

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Sciascia, 2017 SCC 57, [2017] 2 S.C.R. 539 | **Appeal heard:** April 24, 2017  **Judgment rendered:** November 23, 2017  **Docket:** 37155 |

Between:

Joseph Sciascia

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of British Columbia

Intervener

**Coram:** Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 45) | Moldaver J. (Abella, Karakatsanis, Wagner, Gascon and Rowe JJ. concurring) |

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| **Dissenting Reasons:**  (paras. 46 to 76) | Côté J. |

R. *v*. Sciascia, 2017 SCC 57, [2017] 2 S.C.R. 539

Joseph Sciascia Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of British Columbia Intervener

**Indexed as: R. *v.*** Sciascia

2017 SCC 57

File No.: 37155.

2017: April 24; 2017: November 23.

Present: Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ.

on appeal from the court of appeal for ontario

*Courts — Jurisdiction — Trial — Procedure — Joinder — Accused tried for provincial offences and summary conviction criminal offences arising from same events in single proceeding — Whether Ontario provincial court judge had jurisdiction to conduct joint trial and, if not, whether error can be saved by curative provisos.*

Following an episode of erratic driving, S was charged with offences under the *Criminal Code* in one information and with offences under Ontario’s *Highway Traffic Act* in another information. The Crown elected to proceed by way of summary conviction for the criminal offences. With his consent, S was tried in the Ontario Court of Justice for all of the offences in a single proceeding, and was found guilty of one criminal offence and one provincial offence. He appealed from his convictions, arguing that the trial judge lacked jurisdiction to conduct a joint trial on the criminal and provincial charges and that his trial was therefore a nullity. The summary conviction appeal judge dismissed the appeals. The Court of Appeal found that the trial judge lacked jurisdiction to hold a joint trial, but dismissed the appeals on the basis that the error could be cured by applying the procedural proviso under s. 686(1)(b)(iv) of the *Criminal Code* and the proviso under s. 120(1)(b)(iii) of the *Provincial Offences Act* (“*POA*”).

Held (Côté J. dissenting): The appeal should be dismissed.

*Per* Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ.: The trial judge had jurisdiction to conduct a joint trial of the provincial charges and summary conviction criminal charges, and he did not err in exercising his discretion to do so in the circumstances.

An Ontario Court of Justice judge has statutory jurisdiction to try provincial charges and to try summary conviction criminal charges, and there is no provision in the *Criminal Code* or the *POA* that expressly prohibits trying those charges jointly. Absent such a provision, the jurisdiction of an Ontario Court of Justice judge to conduct a joint trial of provincial charges and summary conviction criminal charges depends on compliance with legislative intent and adherence to relevant common law principles.

Permitting a joint trial of provincial charges and summary conviction criminal charges is consistent with the intent of both the *POA* and the *Criminal Code*. The *POA* was designed to implement more efficient procedures to deal with the large volume of provincial offences that were clogging up courts in Ontario. Although the separation of *POA* prosecutions from the more rigorous and time‑consuming criminal trial process was designed in the main to enhance efficiency and reduce court backlogs, where this objective of efficiency is better served by conducting a joint trial than by holding separate trials, it would pervert the true spirit and objectives of the *POA* to blindly enforce strict separation.

The two‑part common law test for joinder set out in *R. v. Clunas*, [1992] 1 S.C.R. 595, applies to joinder of a provincial charge and a criminal charge. The first element of the test, which requires that the offences could initially have been jointly charged, can be satisfied even when a provincial offence and a criminal offence cannot be charged in the same physical document, as in Ontario. A functional approach to this element asks not whether it is technically possible to use the same prescribed form, but rather whether there is a sufficient factual nexus between the provincial charges and the criminal charges. The second element requires that a joint trial be in the interests of justice. This inquiry involves a weighing of the costs and benefits of a joint trial. An accused person’s consent is relevant, but the ultimate decision of whether to conduct a joint trial lies with the court.

In the present case, conducting a joint trial was permissible and desirable in the interests of justice: no provision in the relevant statutes prohibited the trial judge from conducting a joint trial; allowing for a joint trial was consistent with enhancing efficiency; the charges related to the same course of events, establishing a clear factual nexus; and there was no prejudice to the accused.

*Per* Côté J. (dissenting): A judge of the Ontario Court of Justice lacks the jurisdiction to conduct a joint trial of provincial offences and summary conviction criminal offences. Where a province has created a procedural regime for provincial offences that is designed to operate separately and apart from the federal criminal justice system, like the regime contained within the *POA*, the courts must respect this legislative choice. A joint trial of a summary conviction offence under the *Criminal Code* and of a provincial offence would therefore be inconsistent with the legislative intention behind the *POA*.

Both the wording and the context of this statute signal that the legislature’s intention was to implement a procedural regime that applies exclusively to provincial offences. Conducting joint trials would undermine this intent by ignoring the important distinction between provincial offences and true crimes *—* a distinction that lies at the heart of the *POA* *—* and the separate sets of procedures that apply to each. Neither the consent of the accused nor the absence of prejudice is of any significance, since those elements cannot create jurisdiction where it did not exist to begin with.

The common law rules for joinder set out in *Clunas* are not applicable to joinder of the criminal and provincial charges in the present case. First, joining these charges together in a single trial would be inconsistent with the legislative scheme contained within the *POA*. The intent of the legislature on the question of jurisdiction takes precedence over the common law rules, as the common law cannot permit a joint trial where the legislature’s intent was to maintain two separate justice systems. Second, *Clunas* was decided solely within the context of the *Criminal Code* and dealt with charges under the same statute that were prescribed by the same level of government and were subject to the same evidentiary and procedural rules, whereas the present case deals with statutes enacted by different levels of government, each of which has its own distinct procedures and rules of evidence.

The provincial court judge’s error in conducting a joint trial cannot be saved by the curative provisos in either the *Criminal Code* or the *POA*. While loss of jurisdiction as a result of procedural irregularities can be cured by s. 686(1)(b)(iv) of the *Criminal Code*, that provision cannot cure the absence of jurisdiction in the first place. The error in this case was not a procedural irregularity, but rather a foundational defect in the proceedings *—* there was a total absence of jurisdiction to conduct the joint trial. Moreover, this proviso should not be used to cure the systematic thwarting of the legislature’s intent. As for s. 120(1)(b)(iii) of the *POA*, it does not apply since there was no error of law in this case, but rather a total absence of jurisdiction to proceed with a joint trial.

**Cases Cited**

By Moldaver J.

