Indexed as:

R. v. Tait

IN THE MATTER OF the Provincial Offences Act, R.S.O. 1990, c. P.33

Between
Her Majesty the Queen, respondent, and
Sheila Tait, moving party (defendant)

[2001] O.J. No. 2948

Ontario Court of Justice
Provincial Offences Court - Toronto, Ontario
Quon J.P.

Heard: May 8, 2001.
Judgment: July 17, 2001.
(132 paras.)

Ruling on preliminary motion for declaration summonses are nullities and the Court not having jurisdiction over the defendant's person.

Cases considered or referred to:

R. v. Arnold (1982), 39 O.R. (2d) 9 (O.H.C.), per Osler J.
R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J.
R. v. Bertolucci et al., [1995] O.J. No. 4283 (Ont. Ct. (Prov. Div.)), per Reinhardt J. at Toronto.
R. v. Dhillon [1997] O.J. No. 6018 (Ont. Ct. (Prov. Div.)), per Quon J.P.
R. v. Discovery Place Limited et al., [1996] O.J. No. 690 (Ont. Ct. (Gen. Div.), MacDougall J. at Peterborough.
R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.), [1981] O.J. No. 142, per Jessup, Zuber and Weatherston JJ.A.
R. v. General Motors of Canada Ltd., [1990] O.J. No. 3175 (Ont. Ct. (Prov. Div.)), per Harris J.P.
R. v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.).
Grice v. R. (1957), 26 C.R. 318 (Ont. S.C.), per Ferguson J.
R. v. Gwynne [2001] O.J. No. 331 (O.C.J.), per Quon J.P.
R. v. Hung [1997] O.J. No. 6017 (Ont. Ct. (Prov. Div.)), per Quon J.P.
R. v. Johnson (1920), 34 C.C.C. 98 (Ont. S.C.).
Re Harnish and R. (1979), 49 C.C.C. (2d) 190 (N.S.C.A.).
R. v. Krannenburg, [1980] 1 S.C.R. 1053 (S.C.C.).
R. v. Murugan, [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)), per Knazan J. at Toronto.
R. v. MacAskill, [1981] 58 C.C.C. (2d) 361 (N.S.C.A.), per MacKeigan C.J.N.S., Hart and Macdonald JJ.A.
R. v. Naylor (1978), 42 C.C.C. (2d) 12 (O.C.A.), per Dubin, Houlden and Morden, JJ.A.
R. v. Pham; R. v. Oehlert [1996] O.J. No. 4366 (Ont. Ct. (Prov. Div.)) per Quon J.P.
R. v. Sault Ste. Marie (1978), 3 C.R. (3d) 30 (S.C.C.).

R. v. Wetmore (1976), 32 C.C.C. (2d) 347 (N.S.C.A.), per MacKeigan, C.J.N.S., Coffin and Macdonald, JJ.A.

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 130, 199(1), 200(1)(a).
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 2, 3, 5, 5.1, 9, 9.1, 22, 23, 24, 29(7), 36, 54 and 90. Reg. 950 (Proceedings Commenced by Certificate of Offence), R.R.O. 1990, s. 2.
Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200, rule 32(4).

Reference Materials and Textbooks cited:

Hutchison, Rose and Downes, The Law of Traffic Offences (2d ed.) (Carswell, Toronto: 1998), p. 37.
Stewart and Macey on Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998), pp. 72-73.

Exhibits entered:

Exhibit "1" -- copies of three summonses served on Sheila Tait on October 26, 2000 absent issuing officer's signature and absent the date of issuance.

Counsel:

M. Kierans, provincial prosecutor.
W. Blair, for the moving party (defendant).

QUON J.P.: —

1. INTRODUCTION

¶ 1 The defence in this preliminary motion has requested that the three summonses served on the defendant be declared nullities on two grounds. First, it is argued, the issuing officer did not sign the summonses issued to the defendant. Secondly, the defence contends that the officer failed to comply with s. 23 and s. 24, and improperly used s. 22 of the Provincial Offences Act, R.S.O. 1990, c. P.33 ("P.O.A."). In the non-compliance with s. 23 and s. 24, the officer failed to lay the information first before a justice, and failed to obtain, receive and serve judicially issued summonses on the defendant. The officer actually served non-judicially issued summonses on the defendant before laying the information according to s. 22 of the P.O.A., except that the officer had not found and served the defendant at or near the place where the offence had been committed. Furthermore, because of these two procedural or technical errors, the defence contends the Ontario Court of Justice has no jurisdiction over the defendant to deal with these offences. Although the defendant appeared in court on two occasions, she argues that she has not attorned to the jurisdiction of this court. Despite this last contention, this court has been asked to find that it has no jurisdiction over the defendant and to declare the summonses nullities. There is no argument that the charging document, the information in this case, is invalid. If the defence request were granted then the prosecution or its agents would have to serve fresh and proper summonses on the defendant for the court to gain jurisdiction over the defendant. The defendant had been charged with committing the offences of careless driving, failing to report an accident, and failing to remain at the scene of an accident under the Highway Traffic Act.

¶ 2 In the first ground for a declaration of nullity, the issue is whether the officer's missing signature on the summonses nullifies those summonses, or has the defendant's appearance in court on the date, time and place as stated on the summonses, an attornment to the jurisdiction of the court and therefore cures any procedural defects or errors? The defence also alludes to a situation where the officer may have done something improper with the way he issued the summonses since the summonses filed in court have his signature but they are absent on the

summonses served on the defendant. In addition, it was submitted that the defendant is entitled to know the name of the officer that issued the summonses. That is, since the officer's signature is absent on the summonses the defendant would not know the officer's name, thereby nullifying the summonses.

¶ 3 Regarding the second ground, the question is whether the officer's failure to comply with ss. 22, 23 and 24 of the P.O.A. by improperly issuing and serving summonses on the defendant when the defendant had not been found at or near the vicinity of where the offence occurred, invalidates the summonses. Alternatively, does the defendant's appearance also rectify the procedural error? On the other hand, is this argument moot or a non-starter since the justice who confirmed the summonses has retroactively legitimized the flawed summonses?

¶ 4 For the issue of jurisdiction, the query is when does the Ontario Court of Justice have jurisdiction over the person. The defence argues there has been no attornment to the court as there has been no arraignment or a plea entered. If the court finds the defendant has attorned to its jurisdiction by simply appearing in court, then any procedural errors or defects relating to the summonses are cured by the defendant's appearance.

¶ 5 The defence relies on R. v. MacAskill, (1981), 58 C.C.C. (2d) 361 (N.S.C.A.), per MacKeigan C.J.N.S., Hart and Macdonald JJ.A., R. v. Bertolucci et al., [1995] O.J. No. 4283 (Ont. Ct. (Prov. Div.)), per Reinhardt J. at Toronto, and R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J., to support their arguments. The prosecution counter with R. v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.), [1981] O.J. No. 142, per Jessup, Zuber and Weatherston JJ.A and R. v Murugan, [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)), per Knazan J. at Toronto.

¶ 6 The arguments on this preliminary motion were heard on May 8, 2001 and the ruling was reserved and adjourned to be given on July 17, 2001.

2. FACTS

¶ 7 The defendant has been charged with committing three offences on October 17, 2000, under the Highway Traffic Act, R.S.O. 1990, c. H.8: careless driving under s. 130, failing to report an accident under s. 199(1), and failing to remain at an accident under s. 200(1)(a).

¶ 8 The information containing the three offences indicates these offences had occurred at westbound Danforth Avenue in Toronto.

¶ 9 The defendant says a police officer served the summonses for these offences on her personally at the police station located at Coxwell Avenue (Division 55) on October 26, 2000. The affidavits of service sworn by Officer Alan Crabb attests that he personally served the defendant with the three summonses.

¶ 10 After the summonses had been served on the defendant, J. Charlemagne, a peace officer, acted as informant and swore the information against the defendant on November 2, 2000. The Justice who heard the informant confirmed the summonses issued to the defendant on November 2, 2000.

¶ 11 Copies of the summonses (Exhibit "1") served on the defendant were neither signed nor dated by the issuing officer.

¶ 12 The summonses commanded the defendant to appear before the Ontario Court of Justice at Old City Hall Court, 60 Queen Street West, Toronto on the 23rd day of November in courtroom 'C' at 9:00 a.m. and to appear thereafter as required by the court in order to be dealt with according to law.

¶ 13 The record of the proceedings indicates that the defendant appeared personally on November 23, 2000 in courtroom 'C' and the defendant's matters were adjourned to May 8, 2001 in courtroom 'D' at 1:30 p.m. for trial. It was also marked "with or without counsel" for the next court date.

¶ 14 On May 8, 2001, the defendant and her counsel appeared before me in courtroom 'D' and brought this preliminary motion to have the summonses declared nullities and to have this court find that it lacked jurisdiction over the defendant's person.

¶ 15 There was no arraignment put to the defendant or a plea entered on May 8, 2001 prior to the defendant's counsel bringing this preliminary motion. Neither is there evidence of a plea or arraignment on November 23, 2000 when the defendant made her first appearance before the Ontario Court of Justice.

¶ 16 I reserved giving my ruling on this motion and adjourned it to July 17, 2001 at 9:00 a.m. in courtroom 'C'. These are the reasons for my ruling on this motion.

3. ISSUES

¶ 17 Does the absence of the issuing officer's signature on the summonses nullify any of the summonses?

¶ 18 Is there any malfeasance inferred from the existence of the officer's signature on the summonses filed with the court and the absence of his signatures on the summonses served on the defendant?

¶ 19 Is the identity of the officer on the face of the summonses essential to their validity?

