CITATION: York (Regional Municipality) v. Winlow, 2009 ONCA 643
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COURT OF APPEAL FOR ONTARIO

Laskin, Gillese and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen Ex Rel. The Regional Municipality of York

Appellant

and

Robert J. Winlow

Respondent

Hans J. Saamen, for the appellant

Adam Little, as *amicus curiae*

Heard: January 14, 2009

On appeal from the decision of Justice R.A. Minard of the Ontario Court of Justice dated March 6, 2008, upholding the dismissal of an application to amend a certificate of offence by Justice of the Peace Hazel Hodson-Walker dated August 16, 2007.

Laskin J.A.:

A. INTRODUCTION

[1] Ontario's *Highway Traffic Act* imposes a scale of fines for motorists convicted of speeding. The dollar amount of the fine increases for every kilometre per hour over the

speed limit. This system of fines has given rise to a practice in some Ontario municipalities, which is reflected in the facts of this case.

[2] Robert Winlow was caught speeding on Highway 400 in the Regional Municipality of York. The police officer who stopped him said that he was driving 30 kilometres per hour over the speed limit but ticketed him for only 15 kilometres per hour over the limit. However, when Mr. Winlow refused to pay the set fine and asked for a trial, the prosecutor sought an amendment to charge him with driving 30 kilometres per hour over the limit. The justice of the peace refused to amend the charge, and her decision was upheld on appeal in the Ontario Court of Justice.

[3] The Regional Municipality of York appeals with leave to this court and asks us to rule on these questions:

1. Is the particular rate of speed an essential element of the offence of speeding?

2. Depending on the rate of speed, is the fine for speeding fixed or does the court have discretion to reduce the fine?

3. Did the courts below err in refusing to amend the charge, and, more broadly and importantly, is the practice of "amending-up" permissible?

B. THE LEGISLATION IN ISSUE

[4] The questions on this appeal turn on the interpretation and application of two legislative provisions: s. 128 of the *Highway Traffic Act*, R.S.O. 1990 c. H.8 ("*HTA*"); and s. 34 of the *Provincial Offences Act*, R.S.O. 1990 c. P.33 ("*POA*").

1. Section 128 of the *HTA*

[5] Section 128(1) of the *HTA* makes speeding an offence. Mr. Winlow was charged under s. 128(1)(d), which states:

> (1) No person shall drive a motor vehicle at a rate of speed greater than …
>
> > (d) the rate of speed prescribed for motor vehicles on a highway in accordance with subsection … (7)

[6] Section 128(7)(b) stipulates that the Minister of Transportation may make regulations prescribing a rate of speed for any class or classes of motor vehicle driven on the King's Highway.

[7] Section 1(a) and Schedule 123 of Regulation 619, R.R.O. 1990, taken together, stipulate that the rate of speed on Highway 400 is 100 km per hour.

[8] Section 128(14) of the *HTA* sets out the penalty for speeding with a sliding scale of fines: the greater the speed over the limit, the greater the fine. It reads as follows:

> (14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an

> offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,
>
> > (a) is less than 20 kilometres per hour over the speed limit, to a fine of $3 for each kilometre per hour that the motor vehicle was driven over the speed limit;
> >
> > (b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the speed limit, to a fine of $4.50 for each kilometre that the motor vehicle was driven over the speed limit;
> >
> > (c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the speed limit, to a fine of $7 for each kilometre that the motor vehicle was driven over the speed limit; and
> >
> > (d) is 50 kilometres per hour or more over the speed limit, to a fine of $9.75 for each kilometre per hour that the motor vehicle was driven over the speed limit.

2. Section 34 of the *POA*

[9] Section 34 of the *POA* authorizes the amendment of an information or certificate of offence. The amendment power is broad, reflecting a legislative intent that *POA* charges be decided on their merits and not on technical grounds or procedural irregularities.

[10] Section 34(2) permits the court, during the trial, to amend a certificate to conform to the evidence:

> (2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

In seeking to uphold the practice to which it subjected Mr. Winlow, the Regional Municipality of York relies on s. 34(2).

[11] Section 34(4) states that in deciding whether to grant an amendment, the court shall take into account four considerations:

> 34(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.

These four considerations and their application lie at the heart of the main question on this appeal: whether the prosecutor can "amend up".

[12] Section 34(5) stipulates that the question whether an order to amend a certificate should be granted or refused is a question of law. Because the refusal of an amendment is a question of law, the decision of the appeal court judge was appealable to this court under s. 131 of the *POA*.

