Indexed as:

R. v. Gwynne

IN THE MATTER OF the Provincial Offences Act, R.S.O. 1990, c. P.33

Between
Her Majesty the Queen, respondent, and
Ronald G. Gwynne, moving party (defendant)

[2001] O.J. No. 331

Ontario Court of Justice
Provincial Offences Court - Toronto, Ontario
Quon J.P.

Heard: December 1, 2000.
Judgment: February 5, 2001.
(75 paras.)

Cases Considered or Referred To:

R. v. Chaulk (January 21, 1997) (Ont. Ct. (Prov. Div.)), per Quon J.P.
R. v. Dealwis (July 17, 1995) (Ont. Ct. (Prov. Div.))
R. v. Discovery Place Limited et al (Ont. Ct. (Gen. Div.)) (Feb. 15, 1996), File no. 68342/95, MacDougall J. at Peterborough
R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.), [1981] O.J. No. 142, per Jessup, Zuber and Weatherston JJ.A.
R. v. Koza 2[1995] O.J. No. 4278 (Ont. Ct. (Prov. Div.)) per Smith J. at Brampton
R. v. Kwoon [1999] O.J. No. 4989 Ontario Superior Court of Justice per Howden J.
R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.)
R. v. Ontario (Min. of Transportation) (May 9, 1996) (Ont. Ct. (Gen. Div.)), per Meehan J. at Sudbury.
R. v. Murugan [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)), per Knazan J. at Toronto
R. v. Pham; R. v. Oehlert [1996] O.J. No. 4366 (Ont. Ct. (Prov. Div.)) per Quon J.P.
R. v. Sault Ste. Marie, (1978), 3 C.R. (3d) 30 (S.C.C.)
R. v. Theosanamoorthy [1997] O.J. No. 6175 (Ont. Ct. (Prov. Div.)) per Jogendra J.P. at Scarborough

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, s. 11(b).
Highway Traffic Act, R.S.O. 1990, c. H.8, s. 130.
Interpretation Act, R.S.O. 1990, c. I.11, s. 29(2).
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 3(1), 3(2), 3(5), 5, 5(2), 5.1, 5.1(3), 5.1(5), 34, 36(2).
Proceedings Commenced by Certificate of Offence, R.R.O. 1990, Reg. 950, s. 4.5.

Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200, ss. 11(1), 13(1.1), 13(3), 13(6), 15(2)

Reference Materials and Textbooks Cited:

Hutchison, Rose and Downes, The Law of Traffic Offences (2d ed.) (Carswell, Toronto: 1998), p. 37.

Counsel:

L. Smith, provincial prosecutor.
M. Ryk, for the moving party (defendant).

QUON J.P.:—

1. INTRODUCTION

¶ 1 Now this is a request to have the careless driving charge quashed. Based not on the merits of the case, but on a technicality. The defendant contends two errors were committed that would invalidate the charge. One being the clerk of the court failed to issue an immediate trial date. The other being an improper amendment made on the certificate of offence.

¶ 2 First it is argued, the clerk failed to immediately give the defendant a trial date, after he had personally requested a trial by filing a notice of intention to appear at the courthouse. He believes the Provincial Offences Act ("P.O.A.") mandates the clerk issue a trial notice to him at the same time he filed his request. Instead, the clerk sent him the notice of his trial date several weeks afterwards. At issue is whether it is mandatory for the clerk to issue this trial notice at the same time as the filing of the trial request, or is it discretionary as to when the clerk may issue the trial notice. If it is mandatory, is this failure to issue the notice at the same time, so prejudicial or unjust, that the procedural error would invalidate the charge?

¶ 3 Secondly, the defendant suggests there is an improper amendment made to the certificate of offence. An amendment only the court is authorized to make. He believes the original signature of the officer on the certificate of offence is improper, since the signature was added after the offence notice with the details of the charge had been served on the defendant. That is, the signature was made as an addition to the certificate after it had been filled in with particulars of the charge and the defendant was served with the particulars of the charge. If this is an improper amendment, does this improper amendment on the certificate of offence invalidate the charge?

¶ 4 The motions were argued on December 1, 1999. To prevent inconvenience to the prosecution's civilian witness, by having her return on another date, I permitted her testimony to be given on the same day. The matter was then adjourned to February 5, 2001 for a ruling on the 2 motions. If the ruling were in favour of the defendant the certificate of offence would be quashed. If the ruling were negative, the matter would continue to be heard.

2. FACTS

¶ 5 The defendant has been charged under section 130 of the Highway Traffic Act R.S.O. 1990, c. H.8, for careless driving on March 31, 2000. He received the offence notice from Officer K. Coady on April 1, 2000. Officer Coady signed the offence notice. It was an original black ink signature.

¶ 6 The officer also signed the certificate of offence certifying that he had served an offence notice personally upon the defendant on April 1, 2000 at 22:26 hours and that he believed an offence had been committed by the defendant. The signature on the certificate was an original black ink signature.