¶ 20 Has the failure of the officer to comply with s. 23 and s. 24 of the Provincial Offences Act by not laying an information first before serving the summonses nullify the summonses served on the defendant?

¶ 21 Has the improper use of s. 22 of the Provincial Offences Act by the officer in issuing and serving summonses on the defendant when the defendant had not been actually found at or near the place where the offence was committed make those summonses nullities?

¶ 22 Does the defendant have to face an arraignment or enter a plea before she can be found to have appeared or attorned to the jurisdiction of the court?

¶ 23 Has the defendant attorned to the jurisdiction of the court?

ARGUMENTS

The defence motion

¶ 24 First of all, the defence does not refer to this request for a declaration that the summonses are nullities and a finding of no jurisdiction over the defendant's person as a motion. It was submitted that s. 36 of the P.O.A. only refers to a motion to quash for defects on a certificate of offence or summons. Section 36 states:

> 36.(1) An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court.

¶ 25 Next, the defence argues that the summonses in question never existed in law and as such seek a declaration that the summonses are nullities. Their position is supported by two main arguments -- the missing officer's signature and non-compliance with ss. 22, 23 and 24 of the P.O.A. The missing signature argument consists of three parts. They are: the defendant is entitled to know the name of the officer who issued the summonses, the summonses are not valid without an authorized signature and the officer has acted with malfeasance when preparing and issuing the summonses.

¶ 26 The defence argues that because the officer's signature is missing on the summonses, it is analogous to the situation in R. v. Bertolucci [1995] O.J. No. 4283 (Ont. Ct. (Prov. Div.)), per Reinhardt J. at Toronto, where there was an offence notice missing that officer's signature. The Provincial Offences Appeal Court upheld the trial judge's decision that the defendant is entitled to know whom the informant is on the offence notice. Although the process document referred to in Bertolucci was an offence notice issued under Part I of the P.O.A. and is different than the summonses issued in this case, the defence submits the principle of that case is relevant and analogous to their argument. The defence refers to Reinhardt J.'s comment in Bertolucci at para. 2 and 3 and 5:

> And in each instance of the two represented people before me today I was shown the offence notices which do not disclose the name of the person; the informant, whose belief and certification is necessary for a valid offence notice.
> Now, the actual certificate of offence in each instance is signed by Henry Gotham and properly filled out in all particulars. But it was the decision of Justice of the Peace McCurdy that it was a fatal flaw not to tell the accused driver who was informing or concluding that they had breached the Highway Traffic Act.
>
> ...
>
> failing to put the informant on the offence notice is not something that can properly be cured by particulars at the time of trial. ... I agree with the Justice of the Peace; is to make the notice a useless document for the purposes of the defendant. And the principles of justice would not be served by permitting an amendment to be made of that basic element.

¶ 27 Thus, the defendant's analogy derived from Bertolucci that the defendant is entitled to know who the officer is that issued the summonses, and in this case the missing signatures deprived the defendant of this knowledge, makes the summonses issued to the defendant useless documents for the purposes of the defendant.

¶ 28 The defendant's argument simply is that the summonses are not valid summonses without the issuing officer's signature. It follows this logic: it is an invalid document that has no force in law, as there is no signature of authority compelling the defendant to appear in court. Hence, the defendant should not be subject to any penalty if she did not appear in court.

¶ 29 On the point relating to malfeasance on the part of the officer, the summonses submitted in court contain the officer's signature. This is contentious the defence submits, since all the summonses, including the one issued to the defendant are based on a snap-set system that have the ability to accept an original signature on the top summons and simultaneously to be carbon copied on each subsequent summons comprising the snap-set or document lying underneath the original summons.

¶ 30 In the fail to comply with ss. 23 and 24 and the improper use of s. 22 argument, the defence submits that ss. 23 and 24 of the P.O.A. should be the governing sections in this matter, instead of s. 22. Since the defendant was not found in the vicinity of the location of the offence when the officer decided to charge the defendant, the officer could not use the procedure found in s. 22 and serve summonses on the defendant prior to laying the information before a justice. The defence submits therefore, the officer was only entitled to use ss. 23 and 24. The officer was required to first lay the information before a justice according to s. 23 and then to wait for the justice, who heard details of the offences contained in the information, to issue process under s. 24 and then to serve the defendant with this process, if the justice decided to issue summonses for the defendant to appear in court. The officer did not follow this procedure but instead used the procedure found in s. 22, which he was not rightfully able to use, since the prerequisite of finding the defendant at or near the place of the offence did not exist.

¶ 31 The defence does not contend that these procedural defects or errors affect the validity of the information. In fact, they submit that there is a valid existing information but that in order to have jurisdiction over the defendant a new set of summonses would have to be issued by a judicial official and subsequently served on the defendant.

¶ 32 Section 22 provides:

> Summons before information laid
>
> 22. Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom the officer finds at or near the place where the offence was committed, he or she may, before an information is laid, serve the person with a summons in the prescribed form.

¶ 33 Sections 23 and 24 state:

> Information
>
> 23.(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.
>
> 24.(1) A justice who receives an information laid under section 23 shall consider the information and, where he or she considers it desirable to do so, hear and consider in the absence of the defendant the allegations of the informant and the evidence of witnesses and,
>
> (a) where he or she considers that a case for so doing is made out,
>
> (i) confirm the summons served under section 22, if any,
> (ii) issue a summons in the prescribed form, or
> (iii) where the arrest is authorized by statute and where the allegations of the informant or the evidence satisfy the justice on reasonable and probable grounds that it is necessary in the public interest to do so, issue a warrant for the arrest of the defendant; or
>
> (b) where he or she considers that a case for issuing process is not made out,
>
> (i) so endorse the information, and
> (ii) where a summons was served under section 22, cancel it and cause the defendant to be so notified.

¶ 34 To support their s. 22 argument, the defendant's counsel refers to a comment in Stewart and Macey on Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998) at pages 72 to 73:

> The s. 22 requirement that the officer must find the defendant "at or near the place where the offence has been committed" can be problematic for provincial offences officer. For example, the investigation of a motor vehicle accident where the offending driver failed to remain at the scene requires ongoing police investigation to determine the identity of a driver. Once the driver has been found, the officer may need to interview the person. It is possible that only at the conclusion of the interview, the officer formulates the requisite reasonable and probable grounds to believe that the person interviewed is the person who committed the offence. A strict interpretation of the Act would preclude the officer from serving the defendant at that time because the person has not been found "at or near the place where the offence has been committed". However, the officer may be tempted to serve the person with the s. 22 summons and then attend before a justice to swear to the information under s. 23 of the Act, given that the officer may not be able to locate the defendant to serve him or her with the summons after swearing to the information.

¶ 35 In reply to the prosecution argument that an appearance by the defendant rectifies any error or defect in the substance or form of the summonses, it was submitted that the defendant has not made an appearance or attorned to the court's jurisdiction until she actually enters a plea or that she has been arraigned or that the charges were read to her requiring her to answer to them.

¶ 36 The defence in their non-appearance and non-attornment argument points to a passage in R. v. MacAskill (1981), 58 C.C.C. (2d) 361 (N.S.C.A.), per MacKeigan C.J.N.S., Hart and Macdonald JJ.A, at pages 368-369: In my opinion, the procedures used to bring an accused person before a Court for the first time either by way of appearance notice, summons or warrant do not impose upon that Court jurisdiction over the offence. It is only

when the accused has presented himself to the Court and made its election or plea that the Court becomes seized with the type of jurisdiction that can be lost in a Krannenburg situation. Up until this time any error in the method of bringing him before the Court, or any change in the time or place of his first appearance can be made by the issuance of a new summons or warrant, which should, if possible, be brought to the attention of the accused before the time set initially for his appearance.

¶ 37 In addition, the defence points to a passage in R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J. at page 129 to support their non-attornment argument:

> I hold that he did attorn by attending at the appropriate office and setting a trial date. He could not do so without pleading and he, in fact, did enter a plea of not guilty.

¶ 38 As a result, the defence's grounds for a declaration that the summonses are nullities and the court has no jurisdiction over the person only has one favourable result or conclusion for the defendant. The defence request, if granted, requires that the prosecution seek a re-issuance of the summonses from a member of the judiciary and then to serve the defendant with these validly issued summonses. This, the defence submits, is required in order for the court to have jurisdiction over the defendant and to proceed with the matter.

The prosecution's response

¶ 39 On the issue about the service of the summonses under s. 22, the prosecution submits that the defence has misinterpreted the meaning of the section regarding where service is supposed to take place. It is not where service should be made but whether the defendant has been found at or near the place where the offence occurred. Since issuing the summonses required the officer to have reasonable and probable grounds, and if the defendant was found near the scene of the offence, the officer would then have reasonable and probable grounds to issue these summonses.

¶ 40 Furthermore, the prosecution submits that the charging document is the information in this case, and the summonses are something that compels or asks the defendant to appear. Thus, the issue is not where the service was made but that it had occurred. There is no means of having the defendant before the court unless he or she was served with a summons to appear. Therefore, it is irrelevant where the defendant was served but relevant that she was served at all. If the defendant was personally served, and this was proven to the court, the court would have jurisdiction to deal with the matter, whether the defendant was before the court or not.

¶ 41 In addition, the prosecution submits that many summonses can be issued under a valid and subsisting information. If a summons could only be served at the location of the offence, this requirement would cause a rigidity that was not contemplated by s. 22.

