** Unedited **

Indexed as:

R. v. Pham

Between
Her Majesty the Queen, respondent, and
Vinh Van Pham and Johann Oehlert, moving parties (defendants)

[1996] O.J. No. 4366
DRS 97-03211

Ontario Court of Justice (Provincial Division)
Provincial Offences Court - Etobicoke, Ontario
Quon J.P.

Heard: July 9, 1996.
Judgment: November 14, 1996.
(36 pp.)

Ruling on Motion to quash (S. 36 Provincial Offences Act)

Motor vehicles — Offences — Prosecutions — Summons or ticket, validity of.

Motion by the defendants for a pre-trial order quashing their respective certificates of offence for speeding offences by reason of a defect on the face of the certificates. The Pham certificate did not show the set fine amount, although the total payable fine amount was present on it and the offence notice. In the Oehlert application the set fine and the total payable fine amounts were shown incorrectly. The Crown requested that the certificates be amended to cure the deficiency in form.

HELD: Motions granted. The certificates were quashed. The Oehlert certificate incorrectly stated a higher set fine. The first opportunity Oehlert would have had to speak about the defect would have been at trial, as a JP did not have the jurisdiction to quash a proceeding or amend a certificate in the Guilty Plea court. If a certificate of offence or the offence notice contained an incorrectly written amount for the legally ordered set fine amount for a particular offence under Part I of the Provincial Offences Act and that written amount was higher than the legally ordered set fine, then the certificate and notice was a nullity. It was void ab initio and could not be amended. If the defendant had done nothing after receiving the offence notice, it would have been quashed under the Fail to Respond mechanism of section 9 of the Provincial Offences Act. It would have been unjust to reward passivity and to punish a defendant who actively contested a defect on his certificate. The Pham certificate of offence and offence notice were missing the requisite set fine and fell within the class of defective certificate that could be amended at the discretion of the trial court. The proposed amendment would have failed to serve the ends of justice, for the same reasons as in the Oehlert case. If the defendant had done nothing, the certificate would have been quashed under the Fail to Respond mechanism as in the Oehlert case.

Cases Considered:

Day v. R. (1985), 36 M.V.R. 221 (Ont. Dist Ct.). per Hurley J.
R. v. Alves (February 18, 1994) (Ont. Prov. Div.) per Silverman J.; additional reasons delivered on March 4, 1994.
R. v. Bagg (January 11, 1991) (Ont. Prov. Div), per Payne J.
R. v. J.F. Brennan and Associates Limited (1981), 61 C.C.C. (2d) 1, (Ont. H.C.), per Osler J.

R. v. Bertolucci et al (June 23, 1995) (Ont. Prov. Div.), per Reinhardt J.
R. v. Corbeil and Associates Ltd. (1984), 27 M.V.R. 227 (Ont. Prov. Ct.), per Langdon J.
R. v. Deangelis (November 10, 1994) (Ont. Prov. Div.), per Bokusky J.
R. v. Discovery Place Limited et al (Ont. Gen. Div.) (Feb. 15, 1996), File no. 68342/95 at Peterborough, per MacDougall J.
R. v. Doukas (May 3, 1996) (Ont. Prov. Div.), per August J.
R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.)
R. v. Kimberly-Clark Canada Inc. (August 21, 1995) (Ont. Prov. Div.), per Bice J.
R. v. Lam (March 18, 1996) (Ont. Prov. Div.), per Silverman J.
R. v. Moore (1988), 41 C.C.C. (3d) 289 (S.C.C.)
R. v. Murugan (December 16, 1994) (Ont. Prov. Div.), Knazan J.
R. v. Sault Ste. Marie, (1978), 3 C.R. (3d) 30 (S.C.C.)
Thermoset Thermoplastic Custom Moulder Ltd. v. Ontario (Attorney General) (November 26, 1992) (Ont. Gen. Div.) at Brampton, per Caswell J.
R. v. Thompson (July 23, 1981) (O.N.C.) at Toronto, per Griffiths J.
Re R. And Village of Bobcaygeon (1974), 17 C.C.C. (2d) 326 (Ont. C.A.)
R. v. Whin Enterprises Inc. (May 16, 1994) (Ont. Prov. Div.) at Toronto, Sparrow J.
R. v. Windsor (City) (1982), 12 C.E.L.R. 11 (Ont. Prov. Ct.)

Authorities Referred To:

Ontario Provincial Offences Procedure, Drinkwalter and Ewart (Toronto, Canada: The Carswell Company Limited, 1980)
Fitch, G.J., "Sufficiency of Information and Curative Powers under s. 26(3) of Ontario's Provincial Offences Act: A Brief Annotation" (1989), 1 J.M.V.L. 109

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 128.
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 1(1), 2(1), 3(1), 3(2), 3(2)(a), 3(2)(b), 7, 9(1)(a), 9(1)(b), 13(1)(a), 33, 33(1)(a), 33(1)(b), 33(2), 34, 34(1)(a), 34(1)(b), 34(1)(c), 34(2), 34(3)(a), 34(3)(b), 34(4)(a), 34(4)(b), 34(4)(c), 34(4)(d), 34(5), 34(6), 35, 36, 36(1), 36(2), 37, 49(1), 90, 90(1)(a), 90(1)(b), 90(2).
Regulation 950, R.R.O. 1990 - Proceedings commenced by Certificate of Offence, ss. 1(1), 2(1).
Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200, rules 1, 2(1), 3, 6, 15(1), 16.
Ontario Regulation 786/94.

Counsel:

J. Carter, for the Crown.
A. Le, agent for the defendant Vinh Van Pham.
P. Periti, agent for the defendant Johann Oehlert.

QUON J.P.: —

1. INTRODUCTION

¶ 1 The Defendants move for a pre-trial order to quash their respective certificates of offence pursuant to section 36 of the Provincial Offences Act, R.S.O. 1990, c. P.33 [as amended] (hereinafter referred to as the "P.O.A."). Both defendants are charged under section 128 of the Highway Traffic Act, R.S.O. 1990, c. H.8 [as amended] for speeding offences. The Defendants desire the certificates be quashed by reason of a defect on the face of their certificates. Both Defendants received offence notices issued under Part I of the P.O.A. Correspondingly, the same defect occurs on their offence notices. The offence notice is the mirror image of the certificate of offence save for a minor change regarding the name of the documents.

¶ 2 This judgment contains my ruling on both applications as they are similar in context. The defect in the Pham application is the absence of the set fine amount on the face of the certificate of offence and the offence notice, albeit the total payable fine amount is present on both documents.

¶ 3 In the Oehlert application the set fine and the total payable fine amounts are present on both the certificate and the notice, but they are incorrect -- the set fine amount inscribed by the officer who issued the certificate is a value numerically greater than the actual set fine designated for the alleged offence.

¶ 4 The Provincial Prosecutor, Mr. Carter, argues that leaving the set fine off the certificate is not central to the charge and that the fine only goes to the penalty stage of the trial. He also says that the absence of the set fine is only a defect in form. Furthermore, Mr. Carter argues it is irrelevant that the fine is incorrectly stated on the certificate of offence as the court has jurisdiction at the sentencing portion of the proceeding to deviate from the set fine. Ergo, the Prosecutor requests the certificates be amended to cure the deficiency in form. The Prosecutor submits that the ruling in the unreported decision of R. v. Lam (March 18, 1996) (Ont. Prov. Div), per Silverman J., should be followed and is binding on the cases at bar.