**Applied:** *R. v. Clunas*, [1992] 1 S.C.R. 595; **considered:** *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426; **referred to:** *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *In re Clayton*, [1983] 2 W.L.R. 555; *R. v. Massick* (1985), 21 C.C.C. (3d) 128; *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550, aff’d (1982), 66 C.C.C. (2d) 576; *London (City) v. Young*, 2008 ONCA 429, 91 O.R. (3d) 215; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Crawford*, [1995] 1 S.C.R. 858; *R. v. Chow*, 2005 SCC 24, [2005] 1 S.C.R. 384; *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146.

By Côté J. (dissenting)

*R. v.* *S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Clunas*, [1992] 1 S.C.R. 595; *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35.

**Statutes and Regulations Cited**

*Canada Evidence Act*, R.S.C. 1985, c. C‑5, ss. 7, 9(2), 16.1, 29, 30.

*Courts of Justice Act*, R.S.O. 1990, c. C.43.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 249, 270.01, 486.3, 591(3), 599(1), 669.2(1), 686(1)(b)(iv), 785 “proceedings”, 788(1).

*Evidence Act*, R.S.O. 1990, c. E.23, ss. 12, 18.1, 18.6, 23, 33, 35(1).

*Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 201, 216.

*Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 1(1) “offence”, 2(1), 23, 29(4), 30(2), (3), 47(1), 120(1)(b)(iii).

*Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Reg. 200, r. 32(5).

*Summary Convictions Act*, R.S.O. 1970, c. 450, s. 3.

**Authors Cited**

Doherty, David H. “Phillips: An Unwarranted Return to the ‘Punctilio of an Earlier Age’” (1983), 35 C.R. (3d) 203.

Ontario. Ministry of the Attorney General. *Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals — The Provincial Offences Act, 1978 and The Provincial Courts Amendment Act, 1978*. Toronto, 1978.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Watt and Miller JJ.A.), 2016 ONCA 411, 131 O.R. (3d) 375, 336 C.C.C. (3d) 419, 350 O.A.C. 86, [2016] O.J. No. 2789 (QL), 2016 CarswellOnt 8328 (WL Can.), affirming a decision of Morissette J., 2015 ONSC 1885, [2015] O.J. No. 1427 (QL), 2015 CarswellOnt 3948 (WL Can.), affirming the convictions of the accused for dangerous operation of a motor vehicle and failing to stop for the police. Appeal dismissed, Côté J. dissenting.

Owen Wigderson, Owen M. Rees and Benjamin Grant, for the appellant.

Lorna Bolton, for the respondent.

John R. W. Caldwell, for the intervener.

The judgment of Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe  JJ. was delivered by

Moldaver J. —

1. Overview
2. This appeal concerns the jurisdiction of a judge of the Ontario Court of Justice (“OCJ judge”) to try provincial charges and summary conviction criminal charges together in a single proceeding.[[1]](#footnote-1) As I will explain, in my view, conducting a joint trial is both permissible and desirable where the provincial charges and the summary conviction criminal charges share a sufficient factual nexus and it is in the interests of justice to try them together.
3. The appellant, Joseph Sciascia, was tried by an OCJ judge, in a single proceeding, for the following four offences: (1) dangerous operation of a motor vehicle (a criminal offence under s. 249 of the *Criminal Code*, R.S.C. 1985, c. C-46); (2) assaulting a police officer with a weapon (a criminal offence under s. 270.01 of the *Criminal Code*); (3) failing to stop for the police (a provincial regulatory offence under s. 216 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (“*HTA*”)); and (4) failing to report property damage resulting from his operation of a motor vehicle (contrary to s. 201 of the *HTA*).[[2]](#footnote-2) The charges stemmed from an episode of erratic driving by Mr. Sciascia during the early morning hours of March 17, 2012. At the time, the police were attempting to break up several St. Patrick’s Day parties on a residential street in London, Ontario. Mr. Sciascia drove onto the street and a police officer signalled for him to pull over and stop. Mr. Sciascia began to do so, then suddenly accelerated forward and sped down the street, narrowly missing the officer. Moments later, Mr. Sciascia hit a curb and blew out a tire, then fled the scene on foot. Two passengers from the vehicle identified Mr. Sciascia as the driver to the police. Mr. Sciascia was arrested at his home the following day.
4. Mr. Sciascia’s trial took place over two days — November 2, 2012 and April 5, 2013. The Crown elected to proceed by way of summary conviction on both criminal offences. At the outset, the Crown informed the court that a *Criminal Code* information and a Part III *Provincial Offences Act*, R.S.O. 1990, c. P.33(“*POA*”),information were both scheduled for trial before the same judge at the same time and suggested that Mr. Sciascia enter pleas on both informations. Mr. Sciascia consented to this procedure and entered pleas of not guilty. He raised no issue about the jurisdiction of the presiding OCJ judge to try the criminal and provincial charges together in a single proceeding. On June 7, 2013, the trial judge found Mr. Sciascia guilty on the charges of dangerous operation of a motor vehicle and failing to stop for the police: trial reasons, reproduced in A.R., at pp. 14-22.
5. Mr. Sciascia changed counsel and appealed from his convictions. On appeal, he argued for the first time that the OCJ judge lacked jurisdiction to conduct a joint trial on the criminal and provincial charges and that his trial was therefore a nullity. The summary conviction appeal judge applied the two-part common law test for joinder of charges set out by this Court in *R. v. Clunas*, [1992] 1 S.C.R. 595, at p. 610, and she rejected Mr. Sciascia’s submission: 2015 ONSC 1885. She found that there was a sufficient factual nexus between the charges and, in light of Mr. Sciascia’s consent to a joint trial and the absence of any prejudice, she concluded that it was in the interests of justice to try the charges together in a single proceeding.
6. Mr. Sciascia was granted leave to appeal the convictions to the Court of Appeal for Ontario on the ground that the OCJ judge did not have the jurisdiction to conduct a joint trial of criminal and provincial charges. Justice Watt, writing for a unanimous court, dismissed the appeals: 2016 ONCA 411, 131 O.R. (3d) 375. However, he disagreed with the summary conviction appeal judge and found that the OCJ judge lacked jurisdiction to hold a joint trial in this context. Specifically, he concluded that the *Clunas* test was not met because the criminal and provincial offences could not be joined together in the same charging document. He further held, citing this Court’s decision in *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, that permitting a joint trial would frustrate the intent of the Ontario Legislature (“Legislature”) to establish a separate and distinct court system under the *POA*. Nonetheless, he dismissed the appeals, accepting the Crown’s alternative argument that the error could be cured by applying the procedural proviso under s. 686(1)(b)(iv) of the *Criminal Code* and the proviso under s. 120(1)(b)(iii) of the *POA*.
7. Mr. Sciascia now appeals to this Court. He maintains that the provisos cannot be used to cure an absence of jurisdiction. The Crown challenges that submission. In addition, the Crown maintains that the Court of Appeal erred in holding that the OCJ judge did not have jurisdiction to conduct a joint trial.
8. For the reasons that follow, I would dismiss the appeal. Unlike the Court of Appeal however, I am respectfully of the view that the OCJ judge had jurisdiction to conduct a joint trial and that he did not err in exercising his discretion to do so in the circumstances. Accordingly, I find it unnecessary to address the curative proviso issue.
9. Analysis
10. The legal issue in this appeal is a narrow one: Does an OCJ judge have jurisdiction to conduct a joint trial of provincial charges and summary conviction criminal charges? In my view, the answer is yes.[[3]](#footnote-3) At common law, courts enjoy broad discretion to conduct a joint trial where it is in the interests of justice: *Clunas*, at p. 610; *S.J.L.*, at para. 60. Policy considerations weigh in favour of this pragmatic approach. In the absence of an express statutory prohibition, or clear legislative intent to the contrary, there is no justification to oust this discretion: see e.g. *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 29-30.
11. In the present case, four considerations lead me to conclude that conducting a joint trial was permissible. First, no provision in the relevant statutes prohibits an OCJ judge from conducting a joint trial of criminal and provincial offences. Second, allowing for a joint trial is consistent with enhancing efficiency — the main objective underlying the enactment of the *POA*. Third, in this case, the charges in question related to the same course of events, establishing a clear factual nexus. Finally, there was no prejudice to the accused — indeed, he expressly consented to the joint trial taking place. In these circumstances, conducting a joint trial was both permissible and desirable in the interests of justice.
    1. Statutory Jurisdiction
12. It is common ground amongst the parties that an OCJ judge has statutory jurisdiction to try both provincial charges and summary conviction criminal charges. Likewise, it is acknowledged that no provision in the applicable statutes expressly prohibits conducting a joint trial of criminal and provincial charges. The issue therefore turns on whether these independent statutory sources of jurisdiction can be exercised by an OCJ judge at the same time in the context of a joint trial — in other words, whether an OCJ judge can wear these “two hats” at once.
13. Mr. Sciascia submits that the absence of express statutory authorization for conducting a joint trial is determinative in this case. Although he does not raise a constitutional challenge, he portrays the simultaneous exercise of these two sources of jurisdiction as its own unique form of “hybrid” jurisdiction, requiring express statutory authorization from both the provincial and federal governments.
14. With respect, I find this approach to be unduly formalistic. A less restrictive and more flexible approach to process accords with the approach adopted by this Court in *Clunas*, where Lamer C.J. endorsed, at p. 599, the following observation of Lord Roskill in *In re Clayton*, [1983] 2 W.L.R. 555 (H.L.), at pp. 562-63:

