IN THE MATTER OF A DISCIPLINE PROCEEDING PURSUANT TO THE POLICE ACT, RSBC 1996, c. 367, BEFORE DEAN FORTIN, DISCIPLINE AUTHORITY AND CHAIR OF THE POLICE BOARD OF THE VICTORIA POLICE DEPARTMENT

Complainant:

BRUCE DEAN

Respondent:

CHIEF CONSTABLE JAMIE GRAHAM

REPLY SUBMISSION ON BEHALF OF CHIEF CONSTABLE JAMIE GRAHAM

Introduction

1. In this Review on the Record ("ROR"), arranged by the Police Complaint Commissioner (the "Commissioner") pursuant to section 141 of the *Police Act*, Chief Graham's initial submission was filed on November 25, 2011. Mr. Dean, the complainant, filed a submission on December 22, 2011, and Commission Counsel provided submissions on January 9, 2012.

2. This is Chief Graham's reply to the submissions of both Mr. Dean and Commission Counsel.

Reply to Mr. Dean's Submissions

Supplementary Materials not in the Record

3. Some of Mr. Dean's materials, such as the newspaper articles, were not in the record below. They should therefore not be relied upon as evidence in this review.

The Investigation is not in Issue

4. Mr. Dean contends that both the original investigation completed by RCMP Chief Superintendant Don Harrison and the second investigation by RCMP Chief

Superintendent Rick Taylor were flawed and incomplete, and asks the Adjudicator to cancel this review and allow a public hearing.

5. As submitted by Commission Counsel, an adjudicator is not empowered to provide such relief by the *Police Act*. Section 141(10) of the *Police Act* states as follows:

> After a review of a disciplinary decision under this section, the adjudicator must do the following:
>
> (a) decide whether any misconduct has been proven;
>
> (b) determine the appropriate disciplinary or corrective measure to be taken in relation to the member or former member in accordance with section 126 [imposition of disciplinary or corrective measures] or 127 [proposed disciplinary or corrective measures];
>
> (c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

6. At the ROR Conference on November 4, 2011, no application was made to introduce additional evidence, and the Adjudicator did not consider there to be special circumstances present that made it necessary and/or appropriate to receive evidence outside of the existing record. Accordingly, the Adjudicator determined that the ROR would proceed on the record set out in section 141(3), with no further evidence adduced.

7. As a result, the review must proceed on the existing record (as defined in section 141(3)), and the record includes the final investigation report of the investigating officer. The adequacy of the investigation is not in issue.

The Sole Complaint Concerns the Alleged Outing of an Undercover Officer

8. Mr. Dean's submissions demonstrate how rooted his complaint remains in the unrelated incident involving himself and another officer from the Victoria Police Department. Mr. Dean perceives that an injustice occurred in that incident and that sense of injustice

triggered his complaint over Chief Graham's conduct. The only concern advanced in this discipline process is the alleged "outing" by Chief Graham of an undercover officer. This was investigated and it was determined that the scenario expressed in the jest was imaginary – th e Chief had no knowledge of whether the driver was an undercover operator or not.

9. Neither Mr. Dean nor anyone else claims to have felt demeaned by the jest made by Chief Graham at the security conference. The Integrated Security Team officers who took issue with the jest did not advance a complaint and chose to address their concerns internally. The members of the Olympic protest groups, who were well aware that there were undercover officers present in the protest groups and who themselves were publicizing that fact (see the affidavit of T. Webb), have not advanced a complaint on the basis that they considered the Chief's comments to have been made at their expense. The focus of the analysis of intentionality must therefore proceed in reference to this allegation that the jest was inappropriate because it made a reference to an undercover officer.

Reply to the Submissions of Commission Counsel

10. The fundamental issue in this case is whether the Chief Graham's conduct was committed with a mental state that was culpable for the purposes of the discipline default of discreditable conduct.

11. As discussed in Chief Graham's initial submissions, and accepted by Commission Counsel, section 17 of the *Code of Professional Conduct* requires that the mental element of intention or recklessness to be established.

12. Commission Counsel su bmits that Chief Graham "intended" to make the comments because the words came out of his mouth, regardless of the lack of forethought. This imports a concept of intention that is inappropriately broad in the circumstances of this delict. Commission Counsel's position brings the delict perilously close to strict liability – that simply doing the act establishes culpability.

13. The concept of intention with respect to discreditable conduct cannot be interpreted in this way. A discipline default under the *Police Act* is a very serious matter. It is not a regime designed to formally and publically reprimand and denounce simple human error. Section 17 of the *Code* makes that patently clear.

14. Here, the mental elements of intent or recklessness have to be linked to knowledge of the consequences identified as bringing discredit on the department. The appropriate question with respect to the mental element is not so broad as "did Chief Graham intend (even if only a split second before saying the words) to utter the words that comprised the jest?" Conversely, it is acknowledged that the question should also not be framed so narrowly as "in making the jest, did Chief Graham intend to discredit the department?" The proper question is *"did Chief Graham intend to reveal or inappropriately refer to an undercover officer or was he reckless in that regard such that he saw the risk that could happen and took the chance?"* That is the culpable state of mind that is in question, because it is the outing of an undercover officer or operation which is to be discouraged, not the giving of speeches or the telling of jokes.

15. The mental element of recklessness is addressed in detail in Chief Graham's submissions dated November 25, 2011 (paras 38-41), so this reply submission will deal primarily with the mental element of intention which is the focus of Commission Counsel's submission.

16. In the criminal law, Courts distinguish the committing of the act that constitutes an offence on the one hand, from the intention to commit the offence on the other, and in each case there is consideration given to the specific nature of the intent required by the offence. In *R. v. Hamilton*, 2005 SCC 47, for example, an accused was charged with counselling other persons to commit an offence by sending "teaser" emails marketing the sale of "top secret" files and software that would enable the purchaser to generate "valid" credit card numbers. The accused made a number of sales. Section 464(a) of the *Criminal Code* provided as follows:

> Everyone who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable;

The Supreme Court of Canada defined the *actus reus* and *mens rea* of this offence as follows at paragraph 29:

> In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct. [emphasis added]

17. Thus the Supreme Court of Canada held that a finding that a person has "deliberately" or "actively" committed the act of counselling (i.e. which would be sufficiently "intentional" according to Commission Counsel's submission in the case at bar) is not sufficient to establish the required mental element of the offence (intention or recklessness). Proof of a mental state that has contemplated or appreciated the culpable consequence is required. The same analysis ought to be applied to the discipline default of discreditable conduct.

18. Previous decisions under the *Police Act* have recognized that culpability for a discipline default under the *Code* requires more than just an intention to simply do the conduct in issue. For example, in a decision dated October 11, 2011 by retired Provincial Court Judge Alan Filmer, Q.C., acting as Adjudicator in a public hearing [the "Filmer Decision"], Sergeant Berndt was found by police officers asleep in the driver's seat of his motor vehicle and in an intoxicated state. During the course of Sergeant Berndt's interactions with the officers, he produced his police identification and badge. The delict at issue was whether Sergeant Berndt produced his police identification and badge to the officers to gain favourable treatment, constituting "corrupt practice" contrary to the *Code*.

19. Section 9 of the *Code* provided that an officer would commit the disciplinary default of corrupt practice if the officer

...

(c) for personal gain or for purposes unrelated to the performance of his or her duties as a police officer, the police officer

(i) uses authority or position as a member of the municipal police department, or

(ii) uses any equipment or facilities of a municipal police department or a police force.

20. Adjudicator Filmer framed the question to be determined as follows:

> In my view, the issue coalesces into why the badge was produced. Was it produced unintentionally because it was in the same wallet as the driver's license, or was it produced with an intention to influence the manner in which the RCMP officers would treat Sergeant Berndt?

He reviewed the specific circumstances around the production of the badge, and held that Sergeant Berndt committed the delict of corrupt practice. He stated as follows at p. 6:

> It is clear that the production of the badge, in and of itself, is not the deciding factor. In many innocent situations, the badge may be produced to identify its carrier.
> ...On the day in question, it is evident that Sergeant Berndt's conduct was motivated by his desire to have the police cease their investigation of him for care and control of a motor vehicle while impaired. It is my view that the production of the badge was intended to produce that result. Coupled with the clear evidence given by Constable Catton that the badge was produced immediately, but that the driver's licence had to be requested a second time by Constable Komlos, I am convinced that Sergeant Berndt's intention was to gain favourable treatment and that thereby, he committed the delict as alleged.

21. It is clear from this decision that proof that an officer committed an act that constitutes a default (revealing the badge) such that he must be taken to have intended to do that, is not sufficient to constitute a discipline default under the *Code*. That would transform the delict into one of strict liability. To constitute misconduct, the officer must have intended to gain favourable treatment by revealing the badge – that was the mental element of the conduct worthy of sanction.

