IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 110/2024

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

Referrer

SUBMISSIONS OF COUNSEL ASSISTING THE COURT

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MAY IT PLEASE THE COURT:

Introduction — Background

1. The relevant factual background is—

   (a) An Acting Deputy Solicitor-General consented, in her own name, to corruption charges being laid against Mr Nikoloff and they were filed on 13 August 2019. The Deputy Solicitor-General concerned did not have delegated power to consent to the charges being laid.

   (b) On 16 March 2021, after an inquiry from a co-defendant, an "instrument of ratification" was signed by the Attorney-General and the Solicitor-General.

   (c) In 2024 Mr Nikoloff successfully appealed his conviction upon the ground that the charge upon which he had been convicted was a nullity due to the lack of the required delegation of power to consent to the above Deputy Solicitor-General.

2. Consequent upon the successful appeal against conviction, the Solicitor-General has filed a reference and been granted leave to refer two questions—

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

   (b) Was the trial at which Mr Nikoloff was convicted a nullity?

Summary of argument

3. Counsel Assisting submits, in summary that –

(a) the defective consent was a nullity in the legal sense because it was an action taken without the jurisdiction required by the statute. Consequently, inquiries as to the abilities of the decision maker and whether prejudice arose from the defect are irrelevant.

(b) A nullity is not capable of remediation because it is a nullity and there is nothing to rectify. Further, the doctrine of ratification does not apply to the purported exercise of undelegated powers. The actions of a delegate are their own actions, not the actions of any other individual.

(c) The powers of law officers spring from statute. Therefore, if there is no explicit statutory power of the Solicitor-General to retrospectively adopt the decision of another law officer, or to consent after proceedings are instituted, no such power of adoption.

(d) The wording of the instrument does not constitute a ratification. It is a consent by one public official to the prior consent of another public official, being given well after the time limit for any consent.

Structure of submissions

4. The first question involves two inquiries—

(a) What was the legal categorisation of the *defect in the leave given on behalf of the Attorney-General*.

(b) Was that category of defect capable of ratification, resurrection or correction generally.

5. The second question, following on from the first, is an inquiry whether, if the power of ratification exists in this situation, was the instrument of ratification effective.

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

a) What was the legal status of the defect in the leave given on behalf of the Attorney-General

Was the Defective Consent a "nullity"?

6. The guilt or innocence of an individual is to be ascertained by trial only according to the law. Put another way — *"If the criminal law is to be used, its deployment should comply with a variety of constraints, both principled and pragmatic."*[1]

7. Obtaining the Attorney-General's consent is one of those constraints. Before someone is charged with corruption, Parliament has decided by enacting s106 that this crime is so serious and potentially damaging to the class of defendants involved, that the Attorney-General's oversight and approval *must* occur before the laying of the charges.

8. Where a necessary statutory consent has not been provided, the charge will be a nullity.[2] As held by the Court of Appeal in *Narayan v R*:[3]

> *[6] The absence of the Attorney-General's consent to bring the charge in this case was a defect that*

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1 AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [21.6].

2 *Talley's Group Ltd v Worksafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198 at [45] citing *R v O'Connell* [1981] 2 NZLR 192 (CA).

3 *Narayan v R* [2022] NZCA 527.

> *went to the heart of the charging document, rendering it a nullity. The proceedings should not have been instituted, and should not have been considered by the District Court. That in and of itself requires the conviction to be set aside. It is not strictly speaking necessary to inquire further. …*
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> *[7] In these circumstances, it is appropriate for the extension of time to appeal to be granted and for the appeal to be allowed. The conviction should be set aside. … In the absence of any valid charging document, no question of retrial arises. There is, quite simply, no valid charge before the District Court.*

9. There is also a clear distinction drawn between where requirements are *procedural requirements* compared to where they are *jurisdictional requirements*. If a Court acts without jurisdiction, proceedings will usually be a nullity.[4] This is the end of the matter in terms of a conviction — the Court does not consider further questions of prejudice or whether the error otherwise constitutes a miscarriage of justice.[5] This suggests that these questions are irrelevant once it has been established that the error is so fundamental that the proceedings were a nullity.

10. The case law is clear that a failure to obtain a necessary statutory consent at the required time means the Court lacks

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4 *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181 at [4]–[5]; and *R v Clarke* [2008] UKHL 8, [2008] 1 WLR 338 at [14]; *Abraham v District Court at Auckland*, [2007] NZCA 598, [2008] 2 NZLR 352 at [49]; and *Wallace Corp v Waikato Regional Council* [2023] NZCA 422.

