, makes the most sense in light of the objectives of the judicial interim release provisions of the *Code*.

[51] In this case, Information 21-00154 charges the same offences as were on the prior process, Information 20-00842. Therefore, s. 523(1.1) applies to allow for the transfer of process to Information 21-00154. In doing so, there is not a unilateral right under s. 523(2)(c)(ii) to re-open Mr. Le Diuzet's detention order in respect of this Information.

[52] Information, 21-00171, however, adds an additional charge, Count 5 being a second s. 5(2) offence. The circumstances are different from the s. 5(2) *CDSA* offence Mr. Le Diuzet is accused of committing in Count 1. Therefore s. 523(1.1) does not allow for process to be transferred and s. 523(2)(c)(iii) allows Mr. Le Diuzet to apply to vacate his detention order.

[53] I appreciate that this charge was subject to the provisions of ss. 507 and 508 when Information 20-00743 was sworn and process issued. Had this charge on Information 20-00743 been included on Information 21-00050, and process transferred, rather than this charge being withdrawn, then s. 523(1.1) would have applied to transfer

process, and consent to re-open Mr. Le Diuzet's detention order would have been required under s. 523(2)(c). However, once the charge was withdrawn, it cannot simply be laid again and have the prior judicial oversight re-apply. It must be treated as a new charge.

[54] In the event that I am wrong in my consideration of the application of s. 523(1.1) and s. 523(c)(iii) to these Informations, it would seem that it would have the same result, as, instead of being able to revoke the detention of Mr. Le Diuzet and proceed to a judicial interim release hearing on Information 21-00171, as I have decided, he would instead be able to apply on Information 21-00154. This is the position of counsel for Mr. Le Diuzet, that the plain reading of s. 523(2)(c) allows for an application to re-open Mr. Le Diuzet's detention order because subsection (1.1) applies to charges on a new Information that are the same.

[55] One further issue that requires consideration is whether the laying of a single Information that opens the door to a unilateral application to review the release or detention of an accused, triggers the right to apply to revoke the order that has been made in respect of several Informations that were, pursuant to s. 524, all before the Court at the judicial interim release hearing. In my opinion, the only logical answer is yes. The order for release or detention was made on the basis of all the Informations that were before the Court at the time, and, as such, if a further judicial interim release hearing is granted on one of the Informations, all should be before the Court.

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COZENS C.J.T.C.