C. BACKGROUND

1. The Facts

[13] In the early evening of December 6, 2006, Mr. Winlow was driving north on Highway 400. The posted speed limit on the highway is 100 km per hour. A police officer stopped Mr. Winlow and charged him with speeding, contrary to s. 128 of the *HTA*. On the offence notice given to Mr. Winlow, the officer noted the speed at 115 km per hour in a 100 km per hour zone. The offence notice provided that Mr. Winlow could dispose of the charge by paying a set fine of $37.50 plus $5.00 for costs and a $10 victim fine surcharge – a total of $52.50. Mr. Winlow chose not to pay the fine; instead he asked for a trial.

2. The Trial Before the Justice of the Peace

[14] The trial took place on August 16, 2007 before Justice of the Peace Hodson-Walker. Mr. Winlow represented himself.

[15] Before the trial began, the prosecutor told Mr. Winlow that the police officer would likely testify Mr. Winlow was driving faster than 115 km per hour. The prosecutor also told Mr. Winlow that if that was the officer's evidence, the prosecutor would ask the court to amend the charge to conform to the higher rate of speed. Because a conviction at a higher rate of speed would mean a higher fine and, perhaps, other serious consequences, the prosecutor offered Mr. Winlow an adjournment to speak to a counsel or an agent.

[16] Mr. Winlow refused an adjournment. He said that he wanted the trial to go ahead. Before the justice of the peace, the prosecutor asked Mr. Winlow if he was aware of the possibility that the charge could go up, to which he responded "I am". Mr. Winlow was arraigned on the certificate of offence – he was charged with the offence of speeding, 115 km per hour in a 100 km per hour zone. He pleaded not guilty.

[17] The officer who had stopped Mr. Winlow on Highway 400 testified for the prosecution. He gave evidence that he followed Mr. Winlow and "paced" him. The officer was driving at a speed of 130 km per hour, and yet Mr. Winlow was pulling away from him. The officer used his discretion to write the offence notice at 115 km per hour.

[18] After the officer's examination-in-chief, the prosecutor asked to amend the certificate of offence under s. 34(2) of the *POA* to conform with the evidence that Mr. Winlow was driving at 130 km per hour.

[19] The justice of the peace refused to permit the amendment. She gave two reasons: if the certificate was amended, Mr. Winlow who "was not expecting this turn of events might feel coerced in pleading guilty"; and "the motion to amend is not compatible with the philosophy" of the Act – which "is to deal with matters in a quick, efficient and fair manner". Significantly, in refusing the amendment, the justice of the peace did not make a finding that Mr. Winlow was driving at 130 km per hour.

[20] The trial continued. Mr. Winlow cross-examined the officer. He then testified. He said that he did not believe he was going any faster than the other traffic on the highway. But he acknowledged that he did not look at his speedometer, and did not know at what rate of speed he was driving.

[21] At the conclusion of the trial the justice of the peace gave brief oral reasons. She rejected Mr. Winlow's evidence. She convicted him of speeding, 115 km per hour in a 100 km zone. She imposed a total fine of $60 - $45, the "statutory requirement" for that rate of speed, plus $5 in court costs and a $10 surcharge.

3. The Appeal in the Ontario Court of Justice

[22] The Regional Municipality of York appealed to the Ontario Court of Justice. Mr. Winlow again represented himself. The Regional Municipality contended that the justice of the peace erred in law by refusing to amend the certificate of offence.

[23] Justice Minard, the appeal court judge, dismissed the appeal. He said that the proposed amendment did not prejudice Mr. Winlow. He also acknowledged that had he been exercising his discretion at the trial, he would have granted the amendment. But he could not say that the justice of the peace had erred in law.

[24] The Regional Municipality sought leave to appeal under s. 131 of the *POA*, which prescribes that leave may be granted on a question of law alone where it is essential in the

public interest or for the due administration of justice that leave be granted. On April 18, 2008, the Chief Justice of Ontario granted leave to appeal to this court.

D. THE ISSUES ON THE APPEAL

First Issue: Is the particular rate of speed an essential element of the offence of speeding?

[25] There appears to be a small debate among the justices of the peace and the Ontario Court of Justice judges over whether the particular rate of speed at which a defendant is charged with driving is an essential element of the offence of speeding or a particular relevant only to penalty. In the vast majority of cases, justices of the peace and Ontario Court of Justice judges have concluded that the offence is speeding contrary to s. 128(1) of the *HTA*, and that the actual rate of speed matters only on penalty. A few cases, however – see, for example, *R. v. Ali*, [1993] O.J. No. 4675 (Ct. J.) – suggest that the particular rate of speed is an essential element of the offence and thus, if the certificate is amended, the defendant is facing a different offence.

