

ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

MATTHEW FINLAYSON

BEFORE HIS HONOUR JUDGE PAYNE
on March 8, 1996, at Barrie, Ontario.

CHARGE: Speeding

APPEARANCES:

Counsel for the Crown

Ms. M. Rumble

Counsel for the Defendant

P. Periti, (agent)

R. v. Finlayson,

Mar, 8/96

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MS. RUMBLE: I understand, Your Honour, there is an agent here on the Finlayson matter.

THE COURT: Which one?

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MS. RUMBLE: Finlayson.

THE COURT: Finlayson.

MS. RUMBLE: Number four.

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MR. PERITI: Good morning, Your Honour. Paul Periti appearing as agent for the appellant. The last name is spelt, P-E-...

THE COURT: Hang on just a second while I get...my shuffle here will drown out your voice.

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MR. PERITI: Take your time, take your time.

THE COURT: Yes. Finlayson, oh, that's an interesting one, yes. What do you think? Have you read that over?

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MS. RUMBLE: I didn't have the tape, Your Honour. And all I have is the notice of appeal itself. It says that we lost jurisdiction over the defendant prior to trial date. I don't know what the reason is given by the defendant.

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THE COURT: Well if you look there was a notice

of motion. Have you got a copy of that?

MS. RUMBLE: Appeal was faxed.

THE COURT: No. The copy of that yellow form?

MS. RUMBLE: No, I don't.

THE COURT: What it appears to be is an application by the Crown for an adjournment. I sent a notice of motion to Mr. Finlayson, a copy which is attached, saying that Matthew Finlayson charged speeding 116 kilometers in a posted 80 zone, trial date has been set for the 13th of July '95, at 10:30 a.m., that was the initial date.

Constable Corey is on vacation leave on the set date, the Crown is requesting a new trial date of November the 16th '95, 9:00a.m. If Mr. Finlayson is agreeable to the new trial date he need not appear on the 13th of July.

Now no one appeared on the 13th, and no one appeared... the case was called on November the 16th and Mr. Finlayson wasn't there, and the trial proceeded in absentia and he was convicted.

Now my first looking at that is I didn't see any proof of service, even of that notice of motion in the first place; and secondly, I don't think the Crown is entitled to create by

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silence consent. They don't have the authority to do that. They were entitled to ask for the adjournment and invite Mr. Finlayson to confirm with them and give them authority, as an agent, on the day in question to adjourn it to a new day, but they're not entitled to impose, say we don't hear from you, we'll presume consent. It might have helped a bit, even if they'd notified him confirming the November the 16th date, but I question that too, but I don't believe that the Crown had the right to put that in a notice of motion and then take consent from the fact that they didn't get any answer.

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MS. RUMBLE: Did the defendant appear on the first trial date?

THE COURT: No, that, July was the first trial date.

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MR. PERITI: Your Honour, Mr. Matheson (s.p.) from my office did appear. As we take a look at the certificate of offense...

THE COURT: On, on...

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MR. PERITI: ...or sorry, offense notice, you'll see that we were on the record already. There should be a white sticker with our stamp...

THE COURT: Just a moment.

MR. PERITI: ...and address on there. At that point we are deemed to be on record.

THE COURT: Well was July 1st - was it a second trial date?

MR. PERITI: July 13th was the trial date that was set. I've got the notice of trial here.

We appeared on that date there, found nothing. We assumed that the matter had slipped through the cracks, assuming that, we were on record, because we were on record at that already...

THE COURT: Just a moment. This notice was in advance of the...this was the 5th of July for trial on the 13th. You showed up on the 6th and there was nothing on the record?

Nothing...

MR. PERITI: On the 13th,

THE COURT: On the 13th.

MR. PERITI: The 13th of July. There was nothing here.

THE COURT: No. So you just went away.

MR. PERITI: We assumed it went through the cracks, sometimes does.

THE COURT: With a little bit of luck?

MR. PERITI: We figured that...with a bit...well, Your Honour, once in a while we do

get lucky.

THE COURT: Right.

MR. PERITI: However, we knew we were on record and we were not notified of any motion, so we assumed that if there was something that had changed that obviously it was, the Court had lost jurisdiction, so we had no reason to actually look into any further.

THE COURT: So there was no formal adjournment from the 6th, to November, and that's what I've got on the record here that they were presuming consent from silence.

Do you have argument with that?

MS. RUMBLE: What I am thinking, Your Honour, is that perhaps it should have been set to be spoken to on the 3rd date instead of simply put over without having been on the docket at all. Any indication on the information as to whether...

THE COURT: Yes, I don't know by what authority anyone would have had taking it off the set date and putting it on the new date without, based on that notice of motion and no response. I think quite clearly they've lost jurisdiction.

MS. RUMBLE: Thank you.

5 THE COURT: So the appeal will be allowed.
Conviction set aside. So has the fine been
paid there?

MR. PERITI: Yes, it has, Your Honour.

10 THE COURT: And is the address for Mr.
Finlayson still the same for refund. I don't
know how quickly he'll get it now with the slow
down.

MR. PERITI: I believe it is the same.

THE COURT: 19...

15 MR. PERITI: I will contact him and inform him
that he should be expecting it. I'll inform
him about the strike and whatnot...and should
he not receive it after a month he can make
enquiries, another month and some more
enquiries.

20 THE COURT: But the his Yonge Street address
and postal code is still correct?

MR. PERITI: Yes.

COURT REPORTER: May have your name, please.

25 MR. PERITI: P-E-R-I-T-I, first initial P,
once again. Thank you, Your Honour. Have a
good day.

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THIS IS TO CERTIFY that
the foregoing is a true and
accurate transcription from
the record made by sound
recording apparatus to the best
of my skill and ability.

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M. Gay.

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Margaret Gay,
Certified Court Reporter

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