22. This view of intentionality is supported by the scheme of the *Code*. If the mere intention to commit the physical act is all that was required for a finding of default, then section 17 would serve no purpose, as the definitions of various kinds of misconduct in the *Code* would suffice. For example, the *Code* provides that an officer commits the disciplinary default of deceit if the officer signs a false, misleading, or inaccurate oral or written

statement or entry in any official document or record (section 7). In light of section 17 of the *Code*, the existence of a false, misleading or inaccurate document, and the fact that an officer signed the document reflects some level of intention (to physically put pen to paper), is not sufficient to constitute the discipline default of deceit. To have committed the default of deceit, in signing the document, the officer, when signing, must have known that the document was false, misleading or inaccurate, or been aware that there was a significant risk that the document was false, misleading or inaccurate, but nevertheless proceeded to sign it.

23. Similarly, in the case at bar, the mere fact that Chief Graham said the words at issue cannot be sufficient to constitute the discipline default of discreditable conduct. The question is whether Chief Graham intended to reveal an undercover officer or was he reckless in that regard such that he saw the risk and took the chance?

24. The uncontradicted fact is that there was no evidence in the proceeding that Chief Graham had any such intention or in any way saw the risk and took the chance. There was no forethought to the imaginary scenario that formed the jest. He had no knowledge of any undercover operation beyond what was generally and publically known that one was likely. On the evidence in the record, the statement was spontaneous and inadvertent and the Chief's state of mind was simply not culpable for the purposes of a discipline default. In these circumstances, his honest mistake, however unfortunate, does not equate to a discipline default of discreditable conduct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

January 25, 2012
Dated

Sean Hern, Counsel for Chief Graham

Indexed as:

R. v. Hamilton

Her Majesty The Queen, appellant;
v.
René Luther Hamilton, respondent, and
Attorney General of Ontario and Canadian Civil Liberties Association, interveners.

[2005] 2 S.C.R. 432

[2005] S.C.J. No. 48

2005 SCC 47

File No.: 30021.

Supreme Court of Canada

Heard: January 14, 2005;
Judgment: July 29, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(87 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Criminal law -- Counselling offence that is not committed -- Elements of offence -- Mens rea -- Accused sending "teaser" e-mail on Internet marketing sale of "Top Secret" files -- Teaser advertising software that would enable purchaser to generate valid credit card numbers -- Files sold including instructions on how to make bombs and how to break into a house -- Accused charged with counselling four offences that were not committed -- Whether accused had requisite mens rea for offences charged -- Criminal Code, R.S.C. 1985, c. C-46, s. 464.

Summary:

The accused sent "teaser" e-mails on the Internet to more than 300 people, marketing the sale of "Top Secret" files he himself had purchased off a website. The teaser advertised software that would enable the purchaser to generate "valid" credit card numbers. The accused made at least 20 sales and the files that were sold, although not the teaser, also included instructions on how to make bombs and how to break into a house. A document describing a credit card number generator that was not part of the files was discovered on the accused's computer. As well, a handwritten list of Visa numbers was seized in his possession. No complaints were received by the bank regarding their improper use. [page433] The accused was charged under s. 464 of the *Criminal Code* with counselling four indictable offences that were not committed, including fraud. The accused testified that he had seen a computer-generated list of the contents of the files but that he had not read the files. The trial judge accepted the accused's evidence in this regard and also accepted his evidence that he had not used the credit card numbers he had generated. She acquitted the accused, concluding that the *actus reus* of the offence had been proven in respect of each of the counts but not the *mens rea*. The Court of Appeal upheld the acquittal. The Crown appealed to this Court on the issue of *mens rea*.

Held (Major, Abella and Charron JJ. dissenting): The appeal should be allowed on the count of counselling fraud.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps and Fish JJ.: The concern in this case is with the imposition of criminal liability on those who counsel others to commit crimes. The *actus reus* for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence. The *mens rea* consists of nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counselling: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct. Courts cannot contain the inherent dangers of cyberspace crime by expanding or transforming offences, such as counselling, that were conceived to meet a different and unrelated need. [para. 21] [para. 29] [para. 31]

The trial judge acquitted the accused on the count of counselling fraud because his motivation was mercenary as opposed to malevolent. The trial judge's conclusion that the accused did not intend to induce the recipients to use those numbers is incompatible with the plain meaning of the "teaser" e-mail and with her other findings of fact, including her finding that the accused understood that the use of the generated numbers was illegal. Her assertion that "[h]is motivation was monetary" immediately after her reference to these facts demonstrates an error of law as to the *mens rea* for counselling the commission of a crime, and warrants a [page434] new trial. The trial judge confounded "motive" and "intent". [para. 40] [para. 45]

Per Major, Abella and Charron JJ. (dissenting): In interpreting a *Criminal Code* provision, it is important not to overreach the purpose of the criminal sanction at the expense of other important social values. This is particularly so in a case such as this one where the conduct in question consists of communications. The *actus reus* under s. 464 of the *Criminal Code* consists of "counsel[ling] another person to commit an indictable offence". In order for the *actus reus* to be proven, the words communicated by the accused, viewed objectively, must be seen as actively inducing, procuring or encouraging the commission of an offence. However, it is well established that it is not necessary that the person counselled be in fact persuaded. The *mens rea* of the offence is largely inferred from the *actus reus* itself. It is not sufficient that the communication simply raise the possibility of affecting its recipient. At the very least, the counsellor must subjectively intend to persuade the person counselled to commit the offence. Mere recklessness as to the counselled person's reaction to the communication is insufficient. Except in the most unusual circumstances, the counsellor who intends to persuade the person counselled to commit an offence will intend that the offence be committed. This restricted interpretation of the *actus reus* and *mens rea* of the offence of counselling ensures that the scope of the offence remains within the justifiable limits of the criminal law and protects freedom of expression by limiting the potential overbreadth of a criminal sanction whose sole target is speech. While the Internet poses particular risks because of the ease with which mass communications may be disseminated worldwide, the remedy does not lie in an expansive interpretation of the offence of counselling. [paras. 66-67] [para. 72] [paras. 76-77] [para. 81]

There is no reason to interfere with the trial judge's conclusion that the accused did not have the necessary *mens rea.* Her consideration of the accused's motivation must be examined in the context of the evidence before her, and her reasons must be read as a whole. Here, the Court of Appeal correctly concluded that the trial judge had considered motive as part of her findings of fact, but that her decision on the issue of *mens rea* was based on other facts relating to the accused's knowledge. It was on the basis of these other facts that the trial judge found [page435] the accused lacked sufficient knowledge of the consequences of his actions to satisfy the *mens rea* requirement. [para. 84] [para. 86]

Cases Cited

By Fish J.

Discussed: R. v. Janeteas (2003), 172 C.C.C. (3d) 97; R. v. Sansregret, [1985] 1 S.C.R. 570; referred to: Brousseau v. The King (1917), 56 S.C.R. 22; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Gonzague (1983), 4 C.C.C. (3d) 505; Leary v. The Queen, [1978] 1 S.C.R. 29; R. v. Dionne (1987), 79 N.B.R. (2d) 297; Lewis v. The Queen, [1979] 2 S.C.R. 821; United States of America v. Dynar, [1997] 2 S.C.R. 462; R. v. Hibbert, [1995] 2 S.C.R. 973.

By Charron J. (dissenting)

R. v. Dionne (1987), 79 N.B.R. (2d) 297; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v.

Keegstra, [1990] 3 S.C.R. 697; R. v. Walia (No. 1) (1975), 9 C.R. (3d) 293; R. v. Glubisz (1979), 47 C.C.C. (2d) 232; R. v. Gonzague (1983), 4 C.C.C. (3d) 505; R. v. Janeteas (2003), 172 C.C.C. (3d) 97.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21(1), 22, 81(1)(a), (d), 348(1)(d), 380(1)(b), 463, 464.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Conrad, Hunt and Park JJ.A.) (2003), 25 Alta. L.R. (4th) 1, 330 A.R. 328, 299 W.A.C. 328, 178 C.C.C. (3d) 434, 18 C.R. (6th) 337, [2004] 7 W.W.R. 388, [2003] A.J. No. 1080 (QL), 2003 ABCA 255, affirming a judgment of Smith J. (2002), 3 Alta. L.R. (4th) 147, 309 A.R. 305, [2002] 8 W.W.R. 334, [2002] A.J. No. 30 (QL), 2002 ABQB 15, acquitting the accused of counselling four indictable offences that were not committed. Appeal allowed in part, Major, Abella and Charron JJ. dissenting.

Counsel:

James C. Robb, Q.C., and Steven M. Bilodeau, for the appellant.

F. Kirk MacDonald, for the respondent.

Christopher Webb, for the intervener the Attorney General of Ontario.

Andrew K. Lokan, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps and Fish JJ. was delivered by

FISH J.:--

I

1 The respondent, René Luther Hamilton, offered for sale through the Internet access to a "credit card number generator" -- in terms that extolled its use for fraudulent purposes. As part of the same package of "Top Secret" files, he also offered for sale [page437] bomb "recipes" and information on how to commit burglaries.

