Citation: R v Siwicki, 2022 MBCA 53
Date: 20220610
Docket: AR21-30-09589

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Mr. Justice William J. Burnett

B E T W E E N :

HER MAJESTY THE QUEEN	)	
	)	***B. S. Newman***
Respondent	)	*for the Appellant*
	)	
- and -	)	***D. L. Carlson*** *and*
	)	***P. R. Girdlestone***
TAMARA LEE SIWICKI	)	*for the Respondent*
	)	
(Accused) Appellant	)	***S. A. Inness*** *and*
	)	***S. D. McNamara***
- and -	)	*for the Intervener*
	)	*Criminal Defence Lawyers*
CRIMINAL DEFENCE LAWYERS ASSOCIATION OF MANITOBA	)	*Association of Manitoba*
	)	
	)	***A. B. Graham, Q.C.***
(Intervener) Intervener	)	*as amicus curiae*
	)	
- and -	)	*Appeal heard:*
	)	***January 12, 2022***
PROVINCIAL JUDGES' ASSOCIATION OF MANITOBA	)	
	)	*Judgment delivered:*
	)	***June 10, 2022***
(Intervener)	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2021 MBQB 42

CHARTIER CJM

Introduction and Issues

[1] This is an appeal from an order dismissing the appellant's application to quash the decision of the Provincial Court judge (the judge) denying a request to change the venue of a sentencing.

[2] The critical question on this appeal is whether a court maintains oversight over such requests. The parties submit that the answer to the question turns on the correct interpretation of section 479 of the *Criminal Code* (the *Code*), which reads as follows:

> **Offence outstanding in same province**
> **479** Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in section 469 and
>
> **(a)** in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or
>
> **(b)** in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,
>
> appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.
>
> [emphasis added]

[3] As I will explain, I am of the view that section 479 is a vestige of the past and has no application to the matter at hand. Put squarely, the issue is whether the parties or the court chooses the venue of a sentencing. For the reasons that follow, I would conclude that the final decision on venue rests with the court.

[4] The facts are straightforward. The appellant is facing offences relating to driving while impaired. She is prepared to plead guilty to the charges. She asked the judge to change the venue of the sentencing from the originating court (in the jurisdiction where the offences occurred) to another court (the receiving court). The Crown (represented by a different Crown attorney in this appeal) consented to the request (the transfer request). Neither the appellant nor the Crown stated that the transfer request was being made pursuant to section 479. The judge referred counsel to a recent practice directive issued by the Chief Judge of the Provincial Court (see Manitoba, Provincial Court, "Practice Directive: Re: Transferring Matters between Judicial Court Centres" (25 July 2019), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1175/notice_- _transferring_matters_between_judicial_court_centres_-_e.pdf> (date accessed 13 May 2022)) (the directive). As per the directive, he inquired as to the extenuating circumstances for such a request. None were offered. The directive, which makes no mention of section 479, is reproduced at para 46 of these reasons.

[5] After noting that the transfer request was not an "issue of . . . getting [the sentencing] dealt with sooner rather than later" because the requested transfer disposition date was only one day earlier than the next remand date in his court, and it was "not a situation where [counsel had] to drive three hours to . . . do one . . . disposition" because the distance between the

originating court and the receiving court was only a five-minute drive away, the judge denied the appellant's transfer request.

[6] The appellant then applied to a judge of the Court of Queen's Bench (the application judge) for an order of *certiorari* to quash the judge's decision. The application judge determined that a judge has a discretion under section 479 to allow or refuse a transfer from one judicial centre to another. The *certiorari* application was therefore dismissed. The appellant now appeals to this Court.

Standard of Review

[7] A question of statutory interpretation engages a question of law. As a result, the standard of review will be correctness (see *Lockport Taxi Ltd v The Rural Municipality of East St Paul et al*, 2021 MBCA 40 at para 1). In addition, this appeal raises an issue of a court's jurisdiction, decisions on which are also reviewed for correctness.

Decision of the Application Judge

[8] The application judge applied the modern approach as set out in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 (*Rizzo Shoes*), in his statutory interpretation of section 479 of the *Code* (see para 10). He also applied the presumption that Parliament intends section 479 to comply with constitutional principles, such as judicial independence (see paras 24-25). He understood the two dimensions of judicial independence (adjudicative independence of a judge and administrative independence of a court) (see para 31).

[9] The application judge found that the decision to transfer a matter from one judicial centre to another is an "administrative decision" (at para 36) that is part of a court's overall responsibility bearing directly and immediately upon the exercise of the judicial function (*ibid*). He recognized that part of the administrative independence of a court rests with its ability to control, among other things, "court lists" (at para 42) and that an interpretation of section 479 that would take away a court's discretion would undermine its ability to control and manage the court lists (*ibid*).

