

**Supreme Court of Newfoundland and Labrador, Trial Division**

**R. v. Burton**

**Date: 2000-06-30**

*Scott K. Fenton, for the Applicant;*

*Lynn Moore, for the Respondent.*

(2000 St. J. T0425)

June 30, 2000.

[1] O'REGAN, J.: The applicant, David Burton, was charged in July of 1999 with indecent assault and gross indecency involving a complaint made by G.M. in July of 1997. David Burton requests that a stay of proceedings be entered on these charges claiming that to continue would constitute an abuse of process under s. 7 and 11 of **Charter of Rights and Freedoms** (the **Charter**). He bases his application on the fact that these charges should have been dealt with in 1993 when he voluntarily brought them to the attention of the investigators and confessed. At that time, because of the circumstances which I will more fully discuss, the police elected not to charge and the Crown agreed not to proceed.

[2] The application proceeded on June 27, and 28, 2000, and on June 30th, in an oral decision, I entered a stay of proceedings on the charges. A transcript of my oral decision was subsequently forwarded to the Crown and the defence. These are my written reasons.

[3] An Agreed Statement of Facts gives the background and the chronology of events leading to the application. The Agreed Facts are as follows:

"1. Mount Cashel Orphanage was owned and operated by the Irish Christian Brothers (Canadian Province). Prior to being torn down in 1992 it was located at 67 Torbay Road, St. John's, Newfoundland.

"2. The accused, David Jerome Burton (DOB: 1939 07 14), joined the Irish Christian Brothers in 1957. He was assigned to Mount Cashel between 1964 and 1968. Mr. Burton returned to Mount Cashel in 1975 and remained there until 1982. During this time Mr. Burton was a supervisor of the St. Stan's Dormitory in 1964-1965, and between 1976 and 1982.

"3. The complainant, G.M. (DOB: [1965 omitted]), entered Mount Cashel Orphanage on August 4, 1977 and remained there until August 12, 1982. He ran away three or four times but was always returned. The last time he ran away he went to Toronto and never lived at Mount Cashel again.

"4. On November 13, 1997 Sergeant Mark Wall of the Royal Newfoundland Constabulary received a telephone call from G.M. G.M. stated that he wanted to lay charges against a Brother Burton for sexually assaulting him while at Mount Cashel. Sergeant Wall asked G.M. a number of questions including why was he coming forward now. He replied that it's been getting on his nerves more and more. He's tried suicide. He gets very angry thinking about it.

"5. Sergeant Wall arranged for a statement to be taken from G.M. on November 27, 1997. This statement indicated that:

a. When G.M. was asleep Mr. Burton would come to his bed and perform oral sex on him. The first incident lasted about fifteen minutes to one half hour. He told Mr. Burton it was hurting and to stop. Mr. Burton told him to shut up and not to tell anyone if he knew what was good for him. This happened approximately twenty times.

b. Lots of times Mr. Burton would take him to the office, remove his pants and perform oral sex on him. Incidents of masturbation also occurred. Mr. Burton made one attempt at anal sex but this was resisted.

c. On one occasion in the office Brother Lockyer walked in and found Mr. Burton nude. When Brother Lockyer asked what was going on Mr. Burton replied that he was busy and shut the door. The incident was never mentioned again.

d. The abuse ended when he was approximately fifteen.

"6. On June 11, 1993 while investigating a complaint by A.B., Sergeant Wall interviewed David Burton in Toronto. This interview took place in the presence of his lawyer, Douglas Hunt. Although the interview was audio taped by Mr. Hunt, Sergeant Wall was permitted to take notes.

"7. This interview was very emotional and was summarized by Sergeant Wall as follows:

'Burton informed me that he was stationed at Mount Cashel Orphanage on two occasions. The first time was from 1964 to 1968 and the second time from September 1976 until 1983. He has not returned to the Orphanage since leaving in 1983.

'After 1983 he went to South Down for psychiatric treatment and then to Vancouver where he taught until 1989. In 1989 the Mount Cashel Orphanage investigation reopened and the Congregation brought out a policy for their members saying that if a member was charged or convicted of an offence, then he could no longer teach again. This is when he returned to Ontario.