2 Mr. Hamilton was charged under s. 464(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, in four separate counts, with counselling the commission of indictable offences that were not in fact committed.

3 The trial judge was not satisfied that Mr. Hamilton had acted with the requisite *mens rea*, or culpable intent, and she therefore acquitted him on all four counts: (2002), 3 Alta. L.R. (4th) 147, 2002 ABQB 15. The Court of Appeal for Alberta dismissed the Crown's appeal: (2003), 25 Alta. L.R. (4th) 1, 2003 ABCA 255.

4 The Crown now appeals to this Court on the ground that the trial judge erred as to the *mens rea* of counselling. In the Crown's view, it is unnecessary to prove that the person who counselled the offence intended that it be committed; recklessness is sufficient.

5 The Crown contends that even if recklessness is insufficient, the trial judge erred in confounding "motive" and "intent". With respect, I agree that the trial judge erred in this regard and that her verdict, but for this error, might very well have been different, at least on the count for counselling fraud. She acquitted Mr. Hamilton of that offence because, in her own words, "[h]is motivation was monetary" (para. 53 (emphasis added)).

6 I would therefore allow the Crown's appeal, order a new trial on the count for counselling fraud and dismiss the appeal with respect to the three remaining counts.

II

7 Mr. Hamilton was charged under s. 464 of the *Criminal Code* with counselling four indictable offences that were not committed: making explosive [page438] substances with intent; doing anything with intent to cause an explosion; break and enter with intent; and fraud.

8 The charges resulted from an advertisement, or "teaser", sent by Mr. Hamilton through the Internet to more than 300 people whose addresses he had acquired from published lists. His advertisement read, in part:

> HAVE YOU EVER HEARD OF A SOFTWARE PROGRAM THAT CAN PRODUCE AND DISPLAY VALID WORKING CREDIT CARD NUMBERS AT THE TOUCH OF A KEY!!!!
>
> WELL IT'S ARRIVED ... . . THE TIME IS NOW!!
>
> THE AUTOMATIC CREDIT CARD NUMBER GENERATOR!!!!!!!!!
>
> ...
>
> ALL VALID AND FULLY FUNCTIONAL!!
>
> ...
>
> *YOU CAN ALSO Extrapolate NEW CREDIT CARD NUMBERS OFF OF YOUR EXISTING ALREADY VALID REAL CREDIT CARDS!!!! 100% valid numbers!

SIMPLE TO USE??? - - - - ABSOLUTELY!!

...

*IMAGINE THE THINGS THAT YOU COULD DO WITH THIS PROGRAM, AND THE VALID CREDIT CARD NUMBERS IT GENERATES!!

THE POSSIBILITIES ARE ENDLESS!!! ... .

...

ALSO AVAILABLE IS THE OVERSEA'S AT&T CALLING CARD NUMBER GENERATOR!!!!!

[page439]

FREE LONG DISTANCE??? YUPPERS! YES INDEED, ABSOLUTELY!!!!!

*THIS SIMPLE EASY TO USE PROGRAM PRODUCES VALID OVERSEA'S AT&T CALLING CARD NUMBERS. . WITH ONE STROKE OF THE KEY!!! ... .

...

*GET ANY CREDIT CARD YOU WANT

...

ALL OF THESE METHODS HAVE BEEN PROVEN TO WORK OVER AND OVER, TIME AND TIME AGAIN!! THESE ARE THE SECRETS THAT MILLIONAIRES AND GOVERNMENT INSIDERS ONLY TELL THEIR FRIENDS ABOUT!!

Don't delay ... This Extraordinary and Valuable Information including the Card Generator Programs can be yours Today for ONLY $50 (US FUNDS).

...

> IF YOU DOWNLOAD THE PROGRAMS AND USE THEM ... WE ACCEPT NO LIABILITY FOR YOUR ACTIONS!
>
> DON'T MISS OUT ON THIS CHANCE TO GET YOUR HANDS ON THESE TWO AMAZING PROGRAMS, THAT WILL FOREVER CHANGE YOUR LIFE ... ! IF YOU MISS THE CHANCE NOW, IT MIGHT NOT COME AROUND AGAIN ... . AS THESE SOFTWARE PROGRAMS ARE NOT SOLD IN RETAIL STORES, FOR OBVIOUS REASONS!!
>
> ...
>
> Looking forward to seeing you well on your way to a wealthy lifestyle!!
> [Emphasis added.]

9 Mr. Hamilton also created a web site advertising the Top Secret files, and was shown to have made at least 20 sales.

10 The trial judge found that Mr. Hamilton had seen a computer-generated list of the contents of the Top Secret files. They contained document descriptions such as "bombs.txt", "bombs2.txt", "bombs3.txt", [page440] "How to Break into a House.txt", and "visa hacking.txt". Mr. Hamilton testified that he had not read these files, and the trial judge, without making an express finding, appears to have accepted his evidence in this regard. The Top Secret files were organized into two zip files, which consisted of roughly 2000 pages of text. Only 13 pages related to the counselling charges that concern us here.

11 A document describing a credit card number generator that was not part of the Top Secret files was also discovered on Mr. Hamilton's computer. As well, a handwritten list of Visa numbers was seized in his possession. Of the listed numbers, all but one were found by the judge to be "valid" (para. 15), in the sense of "usable". But no complaints were received by the bank regarding their improper use. The trial judge accepted Mr. Hamilton's evidence that he did not use the credit card numbers he had generated.

12 The trial judge acquitted Mr. Hamilton on all counts and the Court of Appeal affirmed the acquittals.

III

13 The Crown contends that recklessness satisfies the fault requirement of counselling and that, even if intent (as opposed to recklessness) must be proved, the trial judge erred in grafting onto the required element of intention an additional requirement of motive.

14 At common law, counselling or procuring a felony was a substantive offence, whether or not

the felony was subsequently committed: *Brousseau v. The King* (1917), 56 S.C.R. 22. The charges that concern us here are now codified in s. 464(*a*) of the *Criminal Code*, which provides:

[page441]

> **464.** ...
>
> (*a*) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable;

15 The *actus reus* for counselling will be established where the materials or statements made or transmitted by the accused *actively induce* or *advocate* -- and do not merely *describe* -- the commission of an offence: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 57, *per* McLachlin C.J.

16 The *mens rea*, or fault element, for counselling was recently considered in *R. v. Janeteas* (2003), 172 C.C.C. (3d) 97 (Ont. C.A.), which involved an appeal by the accused against his conviction on one count of counselling murder and two counts of counselling unlawful bodily harm. The trial judge had instructed the jury that they could convict the accused of these offences only if they were satisfied beyond a reasonable doubt that he had counselled their commission "with the intent that his advice or counselling ... be accepted" (para. 14 (emphasis added)).

17 The Ontario Court of Appeal found this instruction to be inadequate. In the court's view, it was not enough for the jury to conclude that the accused intended that his counselling of the offences "be accepted" or "be taken seriously" by the persons counselled to commit them; the accused must have intended as well that the offence counselled *be in fact committed* (para. 46).

18 In the present case, the trial judge described counselling as a "dual *mens rea* offence" (para. 37) and the Court of Appeal in *Janeteas* cited this characterization of the requisite mental element in its reasons (para. 19).

[page442]

19 *Janeteas* was decided on an unusual set of facts and in light of concessions by Crown counsel as to the inadequacy of the trial judge's instructions to the jury. Moreover, authorities cited by the

Court of Appeal -- none of them binding on this Court -- do support the proposition that counselling is a "dual intent" offence. But the Court of Appeal in *Janeteas* did take care to say that it would have reached the same result even if it were found sufficient for conviction that the accused, in counselling the commission of the offences, was reckless as to the consequences.

20 In my respectful view, a judicial determination of the fault element for counselling should not be made to depend on whether the required *mens rea* is characterized as "dual". I find it preferable to begin instead by considering why the counselling of crime is prohibited and then to examine the ordinary meaning of the words used by Parliament to achieve its purpose.

21 Our concern here is with the imposition of criminal liability on those who counsel others to commit crimes. In this context, "counsel" includes "procure, solicit or incite": see s. 22(3) of the *Criminal Code*.

22 In their relevant senses, the *Canadian Oxford Dictionary* (2nd ed. 2004) defines "counsel" as "advise" or "recommend (a course of action)"; "procure" as "bring about"; "solicit" as "ask repeatedly or earnestly for or seek or invite", or "make a request or petition to (a person)"; and "incite" as "urge". "Procure" has been held judicially to include "instigate" and "persuade": *R. v. Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.).

23 Those who encourage the commission of crimes in any of these ways are criminally responsible for their conduct by way of "secondary liability".

[page443]

24 The rationale underlying secondary liability was described by the Law Reform Commission of Canada as "straightforward, obvious and justifiable" -- in principle, though not always in practice: Working Paper 45, *Secondary Liability: Participation in Crime and Inchoate Offences* (1985), at p. 5.