5 *Haunui v R* [2020] NZSC 153 at [51]; and *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9].

jurisdiction.[6] This is because the laying of the consent is a pre-requisite to the proceedings commencing, as explained by the Court of Appeal in *Wallace Corp v Waikato Regional Council*:[7]

> *… the wording of the statutory provisions at issued in the English cases, as well as O'Connell and Field, explicitly required consent before proceedings could be commenced. The relevant sections were phrased in prohibitory terms. As a matter of degree, Parliament made plain its intention in those cases that leave was an essential prerequisite and integral to the process of issuing proceedings; the leave requirements were stipulated in the provisions constituting the offences in question. In effect, the offence was incomplete in those cases and did not come into existence until consent was given. So, without it, the Court had no jurisdiction.*

11. The Court of Appeal of England and Wales in *R v Lalchlan* explained that the requirement that consent be obtained prior to the proceedings being instituted meant that it was a jurisdictional requirement: [8]

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6 *R v Bates* [1911] 1 KB 964 (EWCA Crim) at 965: "In our opinion the failure to obtain the consent of the Attorney-General deprived the Court of any jurisdiction to try the prisoner on the indictment …"; *R v Ostler* [1941] NZLR 318 (CA) at 330 where the Court describes the consent as a "condition precedent to a prosecution"; and *Abraham v District Court at Auckland*, above n 4, at [49]: "Similarly, where some process, *the effect of which is to confer jurisdiction*, has not been followed (*for example, a statutorily required consent to prosecute has not been obtained*), it is easy enough to characterise what follows as a nullity"; and *S v R* [2018] NZSC 124, [2019] 1 NZLR 408 at [40]. This proposition is seemingly accepted by the Solicitor-General: Solicitor-General's submissions at [33].

7 *Wallace Corp v Waikato Regional Council*, above n 4, at [84] (footnote omitted).

8 *R v Lalchlan* [2022] EWCA Crim 736, [2022] 3 WLR 385 at [41]. See also *Nikoloff v R* [2024] NZCA 318 at [55].

> *The requirement that of consent be obtained before proceedings are instituted reveals that it was the purpose of the provision that proceedings are instituted reveals that it was the purpose of the provision that proceedings commenced without consent should be invalid. No other conclusion is consistent with the statute, as enacted.*

12. The result of the Court lacking jurisdiction is that it cannot determine the proceedings before it, as those proceedings are so flawed that they do not exist. As noted by the Court of Appeal in *Abraham v District Court at Auckland*, s 209 of the Summary Proceedings Act 1957 (now s 379 of the Criminal Procedure Act) "cannot … confer jurisdiction where [jurisdiction] does not exist".[9]

13. It is submitted that, where the error is one that is so fundamental and jurisdictional such that it results in the charging documents being a "nullity", the Court of Appeal was correct to hold that the validity of the prosecution does not fall to be assessed by reference to whether there has been actual prejudice or an unfair trial, and is not one of the commonplace cases where "the questions of miscarriage of justice and nullity will tend to merge".[10]

14. The effect of the case law cited above is that Parliament's intention where this requirement is not met is that there were *never* valid proceedings before the Court.

<u>Degrees of nullity?</u>

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9 *Abraham v District Court at Auckland*, above n 4, at [49].

10 *Nikoloff v R*, above n 8, at [60] citing *Police v Thomas* [1977] 1 NZLR 109 (CA) at 121.

15. The Solicitor-General accepts that if the error in delegation had not been corrected, then the charging documents, the proceedings as a whole, and the trial would have been "nullities".[11] However, the Solicitor-General's submissions call for a "nuanced" approach to the concept of "nullity" in the criminal law such that a "nullity" can be "fixed" so that it is no longer a "nullity".

16. It is submitted that the law, as it stands, adopts a "nuanced" *inquiry* to determine *whether* a procedural error is so fundamental such that result is a "nullity" and all that follows should be vitiated. This is contrasted with the situation where the issue is jurisdictional. This is clear from the dicta in *Abraham v District Court at Auckland*, the leading case in this regard:[12]

> *[48] The foregoing authorities indicate that whether a particular procedural failure constitutes a nullity in the context of s 204 is a matter of degree requiring an overall assessment of the particular failure against the relevant statutory background. It is critical to understand the place of the particular requirement in the scheme of the legislation. Further, as Cooke J noted in Police v Thomas, the concept of a nullity will frequently overlap with the concept of a miscarriage of justice in s 204.*
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> *[49] The application of the nullity concept will be straightforward in some situations. For example, if a judicial officer deals with a matter that he or she*

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11 Solicitor-General's submissions at [26].

12 *Abraham v District Court at Auckland*, above n 4; *Wallace v R* [2023] NZCA 422 at [145]; and *S v R* [2018] NZSC 124, [2019] 1 NZLR 408 at [36].

> *has no jurisdiction to deal with, it seems obvious that the resulting decision should be characterised as a "nullity" which cannot be rectified by resort to s 204. The effect of s 204 cannot be to confer jurisdiction where it does not exist. (A similar issue arises in relation to the application of the proviso to s 385(1) of the Crimes Act to trials that are nullities in terms of s 385(1)(d) — see R v Blows … and R v O (No 2) …). Similarly, where some process, the effect of which is to confer jurisdiction, has not been followed (for example, a statutorily required consent to prosecute has not been obtained), it is easy enough to characterise what follows as a nullity.*

17. Therefore, the nuanced process suggested by the Solicitor-General is not followed in jurisdictional contexts to determine whether a charge or a proceeding is a nullity. The jurisdiction inquiry process does not give significant weight to prejudice or "substantive compliance" with the statutory purpose. This precise argument, presented as a "modern approach", was rejected by the Court of Appeal of England and Wales in *R v Lachlan*:[13]

> *Nor do we think it is correct to say that there is any "modern approach" that means that the only matter that ought ever to concern a court is the fairness of the proceedings or the presence or lack of prejudice to a defendant. … As so often, context is all. The question thus reverts to what the Parliamentary intention is to be taken as having been in the event*

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[13] *R v Lachlan*, above n 8, at [39].

