# SUPREME COURT OF YUKON

Citation: *R. v. Dougan*, 2012 YKSC 88

Date: 20121031
S.C. No. 11-AP013
Registry: Whitehorse

Between:

REGINA

Applicant

And

ABE DOUGAN

Respondent

And Between

REGINA

Applicant

And

BRIAN TALLERICO

Respondent

Before: Mr. Justice P.J. McIntyre

Appearances:

| | |
|---|---|
| Lee Kirkpatrick | Counsel for the Applicant |
| Michael A. Reynolds | Counsel for the Respondent Dougan |
| André W.L. Roothman | Counsel for the Respondent Tallerico |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] Can an accused be compelled to answer to territorial charges without being summonsed? This application deals with jurisdiction over an accused appearing by agent.

[2] The respondents in this case are Brian Tallerico, a big game hunter from Wyoming, and Abe Dougan, his guide, from British Columbia. After a hunt on August

17, 2011, at Fox Mountain, Yukon, the two went to the Conservation Officer Services office in Whitehorse to get permission to export Tallerico's trophies and meat to the United States. Rather than giving them permission, conservation officers ticketed them for wasting caribou meat, seized the trophies and meat, including moose and sheep meat, and warned them there would be further investigation and possible further charges. The respondents retained counsel to appear for them on the tickets.

[3] When counsel made an appearance for the respondents, they found that a conservation officer had sworn an information (sometimes called a long-form information) charging the respondents jointly and adding other related charges. Counsel took the position they were only retained to appear on the tickets, and had not been retained to appear on the information. The Justice of the Peace refused to proceed with the information without personal service of the respondents. The charges on the information and tickets have been adjourned from time to time. On January 17, 2012, Senior Justice of the Peace Cameron struck the information from the docket for lack of personal service of the respondents.

**Application**

[4] The Crown asks for an order quashing the decision of Senior Justice of the Peace Cameron to strike the information from the docket for lack of personal service, and an order returning the information to court for plea.

**BACKGROUND**

[5] These proceedings began by tickets issued to each respondent on August 26, 2011, when they attended the Conservation Officer Services Office. The tickets, issued under the *Summary Convictions Act*, R.S.Y. 2002, c. 210, are identical (although written

by separate conservation officers). Each ticket gave notice of a charge of “waste of meat (caribou)”. The Notice section dealing with a voluntary penalty or plea of not guilty was crossed out. (The Notice section allows for voluntary payment of a specified fine by mail or in person or pleading not guilty by mail.) The conservation officers gave copies of the tickets to the respondents, who signed them. The tickets state: “You are commanded to appear in court [at] Whitehorse, Yukon [on] October 18, 2011”. On August 30, a conservation officer swore the tickets before a Justice of the Peace, swearing that he had reasonable and probable grounds to believe that on August 17, 2011, the respondents had committed the offence of wasting caribou meat at Fox Mountain, Yukon, contrary to s. 32 (1) of the *Wildlife Act*, R.S.Y. 2002, c. 229.

[6] On October 7, 2011, before the first appearance date, another conservation officer added to the charges against the respondents by swearing an information that listed the original charges, and 4 more. On this information, the respondents were jointly charged with wasting caribou meat, plus wasting Dall sheep meat and moose meat. The respondent Dougan was charged separately as a guide, for failing to prevent the person he was guiding from committing the offences. The information has a section underneath the signature of the informant and above the signature of the Justice of the Peace to deal with the method by which an accused is compelled to attend court. The choices are “Appearance Notice”, “Promise to Appear”, “Recognizance”, “Summons, Warrant” and “Previous Process Applies”. An ‘x’ has been placed in the box next to “Previous Process Applies”. This x was either placed by the Justice of the Peace or approved by him or her. The only process then in place was the requirement to appear in Court contained in the tickets.

[7] When counsel for the respondents appeared on October 18, 2011, they said they were appearing solely on the tickets, and had not been retained on the information. The presiding Justice of the Peace apparently struck the information, holding that it was not properly before the Court and finding that the accused must be served personally. I say apparently because there is no transcript of that appearance. The clerk's notes read: "Process not complete" and "Cr. Adj. –disclosure to be provided. – more charges to come". The charges on the tickets were adjourned.

[8] The charges in the tickets have since been adjourned from time to time. The status of the information has been the subject of discussion at the adjournments. The last discussion was with Cameron J.P. on January 17, 2012. There is a transcript. He agreed that striking the information and requiring personal service is appropriate.