[26] I agree with the majority. The offence provision for speeding is s. 128(1) of the *HTA*: "no person shall drive a motor vehicle at a rate of speed greater than" the statutorily prescribed rate. The actual rate of speed is a particular relevant to penalty under s. 128(14) of the *HTA*, because the amount of the fine increases as the rate of speed over the speed limit increases. Thus, to obtain a higher fine in a case such as the present one, the

prosecutor must seek an amendment, and the court must make a finding of fact on the actual rate of speed. That fact must be proved beyond a reasonable doubt.

[27] In the context of the court's amendment power, this debate has little significance. Even if an amendment to conform to the evidence disclosed at trial would mean that the defendant was facing a new offence, the court would still have the power to grant the amendment under s. 34(2) of the *POA* so long as it was supported by the evidence, and would not cause prejudice or an injustice to the defendant: see *R. v. Irwin* (1998), 38 O.R. (3d) 689 (C.A.).[1]

[28] I now turn to an issue that has caused a much larger debate among justices of the peace and Ontario Court of Justice judges. This debate raises an important and difficult question.

Second Issue: Depending on the rate of speed, is the fine for speeding fixed or does the court have discretion to reduce the fine?

[29] For convenience, I reproduce s. 128(14) of the *HTA*, which sets out the fines for speeding:

> (14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,
>
> > (a) is less than 20 kilometres per hour over the speed limit, to a fine of $3 for each

[1] In that case, Doherty J.A. was considering the amendment power contained in s. 683(1)(g) of the *Criminal Code*.

> kilometre per hour that the motor vehicle was driven over the speed limit;
>
> (b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the speed limit, to a fine of $4.50 for each kilometre that the motor vehicle was driven over the speed limit;
>
> (c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the speed limit, to a fine of $7 for each kilometre that the motor vehicle was driven over the speed limit; and
>
> (d) is 50 kilometres per hour or more over the speed limit, to a fine of $9.75 for each kilometre per hour that the motor vehicle was driven over the speed limit.

[30] Mr. Winlow was found to have been driving at 115 km per hour in a 100 km per hour zone and was therefore fined under s. 128(14)(a). Was the justice of the peace required to impose a fine of $45 ($3 X 15) or did she have discretion to reduce the fine?

[31] The justice of the peace imposed a fine of $45 (plus costs and a surcharge). She did not suggest that she had a discretion to do otherwise. The majority of justices of the peace and judges who have considered this issue agree that she did not have discretion to reduce the fine: see for example, *R. v. Weber* (2003), 64 O.R. (3d) 126 (Ct. J.), *R. v. Carter*, [2005] O.J. No. 654 (Ct. J.), and *R. v. Chu* (2005), 77 O.R. (3d) 380 (Ct. J.). They view s. 128(14) as a legislated exception to the usual principle that judges have discretion when sentencing an offender. In their view, s. 128(14) admits of no discretion. The amount of the fine is mandatory, and is derived from a simple mathematical

calculation: the number of kilometres over the speed limit multiplied by the appropriate dollar figure.

[32] Some justices of the peace and judges, however, have taken a contrary position: see for example, *R. v. Kuntz*, [2004] O.J. No. 4631 (Ct. J.). In their view, s. 128(14) of the *HTA* does not clearly remove the usual discretion given to sentencing judges. Any ambiguity in the interpretation of s. 128(14) must be resolved in favour of the offender.

[33] Justices of the peace and provincial court judges belong to tribunals created by statute. Therefore, their jurisdiction to impose a penalty is limited by their authorizing legislation. Neither has any inherent power. The governing principle, now well established, is that justices of the peace and provincial court judges, have only the powers expressly or impliedly granted to them by the legislature: see *R. v. 974649*, [2001] 3 S.C.R. 575 at 589. See also s. 17(1) of the *Justices of the Peace Act*, R.S.O. 1990 c. J. 4. A corollary of this principle is that although sentencing judges ordinarily have a discretion to exercise, the legislature can limit that discretion or eliminate it altogether: see *R. v. Wu*, [2003] 3 S.C.R. 530.

[34] Does s. 128(14) of the *HTA* eliminate the court's discretion to impose a lesser fine than the fine derived from multiplying the number of kilometres per hour over the speed limit by the specified dollar figure? The answer to this question turns on the meaning of the words "is liable … to" in s. 128(14), words that my former colleague Robins J.A.

aptly noted are not always free of ambiguity: see *R. v. Dilorenzo* (1984), 45 O.R. (2d) 385 at p. 396.

[35] On one hand, some argue that these words connote a mandatory obligation. If the legislature had intended to give the sentencing judge a discretion to impose a lesser fine it would have used words such as "is liable … to a fine of up to $3 for each kilometre per hour that the motor vehicle was driven over the speed limit", or "is liable … to a fine of not more than $3".

