Citation: *R. v. Dillabough*, 2020 YKTC 4

Date: 20200130
Docket: 19-05202
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JAMES DILLABOUGH

Appearances:
Kimberly Sova — Counsel for the Territorial Crown
James Dillabough — Appearing on his own behalf

RULING ON APPLICATION

[1] James Dillabough is before the Court on an application to quash a Certificate of Automatic Conviction (the "Certificate"). The Application was filed on October 30, 2019.

[2] Submissions were made on November 13, 2019, and judgment reserved. This is my judgment.

[3] The ticket for which the Certificate was issued, #338433 (the "Ticket"), alleges that Mr. Dillabough committed an offence contrary to s. 26 of the *Pounds Act,* RSY 2002, c. 173. The offence date is September 9, 2019.

[4] The Ticket was purportedly served on Mr. Dillabough on September 25, 2019. In compliance with the applicable time limits, on October 25, 2019, Mr. Dillabough was convicted by way of automatic conviction.

[5] Mr. Dillabough disputes that he was properly served with the Ticket and, therefore, he was not subject to automatic conviction.

Evidence

[6] Bylaw officer Jesse Walchuk provided an affidavit, and also testified. His evidence is that on September 25, 2019, due to issues that existed between himself and Mr. Dillabough, arrangements had been made to serve the Ticket on Mr. Dillabough's lawyer on other matters, Lynn MacDiarmid, at the Whitehorse Courthouse.

[7] Officer Walchuk attended at the Courthouse at approximately 9:10 a.m., however, he did not know who Ms. MacDiarmid was. He noticed Mr. Dillabough speaking to a woman who he suspected was Ms. MacDiarmid, however, because she did not approach him first, he never spoke to her. When he observed them go into court, at approximately 9:30 a.m., he left the Courthouse area.

[8] Shortly thereafter, by happenstance he encountered and spoke with Mr. Dillabough within a block or so of both the Courthouse and Mr. Dillabough's vehicle. He told Mr. Dillabough that he was going to be issuing him the ticket, and why he was doing so. Officer Walchuk did not attempt to serve the ticket on Mr. Dillabough. He left the Ticket in his pocket and did not pull it out or otherwise show it to Mr. Dillabough.

[9] Officer Walchuk stated that Mr. Dillabough told him that he would not take the ticket. It was not entirely clear to me whether this was said at that time, or whether it had been said at another point in time, which is why arrangements had been made to serve the ticket on Ms. MacDiarmid.

[10] Due to Mr. Dillabough's aggressive response, he told Mr. Dillabough that he would place the ticket on the windshield of Mr. Dillabough's truck. He was familiar with this truck through his prior dealings with Mr. Dillabough. After Mr. Dillabough left the area, he placed the ticket on Mr. Dillabough's vehicle under the windshield wiper. He waited in the area until he watched Mr. Dillabough return to the truck and remove the ticket from under the windshield wiper.

[11] Mr. Dillabough testified that he had expected the Ticket to be served on Ms. MacDiarmid and not him. He denied taking the Ticket from under the windshield of his truck.

Analysis

[12] Section 22(6) of the *Summary Convictions Act,* RSY 2002, c. 210 (the "*Act*"), reads as follows in regard to the hearing of an application to quash a Certificate of Automatic Conviction:

> If upon the hearing of an application under this section a justice is satisfied that, through no fault of the defendant, the defendant did not receive notice of the option to pay the set fine or of the requirement to appear at the time and place specified in the ticket, the justice may
>
> (a) set aside the conviction and related penalty and allow the defendant to enter a plea in respect of the original charge; or

> (b) confirm the conviction, allow the defendant and prosecutor to make submissions as to penalty and
>
> (i) confirm the penalty, or
>
> (ii) impose a lesser penalty.

[13] Section 12(1) of the *Act* reads:

> Subject to section 14, an enforcement officer shall serve a ticket by delivering it to the defendant personally within 30 days after the day on which the offence described in the ticket is alleged to have been committed.

[14] The *Act* does not provide a definition as to what constitutes "delivering a document personally to the defendant".

[15] Rule 11 of the Supreme Court of Yukon *Rules of Court* reads in part:

> (1) Service of a statement of claim or any originating process is required unless the defendant or respondent enters an appearance.
>
> (2) Service of a document is effected on
>
> (a) an individual by leaving a copy of the document with the individual,

[16] Rule 11(6) provides instructions for when a document is to be delivered, rather than served, on an individual.

[17] Based upon the above, I am satisfied that the requirement that service of a ticket to an individual is effected by delivering a document <u>personally</u> to the defendant, means that the ticket must be personally served, rather than just delivered to an individual. Otherwise the word "personal" would have no meaning.

[18] *Black's Law Dictionary,* Bryan A. Garner et al, eds., Ninth edition (Thomson Reuters, 2009), defines personal service as:

> 1. Actual delivery of the notice of process to the person to whom it is directed. – Also termed *actual service*.