¶ 5 The agent for Mr. Pham relies on the unreported decision of R. v. Bertolucci et al (June 23, 1995) (Ont. Prov. Div), per Reinhardt J., and the agent for Mr. Oehlert relies on the unreported decision in R. v. Deangelis (November 10, 1994) (Ont. Prov. Div.), per Bogusky J., to support their motions to quash.

2. THE LAW

[A] GENERAL

¶ 6 The commencement of a proceeding by a certificate of offence is governed by subsection 3(1) in Part I of the P.O.A.

> 3. (1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court.

¶ 7 In the cases at bar, the defects on both certificates of offence pertain to the set fine that should appear on the face of the certificates. Subsection 3(2) of the P.O.A. requires the proper set fine be placed on the certificate of offence and the offence notice by the officer issuing the certificate of offence. This subsection also requires the officer to complete both the certificate and offence notice.

> 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.

¶ 8 Section 13 of the P.O.A. allows the Lieutenant Governor to make regulations respecting the forms for the offence notice and the certificate of offence used under Part I.

> 13. (1) The Lieutenant Governor in Council may make regulations,
> (a) prescribing the form of certificates of offence, offence notices and summonses and such other forms as are considered necessary under this Part;

¶ 9 The actual Form used for certificates of offence and offence notices for provincial offences is governed by Regulation 950 (Proceedings Commenced by Certificate of Offence), R.R.O. 1990 [as amended]. Subsection 1(1) of Regulation 950 states: "A certificate of offence shall be in Form 1." Subsection 2(1) of the same regulation states: "An offence notice shall be in Form 3." The certificates of offence and the offence notices in the cases at bar conform to the last regulation amending Regulation 950 in respect of the layout and content of

Form 1 and Form 3. Ontario Regulation 786/94 made on October 27, 1994 (filed on December 16, 1994) is the last regulation passed amending the Forms to be used for the certificate and the notice. Regulation 786/94 amended the certificate and notice by adding the victim fine surcharge wording to the certificate and the notice. The certificates of offence in these applications before me fulfil the requirements of Regulation 786/94.

¶ 10 A portion of the certificate of offence which is at issue is produced below in Figure "A". This certificate portion is identical to the comparable portion on the offence notice.

figure A

SET FINE OF/L'AMENDE FIXÉE DE $	$	TOTAL PAYABLE	
(INCLUDING COSTS) IS INCLUDED IN THE TOTAL PAYABLE ALONG WITH THE APPLICABLE VICTIM FINE SURCHARGE (INCLUANT LES FRAIS) ET LA SURAMENDE COMPENSATOIRE APPLICABLE SONT COMPRISES DANS LE MONTANT TOTAL À PAYER.		$	$
		MONTANT TOTAL EXIGIBLE	

¶ 11 The set fine referred to in subsection 3(2) of the P.O.A. is defined in subsection 1(1) of the same Act.

1(1) In this Act,

> ...
> "set fine" means the amount of fine set by the Chief Judge of the Ontario Court (Provincial Division) for an offence for the purpose of proceedings commenced under Part I or II. ("Amende fixée")

¶ 12 Set fines have to be extant before an officer can use the offence notice and certificate process under Part I or Part II of the P.O.A. Part II governs specifically parking infractions. The provision requiring the existence of set fines is found in Rule 6 of the Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, Regulation 200, R.R.O. 1990, [as amended]. Other relevant rules applicable to these motions are:

Regulation 200

1. In these rules, "Act" means the Provincial Offences Act.

2.(1) these rules apply to proceedings under the Act and a word or term in the Act has the same meaning in these rules as it has in the Act.

3. These rules shall be construed liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding.

...

6. For the purpose of proceedings under Part I or II of the Act, the amount of fine set by the court for an offence is such amount as may be set by the Chief Judge of the Ontario Court (Provincial Division).

...

15.(1) The following matters shall be dealt with only in court:

1. Quashing a proceeding, except under section 9, 18.3 or 18.5 of the Act or under section 205.7 of the Highway Traffic Act.
2. Amending an information, or a certificate of parking infraction.

16. A justice shall not quash a proceeding or amend a certificate of offence in respect of a defendant who is appearing before the justice for the purposes of section 7 of the Act.

¶ 13 Drinkwalter and Ewart discuss set fines on page 39 of their reference work: "Ontario Provincial Offences Procedure" (Toronto, Canada: The Carswell Company Limited, 1980):

> "a set fine is substantially the same as what was formerly called an out-of-court settlement under s. 7(4) of The Summary Convictions Act. It defines the fine which a defendant can pay by pleading guilty without attending court. The availability of a set fine determines whether an offence notice, with its attendant new options, can be used in any particular case. The rules of court provided that the set fine is to be created by the Chief Judge of the Provincial Offences Courts"

¶ 14 At page 49 of their work, Drinkwalter and Ewart confirm that a set fine must exist before an offence notice may be used:

> "Once an officer has decided that it is appropriate to commence proceedings under Part I, there is only one restriction on the use of an offence notice. As indicated by s. 3(2)(a), he can use an offence notice only if there is a set fine for the offence."

¶ 15 The Defendants' certificates were issued pursuant to infractions against the Highway Traffic Act. Both applicant Defendants were charged with driving over the allowable speed limit. The set fines pertaining to offences under the Highway Traffic Act have been set by the Chief Judge. The Chief Judge's order follows:

Ontario Court of Justice
Provincial Division

It Is ordered, pursuant to the provisions of the Provincial Offences Act and the rules for the Ontario Court of Justice, Provincial Division, that the amount set opposite each of the offences in the attached schedule of offences under the Provincial Statutes and Regulations thereunder is the Set Fine, including costs, for that offence.
It Is furthered ordered that, upon date of the coming into effect of this order, all previous orders will continue to be in force only in relation to offences committed prior to the date this order is to take effect.
This order is to take effect November 16, 1992.
Dated at Toronto, this 5th day of November, 1992.
"Sidney B. Linden"
Sidney B. Linden, Chief Judge
OntarIo Court of Justice
Provincial Division

¶ 16 The relevant fines for Highway Traffic Act offences are found in Schedule 43 of the Chief Judge's Order:

SCHEDULE 43
THE HIGHWAY TRAFFIC ACT

ITEM	COLUMN 1	COLUMN 2 SECTION	SET FINE (INCLUDING COSTS)
...			

340.	Speeding	128	SCHEDULE B

¶ 17 Schedule 43 then refers the reader to Schedule B to determine the set fine for speeding offences pursuant to section 128 of the Highway Traffic Act

Schedule B
Highway Traffic Act
Set Fines

	Kilometres	Set Fine
a)	1 - 19 kilometres per hour over the maximum speed limit	$2.50 per kilometre plus costs of $5.00
b)	20 - 34 kilometres per hour over the maximum speed limit	$3.75 per kilometre plus costs of $5.00
c)	35 - 49 kilometres per hour over the maximum speed limit	$6.00 per kilometre plus costs of $5.00
d)	50 kilometres per hour or more over the maximum speed limit	no out-of-court settlement

¶ 18 The procedure for prosecuting and trying infractions issued under the Highway Traffic Act is governed by the P.O.A. Section 2 of the P.O.A. describes the purpose and the philosophy of the P.O.A.:

> 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.