> *of non-compliance, having regard to the language, purpose and (where applicable) history of the legislative provisions in question. Consideration of the fairness of proceedings or prejudice to the defendant will only arise if, on construction of the statutory provision in hand, the conclusion reached is that the purpose was not that an act done in breach of the statutory requirements should be invalid.*

18. An evaluative decision does not occur after the Court has determined that the charge or proceeding is a "nullity". A "nullity", by definition, is irremediable. This distinction is clearly drawn by the Court of Appeal in *Hall v Ministry of Transport*:[14]

> *Mahon J thought in Police v Walker … that an information was so unintelligible that the exact nature of the supposed offence could not be ascertained, and characterised it as a nullity. He declined to apply the section. "Nullity" or otherwise can be a question of degree. No doubt if a document or proceeding is so gravely defective that it should be treated as completely non-existent, the section will not apply. The Court is slow, however, to reach such a drastic conclusion, even where there are*

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[14] *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 57. See *Wallace Corp v Waikato Regional Council*, above n 4, at [74]: "Our approach will be to determine whether the omission to obtain leave was … an essential prerequisite to jurisdiction. … If not, the question will be whether the particular omission constitutes the whole proceeding as a nullity or whether there remains something before the Court which is able to be cured or saved by s 204"; and *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [129]: "The authorities accept that some defects are so serious that the document or process concerned must be treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach."

> *substantial deficiencies … Whether the defect in Police v Walker was correctly held to be in the rarer category of reducing the information to a mere nothing need not now be discussed, for the form used in the present case was certainly intelligible … The Court is not constrained to go as far as to dismiss it as a nullity.*

19. The Court of Appeal also cited its earlier decision in *Best v Watson:*[15]

> *In our view the section has to be given its full meaning and is not to be read subject to any limitations not required by the statutory language. There must, of course, be proceedings before the Court before rectification may be directed under s 11. So if the document is so defective that it is a nullity there is nothing before the Court capable of rectification. This distinction between nullity and irregularity is well recognised in other areas of the law … In [Police v Thomas] Cooke J, referring to s 204 of the Summary Proceedings Act 1957 … said at p 121: "No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity". He went on to observe that "nullity or otherwise is apt to be a question of degree".*
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> *… In the present case Mahon J concluded that, despite the two omissions …, it was not a nullity and was therefore capable of amendment.*

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[15] At 57 citing *Best v Watson* [1979] 2 NZLR 492 (CA) at 494 (emphasis added).

20. Consequently, legally, an action or decision is either a nullity or is not.

Was that defect capable of resurrection or correction generally?

Can a "nullity" be ratified?

21. With this background, it is submitted that there are insurmountable challenges to the Solicitor-General's claim that a nullity can be "fixed" such that it no longer constitutes a nullity. First, if the error with the charge is so serious and fundamental that there is "nothing before the Court capable of rectification",[16] it is hard to see how that position can be fixed by a third party ratifying a decision for leave to prosecute.

22. The putative charging document had already been laid without an effective leave to prosecute, making it ineffective as a charging document. It may as well have been a blank piece of paper. The purported alteration of the validity of a different document, the consent to prosecute, cannot, two years later, fundamentally alter the identity of the flawed charging document.

23. Further, it is not apparent that an act of ratification can be sufficient to retrospectively validate/institute proceedings where there are no valid proceedings already before the court. Criminal proceedings are commenced by filing a charging document.[17] There were no valid proceedings before the court in 15 March 2021, the day before the purported ratification. The ratification of the consent is not the filing of a charging

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16 *Best v Watson*, above n 15, at 494.

17 Criminal Procedure Act 2011, s 14(1).

document, so cannot have the effect of creating proceedings where none exist.

24. As is clear from the Court of Appeal's decision in *Narayan v R,* any steps taken in a proceeding done in error.[18] Arguably, this extends to the purported consent.

25. A useful comparison can be drawn to *Attorney-General ex rel Co-operative Retail Services Ltd v Taff-Ely Borough Council*.[19] In that case, two parties were seeking to obtain planning permission from the local council. The council adopted a resolution not granting one application and granting the other "in outline subject to the conditions detailed in the report". A clerk, outside of their scope of authority, then sent a notice to the parties informing one party that the council granted planning permission. The council then passed a resolution affirming the action taken by the clerk. The House of Lords issued a short decision on appeal, holding that the council's initial resolution did not amount to a planning permission. The action of the clerk, as well as being unauthorised, "could not covert what was not a planning permission into a planning permission" and that "the notice of what was not a planning permission could not be a notice of, or grant of, a planning permission".[20] The Court then said that the resolution of the council affirming the clerk's decision "did nothing more than covert the clerk's unauthorised action into authorised action"

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18 *Narayan v R*, above n 3, at [6].

19 *Attorney-General ex rel Co-operative Retail Services Ltd v Taff-Ely BC* (1980) 39 PCR 223 (EWCA Civ); and *Attorney-General ex rel Co-operative Retail Services Ltd v Taff-Ely BC* (1981) 42 PCR 1 (UKHL).