[10] The application judge recognized that, if there is ambiguity in section 479, it should be read down to accord with the presumption that Parliament intends its legislation to comply with constitutional principles (see para 46). He determined that, to read section 479 in a manner that would not afford a judge "a discretion to adjudicate the request to transfer a matter from the originating judicial centre to a different judicial centre, would infringe upon the constitutional principle of the administrative independence of the judiciary" (*ibid*). Finally, the application judge concluded that the judge did not exceed his jurisdiction when he refused the transfer request (see para 57).

Positions of the Parties

a) Positions of the Appellant, the Intervener and the Crown

[11] The appellant, the intervener the Criminal Defence Lawyers Association of Manitoba and the Crown raise many of the same arguments. For ease of reference, I will collectively call them "the appellants". They argue that section 479 is straightforward and that its ordinary and plain meaning is clear. They submit that, once the preconditions in section 479 are

met, they are insulated from judicial oversight and the judge must transfer the offence(s) to the receiving court.

[12] The appellants submit that, had Parliament intended to vest discretion with the court for a transfer of charges pursuant to section 479, it would have explicitly done so by referencing a test or listing factors similar to those contained in section 599. They also argue that the interpretation given by the application judge creates an inconsistent and absurd result for the operation of section 478(3), which deals with inter-provincial transfers and which uses essentially the same language as in section 479.

[13] The appellants also argue that, in enacting sections 470 and 479, Parliament has explicitly overridden the common law rule that matters be heard where the offence occurred. They submit that the application judge erred when he read down section 479 in order to protect the broader issues of administration of justice and administrative judicial independence.

[14] The Crown raises the additional issue of prosecutorial discretion. It submits that it had reached an agreement with the defence, made in the context of resolution discussions, regarding the location of the sentencing hearing. It argues that the judge's decision to refuse the transfer request was an improper interference with a proper exercise of prosecutorial discretion.

[15] In the view of the appellants, the appropriate remedy would be to (1) allow the appeal, (2) quash the judge's decision to refuse to transfer the charges and, (3) remit the matter back to the originating court with a direction that the transfer of the charges be ordered.

b) Position of the Amicus Curiae

[16] The position of the *amicus curiae* is diametrically opposed to the appellants. He argues that section 479 was intended to apply in provinces at a time when provinces, such as Manitoba, were divided into territorial districts in which a judge or magistrate appointed in one would not have jurisdiction in another. He offers that section 479 may no longer have application in Manitoba.

[17] The *amicus curiae* submits that, even if section 479 applies, the application judge was correct in holding that a judge in the originating judicial centre has the requisite authority to exercise a discretion as to whether to permit the transfer request, even when the preconditions are met. He submits that the word "shall" in section 479 applies to the responsibilities of the judge in the receiving court and has no bearing on the manner in which the judge in the originating court is to respond to the request for the transfer. As a result, section 479 can be regarded as silent with respect to the nature and extent of the discretion to be exercised by the judge in the originating court.

[18] With regards to the Crown's submission that the judge interfered with a proper exercise of prosecutorial discretion, the *amicus curiae* argues that that is not what happened in this case. He argues that it is important to distinguish between the Crown's decision to accept a guilty plea to a lesser charge, which is a core element of prosecutorial discretion, and its decision to consent to the accused's transfer request, which he submits is not.

[19] Finally, the *amicus curiae* argues that, when interpreting section 479, it is important to recognize that Parliament is presumed to have acted in a manner which does not impinge on the independence of the

judiciary or on provincial jurisdiction over the administration of justice. He says that the application judge correctly concluded that a decision on whether to allow the transfer from the originating court to the receiving court is an administrative decision, bearing directly upon the exercise of the judicial function.

[20] The *amicus curiae* submits that the application judge did not err and that this appeal should be dismissed.

Analysis

[21] The appellants submit that this appeal turns on the proper statutory interpretation of section 479, which section is reproduced at para 2 of these reasons. The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo Shoes* at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). This approach incorporates "a textual, contextual and purposive analysis" (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10).

[22] However, the modern approach does not mean that the statutory interpretation of a provision can be founded on the plain or ordinary meaning alone. Courts must consider more. They must consider the total context, including related provisions in the same and other legislation, as well as presumptions of legislative intent (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at sections 3.6-3.7, 16.10).

[23] In terms of legislative intent, this approach must be guided by the presumption that Parliament and the legislatures intend legislative provisions to comply with constitutional principles. As the Supreme Court of Canada recently reaffirmed, judicial independence, albeit an unwritten one, is a constitutional principle (see *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 55).