[9] All counsel treat Cameron J.P.'s decision to strike the information as the proper subject of this application. The decision of the presiding Justice of the Peace on October 18, 2011 has not been argued.

**Legislation**

[10] Section 7 of the *Summary Convictions Act* incorporates the provisions of the *Criminal Code*, R.S.C.1985, C-46, for summary convictions and extraordinary remedies, with such modifications as circumstances require. Subsections 7(1) and (4) state:

> 7(1) Subject to this Act, the provisions of the Criminal Code (Canada), in force from time to time, relating to summary convictions and extraordinary remedies apply mutatis mutandis to proceedings in respect of an offence against an enactment.
>
> …
>
> (4) For the purpose of this section, "proceedings" includes proceedings commenced by a ticket issued under this Act.

[11] Sections 9 to 26 of the *Act* set out a procedure for the use of tickets. Section 9 provides that tickets may be issued "[I]nstead of the procedure set out in the *Criminal Code* (Canada) for the commencement of proceedings by laying an information …". Subsection 9(2) provides that a ticket shall be issued in at least two parts; a complaint and a notice to appear. In s. 1, complaint is defined as the "complaint" part of a ticket. Notice to appear is defined as the "notice" to appear part of the ticket. Interestingly, ss. 9(3) states that the complaint shall be dealt with as if it were an information, except that it need not be laid before a justice, nor under oath (although the complaint must be sworn before a trial (s. 25)). The complaint may not charge more than one offence or relate to more than one matter of complaint (ss. 9(3)). Subsection 11(1) states a notice to appear shall contain a statement about when the person is to appear in court and an endorsement that a person may plead not guilty by signing the plea of not guilty on the notice to appear. Subsection 11(2) states that for the purposes of s. 7, a notice to appear is to be dealt with as if it were a summons. Subsection 20(5), provides that a peace officer may issue a ticket that requires the accused to appear in court, without the option of paying a voluntary penalty, but the specified fine amount and the option of pleading guilty by mail or in person are not to appear on the ticket.

[12] Section 795 of the *Code* incorporates into summary conviction proceedings the provisions of the *Criminal Code* for compelling the appearance of an accused, to the extent they are not inconsistent with Part XXVII –Summary Convictions, with such modifications as circumstances require. Thus, those provisions are also incorporated into the *Summary Convictions Act*.

**ANALYSIS**

[13] For the following reasons, when Cameron J.P. had the information before him with counsel for the respondents appearing, he had jurisdiction over the offences and jurisdiction over the persons named in the information. Having jurisdiction, he was obliged to call upon the respondents to enter a plea, in this case through their counsel.

[14] The concepts of jurisdiction over the offence and jurisdiction over the accused are found in s. 485 (1) of the *Criminal Code*. This section of the *Criminal Code* was added in 1985 as a response to one of the cases cited by the respondents: *R v. Krannenburg*, [1980] 1 S.C.R. 1053. And see *R v. Oliveria,* [2009] O.J. No. 1002, 2009 ONCA 219, per Doherty J.A., and *R v. Millar*, [2012] O.J. No. 1276, 2012 ONSC 1809, per Code J., at paras. 38 and 39.

[15] Cameron J.P. had jurisdiction over the offences in the information. It was sworn. It alleged charges contrary to Yukon legislation, committed in the Yukon. See s. 504 of the *Criminal Code*.

[16] As to jurisdiction over the respondents, the first charge on the information, a joint charge of wasting caribou meat, was identical to the charge on the tickets. Now the respondents were charged jointly and there were additional related charges. The Justice of the Peace before whom the information was laid directed that previous process applied. The previous process, the Notice to Appear, is to be treated as a summons (ss. 11 (2)). Because a summons had already been issued, there was no need to issue another summons. Therefore, the respondents should have been called upon to plead to count 1 on the information. This reasoning assumes the Notice to Appear given to the respondents pursuant to the ticket is valid. But, the respondents say

it is not a valid Notice to Appear because the not guilty plea portion was struck from the ticket, and thus it does not conform to the requirements of ss. 11(1) of the *Summary Convictions Act*.

