

# R. v. Horse, [2019] S.J. No. 226

Saskatchewan Judgments

Saskatchewan Court of Appeal

L.M. Schwann, R. Leurer and J.A. Tholl JJ.A.

Heard: March 19, 2019.

Judgment: June 18, 2019.

Docket: CACR3201

**[2019] S.J. No. 226** | 2019 SKCA 56

Between Sean Lyndon Horse, Appellant, and Her Majesty the Queen, Respondent

(45 paras.)

## Case Summary

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### Court Summary:

Disposition: Leave to appeal granted; appeal dismissed.

### Appeal From:

On appeal from 2018 SKQB 308, Battleford.

## Counsel

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Benedict Feist for the Appellant.

Andrew Davis for the Respondent.

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The judgment of the Court was delivered by

**R. LEURER J.A.**

## I. INTRODUCTION

1 The appellant, Sean Lyndon Horse, appeals a decision of a judge of the Court of Queen's Bench, sitting as a summary conviction appeal court [appeal court]. The appeal court dismissed Mr. Horse's appeal against a conviction before a Provincial Court judge on a charge of theft under \$5,000, contrary to s. 334(b) of the *Criminal Code*.

2 An appeal to this Court from a decision of an appeal court is limited to questions of law alone, and requires leave of this Court pursuant to s. 839 of the *Criminal Code*. Mr. Horse argues the trial judge and appeal court "erred in failing to consider the effect of intoxication on the specific intent required to form *mens rea* for theft". However, the evidence did not suggest that Mr. Horse may have been intoxicated to this extent, and the trial judge's treatment of intoxication was not raised as an alleged error before the appeal court. For these reasons, it cannot be said that the appeal court erred in law in its treatment of the issue.

3 The second argument Mr. Horse makes, and the one he most emphasizes, is with respect to the role that colour of right plays in the proof of the offence of theft. Mr. Horse argues that the trial judge and appeal court erred in law by "treating colour of right as a pure defence to be raised by the accused, rather than as an essential element of the offence to be proven by the Crown". However it is viewed, the Crown is entitled to say that it has met its burden of proving the absence of colour of right if the other elements of the offence of theft are proven and the existence of an alleged colour of right is not asserted on the evidence before the court. The insurmountable hurdle Mr. Horse's appeal faces is that an allegation of colour of right does not arise on the evidence.

4 Therefore, while I would grant Mr. Horse's application for leave to appeal, I would dismiss his appeal on its merits. My reasons for these conclusions follow.

## II. BACKGROUND

### A. Evidence at trial

5 This appeal involves the alleged theft of a cellphone. Shortly after noon on January 4, 2016, Mr. Horse approached a Battleford resident [complainant] to borrow his cellphone. The complainant voluntarily gave the cellphone to Mr. Horse who then ran away with it in hand. The complainant yelled at Mr. Horse, who discarded the cellphone. The cellphone was found the next day in a neighbour's yard. Many of the nuances beyond these core facts are in dispute.

6 Mr. Horse was charged with theft of property of a value not exceeding \$5,000. The Crown proceeded summarily. Mr. Horse pleaded not guilty. Four witnesses testified at trial.

7 The complainant, who was a civilian employee of the Royal Canadian Mounted Police [RCMP], testified that he was in his garage putting his infant daughter in her car seat when he was approached by an individual later identified to be Mr. Horse. Mr. Horse said he had lost his dog and he needed to make a phone call to his girlfriend, and asked to borrow the complainant's cellphone. The complainant began to dial the number, as given to him by Mr. Horse, but handed Mr. Horse the cellphone when his daughter required attention. In a brief conversation conducted while Mr. Horse had the phone to his ear, Mr. Horse identified himself as "John", and the complainant identified himself as "Dane". After tending to his daughter, the complainant turned his attention back to Mr. Horse who was at this point again pressing on the phone and backing away, saying "I'm sorry, Dane. I'm so sorry, Dane. I'm sorry, man. I'm sorry". The complainant

concluded Mr. Horse was about to steal his cellphone, and said "Don't do it, John". When Mr. Horse was at the edge of the complainant's property, the complainant yelled "John, I work for the police. We're going to catch you". Mr. Horse paused momentarily and then started to run and left the complainant's property. The complainant testified that he could not follow Mr. Horse because he needed to tend his daughter.