¶ 19 My jurisdiction to quash a certificate of offence pursuant to a pre-trial motion to quash is found in the P.O.A. under section 36.

> 36.(1) An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court.
>
> (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.

¶ 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".

¶ 21 In the unreported decision of R. v. Discovery Place Limited et a (Ont. Gen. Div.) (Feb. 15, 1996), File no. 68342/95 at Peterborough, MacDougall J. states:

> "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."

¶ 22 In a provincial offences case, Dickson J., as he was then, 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 states:

> "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.

¶ 23 Academic writing has also touched on this subject and conclude the days of formal and technical argument regarding defects have been abandoned by the courts, and the merits of the case approach is now prevailing. The leading tome on the interpretation of the P.O.A. is Drinkwalter and Ewart's "Ontario Provincial Offences Procedure". At pp. 143-144 of their tome the authors affirm the principle espoused by the P.O.A. that the substance of the case is the foremost consideration, and not a misguided reliance on form:

> "Assuming that a defect is found in a particular count the new rule is laid down in s. 37(2) [now subsec. 36(2) of the P.O.A.] as follows:
>
> > The court shall not quash an information or certificate unless an amendment or particulars under section 34, 35 or 36 [now ss. 33, 34 and 35 of the P.O.A.] would fail to satisfy the ends of justice. [Emphasis added]
>
> This section constitutes a clear, unequivocal direction to the courts that defective informations are not to be quashed, except in unusual circumstances. Instead the broad curative powers set out in ss. 34 to 36 [now ss. 33 to 35] are to be used. The purpose here, as throughout the entire Act, is to reinforce the basic premise that provincial offences are not criminal, and are not to be treated as if they were."

Further, at page 144 Drinkwalter and Ewart state:

> "It is not without significance, however, that even in criminal law there has recently been a complete shift away from earlier doctrines. But of greater significance is the Act's clear statutory enunciation of a dramatic departure from the previously prevailing rules. Such a deliberate, marked legislative change requires an interpretation by the courts which is consistent with both its letter and underlying spirit.
>
> If this spirit is put into practise by the courts, then there will be very few, if any, informations quashed. The rule in s. 37(2) [now subsec. 36(2)] applies to all defects, substantive as well as technical. While the power to quash is left open in limited circumstances, it is expressly restricted to cases in which the application of ss. 34 to 36 [now 33 to 35] would fail to satisfy the ends of justice."

Also Drinkwalter and Ewart at page 147 conclude:

> "Perhaps the only basis now for quashing an information is a failure to relate to an offence known to law. If it relates to an offence, but simply misdescribes it or leaves out one or more essential elements or is duplicitous, an information is defective, but is not a nullity. It can and should be amended."

¶ 24 Sections 33, 34 and 35 of the P.O.A. follow:

> 33.(1) A defendant may at any stage of the proceeding make a motion to the court to amend or to divide a count that,

(a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactments that creates or describes the offence; or
(b) is double or multifarious, on the ground that, as framed, it prejudices the defendant in the defendants defence.

(2) Upon a motion under subsection (1), where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

Whether the defect is one of substance or form it may be amended under the provisions of s. 34(1) of the P.O.A. at any time during the proceeding. Section 34 also provides guidance in deciding whether an amendment is warranted or not.

34.(1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

(a) fails to state or states defectively anything that is requisite to charge the offence;
(b) does not negative an exception that should be negatived; or
(c) is in any way defective in substance or form.

(2) the court may, during the trial, amend the information or certificate as may be necessary if the mailers to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.
(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

(a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
(b) the place where the subject-mailer of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

(a) the evidence taken on the trial, if any;
(b) the circumstances of the case;
(c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law.
(6) An order to amend an information or certificate shall be endorsed on the information or certificate as part of the record and the trial shall proceed as if the information or certificate had been originally laid as amended.

Section 35 of the P.O.A. allows the court at its discretion to order particulars to the defendant to ensure a fair trial.

> 35. The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceeding, be furnished to the defendant.

¶ 25 Where an amendment to cure a defect on a certificate of offence is granted that may prejudice the defendant's defence, the trial court may grant an adjournment pursuant to subsection 49(1) of the P.O.A. to remedy the prejudice. If an adjournment results from the amendment then the court may also award costs to the defendant under section 37 of the P.O.A.

> 49(1) The court may, from time to time, adjourn a trial or hearing but, where the defendant is in custody, an adjournment shall not be for a period longer than eight dart without the consent of the defendant.
>
> 37. Where the information or certificate is amended or particulars are ordered and an adjournment is necessary as a result thereof the court may make an order under section 60 for costs resulting from the adjournment.

¶ 26 Notwithstanding the trend to use the P.O.A.'s broad curative and amendment powers on defective certificates and informations, such amendments or cures ought to be restrained, if causing or not ameliorating any prejudice to the defendant. If the defendant suffers clear prejudice that cannot be remedied by an adjournment or an award of costs resulting from the adjournment pursuant to section 37 of the P.O.A. then the court should quash the proceedings. If the prejudice can be remedied then the certificate may be amended if it can be done without injustice being done. At page 150 Drinkwalter and Ewart state that:

> "Subsection (4) [subsection 34(4) of the P.O.A] requires that the issue of prejudice be canvassed by the court; the only real difference between amendments at this stage and those before trial is that if prejudice is unavoidable the amendment might be refused at this stage."

¶ 27 Likewise, procedural fairness and the defendant's rights must still be considered by a court before it quashes or amends a defective certificate even if it rules any prejudice to defendant or his defence can be remedied by adjournment or other appropriate remedy. The principles of justice, therefore, should not to be usurped by the P.O.A.'s broad curative powers to amend or remedy defective certificates or informations. This proposition is supported by a statement at page 114 in the article, "Sufficiency of Information and Curative Powers Under Section 26(3) [now 25(3)] of Ontario's Provincial Offences Act: A Brief Annotation", Fitch, Gregory J. (1989) 1 J.M.V.L. 109.

> "It is submitted that the existence of such curative power is consistent with the underlying philosophy of Ontario's Provincial Offences Act to "simplify, clarify and expedite [proceedings] but not to do so as the expense of any right bearing upon procedural fairness or the attainment of a proper verdict on the merits."

¶ 28 Moreover, even where there is no clear prejudice from a proposed amendment or where the prejudice can be remedied, the Provincial Offences Appeal Court has declined to amend defective certificates by using the exception clause of subsection 36(2) of the P.O.A. Defective certificates according to that clause should not be amended if the proposed amendment "would fail to satisfy the ends of justice".

¶ 29 Osler J. at page 5 in R. v. Brennan & Associates Limited (1981) 61 C.C.C. (2d) 1, (Ont. H.C.J.) in reference to the P.O.A. states:

> "The statute obviously presents a built-in bias in favour of amendment over quashing and leaves it to the Court to consider whether or not this can be done without injustice. It seems to me that no rigid limits can be laid down and that each case must rest upon its own merits."

¶ 30 Osler J. in Brennan also states:

> "The wording of s. 37(2) of the Provincial Offences Act, 1979 [presently subsection 36(2)], that "the court shall not quash an information or certificate unless an amendment or particulars under section 34, 35 or 36 would fail to satisfy the ends of justice" (emphasis mine) reinforces the view that it must appear that injustice would result from an amendment."