[36] On the other hand, some contend that the words "is liable … to" mean "exposed to", but give the court discretion to impose a smaller fine. If the legislature had intended to remove the sentencing judge's discretion it would have used words such as "is liable … to a fine equal to $3 for each kilometre per hour that the motor vehicle was driven over the speed limit", or simply declared that "the fine shall be $3".

[37] The cases on the meaning of "is liable … to" mirror this debate. They too are conflicting. For example, in *Canada (Minister of National Revenue – M.N.R.) v. Panko*, [1972] S.C.R. 319, Judson J. held that a penalty for tax evasion under the *Income Tax Act* – providing that the tax payor is "liable to a penalty of 25 per cent of the amount by which the tax that would so have been payable is less than the tax payable by him for the year" – gave the Minister no discretion about the amount or the penalty: it was fixed at a flat 25 per cent.

[38] Similarly, in the *R. v. Smith* (1923), 1 D.L.R. 820, the Nova Scotia Supreme Court had to decide whether a section of the *Income War Tax Act* providing that a person failing to file a tax return "shall be liable on summary conviction to a penalty of $25 for each day during which the default continues" gave the magistrate discretion to impose a lesser fine. The majority held that the provision established a penalty in the fixed sum of $25 per day. In the words of Rogers J. at p. 825, "… the magistrate can no more reduce it than he can increase it. The words used, 'shall be liable … to …' convey to my mind only one meaning. They mean what they say; no more no less".

[39] In a case decided a year later, *R. v. Harrison and O'Kelly*, [1924] 3 D.L.R. 312, Trueman J.A., writing for a unanimous five-member panel of the Manitoba Court of Appeal also concluded that this provision in the *Income War Tax Act* gave the magistrate no discretion to reduce the fine. In his view at p. 313, the "mandatory nature" of the words "be liable …" are "beyond question".

[40] By contrast, in *R. v. Robinson*, [1951] S.C.R. 522, Cartwright J., concurring, held that the meaning of the phrase "liable to" in a section of the *Criminal Code* stating that a person could not be found to be a "habitual criminal" unless three times previously "convicted of an indictable offence for which he was liable to at least five years' imprisonment" meant "exposed to". And, in *R. v. Fraser* (1944), 81 C.C.C. 114 (P.E.I. S.C.), Campbell C.J. held at p. 126 that a penalty provision of the federal *Fisheries Act*

making a person "liable … to a fine of one hundred dollars" gave the court discretion to impose "any fine not exceeding the maximum level of $100".

[41] The exercise of determining the meaning of these words is an exercise in statutory interpretation. Two key elements that guide a court's interpretation of the words of a statute are context and legislative purpose. These two elements underlie Driedger's cardinal principle of statutory interpretation, repeatedly endorsed by the Supreme Court of Canada:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983).

[42] The apparently conflicting results in the cases I have summarized may simply reflect the different contexts and legislative purposes of the statutes in which these words appear. Although some have argued that the meaning of "is liable … to" in s. 128(14) is ambiguous, the mere existence of different results does not create ambiguity. As Iacobucci J. said in *Bell ExpressVu* at para. 30, "[i]t is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger" to determine whether real ambiguity exists – that is, whether the provision is reasonably capable of more than one meaning.

[43] Having undertaken this exercise, I have concluded that the meaning of the words "is liable … to" in s. 128(14) of the *HTA* is not ambiguous. Especially in the light of their context and the legislative purpose of s. 128(14), in my view, they admit of only one meaning: they establish a statutory penalty regime that obliges courts to impose the fines specified in the section. Courts have no discretion to reduce these fines. Several considerations support this conclusion.

(i) Immediate context

[44] The dictionary meaning of "liable" is "bound or obliged by law of equity, answerable at law … bound in law to do": see the New Shorter Oxford Dictionary Vol. 1 (Clarendon Press: Oxford, 1993). The dictionary meaning of a word is not always the same as Driedger's "ordinary sense" of the word because words take their colour from their surroundings: see Iacobucci J. in *Bell ExpressVu* at para. 27, quoting Professor John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1.

[45] However, here the immediate context in which the phrase "is liable … to" occurs, s. 128(14) of the Act itself, strongly suggests that these words are meant to bind or oblige courts to impose the specified fines. Why else, I ask rhetorically, have a precise scale of fines where the dollar amount of the fine increases for every kilometre per hour over the speed limit by a specified amount depending on whether the rate of speed over the limit falls under ss. (a), (b), (c) or (d)?

(ii) Broader context

[46] The broader legislative context of the other penalty provisions of the *HTA* further supports this conclusion. The Act is replete with specific fines for specific offences. Two things may be said about these fine provisions. First, the legislature consistently has used the words "is liable … to" in setting out the fine that the court may impose.