20 At 4.

and that there was still no grant of planning permission upon which the clerk's or the council's actions could operate.[21]

26. Equally here, it is submitted that the subsequent approval of an Acting Deputy Solicitor-General's ultra vires consent cannot act to convert what was *not* a charging document into a charging document.

27. The fact that the charging documents and the proceedings were a nullity is what distinguishes this case from what may otherwise be seen as the equivalent private law action — ratifying proceedings that were brought without authority by an agent. However, the law is clear that that ratification is allowed specifically because those proceedings are *not* a nullity.[22]

28. Secondly, this is a case where the error is so fundamental that the Court lacked jurisdiction. The Court has no power to cure its own lack of jurisdiction. It is submitted that it must follow that a third party to the proceeding without an explicit or statutory power must also lack the ability to confer jurisdiction on the court where it previously did not exist.

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21 At 4.

22 See *Presentaciones Musicales SA v Secunda* [1994] 2 WLR 660 (EWCA) at 668 per Dillon LJ: "Where a writ is issued without authority, the cases show that the writ is not a nullity." Associate Judge Faire in *Body Corporate 192964 v Auckland City Council* HC Auckland CIV-2004-404-7207, 23 May 2005 (a case cited by the Solicitor-General) at [29]–[34] discussed whether civil proceedings issued without authority were a nullity and concluded that they were not, for if they were, they would be incapable of ratification. The Court of Appeal also drew this conclusion in *Walker v Mount Victoria Residents Association Inc* [1991] 2 NZLR 520 (CA) at 526 (emphasis added): "I accept that the authority of the secretary to lodge the notice of appeal may have been able to have been challenged before the ratification by the executive committee. Even if it had been *it would not have resulted in the appeal being a nullity in any sense* as the notice of appeal was capable of being ratified either by the executive committee or by the first respondent in general meeting."

29. This is a power that goes beyond the implications of ratification in the private law. If such a power were to exist, one would expect Parliament to legislate for it. This is particularly the case where that power lies with the Solicitor-General, which is a position for a public servant with no inherent powers.[23]

30. The Court of Appeal also dealt with the Crown's argument that failures of consent in other cases, such as *Firth v Staines*, were not treated as nullities. The answer to this dilemma perhaps lies in the distinction between jurisdictional and procedural requirements. While the Attorney-General's consent is clearly a pre-requisite to prosecution under s 106, and therefore an error going to jurisdiction,[24] not all consents to prosecute are jurisdictional requirements.[25] Whether a consent requirement goes to jurisdiction is a question of statutory interpretation. It appears that in *Firth v Staines* the requirement of the vestry's consent to bring proceedings was not jurisdictional. This was the basis of Hawkins J's decision, where his Honour considered that the meaning of the legislation required the vestry to approve the "acts" of the committee, which could only occur after the committee had acted.[26]

31. It is submitted that, as held in the Court of Appeal, the fact that the proceedings were a nullity meant that there was nothing

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23 See John McGrath "Principles for Sharing Law Office Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 203; and Public Service Act 2020, sch 7 cl 11.

24 See above at [10]; and Crimes Act 1961, s 106(1): "*No one shall be prosecuted* for an offence against any of the provisions of sections 100, 101, 104, 105, 105A, 105B, 105C, 105D, 105E, and 105F without the leave of the Attorney-General, who before giving leave may make such inquiries as he or she thinks fit."

25 See *Wallace Corp v Waikato Regional Council*, above n 4, at [85], which considered that if leave was required by a District Court Judge or registrar to file informations for a regulatory infringement offence, an error in not obtaining that leave would not be one that went to jurisdiction based on the legislative interpretation of the provisions.

26 *Firth v Staines* [1897] 2 QB 70 at 74–75.

before the court capable of ratification that could possibly save the proceedings. It is submitted that this is a complete answer to the questions this Court granted leave for.

Does the Solicitor-General have the power to ratify the decision of the Acting Deputy Solicitor-General?

Can delegators ratify the decisions of their delegates?

32. The starting point is that the Acting Deputy Solicitor-General was purporting to act as a delegate, rather than an agent, of the Attorney-General. This distinction is significant because, as outlined by the Court of Appeal, the doctrine of ratification is grounded in the law of agency:[27]

> *[37] It is useful to start with basic principle. Ratification is a doctrine grounded in the law of agency. It applies where an ostensible agent enters a transactions or does an act purportedly in the name of the principal has not in fact authorised them to do so. If, in those circumstances, the principal subsequently ratifies the transaction — adopts it as their own — then the principal retrospectively becomes a party to the transaction. Ratification can therefore conceptually be seen both as a source both [sic] of an agent's extended authority and of the agency relationship itself.*

33. The premise of ratification is that the principal retrospectively becomes legally bound by and responsible for the acts of their ostensible agent, as if they are adopting those actions as their

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[27] *Nikoloff v R*, above n 8.

own. As expressed by the authors of *Halsbury's Laws of England*:[28]

> *Under certain conditions an act which, at the time it was entered into or done by an agent, lacked the authority, express or implied, of a principal, may by the subsequent conduct of the principal become ratified by them and made as effectively their own as if they had previously authorised it.*
>
> *Where the act has been done by a person not assuming to act on their own behalf, but for another, through without their precedent authority or knowledge, and is subsequently ratified by that other person, the relation of principal and agent is constituted retrospectively, and the principal is bound by the act whether it is to their advantage or detriment, and whether liability is founded in contract or in tort, to the same extent and with all the same consequences as if it had been done by their previous authority.* [Counsel's underlying]

34. An agency relationship is fundamentally different to a delegation of statutory power.[29] Most importantly for these purposes, a delegate exercises a power in their own name and uses their own, independent discretion — the exercise of the power is not done through nor imputed to the delegator.[30] This

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28 Halsbury's Laws of England Agency (Volume 1, 2022, online ed) at [58] (emphasis added).