¶ 31 Defects in process or on the offence notice can be cured by subsection 90(2) of the P.O.A. If it appears the defendant has been misled by a defect or irregularity on the offence notice then the trial court may grant an adjournment with costs and other appropriate remedy in favour of the defendant, in order to protect the defendant's right to a fair trial. This section also illustrates the P.O.A.'s broad curative powers.

> 90.(1) The validity of any proceeding is not affected by,
>
> (a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or
> (b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.
>
> (2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs.

¶ 32 The line of reasoning drawn from the decided cases is that the majority of defective certificates of offence should not be quashed automatically. These certificates may be amended by the court to cure the defect. The remaining class of defective certificates of offence cannot be amended because of their fatal error. The former category of defective certificate may be referred to as "amendable defective certificates". The latter class of defective certificates are termed "invalid defective certificates". These invalid defective certificates are nullities or certificates that are void ab initio.

¶ 33 Furthermore, within the larger class of defective certificates, the amendable class of defective certificates, there is a subclass categorized as "irremediable defective certificates". These irremediable certificates are amendable certificates that should not be amended as the proposed amendment would either prejudice the defendant's defence or would fail to satisfy the ends of justice.

¶ 34 In sum, there are two classes of deficient certificates of offence -- the certificate with the amendable defect and the defect that nullifies the certificate. A small number of amendable defects should however not be amended. These defects cannot be remedied by amendment as the amendment would fail to satisfy the ends of justice or would prejudice the defendant. These are irremediable amendable defects.

[B] AMENDABLE DEFECTIVE CERTIFICATES

¶ 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.

¶ 36 In the unreported case of Ontario (Ministry of Labour) v. NMC Canada Inc. (September 5, 1995), Doc. CA C11366 (Ont. C.A.) the court found that it has a broad power of amendment in proceedings under the Provincial Offences Act. The court said that absent prejudice, it has a discretion in civil proceedings to add a defendant to an existing action despite the expiry of a limitation period. The court said it had a similar discretion under the Provincial Offences Act. The court of Appeal also found that the proposed amendment to the

information would not work an injustice. In the circumstance of the case the court found there was no injustice in amending the information to charge the two partners instead of the firm of NMC Canada Inc. A worker died in an accident happening at the two partners' (NMC and Stamford) place of business. The court found that amending the information pursuant to section 34 of the P.O.A. to add NMC and Stamford as defendants would not fail to satisfy the ends of justice.

¶ 37 In R. v. Windsor (City) (1982), 12 C.E.L.R. 11 (Ont. Prov. Ct.) per Nosanchuk J. an amendment to the information was allowed by the court during the course of the trial. In this case, Count 3 of the information laid against the defendant was inadvertently withdrawn in the course of the proceedings. Counsel for the Crown had meant to withdraw Count 2 and mistakenly asked the court to withdraw Count 3, which the court did. The Crown then sought to amend Count 2 with the charge that was originally stated in Count 3 before it had been withdrawn. At page 13, Nosanchuk J. said:

> "the Court has determined that the defendant was not misled or prejudiced in his defence by the inadvertent error made in withdrawing this. The court has determined that the defendant would not be misled or prejudiced in his defence with the proposed amendment being made. Having regard to the merits of the case, the proposed amendment can be made without an injustice being done and the Information is amended accordingly"

¶ 38 Sparrow J. in the unreported decision of R. v. Whin Enterprises Inc. (May 16, 1994), (Ont. Prov. Div.) at Toronto concluded:

> "In my view, the above ruling in 1974 embodies the principle later clarified in Moore and Webster supra as well as R. v. Côté 33 C.C.C. (2d) 353 (S.C.C.): namely, that a defective information will not be a nullity so long as it gives fair notice of the offence to the accused so that he can prepare a defence."

In R. v. Whin Enterprises the Justice of the Peace at trial had found that a charge which had not referred to any Act was a nullity. The Crown argued the Justice of the Peace had erred because the charge was sufficient as worded or should have been amended to include reference to the Liquor Licence Act which created the offence. Sparrow J. allowed the Crown appeal and found that any prejudice which might be caused by such a technical insufficiency could be cured by an amendment or an order for particulars and an adjournment. It was found that the defendant knew what the offence was.

¶ 39 In the unreported decision of Thermoset Thermoplastic Custom Moulder Ltd. v. Ontario (Attorney General) (November 26, 1992) (Ont. Gen. Div.) at Brampton, per Caswell J., there was an application in the nature of certiorari, to quash an order made by the Justice of the Peace to amend an information by deleting the reference to Regulation 691 and substituting therefore Regulation 692. The application to quash the order to amend was denied.

¶ 40 Thermoset Thermoplastic Custom Moulder Ltd. was charged as an employer for committing the offence of failing, as an employer, to ensure that the measures and procedures prescribed by section 28 of Regulation 692, R.S.O. 1980, were carried out in the workplace contrary to section 14(1)(c) of the Occupational Health and Safety Act. The following particulars were given by the Crown: A 25 ton compression (moulding) machine with an exposed moving part that may have endangered the safety of a worker, Mr. Kawalsingh, was not equipped with and guarded by a guard or other device that prevented access to the moving part. The worker's left hand was trapped in the machine and an injury resulted. Caswell J. said:

> 'Counsel has also argued that the applicant is prejudiced because the information sets out the wrong regulation. It is my view that this is not so since the particulars on the information are set out in sufficient detail so that the accused is able to make a full defence at trial. The information meets the test set out by de Grandpre J. in R. V. Cote, (1978), 1 S.C.R. 8, 73 D.L.R. (3d) 752, 13 N.R. 271.

> "... the golden rule is for the accused to be reasonably information of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."'

¶ 41 In Drinkwalter and Ewart at page 149 of their tome, the authors discuss the principles of amendment under the P.O.A.:

> 'It will be seen that subss. (1) and (2) of s. 35 [now s. 34] permit almost everything to be cured by amendment.
> ...
> Certainly there should be no difficulty in amending an information which omits an essential averment, or otherwise misstates the offence. As long as the defendant knows the case he has to meet, or is given an adjournment if the amendment results in a charge which takes him by surprise, there is no justification under the Act for quashing instead of amending the information."

¶ 42 Generally, most defective certificates of offence fall in the amendable class. They may be amended by the trial court if there is no prejudice or injustice caused by the amendment.

[C] INVALID DEFECTIVE CERTIFICATES

¶ 43 In exceptional situations a defect on a certificate of offence renders the certificate an absolute nullity or void ab initio. Some amendable defects have been declared nullities by the courts when the prejudice caused by the proposed amendment cannot be cured or when a court has to prevent an injustice.

¶ 44 As Drinkwalter and Ewart concluded in their tome at page 147, "[p]erhaps the only basis now for quashing an information is a failure to relate to an offence known to law". This was affirmed in Day v. R. (1985), 36 M.V.R. 221 (Ont. Dist. Ct.) per Hurley J. The court found that an information which did not disclose an offence known to law was not capable of amendment and must be quashed.

¶ 45 Another example of a deficiency on a certificate or information that is a nullity is one in which a certificate or information failed to disclose whether a charge had been laid within the limitation period prescribed. In Re R. And Village of Bobcaygeon (1974), 17 C.C.C. (2d) 236 (Ont. C.A.) it was decided by the Court of Appeal that it cannot be determined from the face of the information whether it was laid within the six-month limitation period prescribed for summary conviction prosecutions. The Court found this defect on the charging document to render the proceeding a nullity. At page 240 of the judgment:

> "The defendant and the Provincial Judge were entitled to know, by perusing the information, the components of the offence, the time and place of its commission and that the informant had laid the information within the prescribed time. The information, which failed to convey this information, was a nullity."