¶ 42 However, it is submitted that the error contended by the defence is simply a procedural error that falls within s. 90 of the P.O.A. The prosecution submits that the failure of the officer to sign the summonses was an irregularity or defect in substance or form within the meaning of s. 90(1) of the P.O.A. and does not effect the validity of the proceedings. Section 90 of states:

> Irregularities in form
>
> (1) The validity of any proceeding is not affected by,
>
> (a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or
> (b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.
>
> Adjournment to meet irregularities

> (2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs.

¶ 43 The prosecution submits that the court may adjourn the matter or make such order that it considers appropriate if the defendant has been misled by the irregularity or defect in the form of the summonses. This would be the procedure to follow in keeping with the underlying philosophy of the P.O.A. That is, the prosecution of these offences proceeds in a way without technicalities of form to inhibit a swifter and efficient process of justice for these public welfare offences.

¶ 44 Nevertheless, the prosecution submits that R. v. Elliot, [1981] O.J. No. 142 (O.C.A.), per Jessup, Zuber and Weatherston JJ.A, governs the issue of a missing officer's signature on a summons. The Court of Appeal held that the failure of the officer to sign the offence notice was an irregularity or defect in substance or form within the meaning of s. 90(1) and does not effect the validity of the proceedings. The finding of the Court of Appeal of Ontario in R. v. Elliot is that the missing signature should not be considered as a fatal defect of any kind.

¶ 45 Moreover, in R. v. Murugan, [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)), per Knazan J. at Toronto, it was held that the order of service is not crucial, but the fact that personal service has been proven. In the defendant's case, the discussion concerns a temporal situation and the fact that service occurred a week later. The location of service does not matter. What is important is the fact of personal service.

¶ 46 The prosecution submitted that R. v. Bertolucci could also be distinguished on the facts. The heart of the decision in Bertolucci was that the failure of putting the name of the informant on the offence notice is something that cannot be properly cured by an amendment at the time of trial. In the case before this court, the person who personally served the summonses on Ms. Tait was present. The defendant also testified that she knew the officer's name. The information is not absent of whom thought or who had the reasonable and probable grounds that the defendant committed the offences. It was entirely clear to Ms. Tait precisely who the officer was that thought she had committed these offences. In addition, the officer personally served her.

¶ 47 The summonses are not nullities. They are precisely the kind of situation contemplated by s. 90 of the P.O.A. If there is a defect in the summonses, instead of placing these summonses into the graveyard of legal proceedings, it can be amended or an order can be made under s. 90 to amend the summonses. The prosecution submits that it is not entirely clear that Macey and Stewart's argument is persuasive. It is not case law. It is nothing more than an interpretation by two people who work in this area. However, they believe that the Justice entertaining any argument on this issue under s. 22 would be exercising appellate jurisdiction. This something that cannot be simply accepted without case law or some kind of law to support it.

¶ 48 Finally, on the plain meaning of what is contained in s. 22, it was submitted that a summons may be issued near the location of the offence but that the location of service is not as important as whether the summons was served at all.

¶ 49 The prosecution submits on the argument of jurisdiction over the person, that if the defendant is before the court, then there is no longer an argument regarding jurisdiction. In addition, the facts in R. v. MacAskill are not remotely similar to the facts of this case. Finally it is argued, the summonses are not nullities. The prosecution submits this court has jurisdiction to deal with the matter.

4. ANALYSIS OF FACTS AND LAW

¶ 50 First, the defence states this is not a motion under s. 36 of the P.O.A., as the impugned defects do not relate to an information or certificate of offence. However, when a defendant appears and seeks some remedy, ruling or declaration from the court it has to be procedurally done by a motion. Thus, because there has been no arraignment or plea yet entered by the defendant, this request will be referred to as a preliminary motion. The

P.O.A., although silent on the actual procedure to use for the defendant's request, does refer to preliminary motions in s. 29(7). That section states:

> Preliminary motions
>
> 29.(7) The court at a location to which a proceeding is transferred under this section may receive and determine any motion preliminary to trial although the same matter was determined by the court at the location from which the proceeding was transferred.

¶ 51 It appears that the rationality for the defence's reluctance to refer to their request as a motion is based on the defence's effort to show that the defendant has not attorned to the court's jurisdiction and that the court has no jurisdiction over the defendant's person. The reference to this request being a motion can be no more damaging to the defendant's argument of non-attornment than the defendant's appearance in court.

¶ 52 When the defence wishes to attack the validity of any summons or the charging document itself on a procedural or technical error, the purpose and aim of the Provincial Offences Act, R.S.O. 1990, c. P.33, that governs the procedure for provincial offences must be first considered. No longer are charges routinely dismissed or quashed when "the i's are not dotted or the t's are not crossed". That era no longer exists. In R. v. Gwynne [2001] O.J. No. 331, at para. 28 to 31, I reviewed the raison d'être of the P.O.A. and its underlying principles:

> The starting point in any analysis of a request to quash a proceeding, based on a technical deficiency, is to note the underlying ideology of the P.O.A. This can be summed up best in a commentary made by Dickson J., as he was then, in a provincial offences case. In writing for the Supreme Court of Canada in R. v. Sault Ste. Marie, (1978), 3 C.R. (3d) 30 (S.C.C.) at pages 38-39 he observed:
>
> > That age has passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.
>
> This theme is affirmed by MacDougall J. in the unreported decision of R. v. Discovery Place Limited et al., [1996] O.J. No. 690, (Ont. Ct. (Gen. Div.)) (Feb. 15, 1996), File No. 68342/95 at Peterborough in which he pronounces:
>
> > The overall philosophy of the Provincial Offences Act is to ensure that technical objections do not impede the arrival of a verdict on the merits. The Act provides broad curative provisions ensuring that the jurisdiction over the information is not lost because of any failure of a court to exercise its jurisdiction at any particular time.
>
> Authors Hutchison, Rose and Downes in their tome, The Law of Traffic Offences (2d ed.) (Carswell, Toronto: 1998) at page 37 confirm that formal defects should not be fatal to the charging document:
>
> > It is important to remember that the central purpose of the modern procedural statues like the Provincial Offences Act has been to eliminate unnecessary procedural "technicalities" from regulatory prosecutions. It was not intended that a purely formal defect should be fatal to a charging document. The main consideration in these cases is to be the effect of the defect on the parties and their rights under the procedures available under the Act. Even a substantive error may be allowed if it is possible for the court to correct the error without depriving the defendant of his right to know and defend the charge against him.
> > Most such statutes provide broad powers to amend a charge to cure defects which are merely formal in nature. ...

In R. v. Pham; R. v. Oehlert [1996] O.J. No. 4366, I extensively examined academic writings and judicial ruminations on this topic and wrote at para. 20:

> The trial court's decision to quash a certificate or to amend a certificate, as a question of law, has been examined and reviewed numerous times by the Provincial Offences Appeal Court. The Appeal Court's judgments have looked at section 36 of the P.O.A. and have ruled that, in general, a defective certificate of offence should not be quashed but amended. The Appeal Court has decided, ordinarily, a certificate of offence should be considered on its merits, and not to be quashed on a technical defect.
> They have adopted the philosophy of "substance over formality".

¶ 53 Furthermore, s. 2 of the P.O.A. states the purpose of the Act:

> 2.(1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the Criminal Code (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.

¶ 54 Ergo, the underlying principle in analyzing the validity of the charging document or the summonses under the P.O.A. is that "substance prevails over form, purpose prevails over procedure, and merit prevails over technicalities". In addition, that theme is reflected in s. 90 of the P.O.A. That section addresses the situation arising when there is a defect or error relating to summonses, offence notices or process documents.

Validity Of Proceedings Upon Failure Of The Officer To Sign Summonses

(a) Summonses are nullities

¶ 55 Exhibit #1 clearly indicates the issuing officer neglected to sign the summonses before he served them on the defendant. The defence argues these summonses are nullities because of this defect. Contrarily, the prosecution submits that R. v. Elliot, supra, governs the situation at bar.

¶ 56 The purpose of a summons is to inform the defendant of what charges she faces and the place and time that she has to appear in court to answer to these charges. The summonses in this case required her to appear on November 23, 2000 in courtroom 'C' at 9:00 a.m. She appeared on that date personally without counsel. Her matter was adjourned on that date and the court ordered her to return on May 8, 2001 in courtroom 'D' at 9:00 a.m. for her trial. The court also ordered the matter to proceed on a "with or without counsel" basis. On May 8, 2001, the defendant appeared in court with counsel. Thus, it can be inferred from the record of proceedings of November 23, 2000, that the defendant identified herself to the court and an adjournment was granted in order for the defendant to obtain counsel.

¶ 57 Before addressing the issue of attornment and the defendant's appearance, a review of the Court of Appeal of Ontario's decision in R. v. Elliot is apropos.

¶ 58 Jessup J.A. for the Court of Appeal of Ontario in R. v. Elliot held at page 36:

> In our opinion, the failure to sign the offence notice was an "irregularity or defect in the substance or form" within the meaning of s. 90(1) of the Provincial Offences Act, 1979 (Ont.), c. 4, and consequently did not affect the validity of the proceedings before the convicting Justice of the Peace.

¶ 59 Therefore, the highest court in Ontario has held that the failure of an officer to sign the process document or summonses was an irregularity or defect in the substance or form within the meaning of s. 90(1) of the P.O.A. and did not affect the validity of these proceedings against the defendant. As a consequence, since these

summonses are virtually identical to offence notices mentioned in R. v. Elliot, then by analogy, these summonses absent the officer's signature are not nullities.