'Burton stated that after 1983 he never offended anyone. He went to South Down for treatment and since that time he has felt guilt for what he has done. Burton stated that he did not molest anyone. It was sexual contact and not molestation. He said that there were no accusations since 1983 and no one made accusations against him while in Vancouver.

'I asked Burton about his second visit to the Orphanage. He replied that he went there around 1975 or 1976 just after the scandal was on the go. He was one of a new group of Christian Brothers who went there after the scandal. He also taught at St. Pius X School and concentrated on helping the kids at the time. Prior to going to Mount Cashel at that time, he resided at Mount St. Francis on Merrymeeting Road and taught at St. Pat's School on Bonaventure Avenue, St. John's....

'At this time, Burton became more emotional than he already was. He stated, 'I'm hurt. I'm sorry. I just want to get rid of it ...' [The details regarding the confession to A.B. have been omitted.]

'At this point Burton stated to me that in 1983 when he was on trial for the charges related to Mount Cashel, he wanted to get rid of all of them then. I asked him what he meant by that. He replied that in 1983 he went to his lawyer's home and told him about the abuse on other boys. His lawyer, William English, told him to leave the others alone and only face the charge against him now.

'I asked Burton if he told his lawyer about the other abuse and he replied, "Yes, I told him ..."

'I asked Burton if there were others involved and he responded, "Yes." I told him that in his 1982 interview with Detective Power of the Royal Newfoundland Constabulary, he stated that there was no one else. Burton replied that there were others. He said, "I wanted to say then. I should have said. I should have. I never had the courage ..." [A portion of the confession dealing with matters unrelated to G.M. has been deleted.]

'Burton said he left Mount Cashel in 1968 and returned in 1976. He also stated that he told me about A.B. and there was also a boy named G.M. at the Orphanage that he touched. Burton said he touched G.M. by masturbating him on a couple of occasions. The incidents occurred in Burton's bedroom, in G.M.'s room and while on a trip to Maine, USA.

'Burton then began to cry and exclaimed, "What did I do!"

'I asked Burton if there was any oral sex. He replied, "Yes, sometimes. He never did it to me. I never forced anyone."

'Burton was very emotional and shaking. His lawyer requested a short break and asked me to leave the room while he spoke to Burton for a moment. At 4:50 pm, I agreed and left the room...

'Burton then began to cry and stated, "I want to get it over with. If I hurt them, I'm sorry. I don't know if I have the right to walk into their life now. Maybe they left it behind. Now I'm dragging them into this ..."

'Burton then told me that there was no one else involved. He repeated that he wanted to say he was sorry. He wanted to continue the life he started in 1983. Now he's doing what he should have done in 1983. Burton stated, "I really don't understand what happened ..."

‘Burton then stated, “I would like to convey to these people that I’m really sorry. I know I’m dragging them through this. They all have a wife and kids. I don’t know if I have the right to do this. I’m sorry. Maybe they left it behind.”’

“8. Following the interview with Mr. Burton several attempts were made by Sergeant Wall to contact G.M. Sgt. Wall was informed by a member of his family that G.M. was now living on the Mainland. They did not want to provide a telephone number for him because G.M. had told them to tell Sgt. Wall that he wanted no involvement whatsoever with the Mount Cashel Orphanage investigation. The charge before the court arises from G.M.’s 1997 complaint to the Royal Newfoundland Constabulary.

“9. In 1983 Mr. Burton was convicted of a breach of s. 157 (Gross Indecency) and served 12 days and 3 years probation. In 1993 he was convicted of a breach of 156 (Indecent Assault on a Male) and sentenced to imprisonment for one year.”

[4] For the purposes of the present application, the important aspects of the Agreed Statement of Facts can be summarized as follows: In 1983 Mr. Burton was on trial for other offences which occurred at Mount Cashel. At that time he informed his lawyer, Mr. William English, that there were other offences that he had committed while a resident at Mount Cashel, but these offences were not part of that ongoing investigation. He was advised by his lawyer that his only obligation was to face the present charges and that he should not concern himself about matters that were not being investigated.

