Howie v Youth Justice Court [2010] NTSCFC 32

PARTIES:	RICHARD GORDON HOWIE v YOUTH JUSTICE COURT AND OTHERS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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DELIVERED:	25 June 2010
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JUDGMENT OF:	MILDREN, RILEY AND KELLY JJ

CATCHWORDS:

PROHIBITION AND MANDAMUS – Right to apply – jurisdiction

CRIMINAL LAW AND PROCEDURE – jurisdiction – proper construction of s 52, s 53, s 54 and s 55 of the *Youth Justice Act* – alleged lacuna in the *Youth Justice Act* – statutory interpretation – right to trial by jury of indictable offences committed by juveniles – jurisdiction of Youth Justice Court to hear and determine indictable offences – orders sought granted

Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue (NT) (2009) 239 CLR 27
R v Australian Stevedoring Industry Board; Ex Parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100
Birkeland-Corro v Tudor-Stack (2005) 15 NTLR 208

Cheatle v The Queen (1993) 177 CLR 541
CIC Insurance Co Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation (1981) 147 CLR 297
Ebatarinja v Deland (1998) 194 CLR 444
R v Galvin; ex parte Metal Trades Employers' Association (1949) 77 CLR 432
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149
Johnson v Director-General of Social Welfare (Vic) (1976) 135 CLR 92
Magrath v Goldsbrough, Mort & Co Ltd (1932) 47 CLR 121
Mills v Mecking (1990) 169 CLR 214
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

REPRESENTATION:

Counsel:

Plaintiff:	Dr N Rogers SC
Second & Third Defendants:	I Read
Fourth Defendant	R Wild QC

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendants:	Northern Territory Legal Aid Commission & North Australian Aboriginal Justice Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Howie v Youth Justice Court [2010] NTSC 32
No 57 of 2010 (21018343)

BETWEEN:

RICHARD GORDON HOWIE
Plaintiff

AND:

YOUTH JUSTICE COURT AND OTHERS
Defendants

CORAM: MILDREN, RILEY AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 25 June 2010)

MILDREN AND RILEY JJ

[1] We have had the benefit of reading the draft judgment of Kelly J. With respect, we adopt the summary provided by her Honour of the competing submissions made by the parties regarding the construction of the *Youth Justice Act*. We also recognise the difficulties identified by her Honour in relation to each of those constructions. However, we have reached a different conclusion from her Honour as to the preferred construction.

A preliminary issue

[2] Counsel for the defendants submitted that the application was premature because no order or determination had been made by the Youth Justice Court to hear the charges summarily.

[3] The facts are that on 20 April 2010 the charges were set down for a summary trial in the Youth Justice Court by Ms Oliver SM. The summary trial was listed for hearing on 10 and 11 June 2010. On 18 May 2010, an application was made to the same Magistrate by the Director of Public Prosecutions to vacate the trial dates and to set the matter down for a preliminary examination on another date. The learned Magistrate confirmed the summary hearing on the dates listed, notwithstanding the judgment of Olsson AJ in *Curtis v Eaton*,[1] in which his Honour expressed the view that the Youth Justice Court had no jurisdiction to try this kind of offence summarily. It is clear that the learned Magistrate regarded his Honour's opinion on this topic as *obiter dicta* and that she held a contrary view. Because the summary hearing was listed before a different Magistrate, apparently Mr Cavenagh SM, any decision to confirm the trial date was technically not binding on him, as the learned Magistrate recognised.

[4] There is some evidence that Mr Cavenagh SM had expressed an opinion that the matters would proceed as a summary trial. However, that was not a formal ruling and we have no doubt that his Honour would have been

[1] [2010] NTSC 19.

obliged to consider any arguments to the contrary which might have been put to him.

[5] In our opinion, it was not necessary for the applicant to wait and make a further application before Mr Cavenagh SM before applying for prohibition. We think the point is amply covered by the decision of the High Court in *R v Galvin; ex parte Metal Trades Employers' Association*,[2] where the same argument was rejected:

> A person against whom a non-existent jurisdiction is invoked is not bound to wait until the tribunal decides for itself whether it has jurisdiction or obtains a decision of the question by a reference or case stated or the like. He may move at once for a prohibition.[3]

[6] There is also some authority to the effect that, as prohibition is a discretionary remedy, the Court may refuse prohibition if the point has not been determined by the Court below, if it has authority to determine its own jurisdiction.[4] According to Ms Oliver SM, the Youth Justice Court has always proceeded to hear cases of this kind summarily. There seems to us to be a real likelihood or danger that it will continue to do so. To the extent that we have a discretion, we would exercise it in favour of the applicant.

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[2] (1949) 77 CLR 432 at 445 per Latham CJ, Dixon, McTiernan, Williams and Webb JJ.

[3] See also *R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Incorporated)* (1978) 143 CLR 190 at 202 per Barwick CJ with whom Gibbs J agreed, Murphy J at 238 and Aickin J at 240 - 241.

[4] *R v Australian Stevedoring Industry Board; Ex Parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119.

The fourth defendant's construction

[7] There are significant problems arising from the construction proposed by Mr Wild QC on behalf of the fourth defendant. Foremost is that the proposed construction serves to deprive a youth of the right to a trial by jury for serious offences which fall within the alleged lacuna (hereinafter referred to as "the gap" or "gap offences"). Such a result should not be inferred in the absence of an express specific legislative intention.[5] Further, it is well established that a statute is not to be interpreted as affecting the jurisdiction of the Supreme Court to deal with a matter unless an intention to do so appears clearly and unmistakably.[6]

[8] Other problems exist. In relation to federal indictable offences, the accused, whatever his age, has a right under s 80 of the *Constitution* to trial by jury, which cannot be abrogated by an Act of the Commonwealth, a State or a Territory.[7] The provisions of the *Youth Justice Act* must be read down so as not to offend s 80 of the *Constitution*. One way that this can be achieved is to adopt the course preferred by Olsson AJ in *Curtis v Eaton*,[8] viz, that there must be a preliminary examination vide s 53(1) of the Act.

