ONTARIO COURT OF JUSTICE

CITATION: *R. v. Live Nation Canada Inc.,* 2017 ONCJ 356
DATE: June 6, 2017
COURT FILE No.: Toronto

B E T W E E N :

HER MAJESTY THE QUEEN
(Prosecutor)

— AND —

LIVE NATION CANADA INC., LIVE NATION ONTARIO CONCERTS GP INC., OPTEX STAGING & SERVICES INC., and DOMENIC CUGLIARI
(Defendants)

Before Justice Nakatsuru
Heard on April 27, 2017
Reasons for Judgment released on June 6, 2017

D. McCaskill, S. Succi..... counsel for the Prosecution
J. Siegel, A. Grossman, J. Solomon ..... counsel for Live Nation
No one appearing…..…….…….…….…….…….…….…….…….…. .....for Optex
S. Thompson…….…….…….…….…….…….…….…….…..counsel for Cugliari

NAKATSURU J.:

A. INTRODUCTION

[1] Radiohead is an English rock band that became hugely popular in the 1990s. On June 16, 2012, excited fans were lining up to see the band at an out-door venue in Downsview Park, Toronto. A large stage had been constructed at this former Canadian Forces base for the show. Optex Staging and Services Inc. was contracted by the concert promoter Live Nation to build this stage. Domenic Cugliari was the engineer whose firm oversaw the construction of the stage. Last minute preparations were underway. The band technicians were on the stage doing their work to make sure the performance was as brilliant as the other shows in Radiohead's world-wide tour. Before the gates to venue were opened,

with little warning, the massive roof collapsed to the floor of the stage. Tragically, a drum technician was crushed and died. Emergency first-responders rushed to the scene. The show was cancelled. The Ministry of Labour was called in to investigate the collapse. Their investigation led to the charges under the *Occupational Health and Safety Act* against the defendants.

[2] This has been a long trial. It has taken many years to get to this point. I have heard all the evidence that is to be called at this trial. The parties were preparing written submissions. Three days for argument were set in June. Then I would have decided the case.

[3] On April 12, 2017, I was appointed to the Superior Court of Ontario. I was no longer a provincial court judge. After hearing submissions from the parties, I ruled that I had no jurisdiction to continue with this trial. These are the written reasons expanding upon that decision.

[4] Before I do that, let me say this. It is with great regret that I have come to this decision. A lot of effort and resources have gone into this trial. We had nearly completed it. My appointment was unexpected and without notice. I know that the defendants have waited a long time for the final resolution of this case. So has the public. I know that the father of the deceased has travelled from the United Kingdom on more than one occasion. I empathize deeply for his situation. There are many compelling reasons why it would be in the best interests of justice for me to finish this. But I cannot. I find that I do not have the jurisdiction to do so. In other words, due to my appointment I no longer have the authority to decide.

B. POSITION OF THE PARTIES

[5] The parties here have differing views of whether I continue to have jurisdiction. The Crown argues that I have. Mr. McCaskill submits that under the sections of the *Provincial Offences Act*, R.S.O. 1990 c. P.33, I have the authority to finish this case like I would have if this was a criminal trial. Section 669.3 of the *Criminal Code* expressly states where a provincial court judge is appointed to another court, he or she continues to have jurisdiction to finish the trial. While the *Provincial Offences Act* does not have a similar provision, the Crown argues that a proper interpretation of sections 30 and 2(2) leads to the same result. Section 30(1) requires that a justice presiding over a trial must preside over the whole trial once evidence is heard. Section 30(2) provides for a new trial, if the presiding justice dies or for any reason is unable to continue. The Crown submits that s. 30(2) does not apply to a situation such as this where I am appointed to another court. Rather, he argues that s. 2(2) and other principles of interpretation, results in the application of *Criminal Code* provisions where there is absence of a specific provision such as one for continuing jurisdiction. Thus, in his view, I would maintain jurisdiction over these provincial offences similar to the case if I was hearing a trial dealing with criminal charges.

[6] Mr. Thompson on behalf of Mr. Cugliari takes the contrary position that I do not have any jurisdiction to continue. He submits that my appointment to the Superior Court has meaningful legal consequences. Section 669.3 of the *Criminal Code* was enacted because such an appointment would otherwise have resulted in the loss of jurisdiction of the trial judge. He points to s. 123(2) of the *Courts of Justice Act* which similarly permits continuing jurisdiction when a judge is appointed to another court for civil proceedings. However, there is no legislation to cover a situation like the case at bar. As a result, I have lost jurisdiction. A new trial will have to be ordered.