**8** The complainant filed a report with the RCMP. A short time later he learned that a man matching the description of the person who had taken his cellphone was in custody. The complainant went to the police station, where he recognized the man, later identified to him as Mr. Horse. The complainant testified that he asked "John" where his cellphone was, but "John" said to him "I don't know what you're talking about".

**9** The complainant testified that he retraced Mr. Horse's steps the next day and found his cellphone, undamaged, under a tree on his neighbour's property, approximately two feet from where Mr. Horse was when the complainant had shouted he worked for the police. When the complainant found the cellphone he saw a text message on it asking who had called. From this the complainant deduced that Mr. Horse had made a call on his cellphone before he dropped it.

**10** The complainant testified that approximately two weeks later, Mr. Horse came to his house. Mr. Horse introduced himself by saying "Hi, I told you my name was John". The complainant said "I know who you are Sean", and told Mr. Horse to step outside with him. Mr. Horse apologized and explained that the day he took the cellphone he was highly intoxicated, he had been in a fight with his family, he was "wandering the highway", and he did not have his jacket on because he "didn't know what was going on". Mr. Horse further explained that he did not live in the area, but was visiting family and had lost his dog, which he was then looking for. He was "really worried because his dog had been known to get into fights" and "he didn't want a dog that vicious ... wandering the neighbourhood in case it attack[ed] somebody else's dog".

**11** The second witness was the police officer who arrested Mr. Horse in the afternoon on January 4, 2016, some distance from the complainant's home. The officer testified that he became aware of the alleged theft and received a description of the alleged perpetrator. Shortly thereafter, the arresting officer noticed a male walking who matched the description the complainant had provided. The man was later identified to be Mr. Horse. The officer stated that it was "clear" to him that Mr. Horse was intoxicated. The officer noted Mr. Horse had "glossy eyes and [was] a bit unsteady on his feet" and was wearing only a thin shirt, which he considered "odd" given the time of year. In cross-examination, the officer acknowledged it was possible that Mr. Horse may simply have been hungover.

**12** Mr. Horse testified in his own defence. He explained how one of his two dogs had escaped while he was visiting a friend in the area and that he set out on foot in search of the dog, while his girlfriend took the car and a joint-use cellphone on a similar quest. Mr. Horse testified he could hear dogs barking and wanted his girlfriend to come to his location. According to Mr. Horse, this was when he saw the complainant and asked to use his cellphone. The complainant obliged and started dialing the phone number Mr. Horse gave him. Before the call was completed, the complainant's daughter began to fuss, so the complainant handed the cellphone to Mr. Horse who completed the call. Mr. Horse acknowledged that he gave his name to the complainant, but says the complainant must have confused "Sean" for "John". He also testified that the call did not go through so he tried a second time. At this point, Mr. Horse says he heard his dog barking. Mr. Horse explained that this prompted him to run away with the cellphone. Mr. Horse said he realized he still had the complainant's cellphone, so he dropped it in a nearby

yard, yelling "[s]orry about this", referring to dropping and not returning the cellphone to the complainant. In cross-examination, Mr. Horse stated that he also "feel [*sic*] like" he had not only heard, but had seen his dog.

**13** Mr. Horse acknowledged hearing the complainant yell that he worked with the police, but understood from what was yelled that the police might provide "some potential help". He was not certain whether it was before or after he threw the cellphone down since everything "happened so fast" and was "all like reflex". Mr. Horse denied that at any point he intended to steal the cellphone. Mr. Horse was adamant that he thought he had thrown the cellphone down on the complainant's property.

**14** Mr. Horse testified that he never did find the dog. He explained that he left his jacket at a family member's house as a sign for his girlfriend so she would know he had been there. He stated that he resumed walking until he was detained by the police. Mr. Horse denied he was intoxicated. He said he had not consumed alcohol that day (Monday) or the previous day (Sunday), but said he was hungover from heavy drinking over the previous Friday and Saturday. Mr. Horse described the complainant as rude, or mocking, during their brief encounter at the police station. He denied being confronted by the complainant about the location of the cellphone or telling the complainant that he did not know what he was talking about.