[9] If Mr Wild's argument is correct, logically neither the Director of Public Prosecutions nor the Attorney-General would have power to lay an ex officio indictment in this Court, despite s 300 of the *Criminal Code*. A

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[5] *Birkeland-Corro v Tudor-Stack* (2005) 15 NTLR 208.

[6] *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121 at 134 per Dixon J; *Johnson v Director-General of Social Welfare (Vic)* (1976) 135 CLR 92.

[7] *Cheatle v The Queen* (1993) 177 CLR 541.

[8] [2010] NTSC 19.

consequence of this is that there would be no provision in the law applicable to youths, or to adults who committed an offence whilst a youth, where the accused was unfit to plead. It is well established that an ex officio indictment can be laid if a committal proceeding cannot be taken against a defendant.[9] It seems clear that s 54 of the Act is not intended to operate to prevent an ex officio indictment being laid in those circumstances.

[10] Section 61 of the Act requires the Youth Justice Court "to satisfy itself that a youth who is the subject of proceedings for an offence understands the nature of the proceedings". If the Court is not so satisfied, no summary trial or committal can be held. The Act makes no specific provision for what is to occur in those circumstances. The Youth Justice Court has no power to proceed under Part IIA of the *Criminal Code*, as proceedings of that nature must be dealt with in the Supreme Court. If the question arises during a committal proceeding, s 43M of the Code now requires the committal to go ahead, but makes no specific provision in the case of indictable offences tried summarily.

[11] Further, the effect of this construction is to require that the gap offences (being offences which presently carry maximum penalties of imprisonment for more than 10 years, but less than life imprisonment, or which fall within a class of offences referred to in s 121A(1)(b)(ii) of the *Justices Act* where the maximum penalty is not more than 14 years imprisonment) be subject to a new maximum penalty of imprisonment for two years in the case of a

[9] *Ebatarinja v Deland* (1998) 194 CLR 444.

youth who is aged from 15 years up to 18 years.[10] Offences within the gap offences include kidnapping for ransom, unlawfully causing serious harm, assaulting a police officer in the execution of the officer's duty causing the officer serious harm, the offence of aggravated recklessly endangering life, the offence of having sexual intercourse with a child under the age of 16 years and a number of drug offences. In our view, it is unlikely that the legislature intended to effect such a dramatic reduction in maximum penalties for such serious offending by what is, in effect, a side wind.

[12] Each of these factors point strongly to the conclusion that the legislature did not intend to take away the accused's right to trial by jury for serious indictable offences which fall within the gap.

The history of the legislation

[13] The history of the legislation may throw some light on the matter. Section 19 of the former *Juvenile Justice Act* was in similar terms to s 52 of the *Youth Justice Act*, in that the special court established to deal with youths or juveniles, was required to "deal with" (or "hear and determine") all charges both of a summary or indictable nature. Both Acts specifically excepted indictable offences which required the consent of the accused if the accused was an adult. In those circumstances, a summary trial was only possible if the youth or juvenile consented.[11] Both Acts also excepted

[10] Section 83(2) of the *Youth Justice Act* read with s 6 of the Act.
[11] See *Juvenile Justice Act*, s 37(1) and *Youth Justice Act*, s 54(2).

offences punishable by imprisonment for life, which could not be dealt with summarily.[12]

The second and third defendant's construction

[14] The submission of Mr Read on behalf of the second and third defendants would require reading into the Act a restriction on the power of the Youth Justice Court to try offences summarily which fall in the gap, except with the consent of the youth. Plainly, that is not possible without completely redrafting either s 54(2)(a) or reading down the provisions of the *Justices Act* which are incorporated by reference in s 54(2)(a). The former exercise seems to be impossible, as it would require the Court to find that all the words in s 54(2)(a) were superfluous.[13] The second alternative would require the Court to read s 121A(1)(b) of the *Justices Act* as if all the words after "the offence" were to be read as if they were omitted and replaced with the words "not punishable by imprisonment for life" and as if s 121A(1)(c) was otiose. We are not aware of any principle of statutory interpretation which can be called in aid to support that approach. There is no provision in the *Interpretation Act* which can be called in aid to achieve this result.

The plaintiff's construction

[15] There are also difficulties in the construction urged upon us by Dr Rogers SC on behalf of the plaintiff. The first difficulty is in s 54(1) which provides that the Youth Justice Court "must hear summarily all

[12] *Juvenile Justice Act*, s 35; *Youth Justice Act*, s 54(1) and s 54(3).
[13] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382.

charges of a summary or indictable nature, unless the offence, if committed by an adult, would be punishable by imprisonment for life". Similarly, the Youth Justice Court is to "deal with" charges punishable by imprisonment for life by way of preliminary examination.[14] These provisions are curious because they provide that it is the Court (and not a magistrate or justice of the peace) who conducts committal proceedings.[15] Yet, historically, committal proceedings (or preliminary examinations) are not conducted by a Court because they are purely ministerial in character and remain so until the magistrate or justice of the peace proceeds to dispose of the case summarily.[16]

[16] However that may be, the expressions used in the various provisions are "deal with"[17] or "hear"[18] rather than "hear and determine". The legislation on occasions uses "deal with" when referring to a preliminary examination,[19] yet in s 56(3) the expression used is "deal with the matter summarily". This inconsistency makes it difficult to discern any difference between "hear" and "deal with". Read literally, s 54(1) when it refers to "hear summarily all charges of a summary or indictable nature", does not support a conclusion that what the subsection meant to be conveyed was "hear and determine all matters of a summary nature and hear or deal with all matters of an indictable nature".

