IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 110/2024**

IN THE MATTER OF **SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2024) FROM CA441/2023 ([2024] NZCA 318)**

Referrer

SUBMISSIONS ON BEHALF OF THE SOLICITOR-GENERAL

3 February 2025

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COUNSEL FOR REFERRER CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION.

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SUMMARY

1. A defect occurred due to human error with the result that statutory requirements designed to protect citizens by providing an independent Law Officer "check" on certain prosecution decisions were not all met at the time the statute required. But:

   1.1 the independent check did in fact happen;

   1.2 it happened at the right time, i.e. prior to charge;

   1.3 it was carried out by a well-equipped – indeed, the most well-equipped – person to do it;

   1.4 the decision was carefully made, applying specialist legal expertise;

   1.5 but for the error, the decision-maker would have held the proper authority required under the statute;

   1.6 at the time, the decision-maker properly held the delegation from the Solicitor-General to exercise that Law Officer's powers, and was properly appointed to act in her temporary role;

   1.7 the defect was identified two years before trial and steps were immediately taken to address it;

   1.8 the Senior and Junior Law Officers themselves confirmed that they approved the actual decision that had been made in the original flawed process; and

   1.9 there was no material prejudice to the defendants from either the defect or the process undertaken to fix it.

2. Notwithstanding these facts, the Court of Appeal quashed convictions for serious offending, reached after an otherwise unimpeachable trial.

3. The Solicitor-General submits that the Court's reasoning and conclusion are, with respect, contrary to public interest and not supported by contemporary law. The Court applied a rigid and outdated approach which has unhelpful

implications for the criminal law, especially concerning the law's ability to correct errors.

4. The Solicitor-General on this reference appeal asks this Court to take a nuanced approach to the question of "nullity" having regard to the nature, degree, and impact of any defect. Whether an error in statutory delegated decision-making can be fixed is also inherently circumstance – rather than "category" – specific. Particular focus should be put on the purpose of the statutory provision, the timeliness of the attempt to rectify, and, importantly, whether any material prejudice has arisen.

BACKGROUND

Corruption by officials

5. Simon Nikoloff and Gerard Gallagher (the **defendants**) were charged by the Serious Fraud Office with corrupt use of official information.[1] They were alleged to have obtained a commercial advantage for their private company through the use of official information in two transactions.[2]

5.1 While working as investment facilitators for the Canterbury Earthquake Recovery Agency (**CERA**), a government department, the defendants learned the YHA building in central Christchurch was for sale and came up with a plan to secure the property for their own personal profit. They made false representations to the vendor about an "anonymous investor". They then obtained due diligence material that they would not have received but for their roles at CERA. They obtained a conditional agreement for sale and purchase for their own company, preventing other potential purchasers from securing the property (the commercial advantage). Their attempts to obtain an investor to invest in their company did not ultimately come to fruition.

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1 Under s 105A of the Crimes Act 1961 **[[BoA Tab 1]]**. See Crown Charge Notice, Charge 3 **[[02 COA Case Book 18]].**

2 A more detailed summary of the facts as established at trial is available in the Sentencing Remarks of Harland J 6 July 2023 **[[02 COA Case Book 400]]** and the Summary of Facts **[[02 COA Case Book 24]].**

5.2 The defendants later worked as officials at Ōtākaro Limited, a government entity that replaced CERA when it was disestablished in 2016. Through his public role, Mr Gallagher learned that a company that was looking to build a facility on an Ōtākaro property also needed more land from a neighbouring site known as "Stonehurst". He used his knowledge of the company's intentions to develop his own business plan to acquire the Stonehurst land in a manner that would benefit him and his sons. Mr Nikoloff was alleged to have been involved with this transaction also, but he was acquitted of the charge he faced in relation to this transaction.

Consent sought and considered

6. Prosecution of corruption charges, including corrupt use of official information, require the consent (or "leave") of the Attorney-General.[3] Here, the Serious Fraud Office sought the required approval via the Crown Law Office in accordance with the established practice.[4] The decision to grant leave was made by an Acting Deputy Solicitor-General (Criminal) (the **Acting Deputy**).[5] The necessary written endorsement of consent[6] was presented at the time the charges were filed in August 2019.[7]

7. The defendants entered not guilty pleas and the matter proceeded to trial.

8. In the pre-trial stage, it was discovered[8] that there had been an oversight when the Acting Deputy had been appointed. The Solicitor-General had delegated her functions, duties and powers to the Acting Deputy pursuant

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3 Section 106 of the Crimes Act 1961 **[[BOA Tab 1]]** provides: "[n]o one shall be prosecuted for an offence against any of the provisions of… s 105A… without the leave of the Attorney-General, who before giving leave may make such inquiries as he or she thinks fit."

4 By long-standing practice, consent is considered by the Deputy Solicitor-General (Criminal) under delegation pursuant to s 9C(1) of the Constitution Act 1986 **[[BOA Tab 2]]**. See Solicitor-General's Prosecution Guidelines 2013 at 11 (available at https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf) and Solicitor-General's Prosecution Guidelines 2024 (available at https://www.crownlaw.govt.nz/prosecution-guidelines/statutory-consents-to-prosecutions).

5 Namely, Ms Charlotte Brook. The permanent Deputy Solicitor-General, Mr Horsley, was out of the county.

6 See s 24 of the Criminal Procedure Act 2011 **[[BOA Tab 3]].**

7 See Consents to prosecute dated 8 August 2019 **[[03 COA Additional Materials 16]]**.

8 On 27 January 2021, counsel for Mr Gallagher requested evidence of the delegations that is relevant to the consent to prosecute Mr Gallagher. The Crown then identified the missing delegation.

to s 9C(2) of the Constitution Act 1986,[9] but there was no delegation of the *Attorney-General's* powers (s 9C(1)).

9. While the Solicitor-General herself can exercise the functions, duties and powers of the Attorney-General,[10] the onwards delegation of the Attorney's functions requires a written delegation from the Solicitor-General and the written consent of the Attorney to that course.[11] The delegation of the Attorney's powers and functions did not occur in this instance.

10. Accordingly, the leave granted to the Serious Fraud Office to file the charges was flawed because the Acting Deputy did not have the delegation to grant it.

11. This flaw was discovered early in 2021, some months before the trial was then due to start. The Crown might have invited dismissal of the charges as nullities at that time, and the charges could have been re-filed, with the entire prosecution process starting afresh. There was no statutory limitation period preventing this course, and the defendants accepted this option was available. But, dismissing the proceedings risked the loss of the existing trial date and duplication of the earlier process. Instead, the Crown took a positive step to substantively correct the defect.

12. In a document entitled "Instrument of Ratification" dated 16 March 2021, the earlier decision of the Acting Deputy was ratified – that is, approved, by the appropriately qualified statutory decision makers:[12]

    12.1 the Solicitor-General approved the granting of leave to prosecute the defendants by the Acting Deputy; and

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9 See the Delegation of Solicitor-General Functions to Charlotte Brook (July 2019) **[[03 COA Additional Materials 15]]**, and s 9C of the Constitution Act 1986 **[[BOA Tab 2]].**

10 Constitution Act 1986, s 9A **[[BOA Tab 2]]**.

11 Constitution Act 1986, s 9C(1) which provides that: "[t]he Solicitor-General may, with the written consent of the Attorney-General, in writing delegate to a Deputy Solicitor-General, any of the functions or duties imposed, or powers conferred, on the Attorney-General." At the relevant time, there was an effective written consent of the Attorney-General to the Solicitor-General's onward delegation of his powers (the Attorney-General at the time was the Hon. David Parker), but that consent specifically named the then-permanent Deputy Solicitor-General (Mr Brendan Horsley) and not the Acting Deputy).