¶ 46 The principle in R. v. Moore (1988), 41 C.C.C. (3d) 289 (S.C.C.) is that the court has no jurisdiction to amend an information that is a nullity. However, all defective certificates or informations are not nullities. An information will only be a nullity if it is so badly drawn that it fails to completely give the defendant notice of the offence with which the defendant is charged.

¶ 47 In the unreported decision of R. v. Bagg (January 11, 1991) (Ont. Prov. Div.), Payne J. refers to a decision of His Honour Judge Downie in which an information was quashed for not telling on the face of it where the Provincial Offences Court was located which had jurisdiction over the information.

> "His Honour Judge Downie in quashing the ticket ruled as follows:
>
> > "I think the information ought to be quashed in this case. The Defendant I think is entitled upon getting the ticket to know where they are supposed to go to deal with it, and I say nothing about the lack of information on the back of the ticket, but the one

> the front of the ticket seems to me is a defect that vitiates the proceeding, so on the Paulter matter all right, I have endorsed this as follows: Appeal allowed, information quashed due to insufficient information on face of offence notice portion of ticket, not telling where Provincial Offences Court is, see Exhibit One."

¶ 48 In the unreported decision of R. v. Doukas (May 3, 1996) (Ont. Prov. Div.), August J. at page 6 refers to prejudice that cannot be remedied as a reason for quashing and the proceeding being a nullity. August J. refers to incurable prejudice caused by the proposed amendment as creating a situation that is a nullity,

> "It is therefore clear that defects in language do not make information (sic) and certificates void. The only basis for quashing an information or certificate is a failure to relate to an offence known to law or an amendment would cause prejudice to the defendant that cannot be removed whether by an adjournment or other means. This would create a nullity and under these circumstances the Justice of the Peace would be justified, in order to prevent an injustice, to quash the information or certificate acting "ex mero motu".

¶ 49 In a situation in which a certificate of offence fails to disclose an offence known to law, or fails to disclose whether a charge had been laid within the limitation period prescribed, or is so badly drawn that it fails to completely give the defendant notice of the offence with which the defendant is charged, or fails to show which court has jurisdiction over the certificate, or a proposed amendment would cause incurable prejudice or injustice to a defendant, then these certificates would be invalid or nullities. These are invalid defective certificates.

[D] IRREMEDIABLE AMENDABLE CERTIFICATES

¶ 50 Defective certificates of offence that are amendable may still be quashed if the proposed amendment is prejudicial or misleads the defendant. If the prejudice or misleading circumstance cannot be cured by adjournment or other remedy then it should be quashed. Further, if the prejudice or misleading circumstance is remediable but the amendment cannot be made without injustice occurring, then the certificate must also be quashed. These amendable defective certificates are hence irremediable.

¶ 51 Reinhardt J. in the unreported decision of R. v. Bertolucci et al (June 23, 1995) (Ont. Prov. Div.) found he had jurisdiction to amend a defective certificate of offence but declined to do so because the certificate if amended would fail to satisfy the ends of justice.

¶ 52 At the trial stage in R. v. Bertolucci, Justice of the Peace McCurdy decided to quash the 3 certificates of offence issued to the defendants for the failure of the police officer to place his name on the offence notice. That is, the notices did not disclose the name of the person (the informant) whose belief and certification is necessary for a valid offence notice. The Crown appealed to the Provincial Offence Appeal Court. Reinhardt J. dismissed the Crown's Appeal and found Justice of the Peace McCurdy's conclusion valid and correct.

> Reinhardt J. states:
> "And although the Provincial Offences Act provides for a remedy short of quashing the certificate and suggests that in general such a remedy is not appropriate under the Provincial Offences Act. And I refer specifically to Sections 35, 90 and 36. Ninety, for example, suggested in dealing with offence notices that irregularities in form or defects in substance of an offence notice do not affect the validity of a proceeding. And if you follow that theme in the Provincial Offences Act of Section 36, it says, "an objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash, and the court shall not quash unless and (sic) amendment or particulars under 33, 34 or 35 would fall to satisfy the ends of justice".
> It is my view ... that failing to put the informant on the offence notice is not something that can property be cured by particulars at the time of trial. And although there is jurisdiction to amend, all those particulars in my view deal [with] the details of the offence and they are describing circumstances where the offence has not been stated property. They do not

> contemplate in my view the actual addition of the name of the informant. That is something which is so basic. I agree with the Justice of the Peace; is to make the notice a useless document for the purposes of the defendant. And the principles of justice would not be served by permitting an amendment to be made of that basic element. So I am not prepared to amend and I suggest that the appropriate decision was that of the Justice of the Peace."

¶ 53 His Honour Judge Bice in the unreported decision R. v. Kimberly-Clark Canada Inc. (August 21, 1995) (Ont. Prov. Div.) decided that a request by the prosecutor to amend the information to substitute one corporation for another as the defendant would be inappropriate. At page 12 of his decision Bice J. concludes:

> "Therefore under the circumstances of this case I would decline the application to amend the information as to the name of the defendant and for reasons as stated above, it would in these circumstances to me, be an obvious prejudice to suggest a new defendant."

Bice J. described the obvious prejudice in his reasons at page 11:

> "To amend to a different corporate entity would, in fact, replace the present defendant with a new defendant. The new defendant was not served with any documentation. Since the limitation period has long passed to lay a charge and they name a substituted defendant, would deprive that defendant of that defence."

In reference to the P.O.A.'s broad powers to amend Bice J. at page 8 of his judgment states:

> "I would agree here that while the amendment powers set out in Section 34(1) of the Provincial Offences Act, the powers there are very broad, the Court must consider whether, on an application to amend, whether it can be done without injustice or prejudice to a defendant. To substitute one defendant for another is basically an injustice to the substituted defendant except in special circumstances."

¶ 54 In R. v. Corbeil and Associates Ltd. (1984), 27 M.V.R. 227 (Ont. Prov. Ct.), per Langdon J., the court was not clear who should be named as the defendant if it were to grant an amendment. The court found it was in a position where any amendment might well result in an injustice being done. At page 235, Langdon J. said:

> "Most important, I must consider s. 35(4)(d) [now paragraph 34(4)(d)] which requires me to consider whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done. Were I to amend the information, whom should I name as the defendant? ... Therefore, apart from being unable to determine with certainty what amendment should be made, I am in the position where my amendment might well result in an injustice being done."

¶ 55 If the defect on a certificate of offence is one which is classified as an amendable defect, but is irremediable, then it should be quashed. The presence of incurable prejudice and injustice occurring upon the proposed amendment of a defective certificate are bars to granting the amendment.

3. ANALYSIS

¶ 56 The analysis to determine whether to quash or amend a defective certificate of offence follows:

¶ 57 A trial court should first determine if the defect or error on the certificate of offence is a nature that would render the certificate an absolute nullity. If the defect does make the certificate an absolute nullity then the defective certificate should be quashed. Accordingly, this defective certificate is categorized as an invalid defective certificate.

¶ 58 However, if it is determined that the defective certificate is not an absolute nullity then it is a certificate that falls within the amendable class of defective certificates.