[14] Section 54(3).
[15] See also s 54(2).
[16] *Justices Act*, s 125(2).
[17] Section 52(1), s 54(2), s 54(3).
[18] Section 54(1).
[19] C.f s 55(5) and s 55(6).

The text

[17] The ordinary rule of construction is that the starting point is to look at the text itself. In *Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue (NT)*,[20] it was said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

[18] We have mentioned historical considerations. So far as extrinsic materials are concerned, the Court has been provided with the Minister's second reading speech and we have also read the explanatory statement accompanying it which was tabled in the Legislative Assembly. Neither provide any illumination on the problem.

[19] So far as the text is concerned, it suggests, when read with s 53(1), s 54(2), s 54(3) and s 55, that it was not the intention of the legislature to take away the right to trial by jury of indictable offences committed by juveniles, except, perhaps, those offences which the Court of Summary Jurisdiction constituted by a Magistrate has jurisdiction to try summarily even without the consent of the accused under s 120 of the *Justices Act* (although even that is not clearly stated to be the case).

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[20] (2009) 239 CLR 27 at 46-47 per Hayne, Heydon, Crennan and Keifel JJ.

Curtis v Eaton

[20] The approach of Olsson AJ in *Curtis v Eaton*[21] was to rely on s 53(1) of the *Youth Justice Act* to fill the gap. This section provides:

> Unless this Act makes specific provision in relation to proceedings, orders or convictions, the *Justices Act* applies as if the Youth Justice Court were the Court of Summary Jurisdiction established by that Act.

[21] This approach would enable the Youth Justice Court to try s 120 offences summarily without the youth's consent. It would require gap offences to be dealt with by the Court conducting a preliminary hearing without any power to hear and determine gap offences summarily.

[22] So far as the general purpose and policy of the provisions are concerned, read as a whole it is difficult to conclude, for the reasons already stated, that the policy included a denial of a right to trial by jury in the case of gap offences. As to the mischief to which the legislation is addressed, the principle stated in s 4(d) of the *Youth Justice Act* does not support a contrary conclusion. That provision states:

> (d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity *and have the same rights and protection before the law as would an adult in similar circumstances…[emphasis added]*

[23] We note also that s 62A of the *Interpretation Act* requires courts to prefer a construction of a provision that promotes a purpose or object underlying an Act, to one that does not. This is especially so where the purpose is set out

[21] [2010] NTSC 19.

in the Act.[22] This approach to interpretation does not require the presence of ambiguity or inconsistency in the provision being interpreted.[23]

[24] Nevertheless, there are objections to this course. It might be said that s 53(1) is a general provision. It might also be said that s 54(1), being a later provision in the Act, is inconsistent to that extent with s 53(1) and the latter section must prevail. But, as was said in *Project Blue Sky*:[24]

> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

[25] It is, therefore, necessary to see whether, on the interpretation urged upon us by Dr Rogers, it is possible to give to s 54(1) a meaning which is

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[22] *Mills v Mecking* (1989) 169 CLR 214 at 235 per Dawson J.

[23] See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

[24] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 - 382.

harmonious with the object of s 4(d), but at the same time does not result in words which are "superfluous, void, or insignificant".

[26] To begin with, it is to be observed that s 54(1) is expressed in a form which is apparently mandatory. We refer here to the word "must". It is clear, both from s 54(1) itself and from s 54(2), that the expression "must hear summarily all charges of a[n] … indictable nature …" is subject to two specific exceptions, viz, offences carrying a maximum penalty of imprisonment for life and offences, which if committed by an adult, would require the defendant's consent to be tried summarily. Therefore, it cannot be said that "must" unequivocally means an imperative instruction in all cases. The intention to create another exception, not specifically mentioned, is not necessarily fatal. Secondly, to construe s 54(1) as being subject to s 53(1) does not render any words in that section superfluous, void or insignificant. The words "unless the offence, if committed by an adult, would be punishable by imprisonment for life" are not otiose; they make it abundantly clear that such offences (which can only be indictable offences) must proceed by way of a preliminary examination, but this does not carry with it a necessary implication that other indictable offences short of carrying a maximum life term, fall outside of the purview of the section. Indeed, s 54(2) makes this abundantly clear.

[27] Reading s 54(1) as if the words "subject to this Act" were inserted at the beginning would go a long way towards resolving the problem in favour of s 53(1) providing the mechanism for cases which fall within the gap. There

is nothing particularly novel about such an approach. As an Act must be read as a whole; the expression "subject to this Act" is generally otiose.[25]

[28] There are two other considerations. First, it has been said that it is an elementary and fundamental principle that the object of the court, in interpreting a statute, is to see what is the intention of the legislature by reference to the language of the statute as a whole. In performing this task, the courts look to the operation of the statute and to its terms and to legitimate aids to construction. But, as was said in *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation*,[26] the rules of construction are not rules of law; they are rules of common sense. Their Honours said:[27]

> But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.
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> Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

[25] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 176 per Dawson and Toohey JJ.