12 See Instrument of Ratification 16 March 2021 **[[03 COA Additional Materials 30]]** and Crown Memorandum dated 25 March 2020 **[[03 COA Additional Materials 26]]**.

12.2 the Attorney-General consented to the Solicitor-General approving the granting of leave to prosecute the defendants by the Acting Deputy.

13. The ratification in this case related to the instance in which the Acting Deputy had exercised the power of the Law Officers to grant leave to prosecute in this individual case. (It was not an attempt to ratify or recreate the non-existent s 9C(1) delegation itself.)

14. Steps have subsequently been taken to avoid such oversights in the future. Crown Law has developed fixed templates for delegation processes, checklists, and a rigid peer review process. At the same time, the Solicitor-General is conscious that experience and case law from New Zealand and overseas confirms that, almost inevitably, human errors in statutory delegation and consent processes do arise. This Court's grant of leave reflects that how the law responds to such errors – the circumstances of which are highly variable – raises important matters of principle which have significant impact on criminal prosecutions.

Pre-trial challenge

15. The defendants did not accept the validity of the ratification and applied pre-trial for the charges to be dismissed as nullities.[13] The defendants contended ratification was not available because the statute required the Attorney's consent to prosecute *prior* to commencement of prosecution and the Court should insist on strict compliance with a criminal statute. The defendants nevertheless agreed that if the charges were nullities, the SFO could file the charges again.[14]

16. The Crown accepted that charges filed without the required consent would usually be found to be nullities, but submitted the Court should accept rectification was possible through the process followed here. It was

13 See Judgment of Venning J on s 147 application **[[02 COA Case Book 63]]**.

14 Judgment of Venning J on s 147 application at [15] **[[02 COA Case Book 66]]**.

consistent with the common law doctrine of ratification and the interests of justice to permit the charges to be restored by this means.

17. Venning J accepted it was possible to ratify criminal proceedings before trial and declined to dismiss the charges.[15] While the timeframe for when errors can be corrected in consents to prosecute is not a clear line, if ratification had been attempted after a defendant was placed in charge of the jury, it would likely be too late to ratify. His Honour rejected the contention that the terms of the ratification document itself were ineffective to fix the flaw.[16] The prosecutions were held not to be nullities.[17] The case continued to trial.

18. The August 2021 trial was aborted on day three due to a COVID-19 lockdown. The trial ultimately occurred in February and March 2023. Mr Nikoloff was convicted of one charge in relation to the attempted purchase of the YHA building, and Mr Gallagher of charges for both transactions. They were both subsequently sentenced to home detention and completed their sentences.

COURT OF APPEAL

19. Mr Nikoloff appealled his conviction to the Court of Appeal on two grounds:

    19.1 The error in the Attorney-General's consent resulted in a charge that was a nullity, and Venning J was wrong to find the error was validly ratified.

    19.2 The framing of Charge 3 as a "course of conduct" resulted in prejudice to Mr Nikoloff. This made the trial unfair and/or resulted in a miscarriage of justice.

20. Mr Nikoloff's appeal was allowed on ground one. The Court did not otherwise consider there was any basis to find a miscarriage of justice.

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15 Judgment of Venning J on s 147 application at [59] **[[02 COA Case Book 79]]**.

16 Judgment of Venning J on s 147 application at [60]-[65].

17 Judgment of Venning J on s 147 application at [67]. This decision being an unsuccessful application to dismiss charges, the defendants could not appeal Venning J's decision.

21. Mr Gallagher, who initially had not appealed his convictions, was later granted leave to appeal out of time and his convictions were set aside on the same basis.[18]

22. As the Court of Appeal found there were no valid charges no re-trial was ordered,[19] but there was no legal impediment to the charges being re-filed. However, the Serious Fraud Office decided it was not in the public interest to commence a fresh prosecution of either defendant.[20]

23. As the respondent to a successful conviction appeal, the Crown cannot directly appeal the Court of Appeal's decision, hence the reference appeal. The outcome of this Court's decision on this reference appeal will not impact the defendants personally.[21]

SOLICITOR-GENERAL'S REFERENCE

24. The Court of Appeal held the charges, and thus the subsequent trial, were nullities, making them void in the "absolute" sense. The Crown's attempted correction of the error was ineffective because "there was nothing to be saved".[22] And in any event, ratification was not available in this statutory and factual context.[23]

25. This Court has granted the Solicitor-General's application for leave to refer two questions of law to this Court. The two questions are closely related, and the analysis and factors relevant to both questions merge. The Crown's summary answers are in italics:[24]

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18 *Gallagher v R* [2024] NZCA 589 **[[BOA Tab 4]]**. The Crown acknowledged that given the Court of Appeal's decision in *Nikoloff v R* [2024] NZCA 318, which the Crown cannot directly appeal, and as a matter of even-handed treatment of the co-defendants, the Court of Appeal would almost certainly allow his appeal. The Crown maintained however, for the same reasons as in Mr Nikoloff's case, that the charge and the trial were not nullities and there has been no miscarriage.

19 No question of re-trial arose. As the charge was a nullity, the Crown could re-file it. See *Narayan v R* [2022] NZCA 527 at [7] **[[BOA Tab 5]]**. This was also the effect of the outcome in *R v Lalchan* [2022] EWCA Crim 736, [2022] 3 WLR 385 **[[BOA Tab 18]]** discussed further below.

20 This decision was announced on 25 November 2024, see https://sfo.govt.nz/media-cases/media-releases/court-of-appeal-has-set-aside-the-convictions-of-simon-nikoloff-and-gerard-gallagher.

21 Criminal Procedure Act 2011, s 318(5).

22 Court of Appeal decision at [63] **[[01 SC Casebook 31]].**

23 Court of Appeal decision at [64]-[82] **[[01 SC Casebook 31]].**

24 *Solicitor-General's Reference (No 1 of 2024) From CA441/2023* [2024] NZSC 160 **[[01 SC Casebook 8]].**

25.1 Was the defect in the leave given on behalf of the Attorney-General able to be remedied or rectified by the instrument of ratification?

In principle, the defect that occurred here was in law capable of being remedied. Essential to that is the argument that the charge was not a nullity void ab initio (or void in an absolute sense); it was not incurable.

The instrument of ratification was effective in all the circumstances of this case to rectify (i.e. overcome) the defect in the consent process and thereby saved the charges.

25.2 Was the trial at which Mr Nikoloff was convicted a nullity?

The charges were cured by the ratification, and therefore the trial, two years later, was valid and also not a nullity.