[19] *The Dictionary of Canadian Law*, Daphne A. Dukelow, ed., 3rd edition (2004 Thomson Canada Limited) defines personal service as:

> "…Hogg J.A. stated in Re Avery, [1952] 2 D.L.R. 413 at p. 415…(C.A.): 'Personal service has been said to be service made by delivering the process into the defendants hands or by seeing him and bringing the process to his notice.' Modern cases stress that the question of whether the purpose of giving notice to the person being served has been achieved is the relevant question [in satisfying the requirement of being 'served personally' within the meaning of the Federal Court Rules…In Re Consiglio, [1971] 3 O.R. 798 (Master's Ch)…the court held that personal service was satisfied if it appeared that the document came to the knowledge or into possession of the person to be served either directly or indirectly from a third party. Then in *Rupertsland Mortgage Investment Ltd. v. City of Winnipeg* (1981), 25 Man. R. (2d) 29 …(Co.Ct.)…it was held that…personal service will be effected if it can be shown that the person to be served actually received the document and was apprised of the contents whether directly or through an intermediary.

[20] In ***Yukon (Minister of Energy, Mines and Resources)*** v. ***Bonnet Plume Outfitters (1989) Ltd.***, 2007 YKSC 17, Gower J. considered the requirement for service of a summons when the governing Act did not provide clear guidelines.

> 18 *Boardwalk Reit Limited Partnership* v. *Busler*, 2006 ABQB 695, dealt with certain provisions in the Alberta *Residential Tenancies Act*, S.A. 2004, c. R-17 (the "*RTA*"), which are also similar, in some respects, to s. 18 of the *Territorial Lands (Yukon) Act*. Section 41 of the Alberta *RTA* provides that if a landlord applies to the court for termination of a tenancy, the landlord is to serve the notice of the application and any supporting affidavit upon the tenant. However, s. 57 of the *RTA* deals with the service of notices and, while s. 57(1) provides that notice must be served personally, by registered mail or certified mail, s. 57(3) allows the

landlord to serve "by posting the notice, order or document in a conspicuous place on some part of the premises" if the tenant is absent from the premises or is evading service. Finally, s. 57(6) states "This section does not apply to service governed by the rules or practice of a court."

19 At paras. 7 to 9 of *Boardwalk*, Acton J. held as follows:

> 7 The *Rules of Court* relating to service have the force of legislation and the practice of the Court is governed by them. Whatever inherent jurisdiction the Court may have does not permit it to ignore the *Rules*.
>
> 8 Section 71 of the *RTA* requires that an application under the Act to the Court of Queen's Bench must be made by way of originating notice, which is defined in the *Rules* (Rule 5(1)(k)) as a pleading by which an applicant commences its action.
>
> 9 Rule 14 of the *Rules of Court* specifically requires that a document by which an action or other proceeding is commenced is to be served personally. Rule 15(1) indicates that personal service is effected on an individual by leaving a true copy of the document to be served with the individual ... Rule 23(1) provides for substitutional service where it is impractical for any reason to effect prompt personal service, but only on order of the Court.

20 Acton J. then went on to quote from Veit J., in *Owczarczyk* v. *Livingston*, 2003 ABQB 158, who confirmed that personal service is a requirement under the Alberta *RTA* and that any other form of service is inadequate. At para. 10 of *Boardwalk*, Veit J. was quoted as follows:

> The key provision here is s. 57(5) [now s. 57(6)]; our *Rules of Court* require that when a proceeding is commenced against a party, that party must be given personal notice of the proceedings. Therefore, although the applicants may have been able to rely on s. 57(3) of the *RTA* to post notices of termination on the premises' door by virtue of Ms. Livingston's being absent from the premises, <u>they cannot do so for their originating notice</u>. Therefore, Ms. Livingston did not have proper notice of the application and therefore the court cannot make any finds [as written] against her ... (my emphasis)

21 In *Boardwalk*, Acton J. was sitting as an appeal court from a decision of Master Waller in chambers. She agreed with Master Waller's written decision below and quoted him, at para. 11, as stating

> Personal Service is preferable for a number of reasons. First it provides absolute certainty that the documents have been received by the respondent(s). Secondly it serves to emphasize the importance of the documents ...

Acton J. then noted that Master Waller had referred to Justice Côté's decision in *Hansraj* v. *Ao*, 2004 ABCA 223, to support the proposition that proper service is important and that serious problems can arise in the absence of proper service. Not surprisingly, Acton J. concluded, at para. 13, "The important aspect of personal service is that it gives the Court comfort that the document in question has come to the personal attention of the defendant or respondent in the matter."