[26] (1980) 147 CLR 297 at 320 per Mason and Wilson JJ.

[27] *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation* (1981) 147 CLR 297 at 321.

[29] In our opinion, the decisive factors in making a choice between an interpretation which gives primacy to s 53(1) and a literal application of s 54(1) are that the latter is capricious and irrational. It is directly in conflict with the stated purpose as expressed in s 4(d) of the Act, it purports to take away a fundamental right to trial by jury and it purports to limit the jurisdiction of this Court to deal with indictable offences. In our opinion, it was unintended.

[30] We agree with Olsson AJ in *Curtis v Eaton* that both gap offences and offences which fall within s 120 of the *Justices Act* are offences for which no specific provision was made and are to be dealt with in accordance with the *Justices Act* vide s 53(1).

[31] For these reasons, in our opinion, the Youth Justice Court has no jurisdiction to try the offence before it summarily, even with the consent of the parties. It must proceed by way of a preliminary hearing. We would grant the orders sought in the summons.

[32] If we are wrong in our conclusion, it is open to the legislature to amend the *Youth Justice Act*. The provisions under consideration are badly drafted and we draw to the attention of the legislature the need for amendment in order to give clear expression to the legislature's will. To the extent that our interpretation of the provisions may result in some previous decisions of the Youth Justice Court being invalid, that is also a matter which the legislature can cure retrospectively.

KELLY J

[33] From 20 April 1984 to 20 December 2006, during the currency of the *Juvenile Justice Act* (NT), there was an established regime for dealing with juveniles charged with offences. Under that regime:

(a) offences which in the case of an adult defendant were dealt with summarily by the Court of Summary Jurisdiction were dealt with summarily by the Juvenile Justice Court [*Juvenile Justice Act* s 19];

(b) all other offences, other than offences punishable by imprisonment for life, were tried summarily in the Juvenile Justice Court [s 35] unless the juvenile did not consent [s 37], or the Juvenile Justice Court declined to deal with them [s 38], in which case they were dealt with under the provisions of the *Justices Act* relating to indictable offences (ie committal proceedings were held and the juvenile committed for trial by jury) [s 36];

(c) offences punishable by imprisonment for life had to be dealt with under the provisions of the *Justices Act* relating to indictable offences [s 35 and s 36].

[34] On 20 December 2006, the *Juvenile Justice Act* was replaced by the *Youth Justice Act* which replaced the Juvenile Justice Court with the Youth Justice Court ("YJC"). Similar provisions to the old sections 19, 35, 36, 37 and 38 are found in the *Youth Justice Act* s 52, s 54 and s 55.

[35] Since that time, youth defendants, as they are now called, have continued to be dealt with under essentially the same regime.

(a) Offences which, in the case of an adult offender, are dealt with summarily by the Court of Summary Jurisdiction are dealt with summarily by the YJC [*Youth Justice Act* s 52 and s 54(1)].

(b) All other offences other than offences punishable by imprisonment for life are tried summarily in the YJC [s 54(1)] unless the youth defendant does not consent [s 54(2)], or the YJC declines to deal with them [s 55(6)], in which case they are dealt with by way of preliminary examination and committal for trial by jury.

(c) Offences punishable by imprisonment for life must be dealt with by the YJC by way of preliminary examination and committal for trial by jury [s 54(3)].

[36] This has been thought by all concerned to be the regime provided for in the *Youth Justice Act*. However, in 2010, counsel for a youth defendant (in *Curtis v Eaton*)[28] "discovered" a lacuna in the *Youth Justice Act*. He contended that s 54(2) of the Act (which allows a youth to refuse to consent to summary determination of offences covered by that section) only applies to offences which in the case of an adult **can** be dealt with summarily by consent (ie less serious offences, in general those punishable by 5 to 10 years imprisonment): all other indictable offences (ie the more serious ones

[28] [2010] NTSC 19.

punishable by 10 years imprisonment or more) must be dealt with summarily by the YJC under s 54(1).

[37] Dr Rogers SC, counsel for the Crown in *Curtis v Eaton*, rightly contended that such a perverse result could not have been intended by the legislature. She argued, and Olsson AJ accepted, that the apparent lacuna was covered by s 53 of the Act which provides that unless the Act makes specific provision in relation to proceedings, the *Justices Act* applies as if the YJC were the Court of Summary Jurisdiction. If correct, the result would be that serious indictable offences, which cannot be dealt with summarily in the case of an adult, cannot be dealt with summarily by the YJC in the case of a youth defendant.

[38] While I agree that the perverse result contended for by the defendant in *Curtis v Eaton* cannot have been intended, for the reasons which follow, I cannot agree with the solution adopted in *Curtis v Eaton*, and by their honours Mildren and Riley JJ in this case. While I agree that the Act is unhappily worded, in my view, on the proper construction of s 54(2) there is no such lacuna. The Act has been correctly interpreted since 20 December 2006; s 54(2) applies to all offences which, in the case of an adult, cannot be dealt with summarily without the consent of the accused; and the regime which has been implemented by the YJC (and this Court) is the one provided for by that Act.