**15** Mr. Horse agreed that two weeks later he was in the neighbourhood again and took the opportunity to "apologize for disrupting the harmony and balance of [the complainant] and his family's household" and to "clarify the incident". He denied that he apologized for taking the complainant's cellphone. He also denied having a motive to steal the complainant's cellphone, as he already owned one.

**16** Ms. Horse's girlfriend confirmed that she was searching for the escaped dog in her car while Mr. Horse searched on foot. She said she found the dog not "much longer after he ran away". While searching, she said she had missed one or two calls from an unknown number, prompting her to send a text message asking who was calling. The text message was marked as "read" later on the same day. That evening, she received a call from the RCMP advising that Mr. Horse was in custody and she could pick him up. Mr. Horse's girlfriend agreed Mr. Horse had a cellphone that was the same kind as hers, but on the date of the alleged theft she said they were sharing a phone. Mr. Horse's girlfriend confirmed that she found Mr. Horse's jacket at the relative's home where Mr. Horse testified he had left it.

## **B. Trial decision**

**17** Against this background of evidence, Mr. Horse argued at trial that the Crown had failed to prove the necessary *mens rea* to commit an offence pursuant to s. 322 of the *Criminal Code*. Mr. Horse took the position that he was given possession of the cellphone voluntarily by the complainant, giving him a right to the possession of it and that he never formed the intent to steal the cellphone. The assertion was that Mr. Horse "may [have] reflexively run off the property", but this was not done with a view to taking the phone. It was further argued that Mr. Horse "did not move the phone with the intention to steal and ... he had a colour of right to have the phone in his possession until [the complainant] told him to stop and threatened to call the police".

**18** The trial judge concluded that the *actus reus* of the crime was clearly made out on the evidence. The live issue was whether Mr. Horse had the required *mens rea* for the offence. After

reviewing the evidence, the trial judge "reject[ed] the evidence of the accused when he [said] that he did not intend to steal the phone". The trial judge concluded it was "clear that Mr. Horse took the phone from [the complainant's] property with the intention of stealing it". She then elaborated on this, stating:

... I've rejected the explanation given by Mr. Horse regarding the incident. There is nothing on the evidence that leads me to have any doubt with respect to his guilt and I find that there is substantial evidence to establish that *the accused intentionally took the cell phone from [the complainant]*. On the evidence, even that of the accused, there is no possibility that one can find that the accused returned the phone to [the complainant]. I am confident that *he had every intention of taking the phone and keeping it but when [the complainant] yelled out that he worked for the police he thought twice about keeping it and that is when he threw the phone from his person.*

(Emphasis added)

On this basis, Mr. Horse was convicted of the offence of theft under \$5000.

### **C. Appeal court decision (*R v Horse*, 2018 SKQB 308)**

**19** Before the appeal court, Mr. Horse alleged four errors by the trial judge, only one of which is repeated in this Court. In respect of this ground of appeal, Mr. Horse alleged the trial judge erred by treating colour of right as a positive defence, rather than as a necessary element of an offence under s. 322, thereby inappropriately relieving the Crown of its burden of proof.

**20** The appeal court concluded, on the authority of *R v Simpson*, 2015 SCC 40 at para 52, [2015] 2 SCR 827 [*Simpson*], that:

... it is clear that colour of right is a defence in which an accused bears the onus of first establishing that there is an air of reality to the asserted defence, namely whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable double about colour of right. It is only once this hurdle is met that the burden falls on the Crown to disprove the defence upon a reasonable doubt.

**21** The appeal court held that this principle was properly recognized by the trial judge. The appeal court then observed that while Mr. Horse at one point held the cellphone with the consent of the complainant, there was no evidence Mr. Horse had a belief he had an interest in the phone at the point he left the complainant's property.