[24] The appellants present this case as one of jurisdiction. In the *certiorari* application, one of the grounds is simply that the originating court has "no jurisdiction to deny a transfer for a guilty plea where both Crown and Defence consent". Jurisdiction was also front and centre before the application judge, who noted in the beginning of his reasons that the appellant said that the judge "improperly interpreted his jurisdiction such that he acted outside of his jurisdiction" (at para 1). The appellants press their view that section 479 is "clear and straightforward" as regards jurisdiction.

[25] The appellants also submit that there is no ambiguity to the provision, which "reads plainly" and reflects "ordinary" meaning. They argue that, once the three preconditions in section 479 are met (the accused pleads guilty to the offence; the offence is not one mentioned in section 469 of the *Code*; and the Crown consents), the appellant is insulated from judicial oversight as to venue and the judge must transfer the information laying the charges from the originating court to the receiving court.

[26] Let me begin by stating that I do not agree with the appellants' submission that section 479 is "clear and straightforward." First, despite the fact that the section purportedly involves the transfer of offences from one court venue to a second court venue, the words "transfer" and "venue" are

nowhere to be found. Second, section 479 does not mention both courts: the originating court and the receiving court. It only mentions the receiving court. Third, the language describing the receiving court uses an unusual reference to a court or judge in the province that "would have had jurisdiction to try that offence if it had been committed in the place where the accused is" (emphasis added).

[27] More importantly, I am of the view that the appellants have conflated different concepts of the term "jurisdiction", which has made this case far more complex than it actually is. The appellant's notice of application filed in the Court of Queen's Bench to quash the judge's decision presented her case as one of jurisdiction ("a different jurisdiction in the same [P]rovince") in regard to section 479:

> . . .
>
> Section 479 of the *Criminal Code* states that when Crown and Defence both consent to have a disposition heard in *a different jurisdiction in the same Province* where the offence occurred, that the Court shall conduct the sentencing as requested . . .
>
> . . .
>
> [italics added]

[28] At this point, it would be useful to break down the different concepts of jurisdiction.

[29] First, there is the concept of "jurisdiction over the offence", which includes the concept of "territorial jurisdiction." "Territorial jurisdiction" is the physical territory over which a court has jurisdiction. If the offence is not committed on territory over which a court has been conferred authority, it has

no jurisdiction over the offence. The concept of "jurisdiction over the offence" also includes a review of whether the information was properly laid (see section 504 of the *Code*) or whether process was properly issued (see section 507). Given that those latter issues are not raised in this appeal, I will limit my analysis to the "territorial jurisdiction" component of the concept of "jurisdiction over the offence."

[30] Second, there is the concept of "jurisdiction over the person." This term is found in the heading of section 470 of the *Code*. The effect of this section is to relax the common law rule that an accused can only be tried in the locality where the offence was committed. It reads as follows:

> **Jurisdiction over person**
> **470** Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> **(a)** if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
>
> **(b)** if the accused has been ordered to be tried by
>
> **(i)** that court, or
>
> **(ii)** any other court, the jurisdiction of which has by lawful authority been transferred to that court.
>
> [emphasis added]

As it relates to this province, section 470(a) confers province-wide jurisdiction on a court to try an accused because the "territorial jurisdiction of the court", whether it be the Provincial Court or the Court of Queen's Bench, is throughout the province (see section 7 of *The Provincial Court Act*, CCSM c

C275 (the *PC Act*); and section 32 of *The Court of Queen's Bench Act*, CCSM c C280 (the *QB Act*)).

[31] The third and final jurisdictional concept is the wider concept of "jurisdiction" in the sense of a court's authority to make certain decisions. The type of jurisdiction/authority that is relevant to this appeal is the one emanating from the principle of judicial independence and, specifically, its "administrative independence" component. This relates to a court's authority "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente v The Queen*, [1985] 2 SCR 673 at para 52; see also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 117) (*PEI Judges Remuneration*).

[32] The provisions on jurisdiction in the *Code* are found in Part XIV, which is entitled "Jurisdiction" (sections 468-482.1). It is divided into three categories: General (sections 468-475), Special Jurisdiction (sections 476-481.3), and Rules of Court (sections 482-482.1). Only the first two categories have relevance to this appeal.

[33] The General category deals with broad concepts of jurisdiction. Sections 468-469 set out which courts have the jurisdiction to deal with indictable offences. As previously indicated, section 470 provides flexibility on the "jurisdiction over the person" by relaxing the common law rule that an offence can only be tried where it occurred. Section 470(a) allows a court to try an accused provided that the accused "is found, is arrested or is in custody" within the province. Section 470(b) also gives a court jurisdiction over the

person provided "the jurisdiction of [another court] has by lawful authority been transferred to that court", such as when a matter is transferred from another province pursuant to section 478(3).

