Ontario Court of Justice File No. 4760 6114817B

THE ONTARIO COURT OF JUSTICE
IN THE MATTER OF THE PROVINCIAL OFFENCES ACT R.S.O. 1990

MUNICIPAL PROSECUTOR

(Respondent)

And

NICHOLAS BAETA

(Appellant)

****

A P P E A L

To be heard:
June 6, 2016 at
45 Main Street East, HAMILTON, Ontario

****

Charge: s. 154(1)(a) H.T.A.

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Ontario Court of Justice File No. 4760 6114817B

ONTARIO COURT OF JUSTICE

BETWEEN:

THE CITY OF HAMILTON

(Respondent)

And

NICHOLAS BAETA

(Appellant)

APPELLANT'S FACTUM

PART I – STATEMENT OF THE CASE

1. This application is in support of a Part I Appeal made under s.135 of the *Provincial Offences Act*. The Justice of the Peace erred in judgment by registering a conviction pursuant to s. 9.1 of the *Provincial Offences Act*. The wording of the offence does not match the section number therefore rendering the certificate irregular on its face; the appropriate action was to quash the proceedings.

2. The appellant is seeking that the conviction contrary to *The Highway Traffic Act* s. 154(1)(a) registered against the defendant Nicholas Baeta on January 12, 2017 in the City of Hamilton, be set aside.

PART II – SUMMARY OF THE FACTS

1. On April 15, 2016, Nicholas Baeta was stopped by a member of the Hamilton Police Service and issued an Offence Notice for Unsafe Lane Change, contrary to s. 154(1)(a) of the *Highway Traffic Act*.
2. A Notice of Intention to Appear was filed with the City of Hamilton Ontario Court of Justice, within the time prescribed by Regulation, indicating Mr. Baeta's intention to dispute the charge.
3. A Notice of Early Resolution Meeting was issued by the Ontario Court of Justice to Mr. Baeta with a date of July 12th, 2016 10:30 a.m. for Early Resolution in the City of Hamilton Provincial Offences Court.
4. Mr. Baeta appeared by representation on his Early Resolution date, which was set for a trial date.
5. A Notice of Trial was issued by the Ontario Court of Justice to Mr. Baeta with a date of January 12th, 2017 1:30 p.m. for Trial in the City of Hamilton Provincial Offences Court.
6. Mr. Baeta failed to appear either in person or by representation on the aforementioned trial date. Pursuant to s. 9.1 of the *Provincial Offences Act* Mr. Baeta was deemed not to dispute the charge.

7. The wording indicated on the certificate of offence was "Unsafe Lane Change". The appropriate wording for this charge, as set out in the *Highway Traffic Act,* is "Unsafe Move- Lane or Shoulder".
8. Pursuant to s. 9.1(2) of the *Provincial Offences Act* the Justice of the Peace examined the certificate of offence and found it to be complete and regular on its face, and therefore entered a conviction in Mr. Baeta's absence.

PART III – ISSUES AND LAW

There is 1 question which this Honourable Court must answer:

> Is the issue of incorrect wording versus the section number a fatal flaw which renders the certificate irregular on its face when being examined under s. 9.1 of the *Provincial Offences Act*.

9. The wording of the offence does not match the section number listed on the certificate. There are no powers to amend the certificate when the defendant fails to appear in court. Therefore, it is respectfully submitted that the Justice of the Peace erred in entering a conviction. The certificate was not complete and regular on its face and therefore the appropriate action was to quash the proceeding.

Issue #1: Is incorrect wording an error which renders the certificate irregular on its face?

10. In order for a certificate of offence to be "regular on its face" there shall be no conflict which could cause confusion.

R. v. Bargis, [2004] O.J. No. 5565

11. The certificate of offence to be regular on its face must set out who is commencing the process, who is charged under the process, and what process is—statute name and section number.

R. v. Wilson [2001] O.J. No. 4907

R. v. Maniccia, [2004] O.J. No. 5566

12. In order for a certificate of offence to be "regular on its face", the offence section must be properly described by insertion of the short-form description, as it is an essential element.

R. v. Farah, 2015 ONCA 302

13. A certificate of offence with differing offence description and section number creates too much ambiguity for a defendant, especially when the sections are very close; no one can be sure how the person who laid the charge plans to proceed.

R. v. Rodrigues-Dasilva, [2008] O.J. No. 5776

14. The failure to set out a proper section number is a shortcoming that invalidates tickets.

York (Regional Municipality) v. Billinger, [2005] O.J. No. 2627

15. Section 9.1 of the *Provincial Offences Act* is clear in its requirement of the Justice of the Peace to examine the certificate of offence to determine if it is complete and regular on its face. In the event it is not, then the Justice of the Peace is required to quash the proceeding.

R. v. Stuparayk, [2009] O.J. No. 3616

16. The power of the Justice to refuse to enter a conviction and quash the proceeding where there are irregularities on its face constitutes an integral part of this pervasive regime in respect of regulatory infractions.

R. v. Khoshael, [2001] O.J. No. 2110

17. It is important for the certificate to be regular on its face as to not mislead the accused person.

R. v. Stuparayk, supra.

18. The amendment powers set out in s.34 of the *Provincial Offences Act* do not apply to default proceedings under s.9 of the act where the defendant has been deemed not to dispute.

R. v. Hargan, [2009] ONCJ 65.

London v. Young [2008] ONCA 429

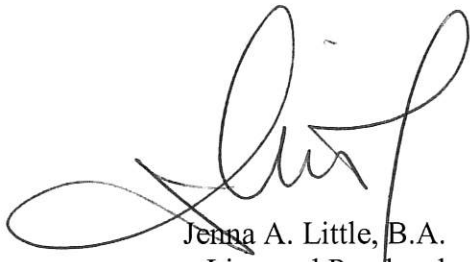
R. v. Khoshael, supra.

PART IV – ORDER REQUESTED

1. The appellant, Mr. Baeta, requests that this Honourable Court to set aside the conviction which has been entered against him and quash the certificate of offence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated in the City of Toronto, in the Province of Ontario, this 4th day of May, 2017.



Jenna A. Little, B.A.
Licensed Paralegal
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(416) 479-8558

Agent for Nicholas Baeta, Appellant

SCHEDULE A – AUTHORITIES TO BE CITED

R. v. Bargis, [2004] O.J. No. 5565	TAB 2
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File No. 4711-999-00-6114817B-00

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 — Provincial Prosecutor
D. Brereton — Counsel for Nicholas Baeta

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ENTERED ON PAGE

RULING 9

Legend
[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.
(ph) - Indicates preceding word has been spelled phonetically.

Transcript Ordered: August 29, 2017

Transcript Completed: September 10, 2017

Ordering Party Notified: September 10, 2017

TUESDAY, JULY 4, 2017

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 then 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

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.

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).

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…

THE COURT: Yes.

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

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

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

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.

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.

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)