(b) Identity or name of officer on the summonses

¶ 60 In this argument, the defence wishes this court to draw the analogy that the name or identity of the officer is required to be place on the summonses or that the defendant is entitled to know the name of the officer who issued the summonses, as had been decided in R. v. Bertolucci, supra. The prosecution argues that since the summonses were personally served on the defendant by the issuing officer and the fact that the defendant testified to knowing that it was Officer Crabb that served the summonses, there can be no issue to identity of the officer. Furthermore, the prosecution submits that the facts of Bertolucci concerned a Part I offence notice and the issue in that case was whether the court at trial should amend the defect.

¶ 61 The defence points to a passage in R. v. Bertolucci [1995] O.J. No. 4283 (Ont. Ct. (Prov. Div.)), per Reinhardt J. at Toronto. However, the process document referred to in Bertolucci was an offence notice issued under Part I of the P.O.A. and is different from a summons used in this case. At paragraph 2, 3 and 5 Reinhardt J. holds:

> And in each instance of the two represented people before me today I was shown the offence notices which do not disclose the name of the person; the informant, whose belief and certification is necessary for a valid offence notice.
> Now, the actual certificate of offence in each instance is signed by Henry Gotham and properly filled out in all particulars. But it was the decision of Justice of the Peace McCurdy that it was a fatal flaw not to tell the accused driver who was informing or concluding that they had breached the Highway Traffic Act.
>
> ...
>
> failing to put the informant on the offence notice is not something that can properly be cured by particulars at the time of trial. ... I agree with the Justice of the Peace; is to make the notice a useless document for the purposes of the defendant. And the principles of justice would not be served by permitting an amendment to be made of that basic element.

¶ 62 In R. v. Bertolucci, [1995] O.J. No. 4283 (Ont. Ct. (Prov. Div.), Reinhardt J. found he had jurisdiction to amend a defective certificate of offence but declined to do so because the certificate if amended would fail to satisfy the ends of justice.

¶ 63 At the trial stage in R. v. Bertolucci, Justice of the Peace McCurdy decided to quash the three certificates of offence issued to the defendants for the failure of the police officer to place his name on the offence notice. That is, the notices did not disclose the name of the person (the informant) whose belief and certification is necessary for a valid offence notice. The Crown appealed to the Provincial Offence Appeal Court. Reinhardt J. dismissed the Crown's Appeal and found Justice of the Peace McCurdy's conclusion valid and correct.

¶ 64 Reinhardt J. in upholding the trial judge's decision states:

> "And although the Provincial Offences Act provides for a remedy short of quashing the certificate and suggests that in general such a remedy is not appropriate under the Provincial Offences Act. And I refer specifically to Sections 35, 90 and 36. Ninety, for example, suggested in dealing with offence notices that irregularities in form or defects in substance of an offence notice do not affect the validity of a proceeding. And if you follow that theme in the Provincial Offences Act of Section 36, it says, "an objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash, and the court shall not quash unless and (sic) amendment or particulars under 33, 34 or 35 would fall to satisfy the ends of justice".

> It is my view ... that failing to put the informant on the offence notice is not something that can property be cured by particulars at the time of trial. And although there is jurisdiction to amend, all those particulars in my view deal [with] the details of the offence and they are describing circumstances where the offence has not been stated property. They do not contemplate in my view the actual addition of the name of the informant. That is something which is so basic. I agree with the Justice of the Peace; is to make the notice a useless document for the purposes of the defendant. And the principles of justice would not be served by permitting an amendment to be made of that basic element. So I am not prepared to amend and I suggest that the appropriate decision was that of the Justice of the Peace."

¶ 65 First of all, in this particular argument, it should noted that the summonses in question are contained in Form 104 as required by rule 32(4) of the Rules of the Ontario Court of Justice in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200. Form 104 does not require that the officer identify himself or place or write his name on the summons, unlike the offence notice under Part I that requires the officer's name be placed on that document. The offence notice mentioned in Bertolucci is required to be on Form 3 as directed by s. 2 of Reg. 950 (Proceedings Commenced by Certificate of Offence), R.R.O. 1990. Form 3 requires the officer to place or write his name on the document.

¶ 66 The significance of an offence notice under Part I requiring the officer's name be legibly place on the document, and in the case of a summons issued under Part III not requiring the placement of the officer's name on it, can be deduced from the different procedures used for a Part I offence and a Part III offence, if the defendant fails to appear for trial. Part I procedures allow persons served with an offence notice to be deemed not to have disputed the charge and to have a conviction entered against them under ss. 9 and 9.1 of the P.O.A. Part III trials have a different procedure when the defendant fails to appear. An ex-parte trial is required and the officer is required to appear in court and testify in order for the prosecution to obtain a conviction under s. 54 of the P.O.A. Part III procedure, therefore contains a safeguard. The officer has to personally appear and give evidence. Under Part I procedure, the officer does not have to appear in order for the prosecution to obtain a conviction. Thus, the name of the issuing officer on the offence notice has more significance, as a conviction cannot be entered under Part I unless there are no defects or errors on the face of the certificate of offence, which is a virtual carbon copy of the offence notice.

¶ 67 Therefore, I find the actual identity or the name of the issuing officer is not required to be placed on the face of the summonses issued to the defendant. Furthermore, there is no prejudice alleged by the defence to the defendant's right to make full answer or defence, even if the defendant did not know the identity of the officer. Consequently, the analogy of R. v. Bertolucci does not apply to the facts of this case.

(c) Malfeasance by the officer who issued and served the summonses

¶ 68 In this argument, which is not clearly argued by the defence, they allude to some malfeasance on the part of the issuing officer. The defence contends that there must be something improper about these summonses since the summonses issued to the defendant are from a snap-set system in which all the summonses for one individual offence are bound together. The officer can complete the details on the top and original document or summons for one offence to be filed with the court. The officer can write the details of one of the offences against the defendant on the original copy of the summons. For ease and efficiency, these same details of one offence on the original summons can be transferred or carbon copied simultaneously onto the copy of the summons to be issued to the defendant and to the copy that is to be retained by the officer. The original summonses filed with the court contain the officer's signature, yet the copies of the summonses issued to the defendant lacks the officer's signature. This is what makes the defence believe something is amiss. However, there is no evidence from the officer on what occurred during the issuance of the summonses to the defendant. Did he forget to sign and date all of the summonses initially and then signed and dated just the copies left in his possession after he had served copies of the summonses on the defendant? Even if this is what had occurred, this defect of failing to sign and date the summonses would only be a defect or error in form only and would fall within s. 90 of the P.O.A.

¶ 69 Since this is not a summons issued under Part I of the P.O.A. then the defendant cannot use the argument found in R. v. Murugan, [1994] O.J. No. 2962 (Ont. Ct. (Prov. Div.)) per Knazan J., which the defence in that case argued that an officer cannot sign the certificate of offence certifying service first, before he actually signs the summons and serves the summons on a person charged. Knazan J. held that the process of certifying service prior to actually serving the document on the defendant is not fatal. The issue in R. v. Murugan was whether certifying service on the certificate of offence prior to actually serving the offence notice to the defendant invalidated the proceedings because of the failure to comply with s. 3(5). Knazan J. decided at para. 25 of his judgment that, "what is important in s. 3(5) is not the order of service in relation to when the certificate is signed but the fact of service". Judge Knazan also found at para. 38, "the defect does not require either quashing or acquittal but can be corrected either by amendment under s. 34 of the Act or by an appropriate order under s. 90 of the Act". His Honour then went on to conclude that once the defendant appeared in court, any defect in service would be extinguished.

¶ 70 Therefore, as there is no evidence of malfeasance on the part of the officer, this particular argument is unsustainable and does not effect the validity of these proceedings according to s. 90 of the P.O.A.

(d) Attornment and waiver of procedural defect upon appearance

¶ 71 A person may be brought before the court by means of a summons, an offence notice, a notice of trial, an undertaking, a recognizance, a warrant, a judge's order, or by voluntary appearance. Once that person is before a proper court possessing a valid charge document, that court must retain its authority over that person until the matter is concluded. Once jurisdiction over the person is lost, it can only be regained by fresh process or the voluntary re-attendance of the defendant. The purpose of any type of process is simply to bring a person charged with an offence before the court.

¶ 72 As a matter of course, if a person appears in court on the day required, then any defect or procedural error in the summons or process document, that defect or error becomes meaningless, since the reason the summons is issued is to command the person to appear at a certain date and time at a certain place. Once the person appears the function of the summons is fulfilled. The person attorns to the jurisdiction of the court and the function of the summons becomes spent.

¶ 73 Hence, the general rule is that any defect or error in the process document or the summons used to bring a person to court is cured upon the appearance of that person at the time or place indicated on the defective summons or process document. However, the defence insists in this case that the defendant has not submitted herself to the jurisdiction of the court or voluntarily appeared to correct the defective summonses. Their argument is that the defendant has to enter a plea first, or alternatively, she has to be subjected to an arraignment either on November 23, 2000 or on May 8, 2001, in order for the court to find there has been attornment on the part of the defendant and to subsequently have jurisdiction over the defendant's person.

¶ 74 I also canvassed the issue of attornment in R. v. Dhillon [1997] O.J. No. 6018. In that case, I found the defendants did attorn to the court's jurisdiction although there had been defective notices of trial that did not indicate which court the defendants had to appear at for trial. I wrote and concluded at para. 38 to 43 that:

> In R. v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.), Morden J.A., at page 229 held:
>
> > The argument is also made that if an accused is not obliged to appear by reason of a defect in process, why should he not be entitled to appear solely to make this point and to obtain the Court's declaration on it in his favour. I appreciate the apparent logic of this submission but it appears to me that it overlooks one of the basic functions of process and that is to bring the accused before the Court. If this purpose is accomplished, and the objection is not based on jurisdictional grounds, the balance of policy considerations is in favour of holding that the Court does have jurisdiction, regardless of protest.