Nature of this proceeding

[39] The second, third and fourth defendants are all youths as defined in the *Youth Justice Act* – that is to say they are all under the age of 18. They have each been charged with, among other offences, unlawfully causing serious harm, contrary to s 181 of the *Criminal Code*. This is a serious indictable offence which, in the case of an adult accused, may not be dealt with summarily even with the consent of the accused.[29]

[40] The charges against each of the three youths have been listed for summary trial in the YJC. The plaintiff contends that, on a true construction of the *Youth Justice Act*, that court has no jurisdiction to summarily try the charges but must proceed by way of a preliminary examination and (if appropriate) commit the defendants for trial in the Supreme Court. The plaintiff applied to a magistrate to vacate the hearing date and list the matter for a preliminary examination. That application was refused. The plaintiff now applies to this Court for an order in the nature of prohibition pursuant to O 56 of the Supreme Court Rules, prohibiting the YJC from summarily trying the charges, and a single judge has referred the matter for determination by the Full Court pursuant to s 21 of the *Supreme Court Act.*

[29] Section 120 of the *Justices Act* sets out offences which may be tried summarily by the Court of Summary Jurisdiction without the consent of the accused. Section 121A and s 131A set out those which may be tried summarily by the Court of Summary Jurisdiction with the consent of the accused and the prosecutor and provided that court is of the opinion that it is appropriate to be so dealt with. All other indictable offences must be tried by a jury in the Supreme Court: see *Criminal Code* s 348.

Preliminary issue

[41] I agree with the decision and the reasons for decision of Mildren and Riley JJ in relation to the preliminary issue. The point is covered by *R v Galvin; ex parte Metal Trades Employers' Association*.[30] It was not necessary for the plaintiff to wait for the YJC to decide whether it had jurisdiction before applying to the Supreme Court for an order in the nature of prohibition.

Substantive application

[42] The principal issue in this proceeding is the interpretation of s 54 and s 53 of the *Youth Justice Act*, namely whether (on the correct interpretation of those sections) the YJC has jurisdiction to deal summarily with offences for which the maximum penalty is more than 10 years imprisonment, but less than life imprisonment.

[43] The first defendant has entered a submitting appearance. The three parties who appeared to argue the case each contended for a different interpretation of the Act.

The Fourth Defendant's construction

[44] Mr Wild QC, for the fourth defendant, contended that such serious indictable offences **must** be tried summarily by the YJC; the youths have no right to insist on trial by jury; and the YJC has no discretion to refuse jurisdiction or refer the matters to the Supreme Court. He submitted that

[30] (1949) 77 CLR 432 at 445.

there was a lacuna in the legislation; that this produced an admittedly absurd result; but that the Act was plain and only the legislature could provide a remedy. His argument in essence was as follows.

(a) The starting point is s 54(1) which provides that the YJC **must** hear summarily all charges of a summary or indictable nature unless the offence, if committed by an adult, would be punishable by imprisonment for life. [Section 54(3) provides that offences punishable by imprisonment for life must be dealt with by the YJC by way of preliminary examination.]

(b) Section 54(2) provides an exception to the general rule stated in s 54(1). It provides that in the case of an offence which, if committed by an adult, would require the consent of the defendant to be heard summarily, if the youth does not consent, the YJC must proceed to deal with the matter by way of preliminary examination.

(c) Offences which require the consent of the defendant to be dealt with summarily are those punishable by imprisonment for more than five years but less than 10 years and certain specified others: *Justices Act* s 121A and s 131A.

(d) This is reinforced by s 55 which provides that in the case of these offences, if the youth consents and the Court is of the opinion that it is appropriate to deal with the matter summarily, the YJC must proceed to hear the matter summarily.

(e) No specific provision is made for more serious offences – ie those punishable by imprisonment for more than 10 years but less than life.

(f) That being the case, the provisions of s 54(1) apply and the YJC **must** deal with these matters summarily. There is no ambiguity in s 54(1) which would enable the Court to have resort to s 53 or any other provision of the Act to "fill the gap".

[45] Mr Wild acknowledged that this would have the effect that the legislature can hardly have intended, of preserving the right of a youth defendant to trial by jury for less serious indictable offences, but not for more serious offences. Moreover, as the provisions of s 55, s 56 and s 57 of the Act only apply to offences to which s 54(2) apply, the YJC would have no power to commit a youth for trial in the Supreme Court or to refer a youth to the Supreme Court for sentencing on these more serious indictable offences, with the result that the maximum penalty that may be handed down to a youth on more serious offences is that fixed by the *Youth Justice Act* (namely two years imprisonment) whereas the full range of sentencing options remains available for less serious indictable offences. Nevertheless, he says that the plain meaning of the words in the Act is clear and this Court is bound to give effect to those words.

The Plaintiff's construction

[46] Dr Rogers SC for the plaintiff contended that, on the true construction of the Act, such charges **must** be tried by a jury in the Supreme Court following a

preliminary investigation in the YJC and the committal of the youth for trial. The YJC has no jurisdiction to deal with such matters summarily. In so contending, she adopted the reasoning of Olsson AJ in *Curtis v Eaton*.

(a) Olsson AJ and Dr Rogers begin with the same starting point as Mr Wild. Section 54(1) provides that the YJC must hear summarily all charges of a summary or indictable nature unless the offence, if committed by an adult, would be punishable by imprisonment for life.

(b) Section 54(2) provides an exception to that general rule in the case of an offence which, if committed by an adult, would require the consent of the defendant to be heard summarily. Like Mr Wild, Dr Rogers sees this sub-section as referring to those offences specified in s 121A and s 131A of the *Justices Act* which, in the case of an adult, may be dealt with summarily with the consent of the accused. Such offences may only be dealt with summarily if the youth consents and the Court is of the opinion that it is appropriate to deal with the matter summarily.

(c) As no specific provision is made for more serious offences which in the case of an adult offender cannot be dealt with summarily even by consent - in general those punishable by imprisonment for more than 10 years but less than life as these are dealt with specifically in s 54(3) – there is an apparent lacuna in the legislation.