[5] In 1993, Mr. Burton was being investigated for another charge involving sexual assault in relation to A.B. It was at this time that he voluntarily confessed to sexual misconduct involving five former students at Mount Cashel, one of whom was G.M., the complainant in the present charges. Mr. Burton stated that he had wanted to confess these crimes in 1983. It was on his lawyer’s advice that he didn’t confess and he had regretted that decision. It was now his intention to acknowledge all crimes so as to “clear the slate”. In confessing these crimes Mr. Burton acknowledged to the investigating officer that although he was “clearing the slate” for his own benefit and peace of mind, he was cognizant of the fact that the complainants had their own lives to live and may want to leave the memories of the assaults behind them. It is clear from the Agreed Statement of Facts that Burton showed a sincere intention to disclose his prior sexual offences to the investigating officers, plead guilty, express his remorse and pay his debt to society.

[6] I am satisfied from the Agreed Statement of Facts, and the viva voce evidence of the investigating officer, that after Mr. Burton made the disclosure the police conducted a “vigorous investigation and at the conclusion of the investigation elected not to charge Mr. Burton with the other offences”.

[7] The evidence which led to the decision not to lay charges in 1993 is worthy of review. According to Sergeant Wall, he was successful in locating three of the five people that Burton confessed to molesting. The three people that were contacted did not wish to proceed with criminal charges and asked the investigating officer to respect their privacy so that they may get on with their lives. G.M. was not personally contacted. Early investigation determined that G.M.'s whereabouts were unknown. Sergeant Wall spoke to one of his colleagues who informed him that he had once made contact with G.M. regarding investigations into Mount Cashel and G.M. informed him that "he had no complaint to make". Subsequent to this information Sergeant Wall spoke with members of G.M.'s family and, although they couldn't disclose G.M.'s whereabouts, they informed Sergeant Wall that G.M. had told them that he didn't want anything to do with the Mount Cashel Inquiry. Sergeant Wall said that he was also aware that in 1995 G.M. had made contact with members of the Royal Newfoundland Constabulary (RNC) regarding the availability of counselling. As well, the investigation showed that in 1995 a doctor in Ontario contacted the RNC requesting any details of alleged offences against G.M. It was through this request that notification was sent to G.M. that if he wished to pursue charges he should go and see the police. Ultimately, according to Sergeant Wall, in 1997 G.M. did lay a complaint which is the subject matter of this application.

[8] It is against this background, and more particularly the investigation in 1993, that Sergeant Wall elected not to lay charges against Mr. Burton. Sergeant Wall acknowledged that it was his decision and he did not, at any time, consult the Crown. He based his decision not to lay charges mainly on the fact that in the case of three of the witnesses they had personally informed him that they did not wish to proceed, and in the case of G.M. the information that he received from his police sources, and G.M.'s family, led him to believe that G.M. did not wish to proceed. He decided to defer to what he believed was G.M.'s request for privacy. Sergeant Wall was a very credible witness and he fairly stated that "In my mind I had made a final decision not to proceed against Burton regarding the charges involving G.M." Likewise, he further stated, "I never addressed what I might do if G.M. came forward."

[9] G.M. testified on his own behalf on the application. He stated that it was his view that he didn't particularly say that he wanted nothing to do with the Mount Cashel investigation, but he did acknowledge that he told his family he didn't want any contact with the police back in 1993. He agreed, however, that when he contacted the RNC for counselling in 1995, it was for counselling only and he was not prepared to disclose the

abuse to the degree that charges would be laid. Obviously, from G.M.'s evidence he didn't wish to disclose in 1995. It is fair to find that had he been personally contacted by Sergeant Wall in 1993, his decision would be not to proceed at that time with charges.

[10] The background, and the events leading to the hearing and guilty plea involving Mr. A.B. before Provincial Court Judge Reid in 1993, are pivotal. At the conclusion of the investigation Mr. Thomas Mills, a Senior Crown Attorney with the Department of Justice, wrote Sergeant Wall and requested that:

"Although it is implicit throughout your Justice Report, could you please confirm that it is your decision not to charge in relation to other victims."

In relation to that request, Sergeant Wall responded on July 30, 1993:

"In response to your letter of July 20, 1993, regarding the other victims of Brother Burton, I have contacted, or attempted to contact, all these persons whom Brother Burton confessed to abusing. Although I feel Burton should be charged with the offences, I am following the wishes of the victims in not laying any charges other than the two relating to A.B."