[34] The Special Jurisdiction category deals with unusual situations such as when an offence is committed on water or on a bridge between two "territorial divisions" (at section 476) or when an offence is committed in an unorganized territory (see section 480), or in Canada, but not in a province (see section 481). It also sets out special sets of circumstances where the legislator decided to provide a court with the necessary territorial jurisdiction it would not otherwise have. Sections 478 (an inter-provincial transfer request) and 479 (an intra-provincial transfer request) are two such situations.

[35] Now that the concepts of jurisdiction have been differentiated, I return to my view that the appellant has conflated various concepts of jurisdiction by presenting her case as one of jurisdiction under section 479. As I said earlier, I am of the view that section 479 no longer has application in Manitoba. It is a vestige of the past. Section 479 deals with "territorial jurisdiction" issues. "Territorial jurisdiction" is the territory over which a court has jurisdiction. If the offence is not committed on territory over which a judge has jurisdiction, then the judge has no jurisdiction over the offence.

[36] Section 479 provides a court with the jurisdiction to consider an accused's request to have the sentencing heard in a different territorial division of that province. When section 479 was first enacted, Manitoba and other provinces had courts of limited jurisdiction, both in relation to territory and subject matter. A judge or magistrate appointed in one district of the province would not have jurisdiction in another district of the province. The

effect of section 479 is to confer jurisdiction on a judge or magistrate in the same province who would not otherwise have it in regard to the acceptance of a guilty plea.

[37] However, in Manitoba, the provincial legislation was changed decades ago. At this point, historical context is necessary. This can be found in the Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges*, Report #72 (Winnipeg: MLRC, 1989) at ch 2. After Manitoba became a province in 1870, *An Act authorizing the appointment of Magistrates and Coroners*, SM 1871-75, c 9, was passed. It authorized the appointment of "police magistrates" (at section 2; see also *The Magistrates Act*, RSM 1954, c 150). Territorial limits were placed on their respective jurisdictions. In the 1960s, all references to "police magistrates" were changed to "magistrates" (see *The Statute Law Amendment Act, 1965*, SM 1965, c 76 at section 3); then in the 1970s, to "provincial judges" (see *The Provincial Judges Act*, SM 1972, c 61); and then to "provincial court judges" (see *The Provincial Court Act*, SM 1982-83-84, c 52). This last change also eliminated the territorial limits to their respective jurisdictions. Since 1972, the "territorial jurisdiction" of provincial court judges is no longer limited to only a specific territory within the province. As provided by section 7 of the *PC Act*, "Every judge has jurisdiction throughout Manitoba".

[38] Section 479 of the *Code* has been considered in Ontario and was found to no longer be necessary, given that, like Manitoba, the jurisdiction for judges is now province-wide (see *R v Feige*, 1992 CarswellOnt 4076 (Gen Div); *R v Marshall*, 1999 CarswellNS 242 (Prov Ct); and *R v Ponnuthurai* (2002), 170 CCC (3d) 440 (Ont Ct J)). In *Feige*, Ferguson J wrote (at para 77):

> The trial judge also expressed the view that s. 479 of the Code impliedly meant that consent must be obtained if the accused is to be tried in a place where the offence did not take place. This section permits the accused to plead guilty (with the Crown's consent) before a court which would not otherwise have jurisdiction to try the offence. It appears to me that this section was intended to apply in provinces where provincial legislation divided the province into separate judicial districts such that a judge appointed to one would not have jurisdiction in another. That is no longer the case in Ontario and therefore the section is really not necessary in Ontario because the same result can be accomplished under s. 470.
>
> [emphasis added]

[39] Sullivan makes the following germane point (at section 6.47):

> . . . It makes sense to assume that when the legislation *initially* was drafted it was meant to apply to something; the legislature would not engage in a futile exercise. However, there is no guarantee against change and no basis for assuming that legislation enacted at a particular time will always have something to apply to. . . .
>
> [emphasis added]

[40] Given that the territorial jurisdiction of all judges is province-wide, section 479 no longer has relevance in Manitoba. As was explained in *Feige*, "the same result can be accomplished under s. 470" (at para 77) as opposed to the now-spent section 479. As a result, this appeal is not about territorial jurisdiction or section 479, as submitted by the appellants. What this case is about is whether the common law rule (that an offence be tried where it occurred), which has been relaxed by section 470, should be followed in the circumstances of this case.

[41] The issue, put squarely, is whether it is the parties or the court that chooses the venue of a sentencing. For the reasons that follow, I would conclude that the final decision on venue rests with the court.