Magistrates’ courts today try the vast majority of criminal cases that arise for hearing in this country as well as many civil cases. Any rule of practice or procedure which makes their task more difficult or demands subservience to technicalities is to be deprecated and your Lordships may think that this House should now encourage the adoption of rules of procedure and practice which encourage the better attainment of justice, which includes the interests of the prosecution as well as of defendants, so long as the necessary safeguards are maintained to prevent any risk of injustice to defendants. [Emphasis added.]

1. This observation accords with the view expressed by the British Columbia Court of Appeal in *R. v. Massick* (1985), 21 C.C.C. (3d) 128, at p. 134:

. . . this court may, subject to any limitations imposed by common law or by binding authority, permit a practice and procedure which serves to promote the administration of justice, fairly and expeditiously. As I have pointed out, there was no prohibition at common law against the incorporation of more than one summary conviction offence in the same information. There is no authority binding on this court which requires us to conclude that an information may not charge a summary conviction offence under the *Criminal Code* and a summary conviction offence under a provincial statute. Moreover, when the charges arise out of the same set of circumstances, such an approach would appear to be reasonable and logical. [Emphasis added.]

1. Apart from its formalism, Mr. Sciascia’s submission — which insists on express statutory authorization to conduct a joint trial — is out of step with this Court’s jurisprudence. In *S.J.L.*, Deschamps J., for the majority, clarified that there is nothing inherently problematic about a judge exercising two independent sources of jurisdiction simultaneously without express statutory authorization (paras. 59-60):

. . . it is not impossible for a judge or a court to wear two hats at once. There are several situations in which a judge’s jurisdiction extends to more than one subject matter. For example, municipal court judges and judges of the Court of Québec and the Superior Court, in addition to exercising their respective jurisdictions, are also justices of the peace . . . .

The simultaneous exercise of more than one jurisdiction is therefore not unprecedented, and has even been considered by the courts in the past. . . . Consequently, where a judge has the authority to exercise two different jurisdictions, there is no general objection to his or her exercising them simultaneously. [Emphasis added.]

1. The intervener, the Attorney General of British Columbia, argues that statutory silence — neither authorizing nor prohibiting a joint trial to be conducted — should, in the circumstances of this case, be treated as a neutral factor in the analysis. I agree. Absent a provision which expressly addresses the issue, the jurisdiction of an OCJ judge to conduct a joint trial of provincial charges and summary conviction criminal charges depends on compliance with legislative intent and adherence to relevant common law principles — matters to which I now turn.
   1. Compliance With Legislative Intent
2. In the present context, permitting a joint trial of provincial charges and summary conviction criminal charges is consistent with the intent of both the *POA* and the *Criminal Code*. Where a particular incident or course of events gives rise to both provincial charges and summary conviction criminal charges, the flexibility to hold a joint trial can only serve to further the objectives of the relevant provincial and federal statutes.
   * 1. Section 2(1) of the *POA*
3. Mr. Sciascia takes no issue with the discretion to conduct a joint trial of provincial charges and summary conviction criminal charges being consistent with Parliament’s intent under the *Criminal Code*. Hesubmits, however, that in enacting the *POA*, the Legislature intended to create a separate and distinct court system. He seizes on s. 2(1) of the *POA*,which states:

**2** (1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.

In Mr. Sciascia’s view, permitting a joint trial of provincial charges and summary conviction criminal charges would undermine the purpose of s. 2(1) and ignore the express will of the Legislature. In this regard, he relies on *S.J.L.*, where this Court held that a joint trial of a youth and an adult would undermine the *Youth Criminal Justice Act*, S.C. 2002, c. 1,which had, as its fundamental purpose, the creation of a separate court system for youth crime.