29 At [67].

30 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [60]–[61].

is in contrast to the law of agency, where the agent acts on behalf of the principal to bind the principal to an agreement.

35. There is no clear legal authority holding that delegators generally have a power to ratify decisions made by their delegates (that is, where it is not express or implied in statute). The only case cited by the Solicitor-General where a delegator was held to have successfully ratified the act of a delegate is *Firth v Staines*.[31] That case, as held in Hawkins J's judgment,[32] has been seen by commentators as a case where ratification was anticipated, and therefore there was at least an implied power.[33]

36. On the other hand, there are cases in the context of failures to obtain consents to prosecute where judges have opined that ratification would not be available. In *Timaru Transport Co Ltd v Ministry of Transport*, Somers J held that: "This is not a case in which a subsequent ratification can be given."[34] Somers J relied on the New South Wales Court of Appeal case of *R v Bacon* where the Court held that an approval to prosecute could not be given retrospectively.[35] Similarly, in *S v Director-General of FACS*, Young J held a purported vesting of authority

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31 *Firth v Staines*, above n 26. The other cases relied on are *Hamilton City Council v Green* [2002] NZAR 327 (HC) and *Goldfinch v Auckland City Council* (1996) 2 ELRNZ 198 (SC). The former involved a statutory bar to delegation, so ratification was clearly unavailable. The latter involved the Council attempting to rely on a lack of delegated authority on a stamp to avoid that stamp constituting a certificate of compliance. This was against the wishes of the appellant, who argued that the house that she had built was approved by the Council under the laws as applicable when she got approval. This decision is therefore different, and today would likely be seen under the doctrine of legitimate expectation.

32 At 74–75.

33 EI Sykes and others *General Principles of Administrative Law* (4th ed, Butterworths, Sydney, 1997) at [356]; and David Lanham "Ratification in public law" (1981) 5(1) Otago Law Review 35 at 38.

34 *Timaru Transport Co Ltd v Ministry of Transport* [1980] 2 NZLR 638 (HC).

35 *R v Bacon* [1973] 1 NSWLR 87 (NSWCA) at 95.

retrospectively was of no effect and that the principles of ratification from agency law did not apply.[36]

37. As noted by the Court of Appeal, academic writers doubt the existence of a general power of ratification in this area. Professor Lanham said:[37]

> *At first sight the decided cases also appear to be in conflict. The apparent conflict can however be largely resolved …. [A]s a general rule the law does not allow ratification of an unauthorised governmental act. Cases which appear to recognise ratification are either based on an express power of ratification or can be justified on some other principle and are not true cases of ratification.*

38. While Professor Lanham also says that ratification can apply where it works in the interests of the subject or in a neutral fashion, that statement must be qualified by the statement quoted above. Certainly, Professor Lanham did not view the institution of proceedings as working in the interests of the subject or in a neutral fashion, as he approved of the decision in *Bowyer, Philpott & Payne Ltd v Mather*.[38] In that decision, the local authority brought proceedings against the appellant for the recovery of penalties for breaching the Public Health Act 1875. However, those proceedings could only be instituted by someone with the correct authorisation. That did not occur. After the proceedings were commenced, a committee of the local authority passed a special resolution confirming what the

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[36] *S v Director-General of FACS* (1989) 18 NSWLR 481 (NSWSC) at 486; and see *Legal and General Insurance of Australia Ltd v Board of Fire Commissions of New South Wales* [1982] 1 NSWLR 555 (NSWSC) at 560.

[37] Lanham, above n 33, at 35.

[38] At 36–37 citing *Bowyer, Philpott & Payne Ltd v Mather* [1919] 1 KB 419 (DC).

respondent had done. Darling J held: "It seems to me that authority to institute proceedings within the meaning of s 259 cannot be given subsequently to the proceedings being instituted by a confirmation of what has already been done."[39]

39. Further, it is not enough to say that there is no explicit law holding that delegators do *not* have such a power, because the origins of the doctrine of ratification are in agency law. The principles of the law of agency cannot simply be imported into the law of delegation because they are superficially similar. The authors on *Bowstead and Reynolds on Agency* note that "[i]t is doubtful whether private law agency terminology assists in clarifying or solving these problems of public law", referring to the difference between agency and delegation.[40]

40. The case cited by the Solicitor-General, *Causwell v The General Legal Council (ex parte Elizabeth Hartley)* does not assist in this regard.[41] That case involved a complaint by a private individual, though an alleged agent, against the individual's former solicitor in the context of a stature regulating, inter alia, complaints against the legal profession. This issue was that, at the time of the complaint there was no evidence proving the agency. The case overturned a distinction between a private individual's ability to ratify their solicitor filing a disciplinary complaint compared to the same ability in a private lawsuit. The case is clearly grounded in concepts of agency, rather than the *source* of the power to ratify. It is submitted that *Causwell*

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39 At 423.

