

File No: 17/08

**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 response to Respondent's *Submissions*

returnable June 11, 2009

These submissions are in response to the Crown's ***Submissions*** received May 29, 2009 and should be read in conjunction with the Applicant's ***Factum***.

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**Background:**

**Parliament's view of Private Prosecutions:**

- 1) The grounds for the Crown to intervene in a Private Prosecution is laid out in the criminal code as well as the Crown's handbook produced by The Federal Prosecution Service Deskbook.

- a. <http://canada.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch26.html>

- 2) Chapter 26 of the Federal Prosecution Service Deskbook covering Private Prosecutions states the following:

*The right of a citizen to institute a prosecution for a breach of the law has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority".*

### Case Law related to Private Prosecutions:

- 3) Reviewing of **R. v. Edge, 2004 ABPC 55** sets out the procedures and limitations of Private Prosecution Pre-enquête. The case was Mr. Durand, the informant, applied before the Alberta court relating to an information charging Officer Christopher Edge with an offence of assault.
- 4) The following guidelines were part of Judge M. Allen's ruling:
  - a. In 1986 the Law Reform Commission published Working Paper 52 entitled *Private Prosecutions*. At p. 5 the authors noted:

[para 21] *The authors agreed that private prosecutions were necessary because they enabled citizens to bring even police or government officials before the criminal courts where the government is unwilling to make the first move: see Working Paper 52 at pp. 19-20.*

- b. [para 22] The authors concluded at p. 28:

*"For the reasons given in Chapter Three, we believe that private prosecutions are not only desirable but also necessary for the proper functioning of the Canadian prosecution process. Our weighing of costs and benefits leads us to conclude that there are measurable gains not only to the citizen but also to the system of state prosecution in providing for private prosecutions as an adjunct to a public prosecution system.*

*Society as a whole is the beneficiary where formal, positive citizen interaction with the justice system results in some additional control over official discretion.<sup>131</sup> Also, the form of retribution which is exacted by the citizen's resort to legal processes is clearly preferable to other unregulated forms of citizen self help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, it is our belief that this form of citizen/victim participation enhances basic democratic values while at the same time it promotes the general image of an effective system of administering justice within the Canadian state."*

### Case Law regarding weighing evidence during Pre-enquêtes:

- 5) *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.
- 6) This discretion must be in accordance to the law. In the case *R. v. Edge* the following are the standard for private prosecutions:
- i. Evidence cannot be weighed.
  - ii. Possible defenses are not to be considered.
  - iii. Character or motives of the Informant can only be considered if the case is frivolous, vexatious, or abusive.
  - iv. Some evidence for each of the essential elements of the charge is required.
- a. [para 60] The standard use by Crown on their prosecutions of "a reasonable likelihood of conviction" is "unsuitable for determining whether a provincial court judge should issue process on an information laid by a private informant."
  - b. [para 61] The leading case upon the proper test is *Whitmore #1* where Ewaschuk J. said at p. 568:

*"It is my further opinion that the proper evidentiary standard to be applied to s. 455.3(1)(b) is the prima facie standard. In other words, the justice must be satisfied that there is some evidence before him from the informant and/or his witnesses that the accused has committed the offence alleged against him and that there is some evidence against him on all the essential elements of the offence."*
  - c. [para 62] see *Marsil v. Lanctot* (1914), 25 C.C.C. 223, 28 D.L.R. 380, 20 Rev. Leg. 237 (Que. S.C.). "It is my view that the test is basically the same as that applied by a judge at a preliminary inquiry. Neither the justice nor the judge may weigh the strength of the case against the accused but must decide simply whether there is some evidence against him on each essential element of the offence charged."
  - d. [para 63] Professor Quigley seemed to agree with that approach but added the following at p. 231 of his text:

“The rules of evidence are relaxed for pre-inquiries, however, so that the justice is permitted to rely on hearsay or other evidence that might not be admissible at a trial or preliminary inquiry.”

e. The following are parts of Judge M. Allen ruling:

- i. [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.”
- ii. [para 103] Character and actions of the Informant is not to be weight. Mr. Durand was ‘not admirable’, he ‘lied to the police’, ‘directed profanities’ at the officers, his actions ‘interfered’ and ‘bordered on obstruction’, he was ‘somewhat intoxicated’, has a ‘difficult remembering a great portion of what happened’ and he has a ‘financial interest’ since he has filed a lawsuit against the Edmonton Police Service.

“However, in this hearing, because I have direct evidence on all of the required elements I am precluded from weighing the evidence.”

- iii. [para 104] “I am also aware that the police can use force in the exercise of their duties and this may provide a defence to the officers. However, any defence should be left to the trier of fact. This is not my function here.”
- iv. [para 105] “I am mindful that he has instituted a law suit against the police in making this decision. I take into account that police officers have a difficult job and they are entitled in certain circumstances to use force. I have weighed these factors in determining whether I will use my discretion to issue process. I do not believe that the issuing of process in these circumstances would amount to being frivolous, vexatious, or abusive. Nor do I conclude that Mr. Durand is mentally disordered. I will not exercise my limited discretion to prevent the issuance of process. I am satisfied that there is a case made out by the informant to compel the issuing of a summons.”

