

ONTARIO  
SUPERIOR COURT OF JUSTICE  
AT CAYUGA

BETWEEN:

Jeff Parkinson (Applicant)

and

HER MAJESTY THE QUEEN (Respondent)

Order of Mandamus

Before Judge Marshall on Jan 12, 2009

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Applicants response to Respondent's *Additional Submissions*  
returnable January 12, 2009

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These submissions are supplemental and should be read in conjunction with the **Factum** dated for October 31, 2008 and the **Additional FACTUM and Book of Authority** dated for Jan. 12, 2009, filed by Jeff Parkinson. These submissions are in response to the Crown's **Additional Submissions** filed for Jan. 12, 2009.

The Crown's Case:

- 1) The Crown is relying heavily upon cases prior to:
  - a. the *Charter of Rights and Freedoms* dated 1982
  - b. the *Law Reform Commissioner* whitepaper report on Private Prosecution in 1986.

- c. Parliament's amendments to the criminal code of 2002 which provides a special section (507.1) for private prosecutions.
  - d. As such the rulings from such case law don't take into account the new section 507.1 and are based on the old reading of section 440 which was later section 455. Currently these sections appear to be the wording for section 507 which is the proceedings for laying of charges by police or the agents of the Attorney General.
- 2) Section 507.1 was added in 2002 whereas all prior private prosecution cases were conducted under section 507.
- a. *R. v. Edge*, 2004 ABPC 55 sets out a comparison between 507 and 507.1 and the history leading up to the 2002 amendment to the criminal code. See tab 1, Mr. Parkinson's original *Factum* dated for Oct. 31, 2008.
  - b. Section 507.1 includes the following paragraph:
 

"(5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid."
  - c. This new paragraph did not exist prior to the 2002 amendment and does not appear in section 507 which most of the Case Law is based on.
  - d. This paragraph provides for the *Informant* the right to commence proceedings to **compel** the justice to issue summons or warrant. This is done after the justice has already reviewed the evidence and for whatever reason doesn't issue process.
  - e. *R. v. Edge*, 2004 ABPC 55 Judge Allan concludes from his comparison between 507 and 507.1 the following:
 

"[para 100] The judge does not weigh the evidence or consider any defences to the charge in coming to a determination whether a *prima facie* case exists. If a *prima facie* case has been established, the judge **MUST** issue process. The judge has some **LIMITED** discretion not to issue process where he or she decides the charge is frivolous, vexatious, or abusive. There is also such discretion when the evidence is based upon the evidence of someone who is mentally disordered. [Bold emphases has been added]"

    - i. The Justice doesn't have legal discretion to weigh or discount any piece of evidence. The Justice has limited discretion but process **MUST** be issued if there is some evidence on each of the essential elements of the charge.
  - f. In *Martin's 2008 Annual Criminal Code* in the synopsis of 507.1 it states:

"If a summons or warrant is not issued and no proceedings are instituted, e.g. through *mandamus*, to compel the judge or designated justice to issue process within six months or the proceedings are instituted but process is not issued as a result, the information is deemed never to have been laid."

- g. In *Martin's 2008 Annual Criminal Code* in the annotations of 507.1 it states:

"If the justice's refusal to issue process was based on extraneous considerations, or if his discretion was not exercised judicially following a proper hearing, *mandamus* will lie: *R. v. Blythe* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.) *Swan (Re)* (1979), 48 C.C.C. (2d) 501 (Ont.H.C.J.)."
  - h. Mandamus is the means by which the informant commences proceedings to compel the justice to issue process.
- 3) The Case Law after 2002 presented by the Crown including wording that states that Mandamus can be used to review the decision of the Justice.
- a. *R. v. Grinshpun*, [2004] B.C.J. No. 2371, at para 34 states: [see tab 3 of Crown's *Case Book of Authorities* dated Oct. 31, 2008]

"[34] On Mandamus the reviewing judge must determine whether it can be said that the pre-inquiry judge exercised his or her discretion judicially, according to law. (*Re. Blythe and The Queen* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.), approved in *R. v. Fry* (C.A.), supra.)"

    - i. The reviewing judge determines whether the pre-inquiry judge exercised his or her discretion judicially – it is not automatically assumed to be true.
    - ii. This discretion must be in accordance to the law. In the case *R. v. Edge* the following are the standard for private prosecutions:
      1. Evidence cannot be weighed.
      2. Possible defenses are not to be considered.
      3. Character or motives of the Informant can only be considered if the case is frivolous, vexatious, or abusive.
      4. Some evidence for each of the essential elements of the charge is required.
    - iii. According to the Law, once there is some evidence for each of the essential elements of the charge process MUST be issued. Failure to do so is not in accordance with the Law.
    - iv. In *R. v. Grinshpun*, this is supported by the fact that the reasoning for the ruling against the Mandamus is found in para. 35 which states:

"[35] I am of the view that Mr. Justice McEwan did not err in concluding that Judge Maughan exercised her discretion judicially and according to law. The appellant failed to establish that there was evidence with respect to all the essential elements of the offences alleged."

- v. Since the informant failed to provide evidence for each of the essential elements of the offence, the Justice was not in error to use her discretion not to issue process. The point of *R. v. Grinshpun* was not that the justice had discretion not to issue process but that Mr. Grinshpun had failed to provide evidence for each of the essential elements in the case. Thus the Mandamus dismissed.

4) The Justice erred in accordance with the Law in four ways:

- a. In Mr. Parkinson's amended application, dated Oct. 31, 2008, it outlines the essential elements of the charge. This includes a clear understanding of the word "willful" regarding the charge of Mischief. Since there was some evidence for all the essential elements the Justice's discretion not to issue process was not in accordance with the Law.
- b. The Justice's view that Mr. Parkinson was filing his private prosecution out of '*animosity*' towards the OPP was in error since the videotape of the owner of the property stated he wanted the evidence used in court to file private prosecution.
- c. The Justice clearly stated that the videotape of the owner would not have much weight in the case which is in error in accordance with the Law.
- d. Finally the Justice considered a possible defence which is also an error in accordance with the Law.

5) The Crown's position is that the discretionary ruling of the Justice is not reviewable. However, the *R. v. Grinshpun* case states the "reviewing judge must determine whether it can be said that the pre-inquiry judge exercised his or her discretion judicially, according to law."

- a. In an Order of Mandamus it is the 'reviewing judge' who determines whether the pre-inquiry judge exercised his or her discretion judicially and that decision is based on whether it was done in accordance with the Law.

6) Mr. Parkinson's Order of Mandamus has demonstrated the pre-inquiry Justice erred four ways in accordance with the law regarding private prosecution cases. As such, along with the provision in 507.1(5) to 'compel' the issuing of process, this court is asked to grant the Order of Mandamus.