[11] There can be no doubt that prior to Mr. Burton's plea in relation to the A.B. matter in 1993 the Crown had confirmed, in writing, with the police, that they had made a decision not to pursue the charges involving the other five boys who Burton had confessed to molesting. In a letter submitted at this hearing Mr. Thomas Mills, the Senior Crown Attorney, acknowledged that it was his recollection that the police had decided not to lay charges. The full text of his letter is as follows:

"June 14, 2000

Ms. Lynn Moore

Crown Attorneys' Office

6th Floor, Atlantic Place

Dear Lynn

Re: David Burton

I have reviewed the affidavit from Doug Hunt. I can advise that the tenor and general thrust of the affidavit is accurate; however, my recollection differs on certain points. For example, there are some statements that I think are inaccurate. I do not recall any statements that the **Crown** would not be laying charges. I recollect this as being that the **police** would not be laying any charges. From the defence point of view this may have been interpreted as one and the same.

I agree that it was definitely my understanding that this was a final resolution of the matter. This, however, was due to the police decision to not lay further charges. I, by the way, supported that decision; however, as you know this was a police decision. Consequently, from my perspective, the guilty pleas to the 1993 charges were not part of a *'plea bargain'*. It was not a situation of *'plead guilty and the police will not charge'*, rather it was a situation of *'the police are not charging and the accused is anxious to conclude the matter'*.

In summary, I differ with the accuracy of the use of *'Crown'* and *'plea bargain'*. I do not differ with Mr. Hunt's general understanding of the situation.

Yours truly,

THOMAS G. MILLS

Senior Crown Counsel"

[12] At the hearing before Provincial Court Judge Reid, Mr. Burton insisted that the Judge be informed of his intent to acknowledge his involvement with the other victims. In that regard, after Mr. Burton entered his guilty plea, Mr. Mills informed the court:

"Your Honour, those are the comments made in relation to Mr. A.B. The statement continued, and at that point, ah, Mr. Burton made reference to sexual activity with five different boys during the time period in question. Constable Wall vigorously pursued those other investigations and spoke to the individuals involved. As a result of Constable Wall's interviews with those individuals, Constable Wall concluded, and I read from his Justice Report:

'All of the men are in their late twenties and thirties and do not want to raise old memories, especially bad memories from so long ago. All expressed the same type of feeling that they have now gone on with their lives, and anything that occurs now will affect their wives and kids today.'

"As a result of that, Constable Wall has decided not to lay charges, and the Crown Attorney's office is not pursuing those charges. I make reference to that with the agreement of My Learned Friend and to put the statement in context." (Emphasis added)

[13] It is clear from the Agreed Statement of Facts, the evidence of Sergeant Wall, and the correspondence of Mr. Mills, that in 1993 the matters involving G.M. and the other victims identified by Mr. Burton, would not be pursued at that time, or in the future. That was the decision made by the police and acknowledged by the Crown. As Mr. Mills said, this appeared to be "a final resolution of the matter". However, in 1997, G.M. decided to disclose, have the charges laid and the matter brought to Court. Quite fairly, the police did not try to dissuade G.M. and acceded to his request. It now must be determined against that background and fact situation whether or not it would be an abuse of process to

proceed against Mr. Burton. I should add, however, that it is obvious from the background, and the application, that Mr. Burton and his counsel were under the impression that the matter had been completely dealt with at the hearing before Judge Reid in July of 1993.

[14] The position of the parties is quite clear. G.M. says he was not prepared to disclose until such time as he felt he could cope with the matter. The position of the defence is that:

“... the conduct of the police and the Crown in bringing the applicant to trial on the G.M. charges seven years after the applicant confessed and appeared before Judge Reid, in circumstances wherein Senior Crown counsel previously stated on the record that the applicant would not be charged with additional offences arising from his confession, constitutes an egregious abuse of process, violates the most basic tenets of fairness in the exercise of prosecutorial discretion, and violates the applicant’s rights under s. 7 and 11 of the **Charter** ...”

[15] I am persuaded by the arguments put forward by the applicant that to proceed with these charges would be an abuse of process and in violation of the **Charter**.