A NUANCED APPROACH TO NULLITY

26. It is well-accepted that a trial on a charge lacking the required Law Officer consent is a nullity. Likewise, a trial on a charge that is a nullity will itself be a nullity. The Crown does not seek to argue otherwise. The Crown also accepts that the relevant statutory provisions required consent to be given at the time the charges were filed.[25]

27. However, the Crown *does* challenge the Court of Appeal's conclusion that a prosecution commenced without the requisite Law Officer consent is a nullity that is "void in an absolute, wholly retrospective sense",[26] or void "ab initio" (referred to in these submissions as "**absolute nullity**"). The Crown invites this Court to take an approach to nullity that avoids rigid boundaries that do not allow consideration of individual facts and circumstances. There

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25 The procedural mechanism by which consent is proved in court is in s 24 CPA, which states that consent may be proved by the filing of a memorandum, but does not require the memorandum at any particular time. Crimes Act 1961, s 106(1) requires "no one shall be prosecuted…" **[[BOA Tab 1]]**. There are a number of other criminal offences that also require the consent of the Attorney-General. A variety of statutory wording is used, some of which more expressly require consent before charges are filed. There is no apparent policy reason for the differences. The Crown accepts, as the Court of Appeal found (at [78]) that s 106 required consent before the prosecution commenced.

26 Court of Appeal Decision at [60] **[[01 SC Casebook 30]].**

are different degrees of nullity, and in the circumstances of this case the charges were not so fundamentally flawed that they could not be repaired.

28. The absolute nullity approach taken by the Court of Appeal in this case is not in the interests of justice, nor does it support public confidence in the administration of justice. Viewing defects in criminal procedure through a rigid "nullity" categorisation does not elucidate the nature of the underlying legal issues, or the factors that may, in certain cases, be relevant to whether a defect is curable.

The test for nullity

29. There is limited case law in New Zealand considering the definition of "nullity" and the implications of such a finding. The cases, and general principles, support a nuanced approach. The nuanced approach in turn enables recognition to be given to the statutory context.

30. New Zealand courts long ago rejected the "Exchequer rule" whereby any and all technical or procedural errors invalidate the entire court process.[27] Some defects are nevertheless so serious that a document or process must be treated as a nullity. Quintessential situations involve charges filed in the wrong court, beyond a limitation period,[28] or without the required statutory consent,[29] or for offences not known at law.[30]

31. Nullity is not however a rigid category. Rather, it is a question of degree. For instance, in *Hall*, the Court of Appeal found:[31]

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27 See *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [11].

28 See *C (CA100/16) v R* [2017] NZCA 58 where, at [9], the Court classed as a nullity a trial occurring without the Attorney-General's consent to charges being filed outside the limitation period. (The Crown conceded this.) See also *Nisha v R* [2016] NZCA 294 where charges filed out of the limitation period were nullities, and similarly *Balchin v R* [2016] NZCA 563 where a conviction on a charge filed outside the limitation period was declared to be a nullity.

29 Discussed further below.

30 In *R v Fonotia* (CA 413/06, 10 May 2007) the Solicitor-General appealed a sentence that had been imposed for drug offences.201 During the hearing of the appeal, the Court of Appeal raised the issue of whether some of the charges were known at law ("selling a controlled drug"). This issue had not been raised by the parties. The Court concluded that the offences were not known at law and quashed the convictions on those charges – even though this was a Crown appeal against sentence! The Court could not sanction a sentence which had been imposed for a non-existent law. The convictions were a nullity.

31 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 58 **[[BOA Tab 8]].** See similarly *Police v Thomas* [1977] 1 NZLR 109 (CA) at 121 **[[BOA Tab 9]]:** "No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity. But nullity or otherwise is apt to be a question of degree:

> "Nullity" or otherwise can be a question of degree. No doubt if a document or proceeding is so gravely defective that it should be treated as completely non-existent… The Court is slow, however, to reach such a drastic conclusion, even where there are substantial deficiencies.

32. This Court touched on the "parameters of the concept of nullity" in *S v R*,[32] a case concerning a failure to advise a defendant of the possibility of a judge-alone trial. The argument that the irregularity resulted in a nullity was not pressed by the appellant in that case, and so this Court did not reach detailed conclusions on the parameters of a nullity (other than concluding what had occurred there had not given rise to a nullity).

33. If a charge (or other document) is a nullity it cannot be "cured" by a "proceedings not to be questioned for want of form" provision – i.e. s 379 Criminal Procedure Act 2011[33] which replaced s 204 Summary Proceedings Act 1957.[34] That provision is designed to ensure that procedural errors do not render proceedings invalid unless they have resulted in a miscarriage of justice. It operates automatically to enable a court to "overlook" such a defect or error. A jurisdictional error – which is effectively the result of the flawed consent – is more fundamental and cannot be overcome in this manner. However, it does not follow that a nullity must be 'absolute' and unable to be fixed by any means. Ratification is a positive act that acknowledges an error and seeks to substantively – and publicly – correct it. It is conceptually different from a "proceedings not to be questioned for want of form" provision.

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compare *Broom v Chenoweth* (1946) 73 CLR 583, 601, per Dixon J; *NZ Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630, 636, and the authorities there cited. In practice the questions of miscarriage and nullity will often tend to merge."

32 *S v R* [2018] NZSC 124, [2019] 1 NZLR 408 **[[BOA Tab 10]].**

33 Section 379 of the Criminal Procedure Act 2011 **[[BOA Tab 3]]** provides that: "No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice."

34 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [120] **[[BOA Tab 11]]**: "…the authorities accept that some defects are so serious that the document or process concerned must be treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach. The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204."

34. The proposition that nullity is a nuanced, rather than absolute, concept aligns with the general shift in the common law away from fixed rules of invalidity to a more flexible approach giving emphasis to the statutory context.[35] Inflexible invalidity rules are contrary to the fair and effective administration of criminal justice.[36] In another context, this Court has endorsed the view that "the correct modern approach to procedural requirements is for the courts to focus not on literal classification but rather on what should be the legal consequence of non-compliance with a statutory or regulatory provision."[37] The crucial question is whether the legislature intended a failure to comply with a procedural provision to vitiate all that followed.[38]

35. The above aligns with the approach in the United Kingdom to statutory non-compliance. As the House of Lords found in *R v Soneji*[39] when considering the impact of invalidity, the analytical focus should be on:

> (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement.

36. More recently, the United Kingdom Supreme Court affirmed *Soneji* in *A1 Properties (Sunderland) Ltd*.[40] Their Lordships went on to say:[41]

> Often, however, analysis according to the *Soneji* approach does not lead to such a clear-cut result. The statutory regime may reflect, and balance, a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime. In that situation, a more nuanced analysis may be called for…A test of

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35 See *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) and *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 in particular at [74]-[76] **[[BOA Tab 12]]**. In the criminal law context, see most recently *Wallace v R* [2023] NZCA 422 at [145]-[153] **[[BOA Tab 13]]** (leave to appeal this case has been declined: [2024] NZSC 8). See also *Ortmann v United States of America* [2020] NZSC 475, [2020] 1 NZLR 475 at [535] in which this Court referred to the eschewing of the theory of absolute invalidity in New Zealand.

36 See the discussion in *Wallace v R*, above n 35, at [145]-[153] **[[BOA Tab 13]]**.

37 *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 35, at [74].

38 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* at [75], citing the Privy Council in *Charles v Judicial and Legal Service Commission* [2002] UKPC 34, [2003] 2 LRC 422.

39 *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 **[[BOA Tab 19]]**.

40 *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27 **[[BOA Tab 20]]**.

41 At [63].

> substantial compliance with a procedural rule may be an appropriate way to allow for such a balance to be struck between competing purposes. If there has been substantial compliance with the rule, so that the purpose served by it has largely (if not completely) been fulfilled, it may more readily be concluded that fulfilment of the competing substantive purpose of the legislation should be given priority.