1. With respect, I disagree with this line of reasoning. Section 2(1) of the *POA* does not mandate separation of the provincial and criminal court systemsas an end in itself. Rather, it espouses separation for the underlying purpose of improving efficiency. As MacKinnon A.C.J. observed in *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.), at pp. 551-52, aff’d (1982), 66 C.C.C. (2d) 576 (Ont. C.A.):

The *Provincial Offences Act* was intended to establish a speedy, efficient and convenient method of dealing with offences under Acts of the Legislature and under Regulations or by-laws made under the authority of an Act of the Legislature. The Courts which hear these matters are given a wide discretion as to how they may proceed.

(See also *London (City) v. Young*, 2008 ONCA 429, 91 O.R. (3d) 215, at para. 34.)

1. In my view, it is this overriding purpose that should guide the analysis, and not the “application of a rule simply for the sake of the rule”: D. H. Doherty, “Phillips: An Unwarranted Return to the ‘Punctilio of an Earlier Age’” (1983), 35 C.R. (3d) 203, at p. 205. The *POA* was designed to implement more efficient procedures to deal with the large volume of provincial offences that were clogging up courts in Ontario: see Ontario, Ministry of the Attorney General, *Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals — The Provincial Offences Act, 1978 and The Provincial Courts Amendment Act, 1978* (1978), at pp. 1-5. To help address the backlog, procedural regimes were established under the *POA* which reduced complexity and enhanced efficiency of provincial offence prosecutions.
2. My colleague Justice Côté is of the view that joint trials are impermissible because the Legislature intended that provincial prosecutions “d[o] not require — and should not be fraught with — the same degree of complexity” as criminal trials (para. 56). However, at issue in this case is an OCJ judge’s power to join a provincial prosecution under Part III with a summary conviction criminal charge. Part III of the *POA* is typically reserved for more serious charges, such as those faced by Mr. Sciascia in this case. Unlike Parts I and II,which significantly streamline the process for the vast majority of minor provincial charges, Part III contains enhanced protections closely resembling those under the *Criminal Code*. Respectfully, my colleague points to no summary conviction offence procedure that would significantly add to the complexity of a provincial prosecution under Part III. But even assuming that such complexity might exist in a particular case, it would of course be open to the presiding judge to hold separate trials.
3. The separation of *POA* prosecutions from the more rigorous and time-consuming criminal trial process was designed in the main to enhance efficiency and reduce court backlogs. In my view, where this objective of efficiency is better served by conducting a joint trial than by holding separate trials, it would pervert the true spirit and objectives of the *POA* to blindly enforce strict separation. And this is what distinguishes *S.J.L.* from the situation at hand.
4. In *S.J.L.*, this Court emphasized Parliament’s intent to keep the youth court system separate from the adult system because of compelling policy considerations, including the “diminished moral blameworthiness of young persons”, their “heightened vulnerability in dealing with the justice system” and the differing objectives of the trial processes (para. 64; see also paras. 72 and 75). Maintaining strict separation in that context was really about protecting youths from being exposed to adults accused in the adult system, and the potential harm flowing from this. Although provincial offences may also entail a lower degree of moral blameworthiness, no similar concerns arise from exposing adults charged with provincial offences under Part III to the summary conviction criminal process. Viewed that way, I do not see *S.J.L.* as an impediment to conducting a joint trial of provincial charges and summary conviction criminal charges in this context.
   * 1. Section 47(1) of the *POA*
5. Mr. Sciascia also relies on s. 47(1) of the *POA* as an indicator of legislative intent. It states:

**47** (1) The court may receive and consider evidence taken before the same justice on a different charge against the same defendant, with the consent of the parties.

He contends that this provision represents an express choice by the Legislature to address factual overlap between criminal and provincial charges through applying the evidence from one trial to the other. This, he claims, excludes the use of other means for achieving the same purpose of improving judicial economy. My colleague adopts Mr. Sciascia’s interpretation of s. 47(1).

1. Respectfully, I cannot accept this interpretation. In my view, s. 47(1) signifies a legislative intent that is inviting of procedural measures which can enhance efficiency, consistent with the spirit of the *POA* reforms. While s. 47(1) represents one way of addressing potential overlap between provincial trials and summary conviction criminal trials, it does not operate to the exclusion of other procedural tools. There is no express prohibition against conducting a joint trial of provincial charges and summary conviction criminal charges in the *POA*. Nor, in my view, can one be implied from this provision where doing so would thwart the underlying spirit of the *POA* to enhance efficiency: see *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 37.
2. As I see it, s. 47(1) and the discretion of an OCJ judge to conduct a joint trial are not mutually exclusive. Section 47(1) may only be applied where the parties consent, which limits its effectiveness. The consent requirement in s. 47(1) effectively arms both Crown and defence with a veto — leaving the court powerless to advance the interests of justice in some cases despite the clear benefits of a joint trial.
3. By the same token, there may be cases where a joint trial should be denied because it would occasion serious prejudice and thereby compromise the interests of justice. In such circumstances, s. 47(1) of the *POA* could nonetheless be invoked to introduce evidence from the first trial before the same judge on the second trial, so long as the parties consent.
4. In sum, s. 47(1) is not in tension with the discretion of an OCJ judge to conduct a joint trial. Rather, these procedural tools may work in harmony to advance the objectives of the *POA*.
   * 1. The Practical Utility of Joint Trials
5. Finally, Mr. Sciascia argues that even if the *POA* is intended to embrace procedures which enhance efficiency, the use of joint trials does not advance that objective. He raises concerns about the ability of self-represented accused persons to navigate various discrepancies in joint trials between the procedures under the federal *Criminal Code* and *Canada Evidence Act*, R.S.C. 1985, c. C-5 (“*CEA*”), compared tothose under the *POA* and provincial *Evidence Act*, R.S.O. 1990, c. E.23. My colleague is similarly skeptical, reasoning that the procedural convenience of joint trials risks “incentivizing overcharging” (para. 62).
6. With respect, I am unpersuaded by these concerns. Nine procedural discrepancies have been identified by Mr. Sciascia. Most of the differences are relatively minor in nature, such as those relating to: the procedure governing cross-examination of one’s own witness (*CEA*, s. 9(2); *Evidence Act*, s. 23); personal cross-examination of a witness under the age of 18 (*Criminal Code*, s. 486.3; *Evidence Act*, s. 18.6); and the number of expert witnesses a party may call without leave of the court (*CEA*, s. 7; *Evidence Act*, s. 12). Many others will arise only in rare circumstances, such as those pertaining to: the admissibility of banking and business records (*CEA*, ss. 29 and 30; *Evidence Act*, ss. 33 and 35(1)); the competence of child witnesses (*CEA*, s. 16.1; *Evidence Act*, s. 18.1); change of venue applications (*Criminal Code*, s. 599(1); *POA*, s. 29(4)); and addressing the death of a trial judge (*Criminal Code*, s. 669.2(1); *POA*, s. 30(2) and (3)).
7. These potential obstacles are far from insurmountable and cannot justify the absolute prohibition on conducting a joint trial which Mr. Sciascia advocates. It is unnecessary in this case to decide exactly how a particular procedural discrepancy should be resolved. Trial courts should be given wide latitude to address any such difficulties as they arise. One option may be to apply the summary conviction criminal procedures, which are typically more favourable to accused persons, in the event of conflict. That approach would be consistent with the direction in *Clunas* that where summary conviction and indictable procedures conflict, the indictable procedures should apply (see pp. 612-13). Moreover, a court may always refuse to conduct a joint trial if the procedural conflicts cannot be resolved and a joint trial would not be in the interests of justice.
8. Nor am I persuaded that the potential for Crown overcharging should preclude courts from ordering joint trials when it is in the interests of justice to do so. The Crown is entitled to pursue charges with a reasonable prospect of conviction that are in the public interest. Nonetheless, the Crown must be careful not to exercise its discretion with too heavy of a hand. As this Court cautioned in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 45:

Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete.

1. Screening out marginal charges that add complexity is a particularly important function given the strains of our overburdened criminal justice system: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 79. Nothing in these reasons should be read as incentivizing the Crown to pursue unnecessary charges.
2. In addition, Mr. Sciascia’s skepticism about the utility of joint trials ignores the long line of authority identifying their benefits. There are “strong policy reasons” supporting the “uniform stream of authority in this country in favour of joint trials”: *R. v. Crawford*, [1995] 1 S.C.R. 858, at paras. 19 and 30; see also *R. v. Chow*, 2005 SCC 24, [2005] 1 S.C.R. 384, at para. 47. The benefits can include such things as improving judicial economy by avoiding redundancy, aiding the truth-seeking function of a trial, reducing inconvenience to witnesses, simplifying resolution discussions and enhancing public confidence by preventing the spectre of inconsistent findings with respect to the same events. These benefits make clear that, absent prejudice, holding a joint trial where a sufficient factual nexus exists will promote the interests of justice: see *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146, at para. 17; *Massick*, at p. 135. In such cases, all participants in the process — including accused persons — are beneficiaries of the time, money and inconvenience saved through holding a joint trial. The consent offered by accused persons, such as Mr. Sciascia in this case, speaks to the mutuality of these benefits. In my respectful view, more is required than speculation about the challenges self-represented accused persons may face to displace the promise of these time-honoured benefits.
3. Accordingly, I conclude that permitting a joint trial is consistent with the spirit and purpose of the *POA*. The next question is whether, in the circumstances of this case, conducting a joint trial adhered to the applicable common law principles.
   1. Common Law Authority
4. In *Clunas*, this Court set out a two-part test which governs joinder at common law, requiring that: (1) “the offences . . . could initially have been jointly charged”; and (2) “it is in the interests of justice” (p. 610). This test was reaffirmed in *S.J.L.*, at para. 60.[[4]](#footnote-4)
5. My colleague concludes that the *Clunas* test applies solely to joinder of criminal charges, which are subject “to the same evidentiary and procedural rules” (para. 67). I respectfully reach a different conclusion. Although both *Clunas* and *S.J.L.* dealt with joinder of multiple criminal charges, there is no reason why the same test should not apply equally to joinder of a provincial charge and a criminal charge. As discussed above, the interests of justice may require separate trials where an irreconcilable gap in evidentiary or procedural rules exists. But the potential for different procedure does not render *Clunas* inapplicable. Rather, it highlights the need for a test sensitive to the varying factors that may tilt the scales for or against joinder in any given case. The *Clunas* test does just that. Its two elements are addressed in turn below.
   * 1. Factual Nexus
6. The Court of Appeal identified the first element — whether the offences could initially have been jointly charged — as a “sticking point” against permitting a joint trial of criminal and provincial charges (para. 54). Because a provincial offence and a criminal offence cannot be charged in the same physical document in Ontario, the Court of Appeal concluded that this element could *never* be satisfied in Ontario. While the substance of each form is essentially the same, Form 105 prescribed for a Part III provincial offence information under s. 23 of the *POA*[[5]](#footnote-5) is distinct from Form 2 used for a criminal information under s. 788(1) of the *Criminal Code*.
7. I disagree with this approach. In my respectful view, treating this technical distinction as dispositive prioritizes *form* over substance and adopts the type of restrictive approach to procedure that courts have resisted: see *Clayton*, at pp. 562-63; *Clunas*, at pp. 598-99; *Massick*, at p. 134. More importantly, it does not reflect the concern which the first element of the *Clunas* test was meant to address.
8. In *Clunas*, the Court was not concerned with the spectre of separate prescribed forms. Instead, the true purpose of the first element was to ensure that the charges shared a sufficient factual nexus.[[6]](#footnote-6) This is evident from the Court’s reliance on *Clayton*, in which the test for joinder was articulated as requiring that “the facts are sufficiently closely connected to justify this course and there is no risk of injustice to the defendants” (p. 565). It is also reflected in the test for severance of charges under s. 591(3) of the *Criminal Code*: see *Last*, at para. 18.
9. Ultimately, a functional approach to this element asks not whether it is technically possible to use the same prescribed form, but rather whether there is a sufficient factual nexus between the provincial charges and the summary conviction criminal charges. To conclude otherwise would make the availability of joint trials contingent on the form chosen by a particular province for provincial charges — an arbitrary result which manifestly privileges form over substance.
   * 1. The Interests of Justice
10. The second element of the *Clunas* test requires that a joint trial be in the “interests of justice” (p. 610). This mirrors the language of s. 591(3) of the *Criminal Code*, which governs severance of charges:

**(3)** The court may, where it is satisfied that the interests of justice so require, order

(**a**) that the accused or defendant be tried separately on one or more of the counts; and

(**b**) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

1. The inquiries concerning joinder and severance involve a weighing of the costs and benefits of a joint trial. In my view, the considerations informing severance are equally applicable with respect to joinder. As stated by this Court in *Last*, at para. 18, this may include the following non-exhaustive list of factors:

. . . the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons . . . .

1. The consent of an accused is also a relevant factor in assessing the costs and benefits of a joint trial. However, to be clear, the decision whether to conduct a joint trial lies with the court. While the consent of the accused is a factor for the court to consider in this regard, it is not in and of itself determinative. In the end, if the court is satisfied that the prejudice occasioned by a joint trial outweighs its benefits, the court should refuse to order a joint trial.
   * 1. Application
2. Once it is accepted that the OCJ judge had jurisdiction to conduct a joint trial in this case, there is no real issue about the propriety of his decision to do so in the circumstances. There was a clear factual nexus between the provincial charges and the summary conviction criminal charges, as they related to the same course of events. Moreover, in the absence of any prejudice, and given Mr. Sciascia’s express consent, it was clearly open to the OCJ judge to find that it was in the interests of justice to hold a joint trial.
3. Conclusion
4. Based on the foregoing analysis, I conclude that the OCJ judge did not err in holding a joint trial of the provincial charges and summary conviction criminal charges against Mr. Sciascia. Accordingly, I would dismiss the appeal and uphold his convictions.

The following are the reasons delivered by

1. Côté J. (dissenting) — Where a province has created a procedural regime for provincial offences that is designed to operate separately and apart from the federal criminal justice system, the courts must respect this legislative choice. This appeal raises the question of whether an Ontario provincial court judge has the jurisdiction to conduct a joint trial of provincial offences and of summary conviction criminal offences in the absence of clear statutory authorization to do so.
2. I would allow Mr. Sciascia’s appeal. A joint trial of a summary conviction offence under the *Criminal Code*, R.S.C. 1985, c. C-46, and of a provincial offence would be inconsistent with the legislative intention behind the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (“*POA*”), which, as I see it, was to create a distinct set of procedures that would apply exclusively to the prosecution of provincial offences. The complexities of criminal procedure were to have no role in this new procedural framework. Joint trials of provincial offences and summary conviction criminal offences would therefore undermine this legislative intention, and for this reason, I am respectfully of the view that a judge of the Ontario Court of Justice lacks the jurisdiction to conduct such a trial.
3. This error is not simply a procedural irregularity; it goes to the core of the court’s jurisdiction to conduct a joint trial. It therefore cannot be saved by the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* or s. 120(1)(b)(iii) of the *POA*.
4. Analysis
5. The first question on appeal is whether an Ontario provincial court judge has the jurisdiction to conduct a joint trial of a summary conviction offence under the *Criminal Code* and a provincial offence. If the provincial court judge lacks such jurisdiction, the application of the curative provisos in the *Criminal Code* and the *POA* must then be considered.
   1. The Court’s Jurisdiction to Conduct a Joint Trial
6. Parliament and the Ontario Legislature (“Legislature”), acting in their distinct legislative capacities, have enacted separate procedural regimes for criminal trials under the *Criminal Code* and trials under the *POA*. Neither of these statutes expressly allows a provincial court judge to jointly try charges for provincial offences and summary conviction criminal offences, but they do not prohibit the practice either. While the common law may permit joint trials in some circumstances, the common law joinder rules do not apply if joining the charges together in a single trial would be inconsistent with the applicable legislative scheme: *R. v.* *S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 52. The question for this Court is therefore whether, despite the lack of clear statutory guidance, Parliament and the Legislature intended a joint trial to be available where an accused is charged with both summary conviction criminal offences and provincial offences.
7. This Court addressed a related question in *S.J.L*. At issue in that case was whether a provincial court had jurisdiction to jointly try young persons charged under the *Youth Criminal Justice Act*, S.C. 2002, c. 1, and adults charged under the *Criminal Code*. Neither the common law nor the *Criminal Code* expressly prohibited a joint trial in these circumstances. This Court therefore had to consider whether “the creation of a separate youth criminal justice system” rendered the common law rule inapplicable, insofar as a joint trial of young persons and adults would be inconsistent with youth criminal justice procedures (para. 52). Despite acknowledging that it would not give rise to insurmountable practical difficulties, the Court concluded that conducting such a joint trial would be inconsistent with the governing principle of the *Youth Criminal Justice Act*: to maintain “a justice system for young people that is separate from the system for adults” (para. 56 (emphasis deleted)).
8. In light of the purpose and scheme of the *POA*, I reach a similar conclusion. Conducting a joint trial of a summary conviction criminal offence and a provincial offence would be inconsistent with the legislative intent behind the *POA*.
   * 1. Legislative Intent
9. Prior to 1979, provincial offences were prosecuted in large part on the basis of procedures set out in the *Criminal Code*: see *The* *Summary Convictions Act*, R.S.O. 1970, c. 450, s. 3. In 1979, the Legislature chose to move away from the application of *Criminal Code* procedures to non-criminal offences as a response to the disproportionate cost and complexity of these proceedings, and to increase judicial efficiency and ease the administrative burden on Ontario’s court system. This culminated in the enactment of the *POA*. Recognizing the fundamental difference between provincial offences and criminal offences (both in terms of the areas of social life being regulated and in terms of their impact on the accused and on society), this statute created a new, simpler set of procedures that would apply *exclusively* to the prosecution of provincial offences. As such, the new informal and accessible procedures reflected the fact that the *Criminal Code*’s formalities and technical rules were not appropriate for the prosecution of most provincial offences: Ontario, Ministry of the Attorney General, *Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals — The Provincial Offences Act, 1978 and The Provincial Courts Amendment Act, 1978* (1978) (“*Analysis and Explanation*”), at p. 1.
10. The Legislature articulated the purpose of the *POA* in s. 2(1), which reads as follows:

**2** (1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.

At the time of the statute’s enactment, the Ontario Ministry of the Attorney General stated the following on the intended effect of this provision:

[S]ection [2(1)] is designed to assist the courts in interpreting the Act by drawing to their attention the core principle, that it is intended to replace entirely, rather than merely modify the existing criminal procedure. The procedures in the Act embody an entirely new philosophy; provincial offences are to be treated differently from criminal cases at every procedural stage, with that difference reflecting the fact that the rigid formalism of criminal procedure is inappropriate for provincial offences.

. . .

The distinction which will be made between the trials of provincial offences and criminal offences is expected to encourage an atmosphere in which the former can be treated with much less rigidity and formality than trials of criminal offences. It is hoped that all persons involved in the trials of provincial offences . . . will, over time, become infused with this distinction, and reflect it in their approach to provincial offences. [Emphasis added.]