¶ 59 Secondly, where the trial court determines the defective certificate falls within the amendable defect class, it must then must examine the certificate and determine whether the proposed amendment to cure the defect on the certificate causes any prejudice to the defendant's defence. If there is no clear prejudice then the court should amend the certificate, if and only if, the amendment can be made without an injustice occurring.

¶ 60 Thirdly, where the trial court determines the amendment does not cause prejudice to the defendant, the court then has to determine if any injustice results from the amendment. If no injustice results, then the amendable defective certificate should be amended and the trial held.

¶ 61 Contrarily, if there is injustice that results from the proposed amendment then the amendable defective certificate is irremediable and the court should quash the certificate.

¶ 62 Fourthly, in the situation where the trial court determines the proposed amendment misleads or causes prejudice to the defendant, the court then has to decide if the prejudice or misleading circumstance can be removed by an adjournment or other remedy. Where the misleading circumstance or prejudice can be removed by an adjournment or other remedy then the court should allow the amendment, grant the adjournment or other remedy and then hold the trial, if no injustice occurs. If there is injustice, again the court must quash.

¶ 63 Finally, if the prejudice or misleading circumstance caused by the proposed amendment cannot be removed by adjournment or other remedy then the court must quash the proceeding.

THE OFFENSE NOTICES

¶ 64 I find that the absence of a set fine on the offence notice is a deficiency that is governed by section 90 of the P.O.A.

¶ 65 In R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.), Jessup J.A. speaking for the court, decided that the failure to sign the offence notice was ban irregularity or defect in the substance or form" within the meaning of s. 90(1) of the Provincial Offences Act and does not affect the validity of the proceedings.

¶ 66 In the unreported decision of R. v. Murugan (December 16, 1994) (Ont. Prov. Div.), Knazan J. found that the procedural error did not invalidate the proceeding. The defendant moved to quash the certificate of offence on the ground it was improper that the officer certified service before he actually served the document. Knazan J. concluded:

> `"In any event, the case of R. v. Elliot 12 M.V.R. 35 dealt with the signature on an offence notice. The officer had failed to sign the offence notice but the respondent had signed the certificate of offence which was delivered to the defendant. The Court of Appeal held that the failure to sign was an" irregularity or defect in the substance or form within the meaning of s. 90(1) of The Provincial Offences Act, 1979 (Ont.), C.4 and consequently did not affect the validity of the proceedings.
>
> > "If the complete failure to sign does not affect the proceedings, then it is hard to see that certifying that service was effected seconds before it actually was would affect the validity of the proceedings."
>
> For these reasons I do not think that the Certificate was defective, but if it was, I agree with Judge Silverman that s. 90 of the Act applies and if prejudice is shown an appropriate order can be made.'

¶ 67 In the unreported decision of R. v. Alves (February 18, 1994) (Ont. Prov. Div.), Silverman J. at page 3 of his judgment states:

> "The whole purpose and framework of the Ontario Provincial Offences Act ... is that it is to be a simple procedure, and some people refer to it as a People's Court, so that technicalities with

respect to procedure no longer are binding"

The Justice of the Peace in R. v. Alves had quashed a certificate of offence for a defect on its face. The defect was that the issuing Provincial Offences officer had not followed the proper procedure required by the P.O.A. The officer had certified on the certificate of offence that he had served the defendant with an offence notice before he had in fact served the notice. This was a defect in procedure. At page 6 of his judgment, Judge Silverman noted:

> "there was no evidence whatsoever before the learned Justice of the peace that the defendant had been misled ... what the learned Justice of the Peace should have done is to follow subsection (1) of Section 90 of the Provincial Offences Act which is applicable, and he should have made an appropriate order requiring an amendment or whatever he may have thought appropriate."

Silverman J. held that in the absence of evidence of prejudice to the accused that the Justice of the Peace could not make an order under s. 90(2) but that even if there were evidence of prejudice, the justice could not quash the certificate of offence but would have to make an appropriate order to remedy the prejudice.

¶ 68 Drinkwalter and Ewart in their tome at page 290 come to the same conclusion as Silverman J. did in R. v. Alves:

> "Subsection (2) [90(2)] prevents this broad curative power from prejudicing a defendant's right to a fair trial. While the section eliminates acquittals based upon defects in process, it does recognize that in some situations a defendant might have been prejudiced by the defect. This might occur if the charge set out on the process differed significantly from the actual charge. In such circumstances, instead of quashing the proceedings, the justice is directed to give the defendant an appropriate adjournment, and if the circumstances make it appropriate, to also award him costs. The latter award is not open-ended, but is limited by the provision of s. 61."

¶ 69 In the unreported decision of R. v. Thompson (July 23, 1981) (O.H.C.) at Toronto, per Griffiths J, the defendant was acquitted of the offence of speeding and no issue was raised at trial concerning the validity of the certificate of offence. The acquittal was appealed. His Honour Judge Bice of the Provincial Court (Criminal Division) of the Judicial District of Muskoka heard the appeal. His Honour Judge Bice, without hearing argument held that the certificate of offence by which the defendant had been charged was a nullity. The Crown then sought an order of mandamus for Judge Bice to take jurisdiction to hear the appeal on its merits.

¶ 70 Griffiths J. found:

> "Here, I regard the omission of the word "issuing" as constituting a defect in form or at worst a defect in substance. It has been held that a defect in substance is one relating to the sufficiency of the charge but where the defect relates only to the means of alleging the charge it becomes one of form (Regina v. Wildefong (1970), 1 C.C.C. (2d) 45, (Sask. C.A.).
> Here the substance of the information, as required by s. 3 of The Provincial Offences Act has been adequately conveyed in the certificate of offence. The omission of the single word "issuing" amounts to a defect in form.
> I am also persuaded that the failure to describe the provincial offences officer in the certificate as the "issuing officer" is not fatal for another reason. Section 3(2) of The Provincial Offences Act requires the issuing officer who completes the form to sign the certificate. In my view, where the certificate has been signed by someone who indicates himself to be a provincial offences officer then there is a presumption of regularity in the absence of evidence to the contrary. In that respect, see Regina v. Justice of the Peace, Ex Parte Robinson, (1971), 2 C.C.C. (2d) 416, (O.C.A.).
> Whether the defect here is one of substance or form it was capable of amendment under the provisions of s. 35(1) [now s. 34(1)] of The Provincial Offences Act.
> ...

> It is common ground between the parties that if the learned trial judge erred, the appropriate remedy is mandamus, accordingly, there will be an order of mandamus directed to His Honour Judge Bice to exercise his jurisdiction to determine the appeal from the respondent's acquittal, on the merits, notwithstanding the variation between the certificate of offence charging the offence and the form of certificate prescribed by the regulations."

¶ 71 With regard to the cases at bar, the defect on both offence notices regard the set fine amount. The courts have found that any defect on the offence notice does not invalidate the proceedings. Subsection 90(2) of the P.O.A. permits the trial judge to grant an adjournment to the defendants to facilitate the defendant's right to a fair trial if an amendment to a defective offence notice would cause prejudice to a defendant. I find that the defendant would experience the same prejudice for a defect on the offence notice as for a defect on the certificate of offence if the defects are identical. An adjournment, while the proper cure for prejudice caused by amending a defect on an offence notice, would not by necessary implication remedy the prejudice caused by amending the certificate of offence. In the cases at bar, the defect on the offence notice is identical to the defect on the certificate offence. If the defect or error was contained only in the offence notice then I am enjoined in using subsection 90(2) of the P.O.A. to remedy any prejudice caused by an amendment with an adjournment. Where only the offence notice contained a defect then I would not have to look further than the application of section 90 of the P.O.A. Any finding of prejudice concerning the offence notice would not terminate the proceeding.