25 According to the Commission (at pp. 5-6):

> ... the rationale for secondary liability is the same as that for primary liability. Primary liability attaches to the commission of acts which are outlawed as being harmful, as infringing important human interests and as violating basic social values. Secondary liability attaches on the same ground to their attempted commission, to counselling their commission and to assisting their commission.
>
> This is clear with participation. If the primary act (for example, killing) is harmful, then doing it becomes objectionable. But if doing it is objectionable, it

> is also objectionable to get another person to do it, or help him do it. For while killing is objectionable because it causes actual harm (namely, death), so too inducing and assisting killing are objectionable because of the potential harm: they increase the likelihood of death occurring.
>
> The same arguments hold for inchoate crimes. Again, if the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them even to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm -- they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking certain measures in respect of them: outlawing them with sanctions, and authorizing intervention to prevent the harm from materializing. [Emphasis added.]

26 These passages, in my view, aptly explain why Parliament has imposed criminal responsibility on those who counsel, procure, solicit or incite others to commit crimes, whether or not the crimes are in fact committed.

27 And it seems to me that the plain meaning of the terms used by Parliament to achieve this purpose [page444] point to a fault element that combines advertent conduct with a "conscious disregard of *unjustified* (and substantial) risk" that it entails: L. Alexander and K. D. Kessler, "Mens Rea and Inchoate Crimes" (1997), 87 *J. Crim. L. & Criminology* 1138, at p. 1175 (emphasis in original).

28 The "substantial and unjustified risk" standard of recklessness has venerable roots in Canada and in other common law jurisdictions as well: see, for example, *Leary v. The Queen*, [1978] 1 S.C.R. 29, at p. 35 (Dickson J., as he then was, dissenting on other grounds); and, generally, M. L. Friedland and K. Roach, *Criminal Law and Procedure: Cases and Materials* (8th ed. 1997), at pp. 508 ff., where Herbert Wechsler explains, at pp. 510-11, why the American Law Institute required in its *Model Penal Code* that the risk consciously disregarded be both "substantial" and "unjustifiable".

29 In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.

30 I would resist any temptation to depart in this case from that relatively demanding standard.

The Internet provides fertile ground for sowing the seeds of unlawful conduct on a borderless scale. And, at the hearing of the appeal, Crown counsel expressed with eloquence and conviction the urgent need for an appropriate prophylactic response.

31 In my view, however, this task must be left to Parliament. Even if they were minded to do so, courts cannot contain the inherent dangers of [page445] cyberspace crime by expanding or transforming offences, such as counselling, that were conceived to meet a different and unrelated need. Any attempt to do so may well do more harm than good, inadvertently catching morally innocent conduct and unduly limiting harmless access to information.

32 Finally, a brief word on *R. v. Sansregret*, [1985] 1 S.C.R. 570. The Court in that case defined recklessness as the conduct of "one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk... . in other words, the conduct of one who sees the risk and who takes the chance" (p. 582). The Court, in *Sansregret*, did not set out the degree of risk required to attract criminal sanction. As Don Stuart points out, courts have arbitrarily endorsed varying standards: "uncertainty, probability, likelihood [and] possibility" -- and, in some instances, "probability" and "possibility" in the very same case (*Canadian Criminal Law: A Treatise* (4th ed. 2001), at pp. 225-26).

33 We have not been invited in this case to revisit *Sansregret* or to consider afresh the governing principles of recklessness as a fault element under the criminal law of Canada. And I should not be taken to have done so.

IV

34 In determining that the *actus reus* of counselling was made out, the trial judge stated:

> In my view the teaser, viewed objectively, actively promotes the use of the credit card generator. The legal disclaimers do not discourage use. Rather they serve as a message that the use of the numbers generated is illegal, and attempt to limit liability, which furthers rather than limits the message which is to use the numbers in a cautious fashion.

[page446]

> The Top Secret files sent out by Mr. Hamilton which relate to the charges amount to "How To" guides. The bomb documents contain recipes for bombs together with instructions for assembly and then instructions on how to detonate the bomb. "How to Break into a House" gives instructions in a step by step fashion for a style of break in and theft. The [Visa] hacker, or credit card number

> generator, is similar. [paras. 20-21]

35 The trial judge appears to have accepted Mr. Hamilton's evidence that he did not read the files relating to bombs and to burglaries and found as a fact that he had no intention to induce the recipients of his "teaser" to either build bombs or commit burglaries. This finding of fact was not reviewable in the Court of Appeal and is not subject to review in this Court, since the Crown's right of appeal is limited in both instances to questions of law alone.

36 Mr. Hamilton's acquittal on the count for counselling fraud does not stand on the same footing.

37 At least as regards the credit card number generator, the trial judge concluded that the documents offered for sale -- and sold -- by Mr. Hamilton "actively promote or encourage the actions described in them" (para. 22). Applying the test set out in *R. v. Dionne* (1987), 79 N.B.R. (2d) 297 (C.A.), she found that the documents "are likely to incite and are 'with a view to' inciting the offence" (para. 22).

38 Nothing in the evidence suggests that Mr. Hamilton intended these documents to be read in a different manner or that they be used for a different purpose. Moreover, the trial judge expressly found that Mr. Hamilton had "subjective knowledge that the use of false credit card numbers is illegal" (para. 53).

39 The trial judge nonetheless acquitted Mr. Hamilton on the charge of counselling fraud [page447] because she had "a doubt that Mr. Hamilton had subjective intent to counsel fraud" (para. 53). And she explained her conclusion this way:

> His motivation was monetary, and he sought to pique the curiosity of readers who might acquire the information in the same way that he was initially attracted to the information. Further, he struck me as utterly unsophisticated and naïve to the point that he cannot be said to have been wilfully blind or reckless. [Emphasis added; para. 53.]

40 Essentially, on my reading of this passage, the trial judge acquitted Mr. Hamilton on this count because his *motivation* was mercenary as opposed to malevolent.

41 In my respectful view, this was an error of law requiring our intervention.

42 The distinction between motive and intent has been well understood by Canadian courts since at least 1979, when Dickson J. stated:

> In ordinary parlance, the words "intent" and "motive" are frequently used interchangeably, but in the criminal law they are distinct. In most criminal trials, the mental element, the *mens rea* with which the court is concerned, relates to

> "intent", *i.e.* the exercise of a free will to use particular means to produce a particular result, rather than with "motive", *i.e.* that which precedes and induces the exercise of the will. The mental element of a crime ordinarily involves no reference to motive ... .
>
> (*Lewis v. The Queen*, [1979] 2 S.C.R. 821, at p. 831)

43 Cory and Iacobucci JJ. also underlined this distinction in *United States of America v. Dynar*, [1997] 2 S.C.R. 462, emphasizing the importance, as a matter of legal policy, of maintaining it with vigilance: "It does not matter to society, in its efforts to secure social peace and order, what an accused's motive was, but only what the accused intended to do. It is no consolation to one whose car [page448] has been stolen that the thief stole the car intending to sell it to purchase food for a food bank" (para. 81). See also *R. v. Hibbert*, [1995] 2 S.C.R. 973.

44 In this case, of course, the motive attributed to the accused was far less laudable. He sought to make "a quick buck" by encouraging the intended recipients of his Internet solicitation to purchase a device that generated credit card numbers easily put to fraudulent use.

45 The trial judge's conclusion that Mr. Hamilton did not intend to induce the recipients to use those numbers is incompatible with the plain meaning of the "teaser" e-mail and with her other findings of fact, including her finding that Mr. Hamilton well understood that use of the generated numbers was illegal. Her assertion that "[h]is motivation was monetary" immediately after her reference to these facts demonstrates an error of law as to the *mens rea* for counselling the commission of a crime, and warrants a new trial.

V

46 I would for these reasons allow the appeal on the count for counselling fraud and order a new trial on that count, but dismiss the appeal in relation to the three remaining counts.

The reasons of Major, Abella and Charron JJ. were delivered by

47 CHARRON J. (dissenting):-- At issue in this appeal is the requisite mental element for the offence of counselling the commission of an indictable offence which is not committed. More specifically, must the counsellor intend that the counselled offence be committed or is it sufficient to show recklessness as to the consequences? As we shall see, the debate concerns not so much language as it does the limits of criminal liability.

[page449]

48 Prosecutions for counselling an offence which is not committed have been rare. The Crown in this case seeks to breathe new life into the provision to counter the risk posed by modern day mass communications through cyberspace.