[7] Mr. Siegel on behalf of Live Nation treads the middle ground. He submits that there is much uncertainty whether I do continue to have jurisdiction. There is no obvious route to continuing jurisdiction. According to the *Provincial Offence Act*, a justice of the peace or a provincial court judge must hear this trial. While a Superior Court is a justice of the peace, in this case, the Crown made an election under s. 68(2) of the *Occupational Health and Safety Act* R.S.O. 1990 c. O.1 for a provincial judge to preside over the trial. Thus, I cannot rely upon my status as a justice of the peace to continue with this trial. Secondly, Mr. Siegel casts doubt on the Crown's argument that s. 2(2) or other interpretative principles results in the application of s. 669.3 of the *Criminal Code* to these proceedings. He submits that s. 2(2) was never intended to be used in such a fashion. At the end of the day, Mr. Siegel is unable to offer any more assistance to me.

C. STATUTORY FRAMEWORK

[8] There are a number of provisions in a number of statutes in play. For ease of reference, I will set them out at this point. It is first useful to start with s. 669.3 of the *Criminal Code.* This is a very explicit section whereby Parliament envisioned a situation like this arising and made provision for a clear grant of continuing jurisdiction:

> 669.3 Where a court composed of a judge and a jury, a judge or a provincial court judge is conducting a trial and the judge or provincial court judge is appointed to another court, he or she continues to have jurisdiction in respect of the trial until its completion.

[9] There is no such comparable provision in the *Provincial Offences Act.* Section 30 is the only section dealing with potential situations comparable to this:

> 30 (1) The justice presiding when evidence is first taken at the trial shall preside over the whole of the trial. R.S.O. 1990, c. P.33, s. 30 (1).
>
> (2) Where evidence has been taken at a trial and, before making his or her adjudication, the presiding justice dies or in his or her opinion or the opinion of the Chief Justice of the Ontario Court of Justice is for any reason unable to continue, another justice shall conduct the hearing again as a new trial. R.S.O. 1990, c. P.33, s. 30 (2); 2000, c. 26, Sched. A,

s. 13 (6); 2002, c. 18, Sched. A, s. 15 (6).

(3) Where evidence has been taken at a trial and, after making his or her adjudication but before making his or her order or imposing sentence, the presiding justice dies or in his or her opinion or the opinion of the Chief Justice of the Ontario Court of Justice is for any reason unable to continue, another justice may make the order or impose the sentence that is authorized by law. R.S.O. 1990, c. P.33, s. 30 (3); 2000, c. 26, Sched. A, s. 13 (6); 2002, c. 18, Sched. A, s. 15 (6).

(4) A justice presiding at a trial may, at any stage of the trial and upon the consent of the prosecutor and defendant, order that the trial be conducted by another justice and, upon the order being given, subsection (2) applies as if the justice were unable to act. R.S.O. 1990, c. P.33, s. 30 (4).

[10] It is worth setting out s. 2 of the Act as well. This deals with the general purpose of the Act. It is subsection 2 that the Crown relies heavily upon:

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.

(2) Where, as an aid to the interpretation of provisions of this Act, recourse is had to the judicial interpretation of and practices under corresponding provisions of the *Criminal Code* (Canada), any variation in wording without change in substance shall not, in itself, be construed to intend a change of meaning. R.S.O. 1990, c. P.33, s. 2.

[11] I will also set out some sections of the *Courts of Justice Act* R.S.O. 1990 c. C. 43. Like s. 669.3 of the *Criminal Code*, s. 123(2) of that Act contemplates a situation where there is continuing jurisdiction for 90 days after appointment to a different court:

2) A judge may, within ninety days of,

(a) reaching retirement age;

(b) resigning; or

(c) being appointed to another court,

give a decision or participate in the giving of a decision in any matter previously tried or heard before the judge.

[12] However, s. 95(3) does not permit the application of s. 123(2) to provincial offences proceedings:

(3) Sections 109 (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the *Provincial Offences Act* and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 95 (3); 1996, c. 25, s. 9 (18).