¶ 72 Since the offence notice and the certificate of offence contain the same defect will have to consider whether to quash or amend the certificate as the prevailing query. The prejudice caused by amending the defect on the offence notice can be remedied by an adjournment under subsection 90(2). The P.O.A. gives the trial court more latitude on amending or quashing a certificate of offence in an application to quash than concerning an offence notice defect. If I find that the defect on the certificate of offence vitiates the proceeding or that the defect cannot be amended because of the appearance of prejudice or injustice then I may quash the proceeding. Therefore, in situations where the defect is identical on both the notice and the certificate, an analysis of the defect should be first conducted on the certificate of offence as any remedy allowed on a defective offence notice would be simply secondary in the analysis of a defective certificate. Thus, the analysis of the defective certificate of offence must be performed first.

[A] OEHLERT APPLICATION TO QUASH CERTIFICATE

¶ 73 Mr. Oehlert was charged with exceeding the speed limit by 31 kilometres per hour. From schedule 43, the set fine for the range of 20-34 k.p.h. over the maximum speed limit is $3.75 times the number of k.p.h. over the speed limit and $5.00 costs. That is 31 k.p.h. x $3.75 and $5.00 costs = 116.25 + $5.00 = $121.25 as the proper set fine. The amount entered as the set fine on Mr. Oehlert's certificate was $121.75, an amount higher than the appropriate set fine. This defect is the reason of Mr. Oehlert's application to quash the certificate. Mr. Oehlert's agent brought up the unreported decision in R. v. Deangelis (November 10, 1994) (Ont. Prov. Div.), per Bokusky J., to support his motion.

R. v. Deangelis

¶ 74 The Provincial Offences Appeal Court allowed the Defendant's appeal and quashed the conviction imposed on the Defendant in the Deangelis case. The set fine amount on the face of the certificate was incorrect. The set fine amount written on the certificate of offence, like the certificate in the Oehlert application, was inscribed higher than the prescribed set fine. The Defendant had received a ticket for being a pedestrian contravening a "don't walk" sign. The prescribed set fine was for $50 but the officer had written the amount of $90 as the set fine.

¶ 75 Bogusky J. stated:

> "I feel that when the certificate of offence was issued the out of court payment was set at $90, which meant that on a given day the only way the accused could get rid of it was to pay $90. It is true that he could approach a J.P. [more properly referred to as a Justice of the Peace] and try to discuss the quantum and have it reduced, but if on a given day he could not

> make out a good case the only way he was getting rid of the ticket was to pay the $90 plus costs.
> I am satisfied the law says the maximum a pedestrian can or has to pay is $50, so I do take the position the document has defects on its face. Of course when it was administratively signed, or when judgment was signed, that would have been unknown to anybody signing it."

Bogusky decided that if the certificate failed to be quashed at the Fail to Respond stage under section 9 of the P.O.A. or if Judgment was entered on an ex parte trial that the conviction would be quashed for defects on the face of the certificate.

¶ 76 I concur with Bogusky J.'s reasoning in the Deangelis case. The only way for Mr. Oehlert on any given day to get rid of his ticket was to pay the higher incorrect set fine. Mr. Oehlert would not be able to seek an amendment of the certificate to correct the set fine or to have the certificate quashed for a defect on the face of the certificate with a guilty plea before a Justice of the Peace pursuant to section 7 of the P.O.A. Rule 16 of the Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, Regulation 200, R.R.O. 1990, [as amended] does not allow a Justice of the Peace to quash a proceeding or amend a certificate of offence in the Guilty Plea court.

¶ 77 A defendant when receiving a certificate of offence has three options: pay the fine, plead guilty with representations before a Justice of the Peace or to enter a plea of not guilty and seek a trial. Thus, the first opportunity for the defendant to speak about any defect is to appear at trial. Paradoxically, if the defendant fails to exercise one of the three options and instead does nothing about the certificate, the defective certificate would be sent to the Fail to Respond Docket pursuant to section 9 of the P.O.A. to be reviewed. If the defect is noticed then the certificate would be quashed pursuant to paragraph 9(1)(b).

> 9(1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,
>
> (a) where the certificate of offence is complete and regular on it face, the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or
> (b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding.

Invalid defective certificate or amendable defective certificate.

¶ 78 I find that the error or defect on Mr. Oehlert's certificate of offence is of such nature that it invalidates the certificate. Mr. Oehlert's certificate is void ab initio and cannot be amended. Since an offence notice under Part I of the P.O.A. requires the existence of a set fine before it can be utilized and since the Chief Judge of the Provincial Division issues an order itemizing what the set fine for a particular provincial offence is, then the issuing officer's action of writing a set fine amount on a certificate of offence that exceeds the set fine as ordered by the Chief Judge is akin to a breach of a judicial order and has no validity in law. The officer has no authority under Part I of the P.O.A. to issue a higher set fine for a particular offence that already has a set fine determined by the Chief Judge. The defective certificate in this instance is a nullity and no life can be breathed into it by an amendment. I would therefore quash the certificate.

¶ 79 If I am incorrect in my finding that a certificate of offence containing a higher defective set fine is an absolute nullity by reason of the issuing officer exceeding his authority by issuing a higher set fine, then I would have also found that any amendment to the defective certificate would have failed to satisfy the ends of justice. I would have found that the prejudice caused by an amendment to correct the set fine could have been remedied. However, the amendment would have failed the ends of justice.

The presence of injustice

¶ 80 If Mr. Oehlert would have been passive and did nothing after receiving the offence notice he could have had his defective certificate quashed under the Fail to Respond mechanism pursuant to section 9 of the P.O.A. However, if Mr. Oehlert is proactive, as he was in this case, and exercised his right to challenge his certificate for a defect on the certificate at a trial court and if the court allowed the amendment as requested by the Prosecutor, then the court can reasonably infer that Mr. Oehlert would potentially suffer financial costs, expend time and incur possible demerit points. In contrast if he did nothing, then the certificate would have been quashed under section 9 of the P.O.A. for a defect and the matter would have ended. Ergo, it would be unjust to reward passivity and to punish a defendant actively contesting a defect on his certificate.

¶ 81 In order to easier comprehend the injustice, imagine being in a restaurant. You order a meal according to a menu before you. At the end of the meal the server presents you with the bill for the meal. You check the addition and items on the bill and you realize that the bill is incorrect and that you have been overcharged. You may be upset that you have been charged more than what is listed on the menu for the meal. You ponder your options.

