

**ONTARIO SUPERIOR COURT OF JUSTICE**

HALDIMAND COUNTY - CAYUGA - *Criminal Proceedings*

BETWEEN:

**Gary McHale** (Applicant)

and

**HER MAJESTY THE QUEEN** (Respondent)

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Applicant's Additional Factum

returnable June 29, 2009

These submissions should be read in conjunction with the Applicant's ***Factum***.

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**Additional Review of Supreme Court Ruling:**

- 1) The 1983 Supreme Court Ruling (R. v. Dowson - Tab 6 of Respondent's Book of Authorities) reviewed in detail s. 455 c.c.c. which is now s. 504 which states:

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged (pg 3)

now rewritten to state:

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in **writing and under oath before a justice**, and the **justice shall receive the information**, where it is alleged

- a. The Supreme Court stated that 'the power to stay, while necessary, encroaches upon a citizen's fundamental and historical RIGHT to inform under oath a Justice of the Peace of the commission of a crime". (pg. 2 para 3)
  - i. This is still supported by the current wording of s. 504 which states the information is to be laid in 'writing and under oath before a justice'.
  - ii. Furthermore, the word 'shall' is used stating, "the justice shall receive the information".
- 2) Since the 1983 Ruling, Parliament has not changed the key wording of these sections of the Criminal Code. The only change is in s. 504 where it states 'on reasonable grounds' instead of the phrase 'reasonable and probable grounds' in the old s. 455.
- 3) The Supreme Court considered the discretionary authority of the Crown under the old s. 732.1 (power to stay proceedings) and their responsibility for the conduct of prosecution found in section 11-12 of *The Crown Attorneys Act*. (pg. 4 last para.)
- 4) The discretionary authority contained within *The Crown Attorneys Act* didn't persuade the Supreme Court in 1983 to overrule the Rights of a citizen to inform under oath.
- 5) Provincial Acts cannot overrule the will of Parliament. In the annotations of s. 504 (2008 copy) it states:

"Constitutional considerations - This provision is intra vires Parliament, and provincial provisions such as those contained in the *Youth Protection Act*, 1977 (Que), c. 20, which attempt to prevent anyone from laying an information unless the person has consent of a government official are inoperative..."
- 6) The Supreme Court ruled that the discretionary authority to stay (Intervene in a proceeding) should not overrule the Rights of a citizen without the clear text limiting the citizen's rights. Parliament has not given any clear text that the Crown has authority to withdraw an information.
- 7) The Crown doesn't offer a single court ruling that shows they can withdraw an information. Every case the Crown has provided to the court is referring to charges that have already been laid.

- 8) The Crown doesn't offer a single court ruling to support its interpretation of s. 11(d) of *The Crown Attorneys Act*.
- 9) The Crown's interpretation of s. 11(d) would be 'inoperative' based on the Constitutional consideration - a Provincial Act cannot over rule the will of Parliament.
- 10) The 1983 Supreme Court ruling provide three points as principals in the interpretation of the Law as expressed by Parliament which are:
  - a. A Balance between discretionary authority to stay and the rights of a citizen to inform under oath a Justice of the Peace of the commission of a crime.
  - b. The discretionary authority of the Crown is accountable to Parliament and is best done after the Justice of the Peace issues process.
  - c. The evolution of the Crown's power has been decreasing.

#### **Review of Crown Attorneys Act:**

- 11) The Crown is relying on s. 11(d) of the *Crown Attorneys Act* for their authority to withdraw an information. The wording of 11(d) does not support the Crown's argument.

(d) watch over **cases** conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in **such cases to prosecute**, assume wholly the conduct of the case where justice towards the accused seems to demand his or her interposition;...

  - a. Prior to a Justice issuing process there is no 'case' being prosecuted.
  - b. In fact, there is no 'private prosecutor' until after the issuing of process. Until then the person is merely called the informant.
  - c. This section doesn't state the Crown can intervene on private information but on private prosecutions.

12) The Crown's whole argument has been based on their discretionary authority to intervene when there is a charge. Their own presentation speaks about a 'charge' not an 'information'.

- a. From the Crown's Factum para 19 - 'withdrawal of a charge', para 20 - 'withdrawal of charges from staying of charges', para 20 quote of court ruling also using the term 'charge', para 21 - 'unfettered right to withdraw the charge' and para 23 quote of court ruling using the 'charge'.