[47] Second, where the legislature intends to give courts discretion on the amount of the fine, it uses the words "not more than" and "not less than". Typical are the fine provisions where the legislature prescribes a minimum and a maximum fine, and gives the court discretion to impose an amount in between these limits. The fine under s. 8(2) for driving contrary to restrictions on one's permit is illustrative. On conviction, the offender is liable to a fine of not less than $100 and not more than $500. Similarly, on a conviction under s. 12 for defacing or altering a licence plate, an offender is liable to a fine of not less than $100 and not more than $1,000. Other analogous penalty provisions of the act include s. 9(1), s. 23(4) and (5), s. 32(16), s. 51, s. 53, s. 79(5), s. 99, s. 105(3), s. 124(6) and s. 172(2).

[48] Perhaps more significant for this appeal, when the legislature prescribes only a maximum fine but intends to give the court discretion to impose a reduced fine below a stipulated maximum, it uses the words "not more than". The fine under s. 70(4) of the *HTA* for driving without tires that conform to prescribed specifications is an example.

On conviction, the offender is liable to a fine of not more than $1,000. Other analogous provisions include s. 77(2), s. 82(9) and s. 187(4).

[49] From this consistent statutory scheme, I infer that if the legislature had intended to give courts discretion to reduce the specified fines for speeding it would have used words such as "… is liable … to a fine of not more than $3 for every kilometre per hour that the motor vehicle was driven over the speed limit …". That the legislature did not do so powerfully supports the conclusion that the courts have no discretion to reduce the fines for speeding.

(iii) Legislative evolution and purpose

[50] The legislative evolution and purpose of the fines for speeding also support this conclusion. The legislative regime that now exists came into effect in 1969. Before that date the legislature specified a minimum and a maximum fine and gave courts discretion to impose a fine within those two limits. Section 59(12) of the 1960 *Highway Traffic Act* provided:

> 59(12) Every person who contravenes any of the provisions of this section or any by-law passed or regulation made under this section is liable, for the first offence to a fine of not less than $5 and not more than $50; for the second offence to a fine of not less than $10 and not more than $100, and in addition his licence or permit may be suspended for a period of not more than three months; and for any subsequent offence to a fine of not less than $20 and not more than $200, and in addition his licence or permit may be suspended for a period of not more than six months.

[51] In 1969, s. 59(12) was repealed and replaced by the scheme now in place today – a sliding scale of fines depending on the rate of speed over the limit: see s. 42(2) of S.O. 1968-9, C. 45.

[52] This amendment itself, revoking the previous statutory provision, signals the legislature's intent to remove the court's discretion. So too does the speech of the Minister of Transport introducing this new scheme. Ministerial comments in Hansard, although of limited weight, if reliable, are still relevant to an understanding of the background and purpose of the legislation: see *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 at para. 57. I take the Minister's speech in introducing the amending provision for fines for speeding to be both reliable and relevant. He told the legislature that this new penalty section for speeding was designed to "establish a more meaningful deterrent … a uniform practice": see Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 28th Leg. 2nd sess. (31 March 1969) at p. 2866. By the idea of a uniform practice the Minister undoubtedly meant a reversal of the previous discretionary regime.

(iv) French version

[53] The French version of s. 128(14) of the *HTA* uses the word "passible":

> 128(14) Quiconque contrevient au présent article, à un règlement ou à un règlement municipal pris en application du présent article est coupable d'une infraction et passible, sur déclaration de culpabilité, des amendes suivantes :
>
> a) si la vitesse à laquelle le véhicule automobile circulait est inférieure à 20

> kilomètres à l'heure au-delà de la vitesse maximale, 3 $ pour chaque kilomètre à l'heure où le véhicule automobile circulait au-delà de la vitesse maximale;
>
> …

"Passible … des amendes suivantes …" means "liable to the following fines". See *Le Robert & Collins Senior*, 6th ed. (2002). Therefore, the meaning of these words appears to be common to both the English and French versions of s. 128(14). This is yet another piece of evidence favouring my conclusion.

[54] For all these reasons, in my view, the fines for speeding in s. 128(14) of the *HTA* are fixed and are derived simply by multiplying the number of kilometres per hour over the speed limit by the appropriate dollar figure. The courts have no discretion to reduce these fines.

Third Issue: Is the practice of "amending up" permissible?

1. Overview

[55] We were told by counsel that "amending up" of speeding charges is a common practice among Ontario's municipalities. The appellant, the Regional Municipality of York, is one of the municipalities that engages in this practice.