(d) Since the application of s 54(1) to those more serious offences would give rise to an outcome that is both illogical and anomalous (as acknowledged by Mr Wild), in *Curtis v Eaton*, Olsson AJ concluded that the legislature must have intended to avoid the creation of any such lacuna by enacting s 53 of the Act. That section provides:

> (1) Unless this Act makes specific provision in relation to proceedings, orders or convictions, the *Justices Act* applies as if the Youth Justice Court were the Court of Summary Jurisdiction established by that Act.

(e) Olsson AJ considered that the obvious intention of s 53(1) was to provide for contingencies that have otherwise not specifically been addressed in other sections of the Act.[31] He considered that it ought properly be construed as conveying that, where a youth is charged with an indictable offence attracting a maximum sentence in excess of 10 years, that charge may not be dealt with summarily. Rather, the YJC must hold a preliminary examination and (if appropriate) commit the youth for trial in the Supreme Court.[32] Dr Rogers contends that this construction is the correct one.

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[31] *Curtis v Eaton* at [76].

[32] *Ibid* at [77] Although this was not spelled out in detail in submissions, this result would follow from the application of s 101, s 105A, s 106 and s 112 of the *Justices Act* which deal with the holding of preliminary examinations and the committal of a defendant for trial in the Supreme Court, in combination with s 348 and s 296 of the *Criminal Code*.

The Second and Third Defendants' construction

[47] Mr Read, for the second and third defendants, contended that the legislative intent was that all offences including serious indictable offences (other than those punishable by imprisonment for life) were to be dealt with summarily unless the youth defendant elected to proceed by way of committal or the magistrate believed that the matter should be dealt with by way of committal (ie the regime currently implemented in the YJC).

(a) Mr Read relied on the absurdity that would result from a literal interpretation of s 54(1) and the absence of any specific provision in relation to serious indictable offences, pointed out by Dr Rogers and acknowledged by Mr Wild.

(b) However, he pointed out that the solution suggested by Dr Rogers and Olsson AJ gives rise to its own anomalies. First, if serious indictable offences **must** be dealt with under the provisions of the *Justices Act* (which would be the effect of Dr Rogers' solution), then sub-section 54(3), which provides that offences which if committed by an adult would be punishable by imprisonment for life must be dealt with by way of preliminary examination, would be redundant – as would the exception in s 54(1) stating that such offences are not to be dealt with summarily. If **all** serious indictable offences must be dealt with under the *Justices Act* by way of preliminary examination, then there would be no need to specifically provide for "life offences" to be so dealt with. The evident intention of the legislature

is for "life" offences to be dealt with differently from other indictable offences in the case of youth offenders and Dr Rogers' interpretation would not give effect to this express intention.

(c) Secondly, Mr Read submitted that the general legislative intent set out in s 54(1) is that all indictable offences other than "life" offences are to be dealt with summarily and that this is consistent with the general objects and principles of the Act set out in s 3 and s 4 and s 52(1). The construction contended for by Dr Rogers would not further this intent. Rather, on that construction, the position for young offenders would be no different from the adult position as set out in the *Justices Act*. The same three categories of offence would exist – those which must be dealt with summarily, those which can be dealt with summarily only with the consent of the person charged, and those which cannot be dealt with summarily at all.[33] If that were the intention, there would seem to have been little purpose in enacting the special provisions for youth offenders in the *Youth Justice Act*.

(d) Mr Read conceded that there was an apparent "unhelpful lacuna" in the legislation with respect to serious indictable offences, and that this was "exacerbated" under s 55 and s 56 so that *prima facie* in the case of serious indictable offences there is no provision for

[33] The only difference in the case of juveniles would be that the consent of the prosecutor would not be required for the s 121A offences to be dealt with summarily should the juvenile elect for summary determination and the YJC agree to deal with it.

explanation of rights, no provision for a juvenile to refuse consent to summary disposition of such offences, and no discretion in the YJC to send such matters to trial by jury by way of committal. He said that, if it is accepted that the legislative intent was for most offences to be dealt with summarily, as set out in s 54(1), such rights must be "inferred" for serious indictable offences short of "life" offences. However, he did not suggest a mechanism in the legislation whereby such rights could be inferred.

[48] A mechanism for achieving this result (although not one adopted in submissions by Mr Read) is to construe s 54(2) to apply to all indictable offences other than life offences, as was the case under s 37(1) of the *Juvenile Justice Act*.

[49] The provisions of the Act which provide that the youth defendant may consent to an indictable offence being dealt with summarily [s 55]; and may do so at any stage of the proceeding [s 56]; that the court must explain this right to the youth [s 55(2)]; that the YJC has the power to deal with a matter by way of preliminary examination if it is of the opinion that it is not appropriate to deal with it summarily [s 55(6)]; and that the YJC may refer a matter to the Supreme Court for sentencing [s 57] all apply in the case of matters that come within the exception in s 54(2).[34]

[34] See s 55(1) – which repeats the formulation in s 54(2)(a) – and s 56(1) and s 57(1)(a) – which state that the sections in question apply "if the Court is conducting a preliminary examination in respect of a youth in accordance with s 54(2)".