37. It is against this background that the Crown contends the question of whether a nullity in a particular case is absolute should involve attention to whether the statutory purpose has been breached in a substantive manner. Viewing nullity as a circumstance dependent concept, rather than a category, enables recognition to be given to the particular statutory purpose.

38. In the context of a conviction appeal, nullity is a statutory concept. Where an error, irregularity or occurrence has resulted in a trial that is a nullity,[42] a conviction appeal must be allowed without any further enquiry into the impact of the error.[43] Whether this should occur is again a question requiring "an overall assessment of the error against the relevant statutory background" and "in making that assessment it is critical to understand the place of the requirement that has been breached in the scheme of the legislation". [44]

39. Where the error causing nullity is discovered before a trial starts, and appropriate steps are taken to remedy the error, a principled system of justice should find the trial itself is not tainted by the earlier error.

40. A nuanced approach to nullity would permit a nullity to be remedied in appropriate circumstances. Whether this is possible is a question requiring careful consideration of the facts and statutory context in every case.

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42 Criminal Procedure Act 2011, s 232(4) **[[BOA Tab 3]].**

43 *Haunui v R* [2020] NZSC 153 **[[BOA Tab 14]]** at [51]: "There is no requirement in these situations [unfair trial or nullity] to make any further inquiry into whether or not what occurred constitutes a miscarriage of justice." See also *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9]: "Something that is a nullity, for example a trial in the wrong court, however properly conducted and fair, is unlawful and cannot be upheld. That has rightly been the view taken by the Court of Appeal."

44 *Wallace v R*, above n 35, at [151] **[[BOA Tab 13]].** See also *T (CA115/17) v R [*2017] NZCA 469 at [31] a case where a trial was a nullity where a majority verdict had been taken without the requirements of the Juries Act 1981 being satisfied.

Applying a nuanced approach to nullity in this case

41. In the present case, the Court of Appeal appeared to acknowledge that nullity is rarely regarded (at least in the public law context) as synonymous with "void, null and void, or legally non-existent".[45] But the Court went on to find that the statutory context – Law Officer consent to criminal prosecutions – required a finding that a defective consent resulted in an absolute nullity. The Court was right to focus on the statutory purpose, but fell into error with the conclusion that this context required an absolute nullity.

42. Parliament intended that a prosecution for corrupt use of official information must not commence without the leave of the Attorney-General, a power which in reality is exercised by the politically independent Junior Law Officer or her delegate. There is no suggestion that Parliament intended a failure to give valid consent within time should always lead to charges and sound trials being irretrievable nullities. Substantial compliance with the requirement for Law Officer consent should be sufficient. Here, the combination of the timely (albeit flawed in a key respect) consideration of whether leave should be granted, and the confirmation of that decision by the Law Officers prior to trial, provided substantial compliance with the statutory purpose.

43. The requirement for consent or leave of the Attorney-General for certain offences exists for a number of reasons, as summarised by the Court of Appeal.[46] Offences that require consent are those where there may be wider or more subtle considerations to take into account than what arise in the "usual" decision whether to prosecute. While consent to prosecute requires an assessment (independent from that of the prosecuting agency) which looks at both parts of the test to prosecute, evidential sufficiency and public interest, the focus and rationale for consent are invariably on the latter.

44. The wider public interest considerations may include political, constitutional, or policy considerations that a Law Officer is best placed to assess, such as international affairs, national security concerns, or sensitive or controversial

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45 See Court of Appeal decision at [46], and cases there cited **[[01 SC Casebook at 24]].**

46 See Court of Appeal decision from [8]-[12] **[[01 SC Casebook at 12]].**

areas of law (such as race relations or censorship). Some of the offences are not precisely defined, and are open to a variety of interpretations or encroach to varying degrees on fundamental rights. The additional layer of consent supports consistency of interpretation, captures the full range of public interest considerations (which even the prosecuting agency may not be alive to) and mitigates the risk of vexatious, trivial or vengeful criminal proceedings (either public or private prosecutions). In this sense, the additional consent requirement protects public faith in the administration of justice.

45. The power to grant consent is vested by s 106 of the Crimes Act (and like provisions) in the Attorney-General. By long-standing convention, Attorneys-General have not personally undertaken these decisions in relation to criminal proceedings. This is to avoid any perception of conflict in the roles of the Attorney, who is both an independent officer of the Crown and a member of the Executive government (almost always a member of Cabinet). This convention is a critical safeguard to avoid prosecution and criminal process decisions becoming, or being seen to be, political decisions. Rather, with few historical exceptions,[47] the New Zealand practice has been for criminal prosecution decisions to be made by the Solicitors-General given their wholly non-political role. Further, the convention has developed over the last 25 years such that prosecution decisions are invariably made by the Deputy Solicitor-General with particular responsibility for, and expertise in, public prosecutions – i.e. the Deputy Solicitor-General (Criminal).

46. In sum, the essential purpose of the consent requirement in ss 105A and 106 Crimes Act is to ensure that in the context of a proposal to prosecute a government "official" there is, prior to charge, an independent assessment

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47 Rarely, the Attorney-General has become directly involved in criminal prosecution decisions – see John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 207-210 **[[BOA Tab 31]]**, which cites a couple of examples, mainly unhappy, where this has occurred. Among them, and not controversial, was the decision of the Attorney-Generally, the Rt Hon Paul East QC, to personally make the decision to stay charges against French nationals following the Rainbow Warrior bombing. This is because the public interest in whether to stay was dominated by important considerations about international trade and foreign affairs. See also the discussion in Law Commission Criminal Prosecution Report 66, October 2000 at 38 (page 18), available at https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R66.pdf.

of the legal merits against the test for prosecution. Sensitive political, public confidence, and "separation of powers" issues may be at stake (or not). The assessment must be by or on behalf of the Law Officers, and so is independent in fact and in a constitutional sense from the prosecuting agency. It will focus on whether the public interest has been properly considered and whether it favours prosecution. It will also check the available evidence satisfies each of the technical elements of the charge. Corruption charges are reasonably uncommon and have aspects that are not straightforward.

47. The decision-making process undertaken in this case by the Acting Deputy, and its subsequent ratification, does not undermine the statutory purpose for which consent is required. Rather, it gave it substantive (albeit procedurally imperfect) effect.

48. More generally, there is a good policy basis for the Court to enable mistakes to be fixed where no material prejudice has been caused either by the original decision or its ratification. The alternative – to require a person in Mr Nikoloff's position to be re-tried, or for proceedings to start afresh, or for convictions to be quashed – is contrary to public policy. Such outcomes are more likely to undermine public confidence in the due administration of justice and the ability of the legal system to hold offenders to account.

49. Importantly here, ratification occurred well before the commencement of trial. This timing is important as the defendants are not truly in jeopardy of conviction until the trial commences.[48] This supports Venning J's conclusion

[48] See *R v Taylor* [2008] NZCA 558, [2009] 1 NZLR 654 **[[BOA Tab 15]]** at [36], considering the possibility of double jeopardy: "but clearly a trial does not commence prior to the accused's arraignment (see s 355). (Where an accused is arraigned prior to trial at a callover, a practice seemingly condoned by this Court in *R v Ratu* (2006) 23 CRNZ 284, the trial, for these purposes, would not commence until the process of empanelling jurors started, the phase of the trial immediately following the traditional act of arraignment.) Mr Taylor's discharge had already occurred by the time of his arraignment. He was never in jeopardy of conviction on the aggravated wounding charges. It is a question for another day as to how far the original trial must have progressed before it will count for the purposes of s 358(1), but, as Professor Mahoney said at p 253, it "must have progressed at least to the point where it can be said that the accused was in jeopardy of conviction"."

that ratification was possible before trial, but would not have been possible once the trial commenced.[49]

Case law on consent errors

50. The Court of Appeal considered the absolute nullity finding was compelled by New Zealand and United Kingdom cases where similar errors have arisen with consent requirements. But none of the cases have dealt with the particular facts arising here (where the consent was considered against the statutory criteria but the delegation was procedurally flawed, and where the decision was ratified prior to trial). The previous cases all involve situations where consents had simply never been given, or indeed sought, before the trial started. Those cases do not compel the conclusion reached by the Court of Appeal.