49 René Luther Hamilton sent out "teaser" e-mails on the Internet, marketing the sale of "Top Secret Reports" he himself had purchased off a website. The teaser advertised software that would enable the purchaser to generate valid credit card numbers. The files that were sold, although not the teaser, also included instructions on how to make bombs and how to break into a house. Following a police investigation of a complaint, Mr. Hamilton was charged under s. 464 of the *Criminal Code*, R.S.C. 1985, c. C-46, with four counts of counselling the commission of indictable offences which were not committed: making explosive substances with intent to endanger life or cause serious damage to property (s. 81(1)(*d*)), doing anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property (s. 81(1)(*a*)), breaking and entering a dwelling-house with intent to commit an indictable offence (s. 348(1)(*d*)), and by deceit, falsehood, or other fraudulent means defrauding credit card companies of money of a value not exceeding $5,000 (s. 380(1)(*b*)).

50 The trial judge held that the material, when viewed objectively, counselled the commission of the named offences and that, consequently, the *actus reus* of the offence had been made out. This finding is not in issue on this appeal although more will be said about it later. On the question of *mens rea*, the trial judge concluded that Mr. Hamilton did not intend that the offences be carried out, nor could it be said in the circumstances that he was reckless as to the consequences. She found that he "was naïve, lazy, or ignorant, but [that] his [page450] intention was not criminal on any standard": (2002), 3 Alta. L.R. (4th) 147, 2002 ABQB 15, at para. 49. She therefore acquitted him of all charges. The Alberta Court of Appeal confirmed the acquittals: (2003), 25 Alta. L.R. (4th) 1, 2003 ABCA 255. The Crown appeals from the judgment.

51 For the reasons that follow, I would dismiss the appeal.

I. Facts

52 Mr. Hamilton, 23 years old at the time, was alleged to have sold articles on how to commit the aforementioned offences through a website he had created. Mr. Hamilton had received a "teaser" e-mail advertising the "Top Secret" files, enticing him to purchase the product. Mr. Hamilton recycled the "teaser" and website format of the company he had purchased the files from, changing only the address, and began e-mailing his own "teaser" and advertising the files on his website. The "teaser" was sent to between 300 and 500 people whose addresses he had acquired from published lists. He made in excess of 20 sales over a number of months. His activities came to the attention of the Edmonton police through complaints by some recipients of the spam-mail who either reported it directly to the Edmonton police or to Interpol.

53 The "teaser" that Mr. Hamilton received and subsequently used as his own did not make reference to the bomb or break and enter documents, but did refer extensively to the credit card

number generator. The web page did not make reference to any illegal documents. The relevant parts of the "teaser" are reproduced in my colleague Fish J.'s judgment at para. 8. As one can see, the "teaser" reads like a typical advertisement for a product, asserting its supposed useful qualities in exaggerated terms. Mr. Hamilton received the files he purchased on disk and in hard copy. He testified that the package as a whole interested him, including the "absurd material" and the "money-making opportunities". [page451] According to him, he thought others might be similarly interested.

54 Mr. Hamilton saw a computer generated list containing abbreviated names of the files. He testified that he skimmed through the file names, proceeding to read further into those that caught his attention. The computer list contained file names such as: bombs.txt, bombs2.txt, bombs3.txt, How to Break into a House.txt, and visa hacking.txt. Of the roughly 200 files consisting of 2000 pages of text, it is these 5 files, about 13 pages in length, that are relevant to the charges. Except for the "visa hacking" file, Mr. Hamilton testified that he never read or was aware of the files in question.

55 The files related to explosive substances are best characterized as "how to" recipes. They contain ingredient lists and step-by-step instructions for producing several types of homemade bombs. Evident from its file name, the "How to Break into a House" file is also a "how to" document, listing a series of steps to be followed when attempting to break into a home. It is short and very basic.

56 The "visa hacking" file provides instructions regarding the generation of credit card numbers, which is essentially an exercise in adding and subtracting from an original valid number. A search of Mr. Hamilton's computer revealed another document describing a credit card number generator that did not form part of the "Top Secret" files; however, Mr. Hamilton testified that he frequently downloaded information to his computer which he never read, this file being one such example. Furthermore, a handwritten list of Visa numbers was found. Mr. Hamilton had used the credit card number generator described in the files, his mother's credit card being the starting point. The numbers he generated were all valid save one, but a bank employee testified that no complaints were received [page452] regarding their improper use. Mr. Hamilton testified his motivation in generating numbers was to figure out the mathematics behind credit card number formulation, and not to actually use the numbers. He testified that he did not know at the time that it would be possible to use a credit card number without a name, expiry date or security number that is found on the back of credit cards. At the time, Mr. Hamilton had never possessed a credit card of his own.

II. Judicial History

57 The trial judge found that the *actus reus* had been proven in respect of each offence. As noted earlier, this finding was not contested before the Court of Appeal or before this Court. The more contentious issue raised at all court levels concerns the requisite *mens rea.*

58 The Crown argued at trial that the *mens rea* required for counselling is simply the intent to

counsel. This intent need not be subjective. It can be found on an objective standard and can arise from wilful blindness. Hence, the Crown submitted that the requisite mental element could be inferred from Mr. Hamilton's knowledge that he was passing on a credit card number generator and his knowledge or wilful blindness as to his passing on the instructions in relation to bombs and breaking into homes. On this approach it is irrelevant whether Mr. Hamilton intended or even adverted to the risk that the persons counselled commit any of the offences.

59 The defence argued that the *mens rea* required for counselling is two-fold: first, the subjective intent to counsel an offence; and second, the intent that the offence counselled be committed.

60 The trial judge accepted the defence's position. She held that the counsellor must intend his own [page453] actions -- namely the counselling of an offence -- and must also intend that the counselled offence be carried out. In light of her factual findings on Mr. Hamilton's lack of criminal intent on any standard, the trial judge left for another day the question of whether recklessness or wilful blindness could satisfy the requisite mental element. I will review the trial judge's reasons for acquitting Mr. Hamilton in more detail later in this judgment.

61 The Alberta Court of Appeal dismissed the Crown's appeal. The court affirmed the trial judge's conclusion that an accused must both intend to counsel a criminal act and intend that the counselled crime be committed for the offence to be made out. The court held further that even if recklessness or wilful blindness were the applicable *mens rea*, there was nothing pertaining to these subjects in the trial judge's reasons that amounted to an error of law justifying appellate intervention.

62 The Crown appeals on the question of *mens rea.* The Crown no longer contends, as it did in the lower courts, that solely the intent to commit the act of counselling suffices. However, the Crown submits that the counsellor need not intend that the counselled offence be committed; recklessness as to possible unlawful consequences satisfies the mental element of the offence. Mr. Hamilton's position is that adopted by the Court of Appeal, namely the offence of counselling requires proof that the accused actually intended that the offences be committed, in this case, an intent that someone commit credit card fraud, break and enter into a dwelling house, or make and illegally use bombs.

III. Analysis

A. *Statutory Provisions*

63 The offence of counselling is set out in s. 22(1) of the *Criminal Code*:

[page454]

> **22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Under s. 22(2), the scope of the counsellor's liability is enlarged to encompass collateral crimes committed by the person counselled:

> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Section 22(3) defines "counsel":

> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

As we shall see, the meaning of "counsel" is of crucial importance in this case. The French version of the definition provides further assistance in understanding its meaning:

> (3) Pour l'application de la présente loi, "conseiller" s'entend d'amener et d'inciter, et "conseil" s'entend de l'encouragement visant à amener ou à inciter.

As the wording makes clear, a requisite element of the offence of counselling under s. 22 is the actual participation in an offence by the person counselled. Under s. 21(1), a party to an offence is one who

> (*a*) actually commits it;
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (*c*) abets any person in committing it.

Hence, counselling an offence, if the offence is not committed, does not satisfy the elements of the offence set out under s. 22(1). Criminal liability in these circumstances rests rather on a combination [page455] of s. 22(1) and s. 464 of the *Criminal Code*. Section 464 reads as follows:

> **464.** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

> (*a*) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
>
> (*b*) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

The penalties where the offence counselled is an indictable offence are set out under s. 463 -- where the counselled offence is punishable by life imprisonment, the maximum sentence is 14 years; in other cases, it is one-half of the longest term for which the person who is guilty of the completed offence is liable.

64 As we can see, the *Criminal Code* provisions do not spell out the required *mens rea*, nor do they provide much specificity on the nature and quality of expression that constitutes counselling or the circumstances in which counselling will be held to have occurred. As is the case with many other offences, these matters are left to judicial interpretation. To this end, I will begin by considering the rationale for criminalizing acts of counselling.