Unless the defect argued directly affects the court's jurisdiction to try a matter, defects in the procedure by which the accused is brought to court or attends court does not affect the Court's jurisdiction, whether the accused appears to lodge an objection or not.

In R. v. Callahan, (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J., the Offence Notice issued to the defendant was defective in that it failed to specify the Provincial Offences Court in which the proceedings had commenced. Smith J. at page 129 held [my emphasis below]:

> I hold that he did attorn by attending at the appropriate office and setting a trial date. He could not do so without pleading and he, in fact, did enter a plea of not guilty. The notice was clearly defective but in form only. The applicant was not misled as evidenced by the fact that he attended at the appropriate office. There was an address on the face of the notice.

Smith J. also stated the defect did not go to jurisdiction.

In R. v. Harnish, (1979), 49 C.C.C. (2d) 190 (N.S.S.C. (Appeal Div.)), per MacKeigan for the court states at page 191:

> Any minor objections to jurisdiction falling short of complete nullity of the information were in our opinion in any event waived by the appearance of counsel for the appellant before the Magistrate to object to jurisdiction. The criminal law of Canada does not recognize in this context a conditional appearance or an appearance under protest.

Amicus Curiae

In a situation in which a person appears and declares himself to be amicus curiae and not an agent of the defendant - usually to avoid attorning to the jurisdiction of the court - especially since an appearance is generally considered to be attornment to the jurisdiction of the court, it has been decided by R. v. Grice, (1957), 26 C.R. 318 (Ont. S.C.), per Ferguson J., that a person cannot take advantage of an amicus curiae declaration to avoid attorning to the court's jurisdiction. At page 322, Ferguson J. states:

> I am of the opinion that when counsel has been instructed by a client, the client is bound by the effect of the counsel's appearance. He cannot after instructions divorce himself from his client and appear under the guise of amicus curiae.

Therefore appearance by counsel under the guise of amicus curiae to challenge a deficiency in procedure or defective documents is sufficient to eliminate the defect.

¶ 75 In R. v. Hung [1997] O.J. No. 6017, the issue was whether a defendant's attendance in court to challenge jurisdiction was an appearance, which allowed the Court to regain jurisdiction over the person. I wrote at paragraphs 39 to 48:

> The defendant on May 13, 1997 stated he was only before me to challenge the jurisdiction of the Court and was not making an appearance to answer to the Notice of Trial. The issue left for me to consider is whether the defendant's attendance in court to challenge jurisdiction, is an appearance which allows the Court to regain jurisdiction over the defendant's person.
>
> In R. v. Gougeon et al., (1981), 55 C.C.C. (2d) 218 (Ont. C.A.), the Court of Appeal held that there was no such thing as a conditional appearance, and counsel could not appear in court on behalf of a client to object to a defect in the process which brought the accused before the Court, unless the defect was one that went to the Court's jurisdiction to proceed with the matter.
>
> In the instant case, a summons was not re-issued by a judicial officer after the Court had failed to do anything on December 17, 1996, and jurisdiction over the person had been lost. Instead,

a Notice of Trial was sent by Court administration to the defendant informing him of a trial date for May 13, 1997.

A parallel situation occurred in the decision of R. v. General Motors of Canada Ltd., [1990] O.J. No. 3176, (July 5, 1990) Court File No. 506/90 (O.S.C.). Court Administration, in that case, had sent out a notice to the defendant changing the court location for a trial that had been earlier set by a Provincial Court judge. A Court Administrator wrote the parties and advised them the trials would be still held on the same date but at a different court location. Counsel for the defendants argued the Court had no jurisdiction to proceed on the charges on that date. Counsel for the Ministry of Labour argued that s. 32 (now s. 31) of the Provincial Offences Act applied and the defect in the adjournment did not deprived the Court of the jurisdiction to proceed. The trial Justice held that he did not have jurisdiction to proceed with the case against General Motors. The Ontario Supreme Court upheld the decision and agreed that Court Administration did not have the authority to change the court location for the trial -- only a judge or justice of the peace had that authority. The Court in upholding the trial Justice's decision made the following endorsement:

> In my view the procedure adopted whereby a Court Administrator purported to advise these respondents of the change in location of the sitting of the Court was inappropriate and without authority - only the Court could do that.
>
> In my view in these circumstances there was no attornment to the jurisdiction of the Court by the respondents. The Justice of the Peace was, in my view, correct in proceeding as he did and in the result he achieved.
>
> In result therefore the application is dismissed.

The Court in General Motors also held that the defendants did not attorn to the jurisdiction of the Court as the Court was not dealing with defects in process which went to the jurisdiction of the Court to hear the charges.

The similarity of the instant case and the General Motors case is evident. Court Administration in both cases acted without authority. Like the determination made in General Motors, I also find Court Administration in the instant case acted improperly and without authority in issuing a Notice of Trial to the defendant to attend on May 13, 1997, after the Court had lost jurisdiction over the person on December 17, 1996. The Provincial Offences Court, however, did not lose jurisdiction over the offence on December 17, 1998 by the Court's failure to do anything with the defendant's charge. Section 31 of the Provincial Offences Act provides the override and prevents a loss of jurisdiction over the offence for the Court's failure to act.

In order for the present defendant to be properly brought back to court after the Court's failure to act on December 17, 1996, a new summons would have to be issued by a judicial officer. A Notice of Trial sent by Court Administration is not a valid process to make the defendant re-attend after the Court has lost jurisdiction over the person. A re-issued summons from a judicial officer is required in order for the Court to regain jurisdiction over the person. Since a summons was not re-issued requiring the defendant to appear on May 13, 1997, the defendant was not obligated to attend on May 13, the date on the invalid Notice of Trial.

I am also adopting the finding in the General Motors case which held there was no attornment to the Court's jurisdiction, for the instant case. I find the defendant in this case did not attorn to the Court's jurisdiction, as the Notice of Trial for May 13, 1997 was invalid and went to the jurisdiction of the Court to hear the matter. Further, the invalid Notice of Trial was not a defect that was related to a procedure on adjournments. Therefore, the defendant Hung's appearance to challenge the jurisdiction of the Court does not restore the Court's lost jurisdiction over his person. The invalid Notice of Trial is not the type of procedural defect that can be cured by the appearance of the defendant before the Court.

¶ 76 I found in R. v. Hung that the court had no jurisdiction to deal with the defendant's matter because court administration had issued the Notice of Trial to appear in court instead of a summons being issued by a justice,

after the court had lost jurisdiction over the person. Further, there was no indulgence or absolution granted by a justice in that case for court administration's misstep in issuing the Notice of Trial. In the case at bar, there was a confirmation or vindication by a justice of the summonses issued by Officer Crabb to the defendant. That is, a justice approved the issuance of the summonses, although defective, by confirming this on the information.

¶ 77 Dubin J.A. of the Court of Appeal of Ontario in R. v. Naylor (1978), 42 C.C.C. (2d) 12 (O.C.A.), summarized the law regarding the effect of an accused appearing before the court where there is a defect in the process bringing that accused before that court. Dubin J.A. held that as long as the defect does not affect the validity of the information, the defect in process does not prevent the court from proceeding with the matter when the accused is before it. At page 14 Dubin J.A. wrote [emphasis is mine below]:

> A distinction must be made between those matters which relate to the validity of an information and those matters which relate to the validity of a summons or warrant or to matters relating to the confirmation of an appearance notice, promise to appear or recognizance. Where there is a valid information and an accused attends, the trial Judge has jurisdiction to proceed with the matter notwithstanding that there has been a defect in the process respecting a summons or warrant or confirmation. The invalidity of such process, not invalidating the information, would not deprive the Court of proceeding with the matter when the accused is before it. However, where the information itself is invalid, the trial Judge would have no basis upon which to proceed.

¶ 78 The situation, as described by Dubin J.A. in R. v. Naylor, is indistinguishable from the circumstances found in this case. The defendant appeared in court on the date and place stated on the unsigned or defective summonses. Even if the unsigned summonses were nullities, this particular defect consisting of an unsigned summons as previously decided in R. v. Elliot, does not invalidate the information. Therefore, since the defective summonses received by the defendant do not invalidate the information and the defendant has personally appeared before this court, this court is not barred from proceeding with the matter.

¶ 79 In R. v. Arnold (1982), 39 O.R. (2d) 9 (O.H.C.), Osler J. also found that procedural defects do not invalidate the certificate of offence or result in loss of jurisdiction where the accused appears before the court:

> I am not, however, convinced that the defect was in a matter going to jurisdiction and I find it hard to distinguish the situation on principle from that discussed in R. v. Naylor (1978), 42 C.C.C. (2d) 12, at 19 where procedural defects had occurred but the accused had in fact presented himself before the court and the defects were held not to invalidate the information or result in loss of jurisdiction over the offence.

¶ 80 However, the defence argues that an appearance or attornment to the jurisdiction of the court does not occur until the defendant is subject to an arraignment or the defendant actually enters a plea. In support of this argument, the defendant points to a passage in R. v. MacAskill, (1981), 58 C.C.C. (2d) 361 (N.S.C.A.), per MacKeigan C.J.N.S., Hart and Macdonald JJ.A, at pages 368-369 which states:

> In my opinion, the procedures used to bring an accused person before a Court for the first time either by way of appearance notice, summons or warrant do not impose upon that Court jurisdiction over the offence. It is only when the accused has presented himself to the Court and made its election or plea that the Court becomes seized with the type of jurisdiction that can be lost in a Krannenburg situation. Up until this time any error in the method of bringing him before the Court, or any change in the time or place of his first appearance can be made by the issuance of a new summons or warrant, which should, if possible, be brought to the attention of the accused before the time set initially for his appearance.