¶ 7 After receiving the offence notice, the defendant's agent Jay Cox attended at the courthouse located at 60 Queen Street West in Toronto, on April 7, 2000, to contest the offence. The agent completed and signed a "notice of intention to appear". The agent included his Toronto address of 863 Broadview Avenue on the notice. This request for a trial was given to court administration. The agent was not immediately given a trial date by court administration while he was at the courthouse. He left the courthouse without having a trial date in his hand. It is unclear whether he demanded or insisted on receiving a trial date from the clerk of the court while he was in the courthouse. The "notice of trial" issued on May 3, 2000 was sent on May 4, 2000 by the clerk to the defendant at his address of 101 Frater Avenue in Toronto. The notice indicated the defendant's trial was set for December 1, 2000 at 1:30 p.m. in "D" court at 60 Queen Street West in Toronto.

¶ 8 The defendant and his traffic agent, Mr. M. Ryk appeared before me on December 1, 2000 at 60 Queen Street West in Toronto.

¶ 9 There were no adjournments or requests to change the trial date. No evidence of prejudice or injustice to the defendant was proffered.

ARGUMENTS

The improper amendment argument

¶ 10 This is something akin to the "what came first argument: the chicken or the egg?"

¶ 11 The defendant argues an addition was made to the certificate of offence after a notice containing the particulars of the charge was served on the defendant. The certificate of offence and the offence notice are referred to as being from a "snap set". The defendant gets the carbon copy of the original certificate of offence, called the offence notice. It is argued that an addition was made to the certificate of offence contrary to section 15(1)(2) of the Rules in Provincial Offences Proceedings [See Note 1 below] ("Rules"). The defendant submits only the court may make an amendment or an addition to the actual certificate of offence after the certificate is issued and the notice served on the defendant. This rule states:

> 15(1) The following matters shall be dealt with only in court:
>
> ...
>
> 2. Amending an information, a certificate of offence or a certificate of parking infraction.

Note 1: Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200.

¶ 12 The defence bases its argument on the decision in R. v. Koza [1995] O.J. No. 4278 (Ont. Ct. (Prov. Div.)) that held any changes made on the certificate of offence after delivery to the defendant makes the certificate defective and invalid.

¶ 13 In order to confirm whether any changes are made to the certificate after issuance, one only has to review the offence notice that is nearly a verbatim copy of the certificate. Because the certificate and notice are constructed in a snap set, any writing that the officer makes on the certificate automatically is carbon copied onto the offence notice.

¶ 14 The signature of the issuing officer on the offence notice is in original ink and not a carbon copy of the original signature he made on the certificate of offence. Therefore, the signatures on the certificate of offence and the offence notice were not made at the same moment in time, but at different times. Logically, the officer in order to properly certify that service was made on the defendant, must first sign the offence notice and present it to the defendant, and then sign the certificate of offence.

¶ 15 The argument then continues along the following logic. It is suggested, indication of service can only be made on the certificate of offence. One of the certifications on the certificate for the officer to complete states: "And I further certify that I served an Offence Notice personally upon the person charged". In order to cognizantly make this certification, the officer is required to separate the offence notice from the certificate of offence and sign the offence notice in original ink. Then he gives the notice document to the defendant. After serving the document, the officer then signs the certificate of offence certifying service and certifying that the defendant had committed an offence. The offence notice is a carbon copy of the certificate of offence, save for the difference in the names of the documents and the bottom inch of the two forms. Because the notice is a copy with the exact same details regarding the charge, the defendant argues it is clear an amendment as been made to the certificate of offence after the defendant had been served with the details of the charge. In order to certify service on the certificate of offence, the issuing officer has to sign his signature in original ink. Alas, the addition of this original signature on the certificate of offence now comes in a period of time after the details of the charge had been presented to the defendant.

¶ 16 Therefore it is argued, the officer has added something to the certificate of offence after the offence notice had been issued to the defendant. In the defendant's opinion, the officer cannot certify service until after he has actually served the offence notice on the defendant. Once the offence notice is served, the certificate of offence (the charging document) becomes frozen in time and nothing else can be added to it. Not even the officer's signature.

The failure to receive trial notice at time trial requested argument

¶ 17 In this argument, the defendant insists the certificate has not been brought properly brought before the court. He contends this improper procedure brings the administration of justice into disrepute.

¶ 18 He argues that section 4.5 of Regulation 950 [See Note 2 below] instructs court administration on how to deal with certain documents. This section designates that section 5.1 of the P.O.A. applies to Toronto.

Note 2: Proceedings Commenced by Certificate of Offence, R.R.O. 1990, Reg. 950.

