

PROVINCIAL OFFENSES COURT

HER MAJESTY THE QUEEN

v.

NICHOLAS BAETA

P R O C E E D I N G S A T T R I A L

BEFORE JUSTICE M. AGRO
on July 4, 2017 at HAMILTON, Ontario

APPEARANCES:

N. Isak
D. Brereton

Provincial Prosecutor
Counsel for Nicholas Baeta

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RULING

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Legend

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

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U P O N C O M M E N C E M E N T

MS. ISAK: Nicholas Baeta, line six.

CLERK REGISTRAR: Please spell the last name.

MS. ISAK: B-A-E-T-A. This was adjourned from a previous appeal date, I believe, last month.

THE COURT: Are you on this one as well Mr. Brereton?

MR. BRERETON: That is correct, Your Honour.

CLERK REGISTRAR: B-A-E-T-A?

MS. ISAK: Correct.

THE COURT: Thank you. Is there any agreement on this matter?

MS. ISAK: There is not.

THE COURT: Go ahead, Mr. Brereton.

MR. BRERETON: Yes. Your Honour. I would be relying on the factum that has been filed by my office.

What I'm solely arguing, Your Honour, is the fact that the defendant himself was charged on April 15, 2016, and that the certificate of offence should have been quashed pursuant to a 9.1 hearing, as no one attended on the defendant's behalf. There was a fatal flaw on the ticket, if you see the ticket it's listed as a s. 154 (1)(a) under *The Highway Traffic Act* with an offence of failed to drive in marked lane. That short form wording no longer applies, it's not applicable to that specific offence or section number as the defendant himself was charged on April 15, 2016, the new short form wording that should have applied would have been unsafe move - lane or shoulder, which came into

effect on August 1st, 2015.

THE COURT: All right, that's 154?

MR. BRERETON: 154 (1)(a), Your Honour.

THE COURT: And the short form wording on the ticket is unsafe lane change?

MR. BRERETON: Yes.

THE COURT: You're saying it should be what?

MR. BRERETON: It should be unsafe move, dash, lane or shoulder. As outlined on Schedule 43 as per the August 1st, 2015, which is the current short form wording for that actual offence itself.

THE COURT: That regulation was August 1st, 2015?

MR. BRERETON: August 1st, 2015, that is correct, Your Honour.

THE COURT: All right.

MR. BRERETON: And those are my submissions regarding that, Your Honour, that it is a fatal flaw and the short form wording does not correspond with the section, for that specific date of offence.

THE COURT: Thank you. Ms. Isak? Do you take any issue with what the language was as of the... or ought to have been as of the 1st of August, 2015?

MS. ISAK: I do not. I agree that the short form wording did change...

THE COURT: All right.

MS. ISAK: ...in August of 2015, where I disagree with Mr. Brereton arguments is the fact that the Chief Justice of Ontario changed the short form wording but the section of *The Highway Traffic Act* remained virtually the same. It was unchanged. So, the issue that...

THE COURT: What's the authority to use short form wording?

MS. ISAK: The authority to use the short form wording is pursuant to Regulation 950 of *The Provincial Offences Act* and it's s. 5 (1) of that regulation.

THE COURT: Right, but is there anything in the POA itself that says, that initially an officer can use short form wording? That's what I meant by the question.

MS. ISAK: I'll just... I'll need a moment just to take a quick look at it. I believe it's from the regulation and not an actual section of *The Provincial Offences Act*. Nope. I'm not seeing anything in the Act itself regarding the use of the short form wording other than the regulation that I've set out, the Regulation 950.

THE COURT: Did the appellant appear at trial?

MS. ISAK: No.

MR. BRERETON: No. Your Honour.

MS. ISAK: My understanding is that the legal representative was present and based on the fact that the legal representative was of the belief that the short form wording was not sufficient, they did not attorn to the jurisdiction or appear before the Justice of the Peace.

THE COURT: Which would be given their position, the appropriate thing to do.

MS. ISAK: Yes. I don't take any issue with that.

THE COURT: Well, what do you have to say about the line of cases that requires the certificate to be complete and regular on its case and in

circumstances where there is basically a default conviction, that it has to be regular in all respects, regular and complete? That's the difficulty.

MS. ISAK: And my position with respect to that is that, because this was a case where the short form wording had been changed but the section number remained the same and the section itself remained the same...

THE COURT: That then makes things somewhat duplicitous, doesn't it?

MS. ISAK: It does.

THE COURT: It doesn't help you.

MS. ISAK: It doesn't help me, but I also believe and my position on it when I look at the cases is that if this had been a case where for example the certificate of offence indicated an offence of speeding contrary to s. 154 now it causes some prejudice and confusion. What is the offence that's alleged to have occurred? In this case, for it to be complete and regular, I would submit the defendant has to be aware of what the charges that they're facing and the short form wording corresponds with the offence and the act or the... sorry the section in the act. So, they wouldn't be misled or prejudiced in anyway, and that's the position that I've taken.

THE COURT: Well, do you not see a difference between an unsafe lane change and an unsafe move - lane or shoulder?

MS. ISAK: I don't because the section was amended and the short form or sorry not the section but the

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short form wording was amended to encompass any sort of unsafe move, whether it's an unsafe lane change...