[50] If s 54(2) applied to all indictable offences other than "life" offences which are dealt with specifically in s 54(3), then the Act would have the effect contended for by Mr Read. The words used in s 54(2) are: "if the offence, if committed by an adult, would require the consent of the defendant to be heard summarily; and the youth does not consent, the Court must proceed to deal with the matter by way of preliminary examination." The only offences which, in the case of an adult, do **not** require the consent of the accused to be dealt with summarily are those set out in s 120 of the *Justices Act*. On one view of the matter then, s 54(2) applies to all offences other than those set out in s 120, that is to say **all** indictable offences, not just those set out in s 121A and s 131A of the *Justices Act* which an adult **may** consent to have tried summarily.

Problems with all suggested constructions

[51] The construction contended for by Mr Wild involves taking away the right to trial by jury in the case of juveniles charged with serious indictable offences other than those punishable by life imprisonment, but not for less serious indictable offences. It would also involve taking away the jurisdiction of the Supreme Court to try juveniles charged with serious indictable offences. The court should not impute an intention to do either of these things unless such intention is clearly expressed.

[52] A further highly undesirable consequence of the construction contended for by Mr Wild is that, if it is correct, the Supreme Court lacked jurisdiction to

deal with any of the serious matters involving youth defendants which have in fact been dealt with in the Supreme Court since the commencement of the *Youth Justice Act*. Presumably, then, each of the sentences passed on the youth defendants in question would be a nullity.

[53] The construction contended for by Dr Rogers avoids the drastic (indeed absurd) effect of that contended for by Mr Wild. However, it involves depriving s 54(3) and the closing words of s 54(1) of any effect, and in so doing fails to give effect to the evident intention to treat "life" offences differently from all other indictable offences. It also fails to give effect to what appears to be the legislative intent, expressed in s 54(1), that the starting position is for summary determination of all charges of either a summary or indictable nature other than "life" offences, and makes the regime for juveniles the same as that for adults set out in the *Justices Act*.

[54] Moreover, since the commencement of the *Youth Justice Act* on 20 December 2006, it has been the practice of the YJC to hear summarily all indictable offences other than life offences unless the youth defendant does not consent or the Court is of the view that the matter should be dealt with by way of committal (ie Mr Read's construction). These include matters which on Dr Rogers' construction the YJC has no jurisdiction to deal with. By way of example only, a common offence committed by youths is entering a dwelling at night with intent to commit a crime, an offence punishable by a maximum of 20 years imprisonment. The YJC has dealt with many such charges since its inception. If Dr Rogers' construction of the Act is correct,

these have all been outside the jurisdiction of that court and sentences have not been lawfully imposed.

[55] The construction contended for by Mr Read avoids the problems of the other two constructions, but would require the Court **either** to find an implied right to trial by jury, and an implied discretion in the YJC to commit juveniles to trial in the Supreme Court in appropriate cases (without any words in the statute on which such an inference could be based) **or** to construe s 54(2) to apply to all offences other than those which, in the case of an adult, can be dealt with summarily without the consent of the accused as was the case with s 37(1) of the *Juvenile Justice Act*.

Preferred construction

[56] As is readily apparent, none of the three constructions contended for is entirely satisfactory. In my view, that contended for by Mr Wild is the most unsatisfactory. This Court should not impute to parliament the intention to deprive youth defendants of the right to trial by jury in very serious cases or to remove the jurisdiction of the Supreme Court to try such cases unless that intention has been expressed in the clearest possible language: it has not.

[57] The construction contended for by Dr Rogers and adopted by Olsson AJ in *Curtis v Eaton* would present a logical solution to the apparent lacuna in the Act, if there were such a lacuna. However, in my view there is no such lacuna.

[58] The construction contended for by Mr Read best reflects the evident intention of the legislature and does the least violence to both the language and overall scheme of the Act. It conforms with the practice adopted in the YJC since the commencement of the Act and would not involve the invalidity of any past decisions/sentences by either court.

[59] However, I do not think it is either possible or necessary to **imply** into the Act the right to a trial by jury and/or a discretion in the YJC to deal with matters by way of committal in appropriate cases. Rather, in my view, on its proper construction, s 54(2) applies to all offences other than those which, in the case of an adult, can be dealt with summarily without the consent of the accused, and "life" offences which are dealt with in s 54(3).

[60] There is a good reason why prosecutors, defence counsel, and magistrates (and judges) have worked with this Act for four years, giving it the construction now contended for by Mr Read, and not noticing the existence of any lacuna. There is no lacuna: hence there are no "gap offences". (I should add that, if there were such a lacuna, I would be in complete agreement with the reasoning set out in *Curtis v Eaton,*[35] and adopted by Mildren and Riley JJ for "closing the gap" in relation to such "gap offences".)

[35] It was not argued before Olsson JA that on a proper construction of s 54(2) there was no lacuna in the Act. Both parties assumed there would be a lacuna unless the gap was closed by s 53.

[61] I gain support for this construction from the explanatory statement for the *Youth Justice Bill*. The explanatory statement for cl 54 (which became s 54 of the *Youth Justice Act*) is as follows:

> **Clause 54. Indictable offences to be tried summarily except certain cases**
>
> This clause is to ensure that generally all charges against a youth (of a summary or indictable nature) are heard summarily by the Youth Justice Court unless the offence, if committed by an adult, is punishable by imprisonment for life. If dealing with an offence which, if committed by an adult, is punishable by imprisonment for life, the Court must conduct a preliminary examination.

[62] So far, the explanatory memorandum supports the construction contended for by Mr Read. It would also be consistent with the construction contended for by Mr Wild (which for the reasons set out above, cannot be accepted), but not that contended for by Dr Rogers.

[63] The explanatory memorandum for cl 54 continues:

> "Also, if the offence, if committed by an adult, would require the consent of the defendant to be heard in a summary manner and the defendant youth does not consent, the Court must conduct a preliminary examination."