¶ 81 First, a decision of the Nova Scotia Court of Appeal is only persuasive and not precedential to this court. This court by the doctrine of stare decisis is bound by the decisions rendered by its own higher courts of Ontario. Regarding the R. v. Krannenburg, [1980] 1 S.C.R. 1053 (S.C.C.) decision on the lost of jurisdiction over the

offence, I previously considered a lost of jurisdiction over the person situation in R. v. Hung. I reviewed Krannenburg and wrote at para. 13 to 17 that:

> Krannenburg's criminal trial had been set for 2:00 p.m. in courtroom No. 5. Due to a mix-up, the case was called that morning in courtroom No. 1. Since Krannenburg was not present, the judge issued a warrant for Krannenburg's arrest. Unaware of the situation, Krannenburg and her counsel appeared in courtroom No. 5 at 2:00 p.m. as scheduled. Krannenburg's name did not appear on the list of cases scheduled to be heard that afternoon. Crown counsel informed Krannenburg's counsel that he knew nothing about the charge. Krannenburg and her counsel departed the courthouse.
> The issue for the Supreme Court of Canada in Krannenburg was whether section 440.1, a curative provision of the Criminal Code, R.S.C. 1985, c. C-46 remedied a loss of jurisdiction resulting from the failure of a court to proceed with a trial at the appointed time and place. The Supreme Court decided that section 440.1 was not broad enough to cover the situation where the accused appears at the time and place scheduled, but the court fails to appear, and nothing is done. The Court found that section 440.1 is directed to cure situations where there has been a procedural defect or irregularity in respect of adjournments or remands. In Krannenburg there was no breach of the procedural requirements of the Criminal Code dealing with adjournments. Thus, section 440.1 did not save jurisdiction over the offence when the court had not acted. The result was a finding of loss of jurisdiction over the offence.
> Dickson J. in Krannenburg, at page 1055 stated what the law was before section 440.1 was enacted:
>
> > It has long been recognized in our law that an inferior Court may suffer loss of jurisdiction by reason of some procedural irregularity, as for example, when the date to which an accused is remanded or to which a case is adjourned for trial comes and goes without any hearing or appearance, "with nothing done".
>
> And at p. 1056 Dickson J. also noted what a loss of jurisdiction meant:
>
> > Loss of jurisdiction over the offence occurred when the date of adjournment or remand passed and "nothing was done". Such procedural defect destroyed the jurisdiction of the Court. The indictment or warrant became invalid and of no effect.
>
> Dickson J. at pages 1057-1058 commented on the distinction between the loss of jurisdiction over the offence and loss of jurisdiction over the person:
>
> > Prior to the decision in Doyle, there was a respectable body of authority which drew a distinction between loss of jurisdiction over the person and loss of jurisdiction over the offence, i.e. the indictment or information. Loss of jurisdiction over the person was considered to arise when the court failed to follow the prescriptions of the Criminal Code pertaining to adjournments and remands. Although jurisdiction over the person was said to be lost, it could be regained when the accused appeared before the court voluntarily or in response to a summons or warrant. Proceedings then continued on the original information or indictment.
>
> ...
>
> > The judgment in Doyle cast doubt upon the validity of a distinction between jurisdiction over the person and jurisdiction over the offence.

¶ 82 Secondly, both the R. v. MacAskill and R. v. Krannenburg decisions were criminal matters. The P.O.A. was enacted so that provincial offences would be treated procedurally different from criminal charges. This is stated in s. 2 of the P.O.A. The defendant's argument regarding non-attornment is technically based on the

findings of a criminal proceeding. Section 2 of the P.O.A. codifies the distinction between provincial offences and criminal offences.

¶ 83 In my judgment in R. v. Hung, there was a loss of jurisdiction over the person of the defendant and I had to consider whether the court's jurisdiction over that defendant had been restored when the defendant appeared and argued that the court had no jurisdiction to deal with the matter. I had found that the court's jurisdiction was not regained as the Notice of Trial requiring the defendant to appear was not issued by the judiciary but by court administration which lacked the power to do so. Since there was no judicial involvement in bringing the defendant back to court, I held the court lacked the jurisdiction to deal with the matter. The defendant's appearance could not rectify the situation, especially when it was not the judiciary that ordered the defendant to appear in court. A new summons issued by the judiciary was required to bring the defendant Hung back to court.

¶ 84 I also noted that there was no such concept as a conditional appearance to argue a defect in process unless that defect went to the court's jurisdiction to proceed with the matter. I wrote in R. v. Hung at para. 39 to 40 that:

> The defendant on May 13, 1997 stated he was only before me to challenge the jurisdiction of the Court and was not making an appearance to answer to the Notice of Trial. The issue left for me to consider is whether the defendant's attendance in court to challenge jurisdiction, is an appearance which allows the Court to regain jurisdiction over the defendant's person.
> In R. v. Gougeon et al., (1981), 55 C.C.C. (2d) 218 (Ont. C.A.), the Court of Appeal held that there was no such thing as a conditional appearance, and counsel could not appear in court on behalf of a client to object to a defect in the process which brought the accused before the Court, unless the defect was one that went to the Court's jurisdiction to proceed with the matter.

¶ 85 Based on R. v. Gougeon et al., (1981), 55 C.C.C. (2d) 218, the defence cannot just appear in court and say they are only before the court to challenge its jurisdiction on a defect in process unless that defect robbed the court of jurisdiction to deal with the matter. R. v. Elliot provides that an unsigned summons does not invalidate the information and R. v. Naylor provides that if there is a valid information before the court and the defendant is also before the court then the court can proceed with the matter.

(e) Is a plea by the defendant or arraignment required for the court to find attornment by the defendant?

¶ 86 The record of proceedings shows that the defendant appeared personally on November 23, 2000 at the place and time indicated on the summonses issued by Officer Crabb. The matter was adjourned to May 8, 2001 and set down for trial on a "with or without counsel" basis.

¶ 87 The defendant refers to two passages, which indicate that a court is not seized with jurisdiction over the person until either the defendant has entered a plea or that there had been an arraignment of the defendant.

¶ 88 The first passage is found in R. v. MacAskill (1981), 58 C.C.C. (2d) 361 (N.S.C.A.), per MacKeigan C.J.N.S., Hart and Macdonald JJ.A, at pages 368-369: In my opinion, the procedures used to bring an accused person before a Court for the first time either by way of appearance notice, summons or warrant do not impose upon that Court jurisdiction over the offence. It is only when the accused has presented himself to the Court and made its election or plea that the Court becomes seized with the type of jurisdiction that can be lost in a Krannenburg situation. Up until this time any error in the method of bringing him before the Court, or any change in the time or place of his first appearance can be made by the issuance of a new summons or warrant, which should, if possible, be brought to the attention of the accused before the time set initially for his appearance.

¶ 89 The second passage is found in R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J. at page 129 which states:

> I hold that he did attorn by attending at the appropriate office and setting a trial date. He could not do so without pleading and he, in fact, did enter a plea of not guilty.

¶ 90 The finding by the Nova Scotia Court of Appeal in R. v. MacAskill was in the context of a criminal matter. The P.O.A. has no provisions or procedure for the defendant to make an election. Since provincial offences matters under the P.O.A. enjoy a merit based regime, technical or procedural defects in a summons that do not invalidate the information or the court's jurisdiction are cured by the appearance of the defendant.

¶ 91 Smith J. in R. v. Callahan found attornment by the person charged in that case once he attended court and set a trial date. Smith J. concluded that the person could not set a trial date unless he entered a not guilty plea. The procedure in Callahan concerned offences issued under a Part I certificate of offence. The procedure in obtaining a trial under Part I requires a person under s. 5 or s. 5.1 of the P.O.A. to attend court and deliver or file the offence notice with his or her intention to appear in court for the purpose of entering a plea and having a trial. The defendant in this case did not have the same option. She had to appear as commanded on November 23, 2000. The fact that the matter was adjourned to May, 8, 2001 for trial on a "with or without counsel" basis, even if the defendant did not enter a plea or was arraigned, would indicate to the court that she was not prepared to proceed with her trial on November 23, 2000 or that she did not want to enter a guilty plea on the first appearance and be done with the matter. If the defendant did not seek an adjournment then the matter could have proceeded on November 23, 2000. The fact that the matter was adjourned until May 8, 2001 would also indicate that the defendant would have been given an opportunity to plead guilty on November 23, 2000 and the fact that the matter was adjourned and set down for trial would indicate that she did not want to enter a guilty plea. Although there is no evidence of what occurred on November 23, 2000 when the defendant made her first appearance, the court would not have set the matter down for trial unless the defendant was intending to dispute the charges and wanted a trial on the matters.

¶ 92 In R. v. Naylor (1978), 42 C.C.C. (2d) 12 (O.C.A.), Houlden J.A. for the Court of Appeal of Ontario at page 19 reviewed the effect of an accused who appears in court, in spite of non-compliance by the officer who laid the information, with a particular provision of the Criminal Code, and held that the accused's appearance or presence in the courtroom gave the court jurisdiction:

> In the present case, however, the accused was present in Court. Was this sufficient, as the lower Court Judges held, to give jurisdiction? I believe it was. In order for the appellant to be obligated to attend Court, the provisions of s. 455.1 had to be followed; but the failure to follow that procedure did not, in my opinion, invalidate the information or result in loss of jurisdiction over the offence: see R. v. Pottle (1978), 39 C.C.C. (2d) 484 at pp. 495-6. I agree with the decision in R. v. Halyk (1972), 9 C.C.C. (2d) 105, 21 C.R.N.S. 244, [1972] 6 W.W.R. 506, that non-compliance with s. 455.1 does not make the information a nullity.
> Since the information was still valid and since jurisdiction over the offence had not been lost, the presence of the appellant was sufficient to confer jurisdiction on the Court: R. v. Isbell (1928), 51 C.C.C. 362, [1929] 2 D.L.R. 732, 63 O.L.R. 384, R. v. Wetmore (1976), 32 C.C.C. (2d) 347, 18 N.S.R. (2d) 292. The lower Court Judges were right, therefore, in rejecting the jurisdictional argument of the appellant.