¶ 19 When section 5.1 applies then section 5 of the P.O.A. does not apply to Toronto. The defendant indicates that the requirement of notifying the defendant of the trial date under the regime in section 5 is "as soon as practical". This time requirement is absent from the regime in section 5.1; it is silent as to when the clerk must notify the defendant of his trial date. Thus, the defendant insists, section 5.1(5) requires the clerk of the court issue the notice of trial immediately to the defendant when a request for trial is made in person at the courthouse. Further, it is argued, the clerk has no discretion to issue the notice at another time, only at the same time the defendant is in the courthouse requesting a trial. And, the clerk is not permitted to mail the notice of trial to the defendant. It must be given in person to the defendant at the courthouse.

¶ 20 These two sections read:

Section 5

(1) A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by so indicating on the offence notice and delivering the notice to the court office specified in it.
(2) Where an offence notice is received under ss. (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of trial. [underlining is mine]

Section 5.1(5)

> If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial. [underlining is mine]

¶ 21 To support his argument he refers to section 11(1) of the Rules [See Note 3 below]. He opines that safeguards are built into the P.O.A. to limit when an officer can file charges with the court. In this section, he states, the court is barred from accepting a filing of the certificate of offence more than 7 days after the offence date, unless the court grants an extension of time to file the certificate past the 7 days. Rule 11(1) reads:

> 11.(1) The clerk of the court shall not accept for filing a certificate of offence more than seven days after the day on which the offence notice or summons was served unless the time is extended by the court. [emphasis is mine]

Note 3: Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200.

¶ 22 Furthermore, he refers to section 13(6) of the Rules to show the P.O.A. is specific about allowing court administration time to fulfill certain obligations. Section 13(6) permits the defendant to be provided with proof that a request for a trial had been registered with the court within the allowable time. The clerk under this rule shall provide a receipt to the defendant indicating he requested a trial, if the officer had not yet filed the charge with the court. The clerk then was required to notify the defendant of the trial date "as soon as practical". The words "as soon as practical" under these circumstances extend the time to notify the defendant of his trial date. That is, the clerk is not directed to issue the trial notice at the moment the defendant requests a trial under this scenario, but is allowed time afterwards to make the notification. Rule 13(6) states:

> 13.(6) Where a defendant files a notice of intention to appear under section 5.1 of the Act and it appears that the certificate of offence has not been filed, the clerk of the court shall,
>
> (a) provide the defendant with a receipt for the notice; and
> (b) as soon as practicable after the filing of the certificate of offence, set a day and time for trial and issue the notice of trial.

¶ 23 Since section 5(2) in the P.O.A. speaks to when the defendant shall be notified of his trial date, "as soon as practical", there is discretion granted to the clerk to act. However, since section 5.1(5) is silent as to when the clerk may issue the notice of trial, then by the process of elimination, the clerk has no discretion or option, but to issue the notice of trial immediately. In this scenario "shall" means it is a mandatory directive and not a discretionary one for the clerk to act. He also submits, the court cannot grant an extension of time to issue the notice of trial, as that power to extend is not mentioned in section 5.1, like it is mentioned in Rule 11(1).

¶ 24 Because the P.O.A. makes a distinction between the regimes established in section 5 and section 5.1 about notification, someone who appears in a Toronto courthouse and requests a trial should leave the courthouse with that trial date, and should not have to wait a month afterwards to get notification by mail. This procedural error it is argued, brings the administration of justice into disrepute and is an abuse of process that should invalidate the charge.

3. ISSUES

¶ 25 Does section 5.1(5) impose a mandatory direction that the clerk of the court notify the defendant of his trial date immediately at the time the notice of intention is filed, or is the duty discretionary?

¶ 26 If it is mandatory for the clerk to issue a trial notice immediately, does the clerk's failure to do so, invalidate the certificate of offence?

¶ 27 Has the issuing officer made an improper amendment on the certificate of offence that would invalidate the certificate of offence, by signing the certificate after issuing the offence notice to the defendant?

4. ANALYSIS OF FACTS AND LAW

¶ 28 The starting point in any analysis of a request to quash a proceeding, based on a technical deficiency, is to note the underlying ideology of the P.O.A. This can be summed up best in a commentary made by Dickson J., as he was then, in a provincial offences case. In writing for the Supreme Court of Canada in R. v. Sault Ste. Marie, (1978), 3 C.R. (3d) 30 (S.C.C.) at pages 38-39 he observed:

> That age has passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

¶ 29 This theme is affirmed by MacDougall J. in the unreported decision of R. v. Discovery Place Limited et al (Ont. Ct. (Gen. Div.)) (Feb. 15, 1996), File no. 68342/95 at Peterborough in which he pronounces:

> The overall philosophy of the Provincial Offences Act is to ensure that technical objections do not impede the arrival of a verdict on the merits. The Act provides broad curative provisions ensuring that the jurisdiction over the information is not lost because of any failure of a court to exercise its jurisdiction at any particular time.