### **D. Parties' positions**

**22** Mr. Horse's principal argument is that the trial judge and the appeal court placed an impermissible burden on him to disprove an essential element of the offence of theft by treating colour of right as a positive defence. Mr. Horse also asserts that both courts erred in failing to consider the effect of intoxication on the specific intent required to form the *mens rea* for theft, or alternatively in failing to give reasons for the conclusion on this issue.

**23** The Crown argues that the trial judge and the appeal court were correct in the approach taken on the colour of right issue. The Crown also says the evidence demonstrated Mr. Horse

had no colour of right to the cellphone at the point the theft occurred. Finally, the Crown says there is no evidence that Mr. Horse was intoxicated to the point he lacked the *mens rea* for theft and points out that the issue was not argued at trial or before the appeal court.

### III. ISSUES

**24** Mr. Horse's proposed appeal is best considered in the context of the framework created by the following two questions:

- (a) Did the appeal court err in law in its treatment of the defence of intoxication?
- (b) Did the appeal court err in law by failing to find that the trial judge placed an impermissible burden of proof on Mr. Horse?

### IV. ANALYSIS

#### **A. Did the appeal court err in law in its treatment of the defence of intoxication?**

**25** At trial there was conflicting evidence whether Mr. Horse was intoxicated at the time of the alleged offence. Perhaps ironically, given the position he takes in this Court, Mr. Horse argued at trial that he was *not* intoxicated. It was the Crown that asserted Mr. Horse was intoxicated. The trial judge observed that she was "satisfied that Mr. Horse was intoxicated ... and as a result may not accurately remember what occurred". However, neither the Crown nor Mr. Horse suggested at trial that the alcohol Mr. Horse may have consumed affected his ability to form the specific intent needed to commit the offence of theft. The trial judge therefore did not deal with the intoxication issue when she grappled with the evidence bearing on whether Mr. Horse had the necessary *mens rea* to commit the offence of theft.

**26** Mr. Horse raised no issue before the appeal court with respect to the trial judge's treatment of his alleged intoxication. Mr. Horse's proposed appeal is from the decision of the appeal court. Given the evidence and the positions taken by Mr. Horse both at trial and also before the appeal court in light of that evidence, there can be no error of law in the decision of the appeal court in relation to this issue.

#### **B. Did the appeal court err in law by failing to find that the trial judge placed an impermissible burden of proof on Mr. Horse?**

**27** Mr. Horse says that both the trial judge and the appeal court placed an impermissible burden on him to disprove an essential element of the offence of theft by treating colour of right as a positive defence to the offence of theft. To understand this aspect of Mr. Horse's appeal, it is helpful to set out the parts of s. 322 of the *Criminal Code* most relevant to the charges Mr. Horse faced:

#### **Theft**

**322(1)** Every one commits theft who fraudulently and without colour of right takes, or fraudulently *and without colour of right* converts to his use or to the use of another person, anything, whether animate or inanimate, with intent

- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

...

### Time when theft completed

- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

### Secrecy

- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(Emphasis added)

**28** Mr. Horse argues that, because the *Criminal Code* describes theft as a conversion of something "fraudulently *and without colour of right*", it is incumbent on the Crown to prove the absence of a colour of right as a constituent element of the offence. Mr. Horse supports his argument with reference to the judgment of this Court in *R v Dorosh*, 2003 SKCA 134, [2004] 8 WWR 613 [*Dorosh*], Bayda C.J.S. described the *actus reus* and *mens rea* of the offence in the context of the facts before the Court in that case, which related to the alleged theft of a trailer, in the following terms:

[13] The *actus reus* of the offence charged consisted of the taking by the defendant of the trailer (an animate thing). ...

[14] The *mens rea* element is another matter. *The Crown needed to prove*, beyond a reasonable doubt, the three requirements of this element, namely, (i) a fraudulent intent on the part of the defendant at the time of the taking of the trailer; (ii) *an absence of any colour of right asserted by the defendant*, and (iii) an intent on the part of the defendant to deprive, temporarily or absolutely, the owner, Mr. Zayshley, of the trailer.