B. *Why Criminalize Acts of Counselling?*

65 The criminalization of counselling the commission of an offence creates a form of secondary liability. Where the counselled offence is committed, the act of counselling constitutes participation; [page456] where the counselled offence is not committed, the crime is said to be inchoate. *Black's Law Dictionary* (8th ed. 2004) defines an inchoate crime as "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment." The rationale for imposing criminal liability for participation and inchoate offences is the same as that for primary liability. As noted by my colleague Fish J., the Law Reform Commission of Canada, as it was then called, provided a useful summary of the rationale in its Working Paper 45, *Secondary Liability: Participation in Crime and Inchoate Offences* (1985). I repeat it here for convenience:

> Primary liability attaches to the commission of acts which are outlawed as being harmful, as infringing important human interests and as violating basic social values. Secondary liability attaches on the same ground to their attempted commission, to counselling their commission and to assisting their commission.
>
> This is clear with participation. If the primary act (for example, killing) is harmful, then doing it becomes objectionable. But if doing it is objectionable, it

> is also objectionable to get another person to do it, or help him do it. For while killing is objectionable because it causes actual harm (namely, death), so too inducing and assisting killing are objectionable because of the potential harm: they increase the likelihood of death occurring.
>
> The same arguments hold for inchoate crimes. Again, if the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them even to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm -- they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking certain measures in respect of them: outlawing them with sanctions, and authorizing intervention to prevent the harm from materializing. [Emphasis added; pp. 5-6.]

The Working Paper goes on to note that the imposition of criminal liability, although easily justifiable from a risk-averse perspective, gives rise to [page457] problems concerning the justifiable limits of the criminal law:

> We criminalize certain conduct to protect fundamental values, but at the cost of encroachment on other values. For instance, as some economists would put it, if an act causes harm, that is to the victim, then forbidding it also causes "harm," namely to those who are no longer legally free to do it. The potential victim's well-being is promoted at the expense of the liberty of others. In making criminal laws, therefore, society must seek a balance and beware of undue infringment [*sic*] on individual liberty through forbidding things which people should be free to do. [p. 6]

66 Of course, subject to minimal constitutional requirements, it is up to Parliament to draw the line between criminal and permissible behaviour. However, the language used to express Parliament's intention is often imprecise and open to competing interpretations. In adding flesh to *Criminal Code* provisions it is important not to overreach the purpose of the criminal sanction at the expense of other important social values. This is particularly so in a case such as this one where the conduct in question consists of communications.

C. *The Actus Reus for Counselling an Offence Not Committed*

67 As stated earlier, only *mens rea* is at issue on this appeal. However, in order to properly determine the fault requirement for any offence, it is necessary to consider the *actus reus* of the offence so as to identify the circumstances and consequences to which the offence is directed. The *actus reus* under s. 464 consists of "counsel[ling] another person to commit an indictable offence" (or an offence punishable on summary conviction). Hence, there must be:

(a) an act of counselling;
(b) communicated to another person;
(c) in respect of the commission of an offence.

[page458]

It is readily apparent from the language of the provision that the interpretation of the word "counsel", in large part, will determine the scope of criminal liability.

68 In its ordinary sense, counselling means simply to advise. If given that meaning, the scope of targeted activity would potentially be very wide. The simple communication of information on "how to" commit an offence would suffice to make out the *actus reus* of the offence. The criminalization of all such communications could easily be justified on the basis that society seeks to protect itself against the potential harm occasioned by acts of counselling -- the increased likelihood that the counselled offence be committed. After all, it is at least arguable that the communication of this kind of information may plant a seed in the recipient's mind and increase the likelihood of the crime materializing. Should then all such communications be banned? More significantly, should they be subject to society's severest sanction, the criminal law?

69 We must ask ourselves if the resulting encroachment on freedom of speech would exact too high a cost. If "counsel" meant simply to advise, a lawyer's advice to a client on the law with respect to the various means of committing an offence could potentially be caught. Movies, video games, textbooks, and other literary works that describe or depict the commission of an offence may be subject to state scrutiny. I would think it obvious that such a prohibition on expression would be too wide. It is for this reason, as we shall see, that such an interpretation of the word "counsel" has been rejected in the criminal context.

70 The requisite *actus reus* of the offence of counselling was considered in *R. v. Dionne* (1987), 79 N.B.R. (2d) 297 (C.A.). Mr. Dionne was charged with counselling indictable offences that were not committed. He was alleged to have counselled an undercover officer to commit the offences of [page459] threatening and assault causing bodily harm. The trial judge instructed the jury on the requisite elements of the offences as follows, at para. 20:

> [TRANSLATION] Taking each count individually, the offence is complete if, first of all, the accused had the intention of having injury caused, or of having threats made by telephone, as the case may be, and secondly, if the accused conveyed his intention to someone else with a view to having that person cause the injuries, or make the threats by telephone.

71 On appeal, the New Brunswick Court of Appeal held that these instructions were erroneous. The *actus reus* of the offence of counselling could not be made out on the basis of a mere passive

communication by an accused of his desire that an offence be committed -- more was required. Ayles J.A. stated as follows, at para. 21:

> [TRANSLATION] In my opinion, those instructions are incorrect since the offence of incitement implies actions which are more serious than those of conveying one's intention to have injuries inflicted upon someone, with a view to having those injuries inflicted. The actions or words must be capable of inducing a person to commit the intended offences, and passive communication of one's intention does not constitute an offence even if the object is to have injuries inflicted upon someone. [Emphasis added.]

72 This Court considered *Dionne* and expressly adopted this "stronger meaning of actively inducing" in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 56. In order for the *actus reus* to be proven, the words communicated by the accused, viewed objectively, must be seen as *actively* inducing, procuring or encouraging the commission of an offence. This restricted interpretation of the meaning of counselling is not only consonant with the definition of "counsel" under s. 22(3), it ensures that the scope of the offence remains within the justifiable limits of the criminal law. It is this concern of potential overbreadth that informed this Court's adoption in *Sharpe* of a more restricted meaning of counselling.

73 The need to carefully circumscribe the scope of an offence prohibiting a form of communication [page460] was discussed at length in *R. v. Keegstra*, [1990] 3 S.C.R. 697. In that case, the constitutional validity of s. 319(2), which prohibits communications that wilfully promote hatred against an identifiable group, was challenged on the basis that it unduly restricted the freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. This Court, by majority decision, upheld the constitutional validity of the provision. It did so on the basis that s. 319(2) possessed sufficient definitional safeguards to ensure that it captured only the harm to which the prohibition is targeted and, as such, did not unduly restrict the s. 2(*b*) guarantee.

74 Hence, as held in *Sharpe*, nothing short of *active* inducement or encouragement will suffice to make out the *actus reus* of the offence of counselling. In other words, when viewed objectively, the communication must be one that actively seeks to persuade the person counselled to commit the crime. In this way, the scope of targeted activity is not extended to the mere possibility of planting a seed in the recipient's mind; it is limited to those communications that are likely to cause that seed to sprout, creating a resolve to commit the crime. It is only then that the potential risk justifies the criminal prohibition. However, it is well established that it is not necessary that the person counselled be in fact persuaded: *R. v. Walia (No. 1)* (1975), 9 C.R. (3d) 293 (B.C.C.A.), at pp. 293-95; *R. v. Glubisz* (1979), 47 C.C.C. (2d) 232 (B.C.C.A.), at pp. 235 and 241-42; *R. v. Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.), at pp. 508-9. The focus on a prosecution for counselling is on the counsellor's conduct and state of mind, not that of the person counselled.

D. *The Mens Rea for Counselling an Offence Not Committed*

75 No constitutional challenge is raised in this case. Nonetheless, the Court must be mindful of the potential overbreadth of a criminal sanction whose [page461] sole target is speech. As reiterated in *Sharpe*, Parliament is presumed to have intended to enact legislation in conformity with the *Charter* (para. 33). This concern over the potential sweep of the provision does not end with the analysis of the requisite *actus reus* and the level of risk targeted by Parliament. The persons who could potentially fall within the reach of the criminal law must be considered. Because of the stigma attached to a criminal prosecution and to a conviction, it is important that the offence not catch the morally innocent.

76 The requisite *mens rea* is not expressly set out in s. 464. However, this is not unusual. The mental element of an offence is not always described in the enactment. Often it must be inferred from the nature of the prohibited activity and the harm it is meant to guard against. In this case, because of the nature of the offence, our earlier discussion on the requisite *actus reus* can largely inform the determination of the necessary *mens rea*. As we have seen, it is not sufficient that the communication simply raise the possibility of affecting its recipient; it must actively seek to persuade that person to commit the crime. It follows that the counsellor must, at the very least, *intend to persuade* the person counselled to commit the offence. In this respect, it is my view that mere recklessness as to the counselled person's reaction to the communication is insufficient. In other words, it is not enough that the counsellor, knowing that the communication is objectively capable of persuading a person to commit an offence, goes ahead and does the act anyway. If mere recklessness as to the communication's potential power of persuasion were to suffice, some may argue that the publication of Shakespeare's *Henry VI*, with its famous phrase "let's kill all the lawyers", should be subject to state scrutiny!