¶ 30 Authors Hutchison, Rose and Downes in their tome, The Law of Traffic Offences (2d ed.) (Carswell, Toronto: 1998) at page 37 confirm that formal defects should not be fatal to the charging document:

> It is important to remember that the central purpose of the modern procedural statues like the Provincial Offences Act has been to eliminate unnecessary procedural "technicalities" from regulatory prosecutions. It was not intended that a purely formal defect should be fatal to a charging document. The main consideration in these cases is to be the effect of the defect on the parties and their rights under the procedures available under the Act. Even a substantive error may be allowed if it is possible for the court to correct the error without depriving the defendant of his right to know and defend the charge against him.
> Most such statutes provide broad powers to amend a charge to cure defects which are merely formal in nature. ...

¶ 31 In R. v. Pham; R. v. Oehlert [1996] O.J. No. 4366, I extensively examined academic writings and judicial ruminations on this topic and wrote at para. 20:

> The trial court's decision to quash a certificate or to amend a certificate, as a question of law, has been examined and reviewed numerous times by the Provincial Offences Appeal Court. The Appeal Court's judgments have looked at section 36 of the P.O.A. and have ruled that, in general, a defective certificate of offence should not be quashed but amended. The Appeal Court has decided, ordinarily, a certificate of offence should be considered on its merits, and not to be quashed on a technical defect. They have adopted the philosophy of "substance over formality.

¶ 32 The P.O.A. under section 36(2) directs the court to consider amending, if appropriate, before quashing a certificate:

> 36.(2) The court shall not quash an information or certificate unless an amendment or particulars under section 33, 34 or 35 would fail to satisfy the ends of justice.

¶ 33 However, I am not precluded from staying the proceedings if I am convinced that an abuse of the Court's process has occurred and the defendant's case is of the clearest of cases. In R. v. Chaulk (January 21, 1997), not yet reported, I ruled that an abuse of process had been caused by court administration and the proceeding should

be stayed. The abuse of process in Chaulk related to the procedural aspect of the matter and not to the substantive determination of the charge.

¶ 34 In the unreported decision of R. v. Ontario (Min. of Transportation) (May 9, 1996) (Ont. Ct. (Gen. Div.)) at Sudbury, per Meehan J. at paragraph 15 of his judgment states:

> While there is no doubt that the Courts have a residual discretion to stay proceedings as an abuse of the Court's process, that jurisdiction should be exercised only in the clearest of cases.

¶ 35 In R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.), Blair J.A. enumerated the essential features of the abuse of process doctrine in his dissenting judgment at pages 115-117. He concludes that an abuse of process depends on an objective judicial assessment of the total effect of the proceeding; that the abuse does not have to be committed by the police or the prosecutor or that they had an improper motive; that situations of abuse of process are not limited and are open to be applied to new situations of abuse; that it is applicable only in the "clearest of cases"; and that the defendant or accused has the onus of establishing on a balance of probabilities that an abuse of process has occurred.

¶ 36 In my conclusion in R. v. Chaulk at para. 115-119, I wrote:

> The court has to weigh the "community's sense of fair play and decency" with the "public's interest in having a charge determined on its merits after a fair trial" on a complaint of abuse. In general, the court has to consider the total effect of the proceeding against the defendant complaining of the abuse and take into account all the circumstances of the case. In addition, the court has to consider the seriousness of the charge in relation to any prejudice inflicted on the defendant. In less serious matters, especially minor traffic offences, it is my opinion that a broader application of the abuse of process doctrine is warranted.
> It is not necessary that the police or prosecutor are responsible for the abuse. As in this case, a clerk in Court Administration and Court Administration were the cause of the abuse. Two notices of trial were sent out with two different trial dates and Court Administration did not rectify the error when informed by the defendant. Third parties may be the cause of the abuse which does not preclude the court from finding abuse.
> There was an abuse of process in this case. The defendant suffered prejudice and financial hardship for having to hire representation for one extra trial date. This particular case was unique and of exceptional circumstances. I found the defendant acted in good faith and did what was required in notifying Court Administration about the error. I also found the defendant was treated unfairly by Court Administration and the defendant relied to his detriment on the two Notices of Trial sent to him. The "unfairness" experienced by the defendant, albeit not related to trial unfairness or to the charge, was disproportional to societal interest in convening a trial in this matter.
> The Supreme Court of Canada in R. v. O'Connor has determined that the common law doctrine has been subsumed in the Charter except for situations not caught by the Charter. The common law doctrine is applicable in this instant case as the defendant could not seek a remedy under the Charter.
> No other remedy short of a stay of proceeding was appropriate in this matter as irreparable prejudice would be caused to the integrity of the justice system if the prosecution were to be continued. Therefore staying this proceeding for abuse of process is the proper remedy.

IMPROPER AMENDMENT ON THE CERTIFICATE OF OFFENCE

¶ 37 The defendant's argument is that the officer made an amendment on the face of the certificate of offence. He contends only the court under section 34 of the P.O.A. has authorization to make amendments on this document. The impugned amendment on the certificate of offence was the original signature of the issuing officer.