[42] Section 470 of the *Code* did not abrogate the common law rule that an offence need no longer be tried only where it occurred. It simply relaxes it. This was made clear by Moldaver J, as he then was, in *Gentles (Re)*, [1994] OJ No 1409 (QL) (Ont Ct J (Gen Div)), where he reasserted the general principle that criminal proceedings should continue to be tried where the offence occurred (see para 27). See also *R v Suzack* (2000), 141 CCC (3d) 449 (Ont CA), where the Court held: "It is a well established principle that criminal trials should be held in the venue in which the alleged crime took place. This principle serves both the interests of the community and those of the accused" (at para 30).

[43] I return to *Gentles*, a case about a man who died while incarcerated in Kingston, Ontario. The applicant was a private investigator hired by the man's family and who filed an information, pursuant to section 504 of the *Code*, in Toronto, not in Kingston. Immediately after the swearing of that information, the applicant's counsel sought to begin, before the justice of the peace, the pre-inquiry provided in section 507. The justice was of the view that the matter should be heard in Kingston, not in Toronto. He therefore declined to conduct the pre-inquiry.

[44] The issue that found its way before Moldaver J was whether a party could, in effect, decide the venue of a hearing simply by laying the information in whichever court location it chose. In ordering that the matter proceed in Kingston, not in Toronto, Moldaver J stated in a forceful manner

that it is the court, not the parties, that will have the last word on the venue of a hearing. He reasoned as follows (at paras 22-25):

> . . . If accepted, the informant would be able to pick and choose the location of the s. 507 hearing, irrespective of any and all concerns regarding the proper and efficient administration of justice in this province. Regardless of the scarcity of judicial resources in a particular area; regardless of the backlog that might exist therein; regardless of the time honoured principle that generally, criminal matters should be dealt with in the locale where the alleged offence is said to have been committed, the applicant would have it that an informant could ignore these considerations and in effect take control over the administration of justice. According to [the applicant], so long as the informant could satisfy the selected justice of the existence of any legitimate reason, such as convenience or possible bias within the locale of the alleged offence, the receiving justice would have no choice but to embark upon the s. 507 hearing. Only, he submitted, if the receiving s. 504 justice were to find that the informant's choice of locale amounted to an abuse of process, could he or she then decline jurisdiction over the s. 507 hearing.
>
> In my opinion, [the applicant's] position is a startling one. It runs contrary to the most basic and fundamental principles concerning the administration of justice in this and every other province. Section 92(14) of the [C]onstitution Act, 1867 provides that the provincial legislatures shall have exclusive jurisdiction over the administration of justice. To that end, in this province, the legislature has enacted the Courts of Justice Act, R.S.O. 1990. c. 43 and the Justices of the Peace Act, R.S.O. 1990, c. J.4.
>
> Recognizing the importance of an independent and autonomous judiciary, the legislature has seen fit, for the most part, to place in the hands of the judiciary the tools necessary to ensure the most efficient and effective use of judicial personnel and resources. While it certainly does not lie with the province or the judiciary to incorporate practices which would have the effect of restricting or denying rights afforded to informants (or accused) under the Criminal Code, that is a far cry from suggesting that informants (or accused) should be able to drive the administration of justice as they see fit.

> Under our constitutional and legislative arrangements, it is the responsibility of the judiciary, not the parties, to determine the allocation of judicial work and the assignment of individual judicial officers to individual cases. The practices and procedures adopted to promote efficiency within the administration of justice will only be subject to attack if they can be shown to be abusive or unamicable to the rights afforded to informants and/or accused under the Criminal Code (see for example R. v. Tally (1915), 23 C.C.C. 449 (Alta. S.C.); R. v. Ittoshat, (1970) 5 C.C.C. 159 (Que. Ct. of Sess.) and R. v. Simons (1976), 30 C.C.C. (2d) 162 (Ont. C.A.).
>
> [emphasis added]

[45] *Gentles* was cited with approval in *R v Ellis*, 2009 ONCA 483 at para 44; *R v Garbera*, 2011 ONSC 4871; and *R v Lane*, 2014 ONSC 4553. In *Lane*, Maranger J stated that, "[d]espite the enactment of s. 470 and the division of our courts into [administrative] regions, there remains a strong presumption that a trial ought to take place in the county or district where the offence occurred" (at para 18). I agree with him and adopt his words. Despite section 470, there remains a strong presumption that a matter ought to be tried where the offence was committed.

