

Solda v. The Corporation of the City of Brampton

[Indexed as: Solda v. Brampton (City)]

82 O.R. (3d) 312

Ontario Court of Justice,
Wake J.
June 30, 2006

Criminal law -- Provincial offences -- Jurisdiction -- Clerk of municipally administered court office and clerk of provincially administered court office having concurrent jurisdiction to receive notice of appeal from decision of justice of the peace. [page313]

The appellant was convicted by a justice of the peace of speeding. He filed a notice of appeal with the clerk at the same court location where he had been convicted. That clerk was a clerk of a municipally administered court who was performing court administration duties pursuant to a Memorandum of Understanding between the municipality and the Attorney General. The issue was whether the Ontario Court of Justice presided over by a provincial judge had jurisdiction to hear the appeal, as it was not filed with a clerk of the appeal court.

Held, the court had jurisdiction to hear the appeal.

The Ontario Court of Justice is the court in which all persons charged with offences created by provincial statutes and subordinate legislation are to be tried. Where an appeal is taken from a decision of a justice of the peace assigned to hear Provincial Offences Act, R.S.O. 1990, c. P.33 matters to a provincial judge assigned to hear Provincial Offences Act appeals, the matter never leaves the jurisdiction of the

Ontario Court of Justice. In those circumstances, any person who has been assigned the powers and duties of a clerk of the court, whether a municipal employee or a provincial employee, must have jurisdiction to receive a notice of appeal. There is no reason why a clerk of the court employed by the province and a clerk of the court employed by the municipality but assigned to perform some appeal duties by the Memorandum of Understanding between the municipality and the Attorney General cannot have concurrent jurisdiction to receive notices of appeal.

The appeal was allowed on consent.

Cases referred to

R. v. Eton Construction Co. (1991), 6 O.R. (3d) 42, [1991] O.J. No. 1996, 68 C.C.C. (3d) 219, 14 W.C.B. (2d) 264 (Gen. Div.) (sub nom. R. v. St. Marys Cement Corp.); R. v. Metro News Ltd., [1985] O.J. No. 1322, 11 O.A.C. 58, 21 C.C.C. (3d) 492 (C.A.); Robinson v. Ontario (Securities Commission), [1994] O.J. No. 4185, 3 C.C.L.S. 192 (C.A.)

Statutes referred to

Courts Improvement Act, 1996, S.O. 1996, c. 25
 Courts of Justice Act, 1984, S.O. 1984, c. 11 (as am.)
 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 77(2)
 Criminal Code, R.S.C. 1985, c. C-46
 Highway Traffic Act, R.S.O. 1990, c. H.8, s. 128
 Justices of the Peace Act, R.S.O. 1990, c. J.4
 Provincial Courts Act, S.O. 1979, c. 5, s. 5
 Provincial Courts Act, R.S.O. 1980, c. 398
 Provincial Offences Act, 1979, S.O. 1979, c. 4, s. 118
 Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 131, 133, 135, 162, 167(1)
 Red Tape Reduction Act, 2000, S.O. 2000, c. 26, Sch. A
 Streamlining of Administration of Provincial Offences Act, 1997, S.O. 1998, c. 4

Rules and regulations referred to

Rules of the Superior Court of Justice and the Ontario Court of Justice in Appeals under Section 116 of the Provincial Offences Act, O. Reg. 723/94

Rules of the Ontario Court of Justice in Appeals under Section 135 of the Provincial Offences Act, O. Reg. 722/94, ss. 1, 5

APPEAL from a conviction for speeding. [page314]

Greg Burd, agent for appellant Giovanni Solda.

Carolyn Humeniuk, for respondent.

Robert Ratcliffe, for intervenor Attorney General for Ontario.

[1] WAKE J.: -- The decision in this matter was delivered on June 26, 2006 with brief reasons. I undertook to the parties to provide fuller written reasons. These are those reasons.

[2] The appellant was served with a provincial offences notice alleging that, on or about the 18th day of May 2004, he did commit the offence of "speeding" contrary to s. 128 of the Highway Traffic Act, R.S.O. 1990, c. H.8, as amended.

[3] The appellant filed a notice of intention to appear for the purpose of entering a plea and having a trial.

[4] The appellant's trial was held on July 26, 2004 in Brampton before Justice of the Peace Welsh who found the appellant guilty of the offence charged. It is interesting to note that in the respondent's factum it is stated that the trial was held at the Ontario Court of Justice (Provincial Offences Division).

[5] The appellant filed a notice of appeal with the clerk at

the same court location where he had been convicted at 5 Ray Lawson Blvd. in Brampton. Again, it is interesting to note that in the respondent's factum it is stated that the notice of appeal was filed with the clerk of the Provincial Offences Court.