(Emphasis added)

**29** After reviewing *Dorosh* and several other cases given to her, the trial judge stated:

... it is clear that Mr. Horse took the phone from [the complainant's] property with the intention of stealing it. Although he may have had an initial colour of right defence to have the possession of the cell phone on the property of [the complainant] in the presence of [the complainant], that defence [i.e. of colour of right] was not available to him when he decided to back off the property and to run away with the phone. Mr. Horse has no colour of right *defence* available to him.

(Emphasis added)

**30** The appeal court looked to *Simpson* as the leading authority in respect to the issue of colour of right. *Simpson* dealt with a charge pursuant to s. 348 of the *Criminal Code*. In that case, the trial judge found that there was an air of reality to the accused's assertion of colour of right that the Crown had failed to disprove, and on this basis entered an acquittal. The Supreme Court of Canada held that "trial judge's finding that there was an air of reality to the colour of right defence [was] tainted by her improper reliance on certain evidence that did not, in fact, support the existence of a colour of right" (at para 30). Unlike s. 322, s. 348 does not contain express mention of colour of right in the statutory provision defining the offence. However, the Supreme Court used the facts of *Simpson* as an opportunity to speak more broadly about the place of

colour of right in the criminal law. In this regard, Moldaver J., for the Court, stated as follows:

[31] The colour of right defence is most commonly invoked in relation to the offence of theft under s. 322 of the *Code*, which prohibits the taking of an object or its conversion "fraudulently and without colour of right". ...

[32] *To put the defence of colour of right into play, an accused bears the onus of showing that there is an "air of reality" to the asserted defence -- i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right.* *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 49-53 and 83. Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt. Applying these principles here, the respondents bore the burden of pointing to some evidence upon which a trier of fact could be left in a state of reasonable doubt about the respondents' asserted claim of a colour of right to occupy the commercial space.

(Underlining in original, italics emphasis added)

**31** The appeal court concluded that *Simpson* had resulted in a "clarification" of the law:

[48] The *Simpson* decision has clarified the law respecting the defence of colour of right. In both *Dorosh* and *Simpson*, a defendant must point to some evidence that he had an honest belief in his claim to a proprietary or possessory right to the thing which is the subject matter of the alleged theft even though the claim may be unfounded in law and fact. The accused bears the onus of showing that there is an "air of reality" to the asserted defence; namely, whether there is some evidence upon which a trier of fact, properly instructed and acted [*sic*] reasonably, could be left in a state of reasonable doubt about the colour of right.

[49] It is only once the accused has met this hurdle that the burden falls on the Crown to disprove the defence beyond a reasonable doubt. In the present case, the appellant bears the burden of pointing to some evidence upon which the trial judge could have been left in a reasonable doubt about the appellant's asserted claim to a colour of right to possession of the cell phone.

**32** As I interpret this passage, the appeal court accepted that, rather than being an element of the *mens rea* of theft, colour of right is like any other positive defence, which need only be disproved by the Crown if there is evidence that discloses an air of reality to it.

**33** Mr. Horse has a point when he observes that *Simpson* did not involve a charge where the absence of colour of right is explicitly described in the charging section as a constituent element of the offence (as is the case of s. 322(1) of the *Criminal Code*). On this basis, the statements by the Supreme Court concerning the absence of colour of right as a "defence" for the purposes of a charge of theft might be considered *obiter*. On the other hand, even if technically *obiter*, Moldaver J., in his judgment for the Court, explicitly placed part of his analysis of colour of right in the context of an offence under s. 322. Moreover, he put all of this in the framework of other positive defences. Therefore, I am reluctant to completely ignore *Simpson*.

**34** In most contexts, the difference between treating something as an element of an offence and an affirmative defence is extremely important. In the former case, the ultimate burden of proof of the element rests at all times with the Crown. In the latter case, the accused bears an

evidentiary burden of pointing to evidence creating an air of reality to the defence before the legal burden shifts to the Crown to prove, beyond a reasonable doubt, that the defence has no merit. However, my conclusion is that, in the context of the evidence against Mr. Horse, there is no difference whether the absence of colour of right is treated as an element of the offence of theft (as contemplated in *Dorosh*) or as a positive defence (as contemplated in *Simpson*). To help explain this it is useful to step back and consider what the notion of "colour of right" involves.