**Actions of John Pearson:**

13) The actions of John Pearson, Crown Attorney, during various pre-enquêtes demonstrate a flagrant abuse of his discretionary authority.

14) Prior to withdrawing the information in this case, Mr. Pearson directly interfered with the laying of criminal charges against Brian Skye.

- a. Line 22, pg. 1, tab 1 or Applicant's *Book of Authority* is where Mr. Pearson starts his intervention into the case referring to Mr. Skye.
- b. Line 13, pg. 2, tab 1 states the charges against Mr. Skye are mischief and intimidation which the Crown withdraws claiming the OPP have commenced proceedings against Mr. Skye.
- c. Starting at line 28, pg. 2, tab 1, I question Mr. Pearson regarding this so-called charge by the OPP.
- d. Mr. Pearson did mislead the court - no charge has ever been laid.
  - i. The information sheets against Mr. Skye are for assaulting me from an event on Dec. 1, 2007.
  - ii. On June 12, 2009 Sgt. Phil Carter stated he would review Mr. Skye's case and he reported back to me on June 16 stating that the OPP had never laid a charge of Mischief against Mr. Skye nor any charge related to

the event contained within my private information. (Affidavit statement is found in tab 4 of Applicant's *Book of Record*)

- iii. The fact is the four day blockade of Highway 6 bypass in Caledonia in April 2008 resulted in zero charges filed by the OPP against anyone.
  - iv. The OPP has laid zero charges for the six week blockade in Caledonia for the event in May 2006.
  - v. This pattern of refusing to lay criminal charges is repeatedly seen in every single illegal occupation within Haldimand County. Zero charges by the OPP for the occupation of property in Hagersville and Cayuga (until I filed a private information).
  - vi. This is no mistake regarding details but a willfulness to avoid charging Native People for blockades in Caledonia. The OPP doesn't want the charges filed and the Crown doesn't want to prosecute the cases.
  - vii. Mr. Pearson directly obstructed justice by refusing to allow a private information to go ahead against Mr. Skye.
- e. Mr. Pearson has repeatedly taken the view that any private information filed by any member of CANACE (Canadian Advocates for Charter Equality) is abusive.
- i. Line 25, pg. 4, tab 1 Mr. Pearson states:  
  
"So it is the position of the Crown that the charges that have been laid by Mr. McHale constitute an abuse of process..."
  - ii. Mr. Pearson took the same approach to Mr. Parkinson, found in Tab 6 of Applicant's *Book of Authority*.
  - iii. This demonstrates a bias against members of CANACE and as such is not legal.
- f. Mr. Pearson has illegally shared sealed criminal documents with Civil Lawyers.

- i. In the case when Mr. Pearson was the Crown when Mr. Parkinson was attempting to lay a mischief charge against two OPP officers, Mr. Pearson provided the court documents to the civil side of the Attorney General's office to be used in civil court against members of CANACE. (Tab. 6 of Applicant *Book of Record*)
  - ii. When process is not issued in a private information then the case is sealed and can only be opened with a court order - no such order has ever been given.
  - iii. A second case has now appeared in civil court of the private information filed by Gary McHale to lay charges against Karl Walsh. (Tab. 7 of Applicant *Book of Record*)
  - iv. This demonstrates a repeated abuse on the part of the Crown to violate the rules of court for the purpose of civil cases against members of CANACE.
- g. Furthermore, Mr. Pearson has used documents in court provided to him by various ministries within the Ontario Government against various members of CANACE.
  - i. It is completely inappropriate for various ministries to be sharing documents with the Crown to be used in a pre-enquête.
  - ii. Without the consent of the author such use of a document would be a violation of the Privacy Act.
- h. Finally, Mr. Pearson has repeatedly refused to share documents during pre-enquêtes, which include any case law he is quoting from or private documents from various ministries.
  - i. The rules of evidence are quite clear. During a pre-enquête, evidence is to be entered under oath following the rules of evidence.
  - ii. Mr. Pearson refuses to follow these rules.

- iii. Mr. Bell, the current Crown in this case, stated that the sharing of documents is 'good practice and good law'.
- iv. Doesn't this mean that Mr. Pearson has repeatedly acted in a way that would be considered 'bad practice and bad law'?
- v. The withdrawal of the charge against Mr. Skye is perfect proof of why the Crown must come into court with document to be shared with the Justice and informant to ensure Justice is served. Where was the document to support that Mr. Skye had been charged by the OPP?

