

ONTARIO COURT OF JUSTICE

CITATION: *Chow v. York (Regional Municipality)*, 2018 ONCJ 818

DATE: 2018-11-21

COURT FILE No.: Newmarket 4911-8150943B

B E T W E E N :

JEANNIE CHOW

Appellant

— AND —

THE REGIONAL MUNICIPALITY OF YORK

Respondent

PROVINCIAL OFFENCE APPEAL

Heard: November 9, 2018

Released: November 21, 2018.

Ms. Carolyn Galin agent for the Respondent
Mr. Adelin Mocanu agent for the Appellant

KENKEL J.:

Introduction

[1] The situation in this appeal is very familiar to this court. A defendant files a Notice of Intention to Appear and a trial date is set, but on the day of trial neither the defendant nor an agent appears. The court proceeds by s.9.1 of the *Provincial Offences Act* (POA) RSO 1990, c P33 and enters a conviction. Days later an agent for the defendant files an appeal alleging that the certificate of offence should have been quashed due to an alleged error in the certificate.

[2] Section 9.1 is a statutory shortcut that is a necessary part of the regime for regulatory offences. It's important that the requirements of that section be met before a court takes any action with respect to a defendant who has failed to attend their

trial. However, it's plain that many defendants in this region are intentionally defaulting so as to trigger s.9.1 and a subsequent appeal that can be limited to a technical and often artificial exercise, without reference to the merits of the case. That use of s.9.1 is contrary to the intent of the *Provincial Offences Act* which seeks to eliminate technical arguments in favour of hearings on the merits.

[3] As the citations below show, York Region has had more than its share of appeals related to s.9.1. A defendant is entitled to take advantage of any lawful procedure provided by statute, but many of these appeals are frivolous, wasting court time and the resources of the appellant. These reasons review the s.9.1(2) examination process, cases regarding the “complete and regular on its face” requirement and the impact of the particular deficiency here – the failure of the officer to check off the a.m./p.m. box. It's hoped that this extended discussion will help all parties identify issues that have merit and reduce court time spent on issues that don't.

The 9.1(2) Examination

[4] For regulatory offences such as speeding, where the defendant fails to appear for trial they are deemed not to wish to dispute the charge – s.9.1(1) *Provincial Offences Act* (POA) RSO 1990 c P33. The failure to appear triggers s.9.1(2) which directs the presiding Justice of the Peace to examine the certificate of offence and, without a hearing, enter a conviction and impose a fine if the certificate is “complete and regular on its face”.

[5] In *London (City) v. Young* 2008 ONCA 429 at para 34, Justice Feldman of the Ontario Court of Appeal described the default provision this way:

The purpose or scheme of Part I of the Act is to facilitate an inexpensive and expeditious procedure for dealing with a large volume of less serious offences. The default procedure put in place by the Act is intended to be inexpensive and expeditious for defendants who wish to acknowledge the offence and pay the fine. This procedure also saves the cost to the government of holding trials in cases where people are content to be found guilty of a relatively minor offence and pay a disclosed set fine. However, the trade-off for these savings is that where the default procedure is used, the certificate of offence must be “complete and regular on its face”. If it does not comply, it cannot be amended and must be quashed.

[6] The purpose of the s.9.1(2) examination is to determine whether the defendant received effective notice of all the information needed to decide whether or not to default – *London (City) v Young* at para 29.

Complete and Regular

[7] The important restriction in the *ex parte* hearing is that the certificate must be “complete and regular on its face”, a phrase which is not defined in the statute. As Justice DeFreitas (as he then was) observed in *R v Busu* [2012] OJ No 5823

(CJ) at para 2, “Much judicial ink has been spilled on the meaning of the words, ‘complete and regular on its face’.” The interpretation of that phrase is guided by the test in *London (City) v Young* that links effective notice to the decision that the defendant has to make as to whether or not to default. It’s not the case that any deficiency or variance will do. A certificate of offence will only be quashed on a s.9.1 review where there is potential prejudice to the defendant in that he or she does not have the necessary information required in order to decide how to proceed.