[46] The decision as to where the sentencing should be heard cannot rest with the parties. Courts, not the parties, are given the authority and responsibility under the Constitution and the legislative provisions to exercise their judicial functions and to control their process. Pursuant to section 8.1(b) of the *PC Act*, the Chief Judge is "responsible for the judicial functions of the court, including direction over sittings of the court and the assignment of judicial duties." On July 25, 2019, the Chief Judge of the Provincial Court gave such a "direction" by issuing the directive which states:

> **Re: Transferring Matters between Judicial Court Centres**
>
> There is a general presumption, based on principles of access to justice, matters will be heard in the community in which the incident is alleged to have occurred. It is in the public interest to have matters heard in the community or the closest judicial centre so that members of the affected community can participate fully in the proceedings and see that justice is done.
>
> There may be extenuating circumstances where the above principles should not apply. If that is the case and counsel are seeking to have any matter heard in a judicial centre other than the judicial centre closest to where the incident is alleged to have occurred, counsel shall bring an application before the presiding judge, in the originating judicial centre in which the incident is alleged to have occurred, requesting the matter be transferred to another judicial court centre.
>
> This protocol applies to all jurisdictions and all matters and is effective immediately.
>
> . . .
>
> [emphasis added]

[47] While notices and practice directives do not have the force of law like rules of court made pursuant to section 482(2) of the *Code*, they have legal implications for litigants as they are issued to ensure that contested applications are "dealt with justly and efficiently" (*R v Giesbrecht*, 2019 MBCA 35 at para 126, quoting Manitoba, Provincial Court, "Practice Directives for Contested Applications in the Provincial Court of Manitoba" (4 November 2013) at 1, online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1175/notice_nov4_2013.pdf> (date accessed 20 May 2022); see also para 149).

[48] In the case at hand, the issuance of the directive reflects, in my view, a proper exercise of the Chief Judge's duties under the *PC Act* given that it bears directly and immediately upon the exercise of the judicial function. The judge inquired as to the extenuating circumstances for the appellant's request to change the sentencing venue. None were offered. As a result, he denied the application. This was, in my view, a proper exercise of discretion on the part of the judge.

[49] I will now address the appellants' argument that, because both trial courts hold regular sittings in many locations throughout the province, the transfer of matters between judicial court centres triggers section 479 considerations. Again, the appellants conflate jurisdictional concepts. Regular court sittings are held across the entire province in numerous judicial court centres. The Minister of Justice designates these locations after consultation with the courts' respective Chief Justice or Chief Judge (see section 17 of the *QB Act*; and section 12(1) of the *PC Act*). According to its latest annual report, the Provincial Court sits in six regional court centres and 57 circuit court centres (see Manitoba, Provincial Court, "Annual Report: 2018- 2019", online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1541/mb_prov_court-18-19_ann_report-web.pdf> (date accessed 20 May 2022). However, as I will explain, these 63 court centres do not create territorial districts and do not raise territorial jurisdiction issues.

[50] While the application judge did not address the issue of whether the establishment of these judicial court centres across the province raises territorial jurisdiction issues, he did, in my view, correctly find that the

decision of whether to transfer a matter from one judicial court centre to another is an administrative one. He explained as follows (at para 36):

> In my view, the decision about whether a matter is to be transferred from one judicial centre to another is an administrative decision, the context of which cannot be ignored. This context includes the court's allocation of resources and the individual facts of a given case. This decision involves considerations about the assignment of courtrooms, the assignment of judges, the sittings of the court, the setting of court lists, and the timing and the order in which cases are called during sittings on lists. Like these other administrative matters, it is part of the court's overall responsibility over scheduling and assignments in criminal proceedings. It bears directly and immediately upon the exercise of the judicial function. It may take into account availability of courtrooms, judges, and court staff. It may take into account reduced sitting hours or sittings because of an unexpected interruption due to, for example, an ill judge or insufficient staff, or poor weather, or, indeed, travel restrictions due to a pandemic. It may take into account other unexpected events that draw upon the limited resources of the court such as the need to reschedule matters that are adjourned because of unexpected events. It is the kind of decision that is made frequently in a court's management of its resources. It takes into account volume of matters in judicial centres, prioritization of matters, and the management of delay. It may take into account other public interest policy considerations, such as the need to have resources and a presence in a community, such as a northern community. In this particular case, the practice directive refers to the public interest to have matters heard in the community or the closest judicial centre so that members of the affected community can participate fully in the proceedings and see that justice is done. That consideration, and indeed all of the considerations I have identified above, are part of and inform the nature of the administrative workings of the court. Needless to say, oversight and proper control of those administrative workings of the court, are essential to the court's tasks of ensuring the proper administration of justice and facilitating access to justice, broadly and properly understood.
>
> [emphasis added]

[51] I adopt the application judge's reasoning that the decision to transfer a matter from one judicial court centre to another is an administrative one—requiring judicial oversight to ensure the proper administration of justice and to facilitate access to justice. Such decisions relate to a court's authority "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente* at para 52; see also *PEI Judges Remuneration* at para 117).