THE COURT: Do you have a copy of 154 here?

MS. ISAK: I do. Sorry, do you want the section of the Act itself?

THE COURT: Yes. Thank you.

MS. ISAK: Your Honour, I can actually hand up a 2000...

THE COURT: Do you have the regulation?

MS. ISAK: The regulation is in the prosecutor's factum, we've included a copy of an appendix to it.

THE COURT: Right, where?

MR. BRERETON: It's outlined at page 11, Your Honour.

THE COURT: Page 11? Thank you.

MS. ISAK: Thank you.

THE COURT: Well, all right. I've reviewed both, thank you. What authority are you relying on then? That a short form wording that is not authorized by regulation is sufficient to particularize the offence in a complete and regular manner?

MS. ISAK: So, I am relying on and in the prosecutor's factum or the respondent's factum at paragraph nine we've set out Reg. 950 s. 5(1) specifically and what it states is that: "The words or expressions set out in column one of a schedule..." so that would be the... what we refer to on page 11.

THE COURT: Yes.

MS. ISAK: That it may be used in a certificate of offence, offence notice or summons, to designate

the offence described in the provision, set out opposite in column two of the schedule. So, the prosecution's position on this is that, well the regulation states the short form wording may be used...

THE COURT: Right.

MS. ISAK: It doesn't set out that it must be used.

THE COURT: Must be used. So, you are saying that the... Your argument is then that the certificate would have been complete and regular without any short form language, just saying 154 (1)(a), because unless you can say that...

MS. ISAK: It's difficult for me to say that, because I can definitely say my position would be the certificate was complete and regular on its face had there been short form wording and no section number. If the section number on there was correct and there was no short form wording, I don't think that I can stand before you and say that I would argue that that would be complete and regular on its face.

THE COURT: Well, you're dancing yourself into a knot here, Ms. Isak, because read section... your paragraph [9] s. 51 of the regulation:

[9] "The words or expressions in the column may be used in a certificate to designate the offence described in the provisions set out opposite."

MS. ISAK: Yes.

THE COURT: So, because it is permissive an officer could simply indicate 154 (1)(a), period. Right?

MS. ISAK: Correct.

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5 THE COURT: But the fact that he has particularized the nature of the driving, the offensive driving, as an unsafe lane change, does that not place the onus on the prosecution to prove beyond a reasonable doubt that the offence committed was an unsafe lane change and not anything else?

MS. ISAK: No, because what I would have to prove is what the essential elements are, that are contained within section 154 (1) (a).

10 THE COURT: Un huh, but you have particularized one of the essential elements.

MS. ISAK: Yes, but if I can go back just one step previous, to the question that you asked me regarding the section number being there and no short form wording. I believe we submitted a case book and there is a case in there it's called *R. vs. Wilson* and in that case, the court set out what the requisites are for a certificate of offence to be considered complete and regular on its face, and what the court determined needed to be on the certificate would be the informant - and that's tab 1 of our case book...

20 THE COURT: Yes.

MS. ISAK: So, we have to have the informants name on there...

25 THE COURT: Yes, who's charged, what the process is, statute name and section number, where and when and what the result would be.

30 MS. ISAK: Correct. So, if I go back based on that and answer your previous question which I answered and said I wouldn't think it's complete and regular on the basis of the courts finding in *Wilson* it

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would be complete and regular.

THE COURT: But you see, all of that is already contained in the certificate and the criteria set out in *Wilson*, criteria 1 through 5, coincides with the regulation statement that, and I'm gonna put it in the negative. You don't need to specify particulars, you don't have to use the short form wording, but this officer chose to go above and beyond that and use short form wording.

MS. ISAK: Yes.

THE COURT: Had he not put short form wording, there would be no argument here, but he chose to use a short form wording that is not authorized by the regulation.

MS. ISAK: Correct. And my only position is that I would just go back to the must and may argument, I would say...

THE COURT: But he chose to use language that is no longer authorized by regulation.

MS. ISAK: Correct.

THE COURT: Had he been silent, had he put nothing there, the appellant wouldn't have an argument, because all other necessary criteria have been met, but the officer chose to particularize and once you particularize you are putting an accused person, a defendant, on notice, you've committed this offence and this how you committed it and that's what I'm going to prove.

MS. ISAK: Yes, that's correct.

THE COURT: You follow me?

MS. ISAK: I do, yes.

9.
Ruling
Agro, J.

R U L I N G

Agro, J. (Orally):

And he used language that was not authorized by the regulation, he could have chosen to say nothing, to write nothing, but he chose to use language that is no longer authorized by regulation and for that reason the appeal will be allowed.

MR. BRERETON: Thank you, Your Honour.

THE COURT: Thank you.

MS. ISAK: So that will be the conviction quashed?

THE COURT: Conviction quashed.

MR. BRERETON: Thank you. Thank you, my friend.

10.
Certification

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))
Evidence Act

I, Danielle Mansell, certify that this document is a true and accurate transcript of the recording of R. v. Baeta in the Provincial Offences Court held at, Hamilton, Ontario on July 4, 2017 taken from Recording 4711_308_20170704_094633_POA_6_AGROM, which has been certified in Form 1.

September 10, 2017

(Date)

Danielle Mansell

(Signature)