[6] The characterization of the court which has jurisdiction to hear Provincial Offences Act, R.S.O. 1990, c. P.33 matters as a separate court or as a division of the Ontario Court of Justice has no basis in law. It may explain, to some extent, the confusion which has given rise to the issue on this appeal.

[7] The issue as framed by the respondent is that "this Court", and I presume the reference here is to the Ontario Court of Justice presided over by a provincial judge, does not have jurisdiction to hear this appeal "as it was not filed with the clerk of the appeal court in accordance with the Provincial Offences Act and the regulations thereto".

[8] The Attorney General for Ontario, represented by Mr. Ratcliffe of the Crown Law Office -- Civil has intervened in this matter and has framed the issue in the following way: "does this court have jurisdiction to hear an appeal when the notice of appeal is filed with a clerk of a municipally administered court office, rather than a provincially administered court office?"

Legislative Framework

[9] [Section] 135 of the Provincial Offences Act applies to proceedings commenced by certificate under Part I which was [page315] the situation pertaining to the appellant. [Section] 135 reads as follows:

135(1) A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the Ontario Court of Justice presided over by a provincial judge.

(2) A notice of appeal shall be in the prescribed form and shall state the reasons why the appeal was taken and shall be filed with the clerk of the court within fifteen days after the making of the decision appealed from, in accordance with rules of court.

(3) The clerk shall, as soon as is practicable, give a notice to the defendant and prosecutor of the time and place of the hearing of the appeal.

[10] Ontario Regulation 722/94 -- Rules of the Ontario Court of Justice in Appeals under Section 135 of the Provincial Offences Act, provides as follows (I indicate parenthetically that The Red Tape Reduction Act, 2000, S.O. 2000, c. 26, Sch. A, effective December 6, 2000 struck out "Ontario Court (Provincial Division)" whenever it appears in any statute or regulation and substitutes in each case "Ontario Court of Justice" which I have done throughout this judgment to conform with the stipulation of that Act):

1(1) Definitions -- in these rules,

"Act" means The Provincial Offences Act;

"appeal court" means the Ontario Court of Justice sitting as the appeal court under s. 135 of the Act;

"clerk" means the clerk of the Ontario Court of Justice;

"file" means file with the clerk;

"judge" means a judge of the Ontario Court of Justice sitting as the appeal court under s. 135 of the Act.

(2) Application of rules -- These rules apply in respect of appeals to the Ontario Court of Justice under s. 135 of the Act.

(3) General principle -- 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.

(4) Matters not provided for -- Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[11] On June 11, 1998, the Streamlining of Administration of Provincial Offences Act, 1997, S.O. 1998, c. 4, Part X was enacted. The legislation allowed the Attorney General to make agreements with municipalities permitting them, inter alia, to perform courts administration and court support functions for the purpose of the Act. Specifically, s. 162(1) of The Provincial Offences Act provides as follows: The Attorney General and a municipality [page316] may enter into an agreement with respect to a specified area, authorizing the municipality to, (a) perform courts administration and court support functions, including the functions of the clerk of the court, for the purposes of this Act.

[12] [Section] 167(1) of the Provincial Offences Act provides that when a Transfer Agreement is in effect, "the clerk of the court may be a municipal employee".

[13] On April 29, 1999, the respondent municipality and the Attorney General entered into a Memorandum of Understanding (hereinafter referred to as the MOU) and a local side agreement as contemplated by s. 162 of the Provincial Offences Act.

[14] Article 1.3.1 of the MOU deals with the delivery of courts administration and court support services relating to Provincial Offences Act appeals. It reads as follows:

1.3.1 The Attorney General transfers, under the Transfer Agreement, the following functions to the Municipal Partner:

The courts administration and court functions, including the function of clerk of the court, for proceedings commenced under Parts I, II and III of the Act carried out by the Attorney General prior to transfer, excluding some court administration and all court support functions on

appeals of these matters . . .

(Emphasis added)

[15] It is readily apparent to any provincial judge hearing Provincial Offences Act appeals that all court support functions are performed by the same in-court staff who perform the same functions in Criminal Code, R.S.C. 1985, c. C-46 and other matters where court support staff is provided by the Province. Clearly the phrase "all court support functions on appeals" refers to the exclusion of all of those functions on appeals. It remains to determine what the reference to "some court administration" means. Counsel for the Attorney General submits that "the delegation of court administration functions in art. 1.3.1. must extend, at least, to receiving and processing notices of appeal. Otherwise, there would not be any opportunity for the municipally administered POA courts to perform any administrative functions associated with appeals". It is submitted that this would be entirely inconsistent with the clear language of art. 1.3.1.