¶ 38 The officer is required to certify two matters on the certificate. First, the officer must certify that he or she believes an offence has been committed. Second, the officer must certify that he or she personally served the offence notice to the defendant. The certificate of offence form only allows one box for the officer to sign his name to certify both these matters.

¶ 39 Section 3(2) of the P.O.A. allows an officer who believes a person has committed an offence to choose between issuing a summons under Part III of the P.O.A. or a certificate of offence under Part I of the Act. If the officer, in his discretion, chooses to issue a certificate of offence, he or she is required to complete and sign both the certificate of offence and an offence notice. The provision reads:

> Issuance and service
> 3.(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,
>
> (a) an offence notice indicating the set fine for the offence; or
> (b) a summons,
>
> in the form prescribed under section 13.

¶ 40 Section 3(5) of the P.O.A. requires the issuing officer certify on the certificate of offence that he or she has personally served the offence notice on the person charged and the date of service.

> Certificate of service
> 3(5) Where service is made by the provincial offences officer who issued the certificate of offence, the officer shall certify on the certificate of offence that he or she personally served the offence notice or summons on the person charged and the date of service.

¶ 41 The defendant relies on a decision that says any change to the certificate after delivery vitiates the charge. On appeal to Smith J. in R. v. Koza [1995] O.J. No. 4278 (Ont. Ct. (Prov. Div.)), the court quashed the conviction because the document "was changed after its delivery to the defendant". The defendant uses this holding to support his contention that his charge should be quashed because an amendment was made after the offence notice document was delivered to the defendant, and as such, no additions including an officer's signature certifying service, could be placed on the certificate of offence.

¶ 42 In R v. Sonda [2000] O.J. No. 4324 (Ont. Ct of Justice)) per Megginson J., at Kingston, the court distinguished the decision in Koza and stated in para. 3:

> The cited cases of R. v. Koza, [1995] O.J. No. 4278, and R. v. Lepitre are distinguishable, as both cases involved ex post facto alteration of some substantial part of the Certificate of Offence, after service of the Offence Notice.

¶ 43 The changes or additions referred to in Koza were changes made to the particulars of the charge and not something comparable to this defendant's situation. Sections 3(2) and 3(5) of the P.O.A. require the issuing officer to sign and certify her or his belief an offence has been committed and that personal service was executed on the defendant. This signature, that is required to be on the certificate, after delivery of the offence notice is not an amendment, change or addition to the particulars of the charge. It is part and parcel of a valid certificate.

¶ 44 The defendant, however, also insists this amendment affected the certification of proper service and caused it to be improper.

¶ 45 It has been decided earlier that the process of certifying service prior to actually serving the document on the defendant is not fatal. In R. v. Murugan [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)) per Knazan J., the issue was whether certifying service on the certificate of offence prior to actually serving the offence notice to the defendant invalidated the proceedings because of the failure to comply 3(5). Knazan J. decided at para.

25: "what is important in s. 3(5) is not the order of service in relation to when the certificate is signed but the fact of service". Judge Knazan also found at para. 38: "the defect does not require either quashing or acquittal but can be corrected either by amendment under s. 34 of the Act or by an appropriate order under s. 90 of the Act". He then went on to conclude that once the defendant appeared in court, any defect in service would be extinguished. The defendant in the case at bar appeared in front of me and therefore attorns to the court's jurisdiction.

¶ 46 In my decision in R. v. Pham I held at para. 35:

> Deficiencies in or on a certificate of offence, whether a matter of form or substance may be amended by the trial court if there is no prejudice or injustice created by the amendment. However, if there is prejudice created by the proposed amendment, the trial court then has to decide if the prejudice can be remedied by an adjournment or costs pursuant to section 37 of the P.O.A. If the prejudice can be remedied then the court should cure the defect on the certificate by amendment and not quash the proceeding, unless the amendment fails to satisfy the ends of justice.

¶ 47 Even if there were a defect in the defendant's certificate of offence, I could not quash the certificate unless I considered a request by the prosecution to amend the certificate under section 34 of the P.O.A. to cure the defect.

¶ 48 In sum, the P.O.A. requires the officer under sections 3(2) and 3(5) to sign the certificate of offence to make the required certifications. The addition of a signature by the officer to the certificate after delivery of the charge to the defendant is not the type of amendment as referred to in R. v. Koza. The kind of additions or amendments contemplated in Koza are changes or additions to the particulars of the charge, so that the details about the charge given to the defendant would not be the same as the particulars of the charge given to the court when the certificate is filed. But, even if the impugned defect were to bring into question the certification of service, the appearance of the defendant would cure any defect of service. Therefore this particular attack on the certificate fails.