C. ANALYSIS

[13] Let me begin with some first principles. Jurisdiction is my authority to decide. Here, I was hearing a provincial offences trial. My authority to decide is found in the *Provincial Offences Act* and the *Courts of Justice Act.* Under s. 38(2) of the *Courts of Justice Act,* the Ontario Court of Justice has jurisdiction to hear provincial offences trials:

2) The Ontario Court of Justice shall perform any function assigned to it by or under the *Provincial Offences Act*, the *Family Law Act*, the *Children's Law Reform Act*, the *Child and Family Services Act* or any other Act. R.S.O. 1990, c. C.43, s. 38 (2); 1996, c. 25, s. 9 (18).

[14] The same is set out in the *Provincial Offences Act.* Sections 28 and 29 deal with the trial and the territorial jurisdiction of the provincial offences trials:

28 This Part applies to a proceeding commenced under this Act. R.S.O. 1990, c. P.33, s. 28.

29 (1) Subject to subsection (2), a proceeding in respect of an offence shall be heard and determined by the Ontario Court of Justice sitting in the county or district in which the offence occurred or in the area specified in the transfer agreement made under Part X. 2009, c. 33, Sched. 4, s. 1 (35).

[15] Section 1(1) defines who may hear such trials:

"judge" means a provincial judge; ("juge provincial")

"justice" means a provincial judge or a justice of the peace; ("juge")

[16] Thus, a provincially appointed judge or a justice of the peace in the Ontario Court of Justice are given the jurisdiction to hear trials of provincial offences.

[17] I am no longer such a provincial court judge. On April 12, 2018, I was appointed a justice of the Superior Court of Justice of Ontario. I have now been sworn in to perform my duties.

[18] I agree with Mr. Thompson that my appointment to the Superior Court of

Justice has legal consequence for my jurisdiction to hear this case. There would be no need for s. 669.3 of the *Criminal Code* or s. 123(2) of the *Courts of Justice Act* if such events had no impact on jurisdiction. I note that s. 13.1(1) of the *Justices of the Peace Act* R.S.O. 1990 c. J. 4 also permits continuing jurisdiction for 90 days to decide after appointment to a court. The other circumstances where ss. 123(2) and 13.1(1) apply are instances where jurisdiction is known to be lost ie. resignation or retirement.

[19] That said, I remain a justice of the peace. Under s. 5 of the *Justices of the Peace Act* every judge regardless of the level of court, is by virtue of the office a justice of the peace. Given this, I gave serious consideration to whether I could continue this trial in my capacity as a justice of the peace. Of course, I appreciate that though a justice of the peace, I was no longer a member of the Ontario Court of Justice. And the jurisdiction to hear provincial offences is given only to the Ontario Court of Justice. Recognizing this, while it may have been a stretch, it was conceivable that as a justice of the peace, I could perhaps maintain my jurisdiction to finish up the trial.

[20] However, in my view, the election made by the Crown to have this case heard by a provincial judge made this argument untenable. Section 68(2) of the *Occupational Health and Safety Act* makes it clear that once an election is made, a provincial judge must hear the trial:

> 68. (1) An information in respect of an offence under this Act may, at the election of the informant, be heard, tried and determined by the Ontario Court of Justice sitting in the county or district in which the accused is resident or carries on business although the subject-matter of the information did not arise in that county or district. R.S.O. 1990, c. O.1, s. 68 (1); 2001, c. 9, Sched. I, s. 3 (15).
>
> (2) The Attorney General or an agent for the Attorney General may by notice to the clerk of the court having jurisdiction in respect of an offence under this Act require that a provincial judge preside over the proceeding. R.S.O. 1990, c. O.1, s. 68 (2).

[21] I further note that the appellate framework of the *Provincial Offences Act* considers this election a meaningful one. The route of appeal from a decision of the trial court depends upon whether the trial court is a justice of the peace or a provincial judge. For the former, the appeal lies to a judge of the Ontario Court of Justice. For the latter, the appeal lies to the Superior Court of Justice: see s. 116(2) of the *Provincial Offences Act.*

[22] Thus, for me to have continuing jurisdiction, I come to the core of the Crown's argument. That is the proper interpretation of the *Provincial Offences Act* permits this.