[56] The facts of this case illustrate the typical use of this practice: a police officer clocks a person driving at 30 km per hour over the speed limit but uses discretion to write the ticket for 15 km per hour over the speed limit. If the driver pays the set fine on the offence notice, that amounts to a plea of guilty and a conviction, and disposes of the

charge. A driver who does not pay the set fine, but instead goes to trial, risks a conviction for speeding at 130 km per hour. The prosecutor invariably will ask the court to "amend up" the certificate of offence from 115 km per hour to 130 km per hour to conform to the evidence given at trial. Even if the prosecutor does not seek an amendment, the court can order the amendment itself after hearing the evidence.

[57] Some have expressed concern about the propriety of this practice. Likely it was this concern that prompted the Chief Justice of Ontario to grant leave to appeal to this court. In oral argument, the Regional Municipality of York said that it is less interested in the result of Mr. Winlow's case than in obtaining guidance from this court on the practice.

[58] As a general conclusion, I see nothing inherently unfair about the practice itself. It seems to me that it seeks to achieve, or at least balance, two laudable objectives, both of which are in the public interest: to provide offending drivers with an incentive to settle out of court, thus disposing of many speeding charges quickly and efficiently; and to ensure that drivers who commit speeding offences are convicted at the actual rate of speed over the speed limit that they drive, thus promoting both specific and general deterrence.

[59] The first objective is triggered when a police officer exercises discretion to charge at a reduced rate of speed over the limit. The second objective is triggered when the

prosecutor asks for an amendment of the charge to conform to the evidence disclosed at trial.

[60] Each case, however, turns on its own facts. Drivers – many of whom represent themselves in court – are protected by the four requirements of s. 34(4) of the *POA*. A speeding charge may be "amended up" only if the evidence at trial supports the amendment, the circumstances of the case warrant the amendment, the defendant is not prejudiced by the amendment and no injustice would be visited on the defendant by granting the amendment. Although, under s. 34(5) of the *POA*, the granting or refusal of an amendment is a question of law, the four requirements of s. 34(4) call for a fact-specific inquiry to be addressed by the court in each case.

2. Discussion

[61] I do not consider it inappropriate when a police officer uses discretion to charge a driver with speeding at a rate less than the actual rate over the speed limit. In a sense it is a form of plea bargaining. Normally, the prosecutor engages in plea bargaining with the defence. If a police officer charged a person with speeding 30 km per hour over the speed limit, and the prosecutor said that the charge would be reduced by 15 km if the person pleaded guilty, no one could seriously object. Plea bargaining by the prosecution and the defence is as essential to the effective working of the provincial regulatory system as it is to the effective working of the criminal justice system.

[62] In this case, the police officer, not the prosecutor, initiated the plea bargaining. Many offending drivers no doubt welcome receiving this "break" from the officer, without having to go to court to obtain it. Systemically, many cases can be disposed of without using valuable court time and resources. Indeed, I expect that the large number of speeding charges, the heavy volume of traffic cases before justices of the peace, and the desirability of finding an efficient way to deal with many of these cases has prompted the practice now before this court.

[63] However, when drivers, as is their right, decide not to plead guilty and pay the set fine, but to instead defend the charge at a trial, different considerations come into play. The prosecutor then has carriage of the charge against the defendant. The prosecutor's carriage of the charge includes the discretion to manage the prosecution in accordance with the statute.

[64] And, under s. 34(2) of the *POA*, the legislature has expressly authorized the court to amend a charge to conform to the evidence disclosed at trial. Defendants have no vested right to insist on a trial only on the charge named on the certificate of offence. The prosecutor may thus exercise discretion by asking the court to "amend up" the certificate. The legislation gives the prosecutor the right to do so: see *R. v. Irwin*. It is not for the courts to interfere with the exercise of prosecutorial discretion except in cases of flagrant impropriety: see *Krieger v. The Law Society of Alberta*, [2002] 3 S.C.R. 372.

[65] However, before the amendment is granted, the court must consider the four requirements of s. 34(4) – the word "shall" makes the court's consideration mandatory. These requirements are intended to ensure that the court's amendment power, although broad, is not exercised in a way that is unfair to defendants.

> 34(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.

[66] Although the court's consideration of these requirements will depend on the facts of each case, I offer the following general observations.

(i) The evidence taken at trial

[67] Obviously the court can "amend up" a certificate only if the evidence supports the amendment.

(ii) The circumstances of the case

[68] The particular circumstances of a case may well influence the court's decision whether to grant an amendment. For example, in *Ontario (Ministry of Labour) v. NMC Canada Inc.* (1995), 25 O.R. (3d) 461 (C.A.), this court ordered an amendment to an

information that had charged a partnership with a workplace safety offence.[2] The amendment substituted for the partnership the two individual partners as defendants. One "circumstance of the case" strongly favouring the amendment was the seriousness of the charge: a workplace fatality. As a partnership is not a legal entity for the purpose of proceedings under the *POA*, without the amendment the charge could not proceed. See also *Ottawa (City) v. Seenanan* (2004), 47 M.P.L.R. (3d) 4 (Ont. C.A.) at paras. 24-29.