**35** The most commonly-cited statement of the principle is that by Martin J.A. in *R v DeMarco* (1973), 13 CCC (2d) 369 (Ont CA) at 372 [*DeMarco*]:

The term "colour of right" generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact [citation omitted]. The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done [citation omitted]. The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.

**36** This passage is quoted in *Dorosh* (at para 16), *Simpson* (at para 31), and in appellate-level cases from across the country, and is cited by leading academics. (See, for example only, *R v Templeman*, 2018 NLCA 44 at para 82, 364 CCC (3d) 529; *R v Charters*, 2007 NBCA 66 at para 10, 319 NBR (2d) 179; *R v Harding*, 1991 ABCA 59 (CanLII) at para 7; *R v Manuel*, 2008 BCCA 143 at para 10, 231 CCC (3d) 468; Don Stuart, *Canadian Criminal Law*, 7th ed (Toronto: Thomson Reuters, 2014) at 380; Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 112.)

**37** One point that emerges from the description of colour of right found in *DeMarco* is that this mistaken belief is a live issue only when it is *asserted* by an accused. In this case, it was uncontested that Mr. Horse had an *actual* - not an honest but mistaken belief in a - right to possess the phone when it was first lent to him by the complainant. However, the offence was not found by the trial judge to have occurred at this point in time. Rather, Mr. Horse's actions became criminal when he ran off with the cellphone in hand with the intent to deprive the complainant of his property. At this point in time, there was no issue as to colour of right at all. Said perhaps more clearly, the point of contention at trial when Mr. Horse left the complainant's presence was *not* as to the existence of an honest belief by Mr. Horse in a right to the cellphone. Mr. Horse's evidence was that he did not realize he had the cellphone in his hand at all. The live issue at trial was whether Mr. Horse was being truthful when he made this assertion. In connection with *this* issue, the trial judge concluded, on the totality of the evidence, that she had no reasonable doubt that Mr. Horse intentionally took the cellphone with the further intent to keep it. This was the basis for finding Mr. Horse guilty of the offence of theft.

**38** Although both the trial judge and the appeal court referred to Mr. Horse having "no colour of right defence" when he took off with the cellphone, at that point colour of right was not asserted. In this regard, both the trial judge and the appeal court asked the right question that was raised in the evidence, that is to say whether the Crown had proven, beyond a reasonable doubt, that Mr. Horse intended to possess and keep the cellphone to the deprivation of the complainant when he left the complainant's property. All of this is made clear in the judgment of the appeal court. After observing that the trial judge found Mr. Horse initially held the phone with the

consent of the complainant, the appeal court continued:

[55] However, the appellant, after having been handed the cell phone, backed out of the complainant's garage while the complainant was occupied with his daughter. The accused then backed further down the complainant's driveway onto the sidewalk where he began running away with the cell phone. The trial judge concluded that the defence of colour of right was lost when the accused decided to walk off the complainant's property and run away with the cell phone. The trial judge accepted the complainant's testimony that the accused had left the complainant's property with the cell phone before discarding the cell phone.

[56] There was no evidence at trial, from any of the witnesses, that the accused honestly, albeit mistakenly, believed that he had the right to possess the cell phone outside the immediate presence of the complainant. The appellant's own evidence is to the contrary. He testified that he became aware that he had the cell phone in his hand as he ran toward his dog. He said that he threw the cell phone off to the side simultaneously making an apology to the complainant for the careless manner in which he discarded the cell phone. The accused's own evidence establishes that he knew that he had no right to possession of the cell phone outside the immediate presence of the complainant. The appellant has failed to meet the onus of pointing out some evidence upon which the trial judge could [be] left [with] reasonable doubt about colour of right.

**39** The simple conclusion from all of this is that the issue in play at trial had nothing at all to do with the existence or non-existence of colour of right.