New Zealand cases

51. Mr Narayan was prosecuted for attempting to take a dangerous weapon on board an aircraft.[50] The requirement for Attorney-General's consent to this charge was overlooked and discovered through a Police file audit after he had been convicted and sentenced. Police invited Mr Narayan to file an appeal out of time. The Crown accepted the absence of consent was a defect that went to the "heart of the charging document, rendering it a nullity". The Court of Appeal agreed and set aside his conviction, noting that if consent had been sought there was no guarantee it would have been granted.

52. *Narayan* reflects a long-held acceptance in New Zealand law that a charge or prosecution that proceeds to trial without the required statutory consent will be a nullity.[51] But the *Narayan* decision goes no further (particularly given it was an appeal decided on the papers with limited argument), and it

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49 See Venning J's decision at [54]-[56] **[[02 COA Casebook at 78]].**

50 *Narayan v R*, above n 19, at [6] **[[BOA Tab 5]].** Aviation Crimes Act 1972, s 11(1)(b). Section 18 of that Act requires that "no proceedings for the trial and punishment of any person… be instituted in any Court except with the consent of the Attorney-General".

51 This circumstance has been referred to as the quintessential situation in which a nullity arises. See for instance the comment in *R v Ostler and Christie* [1941] NZLR 318 **[[BOA Tab 6]]**: "There can be no doubt that the consent of the Attorney-General is a condition precedent to a prosecution, and if there had been no consent at all and that objection were made the prosecution must have failed". Also *Abraham v Auckland District Court* [2007] NZCA 598, [2008] 2 NZLR 352 **[[BOA Tab 7]]**: "where some process, the effect of which is to confer jurisdiction, has not been followed (for example, a statutorily required consent to prosecute has not been obtained), it is easy enough to characterise what follows as a nullity."

does not support the proposition that a flawed consent process always results in an *absolute* nullity.

53. There is limited support in earlier case law for the proposition that a nullity cannot be fixed: an obiter remark in the *Talleys* decision.[52] It was argued there that the charging documents were defective because they contained insufficient particulars. The appellant contended this resulted in charges that were nullities. The Court of Appeal held that while the charges were defective for failing to provide sufficient particulars, they were not nullities and so could be "saved" by s 379 of the CPA. This was the context in which the Court surmised that where there was a serious defect in a charge then "there is nothing before the Court capable of rectification" (emphasis added).[53] The Court may have been taking an absolute nullity approach; if so, the Crown invites this Court to take a different view. Alternatively, the Court may simply referring to the unavailability of a savings provision (s 379 CPA). If so, as has been argued above,[54] it does not follow from the unavailability of that section that no nullity can ever be restored.

54. In summary, the existing New Zealand case law does not support the Court of Appeal's conclusion that a charge filed without the required consent will always be an absolute nullity. The nature of a nullity is not, in most situations, a *category* question; rather, it is an exquisitely *circumstance* specific question. Given the particular factors present in this case, the flaw in one part of the consent process was capable of being retrospectively fixed by the Law Officers' ratification of the decision made by the Acting Deputy.

United Kingdom cases

55. The Court of Appeal also cited *R v Lalchan*,[55]a decision from the Court of Appeal of England and Wales, in support of the conclusion that a charge filed without the requisite Law Officer consent will be an absolute nullity.

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52 *Talley's Group Ltd v WorkSafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198 **[[BOA Tab 16]].**

53 Emphasis added. The word used was rectification rather than ratification as the court was considering s 379, rather than ratification. See *Talley's Group Ltd v WorkSafe New Zealand*, above n 52, at [45].

54 See above at paragraph 33.

55 *R v Lalchan*, above n 19 **[[BOA Tab 18]]**.

However, neither that decision, nor the English position more generally, supports that conclusion.

56. *Lalchan*, like *Narayan*, was a case where the requirement for consent was entirely overlooked and the matter proceeded to trial. In *Lalchan* the Crown sought to simply proffer consent following conviction (before sentence), even though the legislation required consent before proceedings were instituted.[56] This attempted fix was rejected by the Court of Appeal of England and Wales. The Court concluded the proceedings were "invalid from the outset".[57] But the Court expressly avoided a finding that the proceedings were a "nullity" and of no legal effect:[58]

> Various recent authorities in fact indicate that it is best to avoid use of the word "nullity" for these purposes. Indeed, as pointed out in *R v Stromberg* [2018] EWCA Crim 561; [2018] 2 Cr App R 5, a criminal conviction and sentence cannot be regarded as truly a "nullity", since such conviction and sentence stand unless and until they have been quashed by the court

57. While the post-trial fix in *Lalchan* was found to be inadequate, consistent with *Narayan* in New Zealand, it does not follow from the Court's reasoning that an invalid charge is an absolute nullity for which no remedy could be available.

58. The factual position in *Lalchan* is materially different: a purported consent was simply offered woefully late and no one turned their mind to whether the prosecution should proceed until after the trial was complete. Perhaps unsurprisingly, the Court was concerned that allowing consent to be given only after the trial had concluded would make the requirement for Law Officer consent devoid of meaningful content or purpose.[59] By contrast, in this case the requirement is given meaningful recognition through the earlier

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56 Under UK legislation, at s 27(1) of the Public Order Act 1986, it is stated: "No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General."

57 *R v Lalchan*, above n 19, at [42].

58 At [25]: "Various recent authorities in fact indicate that it is best to avoid use of the word "nullity" for these purposes. Indeed, as pointed out in *R v Stromberg* [2018] EWCA Crim 561; [2018] 2 Cr App R 5, a criminal conviction and sentence cannot be regarded as truly a "nullity", since such conviction and sentence stand unless and until they have been quashed by the court".

59 At [41], (cited by the CA at [58] **[[01 SC Casebook 29]]**).

considered (albeit procedurally flawed) consent decision and its subsequent ratification prior to trial.

59. The flow of cases in the United Kingdom more generally points to a clear direction away from absolute nullity. In general, the use of the term "nullity" is often discouraged. Several English Court of Appeal decisions indicate the absence of a required consent to prosecute does not result in an "absolute" nullity. Even imperfectly instituted proceedings can have some legal effect:

59.1 *Lambert v R*[60] concerned a statutory consent provision for a terrorism related offence, which involve arranging a meeting to support a proscribed (terrorist) organisation. This offence required both the consent of the Director of Public Prosecutions and the permission of the Attorney-General.[61] The Attorney-General's permission was obtained after the "plea before venue" hearing, which the Crown contended was before proceedings were "instituted". The Crown's argument was rejected. Notably though the Court of Appeal held the Crown Court could reconstitute itself as a Magistrates' Court and hold a new plea before venue hearing. This ruling indicates the proceedings were not absolutely invalid or void "ab initio".