[69] It is unwise to try to catalogue the various circumstances that might be considered under s. 34(4)(b) of the *POA*. These ought to be addressed case by case as the circumstances arise.

(iii) Whether the defendant has been misled or prejudiced in the defendant's defence by a variance

[70] The court must consider whether the defendant is misled or prejudiced by the proposed amendment. This is a key consideration in deciding whether to grant an amendment. Being misled or prejudiced under s. 34(4)(c), however, does not mean the prospect of facing more severe consequences because of the amendment. That a defendant may face a stiffer fine, more demerit points or increased insurance premiums is not a reason to refuse to amend the certificate to allege a higher rate a speed over the

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[2] The amendment was made under s. 34(1)(a) and (c) of the *POA*, which states:

> 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; …
>
> (c) is in any way defective in substance or in form.

limit. To decide whether a defendant is misled or prejudiced under s. 34(4)(c), the court must consider whether the defendant's opportunity and ability to meet the charge would be adversely affected by the amendment. The court must ask: will "amending up" mislead or prejudice the defendant; and if so, can the misleading or prejudice be cured by, for example, an adjournment.

[71] Justices of the peace and prosecutors should be especially sensitive to the question of prejudice. As they know better than most, many defendants who appear in traffic court are self-represented; many have little or no knowledge of the justice system; many are poorly educated or have but a rudimentary knowledge of English. As McKinnon A.C.J.O. said nearly 30 years ago, in words still true today, "the *Provincial Offences Act* is not intended as a trap for the unskilled or unwary": see *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at p. 552.

[72] Special care must be taken to ensure that *POA* proceedings are fair to defendants. Where the prosecutor seeks to "amend up", the prosecutor and the court should ensure, at a minimum, that the defendant understands the amendment, understands the consequences of the amendment and is given a reasonable opportunity to make submissions on why the amendment should not be granted.

[73] Under s. 34(2) of the *POA*, the amendment is to be made during the trial as disclosed by the evidence. An important question bearing on the fairness of the

amendment is when the defendant receives notice of it. No special form of notice is required. Indeed, the notice need not even be in writing. But the timing matters.

[74] Ideally, the defendant should receive notice of a proposed amendment before the day of trial. However, in *POA* proceedings this ideal will not always be practical. If, for practical reasons, notice of the amendment can only be given on the day of trial, then it would be far preferable that the notice be given before the trial begins and that the defendant then be given a reasonable opportunity to consider how to respond.

[75] After notice is given, in most cases, the prosecutor and the court would be wise to do what was done in this case – offer the defendant an adjournment to consult counsel or an agent or just to have more time to consider whether to conduct the defence differently. Of course, if the defendant is represented by an agent, and notice of the motion to amend is not given until the day of trial, the case may necessarily have to be adjourned so that the agent can obtain instructions.

[76] However, I would not lay down as an inflexible rule that on a request to amend up, an adjournment should always be granted if the defendant wants one. Some cases could no doubt go ahead even if the defendant objects. However, prosecutors and the court must take care not to pressure defendants into proceeding, but instead give them a fair opportunity to state their position. Despite a prosecutor's or the court's urge to proceed, an adjournment, if asked for or desired, may be the sensible course of action. By itself, it may cure even the possibility of prejudice.

[77] The appeal court judge in the present case observed that if the practice of amending up will most often require an adjournment, then the practice is at odds with an important objective of *POA* proceedings: to deal with charges quickly, efficiently and inexpensively. He may well be right. However, as I have already said, the practice is not inherently unfair or impermissible. Municipalities and their prosecutors will have to decide whether this practice makes for the most efficient use of resources available for *POA* proceedings.

[78] Although I have suggested that defendants be given notice of their potentially increased jeopardy before the trial begins, the broad amendment power in s. 34(2) of the *POA* does contemplate that notice of the amendment can be made during or even at the conclusion of the evidence. Still, the later during the proceedings that the defendant is given notice of the proposed amendment, the greater the risk of prejudice if the amendment is granted: see *R. v. Wanamaker*, [2005] O.J. No. 1581 (Ct. J.). Where notice to amend up is first given during the trial, defendants may well argue that they would have conducted their defence differently or even retained an agent had they known that they faced more serious consequences. In the face of these or other arguments, before granting an amendment, the court must consider whether prejudice will result and whether any resulting prejudice can realistically be cured.