**40** Still, Mr. Horse argues that there is a substantive difference between treating colour of right as an element of the offence of theft rather than an affirmative defence, as he maintains the trial judge and, more clearly, the appeal court did. This takes me back to the notion that colour of right is a live issue that depends on it being asserted by an accused. In *DeMarco*, Martin J.A. spoke of colour of right as referring to "a situation where there is an *assertion* of a proprietary or possessory right to the thing which is the subject-matter of the alleged theft" (emphasis added). In *Dorosh*, Bayda C.J.S. referred to the second element of the *mens rea* of the offence being "an absence of any colour of right *asserted by the defendant*" (emphasis added).

**41** *Dorosh* did not say, expressly, that the assertion of colour of right must be made by evidence; however, this must be the case. Theft involves, in its *actus reus*, conversion and, at the time of taking, the fraudulent intent of the accused (the first element of the *mens rea* described in *Dorosh*) with an intent to deprive the property holder (the third element of the *mens rea* described in *Dorosh*). In the context where these other elements of the offence have been made out, the Crown is entitled to say that it has met its burden of proving the absence of colour of right if the other elements of the offence are proven and the existence of an honest belief does not arise in the evidence before the court.

**42** This understanding is consistent with the recent decision of the Quebec Court of Appeal in *Thibodeau c R*, 2018 QCCA 1476 [*Thibodeau*]. *Thibodeau* dealt with an appeal involving s. 342.1 of the *Criminal Code*, which, like s. 322, expressly refers to the absence of colour of right in the text of the offence. On the one hand, the *per curiam* judgment of the Quebec Court of Appeal referred to the absence of colour of right as an essential element of an offence (at para 12: "Bien qu'elle constitue un élément essentiel de l'infraction"). Immediately thereafter, the Court referred to the absence of colour of right as a defence, which must arise on the evidence

before the Crown bears a burden to disprove it beyond a reasonable doubt and the Court made reference to *Simpson* (at paras 13 and 14). Not only did the Quebec Court conclude that absence of colour of right must first arise on the evidence before it is at play, but it observed that this will generally require the accused to testify ("Ce n'est, par conséquent, qu'exceptionnellement qu'un accusé pourra faire valoir ce moyen de défense sans avoir lui-même à témoigner pour soulever un doute raisonnable relativement à sa croyance honnête et sincère" at para 13). All of this suggests that colour of right operates much like an affirmative defence because, once the other elements of the offence are made out by the Crown, its absence will be proven unless there is at least some evidence before the court supporting its existence.

**43** As I interpret *Dorosh*, the Crown will have met its burden of proving the absence of colour of right whenever there is nothing in the evidence suggesting the existence of the accused's honest belief as to his or her proprietary or possessory right. On this interpretation, there seems little space between treating the absence of colour of right asserted by an accused as an element of the offence of theft and treating the absence of colour of right as a positive defence. In both cases, the accused must be able to point to some evidence that the issue is a live one at trial. The evidentiary burden falling on an accused in relation to positive defences is the well-developed concept of "air of reality". If there is a difference between this and the interpretation I give to *Dorosh*, this difference must await a case where the facts animate the need to draw the distinction (if any). Mr. Horse's case does not present this opportunity. More specifically, nothing in the evidence raised a question of, or "asserted", Mr. Horse's colour of right to the cellphone at the point in time that the trial judge held the theft occurred.

**44** In summary, the Crown is entitled to say that it has met its burden of proving the absence of colour of right in connection with the offence of theft if the other elements of the offence are proven and the existence of an alleged colour of right does not arise on the evidence before the court. Here, because there was no evidence that raised a question of Mr. Horse's colour of right to the cellphone when he left the complainant's property, and in light of the proof of the other elements of the offence, it does not matter whether the absence of colour of right is viewed as an element of the *mens rea* necessary to commit theft (the burden of proof of which the Crown has met because colour of right has not been asserted in the evidence), or as a positive defence (which the Crown does not need to meet because there is no air of reality to it). On either view, the elements of the offence of theft have been proven beyond a reasonable doubt.

## V. CONCLUSION

**45** For the reasons given above, I would grant Mr. Horse's application for leave to appeal but dismiss his appeal on its merits.

R. LEURER J.A.

L.M. SCHWANN J.A.:— I concur.

J.A. THOLL J.A.:— I concur.