77 Hence, the counsellor must intend to persuade the person counselled to commit the offence. Simply intending the communication, as advocated by the [page462] Crown at trial, is not sufficient. An additional question has been posed, mostly in academic writings: must the counsellor also intend that the offence be committed? This is often referred to as a "dual *mens rea*" requirement. In my view, in all but the most unusual circumstances, it is not necessary to adopt a distinct "two-step" approach to determine whether the accused possesses the necessary *mens rea*. It is logical to infer that the counsellor who intends to persuade the person counselled to commit an offence intends that the offence be committed. However, unusual circumstances did arise in *R. v. Janeteas* (2003), 172 C.C.C. (3d) 97 (Ont. C.A.), and it became necessary for the court to examine whether the counsellor must also intend the commission of the counselled offence. The question was fully canvassed by Moldaver J.A. who concluded that such an intent was required. I agree with his analysis.

78 The peculiar facts of *Janeteas* are as follows. Mr. Janeteas came to befriend J.B. and her mother B.G., subsequently learning of J.B.'s marital difficulties with her husband Dr. M.B. According to Mr. Janeteas, he began to fear for Dr. M.B.'s safety as a result of conversations with J.B. and B.G. in which they made it known that they wanted to have Dr. M.B. harmed or even killed. He felt that Dr. M.B. should be warned, and in an attempt to obtain hard evidence,

tape-recorded a conversation with J.B. and B.G. in which he actively encouraged them to have Dr. M.B. harmed or killed and expressed his willingness to make the necessary arrangements. He then met with Dr. M.B., and over the next few months was able to obtain $35,000 from him. Moldaver J.A. found that Mr. Janeteas did not possess the requisite *mens rea*, stating, at para. 43:

> The present case is one of those rare instances where, despite the appellant's intention that his words be taken seriously, the Crown does not maintain that he intended the commission of the crimes counselled. While the appellant's actions were reprehensible, I am not convinced [page463] that the reach of the criminal law should be extended, at the expense of established principle, to ensnare the likes of the appellant.

79 The Crown's position before this Court is consonant with this "dual" *mens rea* requirement. The Crown is no longer contending, as it did at trial, that an accused's intention in respect of the commission of the counselled offence is irrelevant. The Crown, however, submits that recklessness as to whether the person counselled will commit the offence suffices. Hence, on that approach, the counsellor's knowledge, without more, of the communication's objective potential to persuade would meet the standard. For the same reasons expressed in respect of the *actus reus*, it is my view that this interpretation, which would result in criminal liability even when the counsellor does not intend to see that act committed, but is simply reckless as to the reaction of the person counselled, would unduly widen the scope of criminality. As aptly noted by the intervener Canadian Civil Liberties Association, the interpretation advocated by the Crown would risk criminalizing legitimate forms of protest, advocacy or dissent and, arguably, even the reproduction and distribution, for historical or teaching purposes, of classic texts. The value placed on freedom of expression militates in favour of a more restricted interpretation.

80 Although the offence in question was a different one, the reasoning of the Court in *Keegstra* on the requisite mental element is nonetheless instructive, because much the same concerns about the potential breadth of the prohibition against acts of communication informed the analysis of the Court on the question of *mens rea*. The Court adopted a stringent standard, noting that the limitation on the *mens rea* required to convict for "wilfully promoting hatred" was a key factor in minimizing the impairment of freedom of expression caused by that provision. Dickson C.J. noted that the requirement that the speaker subjectively intend that his speech promote hatred "significantly restricts the reach of [page464] the provision, and thereby reduces the scope of the targeted expression" (p. 775). This was seen to be "an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression" (p. 775). Of course, the word "wilfully" is not found in s. 464 as it was in s. 319(2). However, the restricted meaning of the word "counsel", as an *active* inducing, procuring or encouraging the commission of an offence, connotes the same requirement that there be a subjective intent to persuade the person counselled *to commit the offence*. This requirement, from a logical standpoint, can only be met if the counsellor intends that the offence be committed. Recklessness alone cannot suffice. Since the *mens rea* is largely inferred from the *actus reus* itself, the application of the lesser standard of

recklessness, in my view, would result in widening the scope of prohibited activity beyond that accepted by this Court in *Sharpe*.

81 There is no question that the Crown is correct in saying that the Internet poses particular risks because of the ease with which mass communications may be disseminated worldwide. The particular nature of communications through cyberspace may well provide justification to limit the diffusion of the most dangerous expression on a lesser standard, even on objective grounds alone. However, it is my view that the remedy does not lie in an expansive interpretation of the offence of counselling. The offence of counselling, applying as it does to all crimes, is too blunt an instrument to address this situation without imperiling a range of harmless and/or valuable expression.

82 For these reasons, I agree with the Court of Appeal that the more demanding standard of subjective *mens rea* should apply: the counsellor must intend that the counselled offence be committed for [page465] the offence to be made out. As noted by the Ontario Court of Appeal in *Janeteas* and the Alberta Court of Appeal in this case, this approach has the support of many in the legal community. For Canadian writings, see: D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at pp. 227 and 703; K. Roach, *Criminal Law* (3rd ed. 2004), at pp. 125-26; E. Colvin, *Principles of Criminal Law* (2nd ed. 1991), at p. 377. For American academic support, see: W. R. LaFave, *Substantive Criminal Law* (2nd ed. 2003), vol. 2, at pp. 194-95; J. Dressler, *Understanding Criminal Law* (3rd ed. 2001), at pp. 415-16. For British support, see: A. Ashworth, *Principles of Criminal Law* (4th ed. 2003), at p. 466; G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at p. 442; *Smith & Hogan Criminal Law* (9th ed. 1999), at p. 271.

E. *Application to This Case*

83 As noted earlier, the trial judge concluded that the *actus reus* of the offence had been proven in respect of each of the four counts. While this conclusion in respect of the fraud count appears well founded, it is difficult to find support on the record in respect of the three remaining counts. As discussed earlier, a simple "how to" recipe for committing a crime, without more, does not appear to meet the test adopted in *Sharpe*. However, no issue was raised with respect to the trial judge's conclusion on the *actus reus* and it is not necessary to decide the matter to dispose of this appeal.

84 The trial judge concluded that Mr. Hamilton did not have the necessary *mens rea* on any standard. The Court of Appeal saw no reason to interfere with her conclusion. Nor do I. My colleague Fish J. is of the view that the trial judge erred by confounding "motive" and "intent". He rests this conclusion on the trial judge's finding that Mr. Hamilton's motivation was monetary. With respect, I disagree. The trial judge's consideration of Mr. Hamilton's motivation must be examined in the context of the [page466] evidence before her, and her reasons must be read as a whole.

85 Mr. Hamilton testified that he had not intended to induce the commission of any criminal offence. He had not written any of the files; he had himself purchased them off the Internet and did not even know what much of the information was about. The files consisted of roughly 2,000 pages of text, only 13 of which related to the charges before the court. In particular, he had not read any of

the files about bombs or break and enters. The teaser made no reference to these files. As for the material on the credit card generator, he thought readers would simply be interested, as he had been, in discovering how easy it was to generate valid credit card numbers. He did not think anyone could use the credit card numbers without a valid name, expiry date or security number. Notably, at the relevant time Mr. Hamilton had never owned a credit card. The trial judge, as she was entitled to do, accepted Mr. Hamilton's testimony. She concluded as follows, at paras. 53-54:

> On all the evidence I find that Mr. Hamilton ought to have known he was counselling fraud. The teaser and his subjective knowledge that the use of false credit card numbers is illegal make this conclusion irresistible. However, I have a doubt that Mr. Hamilton had subjective intent to counsel fraud. His motivation was monetary, and he sought to pique the curiosity of readers who might acquire the information in the same way that he was initially attracted to the information. Further, he struck me as utterly unsophisticated and naïve to the point that he cannot be said to have been wilfully blind or reckless.
>
> I also find that Mr. Hamilton did not intend the fraud be carried out nor was he wilfully blind or reckless as to the risk of deprivation which would result (to use the *Theroux* test). In my view the evidence points to a conclusion that Mr. Hamilton was inviting others to do as he had done: to satisfy their curiosity by seeing how [page467] easy it is to generate the numbers and to expect that they cannot use them without the expiry date. In other words, he did not specifically intend that the fraud would be carried out. Nor, in all of the circumstances, ought he to have known that the fraud would be carried out. It follows that there could not be a conclusion that he was wilfully blind or reckless as to the consequences of the fraud. Rather, Mr. Hamilton was trying to make money by selling information on the Internet. In my view, on all of the evidence, it cannot be found he counselled fraud.

86 The trial judge was entitled to consider motive. It is a piece of circumstantial evidence that may assist in determining an accused's state of mind. In reading her reasons as a whole, I see no reason to interfere with the conclusion reached by the Court of Appeal on this issue, at para. 44:

> The trial judge did not err as alleged by the Crown. As she was entitled to do, the trial judge considered motive as part of her fact findings. But her decision was based on other facts relating to the respondent's knowledge. She found, for example, that the respondent had not read most of the "Top Secret" files. She also found that he was not interested in their contents and that he was, overall, "naive, lazy or ignorant". Dealing with the credit card number generator, the trial judge accepted the respondent's testimony that he did not think any generated numbers could be used because they lacked an expiry date. On the basis of these facts, she

found the respondent lacked sufficient knowledge of the consequences of his actions to satisfy the *mens rea* requirement. It is clear that she understood the nature of the test she was bound to apply and did not err in law.