(*Analysis and Explanation*, at pp. 25 and 92)

1. In adopting the *POA*, the Legislature acted within its legislative competence to create a new and simplified procedure for the efficient prosecution of provincial offences. Accordingly, the procedures set out in the *POA* apply only to offences “under an Act of the Legislature or under a regulation or by-law made under the authority of an Act of the Legislature” (s. 1(1) “offence”). Similarly, the *Criminal Code* mandates that summary conviction proceedings are available only for “offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction” (s. 785 “proceedings”). In short, each statute creates a self-contained procedural code, which is to apply only to the prosecution of offences enacted by the respective level of government.
2. The reference to the “distinction between provincial offences and criminal offences” in s. 2(1) of the *POA* is also of significance here. Provincial offences are not true crimes, lacking the constitutional “criminal law purpose” that underlies *Criminal Code* offences: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 27. Provincial offences are instead of a regulatory nature, and as pointed out by my colleague Justice Moldaver in para. 22 of his reasons, they typically entail a “lower degree of moral blameworthiness” than true crimes. Reflecting this important distinction, the wording of s. 2(1) indicates that the trial of provincial offences does not require — and should not be fraught with — the same degree of complexity and formality as the trial of criminal offences. This is supported by the comments of the Ministry of the Attorney General of Ontario in *Analysis and Explanation*:

. . . since there are some very grave provincial offences, carrying penalties which include substantial fines and jail terms, the Act establishes for these offences a separate set of procedures, akin to, but nonetheless significantly less rigid than those adopted at present from the *Criminal Code*. [Emphasis added; p. 1.]

1. These legislative objectives are clearly met when provincial offences and summary conviction criminal offences are tried separately. In such cases, however, it is not necessary that there be two *complete* trials, requiring the Crown to call evidence twice. Specifically, s.  47(1) of the *POA* provides as follows:

**47** (1) The court may receive and consider evidence taken before the same justice on a different charge against the same defendant, with the consent of the parties.

In keeping with the goal of creating an efficient system for the prosecution of provincial offences, s. 47(1) permits a court, upon obtaining the parties’ consent, to receive evidence heard in a different proceeding — including a criminal proceeding — before the same judge and to consider that evidence in trying the provincial offence charge. In practical terms, this relieves the parties from having to call the same evidence twice and minimizes inconvenience to witnesses who would otherwise have to provide the same testimony at two different hearings.

1. The objective behind this provision, as stated by the Ontario Ministry of the Attorney General, is to “prevent technical rules from blocking expedition where both parties are willing to consent to the expeditious procedure”: *Analysis and Explanation*, at p. 51. This statement points directly to the tension between the choice to create a distinct procedural regime for provincial offences and the need for judicial economy and efficiency where the Crown chooses to proceed on both *Criminal Code* offences and provincial offences. Turning its mind to this issue, the Legislature sought to achieve this balance not by authorizing joint trials, but through the operation of s. 47(1) of the *POA*.
2. In paragraph 25 of his reasons, my colleague notes that the consent requirement in s. 47(1) of the *POA* effectively gives both the Crown and the defence a “veto” over the application of that provision. This is no doubt true. In my respectful view, however, this was a legislative choice reflecting the need to strike a proper balance between expediency and efficiency on the one hand and the importance of having a full and fair trial on the other. In cases where either party sees the practical advantage of having two complete trials at which evidence will be called twice, s. 47(1) offers them this opportunity. For example, if the elements of the criminal and provincial offences with which the accused was charged are different, either party may see the utility in having the trial judge rehear and reconsider the evidence. The mechanism of s. 47(1) places the operation of this provision in the hands of the parties, rather than in the hands of the judge. The courts must respect this legislative choice.
3. In short, both the wording and the context of the *POA* signal the Legislature’s intention in enacting this statute: to implement a procedural regime that applies exclusively to provincial offences. Conducting joint trials in circumstances such as these would undermine this intent by ignoring the important distinction between provincial offences and true crimes and the separate sets of procedures that apply to each. This distinction lies at the heart of the *POA*, as indicated through the wording of s. 2(1).
   * 1. The Practical Aspects of Joint Trials
4. In his reasons, my colleague rejects the argument that the use of joint trials does not advance the objective of improving judicial efficiency. He notes that most of the procedural discrepancies between *Criminal Code* and *POA* trials are “relatively minor in nature” or “will arise only in rare circumstances” (para. 29). While this may be the case, it is of no moment. The Attorney General of Ontario readily acknowledges that holding a joint trial would require *Criminal Code* and *Canada Evidence Act*, R.S.C. 1985, c. C-5, procedures and provisions to apply in the event that they conflicted with provincial procedures and provisions. In light of the Legislature’s clear intent to create distinct procedural regimes, this would be unacceptable. And as this Court noted in *S.J.L.*, at para. 56, the fact that a joint trial may not involve insurmountable practical challenges is not determinative. The intent of the Legislature takes precedence and must be respected.
5. Respecting the Legislature’s choice to create a separate and distinct regime for provincial offences is especially important in light of the challenges facing the criminal justice system today. It is true that joint trials can have many practical advantages, such as those noted by my colleague in para. 33 of his reasons. However, these practical advantages are not achieved exclusively through the conduct of joint trials; the application of s. 47(1) of the *POA*, for example, can also have the effect of improving judicial efficiency, reducing court backlogs, and minimizing inconvenience to witnesses. Moreover, joint trials can in some cases have the unwanted effect of overcomplicating provincial offence proceedings and incentivizing overcharging. For example, the availability of joint trials may encourage the Crown to proceed with the prosecution of both provincial and criminal offences where, in reality, only the prosecution of one of these offences is necessary and/or appropriate.
6. I recognize that this Court has recently cautioned the Crown against prosecuting “marginal charges” that will add complexity to the criminal proceeding: *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 45. In my view, prohibiting joint trials of provincial offences and summary conviction criminal offences helps to ensure that prosecutorial discretion is properly exercised in accordance with the public interest.
7. As discussed above, the Legislature has recognized the fundamental difference between provincial and criminal offences, which is reflected in the procedures contained in the *POA*. The Attorney General of Ontario seeks to disregard this difference by prosecuting both regulatory and criminal offences as a matter of course. Where a legislature has sought to fight complexity by creating simplified provincial offence procedures, thus lessening the burden on the criminal justice system in appropriate cases, its efforts must be given their full effect.
   * 1. Legislative Intent Takes Precedence Over the Common Law Rules
8. In his reasons, my colleague concludes that conducting a joint trial in these circumstances is permitted pursuant to the common law rules for the joinder of charges for trial. These rules were set out in *R. v. Clunas*, [1992] 1 S.C.R. 595, where this Court held that multiple informations or indictments under the *Criminal Code* can be joined together in a single trial with the consent of the accused, or in the absence of consent, where a joint trial is “in the interests of justice and the offences or accuseds could initially have been jointly charged” (p. 610).
9. In my view, and with great respect for the opinion of my colleague, this precedent is not applicable to the issue at hand for two reasons. First, the intent of the legislature on the question of jurisdiction takes precedence over the *Clunas* rules for joinder. In other words, the common law cannot permit a joint trial where the legislature’s intent was to maintain two separate justice systems. This point was articulated by Justice Deschamps in *S.J.L.*:

Thus, it must be noted that nothing in the common law or in the *Criminal* *Code* bars either the joinder of young persons and adults in a single indictment or a request for a joint trial.  The question, therefore, is whether as a result of the creation of a separate youth criminal justice system, the common law rule is inapplicable and such joinders are accordingly inconsistent with the procedures that must be followed in cases involving young persons.