[52] However, I will go further. In my view, these judicial court centres were established by the province for administrative purposes, not for territorial jurisdiction purposes. While this issue has never been addressed by any court in this province, it has been considered by different trial courts in Ontario and by the Ontario Court of Appeal in *Ellis*. In *Ellis*, Gillese JA, after citing with approval two trial court decisions (see *R v Hackett*, 2002 CarswellOnt 3353 (Sup Ct J); and *Ponnuthurai*), concluded that these types of centres were created for administrative purposes, not for jurisdictional purposes, and that they created "different administrative regions within a single jurisdictional unit" (see para 41; see also paras 39-40; and *Ponnuthurai* at para 16).

[53] I adopt the reasoning in *Ellis*. Like in Ontario, our trial courts operate "within a single jurisdictional unit", which is province-wide. As a result, the 63 court centres administered by the Provincial Court do not create territorial districts or raise territorial jurisdiction issues. Given that transfers between judicial court centres in Manitoba do not raise territorial jurisdiction issues, section 479 has no application in this matter.

[54] Finally, should section 479 ever have application in Manitoba (through the reintroduction of territorial limits on the jurisdiction of judges within the province), the fact that the Crown consented to the appellant's transfer request does not mean that the court does not retain the final word over the said request. As I explained above, the common law rule that an offence be heard where it occurred remains firmly entrenched. That is why the two trial courts have so many judicial court centres spread out across the province. As is stated in the directive: "It is in the public interest to have matters heard in the community or the closest judicial centre so that members of the affected community can participate fully in the proceedings and see that justice is done." As has been said many times, "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*Brouillard also known as Chatel v The Queen*, [1985] 1 SCR 39 at 43, quoting *R v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256 at 259).

[55] A court's jurisdiction emanates from a number of sources, including (1) from duly enacted legislation, (2) from the principle of judicial independence (a court's authority "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente* at para 52)), or (3) from a court's inherent jurisdiction to control its own process. The consent of the parties, such as in section 479 situations, does not determine a court's jurisdiction.

[56] Courts, not the parties, are given the authority and responsibility under the Constitution and the legislative provisions to exercise their judicial functions and to control their process. Courts have a residual or overriding discretion to refuse or grant such requests. Nothing in section 479 takes away

the court's gatekeeping role. In order to take away this oversight authority, clear language is required. In the end, irrespective of section 479, courts retain the final word on any transfer requests.

[57] Finally, I will address two other issues raised in this appeal. One is by the appellant, the other by the Crown. The first issue is that the interpretation given by the application judge creates an inconsistent and absurd result for the operation of section 478(3), which uses essentially the same language as in section 479. The second issue, raised by the Crown, is whether the judge's refusal to grant the transfer request was an encroachment on the exercise of the Crown's prosecutorial discretion.

[58] First, I will address the section 478(3) argument and its interplay with section 479. Section 478(3) provides a court with the jurisdiction to deal with an accused's request to move the sentencing hearing to another province (an inter-provincial transfer request). Section 479 provides a court with the jurisdiction to deal with an accused's request to move the sentencing hearing to another location in the same province (an intra-provincial transfer request).

[59] The appellant submits that the purpose of inter-provincial transfers in section 478(3) is to "promote the efficient resolution of matters" and/or "to promote the speedy administration of justice". She argues that, given the mirrored wording of the two sections, a similar purpose should be attributed to section 479.

[60] I disagree that the purpose of both sections is to promote efficiency. As mentioned previously, sections 478(3) and 479 are in Part XIV of the *Code*, which is entitled "Jurisdiction" and are made necessary to deal with jurisdictional issues, not efficiency issues. As I explained earlier, in my view,

section 479 no longer has applicability in Manitoba because judges have province-wide jurisdiction. While section 479 is spent, section 478(3) remains necessary.

[61] Section 478(3) is required to get around the territorial jurisdiction obstacle found in section 478(1), which states: "Subject to this Act, a court in a province shall not try an offence committed entirely in another province." It is often referred to as a "waiver of jurisdiction". See, for example, *R v Graham*, 2012 BCCA 376 (at para 3):

> [The respondent] was originally charged in Saskatchewan with a number of offences that occurred in 2008 and 2009. In the summer of 2011, the Attorney General of Saskatchewan, acting under s. 478(3) of the *Criminal Code*, consented to those charges being transferred to British Columbia for the purpose of [the respondent] pleading guilty and being sentenced [there]; what is commonly referred to as a "waiver of jurisdiction".