¶ 93 The Court of Appeal of Ontario in R. v. Naylor did not comment on or address whether an arraignment or a plea was required to give the court jurisdiction. Both Dubin J.A. and Houlden J.A. in Naylor spoke only about the attendance or the presence of the accused in the courtroom, or before the court, to give the court jurisdiction over the matter.

¶ 94 I therefore conclude and find that it is not necessary for the Ontario Court of Justice under the Provincial Offences Act to actually arraign or to have the defendant enter a plea for it to have jurisdiction over the defendant. Furthermore, I find there is no evidence that the defendant has suffered any prejudice from the defective summonses nor has the absence of the officer's signature misled the defendant, at least not in a manner which could not be cured by an adjournment.

¶ 95 Therefore, I find on November 23, 2000, upon the defendant's attendance in court, and subsequent adjournment, to be an appearance and an attornment to the jurisdiction of the court, such that the court has jurisdiction over the defendant's person.

¶ 96 In conclusion, the defendant's argument about the missing officer's signature on the summons is governed by the Court of Appeal's decision in R. v. Elliot. The defects on the summonses do not invalidate the information. The defendant appeared on November 23, 2000 as required, and thus attorned to the court's jurisdiction. Any defects in the summonses were corrected by the defendant's appearance.

Improper Use Of S. 22 And Non-Compliance With Ss. 23 And 24 Of The P.O.A. By The Issuing Officer

¶ 97 The second attack on the validity of the summonses by the defence concerns strict compliance with s. 22 of the Provincial Offences Act, R.S.O. 1990, c. P.33 ("P.O.A."). The defence contends that the summonses were improperly served as that section only allows the officer to serve the summonses to a person he finds at or near the place where the offence was committed, prior to laying the information before a justice.

¶ 98 The information indicates the offence occurred on Danforth Avenue on October 17, 2000. The defendant attended the police station located on Coxwell Avenue, which she believes is Division 55 on October 26, 2000, for an interview with the investigating police officer. At the police station, after the interview, she was served with the summonses. This scenario, the defence contends, does not comply with ss. 23 and 24. It was submitted that the officer could only use the procedure for issuing a summons under s. 22, if he actually found the defendant at or near the location of the offence. If the defendant is not at or near the location of the offence then the officer cannot use s. 22 to issue a summons prior to laying the information; the officer must comply with or use ss. 23 and 24 of the P.O.A. That is, the officer must first lay the information under s. 23 before a justice. If the justice issues process by issuing a summons under s. 24, then the officer is required to serve this judicially issued summons on the defendant.

¶ 99 Section 22 provides:

> Summons before information laid
>
> 22. Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom the officer finds at or near the place where the offence was committed, he or she may, before an information is laid, serve the person with a summons in the prescribed form.

¶ 100 The defendant's counsel refers to a comment in Stewart and Macey on Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998) at pages 72 to 73 to support his argument:

> The s. 22 requirement that the officer must find the defendant "at or near the place where the offence has been committed" can be problematic for provincial offences officer. For example, the investigation of a motor vehicle accident where the offending driver failed to remain at the scene requires ongoing police investigation to determine the identity of a driver. Once the driver has been found, the officer may need to interview the person. It is possible that only at the conclusion of the interview, the officer formulates the requisite reasonable and probable grounds to believe that the person interviewed is the person who committed the offence. A strict interpretation of the Act would preclude the officer from serving the defendant at that time because the person has not been found "at or near the place where the offence has been committed". However, the officer may be tempted to serve the person with the s. 22 summons and then attend before a justice to swear to the information under s. 23 of the Act, given that the officer may not be able to locate the defendant to serve him or her with the summons after swearing to the information.

¶ 101 The defendant in this motion testified she received the summonses for the three offences at the police station located at Coxwell Avenue. The affidavit of service for these three summonses indicates Officer Alan

Crabb served the summonses on the defendant on October 26, 2000. She did not receive these summonses "at or near the place where the offence was committed". The charges identify the location of the offence as "westbound on Danforth Avenue" in Toronto and occurring on October 17, 2000.

¶ 102 Furthermore, Stewart and Macey, also describe the process under s. 22 at page 72 of their tome that strongly supports the defendant's argument that the s. 22 process can only be used if the officer finds the defendant at or near the vicinity of the offence:

> The Part III procedure whereby service occurs prior to the swearing of an information is only available to a police officer or provincial offences officer. Section 22 of the Act allows the officer to serve a summons on the defendant; s. 23 requires the officer to subsequently attend before a justice to swear the information. The officer must have reasonable and probable grounds to believe the offence has been committed and must have found the defendant "at or near the place where the offence was committed". This provides officers with a mechanism to serve a person found committing an offence under more aggravating circumstances which would not warrant proceeding under Part I of the Act. This permits the officer to effect service immediately and then subsequently attend before a justice to swear to the information.

¶ 103 On the other hand, Stewart and Macey write in their tome that once the justice confirms the issuance of the summons by the officer relating to a summons served under the s. 22 procedure, on the information itself, he or she endorses the process. That is, the justice confirms that the officer was correct in believing there were reasonable and probable grounds in issuing a summons to the defendant to appear in court to answer to the charges. The justice in other words validates the procedure used by the officer in issuing the summonses. They write at page 73:

> The justice must be satisfied not only that there is evidence of an offence, but that the process is not flawed. By signing the information the justice is effectively endorsing the process. A challenge at trial to the validity of the charging process in these circumstances would require the trial justice to exercise an appellate function on the decision made by the original justice who confirmed the summons and allowed proceedings to be commenced.

¶ 104 Sections 23 and 24 describe the procedure in having a information sworn and a summons issued:

> Information
>
> 23.(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.
>
> Procedure on laying of information
>
> 24.(1) A justice who receives an information laid under section 23 shall consider the information and, where he or she considers it desirable to do so, hear and consider in the absence of the defendant the allegations of the informant and the evidence of witnesses and,
>
> (a) where he or she considers that a case for so doing is made out,
>
> (i) confirm the summons served under section 22, if any,
>
> (ii) issue a summons in the prescribed form, or
>
> (iii) where the arrest is authorized by statute and where the allegations of the informant or the evidence satisfy the justice on reasonable and probable grounds that it is necessary in the public interest to do so, issue a warrant for the arrest of the defendant; or

(b) where he or she considers that a case for issuing process is not made out,

(i) so endorse the information, and
(ii) where a summons was served under section 22, cancel it and cause the defendant to be so notified.

¶ 105 Substantive or procedural defects in process or on the summonses can be cured by s. 90(2) of the P.O.A. If it appears the defendant has been misled by a defect or irregularity on the summonses then the trial court may grant an adjournment with costs and other appropriate remedy in favour of the defendant, in order to protect the defendant's right to a fair trial. This section also illustrates the P.O.A.'s broad curative powers.

¶ 106 In this confirmation process, there is a presumption of regularity and that the confirming justice turned his mind to the appropriate facts when deciding whether or not to confirm the summonses issued to the defendant by Officer Crabb. There is no evidence that anything was done improperly or that the confirming justice failed to have certain information before him or her at the time of the confirmation. Since, I lack any appellate or review jurisdiction over my brother or sister justice's decision to confirm the summonses on November 2, 2000, I am enjoined from making any ruling regarding the validity of these summonses based on non-compliance with s. 23 and s. 24 and the improper use of s. 22.

¶ 107 I find, therefore, from the fact that the summonses in question were confirmed on November 2, 2000 by my brother or sister justice, that this confirmation retroactively legitimized the defective summonses and that any substantive or procedural defect in or on the summonses were prime facie rectified.

¶ 108 In R. v. Wetmore (1976), 32 C.C.C. (2d) 347 (N.S.C.A.), the applicant argued that the information was invalid since the justice failed to endorse on the information that he or she had confirmed the appearance notice issued to the applicant. The court held that the failure to confirm the appearance notice is relevant to any proceedings taken against the applicant should he fail to attend court as required by the appearance notice, but once the applicant appears in answer to the charge there is no necessity that the appearance notice be confirmed. MacKeigan, C.J.N.S., for the Nova Scotia Court of Appeal at page 351 wrote:

> The failure to observe s. 455.4(1), assuming such failure occurred, was not a jurisdictional defect which would void the information. We agree with Mr. Justice Hart who said:
>
> > The Magistrate has a duty to confirm the appearance notice under the Code and, if he does so, this brings about certain other results, namely, that the person who was supposed to appear would be required to appear under the notice and that appearance could be enforced. The fact that the accused in this particular case did appear before the Magistrate on the day on which the appearance notice called and the trial proceeded, in my opinion, wipes out the necessity of the appearance notice having been endorsed as alleged by the applicant.

¶ 109 According to R. v. Wetmore, once the appearance notice or process document was confirmed, the person would be required to appear in court on that appearance notice, and if he failed to attend, the appearance notice could be enforced. In the case at bar, the summonses were confirmed and therefore, the defendant was legally required to appear on November 23, 2000. If she failed to appear on November 23, 2000, the summonses were enforceable by the court.