[16] In accordance with art. 1.3.1. of the MOU and pursuant to s. 162(1) of the Provincial Offences Act, the Attorney General's delegate executed an Assignment of Powers and Duties of Clerk of the court under the Provincial Offences Act in respect to the Corporation of the City of Brampton. The Brampton Assignment, dated February 19, 2001, includes the following provision: [page317]

[U]nder subsection 77(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43 in exercise of the authority conferred upon me by the designation of the Deputy Attorney General dated June 11, 1990, I assign the powers and duties given to a clerk of the court under The Provincial Offences Act, R.S.O. 1990, c. P.33, its governing regulations and rules of court to the following persons who are municipal employees and who are acting under the authority of the Transfer Agreement made in accordance with subsections 162(1) and 167(1) of The Streamlining of Administration of Provincial Offences Act, 1998, S.O. 1998, c. 4 between the Attorney General and the Corporation of the City of Brampton.

[17] The Attorney General submits that this broad assignment authorizes a court clerk in a municipal court office to perform the court administration duties assumed by the Municipal Partners in the Transfer Agreements, including receiving and processing a notice of appeal, as in this case.

[18] Clearly it is the intention of the Attorney General that receipt of a notice of appeal by the court clerk be included in this assignment and it is not submitted by the respondent municipality that the assignment did not include this function. In fact, the court clerk in the municipally administered provincial offences office in Brampton has been performing these duties, including receiving and processing notices of appeal since the Assignment was made on February 19, 2001.

[19] This is not a situation where the respondent municipality has decided that it no longer wishes to perform these duties or is unclear about whether they were included in the assignment. If that were the case this issue could be dealt with under the terms of the MOU itself which provides for dispute resolution, amendments and even termination.

[20] The respondent municipality's position is that there is no jurisdiction for the municipal court clerk to receive a notice of appeal. The argument is that the rules and regulations governing appeal courts stipulate that a notice of appeal must be filed at the offices of the appeal court rather than the originating court.

[21] This is certainly the case for appeals to the Ontario Court of Appeal as set out in the Ontario Court of Appeal Criminal Appeal Rules and for appeals to that court under s. 131 and s. 133 of the Provincial Offences Act which are commenced by filing an appeal or motion for leave to appeal with the registrar of that court.

[22] Ontario Regulation 723/94 made under the Courts of Justice Act, R.S.O. 1990, c. C.43 is entitled: Rules of the Superior Court of Justice and the Ontario Court of Justice in Appeals under Section 116 of the Provincial Offences Act. These

rules are for matters commenced under Part III of the Act and define "Appeal Court" and "clerk" and "file" respectively as follows: "Appeal Court" means the Superior Court of Justice or the [page318] Ontario Court of Justice, as the case may be, sitting as the Appeal Court under s. 116 of the Act; "clerk" means the clerk of the Ontario Court of Justice or the local registrar of the Superior Court of Justice to which an appeal is or may be taken under Part VII of the Act; "file" means file with the clerk.

[23] It is acknowledged by the respondent municipality that the definition of "clerk" in Regulation 722/94, which governs appeals in Part I matters, does not distinguish between the clerk of the court where the trial took place and where the appeal is intended to take place as it does in Regulation 723/94. However, the respondent municipality refers to s. 5 of Regulation 722/94 which does seem to distinguish between the clerk with whom a notice of appeal is filed and the clerk of the court that imposed the fine.

[24] The argument is then made by the respondent municipality that since two clerks are contemplated, by analogy to the practice "of other appeal courts", the conclusion must be that appeals under s. 135 of the Provincial Offences Act ought to be filed with what the factum refers to as the "Ontario Court (Provincial Division) sitting as an appeal court."

Analysis

[25] It is true that jurisdiction cannot be conferred by consent. See *Robinson v. Ontario (Securities Commission)*, [1994] O.J. No. 4185, 3 C.C.L.S. 192 (C.A.); and *R. v. Metro News Ltd.*, [1985] O.J. No. 1322, 21 C.C.C. (3d) 492 (C.A.).

[26] I am, however, hesitant to find a lack of jurisdiction in the clerk of a municipality who has been assigned the powers and duties of a clerk of the Ontario Court of Justice on the basis of an interpretation founded on rules which were drafted well before the coming into being of the Streamlining of Administration of Provincial Offences Act by which Part X of the Provincial Offences Act was enacted.

[27] It must be remembered that Ontario Regulation 722/94 itself provides that the 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".

[28] It may be time for the Rules Committee to review regulation 722/94 to recognize the new reality not only of Transfer Agreements but of the Ontario Court of Justice as well in matters heard under the Provincial Offences Act.