IV. Disposition

87 For these reasons, I would dismiss the appeal.

Solicitors:

Solicitor for the appellant: Attorney General of Alberta, Edmonton.

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Solicitors for the respondent: Pringle & Associates, Edmonton.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

cp/e/qw/qllls

In the Matter of
The Public Hearing into the Complaint Against
Sergeant David Berndt
Of the Central Saanich Police Service

Reasons for Decision

In the matter before this tribunal, Sergeant David Berndt is alleged to have committed three disciplinary defaults under the Code of Professional Conduct Regulation of the Police Act which was in effect on July 22, 2009.

The delicts are:

1) That while off duty in Armstrong, B.C. on July 22, 2009, Sergeant Berndt acted in a manner that was likely to discredit the reputation of the municipal department with which he was employed, constituting the offence of improper off-duty conduct contrary to S.4(1)(*l*) of the Code of Professional Conduct Regulation of the Police Act (pre-April 1, 2010 version of the Act);

2) That while off duty in Armstrong, B.C. on July 22, 2009, Sergeant Berndt produced his police identification and badge to Armstrong RCMP Officers to gain favourable treatment, constituting corrupt practice contrary to S.4(1)(e) of the Code of Professional Conduct Regulation of the Police Act (pre-April 1, 2010 version of the Act); and

3) That while off duty in Armstrong, B.C. on July 22, 2009, Sergeant Berndt was intoxicated and in care and control of a motor vehicle, constituting the offence of improper off-duty conduct contrary to S.4(1)(*l*) of the Code of Professional Conduct Regulation of the Police Act (pre-April 1, 2010 version of the Act).

Sergeant Berndt has admitted count # 1 which involves his treatment of RCMP Constable Komlos on the date in question.

During argument of counsel, count # 3 was amended to read:

> *That while off duty on July 22, 2009, Sergeant Berndt was intoxicated in a public place in Armstrong, B.C., constituting the offence of improper off-duty conduct contrary to S.4(1)(l) of the Code of Professional Conduct Regulation of the Police Act (pre-April 1, 2010 version of the Act).*

After the amendment, Sergeant Berndt admitted this count.

With counts 1 and 3 decided, the focus of the hearing centered on count # 2.

The evidence on this count is based on the testimony of Sergeant Berndt and two members of the RCMP stationed at Armstrong, B.C. - Constable Komlos and Constable Catton.

Evidence of Sergeant Berndt:

Although his own counsel described him as an "angry and defensive" witness whose responses did not portray the incident accurately, Sergeant Berndt's testimony did provide an insight into what had motivated his actions.

His evidence establishes that on the day in question, he was asleep in the driver's seat of his motor vehicle and was awoken by a banging on the driver's side window. He says that even though he had consumed too much alcohol, he instantly recognized the person at the window as an RCMP officer in uniform.

He says, also, that because of his 31 years as a police officer, with time served as a professional standards officer, he realized that he was in a compromising position.

His evidence regarding the production of his badge, police identification and driver's licence is more difficult to understand. However, from his evidence these points appear to be clear:

- He got out of his vehicle to face Constable Komlos;
- He was told that the police officers were attempting to assist his wife find him;
- He was aware the police were investigating the circumstances of his presence in the motor vehicle;
- He was also aware the police required the production of his driver's licence;
- He observed that one of the police officers tested the hood of his car to determine if it had been recently driven;
- He became agitated because he had been found in the driver's seat of his car while intoxicated;
- He realized he was being investigated for care and control of a motor vehicle while impaired;
- He realized the significance of his badge being produced.

Sergeant Berndt's evidence regarding the production of his badge is that the badge was conspicuous in his wallet, but that it was not produced to curry favour. Counsel on his behalf says he did not say "give me a break; I'm a brother officer".

Evidence of Constable Komlos:

Testimony was also heard from Constable Komlos, the senior RCMP officer at the scene. She appears to have been quite upset by Sergeant Berndt's conduct. Her evidence of what occurred is rather confused and disconnected.

She recalls telling Sergeant Berndt that the officers had been looking for him at the request of his wife, but she then, almost immediately, asked for his driver's licence. Apparently, it was this request which triggered Sergeant Berndt's reaction. Her evidence on page 163, line 16 of the transcript is as follows:

Q. You asked him?
A. I asked him if he had a driver's licence. He became agitated, kind of – sort of laughed at me. He sort of laughed at me before as well when I asked where he had been and mentioned his wife was worried about him.

I believe it was around the time shortly after I asked about the driver's licence that he produced out of his pocket a badge of some sort and handed me the wallet that had the badge in it. And I gave it to Constable Catton. There was dialogue going on. I can't remember everything now. But I do know that he said, "I was one of you guys," and he had mentioned that he had been in the RCMP, a Mountie, and gave me a little detail.

She also testified (page 170, line 14 through Page 171, line 16 of the transcript):

Q. I see. When you received the badge, or what you took to be a badge, from him, did he say anything about it?

A. No, no. He didn't explain the badge. He just opened it and showed me it. And I didn't recognize what force, what it was from. And so I- – he passed it to me and I gave it to Constable Catton, because I was still at this point concerned about my personal safety because he was changing his moods every couple of seconds, it seemed like every minute.

But he never said anything about – I believed from the conversation we had that he was a retired member of the city police or some sort.

Q. Did you form a conclusion as to why he had given you the badge at that time? In other words, did you form the conclusion at the time as to why he had done that?

A. I believed he showed me his badge just so I would stop questioning him, that maybe – he didn't want us there. And I can't remember the words that he said I'm sorry, but he didn't – felt the need that we didn't need to be there, that we could go and everything was fine. I took it that he was showing me his badge as a way of saying, I'm one of you guys, maybe, or it's a form of, maybe, intimidation. But he never said anything about it and he never asked anything.

Evidence of Constable Catton:

Constable Catton also testified. He was a rookie officer on the evening in question and Constable Komlos was his trainer. From his evidence, he appears to have been almost a disinterested bystander. He did not seem to notice the unpleasantness going on between Sergeant Berndt and Constable Komlos, and felt no need to intervene.

When questioned about the production of the badge, he gave this evidence (page 123, line 20 of the transcript):

And Constable Komlos was talking to that male subject. And I stayed more down towards the rear window along the driver's side and observed – I remember Constable

Komlos instructing the subject for his driver's license. I remember an object was produced with from his wallet. It was passed to me. I looked down. It was silver and blue, resembling a badge. Constable Komlos –

Q. Who passed it to you?

A. Constable Komlos passed it to me. I remember when it was passed, Constable Komlos requested again for the driver's licence and it was produced.

On cross examination, Constable Catton says (page 144, line 7):

Q. Ultimately he produced his driver's licence, did he not?

A. Yes, on the second request.

Q. On the first request, what came out, in your recollection, was something that was blue and shiny?

A. It was silver, like a police badge. Like mine but silver.

Q. And that it was at that point that Komlos said to him, "No, no, I want your driver's licence"?

A. Yes, as she passed it over to me.

Q. As she passed the badge over to you?

A. Yes.

Conclusion:

In my view, the issue coalesces into why the badge was produced. Was it produced unintentionally because it was in the same wallet as the driver's licence, or was it produced with an intention to influence the manner in which the RCMP officers would treat Sergeant Berndt?

It is true that at no time did Sergeant Berndt say words to the effect "give me a break"; but it is also to be noted that after the badge became evident, he did not say "Yes, I'm a cop, but do your job".

Throughout his testimony, Sergeant Berndt attempts to obviate the difficult position in which he found himself. His main motivation appears to be the protection of his job, his pension and his family. His explanation of the locking of the car, of the transportation of beer cans from the farm to the motel, and of many other issues does not bear any degree of scrutiny. It is my view that one can not rely on his evidence when considering the issue to be decided.

It is clear that the production of the badge, in and of itself, is not the deciding factor. In many innocent situations, the badge may be produced to identify its carrier. However, when combined with other factors, such an action may lead to an incriminating inference. During his testimony, Sergeant Berndt says that in his role as a professional standards officer, he investigated several fellow officers for inappropriate production of their badges. Thus, he is fully aware of the practice of "badging", and of the problems it can create.

On the day in question, it is evident that Sergeant Berndt's conduct was motivated by his desire to have the police cease their investigation of him for care and control of a motor vehicle while impaired. It is my view that the production of the badge was intended to produce that result. Coupled with the clear evidence given by Constable Catton that the badge was produced immediately, but that the driver's licence had to be requested a second time by Constable Komlos, I am convinced that Sergeant Berndt's intention was to gain favourable treatment and that thereby, he committed the delict as alleged.

Alan E. Filmer, Q.C., Adjudicator October 11, 2011