¶ 110 Even if I had the power to review the confirmation decision of the confirming justice, I wish to point to a passage cited by the defence. In R. v. MacAskill, (1981), 58 C.C.C. (2d) 361 (N.S.C.A.), at pages 368-369: Up until this time any error in the method of bringing him before the Court, or any change in the time or place of his first appearance can be made by the issuance of a new summons or warrant, which should, if possible, be brought to the attention of the accused before the time set initially for his appearance.

¶ 111 The MacAskill decision refers to correcting an error before the time set initially for the defendant's appearance. In the case at bar, the defendant was required to appear on November 23, 2000. The confirming

justice legitimized the defective summonses on November 2, 2000. Therefore, the error in process was judicially corrected before the defendant had to appear in court.

¶ 112 In addition, I cannot see any prejudice to the defendant's right to make full answer and defence. As I stated earlier, the most advantageous relief that the defendant could possibly receive from this court, after a finding that the summonses are nullities and that the court has no jurisdiction over the defendant, is the obligation of the prosecution to obtain fresh summonses and then to serve them on the defendant. I conclude that this was already accomplished when the justice on November 2, 2000 confirmed the summonses. The confirming justice in his or her judicial act of November 2, 2000 breathed new life into those defective summonses, and remedied the procedural defect or error committed by the officer when he failed to comply with ss. 23 and 24 or used s. 22 improperly. This court, even without my brother or sister justice's confirmation of the summonses, would find that the process of the officer issuing the summonses prior to laying an information was only a substantive or procedural defect that falls within s. 90 of the P.O.A. Since, prior to my own involvement in the case at bar, there had been the intervention of a judicial official, who consequently corrected the defective summonses and legitimized them, I am estopped now from declaring them to be nullities or to finding them defective. As I am enjoined from finding the summonses nullities, this court has not been deprived of jurisdiction over the defendant's person.

¶ 113 I also concur with the prosecution submission that s. 90 of the P.O.A. governs procedural or substantive errors regarding the issuance of summonses. Once the defendant appears in court any procedural or substantive error concerning the process to bring the defendant to court is corrected. In the case at bar, the error is substantive since there appears to be obviously non-compliance with s. 23 and s. 24 and the improper use of s. 22. The issuing officer, it can be noted, should have laid the information first, since the defendant was not found by him in or near the place where the offence was committed, and then served judicially issued summonses on the defendant. However, the officer chose to use the s. 22 procedure to issue the summonses first, prior to laying the information before a justice. Although the wording of s. 22 only allows the officer to use this method if the defendant is found in the vicinity of the place of the offence, the improper use of s. 22 does not vitiate the proceedings nor are fresh summonses required in this case. The result of the justice confirming the summonses on November 2, 2000 compared to the result of the re-issuance of fresh summonses would still just bring the defendant before the court to answer to these charges.

¶ 114 Even if I had the power to ignore the confirmation of the summonses on November 2, 2000, I would not find the officer's improper use of s. 22 to be abusive or the clearest of cases for a stay of proceedings. There is a judicial safeguard contained in the confirmation process. If the confirming justice believed that the officer lacked reasonable and probable grounds to lay the charges against the defendant, he or she could have cancelled the summonses issued to the defendant under s. 24 of the P.O.A.

¶ 115 Furthermore, under the P.O.A. the officer had the discretion to use Part I or Part III procedure to charge the defendant with offences. On the day the defendant attended the police station, Officer Crabb could have also issued summonses or a offence notice under s. 3 of Part I of the P.O.A., which would not have required the officer to attend before a justice first, to swear out a certificate of offence.

¶ 116 Section 3 of the P.O.A. provides:

> 3.(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court.
> 3.(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,
>
> (a) an offence notice indicating the set fine for the offence; or
> (b) a summons, in the form prescribed under section 13.

¶ 117 In respect of the officer's noticeable discretion under the P.O.A. to choose between Part I or Part III procedure in charging the defendant, the significant difference is that under Part III the prosecution can seek larger penalties upon conviction, as compared to lesser penalties under Part I.

¶ 118 In sum, the confirming justice on November 2, 2000 retroactively legitimized the defective summonses and cured any substantive or procedural defect regarding the summonses issued to the defendant. I am therefore enjoined from declaring these summonses to be nullities or defective. Even if the officer failed to comply with the procedure under ss. 23 and 24, or improperly used the procedure under s. 22 of the P.O.A., in issuing the summonses and serving them on the defendant, that non-compliance or impropriety by the officer has been formally forgiven by the confirming justice.

5. CONCLUSION

¶ 119 The underlying principle in analyzing the validity of these proceedings or the process that brings the defendant to court under the Provincial Offences Act ("P.O.A.") is that "substance prevails over form, purpose prevails over procedure, and merit prevails over technicalities". Moreover, that theme is reflected in s. 90 of the P.O.A. That section addresses the situation arising when there is a defect or error relating to summonses, offence notices or process documents. Section 90 provides that any irregularity or defect in substance or form regarding the issuance or service of summonses does not affect the validity of the proceeding. If an irregularity, defect or variance has misled the defendant, the court has discretion to grant an adjournment and make an order of costs.

¶ 120 Although in this case, the officer's signature is absent on the face of the summonses served on the defendant, this error does not invalidate the information or the proceedings. That is based on R. v. Elliot, [1981] O.J. No. 142, a Court of Appeal of Ontario decision that governs the defendant's situation. The signatureless summonses are only defects in substance or form within the meaning of s. 90 of the P.O.A. and are not nullities.

¶ 121 There is no evidence of malfeasance on the part of the officer who issued the summonses and served them on the defendant. Although the summonses filed with the court have signatures and the ones served on the defendant do not, an inference of impropriety that would invalidate the information or proceedings cannot be made or inferred.

¶ 122 The summonses issued in this case under s. 22 of the P.O.A. were on Form 104 as required by Rule 32(4) of the Rules of the Ontario Court of Justice in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200. Form 104 does not allow the officer to write or place his name on the summonses. Therefore, there is no requirement under the P.O.A. that the identity of the issuing officer is necessary on the summonses.

¶ 123 As a result, the summonses without the officer's signature are not nullities, nor is the name or identity of the officer required to be on the summonses, nor is there malfeasance on the part of the officer that would invalidate the information.

¶ 124 The officer in this case was required to use ss. 23 and 24 of the P.O.A. He was required to lay the information first before a justice and then to obtain judicially issued summonses to serve on the defendant. He was not rightfully entitled to use s. 22 to issue and serve non-judicially sanctioned summonses on the defendant, prior to laying the information, as the defendant had not been found at or near the place where the offences were committed. In spite of the substantive error on the part of the officer in not complying with ss. 23 and 24, and improperly using s. 22 of the P.O.A., the summonses in question were not invalid or nullities. The fact that a judicial official intervened on November 2, 2000, and confirmed the validity of the impugned defective summonses, retroactively legitimized the defective summonses and cured any defects or errors relating to the service or issuance of the summonses on the defendant. This court therefore was enjoined from declaring these summonses to be nullities.

¶ 125 The Court of Appeal of Ontario in R. v. Naylor (1978), 42 C.C.C. (2d) 12, has decided that if there is a valid information before the court and the defendant appears before that court, the court would have jurisdiction to proceed with the defendant's matter in spite of defective summonses or a flawed process to bring the defendant before the court.

¶ 126 Although there had been no arraignment or plea entered by the defendant on either of November 23, 2000 or May 8, 2001 when she appeared in court on those occasions, the fact that the defendant did appear, attend or put herself before the court on November 23, 2000, as required by the summonses issued and served on her by the officer, is evidence of attornment by the defendant to the jurisdiction of the Ontario Court of Justice. Hence, her attornment and appearance on November 23, 2000 cured or remedied any defect contained in the summonses. Furthermore, the defendant was ordered to stand trial on May 8, 2001 on a "with or without counsel" basis when she appeared in court on November 23, 2000. That order in itself is evidence of attornment to the jurisdiction of the court. The court could not have set the matter down for trial without the defendant appearing and attorning to the jurisdiction of the court on November 23, 2000.

¶ 127 As the defect of a missing officer's signature on the summonses and the error of the officer in failing to comply with ss. 23 and 24, and improperly using s. 22 of the P.O.A., do not nullify the information or these proceedings, the appearance or attornment by the defendant to the jurisdiction of this court also rectifies any substantive or procedural defects relating to the issuance or service of the summonses.

¶ 128 Since it was conceded by the defence that the information was still valid, the only possible remedy for the defendant, if this court would have found the summonses to be nullities or that it lacked jurisdiction over the defendant's person, would have been the requirement of the prosecution to seek fresh and judicially issued summonses and then to serve them subsequently on the defendant.

¶ 129 Thus, the fact that the defendant appeared at the place and time indicated on the impugned summonses, fulfilled the purpose of those summonses on November 23, 2000.

¶ 130 There was no prejudice to the defendant's ability to make full answer and defence, nor did she suffer any prejudice or injustice as a result of the missing signature on the summonses and the officer's non-compliance with ss. 23 and 24, and his improper use of s. 22 of the P.O.A.

¶ 131 In summary, both the appearance of the defendant before the Ontario Court of Justice on November 23, 2000 and the intervention of a judicial official on November 2, 2000 who confirmed the process to bring the defendant before the court, cured or legitimized the summonses. Although these summonses were initially flawed or defective in both form and substance, they were not nullities nor did they invalidate the information or the proceedings. Therefore, this court has jurisdiction over the defendant's person.

6. DISPOSITION

¶ 132 The preliminary motion by the defendant to have the summonses declared nullities or the finding of want of jurisdiction over the defendant's person is dismissed.

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