FAILURE TO ISSUE NOTICE OF TRIAL IMMEDIATELY

¶ 49 In this contention, the defendant insists he should have had the notice of trial in his hand when he left the courthouse according to section 5.1(5) of the P.O.A. And because of this error there has been an abuse of process and the administration of justice has been brought into disrepute.

¶ 50 There is a flaw in the defendant's argument since an agent from POINTTS, a paralegal agency, attended at the courthouse and requested the trial. The agent requested the notice be sent to his business address. This seems to be for the agent's convenience, not the defendant's. There is no evidence the agent demanded the notice of trial or insisted on receiving the trial date immediately. Further, the defendant has not shown any prejudice to his rights to make full answer and defence or that his rights to a fair trial have been infringed by the failure of the clerk to immediately issue the notice of trial to his agent. The defendant carries the burden of proving any abuse of process.

¶ 51 The issue of "as soon as practical" under section 5 arose in R. v. Kwoon [1999] O.J. No. 4989 (Sup. Ct. of Ont.) per Howden J. There had been a 3-month delay in setting the trial date in Kwoon. Howden J. noted that while the Legislature set definite time periods for persons within the provincial offence system, they did not do so regarding the issuing of notices of trial:

> It is important to note that the Legislature, while setting definite time periods for persons within the provincial offence system, pointedly did not do so regarding the issuing of notices of trial. The phrase 'as soon as practicable' in its ordinary meaning means as soon as an act can be done, or as soon as possible in practice. (The Canadian Oxford Dictionary, 1998). It refers to what is feasible for a clerk of the court at the particular time. Section 5(2) is a directory

> section only, as it appears in its present statutory context. It means that the clerk is to act as soon as it is feasible at the time and in the particular circumstances to issue the notice of trial.

¶ 52 I interpret Howden J.'s comment to mean there is no provision in the P.O.A. that requires issuing notices of trial at a specific time, only provisions that require issuance in a reasonable amount of time under reasonable circumstances.

¶ 53 The Justice of the Peace in the unreported decision of R. v. Dealwis (July 17, 1995) (Ont. Ct. (Prov. Div.)) at the trial stage had gone behind the Notice of Trial and ruled that the procedure under section 5.1 of the P.O.A. had not been complied with, in that the defendant had not personally or by agent delivered his Notice of Intention to Appear at the court office having jurisdiction -- the defendant had mailed the Notice to the court instead. On appeal, the court found the Notice of Trial was proper on its face. It also found the Crown and the defendant had both appeared and did not make issue with the defective procedure. The court also concluded that even if the Notice of Trial was improperly issued, the defective procedure did not render the Certificate of Offence a nullity. The Court also found that the defendant and the Crown had attorned to the jurisdiction of the court.

¶ 54 Jogendra J.P. in R. v. Theosanamoorthy [1997] O.J. No. 6175 (Ont. Ct. (Prov. Div.)) at para. 17 held the clerk of the court in section 5.1 is not required to immediately issue a notice of trial because the section does not expressly require this action by the clerk. As long as notice is given out, the clerk's duty contemplated under section 5.1 is fulfilled:

> This section under which evidently the Clerk of the Court had acted does not speak of "as soon as is practicable." The Notice of Trial contemplated is a "notice simpliciter" laying no pre-conditions for doing so, or giving any mandatory directions to the clerk of the Court other than what is expressly set out therein, which for all intents and purposes the clerk had carried out.

¶ 55 Subsection 5.1(5) of the Provincial Offences Act, R.S.O. 1990, c. P.33, directs the clerk of the court to inform the defendant of the time and place of the trial if the defendant files a notice of intention to appear [my emphasis below]:

> 5.1(5) If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial.

¶ 56 The Interpretation Act R.S.O. 1990, c. I.11, under section 29(2) states "shall" is to be interpreted as imperative:

> 29(2) Imperative and permissive forms -- In the English version of the Act, the word "shall" shall be construed as imperative and the word "may" as permissive. ...

¶ 57 The clerk of the court "shall inform the defendant and the prosecutor" of the time and place of the trial. "Shall" in this context is imperative. That is, the clerk must inform the defendant and the prosecutor. The clerk has no discretion whether or not to inform them of the time and the place of trial. Has the clerk in the case at bar complied with his or her mandatory duty to inform? Well, on December 1, 2000 the defendant and the prosecutor were in front of me ready for trial, at the same time and place that was stated in the notice of trial. Therefore, I conclude, because both parties were actually present as required of them from the notice of trial, the clerk has fulfilled his or her duty to inform.

¶ 58 The opposite of "to inform" would be "not to inform". There is not expressly stated in section 5.1(5) that the notice must be given at a specific time, within a certain time period or "as soon as practical". As long as the defendant and the prosecutor are made aware of the time and place of the trial, the clerk's mandatory duty is exercised properly. If the defendant is concerned about when the notification is actually given, or about any delay resulting from the notification, section 11(b) of the Charter protects the defendant against any unreasonable delay in proceeding to trial. Therefore since the section is silent as to any time element or requirement to issue

the notice of trial at a certain time, it cannot be read in, inferred or concluded that the notice must be given immediately or at the same time the request for trial or the notice of intention is filed.