40 Peter Watts (ed) *Bowstead and Reynolds on Agency* (23rd ed, Thomson Reuters, London, 2024) at [5-006]; and see at [2-048].

41 *Causwell v The General Legal Council (ex parte Elizabeth Hartley)* [2019] UKPC 9.

is clearly focussed on the wording of the particular statute involved, and therefore different approaches are justified.[42]

41. The reason that principals have a power of ratification is rooted in an expression of the autonomy of the individual in managing their private affairs.[43] They are choosing to become a party to a proceeding in which someone has, at least superficially, bound them to.

42. In contrast, in administrative law, delegates are exercising statutory powers. There are restrictions on their use of that power, most notably the principle of statutory interpretation *delegatus not potest delegare*, a delegate may not redelegate. Professor John Willis described this maxim as a function of the rule of law in an influential article in 1943:[44]

> *The "rule of law" says that, since the common law recognizes no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so; to point to a provision justifying interference by A does not, of course, justify interference by B.*

43. As identified by the Court of Appeal, there is a further complication in this case in that the Acting Deputy Solicitor-

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42 Lanham, above n 33, at 46–47; and Enid Campbell "Ostensible Authority in Public Law" (1999) 27(1) Fed L Rev 1 at 5–6. at 4.

43 Watts, above n 40, at [2-050]; and see Gualtiero Procaccia "On the theory and history of ratification in the law of agency" (1978) 4 Tel Aviv U Stud L 9 at 25–26 citing A Barak "Agency Law" in G Tedeschi (ed) *Commentary in Laws Relating to Contracts* (Jerusalem, 1975) 218 at 221.

44 John Willis "Delegatus non potest delegare" (1943) 21(4) Canadian Bar Review 257 at 260.

General was not a delegate of the Attorney-General acting outside of the scope of her authority. She had not been appointed as a delegate. Although she *could* have been appointed a delegate, "the mere existence of authority to delegate does not clothe an act with validity in the absence of an actual delegation".[45]

44. Equally, it is not accepted that the instrument of ratification can "indirectly" create a relationship of delegation.[46] There are statutory requirements for creating the relationship of delegation as contained in s 9C of the Constitution Act 1986, including a requirement that the delegation be explicit and that the delegation be in writing. It also goes against the principle that the law requires a delegation of a judicial or quasi-judicial function to be effected in a clear an unambiguous manner, as expressed by Tipping J in *Carey v McInerney*:[47]

> *If there is any uncertainty as to whether the power has been delegated and if so to what extent in my judgment the question ought to be approached restrictively*

45. As the Solicitor-General accepts that the instrument of ratification did not purport to retrospectively create a relationship of delegation,[48] it is unclear how a delegator could ever retrospectively ratify the acts of effectively a stranger without offending the *delegatus not potest delegare* principle.

46. In conclusion, it is submitted that there is no legal basis to conclude that the power of ratification applies to delegators

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45 *Pascoe v Minister for Land Information (No 2)* [2023] NZHC 2844 at [23].
46 Solicitor-General's submissions at [75].
47 *Carey v McInerney* HC Timaru CP32/87, 11 July 1989 at 16–17.
48 Solicitor-General's submissions at [76].

where that power is not expressly or impliedly given to them in statute. The Solicitor-General's actions in purporting to ratify the decision of the Acting Deputy Solicitor-General therefore constitute an *extension* of the law. It is submitted that this would be an inappropriate case to make that step.

Should ratification be available for statutory consents to prosecute?

47. The Solicitor-General effectively argues that because the decision was made by a qualified decision maker and there was a proper, independent assessment of the sufficiency of evidence and public interest in the prosecution, there was no prejudice to the defendant and the statutory purpose of the consent were met such that ratification should be available. It is submitted that this "no harm no foul" approach demonstrates the danger of using this case to extend the powers of delegators to ratify decisions of delegates.

The Quality of the Decision Made

48. The context is that the question the Court decides in this reference will apply more widely than on the facts of this case. It will apply to a question as to whether any Deputy Solicitor General can consent to the laying of corruption charge or whether any Solicitor-General in this position has the power to ratify decisions made by Deputy Solicitor-Generals who were not authorised to do so. If the quality/experience of the consenting Deputy Solicitor-General and the *quality* of the decision-making, together with the effect on the defendant, is the touchstone of the process, rather than jurisdiction a number of problems arise. Firstly, this would be entirely inconsistent with the validity of other decisions made under s 106. If a consent to prosecute is given by a Deputy Solicitor-

General without delegated power, the Court would be required to assess the experience of that decision-maker, and the consequent prejudice on the defendant. This would not be the case where there had been delegated authority. Consequently, this would create a two-tier system. Uniformity and certainty of outcome are desirable.