[23] Before I address this, counsel have been diligent in attempting to find

authorities relevant to this issue. This is certainly not the first time that a sitting judge has been appointed to another court mid-trial. It has happened numerous times before. However, much less frequent is the case where a provincial judge who is hearing a provincial offences trial gets appointed to a superior court. The only case that was brought to my attention is *R. v. Webb* (2009), N.B.R. (2d) 313 (P.C.). In this case, a judge hearing a provincial offences prosecution for failure to remove a trap or a snare was appointed to the Court of Queen's Bench after hearing six days of trial time but before submissions were filed. In *Webb* the parties agreed that the presiding judge had lost jurisdiction and applied before the Chief Justice of the provincial court to designate a new trial to rehear the case. The application was granted. Obviously this case supports my finding that I have lost jurisdiction as it is so similar. But it is of little jurisprudential value since it is not binding, the issue of jurisdiction was not argued, and the case deals with a different provincial statutory scheme.

[24] I am unable to agree with the Crown that s. 2(2) of the *Provincial Offences Act* permits a pathway to my continuing jurisdiction. Section 2(2) is an interpretative section. If recourse is made to the judicial interpretation and practices under corresponding provisions of the *Criminal Code*, section 2(2) tells us that a variation in wording will not itself constitute a change in meaning. In other words, the Crown is right that the *Criminal Code* can be referred to in order interpret the provisions of the *Provincial Offences Act.* However, s. 2(2) is of limited effect. It does not permit me to incorporate provisions of the *Criminal Code* into the *Provincial Offences Act* holus bolus. There is no corresponding provision similar to s. 669.3 of the *Criminal Code*. The Crown suggests that this lacunae can be filled by resort to s. 2(2). In my view, this is beyond the ambit of the proper role of s. 2(2). This is so given the express wording of s. 2(2).

[25] The Crown further argues that s. 30(2) of the *Provincial Offences Act* does not contemplate situations such as the appointment of a trial judge to a higher court. The Crown submits that that the reason why a presiding justice is unable to continue must be interpreted in light of the fact that only the death of a presiding justice is noted in the section. Thus through the use of the *ejusdem generis* rule of statutory interpretation and in keeping with the purpose of the Act, s. 30(2) should be limited to a narrow class of incapacity such as serious illness, retirement, or removal from office.

[26] I disagree. In my opinion, s. 30(2) can contemplate a situation where the trial judge is appointed to a higher court. It is here that I will have resort to a similar provision under the *Criminal Code*: s. 669.2(1). The wording of that section is similar. It states where a presiding judge "dies or is for any reason unable to continue", the proceedings may continue before another judge. This is the same language used in s. 30(2). There is a large body of jurisprudence that has interpreted this broad language in s. 669.2(1) to include a situation where the trial judge gets appointed to a different court: see *R. v. Leduc* (2003), 176 C.C.C. (3d) 321 (C.A.); *R. v. Zola*, [2006] O.J. No. 2825 (S.C.J.); *R. v. Baltovich,* [2008]

O.J. No. 1607 (S.C.J.); *R. v. Dorsey,* [2009] O.J. No. 5368 (S.C.J.); *R. v. Le,* [2011] M.J. No. 319 (C.A.). This is so even though s. 669.3 permits continuing jurisdiction. I see no reason why a similar interpretation should not be made of s. 30(2). The loss of jurisdiction given my appointment to the Superior Court would fall within the parameters of s. 30(2).

[27] I wish however to be clear. It is my view that I have lost jurisdiction to hear this case regardless of the existence of s. 30(2). The lack of any provision for continuing jurisdiction in the circumstances of this case means that I can no longer sit on this trial. By failing to enact a provision similar to s. 669.3 in the *Provincial Offences Act*, means that the Legislature intended that there can be no continuing authority for me to finish this trial. It may be that given provincial offences trials were meant to be efficient and simple, the Legislature saw no need for a provision permitting continuing jurisdiction. It may be that the lawmakers really did not contemplate a lengthy and complex trial like this when enacting the relevant provisions of the Act. However, it is not my role to re-write the law in order to remedy this.

[28] I recognize there are a number of strong practical arguments in favour of my having continuing jurisdiction. These arguments are obvious given the stage this trial is at. However, practicality and convenience do not confer jurisdiction on a court: see *Re: Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 (C.A.).

[29] As a result, I find that I have no jurisdiction to continue with this trial. The appropriate procedure is that pursuant to s. 30(2), the parties attend before the Chief Justice or her designate and have a new trial ordered.

Released: June 6, 2016.

Signed: "Justice S. Nakatsuru"