

**In the Court of Appeal of Alberta**

**Citation: R. v. Lupyrypa, 2011 ABCA 52**

**Date:** 20110210  
**Docket:** 0803-0201-A  
**Registry:** Edmonton

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Barry Lupyrypa**

Appellant

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**The Court:**

**The Honourable Madam Justice Carole Conrad  
The Honourable Mr. Justice Keith Ritter  
The Honourable Mr. Justice Vital Ouellette**

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**Memorandum of Judgment**

Appeal from the Judgment by  
The Honourable Mr. Justice B.R. Burrows  
Dated the 11th day of July, 2008  
Filed on the 11th day of July, 2008  
(2008 ABQB 427, Docket: 061118246U1)

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## Memorandum of Judgment

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### The Court:

[1] The appellant appeals the decision of a Queen's Bench judge refusing to grant *certiorari* quashing an information laid in provincial court. He advances numerous grounds of appeal. All are without merit. His appeal is dismissed.

### Background

[2] On February 11, 2006, the appellant was involved in a confrontation with RCMP constable Daniel Kehler near Morinville, Alberta. On September 9, 2006, Constable Kehler swore an Information against the appellant charging him with assault of a peace officer and obstruction of a peace officer.

[3] In laying the charges, the Constable relied on sections 504 and 508.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. The Constable faxed the Information to the Justices of the Peace offices in Edmonton and received back a sworn Information and Summons requiring the appellant to appear to answer the charges in provincial court in Morinville.

[4] The appellant argues that the process used by the Constable and the two Justices of the Peace who, respectively, received and swore the Information and issued the Summons was defective in three respects and that the Information is a nullity. He also argues that the Information sent by the Constable was insufficient to ground the laying of charges in any event.

[5] The appellant initially applied to the provincial court challenging the process and sufficiency of the Information but was told that he would have to apply in the superior court as the provincial court lacked jurisdiction to deal with his concerns. He then filed an application in Queen's Bench. The Queen's Bench judge hearing the application concluded that, even though more than six months had passed between the date when the Information was sworn and the date when the appellant filed his motion in Queen's Bench, he could nevertheless entertain the application by extending time. He also concluded that all of the appellant's substantive arguments lacked merit and dismissed his application. The issue of whether or not the six months limit applies to the facts of this appeal is not before this panel as the Crown respondent was successful in resisting the appellant's application in any event and consequently it has not appealed this determination. We will not comment on this issue in this memorandum.

### Analysis

[6] The swearing of the Information in this case was done using telecommunications technology. Section 504 of the *Criminal Code* sets out the substantive and formal requirements that are to be met in the swearing of an information. It provides:

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

[7] Section 508.1(1) and (2) provide for the use of telecommunications in the swearing of an Information. It states:

508.1 (1) For the purposes of sections 504 to 508, a peace officer may lay an information by any means of telecommunication that produces a writing.

(2) A peace officer who uses a means of telecommunication referred to in subsection (1) shall, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to the officer's knowledge and belief, and such a statement is deemed to be a statement made under oath.

[8] Section 507 sets out the process to be used and the duties of the justice who swears the Information. It provides:

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.

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence on oath; and

(b) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

(5) A justice shall not sign a summons or warrant in blank.

(6) A justice who issues a warrant under this section or section 508 or 512 may, unless the offence is one mentioned in section 522, authorize the release of the accused pursuant to section 499 by making an endorsement on the warrant in Form 29.

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 499, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 145(5), to have been confirmed by a justice under section 508.

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a

justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing.

[9] Much of the appellant's argument, included what is in his factum, is not directed at the alleged errors of the Queen's Bench judge, but at the validity of his initial arrest and about whether the Constable's assertions should have been believed. Although stated in numerous different ways, the appellant argues that the Queen's Bench judge erred in three respects:

1. By failing to accept the appellant's contention that the faxed outline of the confrontation was insufficient to support the charges that were laid.
2. By determining that the Justice of the Peace who received the faxed material from the Constable was fulfilling a ministerial function not subject to review.
3. By deciding that a Justice of the Peace "hears" a matter when she reads faxed materials.

[10] In the faxed materials, the Constable described the basic elements of the confrontation, which included the appellant's refusal to comply with the Constable's directives and physical contact initiated by the appellant. This is sufficient to support the charges that were laid. The first ground of appeal has no merit.

[11] The second general argument advanced by the appellant relates to the Justice of the Peace who received and signed the faxed Information. The Queen's Bench judge held that this Justice performed a series of purely ministerial functions which are not subject to review. He relied on the authority of *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. S.C.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.) in coming to his decision. In that case, the court determined that before the receiving justice can swear an Information, the justice must perform a series of ministerial functions. These include determining whether the Information describes the accused person so as to be identifiable and assuring that the Information describes an offence known to law. Once these requirements, which establish that the Information is valid on its face, are met, the justice has no choice but to swear the Information: *Whitmore* at 563-564; *R. v. Read, ex parte McDonald et al.* (1968), 1 D.L.R. (3d) 118 at 122-123 (*sub nom. McDonald v. Alberta (Attorney General)*), 66 W.W.R. 111 (Alta. S.C. (A.D.)); *R. v. Edge*, 2004 ABPC 55, 355 A.R. 233 at para. 30; *R. v. Jean Talon Fashion Center Inc.* (1975), 22 C.C.C. (2d) 223 at 227, 56 D.L.R. (3d) 296 (Que. Q.B.).

[12] We conclude that the Queen's Bench judge did not err in his treatment of this issue.

[13] With respect to the appellant's third argument, he relies on section 507(1)(a) which directs the justice of the peace to hear and consider, *ex parte*, the allegations of the informant. The appellant argues that no *ex parte* hearing was held. Rather, the faxed Information was read by the Justice of

the Peace herself. In effect, the appellant argues that someone had to read the Information to the Justice of the Peace so that she could “hear” it. Such a literal interpretation would render nugatory the purpose of s. 508.1 which establishes a mechanism for faxed Informations. We conclude that an *ex parte* hearing occurs when a justice of the peace reads a faxed Information and signs it. This ground is also without merit.

[14] Although the appellant did not really argue a fourth issue, it did come up during the course of the appeal hearing. That issue arises in the wording of section 508.1(2) of the *Criminal Code*. That provision states that a peace officer who makes use of telecommunications in order to lay an information should state that all the matters contained in the information are true to the officer’s knowledge and belief. In this case, the Constable did not strictly do that. Instead, he faxed particulars of the offence that set out in brief form what transpired. He also faxed the Information setting out the two charges in which he stated that pursuant to section 508.1 of the *Criminal Code* all matters contained in the Information were true to his knowledge and belief. In our view, this was sufficient to meet the obligation imposed by section 508.1. However, we note that it would be preferable to repeat the section 508.1 statement on the particulars that are provided.

[15] This appeal is dismissed.

Appeal heard on January 7, 2011

Memorandum filed at Edmonton, Alberta  
this 10th day of February, 2011

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Authorized to sign for: Conrad J.A.

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Ritter J.A.

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Authorized to sign for: Ouellette J.

**Appearances:**

D.C. Marriott, Q.C.  
for the Respondent

Barry Lupyrypa In Person  
the Appellant