[16] It is well established that there is discretion with the Court to exercise its authority in preventing an abuse of process. The discretion should only be exercised in the “clearest of cases” where the circumstances show that to proceed would be against the interest of justice. **R. v. Conway**, [1989] 1 S.C.R. 1659; 96 N.R. 241; 34 O.A.C. 165; 70 C.R.(3d) 209; 49 C.C.C.(3d) 289; **R. v. Jewitt**, [1985] 2 S.C.R. 128; 61 N.R. 159; 21 D.L.R.(4th) 651; 47 C.R.(3d) 193; 21 C.C.C.(3d) 7; **R. v. Keyowski**, [1988] 1 S.C.R. 657; 83 N.R. 296; 65 Sask.R. 122; [1988] 4 W.W.R. 97; 40 C.C.C.(3d) 481; **R. v. Power (E.)**, [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269; 89 C.C.C.(3d) 1.

[17] It is not so much the individual arguments put forward by the applicant which constitute an abuse of process in this case. I am satisfied that when one considers the circumstances of this case, and viewing it in the light of prosecutorial discretion, undertakings, acknowledgments not to proceed, coupled with the initial decision by the police not to prosecute, one can readily see that to proceed with these charges would certainly be against the interest of justice and would amount to an abuse of process.

[18] As I stated in my oral judgment, there may well not have been a plea bargain in the traditional sense, but the circumstances surrounding the agreement not to proceed by the Crown, and the decision not to lay charges by the police, certainly left the impression with Mr. Burton, and his counsel, that an agreement was finalized. In that regard, I am



satisfied, based on the affidavit evidence of Mr. Burton's counsel, Douglas Hunt, Q.C., and the Director of Public Prosecutions, Colin Flynn, Q.C., that if there was not a plea bargain in the traditional sense, there was an agreement not to proceed. If there is a difference in an agreement not to proceed and a plea bargain, then I find the difference is so subtle that the result is the same. The affidavit evidence of Douglas Hunt, Q.C., and Colin Flynn, Q.C., were not challenged. I refer to Mr. Hunt's affidavit:

"I was advised by both Mr. Flynn and Mr. Mills that, notwithstanding Brother Burton's additional disclosures regarding additional offences involving sexual misconduct with the five boys that he had revealed in his confession to P.C. Wall on June 11, 1993, that the police and the Crown was not intending to charge Brother Burton with additional offences in relation to the five additional boys."

And, in the case of Mr. Flynn's affidavit wherein he stated he had no involvement with the matter other than to attend Court on the morning of the guilty plea to meet with Mr. Hunt on a personal matter. However, while there he became aware of the agreement. In his affidavit he stated:

"I do not recall being aware of any agreement on sentence in this matter until I arrived in the courtroom and was told what the agreement was that was negotiated in this matter."

[19] Coupled with these affidavits I again note the submission by Mr. Mills at the sentencing hearing which stated:

"As a result of that, Constable Wall has decided not to lay charges and the Crown Attorney's office is not pursuing these charges."

I am satisfied that all this constitutes an agreement not to prosecute for the offences involving G.M. and there can be little doubt, especially from the fact that Mr. Burton wished to have these matters brought to the attention of Judge Reid, that this agreement was acted upon by Burton. There is no doubt that the Crown, and the police, entered this agreement fully contemplating that it was the wish of G.M. not to proceed with charges. It is on that basis that the Crown and the police were free to conclude that the matter had reached closure. In light of these circumstances, I find that this constitutes a situation which is the type of situation envisaged by the Supreme Court of Canada when discussing that an abuse of process should only be entered in the "clearest of cases". I have no reason to doubt G.M. when he says that he merely told his family that he did not wish to communicate with the police in 1993, and that he was not aware of the fact that the police wanted to discuss with him the abuse he suffered at Mount Cashel. Nevertheless, I am satisfied that the evidence received by the police from members of his family was in

reference to the Mount Cashel situation and they acted on that accordingly. There was no maliciousness on the part of the police in not laying the charges, nor with the Crown agreeing not to pursue the charges. Clearly, at that time everybody was under the impression that the five potential complainants did not wish to pursue the charges and acting on that impression made judgment calls and decisions accordingly. Mr. Burton did more than one would expect in bringing the information before the authorities and the Court, and to allow the charges to proceed after his actions would be against the public interest. Although it is not really related to the application, it is worth noting that although the criminal charges cannot proceed, G.M. is not precluded from any civil actions that he may wish to take for the abuse suffered at Mount Cashel.