[64] The focus appears to be on preserving the right of the defendant youth to refuse to consent to summary determination and to insist on committal and trial by jury in matters which cannot be dealt with in a summary manner without the consent of an (adult) defendant. It also suggests that the proponents of the Bill intended that a distinction be made between matters which **could** be dealt with in a summary manner without the consent of the

defendant and those which **could not** be dealt with in a summary manner without the consent of the defendant. There is nothing in the explanatory memorandum to suggest that the proponents of the Bill intended a distinction to be made in the treatment of matters within the latter category. The explanatory memorandum evinces a general intention that **all** charges against a youth of a summary or indictable nature (except "life" offences) are to be heard summarily by the YJC; but in the case of those which **cannot** be dealt with summarily without the consent of an (adult) defendant, to preserve the right of the youth defendant to a trial by jury.

[65] If s 54(2) is read with the purpose set out in the explanatory memorandum in mind, there is no lacuna in the Act and, given the consequences of the existence of a lacuna, I do not think it can have been the legislative intention to create one. With respect, those who see such a lacuna are asking the wrong question. Section 54(2) is the "gateway" section to the rights and discretions set out in s 55, s 56 and s 57. As its evident purpose is to preserve the right of a youth defendant to refuse to have serious charges dealt with summarily, to find out whether a particular charge passes through that gateway, one asks, "Is this an offence which, in the case of an adult, **cannot be dealt with summarily without the consent of an (adult) defendant**?" If the answer is, "Yes," then the youth defendant has a right to refuse consent to summary determination and the rights and discretions in s 55 to s 57 apply. I do not agree with Mildren and Riley JJ that such an

interpretation involves either a redrafting of s 54(2)(a) or a reading down of the provisions of the *Justices Act*.

[66] Section 54(2) is confusingly worded, but to ask the question the other way, namely, "Is this a charge which **can be dealt with summarily if an (adult) defendant consents**?" has the effect of creating an apparent lacuna in respect of more serious indictable offences; does not advance the purpose of the section or of the Act; and strains the wording of the sub-section at least as much as (if not more than) an interpretation of the section in accordance with its evident purpose.

[67] Both the explanatory memorandum and the Act contemplate three categories of offences only in the case of youth offenders; life offences (which must be dealt with by way of preliminary examination and committal) [s 54(3)]; offences which do not require the consent of an (adult) defendant to be dealt with in a summary manner (which must be dealt with summarily in the YJC) [s 52 and s 54(1)]; and all others (which, in the case of an adult cannot be dealt with summarily without the consent of the defendant, indeed some of which, in the case of an adult, cannot be dealt with summarily at all). Offences in this last category, in the case of youth defendants, are to be dealt with summarily by the YJC [s 54(1)] **unless** the youth defendant does not consent [s 54(2)] **or** the Court is of the opinion that it is not appropriate to deal with them summarily [s 55(6)]. If either of these latter conditions prevail, the YJC must deal with offences in this third category by way of preliminary examination.

[68] That this was the intention of the legislature is further reinforced by looking at the regime in the previous Act, the *Juvenile Justice Act*.

[69] The equivalent of s 54(1) was contained in s 19 and s 35 of the old Act.[36] Section 35 dealt with indictable offences.

> **35. Indictable offences to be dealt with summarily**
>
> Subject to sections 36, 37 and 38, where a juvenile is charged before the Court with an offence which, if committed by an adult, is punishable by imprisonment for 12 months or longer, other than an offence punishable by imprisonment for life, the Court shall hear and determine the matter in a summary manner.

[70] The equivalent of s 54(2) was contained in s 37 of the old Act:

> **37. Juvenile may be committed for trial**
>
> (1) Where a juvenile is charged before the Court with an indictable offence and the offence is such that, if the juvenile were an adult, **the Court would not be empowered to deal with it in a summary manner without the consent of the accused**, the Court shall not so deal with it except with the consent of the accused. *[emphasis added]*

[71] So worded, the emphasis is placed on asking the right question, (ie "Is this an offence which **cannot be dealt with summarily** without the consent of the accused?").

[72] In the new Act, the draftsman rather infelicitously changed the wording as follows:

> "if the offence, if committed by an adult, **would require the consent of the defendant to be heard summarily**; and the youth does not

[36] Section 19 was the equivalent of s 52. It provided that, subject to the Act, the Juvenile Justice Court was to hear and determine all charges of both a summary or indictable nature against a juvenile.

consent, the Court must proceed to deal with the matter by way of preliminary examination." *[emphasis added]*

[73] However, there is not the slightest hint in the second reading speech or explanatory memorandum that by rewording the provision in this way, the legislature intended to make a fundamental change in the regime for dealing with youth offenders and to exclude serious indictable offences carrying a lesser penalty than life imprisonment from the regime set up in s 54(1) whereby indictable offences are generally to be dealt with summarily. Quite the reverse, as explained above. In my view, the two sections mean the same.[37]

[74] I would, therefore, dismiss the application for an order in the nature of prohibition prohibiting the YJC from dealing with the charges against the second, third and fourth defendants in a summary manner. In my view, the YJC does have jurisdiction to deal with these charges in a summary manner pursuant to s 54(1) of the Act unless the defendants do not consent or the YJC itself is of the opinion that it is not appropriate to deal with the charges summarily.

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[37] So far as I am aware, it has not been suggested that there was a similar lacuna in the *Juvenile Justice Act* and that it was wrongly interpreted and administered during the whole of the time it was in force.