59.2 In *R v Welsh*,[62] there were multiple defendants charged with cross-border drug offending. These offences required the consent of the Attorney-General before the proceedings were instituted. For most defendants, consent was only obtained once the cases were transferred to the Crown Court, after preliminary hearings had already occurred. The defendants later entered pleas or were convicted. More than two years later, they sought leave to appeal out of time on the ground the proceedings had been nullities. The

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60 *Lambert v R* [2009] EWCA Crim 700 **[[BOA Tab 21]]**.

61 *Lambert* sets out s 25 of the Prosecution of Offences Act 1985 (UK) which provides that where a statutory consent is required (either for the institution or carrying on of proceedings) for a particular offence, the consent requirement shall not prevent the arrest, remand in custody or bail of a person charged with any such offence.

62 *R v Welsh* [2015] EWCA Crim 1516, [2016] 4 WLR 13 **[[BOA Tab 22]].**

Crown accepted that the required consent had not been obtained before the institution of proceedings. The Court of Appeal held that if the appeals were brought within time the convictions would have been quashed.[63] But in the absence of substantial injustice there was no basis to extend time for appeal. For one defendant, consent had not been obtained at all but it was given after the issue was raised on appeal. That defendant received an extension of time to appeal, and his conviction was declared a nullity by the Court of Appeal.[64] Notably, the Court found the procedure needed to recommence from the point at which the defect arose (i.e. it was not declared an absolute nullity).[65]

59.3 *R v Stromberg*[66] was a similar decision to *Welsh*, where a defendant sought an order invalidating his trial, many years after conviction, on the basis that consent was obtained late. The merits of the application were not considered (procedurally, the applicant needed to seek leave to appeal out of time), but the Court did note the conceptual difficulties raised by a "nullity" finding and affirmed the need to focus instead on trial fairness, prejudice to a defendant and the safety of the conviction. The Court concluded "there can be little doubt that the defendant's trial was fair, that his conviction was safe in factual terms and that the late giving of consent of itself caused him no prejudice".[67]

60. The English case law affirms the importance of obtaining Law Officer consent within the required timeframe, and the invalidity of proceedings instituted

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63 *R v Welsh*, above n 62, at [57]: "The proceedings instituted before the Attorney General gave consent would (or at least should) have been treated as a nullity by the Crown Court had the matter been raised prior to conviction. They would then have been instituted properly and the convictions recorded and sentences imposed exactly as they were. This would have been procedurally inept but relatively sparing of the resources of the criminal justice system. Had an appeal been issued within 28 days of conviction this court would have quashed the convictions and ordered retrials (or perhaps granted a writ of venire de novo). This would have been very wasteful although probably less so than taking the same course now."

64 *R v Smith* [2015] EWCA Crim 1663 **[[BOA Tab 23]]**.

65 The decision of the magistrates to send the appellant to trial was quashed and a fresh order was made sending him to the Crown Court for trial.

66 *R v Stromberg* [2018] EWCA Crim 561, [2018] 2 Cr. App. R. **[[BOA Tab 24]]**.

67 At [35].

without such consent. It does not, however, support the conclusion that a prosecution commenced without the required consent is void in the absolute, wholly retrospective sense. None of the cases directly consider the circumstance here: flawed consent but obtained within time and ratified before the defendants were in jeopardy of conviction.

Conclusion

61. In summary, the Court of Appeal was wrong to conclude the charges were absolute nullities. The particular circumstances of this case do not support that conclusion: the independent check on the prosecution decision was made, in time, by a substantively qualified person, and the error was discovered well before the defendants were in jeopardy. There was no material prejudice to the defendants.[68] The charges should not have been regarded as void in an absolute sense.

RATIFICATION WAS AVAILABLE

62. The Court of Appeal found that even if the charges in this case were not absolute nullities, ratification was not an available course of action in this context.[69] The Crown invites this Court to conclude that while ratification may not be a commonly available remedy in the context of delegated decision making, the particular factual scenario this case presented should have permitted ratification.

63. Ratification is a well-founded common law doctrine, and the circumstances in which ratification is permitted are tightly constrained. Its retrospective operation requires limits ensuring fairness and reasonableness. In the context of delegated decision making where ratification can occur without causing material prejudice to citizens and without undermining the statutory scheme (or purpose), it is available and should be permitted.

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68 See below from paragraph 82.

69 Court of Appeal decision from [64], **[[01 SC Casebook 31]].**

The doctrine of ratification

64. Where an act is purportedly done on behalf of another by a person who had no actual authority to do that act, the doctrine of ratification permits the person on whose behalf the act was done to later approve (ratify) the act. The effect is to make the act valid, as it if had been originally done by his or her authority, whether the person doing the act was exceeding their authority, or simply had no authority to act.[70]

65. The principles applicable to the common law doctrine of ratification in New Zealand were summarised by the High Court in *Hamilton City Council v Green*[71] and *Body Corporate 192964 v Auckland City Council.*[72] The requirements originate from *Firth v Staines.*[73] To constitute a valid ratification:[74]

65.1 The agent whose act is sought to be ratified must have purported to act for the principal.

65.2 At the time the act was done the agent must have had a competent principal.

65.3 At the time of ratification, the principal must be legally capable of doing the act himself.[75]

65.4 The ratification must not be inconsistent with the empowering legislation.[76]

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70 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (23rd ed, Sweet & Maxwell, London, 2024) at 2-047 **[[BOA Tab 32]].**

71 *Hamilton City Council v Green* [2002] NZAR 327 (HC, Baragwanath J) **[[BOA Tab 17]]**.

72 *Body Corporate 192964 v Auckland City Council* HC Auckland CIV-2004-404-7207, 23 May 2005.

73 *Firth v Staines* [1897] 2 QB 70 **[[BOA Tab 25]].**

74 *Hamilton City Council v Green*, above n 71, at [17], citing *Firth v Staines*, above n 73, for the first three requirements, adding the fourth.

75 This was the essential factual scenario in *Attorney General ex rel Cooperative Retail Services Ltd v Taff-Ely BC* (1980) 39 P. & C.R. 223 (EWCA Civ) **[[BOA Tab 26]]** where the local authority was functus officio by the time it sought to ratify an earlier decision. See the summary of this decision in Hamilton *City Council v Green* from [27]. See also the decision on appeal *Attorney General ex rel Cooperative Retail Services Ltd v Taff-Ely BC* (1981) 42 P. & C.R. 1 (UKHL) **[[BOA Tab 27]]**.

76 *Hamilton City Council v Green*, above n 71, at [19].

66. The fact ratification operates retrospectively "requires special rules to prevent its application having oppressive results".[77] These include:

66.1 Ratification cannot operate to make an act that was lawful at the time unlawful.[78]

66.2 A principal cannot ratify the act of a person to whom they could not have delegated the power in the first place. In delegation terms, ratification can have no greater force than the existing power to delegate.[79]

66.3 Ratification must occur either "within a period fixed by the nature of the particular case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person".[80] It has been applied to approve civil proceedings after the expiry of a limitation period.[81]

66.4 The nature of the power can be relevant. Ratification is less likely to be permitted where the power is a 'draconian' one that takes immediate effect[82] (or the removal of a right), but more likely to be available where the decision is to confer a benefit.[83] Ratification is

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77 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (23rd ed, Sweet & Maxwell, London, 2024) at 2-048 **[[BOA Tab 32]].**

78 *Bolton Partners v Lambert* (1889) 41 Ch D 295 (CA) **[[BOA Tab 28]].**

79 See Enid Campbell "Ostensible Authority in Public Law" (1999) 27 FL Rev 1 at 4-5 **[[BOA Tab 35]]**: "If the statutory power which the repository of the power has actually delegated is a power it cannot delegate at all, or cannot delegate to the person it has chosen as the delegate, it cannot, by ratification, validate the acts of the unauthorised delegate" (COA decision at [68]).