. . .

The [Crown’s] proposal [to jointly try adults and young persons] is inconsistent with the spirit and objectives of the [*Youth Criminal Justice Act*], those resulting from the abolition of the transfer to adult court in particular. In addition, the absence of a procedure for joinder of a trial of adults with a trial of young persons shows that Parliament’s intention was that the common law rule on joint trials should not apply. [Emphasis added; paras.  52 and 63.]

It is also notable that the reasoning in *S.J.L.* relies only on the “spirit and objectives” of the *Youth Criminal Justice Act* — and not on the common law framework — in resolving the question on appeal. By the same logic, the Legislature’s intentions behind the *POA* must take precedence over the common law joinder rules.

1. Second, the statutory framework within which *Clunas* was decided is altogether different from that which applies to the case at hand. *Clunas* was decided solely within the context of the *Criminal Code*. It dealt with charges under the same statute that were prescribed by the same level of government and were therefore subject to the same evidentiary and procedural rules. The present case, however, deals with statutes enacted by different levels of government, each of which has its own distinct procedures and rules of evidence. More importantly, the *POA* was enacted to keep provincial offences distinct from true crimes at each procedural stage. Given these considerations, and bearing in mind the way this Court addressed the common law framework in *S.J.L.*, I am of the view that the two-part test set out in *Clunas* is of little assistance in resolving this particular appeal.
   * 1. Conclusion on Jurisdiction to Conduct a Joint Trial
2. Before concluding, I wish to make one final point on this issue: neither the consent of the accused nor the absence of prejudice is of any significance on the jurisdictional question. While it is true that the accused in this case consented to the joint trial and that it may not have occasioned him any prejudice, this cannot create jurisdiction where it did not exist to begin with: *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, at p. 40; *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570, at para. 34.
3. As I conclude that an Ontario provincial court judge does not have the jurisdiction to hold a joint trial of *Criminal Code* offences and provincial offences, since such jurisdiction would be inconsistent with the purpose of the *POA*, it is necessary to consider whether this appeal should nevertheless be dismissed on the basis of the federal and provincial curative provisos.
   1. The Curative Provisos
4. Although the Court of Appeal held that a joint trial was not permitted, it concluded that this was a mere “procedural irregularity” that could be saved by s. 686(1)(b)(iv) of the *Criminal Code* and s. 120(1)(b)(iii) of the *POA*: 2016 ONCA 411, 131 O.R. (3d) 375, at para. 88. I disagree. While loss of jurisdiction as a result of procedural irregularities can be cured by s. 686(1)(b)(iv) of the *Criminal Code*, that provision cannot cure the absence of jurisdiction in the first place. Section 686(1)(b)(iv) provides as follows:

**686 (1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

. . .

**(b)** may dismiss the appeal where

. . .

**(iv)** notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

1. Section 686(1)(b)(iv) was enacted in 1985 and “put an end to the jurisprudence holding that procedural errors having caused a loss of jurisdiction in the trial courts could not be cured”: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 12. For example, prior to the enactment of s. 686(1)(b)(iv), an incurable loss of jurisdiction would result if an accused was inadvertently and inconsequentially absent from the trial, no matter how quickly this irregularity was remedied: see *Khan*, at para. 12; *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.).
2. But s. 686(1)(b)(iv) can cure only *loss* of jurisdiction, not *absence* of jurisdiction. In the words of Goodman J.A. in *Cloutier*, endorsed by this Court in *Khan*, this provision gives an appellate court “the discretionary power to dismiss an appeal where a court has jurisdiction in the first instance but has lost jurisdiction as a result of some procedural irregularity” (p. 46 (emphasis added)).
3. In this case, the provincial court had no jurisdictional basis to try both summary conviction criminal offences and provincial offences simultaneously. The error was therefore not a procedural irregularity, but a foundational defect in the proceedings. Jurisdiction was not lost; there was a total absence of jurisdiction to conduct the joint trial. Section 686(1)(b)(iv) cannot cure this foundational defect.
4. Moreover, the curative proviso should not be used to cure the systematic thwarting of the Legislature’s intent. Disregard for that intent is not a mere procedural irregularity, but a failure to respect the jurisdictional boundaries of the provincial offences system designed by the Legislature.
5. The *POA* does not contain a curative proviso like that in s. 686(1)(b)(iv) of the *Criminal Code*. Rather, s. 120(1)(b)(iii) of the *POA* allows a court to dismiss an appeal only where, despite the existence of an error of law, “no substantial wrong or miscarriage of justice has occurred”. There was no error of law in this case, but rather a total absence of jurisdiction to proceed with a joint trial. Accordingly, s. 120(1)(b)(iii) does not apply in this case.
6. Disposition
7. I would allow the appeal. I would quash Mr. Sciascia’s convictions under s. 249 of the *Criminal Code* and s. 216 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, and order new trials on those charges.

*Appeal dismissed,* Côté J. *dissenting.*

Solicitors for the appellant: O. Wigderson, Barrister, Toronto; Conway Baxter Wilson, Ottawa.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener: Attorney General of British Columbia, Vancouver.

1. In these reasons, “summary conviction” refers to both straight summary offences and hybrid offences where the Crown elects to proceed summarily. [↑](#footnote-ref-1)
2. Although the *HTA* sets out the offences, the applicable procedures are governed by the *Provincial Offences Act*, R.S.O. 1990, c. P.33. [↑](#footnote-ref-2)
3. To be clear, these reasons are restricted to a joint trial of a provincial charge proceeded with under Part III of the *POA* and a summary conviction criminal charge. [↑](#footnote-ref-3)
4. I appreciate that the *Clunas* Court worded the two-part test in reverse order. However, in my view, it may and often will be more convenient for a trial judge to first inquire into the factual nexus between the offences before moving on to consider whether joinder is in the interests of justice. [↑](#footnote-ref-4)
5. See *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Reg. 200, r. 32(5), made under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. [↑](#footnote-ref-5)
6. Before this Court, the Crown proposed that this element required a “factual or legal nexus” (R.F., at para. 5 (emphasis added)). While I have difficulty imagining when, in the absence of a factual nexus, a legal nexus could justify conducting a joint trial of provincial charges and summary conviction criminal charges, I leave that question to be decided if and when it arises. [↑](#footnote-ref-6)