¶ 59 According to the defendant's interpretation of the clerk's obligation under section 5.1(5), immediate notification of the time and place for trial is required. Under the defendant's reasoning, in order for the clerk to immediately fulfill his or her duty to notify the parties, both the defendant and the prosecutor would be required to be in the presence of the clerk, at the time the defendant files the notice of intention to appear. This would require the prosecutor to be at all times standing next to the clerk during office hours, so that the clerk could fulfill his or her duty of notifying any defendant that requires a trial. This burdensome and logistical requirement was not anticipated by the legislators, nor stated expressly in the P.O.A.

¶ 60 Furthermore, one can reform the defendant's argument that time is of the essence and observe the converse. The defendant argues that because "as soon as practical" is expressed in section 5(2), but not expressed in section 5.1(5), he concludes the clerk in section 5.1(5) is required to immediately give out the notice of trial. Therefore, one could argue the opposite is also true. Because section 5.1(5) omits "as soon as practical", then there is no requirement that the clerk has to issue the notice immediately, but at some point the defendant must be informed.

¶ 61 Compare section 5.1(3) where it states "at the time or times" with section 5.1(5) where no timescale or time frame is expressed regarding notification. If the legislators wanted a time factor or a time limit to be a requirement for notification, one would think they would have specified such a time element in 5.1(5).

¶ 62 Section 5.1(3) of the P.O.A. states:

> 5.1(3) A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by attending in person or by agent at the court office specified in the offence notice at the time or times specified in the offence notice and filing a notice of intention to appear with the clerk of the court. [emphasis is mine]

¶ 63 In addition, Rule 13(1.1) is silent as to when the clerk must set the trial date, only that she must set the matter down for trial on a pre-condition. The condition precedent is that the proceedings have commenced. The proceedings are commenced when the issuing officer files the certificate of offence at the court according to section 3(1) of the P.O.A. The evidence before me is that the officer fulfilled this function of filing the certificate on April 5, 2000. The defendant filed his notice of intent on April 7, 2000. Thus, the clerk is mandated to set the matter down for trial. In this rule there is no indication when the notice of this trail date has to be given out.

> 13.(1.1) On the filing of a notice of intention to appear under section 5.1 of the Act, the clerk of the court shall, where proceedings have been commenced, set a day and time for trial.

¶ 64 Now look at Rule 13(3) which mandatorily directs the clerk that he or she must give notice of the trial to both the defendant and the prosecutor "at least seven days" before the actual day of the trial:

> 13.(3) The clerk of the court shall give notice of the trial to the defendant and prosecutor at least seven days before the day set for trail. [emphasis is mine]

¶ 65 This rule does put a time element or limitation on the clerk at the back end of his or her duty to inform the defendant and the prosecutor of the trial date. This rule expressly puts 7 days between the giving of the notice and the actual trial date. There is no time requirement at the front end because it has not been expressly stated in the Rules or the P.O.A. At the back end, it must be at least 7 days between the day of notice and the actual trial date. This affirms the proposition that if the legislators wanted to evince a time element for the clerk to act, as to when the notice had to be given at the front end of his or her duty to notify under section 5.1(3), then they would have included it in that section.

¶ 66 Therefore I concur with my brother justice's finding in R. v. Theosanamoorthy, that I cannot read into section 5.1(5) that there is a requirement that the clerk must issue a notice of trial at the same time a defendant files a request for trial or a notice of intention to appear. Only what is clearly expressed in section 5.1(5) is germane. If section 5.1(5) is silent as to when the duty to inform must be achieved, then the time the notification is to be made is not a factor in the clerk performing his or her duty in notifying the parties of the time and place for trial, except it must occur at least 7 days before the trial.

¶ 67 Finally, I cannot find there would be any prejudice to the defendant's ability to make full answer and defence, or that he has been misled. The defendant appeared personally at the proper court at the time scheduled for his trial. He did not suffer any prejudice as a result of not immediately receiving a trial notice at the time he requested one. Since there is no prejudice or injustice, then there can be no abuse of process inferred to court administration. It is definitely not the clearest of cases for a stay of proceedings. In short, there is no requirement in the P.O.A., especially under section 5.1(5) of immediate notification. The impugned failure of the clerk to immediately notify the defendant of the trial date is therefore not fatal. There has been compliance with the procedure mandated in subsection 5.1(5) of the Provincial Offences Act, which requires the clerk of the court to notify the defendant and the prosecutor of the time and place for trial. The Certificate of Offence is valid and I have jurisdiction over the offence.