[20] Having reviewed the circumstances and the authorities, I am also satisfied that the situation that existed at the hearing before Judge Reid, and the events leading up to it, whereby charges were not laid against Brother Burton, amounted to a lawful exercise of prosecutorial discretion. The use of prosecutorial discretion is succinctly put forward by Mr. Justice La Forest in **R. v. Beare**; **R. v. Higgins**, [1988] 2 S.C.R. 387; 88 N.R. 205; 71 Sask.R. 1; [1989] 1 W.W.R. 97; 66 C.R.(3d) 97; 45 C.C.C.(3d) 57, at p. 76 [C.C.C.]:

“Discretion is an essential feature of the Criminal Justice System. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding in when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

“Though the **Criminal Code** provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement in the criminal justice system nonetheless depends on the exercise of that discretion.”

[21] I am satisfied that the use of prosecutorial discretion can be readily seen in the correspondence between the Crown and the police confirming the police action not to prosecute. The discretion was exercised between a senior police officer and a Senior Crown Attorney and, unless there was an abuse of process in exercising that discretion, this court should not interfere.

[22] In conclusion I am satisfied when viewing all the circumstances, and the relevant authorities, that this is a situation where a stay of proceedings is justified. To lay charges after a clear informed decision was made not to prosecute, and to convey that decision to the applicant while entering his plea of guilty on other charges, would constitute an abuse of process which would offend the public interest. It has often been said that each case

turns on its own unique circumstances and this is clearly one. The circumstances leading to the decision not to prosecute may have been influenced by erroneous information, but nevertheless the decision was done without malice and to subject the applicant to further charges in these circumstances would be manifestly unjust.

[23] The application is granted.

*Application allowed.*

### Appendix

**R. v. Jewitt**, [1985] 2 S.C.R. 128; 61 N.R. 159; 21 D.L.R.(4th) 651; 47 C.R.(3d) 193; 21 C.C.C.(3d) 7.

**R. v. Keyowski**, [1988] 1 S.C.R. 657; 83 N.R. 296; 65 Sask.R. 122; [1988] 4 W.W.R. 97; 40 C.C.C.(3d) 481.

**R. v. Conway**, [1989] 1 S.C.R. 1659; 96 N.R. 241; 34 O.A.C. 165; 70 C.R.(3d) 209; 49 C.C.C.(3d) 289.

**R. v. Power (E.)**, [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269; 89 C.C.C.(3d) 1.

**Balderstone v. R. et al.**, [1983] 6 W.W.R. 438; 23 Man.R.(2d) 125; 4 D.L.R.(4th) 162; 8 C.C.C.(3d) 532 (C.A.).

**R. v. V.T.**, [1992] 1 S.C.R. 749; 134 N.R. 289; 7 B.C.A.C. 81; 115 W.A.C. 81; 71 C.C.C.(3d) 32.

**R. v. E.D.** (1990), 39 O.A.C. 13; 57 C.C.C.(3d) 151 (C.A.).

**Smith and the Queen, Re** (1974), 22 C.C.C.(2d) 268 (S.C.).

**R. v. Crneck, Bradley and Shelley** (1980), 55 C.C.C.(2d) 1 (H.C.).

**Abitibi Paper Co. v. R.** (1979), 47 C.C.C.(2d) 487 (Ont. C.A.).

**R. v. Garcia and Silva**, [1970] 3 C.C.C. 124 (Ont. C.A.).

**R. v. Lees** (1979), 27 N.R. 548; 46 C.C.C.(2d) 385 (S.C.C.).

**R. v. J.C.L.** (1987), 64 Nfld. & P.E.I.R. 81; 197 A.P.R. 81; 36 C.C.C. (3d) 32 (Nfld. C.A.).

**R. v. Tabor (G.G.)** (1993), 111 Nfld. & P.E.I.R. 103; 348 A.P.R. 103; 84 C.C.C.(3d) 448 (Nfld. C.A.).