[8] Cases have established that effective notice of the alleged offence requires the following information:

- Informant – The name of the informant – *R v Wilson* [2001] OJ No 4907 (CJ).
- Accused – The name of the person charged – *R v Wilson* [2001] OJ No 4907 (CJ).
- Place – A description of the place of the offence as being within the jurisdiction of the court which typically includes evidence that a certificate was issued and offence notice served at the place of the alleged offence – *Thunder Bay (City) v Matzov* 2016 ONSC 4557
- Offence – A description of the offence, or the relevant section number or both – *R v Hargan* 2009 ONCJ 65 (CJ),
- Set Fine – the amount of the penalty if the defendant defaults – *London (City) v Young* 2008 ONCA 429.

[9] Where the certificate contains incorrect information that has the potential to mislead or cause prejudice to the defendant and her or his choice regarding default, the certificate is not regular and complete:

- Incorrect Set Fine – The stated amount of a set fine has to be correct so the defendant can decide whether to default and be subject to that penalty – *London (City) v Young* 2008 ONCA 429.
- Misleading Wording – Where the description of the offence is at odds with the section number such that a defendant would be confused as to the offence being charged there is a significant defect and the certificate must be quashed – *R v Farah* 2015 ONCA 302, *R v Romero* 2016 ONCJ 347, *R v Stuparayk* 2009 ONCJ 394, *R v Bargis* [2004] OJ No 5565 (CJ).

[10] A certificate is complete and regular despite omissions or errors that involve information that is not required to provide notice of the offence (surplusage) and could not mislead the defendant with respect to the choice as to whether to defend or default:

- Electronic Signature – Electronic signatures on electronic certificates of offence are sufficient – *London (City) v Caza* 2010 ONSC 1548.
- Filled Boxes – it's not necessary that every box on the certificate be filled out to be "complete" – *R v Wilson* [2001] OJ No 4907 (CJ).
- Location Description – Identification of the regional municipality is sufficient – *York (Regional Municipality) v Askender* [2015] OJ No 2010 (SCJ), *York (Regional Municipality v Di Vito)* [2014] OJ No 4598 (SCJ), Identification of a location on a highway and the municipal district was sufficient, particularly where the certificate showed that it was served at the location of the alleged offence so the defendant knew of the location – *Thunder Bay (City) v Matzov* 2016 ONSC 4557, A short form name is sufficient to identify the regional municipality – *York (Regional Municipality) v Di Vito* [2014] OJ No 4598 (SCJ), Not stating the town name wasn't fatal where it was identified by other information in the document – *York (Regional Municipality) v Abadehee* [2004] OJ No 918 (SCJ), *R v Busu* [2012] OJ No 5823 (CJ), *R v Deveau* [2006] OJ No 3312 (CJ), Hundreds of offence certificates improperly quashed for the omission of "Ontario" from the description of the *Highway Traffic Act*. The word Ontario is surplusage – *R v Baldasare* [2000] OJ No 5515 (SCJ), Including "public" before the word sidewalk at the listed address was unnecessary – *Thunder Bay (City) v Kamenawatamin* [2009] OJ No 1422 (SCJ).
- Offence Description – Use of older short-form language "unsafe lane change" with the correct section number could not confuse a defendant even though the new regulation changed the description to "unsafe move – lane or shoulder" – *R v Mikhov* 2018 ONCJ 248, *R v Badhan* 2018 ONCJ 747. Omission of the short form wording "speeding" not important where the certificate showed the accused was charged with travelling 120km/h in a posted 100km/h zone and the offence section 128 was cited – *Niagara (Regional Municipality) v Kosyatchkov* 2013 ONSC 713 (not a 9.1 case).
- Proof of Service – Failure to complete the proof of service portion of the certificate is not fatal where the defendant filed a notice of intention to appear which shows he or she was served – *Durham (Regional Municipality) v Verma* 2011 ONCJ 19, *Contra* – *R v Khoshael* [2001] OJ No 2110.
- Section Number – Omission of the section number could not create confusion where the offence was otherwise properly described – *York (Regional Municipality) v Martinez* 2014 ONSC 6305, *R v Hargan* 2009 ONCJ 65.
- Speed Description – Omission of kmh after the speed alleged could not have misled the defendant – *York (Regional Municipality) v Billinger* [2005] OJ No 2627 (SCJ).
- Total Payable – Surcharges and costs are added to the set fine by statute