In *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA) **[[BOA Tab 29]]** the board purported to delegate a function to a port manager and, when that was found to be problematic, they sought to ratify the decision. But the function itself was non-delegable. Likewise, ratification was not available in *Hamilton City Council v Green*, where the council sought to ratify a decision of the CE to take court proceedings, in circumstances where the council could not delegate that decision.

80 Halsbury's Laws of England Agency (Volume 1, 2022) at 64 **[[BOA Tab 34]].**

81 As to ratification of a writ issued without authority, after the expiry of the limitation period, see *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737 (CA) and see *Body Corporate No 192964 v Auckland City Council*, above n 72, at [35](h) where ratification occurred after the expiry of a limitation period, but was upheld by the High Court.

82 In the case of *Webb v Ipswich B.C.* (1989) 21 HLR 325 at 336 it was held that, given the 'draconian' powers of the local authority to take over a property with immediate effect, the appropriate authority should not be able to ratify the purported exercise of the power by an unauthorised officer.

83 In *Tachie v Welwyn Hatfield Borough Council* [2013] EWHC 3972 (QB) at [53], a decision to confer a benefit (social housing) which was described as the "distribution of scanty resources in a system of social welfare", the Queen's Bench Division noted that the circumstances in which ratification will be effective "must depend on the overall context, and on the rights and duties involved against the background of the

usually unavailable where it would operate to undermine accrued property rights.[84] Likewise, an estate once vested cannot be divested.[85]

Errors in the Court of Appeal's decision

67. The Court of Appeal's conclusion that ratification was unavailable in this case essentially stemmed from the following propositions – each of which is problematic – examined further below:

67.1 The key differences between agency and delegation indicate that ratification – a principle that derives from the law of agency – should not be extended to the delegation context. This meant the first requirement in *Firth v Staines* was not met.[86]

67.2 A relationship of delegation cannot be created by a ratification "sidewind".[87]

67.3 Ratification would cause prejudice to the defendants.[88]

67.4 Ratification in this context would render the requirement for leave devoid of meaningful content or purpose.[89]

Ratification is available to delegated decision-makers

68. As has been outlined, ratification is a principle derived from the law of agency. As the Court of Appeal noted, there are key differences between the relationship of a principal/agent and delegator/delegate. Importantly, an

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relevant statutory scheme." It also noted that "the court is likely to be more strict where the issue is one of substance as opposed to formality". It adopted a flexible approach to the situation, noting that the property management organisation was "always intended" to discharge the local authority's homelessness functions despite the required Cabinet approval not having been given. It also noted at [55] that Cabinet was present at the relevant Council meeting and the error was a formal one "which scarcely impacted on the substance of the matter".

84 *Bolton Partners v Lambert*, above n 78, at 306 **[[BOA Tab 28]]**. See also *Borvigilant (Owners) v Owners of the Romina G Copy Citation* [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736.

85 *Bolton Partners v Lambert*.

86 Court of Appeal decision at paragraph [74] **[[01 SC Casebook 35]]**.

87 Court of Appeal decision at paragraph [75].

88 Court of Appeal decision at paragraph [81].

89 Court of Appeal decision at paragraph [81](b).

agent makes a decision on *behalf* of a principal, whereas a delegate's decision is their *own*.

69. The courts should be cautious about the use of ratification in the delegation context, particularly for public or governmental decision making. But it does not follow that ratification can never be available for delegated decisions. Rather, it will be available in limited circumstances, provided it accords with the statutory purpose and does not cause material prejudice.

70. While ratification has previously been permitted in the context of delegated decision making,[90] there is academic debate as to the extent to which ratification should be available in the delegation context. This is apparent from the two academic articles referred to by the Court of Appeal. But neither of those articles contend (or support the conclusion) that ratification is *never* available in the delegation context. The conclusions of both academics support the view that ratification should be *limited* in the delegation context, primarily to avoid the risk that ratification (which operates retrospectively) would cause prejudice:

70.1 Professor Lanham expressly states that "where ratification works in the interests of the subject or in a neutral fashion, there seems little reason for not applying the ratification principle".[91] He concludes "where the power concerned is a governmental one the principle of ratification should give way to the principle against retrospective governmental action and so should rarely be available".[92]

70.2 Likewise, Professor Campbell refers to courts having "allowed little room for the application of the doctrine of ratification to the acts of

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90 *Firth v Staines*, above n 73. *Hamilton City Council v Green* **[[BOA Tab 17]]** was decided in the context of a purported delegation, and while the doctrine was ultimately not applied, the High Court held the first condition of *Firth v Staines* was met. In *Goldfinch v Auckland City Council* (1996) 2 ELRNZ 198 at 202, it was argued that the Council officer who decided a stamped plan constituted a "Certificate of Compliance" for the purposes of section 139 of the Resource Management Act 1991 lacked the delegated authority to do so. While not deciding this point, this Court accepted a subsequent resolution adopted by the Council ratifying the decision.

91 David Lanham "Ratification in Public Law" (1981) 5 Otago LR 35 **[[BOA Tab 33]]**.

92 At 47 **[[BOA Tab 33]].**

unauthorised delegates".[93] The relationship between delegator and delegate is governed and limited by statute in a manner that principals and agents are usually not. The limits Professor Campbell refers to are essentially those summarised above at paragraph 66 above, (for example ratification could not be used to ratify the exercise of a power that could never have been delegated to that person). Likewise, an unauthorised decision should not be retroactively validated where that would be prejudicial to a third party. These points indicate ratification should be limited in this context, not totally unavailable.

71. There is no general principle that ratification is never available in the context of public law powers or delegated decision making. Notably, the Privy Council has recently rejected the suggestion that there is "some general divide between public law and private law proceedings, such that ratification is available in relation to the latter, but not the former".[94] Rather, the question "needs to be approached from the starting point that, in the absence of the expression of a contrary intention, the ordinary principles… would permit, rather than prevent, ratification".[95]

72. None of the concerns about the use of ratification in the delegation context materially apply here. The power to grant leave to prosecute was plainly delegable. And the Acting Deputy was clearly an appropriate person to receive the delegation. It was intended she receive the appropriate delegation. At the time she ratified the Acting Deputy's earlier decision, the Solicitor-General maintained the power to grant leave.[96] While a delegator would not usually interfere with the decision of a delegate once made, this should not prohibit ratification from occurring in appropriate cases provided the statutory purpose is not undermined and no material prejudice is caused (as discussed below).

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93 Enid Campbell "Ostensible Authority in Public Law" (1999) 27 FL Rev 1 at 4-5 **[[BOA Tab 35]].**

94 *Causwell v The General Legal Council (ex parte Elizabeth Hartley)* [2019] UKPC 9 at [23] **[[BOA Tab 30]]**.