[29] The Provincial Offences Act, 1979, S.O. 1979, c. 4 was passed in 1979. At that time there was a separate court established under s. 18 of the Provincial Courts Act, R.S.O. 1980, c. 398 styled as the Provincial Offences Court of the county or district [page319] which heard all matters in which jurisdiction is conferred by the Provincial Offences Act.

[30] Section 118 of the original Provincial Offences Act provided that an appeal from a proceeding commenced by certificate under Part I "shall be to the Provincial Court (Criminal Division) of the county or district in which the adjudication was made".

[31] Subsection (2) provided that a "notice of appeal. . . . shall be filed with the clerk of the provincial court (criminal division)". This would support the view that the clerk who should receive the notice of appeal is a different person than the clerk of the provincial offences court. However, s. 33(2) of the Provincial Courts Act, S.O. 1979, c. 5, s. 5 enacted at the time of the original Provincial Offences Act, provided as follows:

33(2) The clerk of a provincial court (criminal division) is the clerk of the provincial offences court of the same county or district.

[32] It would thus appear that the clerk of the trial court and the clerk of the appeal court in provincial offences matters were intended to be the same person, notwithstanding any contrary indication in the the Provincial Offences Act or

the rules.

[33] By 1990, the Provincial Court (Criminal Division), the Provincial Court (Family Division) and the Provincial Offences Court were amalgamated as a court of record named the Ontario Court (Provincial Division) pursuant to s. 33 of The Courts of Justice Act, 1984, S.O. 1984, c. 11 (as amended). The Courts Improvement Act, 1996, S.O. 1996, c. 25, which was proclaimed in force on April 19, 1999, changed the name of the Ontario Court (Provincial Division) to the Ontario Court of Justice.

[34] The Ontario Court of Justice is the court in which all persons charged with offences created by provincial statutes and subordinate legislation are to be tried. See *R. v. Eton Construction Co.* (1991), 6 O.R. (3d) 42, [1991] O.J. No. 1996, 68 C.C.C. (3d) 219 (Gen. Div.), at p. 48 O.R., p. 226 C.C.C.

[35] Unfortunately there still lingers an erroneous notion that provincial offences are dealt with in a separate court called the Provincial Offences Court or the Provincial Offences Division as noted at the outset of this judgment.

[36] Not only do all Provincial Offences Act cases begin in the Ontario Court of Justice, but almost all end in that court. An insignificant number of Provincial Offences Act matters are appealed to other courts, either the Superior Court of Justice or to the Court of Appeal for Ontario. In those cases the rules and statutes require the notice of appeal to be filed in the court to which the appeal is being taken. However, reference by analogy to that situation is not helpful since appeals of proceedings commenced by certificate [page320] under Part I are to the Ontario Court of Justice which is also the court in which all persons charged under Part I are tried.

[37] Where an appeal is taken from a decision of a justice of the peace, assigned by the Chief Justice of the Ontario Court of Justice, or by the Associate Chief Justice -- Coordinator of Justices of the Peace on the direction of the Chief Justice pursuant to the Justices of the Peace Act, R.S.O. 1990, c. J.4 to hear Provincial Offences Act matters and proceedings under Part I, then the appeal is heard in the same Ontario Court of

Justice by a provincial judge assigned by the same Chief Justice of the Ontario Court of Justice or his delegate (regional senior judge or local administrative judge), to hear Provincial Offences Act appeals by virtue of the assignment power under the Courts of Justice Act.

[38] Simply put, the case never leaves the jurisdiction of the Ontario Court of Justice.

[39] In those circumstances, any person who has been assigned the powers and duties of a clerk of the court, whether a municipal employee by virtue of s. 77(2) of the Courts of Justice Act or a provincial employee who is engaged to perform the duties of a clerk, must have jurisdiction to receive a notice of appeal.

[40] I see no reason why a clerk of the court employed by the province and a clerk of the court employed by the municipality but assigned to perform some appeal duties by the MOU between the municipality and the Attorney General, cannot have concurrent jurisdiction to receive notices of appeal.

[41] The issue of whether an appeal should be filed with the clerk in the location where the Provincial Offences Act trial took place or at the court location where the appeal is to be heard may be an issue of convenience and cost to be settled between the Province through the Attorney General and the municipality under the terms of their MOU. It is not, however, an issue of jurisdiction.

[42] Accordingly, I find that the municipal employee who received the notice of appeal filed by the appellant had jurisdiction to receive it. The notice of appeal is therefore validly before the court.

Appeal allowed.

End Note: When I provided counsel with my decision on this matter on June 26, 2006 with reasons to follow, counsel for the respondent municipality, Ms. Humeniuk, requested that, in light of my decision, I allow the appeal on consent in this and the

other test cases before me on this point and grant her permission to withdraw the charges in each case. This request was granted and all charges were withdrawn.