[79] Ordinarily, the prosecutor will ask the court to amend up. Yet the amendment power in s. 34(2) also contemplates that the court on its own initiative can amend up a

certificate of offence: see, for example, *R. v. Morozuk*, [1986] 1 S.C.R. 31. I would not encourage justices of the peace to do so; certainly, they should be cautious before doing so. And, before deciding to exercise the amendment power on their own initiative, justices of the peace must give every defendant a fair opportunity to address the question of prejudice and make submissions why the amendment should be refused: see *R. v. Rahil* (2005), 21 M.V.R. (5th) 262 (Ont. Ct. J.). Again, before exercising this power, justices of the peace must consider whether the defendant is misled or prejudiced by the amendment, and whether any misleading or prejudice can be cured.

(iv) Whether, having regard to the merits of the case, the proposed amendment can be made without any injustice being done

[80] Even if the defendant would not be prejudiced by the amendment, the court should still refuse to amend if doing so would cause an injustice. I take injustice to capture the general notion of unfairness. Thus, under s. 34(4)(d) of the *POA*, the court should not grant an amendment that would be unfair having regard to the merits of the case.

[81] Two decisions of this court show the application of s. 34(4)(d). In *Ontario (Ministry of Labour) v. NMC Canada Inc.*, the proposed amendment of the information to substitute the two individual partners for the partnership caused no injustice. The two partners carried on business using a distinctive firm name; the accident happened at their firm's place of business; and in a practical, if not a legal sense, the worker who died was their firm's employee.

[82] In *Ottawa (City) v. Seenanan*, the majority of this court concluded that an amendment would, indeed, cause injustice to the defendant. The defendant, a taxi driver, had been charged with contravening a City of Ottawa licensing by-law. Although he had pleaded guilty, on appeal in the Ontario Court of Justice his conviction was set aside and he was found not guilty. By then, the City had recognized that it had charged the defendant under the wrong licensing by-law. In this court, for the first time, the City sought to amend the certificate of offence to charge the defendant under a different city by-law.

[83] Gillese J.A., writing for the majority, canvassed the requirements of s. 34(4) of the *POA*, and concluded that the amendment should be refused. On the requirement of injustice, she noted that the amendment would expose the defendant to a different charge from the charge he had faced in the courts below, and would in practice, preclude him from challenging the validity of the city's licensing regime. Thus, especially having regard to the merits of the case, the proposed amendment would cause an injustice.

[84] These two cases illustrate the wide scope of the fourth requirement of s. 34(4) of the *POA*: whether the proposed amendment can be made without doing an injustice. This requirement must be canvassed on any request to amend up a certificate or when the court considers doing so on its own initiative.

[85] I turn now from these general observations to the appeal before this court.

E. THIS APPEAL

[86] It is no doubt apparent from my discussion of the issues on this appeal that I do not fully subscribe either to the reasons of the justice of the peace or to the reasons of the appeal court judge.

[87] On this record, we have no evidence that the police officer misled Mr. Winlow or gave any undertaking that the Regional Municipality would not seek a conviction for a higher speed. We have no evidence that Mr. Winlow was prejudiced or coerced by the prosecutor's proposed amendment. We have no evidence that he was pressured into proceeding.

[88] Indeed, before the trial began, Mr. Winlow was given the opportunity to adjourn the trial to seek the advice of a counsel or agent. He understood his jeopardy if the amendment were granted. Yet he chose to refuse the adjournment and proceed on the scheduled trial date. He did not say that he was pressured to do so. He did not claim that the proposed amendment had the effect of coercing him to plead guilty. He did not claim that he would be prejudiced in the conduct of his defence if the amendment were allowed. Nor did he claim that he would have to conduct his defence differently because of the proposed amendment.

[89] Nonetheless, despite my reservations about the judgments of the justice of the peace and the appeal court judge, I would dismiss the Regional Municipality's appeal. I

would do so for two reasons. First, counsel for the Regional Municipality candidly acknowledged that his client was not interested in obtaining a greater fine for Mr. Winlow. His client simply wanted some guidance from this court on the important issues raised by this appeal.

[90] Second, having ruled that she would not grant the amendment, the Justice of the Peace did not make a finding that Mr. Winlow was driving at a speed of 130 km per hour. Equally, the Appeal Court Judge made no finding that Mr. Winlow's rate of speed was 130 km per hour. I do not consider it appropriate in this case for this court to make a finding that was not made either in the trial court or the first level appeal court. Thus, the amendment lacks an evidentiary basis.

[91] For these reasons, I would dismiss the Regional Municipality of York's appeal.

RELEASED: September 10, 2009

"JL"

"John Laskin J.A."
"I agree E.E. Gillese J.A."
"I agree Paul Rouleau J.A."