[62] I now move to the second and final issue to be addressed in this appeal and that is whether the judge's refusal to grant the transfer request was an encroachment on the exercise of the Crown's prosecutorial discretion. The doctrine of prosecutorial discretion stands for the constitutional principle that Crowns "must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions" (*Krieger v Law Society of Alberta*, 2002 SCC 65 at para 3). Subjecting such decisions to political interference or even judicial supervision could undermine the prosecutorial independence of the Crown (see paras 32, 45).

[63] The application judge found that the judge did not improperly encroach on the Crown's exercise of prosecutorial discretion. He noted that

the Crown had acknowledged that, under section 479, it could not look behind the reasons for the appellant's transfer request (see para 40). He concluded that this Crown limitation "render[ed] all the more important the role of the judiciary" (*ibid*) to oversee a joint request to transfer the matter to a different venue for sentencing.

[64] The Crown argues on appeal that the application judge's refusal to transfer the matter was an improper interference with an exercise of prosecutorial discretion. It submits that it had reached an agreement with the defence in the context of resolution discussions regarding the location of the sentencing hearing.

[65] For its part, the *amicus curiae* submits that that is not what happened in this case. He argues that it is important to distinguish between decisions arising out of resolution discussions, which form part of prosecutorial discretion, and the Crown's decision to consent to the appellant's request to transfer the matter from one court location to another, which he submits, is not.

[66] The nature of the decision will determine whether it relates to an exercise of prosecutorial discretion. As explained in *Krieger*, prosecutorial decisions that are protected from political interference or judicial oversight are those relating to "whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for" (at para 47) (emphasis omitted). The Supreme Court explains that decisions of the Crown in matters of "tactics or conduct before the court" are governed by a court's inherent jurisdiction to control its own process (*ibid*):

> . . . Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[67] In my view, in the circumstances of this case and irrespective of the applicability of section 479, the judge did not encroach on the Crown's exercise of prosecutorial discretion. The evidentiary record before the Court is sparse. The appellant offered the Crown a position in regard to the charges and asked that the matter be transferred to another location for sentencing. The Crown has made two decisions concerning this matter. It is prepared to accept the appellant's offer, and it is consenting to her transfer request. The Crown's first decision (accepting the offer) is clearly an exercise in prosecutorial discretion. The judge did not interfere with that decision.

[68] I now turn to the Crown's second decision. There can be no doubt that the judge's refusal to grant the appellant's transfer request neutralized the Crown's consent to the request. However, it did not, in my view, interfere with the Crown's exercise of prosecutorial discretion. Here, the nature of the decision (whether to change the venue of the sentencing) does not relate to "the nature and extent of the prosecution" (*Krieger* at para 47). Rather, it relates, in my view, to whether it is in the public interest to have the sentencing occur in the court nearest to where the offence occurred. In my view, such a decision is subject to judicial oversight. Once the Crown decides to proceed with the prosecution of a charge and the offence and offender are before the court, it is the court, not the Crown or the parties, that controls the process.

[69] As a result, I agree with the application judge's conclusion that the judge in this case did not improperly interfere with prosecutorial discretion.

Conclusion

[70] In the result, I would conclude that:

a) given that all judges now have province-wide jurisdiction, section 479 of the *Code* is a vestige of the past. The territorial jurisdiction issues it was meant to address are spent, and it no longer has application in Manitoba;

b) the various regional or circuit court centres designated by the Minister of Justice, after consultation with the trial courts' respective Chief Justice or Chief Judge, are established for administrative purposes, not for territorial jurisdiction purposes;

c) a judge's jurisdiction to consider a request to change the venue of a sentencing is found in section 470, which relaxes the common law rule that a matter be tried where the offence was committed;

d) despite section 470, there remains a strong presumption that a matter ought to be tried where the offence was committed;

e) the court, not the parties, has the final word on where the sentencing hearing will occur;

f) if section 479 were to have any application in Manitoba, the court, not the parties, will still have the final word on where the sentencing hearing will occur;

g) the directive issued by the Chief Judge of the Provincial Court, is a proper exercise of a Chief Judge's duties given that it bears directly and immediately upon the exercise of the judicial function;

h) the judge's conclusion that the extenuating circumstances threshold had not been met in this case was a proper exercise of discretion on his part; and

i) the judge's refusal to grant the transfer request was not an encroachment of the Crown's prosecutorial discretion.

[71] In the result, the application judge did not err when he dismissed the appellant's *certiorari* application. The appeal is dismissed.

Chartier CJM

I agree: Steel JA

I agree: Burnett JA