[17] The tickets issued to the respondents are straightforward. The first portion of the ticket sets out the complaint. Immediately under the portion that was later sworn before the Justice of the Peace the respondent is commanded to appear in Court on a specific date. I would have thought this was the Notice to Appear requirement. Yet as referred to in paragraph 11, above, subsection 11(1) of the *Summary Convictions Act* requires a notice to appear to contain an endorsement that a not guilty plea may be entered by signing the plea of not guilty on the notice to appear and delivering it to the place specified in the notice. Underneath that is a reference to the court address and payment of the fine on back of the “Notice to Appear”. This is the only reference I can find on the face of the ticket to a Notice to Appear. So, as I understand the argument of counsel for the respondents, they acknowledge their clients are properly before the Court on the tickets, they do not say there is any confusion for them caused by the wording of the tickets, nor prejudice to them because the not guilty plea section of the ticket has been struck, but they say the ticket simply does not conform with the legislation and thus cannot be the foundation of an endorsement that previous process applies. That a failure to include the not guilty plea provision would nullify the portion of the ticket intended to give notice of the date for court seems contradictory, but as will be seen, it is not necessary to decide that point. No one says the complaint portion of the ticket is invalid.

[18] I turn to the new counts on the information. Subsection 523(1.1) of the *Criminal Code* deals with a new information charging the same offence. As noted above, pursuant to ss. 9(3) of the *Act* the complaint shall be dealt with as if it were an information. Subsection 523(1.1) provides, amongst other things, that when a new information is received charging the same offence or an included offence, the existing summons applies to the new information. Thus, at least for count 1 on the information, the endorsement that previous process applies is an accurate reflection of the law. The other counts on the information, however, were not the same offence or an included offence. They are related offences. But the section does not speak of related offences. Case law and commentary suggest that the Crown cannot add additional charges without serving process.

[19] In Ewaschuk E.G., *Criminal Pleadings and Practice*, 2nd ed., looseleaf (Aurora: Canada Law Book, 1987) at 10:3105 – “Duplicative (replacement) information”, Ewaschuk J. says *Criminal Code* s. 523 (1.1) does not allow the Crown to tack on new offences as of right. However, should the accused appear before a court which has jurisdiction to hear the charges, the court has jurisdiction to proceed even without new process. Authority for this proposition is found in *R v. McCarthy*, [1998] B.C.J. No. 2812, 131 C.C.C. (3d) 102 (S.C.) where at para. 37, Melnick J cites *R v. Whitmore*, (1987) 41 C.C.C. (3d) 555, aff’d 51 C.C.C. (3d) 294 (Ont. C.A.). In *Whitmore*, Ewaschuk J., held that when an accused and a new information are before the court, the court has jurisdiction to deal with the information since the accused is already before the court. At paragraph 10:3105 of *Criminal Pleadings and Practice*, Ewaschuk J. comments on *McCarthy*, noting that McCarthy had attorned to the jurisdiction of the court.

[20] The proposition that when an accused and a new information are before the court, the court has jurisdiction to deal with the information since the accused is already before the court is clearly supported in *R. v. Lindsay*, [2006] B.C.J. No. 636, 2006 BCCA 150. Newbury, J.A., writing for the Court, stated at paragraph 20: “I agree with the Chambers judge that the weight of Canadian authority is to the effect that jurisdiction will not be affected by the manner in which the accused is brought before the court, assuming the charging document is not defective.”

[21] Here, the accused have only appeared in Court through counsel. Counsel say their retainer is limited to the ticket charges, not the charges on the information, so there is no attornment.

[22] I hold that the respondents have attorned. There is no such thing in Canadian law as a conditional appearance in a criminal proceeding by an accused or an agent for an accused. See, eg., *R. v. Sinopec Shanghai Engineering Co*, [2011] A.J. No. 1237, 2011 ABCA 331, leave to appeal dismissed July 13, 2012. If counsel appear on the case in Territorial Court, the clients attorn. See *Sinopec* at para. 12. There were other choices. As noted in para. 10 of *Sinopec*, counsel can raise the efficacy of service without the risk of attornment by application for prohibition in advance of the trial. What counsel cannot do is argue in Territorial Court against the efficacy of service without attorning.

[23] Further, whether the respondents gave no instructions to their counsel to appear on the charges on the information, or had instructed them to not “accept service” is not relevant. The respondents cannot be in a better position by sending a lawyer than they would have been had they appeared in person. Had they appeared personally, on the

authority of *McCarthy*, which I accept, they would have been required to answer the charges in the information. They cannot be advantaged by sending their lawyers.

[24] Finally, there is no prejudice to the respondents. They will have their right to a trial, and to full answer and defence. In addition, the first charge on the information is the very charge contained in the individual tickets, and so is properly before the court in any event.

**CONCLUSION**

[25] I hold that Cameron J.P. had jurisdiction over the charges on the information and the respondents. I hold the information was properly before the court. I quash the decision to strike the information. I direct that a judge or justice of the Territorial Court require the respondents to plead to the charges on the information.

McINTYRE J.