5. CONCLUSION

¶ 68 I must say that I am impressed with the defendant's argument and interpretation of certain sections he made reference to. The interplay between the common law, sections in the P.O.A. and the Regulations created a very logical and complex argument regarding the impugned defects. Unfortunately the defendant's argument must still overcome the underlying philosophy of the P.O.A and section 34 of the P.O.A. regarding amendments. The fundamental principle behind the P.O.A. is that substance prevails over form, purpose prevails over procedure, and merit prevails over technicalities.

¶ 69 Sections 3(2) and 3(5) of the P.O.A. requires the issuing officer to sign the certificate of offence to certify his or her belief that a defendant has committed an offence and that the defendant was personally served by the officer with an offence notice, which contains the particulars of that offence. The officer signing the certificate of offence subsequent to the delivery of the offence notice to the defendant is not an amendment that is improper. This officer's signature on the certificate subsequent to the delivery of the notice is not the type of addition or change to the certificate of offence contemplated in R. v. Koza. The court held in the Koza decision that the certificate of offence was invalid because the officer had altered the certificate after the offence notice had been served on the defendant. The changes were to the particulars of the charge contained in the certificate of offence. There were no such material changes, alterations or deletions to the certificate of offence in the case at bar. Therefore, the officer's signature on the defendant's certificate of offence is part and parcel of a valid certificate.

¶ 70 Even if the impugned amendment on the certificate of offence brought the validity of service into question, the appearance of the defendant in court cures any defect of service.

¶ 71 In regards to issuing a trial date at the time of the request, immediacy is not a requirement. Section 5.1(5) is silent about when the notification has to be made. The only requirement is that notification be made. Under this section, the court clerk shall notify the defendant and the prosecutor of the trial date. "Shall" in section 5.1(5) is imperative only to the act of notification. As this section is silent to when the notification must be made, the actual time the defendant receives notification is not fatal. The court clerk fulfils his or her duty if the notification is made. The defendant is nevertheless protected under s. 11(b) of the Charter if an unreasonable delay occurs between requesting the trial and the trial date.

¶ 72 There was no prejudice to the defendant's ability to make full answer and defence, nor did he suffer any prejudice or injustice as a result of not immediately receiving a trial notice at the time the request for the trial was made. It is difficult to impute any prejudice onto the defendant, when the defendant was represented by a traffic agent. It had been the agent who had filed the notice seeking a trial. The agent had requested the notice of trial be sent to the agent's business address. This appears to be for the convenience of the agent and not for the

defendant's expedience. Therefore, one who relies on an agent to protect their interests cannot now claim their interests have been prejudiced, or that he or she was unjustly treated by the clerk of the court, especially when it was the agent who made the request for trial. The agent did nothing else until they appeared before me on December 1, 2000. Since there is no prejudice or injustice in this case, then there can be no abuse of process inferred to court administration. The defendant's case was definitely not the clearest of cases for a stay of proceedings.

¶ 73 In short, there is no requirement in the P.O.A., especially under section 5.1(5) for immediate notification. The impugned failure of the clerk to immediately notify the defendant of the trial date is therefore not fatal. There has been compliance with the procedure mandated in section 5.1(5) of the Provincial Offences Act, which requires the clerk of the court to notify the defendant and the prosecutor of the time and place for trial.

¶ 74 The Certificate of Offence is therefore valid and survives these two collateral attacks.

6. ORDER

¶ 75 The motion by the defendant to quash his certificate of offence based on two errors is dismissed.

QUON J.P.

* * * * *

Appendix

¶ 76

Cases Considered or Referred To:

R. v. Chaulk (January 21, 1997) (Ont. Ct. (Prov. Div.)), per Quon J.P.
R. v. Dealwis (July 17, 1995) (Ont. Ct. (Prov. Div.))
R. v. Discovery Place Limited et al (Ont. Ct. (Gen. Div.)) (Feb. 15, 1996), File no. 68342/95, MacDougall J. at Peterborough
R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.), [1981] O.J. No. 142, per Jessup, Zuber and Weatherston JJ.A.
R. v. Koza 2[1995] O.J. No. 4278 (Ont. Ct. (Prov. Div.)) per Smith J. at Brampton
R. v. Kwoon [1999] O.J. No. 4989 Ontario Superior Court of Justice per Howden J.
R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.)
R. v. Ontario (Min. of Transportation) (May 9, 1996) (Ont. Ct. (Gen. Div.)), per Meehan J. at Sudbury.
R. v. Murugan [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)), per Knazan J. at Toronto
R. v. Pham; R. v. Oehlert [1996] O.J. No. 4366 (Ont. Ct. (Prov. Div.)) per Quon J.P.
R. v. Sault Ste. Marie, (1978), 3 C.R. (3d) 30 (S.C.C.)
R. v. Theosanamoorthy [1997] O.J. No. 6175 (Ont. Ct. (Prov. Div.)) per Jogendra J.P. at Scarborough

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