

Tenny v Ontario: appeal court clarifies permissible procedure for service of summons *ex juris*

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Introduction

In the context of a prosecution of an environmental regulatory offence, the Ontario Court of Appeal in *Tenny v Ontario*(1) recently and unanimously held that a summons is considered properly served on an individual residing outside Canada if it is delivered by registered mail to the person's last known address abroad. The case confirms that service of a summons *ex juris* is expressly permitted under the Provincial Offences Act(2) for both individuals and corporations, and thus facilitates service on directors and officers charged with provincial offences in Ontario who may not reside in the province. In the environmental context, the case is also significant because it confirms the extension of remedies under the Environmental Protection Act(3) beyond Ontario's (and Canada's) borders, although extraterritorial enforcement of any penalties remains an open issue.

Facts

Appellant Alfred Tenny was the sole officer and president of 1449817 Ontario Inc, a company that owned property in Timiskaming and on which Tenny's related companies carried out waste processing operations. The property had suffered serious environmental issues, and in 2012 Tenny and his company pleaded guilty to charges and were convicted of failing to comply with a provincial officer's order to remove and dispose of chemical waste materials on the property. As part of the sentence, Tenny and his company were required to remediate the property, which they failed to do; they were subsequently charged under Section 186(2) of the Environmental Protection Act. To compel Tenny's attendance before the court, a summons was issued under Section 24 of the Provincial Offences Act and delivered by registered mail to Tenny's last known address in Lahaina, Hawaii pursuant to Section 26(3) of the Provincial Offences Act.

Section 26 of the Provincial Offences Act provides that:

"1. A summons issued under section 22 or 24 shall,

(a) be directed to the defendant;

(b) set out briefly the offence in respect of which the defendant is charged; and

(c) require the defendant to attend court at a time and place stated therein and to attend thereafter as required by the court in order to be dealt with according to law."

Service

2. *A summons shall be served by a provincial offences officer by delivering it personally to the person to whom it is directed or if that person cannot conveniently be found, by leaving it for*

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the person at the person's last known or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

Service outside of Ontario

3. *Despite subsection (2), where the person to whom a summons is directed does not reside in Ontario, the summons shall be deemed to have been duly served seven days after it has been sent by registered mail to the person's last known or usual place of abode.*

Service on corporation

4. *Service of a summons on a corporation may be effected,...*

(b) in the case of any corporation, other than a municipal corporation, incorporated or continued by or under an Act by,

(i) delivering the summons personally to the manager, secretary or other executive officer of the corporation or person apparently in charge of a branch office of the corporation, or

(ii) mailing the summons by registered mail to the corporation at an address held out by it to be its address;

(c) in the case of a corporation not incorporated or continued by or under an Act by,

(i) a method provided under clause (b),

(ii) delivering the summons personally to the corporation's resident agent or agent for service or to any other representative of the corporation in Ontario, or

(iii) mailing the summons by registered mail to a person referred to in subclause (ii) or to an address outside Ontario, including outside Canada, held out by the corporation to be its address."

Decision

It is established law that in penal proceedings, which include prosecutions of regulatory offences such as the environmental charges in this case, service of a summons outside Canada must be clearly and unambiguously authorised by statute. In the absence of proper service, the court has no jurisdiction over the person, even though it may have jurisdiction over the subject matter of the complaint.⁽⁴⁾

On appeal, Tenny argued that Section 26(3) of the Provincial Offences Act did not meet the threshold of clear and unambiguous statutory authority, relying in contradistinction on the language found in Section 26(4)(c)(iii), which expressly permits service on a corporation of a summons by registered mail "to an address outside Ontario, including outside Canada". In other words, Tenny submitted that the absence of the clear language found in Section 26(4)(c)(iii) (ie, "including outside Canada") consequently means that the service of a summons on an individual outside of the country is not permitted.

The Ontario Court of Appeal disagreed, for three principal reasons.

First, the court held that the plain language of Section 26(3), and particularly the words "where the person to whom a summons is directed does not reside in Ontario", includes those persons living outside of Canada. Tenny was unable to identify any authority to the contrary.

Second, the court found that the legislative history of the Provincial Offences Act did not support Tenny's argument. Section 26(4)(c)(iii) of the Provincial Offences Act was enacted in response to the Ontario Court of Appeal's decision in *R v RJ Reynolds Tobacco Co (Delaware)*,⁽⁵⁾ which found that the language of the predecessor provision of the Provincial Offences Act did not clearly authorise

service of a summons on a corporation outside Ontario. In the case at hand, the court reasoned that the legislature did not similarly amend Section 26(3) "because it already provided for service on an individual resident outside Ontario",⁽⁶⁾ and that "minor differences in wording"⁽⁷⁾ between Sections 26(3) and 26(4) were not material to the interpretation of the section.

Third, the court found that, from a policy perspective, giving effect to Tenny's argument would create the absurd result that corporations could be served outside Canada, but individuals could not – an interpretation which would be inconsistent with the purpose of the section, as well as the remedial nature of the Provincial Offences Act in general.

Comment

At common law, there is a generally accepted presumption that jurisdiction lies only over a person physically present within the jurisdiction of the court, regardless of whether the court has jurisdiction over the subject matter of the complaint. If jurisdiction is to be established over a person residing outside the court's jurisdiction, the underlying legislation must clearly authorise this. For example, in the case of criminal prosecutions under the Criminal Code,⁽⁸⁾ it has been settled law since *R v Shulman*⁽⁹⁾ that a summons cannot be properly served on a person outside Canada because the code does not expressly authorise such service.

However, even before the release of this decision, it had generally been accepted that, unlike under the Criminal Code, service of a summons under the Provincial Offences Act is authorised outside Ontario, and possibly outside Canada. The Ontario Court of Appeal in *Tenny v Ontario* conclusively resolved any ambiguity on this point, finding that the service of a summons *ex juris* is authorised under the Provincial Offences Act against both individuals and corporations. Consequently, directors and officers who have been charged with provincial offences should not expect to escape their legal obligations in Ontario simply by moving out of the province – especially in an era where prosecution of cross-border pollution offences is increasingly being pursued.

For further information on this topic please contact [David McCutcheon](#) or [Amer Pasalic](#) at Dentons Canada LLP by telephone (+1 416 863 4511) or email (david.mccutcheon@dentons.com or amer.pasalic@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2015 ONCA 841.

(2) RSO 1990, c P 33.

(3) RSO 1990, c E 19.

(4) *R v Shulman* (1975), 23 CCC (2d) 242 (BCCA) at para 15.

(5) 2007 ONCA 749.

(6) *Tenny*, *supra* note 1 at para 13.

(7) *Ibid.*

(8) RSC, 1985, c C-46.

(9) *Supra* note 4.