49. Secondly, while a decision to prosecute and, likely, a decision to give leave to prosecute are judicially reviewable,[49] where a decision to prosecute has been made, the intensity of review is constrained.[50] Reasons for such constraints include the "importance of observing constitutional boundaries, including the Executive's role in deciding whether to prosecute" and the high content of judgement and discretion in prosecutorial decisions.[51] To look at the specific decision made for the availability of ratification, potentially requiring evidence and justification from the decision-maker, would be completely to the courts' usually delicate role in these matters.

Focus on prejudice

50. It is also submitted that a particular focus on prejudice to the defendant is inappropriate. This is for three reasons. Firstly, it is entirely unclear what would be considered sufficient prejudice such that a ratification should not occur. For example, the Solicitor-General points to the defendants being on bail (itself, an interference with the liberty of the individual) on criminal charges that were nullities for approximately 19 months as being insufficient prejudice.[52] If the defendants

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49 *Burgess v Field* [2008] 1 NZLR 733 (CA) at [44] and [48].
50 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [34].
51 At [34].
52 Solicitor-General's submissions at [80].

were held in custody, would that have been sufficient? It is submitted an individualised assessment of prejudice in each case would be inappropriate, as it would leave defendants in the position where it is unclear whether the charges against them are nullities or have successfully been ratified without the intervention of the courts. This goes against the principle that the criminal law must be certain.[53]

51. Secondly, a focus on prejudice to the defendant is inappropriate where a fundamental requirement to a criminal prosecution has not been met by the government Law Officers. The public are entitled to expect that powers are exercised with due care, particularly where those powers involve something as serious as charging someone in the position of public trust with the crime of corruption. As held by Lord Bingham in *R v Clarke*:[54]

> *[17] … Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for a serious crime a certain degree of formality is not out of place.*
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> *… [21] … The appellants having been arraigned and tried without a valid indictment, I do not think that the somewhat adventitious addition of a signature at the eleventh hour, without (one assumes) any consideration of the counts already in*

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53 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [12].

54 *R v Clarke*, above n 4.

the document, could throw a blanket of legality over the invalid proceedings already conducted.

52. Thirdly, as was seen by the academic texts on *Bowyer, Philpott & Payne Ltd v Mather* discussed above, the imposition of invalid and unauthorised proceedings on a defendant, for no matter the length of time before they become validated, is sufficiently prejudicial in any case to oust the operation of the doctrine of ratification.

The statutory purpose

53. It is also submitted that the importance of the decision being made prior to charges being laid means that ratification is inconsistent with the legislation. The retrospective application of ratification is a legal fiction. It cannot operate practically to achieve the aims of the required consent — being a considered decision by a person *with the power to make that decision* — at the time those aims are to be met.

54. Further, even if ratification was available for delegators and for this type of decision, the timing requirement of the consent would mean that the ratification could not meet the requirement that at the time of ratification, the principal was legally capable of doing the act himself.[55] At the time of instrument of ratification, the Solicitor-General was not capable of providing valid consent to the prosecution. To do so would be beyond the timing requirements.

55. Furthermore, if the retrospective nature of ratification can meet the timing requirement, it is unclear why the consent could not be ratified at any time, including during or post-trial.

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[55] *Firth v Staines*, above n 26, at 75.

This emphasises the absurdity of this position — it files in the face of a meaningful requirement for a valid consent at the outset of the proceedings.

Policy

56. At paragraph 48, the Solicitor-General contends that there is a good policy basis to enable mistakes to be corrected where no material prejudice has been caused as the alternative would be to require the Crown to relay the charges or a retrial. It is submitted that relaying of charges or a successful appeal is not a consequence which is out of proportion to the significance of the error. Consequently, it is unlikely to significantly harm public trust in the legal system.

57. It is not onerous for the Crown law officers to comply with the statutes under which they administer justice. Put another way, there is a good policy basis to require the senior law officers of the government to comply with the statutes from which their powers arise. Put another way, the failure of the senior legal officers of the Crown to comply with the law is likely to significantly undermine public confidence in the administration of justice.

58. Further, there are good policy reasons to not allow for ratification. The purpose of requiring the consent of a Law Officer is to provide an independent check on whether criminal proceedings should be instituted.[56] There is a concern that

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[56] *R v Lachlan*, above n 8, at [31], citing the submission of Sir Donald Summervell QC to a Select Committee considering the Official Secrets Act 1911: "Where Parliament provides that the fiat of the Attorney General or the Lord Advocate is a condition precedent to the prosecution taking place, it is not their business to get a prosecution. It is their business to exercise their discretion to the best of their ability, it being clear from the fact of their consent being necessary that this is a case where Parliament thinks it particularly important that a discretion should be

allowing ratification of such proceedings would put the Solicitor-General in a position where proceedings have publicly begun, potentially against a senior figure in the government on serious charges, and they must determine whether let the ongoing proceedings be declared a nullity or to rectify the identified error. There is a real concern that the decision made at this point would not have been the same one made prior to the commencement of the proceeding.

59. Where the Solicitor-General determines that the proceeding should go ahead notwithstanding the nullity, there are available mechanisms to do so. The charges could be re-laid, there are no time limitations on corruption charges, and the proceedings managed by the courts to avoid undue and unnecessary delay.

60. In those circumstances, and for the reasons above, it is submitted that the Court of Appeal was correct to hold that there was no power of ratification in this case.