upon conviction. An error in the calculation in the total amount does not render the certificate irregular where the set fine is properly identified – *R v Alfonso* [2004] OJ No 5409 (OCJ), *R v Galeazza* [2010] OJ No 6054 (CJ), *R v Gandhi* [2011] OJ No 2642 (CJ), *Haldimand (County) v Mungar* [2011] OJ No 6505 (CJ), *Toronto (City) v Arcos-Nava* 2012 ONCJ 773.

[11] Note that where an officer identifies an error prior to filing the certificate of offence with the court, the officer is entitled to make corrections even though an offence notice has already been served on the defendant – *R v Davis* 2017 ONCA 45.

[12] Some cases have taken a strict view towards any technical deficiency and argue that a lack of prejudice to the defendant is irrelevant in determining whether a component of a certificate is essential or surplus. See for example *R v Hands* 2013 ONCJ 682. However, virtually all of the cases cited above including the Court of Appeal decisions refer to potential prejudice including the impact of the omission or error on the defendant's ability to decide how to proceed when considering whether a particular deficiency or omission means the certificate is not "complete and regular on its face". In my view this approach is consistent with the goal of the act to avoid having proceedings determined on technical objections that could have no prejudicial impact on the defendant – *Davis* at para 49.

AM or PM?

[13] Here the alleged deficiency is the failure of the officer to note whether the time of 11:12 was a.m. or p.m. There's a box for that beside the time and no box to indicate you're using a 24 hour clock as officers often do. The time of the offence is not an essential averment and is not relevant to the defendant's decision whether or not to contest the alleged offence.

[14] Justice Nakatsuru (of this court at the time) considered this same alleged deficiency and found that it was "highly technical" and could not cause any prejudice to the defendant – *R v Tang* 2016 ONCJ 627 at para 3. I agree with His Honour that an appellant would know full well whether they were issued a ticket in the morning or at night. Where the certificate and documents show that the appellant was served with an offence notice at the scene, the court could reasonably infer the appellant was aware of the exact time and location of the alleged offence. In any event, the exact time is not typically a component of the offence so even for the most forgetful defendant the failure to check that box could not reasonably have any effect on their decision regarding default.

Conclusion

[15] The procedures in the *Provincial Offences Act* are intended to permit judges to decide cases on their merits, to deal efficiently and inexpensively with the province's large volume of minor regulatory offences, and to avoid having proceedings invalidated because of technical objections or irregularities having no prejudicial im-

pact on a defendant – *R v Davis* at para 49

[16] Had the defendant attended her trial and raised this issue the matter would have been clarified if required. For more substantial errors s.34 of the POA provides wide powers of amendment before, at or even during the trial. Section 90 of the POA states that the validity of any proceeding is not affected by any irregularity or defect in the substance or form of the offence notice or any variance between the charge set out in the offence notice and the certificate. In cases where a defendant may be misled by any irregularity, the court may adjourn the hearing as appropriate.

[17] The s.9.1 procedure is an exception where a trial court must engage in a technical review, but that review is limited to determining whether the certificate of offence provides effective notice such that a defendant can make a decision as to whether or not to default. In this case the Justice of the Peace made no error in finding that the certificate of offence was complete and regular on its face.

[18] The appeal is dismissed.

Released: November 21, 2018.
Justice Joseph F. Kenkel