95 At [19].

96 Constitution Act 1986, s 9C(3) **[[BOA Tab 2]].**

73. The purpose of the first requirement of *Firth v Staines* (i.e. that the agent must have purported to act for the principal) is to ensure ratification is only of acts that were said to be made in the context of that relationship. In other words, not when the person was purporting to act in another capacity. Here, there is no doubt that the Acting Deputy was purporting to exercise a power of the Attorney-General: she purported to grant leave pursuant to s 106 Crimes Act under the authorisation of the Constitution Act ss 9A and 9C.[97] The need for exercises of government power to be made transparently was accordingly met.

The statutory prerequisites to delegation are not substantively undermined

74. The Court of Appeal's concern that "the relationship of delegation cannot be created by a ratification sidewind"[98] is misplaced. It is well-established that ratification may operate to authorise the acts of an agent who acted without any authority to act.[99] Consequently, it is difficult to see why there would be a problem with ratification creating such a relationship in that sense.

75. Here, the properly authorised people have turned their mind to the decision and the decision maker and have confirmed both. To the extent this indirectly creates a relationship of delegation, this should not be considered problematic. It was a decision that was able to be delegated,[100] and those ratifying the decision had the power to make the decision. The statutory prerequisites to delegation were not substantively undermined.

76. It must be noted that the Instrument of Ratification itself did not attempt to create retrospectively the non-existent delegation to the Acting Deputy by the Solicitor-General, nor the Attorney-General's consent to that delegation.

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97 Consent to prosecute notice of Mr Nikoloff 8 August 2019 **[[03 COA Additional Materials 17]].**

98 Court of Appeal decision at [75] **[[01 SC Casebook 35]].**

99 "The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he has had authority to do the act at the same time the act was done by him…": *Bolton Partners v Lambert*, above n 78, at 306 **[[BOA Tab 28]]**.

100 See *Attorney General ex rel Cooperative Retail Services Ltd v Taff-Ely BC* (EWCA Civ), above n 75 **[[BOA Tab 26]]**, where the local authority was functus officio by the time it sought to ratify an earlier decision. And *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA) **[[BOA Tab 29]]** where there was a purported delegation of a function that could not be ratified as the function itself was non-delegable. Likewise, ratification was not available in *Hamilton City Council v Green*, where the council sought to ratify a decision of the CE to take court proceedings, in circumstances where the council could not delegate that decision.

Rather, it confirmed in a substantive sense the decision made in the name of the Law Officers. It was not "in reality, a retrospective consent to delegate".[101]

77. The substantive concerns with ratification should be twofold: whether any prejudice arises from the retrospective nature of the ratification, and whether it is consistent with the statutory context and purpose.

Ratification did not result in prejudice in this case

78. The Court of Appeal considered ratification was prejudicial because "its intended effect is retrospectively to authorise a prosecution of [Mr Nikoloff] that was, from its inception, unlawful and… undermines the purpose of the statutory consent provision".[102] This conclusion begs the question of whether timely ratification in fact cured the invalidity (on the Crown's view the answer depends on whether the defect undermined the statutory purpose), and overstates the extent of prejudice.

79. As the Court of Appeal rightly noted, the decision to begin a prosecution of an individual has profound consequences.[103] But the Court overstated the extent of prejudice caused to these defendants by the Crown's misstep.

80. The lack of authority to bring the charges does not undermine sufficiency of evidence or the public interest in a prosecution; there was a proper independent assessment of both those topics. At most, there was minor prejudice to the defendants in that for over a year they were on bail for criminal charges that were filed with a flawed authority. That occurred as a result of the Crown's earlier error, not from the attempt to ratify. Any prejudice caused by ratification is even more remote. At most, the defendants lost the opportunity to have the charges dismissed before trial – in circumstances where there was no legal barrier to fresh charges being filed, with fresh consent. The process that had already occurred would then have been repeated – resulting in further time on bail to no advantage of the

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101 Court of Appeal decision at [77] **[[01 SC Casebook 36]]**.

102 Court of Appeal decision at [69] **[[01 SC Casebook 33]].**

103 Court of Appeal decision at [81](a).

defendants. Notably there was also a risk of further delay in bringing the matter to trial if that occurred – which had been prevented by the ratification. In those circumstances, it is difficult to see how ratification was materially prejudicial.

81. Prejudice will of course be a question of degree in every case. Given the important public interests in prosecuting serious offences, and the fact that the defendants otherwise had a trial accordingly to law, the identification of only minor or theoretical prejudice should not be a factor against ratification.

Ratification is consistent with the statutory purpose

82. The Court of Appeal held that ratification of a decision, that the statute required be made before the prosecution commenced, would risk rendering the statutory requirement "devoid of any meaningful content or purpose", and that this would "unacceptably diminish the role of the Law Officers in this context".[104] But, as has been outlined above from paragraph 42 above, ratification does not undermine the role of Law Officers here, unlike in *Lalchan*.

83. Ratification does not "read down" the requirement that leave be obtained before the proceedings commence.[105] Rather, it acknowledges the timing requirement and seeks to retrospectively approve a decision made within it.

84. There was nothing casual in the Crown's response to the issue. The Crown did not purport to simply offer consent at the time the problem was identified. Instead, the Crown acted promptly: it pointed to the decision that was made within time, identified the specific flaw in that decision, and sought to rectify that flaw. Ratification was a formal step taken by both Junior and Senior Law Officers (in recognition of the statutory requirements of the Constitution Act); it is not the equivalent of simply applying a "slip rule" or "proceedings not to be questioned for want of form" provision. This is a substantively different situation to all the previous cases referred to. The

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104 Court of Appeal decision at [81](b)] **[[01 SC Casebook 37]]**.

105 Court of Appeal decision at [81](b)] **[[01 SC Casebook 37]].**

Crown is seeking to retrospectively approve the original flawed decision, not to commence an entire process retrospectively.

CONCLUSION

85. The trial at which the defendants were convicted was not a nullity because:

85.1 While the charges were nullities when originally filed, they were not absolute nullities. Given the circumstances of this case (the appropriate person considered whether the prosecution should be commenced and did so against the appropriate criteria and at the appropriate time, i.e. before any charge was laid), the charges were capable of restoration.

85.2 The defect did not thwart the statutory purpose for Attorney-General's consent and was repaired by ratification.

85.3 The charges were ratified prior to the commencement of the trial, without material prejudice to the defendants. As such, the trial was not tainted by the earlier flaw.

3 February 2025

M F Laracy / Z R Johnston
Counsel for the referrer

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: Counsel to assist the Court.

List of authorities to be cited by the referrer

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2. Constitution Act 1986 ss 9A, 9B & 9C
3. Criminal Procedure Act 2011 ss 24, 232 & 379

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5. *Narayan v R* [2022] NZCA 527
6. *R v Ostler and Christie* [1941] NZLR 318 (CA)
7. *Abraham v Auckland District Court* [2007] NZCA 598, [2008] 2 NZLR 352
8. *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA)
9. *Police v Thomas* [1977] 1 NZLR 109 (CA)
10. *S v R* [2018] NZSC 124, [2019] 1 NZLR 408
11. *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745
12. *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153
13. *Wallace v R* [2023] NZCA 422
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16. *Talley's Group Ltd v WorkSafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198
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30. *Causwell v The General Legal Council (ex parte Elizabeth Hartley)* [2019] UKPC 9

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33. David Lanham "Ratification in Public Law" (1981) 5 Otago LR 35

34. Halsbury's Laws of England Agency (Volume 1, 2022, online ed) vol 22 at 64

35. Enid Campbell "Ostensible Authority in Public Law" (1999) 27 FL Rev 1