Question 2 — if the power of ratification exists in this situation, was the instrument of ratification effective?

61. It is also submitted that, even if there was the power to ratify the consent, the instrument of ratification was ineffective in doing so. This is because, as outlined above, the action of ratification involves adopting a decision as your own. It is not clear that is the effect of the instrument of ratification, which has the Solicitor-General approving the Acting Deputy Solicitor-General's granting of leave.

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exercised that that prosecutions should not automatically go forwards merely because the evidence appears to afford technical proof of an offence."

62. Furthermore, as outlined above, there are real concerns with the Acting Deputy Solicitor-General never having been delegated authority to make the decision. If the decision is not the Solicitor-General's, and it is not from a person who had authority, then the consent still does not meet the legal requirements to be valid. All it could amount to is the Solicitor-General making an independent decision to give leave to prosecute in her own name. However, that would not be effective as it would not have occurred prior to the charging documents being laid.

63. It is submitted that, even if there was the power to ratify the consent and the proceedings were not a nullity, the terms of the instrument of ratification did not amount to an effective ratification. This is for two reasons.

64. First, the instrument does not, in substance, operate as a ratification. The wording of the instrument is that the Solicitor-General "approve[d]" the granting of leave under s 106(1) made to prosecute the defendants made by the Acting Deputy Solicitor-General on 8 August 2019. The Attorney-General "consent[ed]" to the Solicitor-General "approving the granting of leave".[57]

65. As outlined above, the substance of ratification is that the principal adopts the decision of their agent, and from that point the decision becomes the decision of the principal. As stated by the author of Bowstead & Reynolds on Agency: "… the doctrine of ratification would not be appropriately invoked to allow intervention by a person, not contemplated by the

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[57] Court of Appeal Additional Materials Bundle at 31.

purported agent, who simply found it convenient to ratify the transaction".[58]

66. This is not what the instrument of ratification does, notwithstanding its use of the term "ratification". The instrument provides that the Solicitor-General approves of the decision made by the Acting Deputy Solicitor-General but does not purport to adopt the decision as her own. In fact, she considers the decision to have been made by the Acting Deputy Solicitor-General, with no indication that that decision was made on behalf of the Solicitor-General.

67. This is an important distinction because the Solicitor-General would have had the power to give consent in August 2019, meaning that if the decision was in effect her own, it arguably would be valid. However, this is clearly not the case on the face of the wording of the instrument.

68. Furthermore, the instrument does not represent this "approval" as occurring retrospectively. It is submitted that, as this ratification operates outside of established law of ratification in the law of agency, and the significant implications of the putative ratification occurring retrospectively, this needed to be explicit in order for it to be effective.

69. Secondly, the instrument does not purport to delegate the power to grant consent for a prosecution to the Acting Deputy Solicitor-General. While she was delegated the powers of the Solicitor-General,[59] there is a separate requirement that Deputy Solicitors-General be delegated the powers of the

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58 Watts, above n 40, at [2-063].

59 Pursuant to s 9C(2) of the Constitution Act; see Court of Appeal Additional Materials Bundle at 15.

Attorney-General, with the written consent of the Attorney-General.[60] This never occurred. As accepted by the Solicitor-General in her submissions, the instrument of ratification did not purport to retrospectively delegate the powers of the Attorney-General to the Acting Deputy Solicitor-General.[61] This must be correct. The instrument itself draws a distinction between the delegation of the power and the approval of a particular decision:[62]

> *G. Under s 9C(1) of the Constitution Act 1986 the Solicitor-General, with the written consent of the Attorney-General, may in writing delegate to a Deputy Solicitor-General, any of the functions or duties imposed, or powers conferred, on the Attorney-General. Accordingly, the Attorney-General has consented to the Solicitor-General approving the granting of leave by Acting Deputy Solicitor-General Ms Brook described in recital F above.*

70. It is submitted that without an official delegation that would make the decision itself intra vires, the approval of the specific decision by the Solicitor-General at a point later in time cannot retrospectively save the decision. In other words, when the consent was given in August 2019, the consent was invalid because the Acting Deputy Solicitor-General did not have the delegated power to make that decision. At the point that the instrument of ratification was made on 16 March 2021, the Acting Deputy Solicitor-General still did not have the delegated power to consent to prosecutions being brought. The decision

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60 Constitution Act, s 9C(1).

61 Solicitor-General's submissions at [76].

62 Court of Appeal Additional Materials Bundle at 30 (emphasis added).

was therefore still ultra vires. The approval of the substance of the decision does not change that fact — in the same way that if the Solicitor-General approved the decision to prosecute if it were made by a local Crown Solicitor, that would not nor could not change the fact that the original decision was ultra vires. It would not throw a "blanket of legality" over otherwise illegal proceedings.[63] The fact that the power could have been delegated (but was not) could not "clothe the act with validity in the absence of an actual delegation".[64]

DATED this 14th day of February 2025

……	……
S J Shamy	K N Stitely
Counsel assisting the Court	Counsel assisting the Court

Counsel assisting certifies to the best of their knowledge that these submissions contain no suppressed information and are suitable for publication.

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63 *R v Clarke,* above n 4, at [21].

64 *Pascoe v Minister for Land Information (No 2)*, above n 45, at [23].