15) The Actions of John Pearson are a violation of the fundamentals of justice in the following ways:

- a. He is biased against CANACE members.
- b. He refuses to share documents.
- c. He enters information into evidence during a pre-enquête in violation to the rules of evidence.
- d. He mislead the court regarding criminal charges laid by the OPP.
- e. He shares criminal documents, that are sealed by the court, with civil lawyers.

16) Even if the Crown had the authority to withdraw an information before charges are issued, this case would demonstrate a flagrant abuse of that discretionary authority.

17) The Crown has misunderstood the *Ardoch Algonquin First Nation* case they quote from on line 9, pg. 4, tab 1.

- a. It is implied that this case means police cannot be charged because of police discretion.
- b. The Voortman injunction by the Supreme Court on April 3, 2009 quoted from this same case and stated the following: (para. 64) (Tab. 2 of Applicant *Book of Record*)

[64] I agree with Voortman' s counsel that the *Frontenac* case cannot be interpreted to mean that in every dispute between a private land owner and an aboriginal group the Crown must engage in exhaustive consultations. The Ontario Court of Appeal could not have meant that every private land owner in the Haldimand Tract could be subjected to an aboriginal occupation of his/her lands, and if so, then the Crown must consult about every parcel of private land in the Haldimand Tract.

- c. This ruling used by the Crown is not a blanket statement that allows for illegal occupation while the OPP uses the excuse of police discretion to do nothing.
- d. The Voortman ruling also states the following:

[84] Before I conclude I would like to emphasize the rule of law. All people in Canada are governed by the rule of law as confirmed in the preamble to the *Charter of Rights and Freedoms*. That is, all people in Canada are required to obey the law. As a corollary, all people in Canada are entitled to know that every other person in Canada will be required to obey the law. If any person in Canada does not obey the law, the courts will enforce the law. In that way the public has some assurance that they can live in peace without fear of those who might choose to disobey the law.

- 18) The approach of the OPP is best seen in the ruling by the Supreme Court injunction ruling for the Cayuga developer which states: (Tab. 1 of Applicant *Book of Record*)

[28] The remaining defendants' resort to self-help, taken with the authorities' refusal to defend the plaintiff's property rights, has put the plaintiff in a most unfair position. The same government that advises the plaintiff not to pay extra-governmental development fees refuses to enforce its property rights and threatens to arrest its agents if they try to enforce these rights on their own.

[29] I would be the last person to interfere with the proper exercise of discretion by the authorities. I do think that it might be helpful to clear up some misapprehensions that they appear to have.

1. The police have the right to remove unwanted person from private property at the request of the owner with or without an injunction.

2. The police have the right to use their discretion in the enforcement of the law and private property rights. A blanket refusal to assist a property owner or a class of property owners, however, would be an abuse of that right.

3. The police have no right to prevent the plaintiffs from acting with their rights under s. 41 of the *Criminal Code*. Their warning to the plaintiff that they would arrest anyone who is involved in a physical confrontation, regardless of the circumstances, is an abuse of the power conferred on them by s.31 of the *Criminal Code*.

19) In a county, where the OPP are abusing their discretionary authority and threatening to arrest people for exercising their rights under the criminal code, the Crown cannot be permitted to cover for the OPP when citizens want to hold them criminally accountable when people are harmed. No person is above the law including members of the OPP.

Conclusion:

20) The Crown has provided no proof of their interpretation that they have authority to stay an information.

21) The Supreme Court ruled that a citizen has the Right to provide an information under oath before a Justice of the Peace.

22) The Justice is required to receive that information, to review the evidence under oath and to issue process if some evidence of the essential elements are provided.

23) Parliament has not given any clear text limiting the Rights of a citizen.

24) The Provincial *Crown Attorneys Act* cannot overrule the will of Parliament.

25) The Crown's interpretation of this Act is unsupported by any evidence.

26) The Crown demonstrated a flagrant abuse of discretionary authority during the pre-enquête.

27) The Justice was obligated by law to receive the information under oath and to review the evidence.

28) The Crown is attempting to bypass the Justice of the Peace and remove the authority of the Justice by deciding for the Justice which information will proceed.

29) Without a clear text the Rights of a citizen must be protected.

30) For these reasons the Court should order a new pre-enquête.