22 Section 18 of the *Territorial Lands (Yukon) Act* does not contain a provision analogous to s. 57(6) of the *RTA*. On the other hand, Rule 1(4) of the *Rules of Court* states that "These rules govern every proceeding in the Supreme Court except where an enactment otherwise provides." Despite the initial attraction of the argument of the Minister's counsel on this point, I am not persuaded that s. 18(1) can be construed as an enactment which "otherwise provides". As was the case in *Schulz*, s. 18 grants an extraordinary remedy which ought to be strictly construed. If the legislature truly intended that an application for a summons could be made without notice, I expect it would have expressly stated that in the *Act*, which it did not.

23 Therefore, I find that Rule 10 applies to s. 18(1), such that the application for the summons must be brought by an originating application, more specifically a petition, and that a copy of the petition and each affidavit in support must be served on all of the named respondents. Rule 11, in turn, requires that service on an individual is effected by leaving a copy of the document with that person. In the alternative, the petitioner may seek an order for substituted service under Rule 12 "where, for any reason, it is impracticable to serve" the application under Rule 11.

…

CONCLUSION

26 I conclude that s. 18(1) of the *Territorial Lands (Yukon) Act* requires that notice of the application for the summons be given to the person(s) being summoned.

[21] In the present case, the Ticket was not at any time shown or presented to Mr. Dillabough, and there was no attempt to hand deliver or otherwise deliver it to him in person. As I understand it, this was because of concerns regarding the nature of the current relationship between Mr. Dillabough and Officer Walchuk. It was an understandable attempt in the circumstances to avoid an aggressive and potentially confrontational situation.

[22] Arrangements had therefore been made for the Ticket to be served on Mr. Dillabough through his lawyer, Lynn MacDiarmid. However, although Officer Walchuk came to the Courthouse location, where it would appear that arrangements had been made for service of the Ticket, he did not approach Ms. MacDiarmid, nor did she approach him. The Ticket was therefore not served on Mr. Dillabough through counsel in the pre-arranged fashion.

[23] Officer Walchuk then had an unplanned encounter with Mr. Dillabough, and decided instead to simply inform Mr. Dillabough that the Ticket would be left on the windshield of his truck. The Officer placed the Ticket on the windshield and waited for some time until he saw Mr. Dillabough later remove the Ticket from the windshield. I accept the Officer's testimony in this regard and reject Mr. Dillabough's assertion that he did not take the Ticket off his truck's windshield.

[24] Does the placing of the Ticket on the windshield and watching to ensure Mr. Dillabough picked it up therefore comply with the requirement for personal service of the Ticket?

[25] The circumstances and context are relevant considerations in deciding whether the Ticket was delivered personally to Mr. Dillabough.

[26] On the one hand, it is clear that the Ticket was not delivered personally to Mr. Dillabough, in the sense that it was not physically presented to him in an attempt to give it to him so that he would be said to have physically received it, or been actually presented to him and thus providing Mr. Dillabough the opportunity to physically receive it, from the Officer. It was also not delivered personally to him through the pre-arranged plan to have his legal counsel accept service.

[27] On the other hand, as per the comments of Acton J., it could be said that telling Mr. Dillabough that the Ticket was going to be placed on the windshield of his truck, doing so, and then watching Mr. Dillabough remove it, could provide "…the Court comfort that the document in question has come to the personal attention of the defendant or respondent in the matter."

[28] Does applying the latter comments of Acton J. to the manner in which service of the Ticket was effected in this case therefore fulfill the requirement that the Ticket be delivered personally to Mr. Dillabough?

[29] In my opinion, in the somewhat unique circumstances of this case, it does not. Mr. Dillabough, who is known to be, at times, somewhat confrontational and difficult to deal with in a legal context, had an expectation that service was to be effected in a particular way, which was through his legal counsel.

[30] There was admittedly a good reason for service to be effected that way. Mr. Dillabough relied on that expectation and procedure. When the Officer chose to utilize a different means, albeit for no improper reason, arguably even adopting a perhaps pragmatic approach, which also did not include physically presenting the Ticket to Mr. Dillabough, it threw a "wrench into the spokes", so to speak.

[31] While taking the Ticket out of his pocket and trying to actually deliver it to Mr. Dillabough would likely have been sufficient to effect service, notwithstanding any prior agreement to have service effected through legal counsel, placing it on the windshield of his truck was, notwithstanding that the Officer told Mr. Dillabough that he was going to do so and watching until Mr. Dillabough removed the Ticket, in my opinion, not in the circumstances of this case the personal service of the Ticket that was required.

[32] While this is the basis for my decision, I also note that Mr. Dillabough was convicted on December 13, 2018, by way of automatic conviction, of an offence contrary to s. 26 of the *Pounds Act*.

[33] An additional ticket alleging a further offence committed on October 28, 2019, contrary to s. 26 of the *Pounds Act*, was served upon Ms. MacDiarmid on November 1, 2019. A not guilty plea has been entered and this matter is to be set for trial.

[34] In the event that the matter before me is also set for trial, I suggest that counsel consider the possibility of seeking to have both trials heard at the same time.

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COZENS T.C.J.