¶ 82 You may choose to say nothing and pay the bill and leave the restaurant feeling cheated and vowing never to return to the restaurant. [Pleading guilty and paying fine]

¶ 83 Or you may say nothing, attend at the cashier and hope that the cashier notices the error on the bill and properly corrects the bill and charges you the proper amount. If the cashier sees the mistake and corrects the error then you may return to the restaurant. However, you may be less trusting of people working in restaurants. [Do nothing and hope certificate is quashed under the Fail to Respond provisions]

¶ 84 Alternatively, you may summon the service person. The server may reply that only the manager of the restaurant can correct the bill. The manager may correct the bill and offer his apology. Depending on your treatment during this process you may still not return to the restaurant because of your treatment or lack of trust of the establishment. [Attend the First Attendance Court]

¶ 85 The manager, if he decides that you are a valued customer, may offer you recompense. The manager may cancel the bill or offer you a return coupon for a discount, in addition to his apology. [The Trial Court]

¶ 86 If the justice system was so simple then the court would order the charge amended and offer its apologies. But the situation in Mr. Oehlert's case is greatly different from customer service in a restaurant. This is not a restaurant being reviewed for customer service but a court of justice whose mandate is to ensure justice. I repeat that well used adage: justice must not only be done but must also be seen to be done.

¶ 87 The defendant in order to protest the incorrect set fine has had to incur costs in hiring an agent to represent him. There is no opportunity except at this level to seek redress. The defendant is justified in not totally relying on a process that he cannot see, or to expect that his matter will ultimately be quashed at the Fail to Respond stage.

[B] PHAM APPLICATION TO QUASH CERTIFICATE

¶ 88 Mr. Pham's certificate of offence is defective. It is missing the set fine amount. There is an amount written in the Total Payable box.

Invalid defective certificate or amendable defective certificate.

¶ 89 I find, as in R. v. Lam (March 18, 1996) (Ont. Prov. Div.), per Silverman J., that Mr. Pham's defective certificate of offence is the type of certificate that falls within the class of amendable defective certificates. Although I have jurisdiction to amend the defective certificate of offence, I do not find that the ends of justice will be served if allowed the amendment. I have followed Reinhardt J.'s decision in R. v. Bertolucci et al (June

23, 1995) (Ont. Prov. Div.). Reinhardt J. found an amendable situation present in the case before him but preferred not to amend as the ends of justice would not be served.

¶ 90 The Prosecutor argues that R. v. Lam is binding and that the set fine is not central to the charge and that I have jurisdiction to deviate from the set fine during the sentencing phase. I agree with that the Prosecutor's submissions have merit, but his points are only part of the consideration of my review. His arguments go more to the issue of prejudice but not to whether an injustice occurs. The issue is still whether a defective certificate can be amended without injustice or prejudice. I am only able to amend a defective certificate of offence if the amendment does not cause incurable prejudice or causes injustice.

¶ 91 As I stated earlier in my reasons to quash the Oehlert certificate, I find the presence of the same injustice with respect to Mr. Pham's application. I would have also found that the prejudice caused by an amendment to correct the set fine could have been remedied, but the amendment would have failed the ends of justice. Ergo, I find that the proposed amendment would fails to satisfy the ends of justice and would quash the Pham certificate.

The presence of injustice

¶ 92 I find the existence of injustice that is similar to the injustice in the Oehlert application. If Mr. Pham would have been passive and did nothing after receiving the offence notice he could have had his defective certificate similarly quashed under the Fail to Respond mechanism pursuant to section 9 of the P.O.A. However, if Mr. Pham is proactive, as he was in this case, and exercised his right to challenge his certificate for a defect on the certificate at a trial court and if the court allowed the amendment as requested by the Prosecutor, then the court can reasonably infer that Mr. Pham would also potentially suffer financial costs, expend time and incur possible demerit points. Mr. Pham had more incentive to be proactive. The set fine was absent on his certificate of offence and obviously a defect. If Mr. Pham did nothing, then the certificate would have been quashed under section 9 of the P.O.A. for a defect and the matter would have ended. Again, it would be unjust to reward passivity and to punish a defendant actively contesting a defect on his certificate. Thus I find that if I allowed the amendment to Mr. Pham's certificate of offence, it would fail to satisfy the ends of justice.

R. v. Lam

¶ 93 In the Lam case, the Crown appealed an order by Justice of the Peace McCurdy quashing a certificate of offence charging the infraction of proceeding through a red light for the absence of the set fine amount of the face of the certificate. The certificate did however contain the total fine payable amount. His Worship initiated the decision to quash. The Defendant's agent did not raise the issue. In addition, the decision to quash occurred at the end of the trial after all the evidence had been heard. His Worship also made a finding of credibility in favour of the Crown's case and would have found that the Defendant had proceeded through a red light contrary to the Highway Traffic Act, if he had not quashed the certificate. Silverman J. allowed the Crown appeal. The Provincial Prosecutor in attempting to elicit a ruling from the appeal judge asked:

> "For the purposes of clear direction, that the jurist prudence [sic] might be of some guidance to our level of court, Your Honour, has your Honour ruled that the failure to put a set fine on a certificate of offence does not invalidate the certificate"

His Honour replied:

> "It does not invalidate it ... as far as I am concerned. It is an amendable situation. It also should have been brought to the attention of the court immediately, rather than waiting towards the end of the trial."

¶ 94 As Silverman J. stated, the situation where the set fine amount is missing on a certificate is a defect that may be amended. That is, the defective certificate falls within the class of amendable defective certificates. I concur with Silverman J. that a certificate in which the set fine amount is missing is a situation which should not be treated as a nullity or a situation where the certificate is considered to be void ab initio. With respect, the ratio decidendi in R. v. Lam does not state that all certificates missing the set fine amount must necessarily be

amended by the trial court. Instead Silverman J. refers to this type of defect as one that may be amended by the court. I further add, then only to be amended if it does not prejudice the defendant or does not fail the ends of justice, and that costs or an adjournment will not remedy the prejudice to the Defendant.

¶ 95 In contrast to the case at bar, Silverman J. in R. v. Lam was presented with the situation where the evidence presented to the trial judge would have convicted the Defendant. The trial was completed and it appeared that the trial judge would have convicted but for the defect on the certificate of offence: the missing set fine. On the merits in that case, quashing a certificate on a technicality when evidence would have convicted the Defendant would have also failed the ends of justice. However, with the Pham situation, the trial has not been held and there is no evidence before the court for a conviction.

4. CONCLUSION

¶ 96 If a certificate of offence or the offence notice contains an incorrectly written amount for the legally ordered set fine amount for a particular offence under Part I of the P.O.A. and that written amount is higher than the legally ordered set fine, then the certificate of offence and notice is a nullity. It is void ab initio and cannot be amended. This type of defect or error falls within the class of defective certificates specified as invalid certificates. This is the case in respect to the Oehlert certificate of offence. Thus, I conclude the certificate is invalidated by a set fine used higher than is allowed by law. In addition, I would have also found the presence of injustice that would have vitiated the proceeding.

¶ 97 However, if a certificate of offence or the offence notice is missing the requisite set fine, then the defective certificate falls within a class of defective certificates that can be amended at the discretion of the trial court. This class is referred to as amendable defective certificates.

¶ 98 Contrarily, if the trial court decides that although it has jurisdiction to amend the certificate but feels that the defective certificate should not be amended by reason of prejudice to the defendant which cannot be cured by an adjournment or other remedy or that the amendment would fail to serve the ends of justice, then the defective certificate falls within a subclass of the class of amendable defective certificates called irremediable defective certificates. The defective certificate is not curable and is not to be amended and is deemed a nullity. I find the Pham certificate of offence to be an amendable defective certificate that is irremediable because of the presence of injustice.

5. ORDER

¶ 99 The application by the defendant Pham is granted and his certificate of offence is quashed. The application by the defendant Oehlert is granted and his certificate of offence is quashed.

QUON J.P.

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