7) Regarding vexatious or abusive litigants Judge Marshall stated in *R. v. Parkinson*, 2009 CanLII 729 (ON S.C.) the following:

[20] The final issue is that of the justices residual discretion to refuse process where he or she forms the opinion that the informant or his witnesses are not credible in the sense that they are mentally disordered or vexatious litigants (as set out in **R. vs. Whitmore, supra**).

[21] Counsel for the crown submits at paragraphs 28, 29 and 30 that under “Crown Law Policy” counsel must watch over private prosecutions to ensure the right of the private citizen to institute prosecutions is not abused and that such prosecutions are in the best interest of the

administration of justice. It is improper she argues to utilize private prosecutions to further personal interests.

[22] The justice here seems to allude to her discretion in this regard where she says that viva voce evidence would seem to suggest, she said, there was some animosity. This, I take it, could taint the credibility of the informant or his witnesses.

[23] Here, as I have said, the incriminating evidence or intent, is virtually all in the video of the police helping to erect the barricade. It is hard to see how animosity in the informant could taint the video.

[24] Besides this, and in any event this discretion to not issue because of vexation or ulterior motives should in my respectful view be very carefully exercised. See **R. vs. Edge, [2004] 21 C.B. (6th) 361**. If it is not, I would expect there would be few private prosecutions. These cases are after all, generally brought by people because the crown or police for reasons of their own apparently have not proceeded in the usual manner through the police and the crown. A private prosecution such as this is an important part of the public duty to oversee the administration of justice. This is clear on the authorities I have referred to.

[25] Often, much public good is done by people wishing to advance their own ends. The great example outside the law is of course the “invisible hand” of Adam Smith and much philanthropy is, one expects, undertaken with some less laudatory motives than the public good. If one were to pursue motives – one can always find ad hominem motives in a reformer.

[26] We should look - except in the clear case - at public benefit not private demons.

[27] The residual discretion to refuse to issue process in my respectful view should be exercised only in the clearest of cases.

[28] I note, in reviewing the transcript there is evidence of good motive too. Mr. Parkinson stated at line 20, page 23 of the transcript: *“I’m not here out of vengeance, I’m here because of what I saw that day”* and finally at page 24, line 15: *“And, I’m here simply because I believe that these people should be held as accountable as anyone else would be for their actions.”*

### **Review of 1983 Supreme Court Ruling:**

- 8)** The 1983 Supreme Court Ruling (R. v. Dowson - Tab 6 of Respondent's Book of Authorities) did far more than just answer the question about the definition of the phrase 'indictment has been found' in the old 508(1) c.c.c.

9) The Ruling addressed the issue of a balance between discretionary authority of the Crown and the right of a private citizen to present evidence before a Justice of the Peace.

- a. Pg. 2 "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. Parliament has seen fit to impose upon the justice an obligation to 'hear and consider' the allegation and make a determination. In the absence of a clear and unambiguous text taking away that right, and considering a text of law that is open to an interpretation that favours the exercise of that right while amply accommodating the policy consideration that supports the power to stay, the right should be protected."

10) The Ruling addressed the issue of discretionary authority of the crown as being accountable to the Legislature or Parliament but it is best if this is done after the Justice of the Peace issues process.

- a) Pg. 8 The Court of Appeal's third reason was expressed as follows:

Since the decision of the Justice of the Peace to proceed with the charges involves the issue of process in the name of the Sovereign, it would seem appropriate that the Attorney-General as the chief law officer of the Crown should have the power to prevent the use of such process where he considers that the proceedings should be stayed. This involves an executive decision which historically, and now by statute, has been vested in the Attorney-General. This decision is not reviewable by the Courts and is one for which he is in turn accountable to the Legislature or to Parliament, as the case may be.

The right of a private citizen to lay an information, and the right and duty of the Attorney-General to supervise criminal prosecutions are both fundamental parts of our criminal justice system.

There is nothing there said with which I take issue. However, with respect, I fail to see why the conclusion dictated by these remarks would of necessity be that the law should be interpreted as did the Court of Appeal. Indeed, prior to that determination by the Justices of the Peace, there being no summons or warrant issued, one could say that the process is not yet put into operation. Furthermore, when the Attorney General in the exercise of his supervisory power over criminal prosecutions chooses to prevent the use of the criminal process, as is his right, his accountability to the Legislature would be much greater if he acted after the Justice of the Peace has determined that there is cause to issue process.

The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a Justice of the

Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to “hear and consider” the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court’s control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney General’s accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.

- 11) The Ruling addressed the issue of 'evolution of the Crown's power' and stated 'I can see no reason why we should not when possible interpret the law in compliance with this clear attitudinal trend on the part of Parliament.'
- 12) The above three points are principals that the Supreme Court needed to follow 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 Peace issues process.
  - c. The evolution of the Crown's power has been decreasing.
- 13) Contrary to the Crown's view this ruling by the Supreme Court still has merit and continues to be quoted regarding several points. In *R. v. Linamar Holdings Inc.*, 2007 ONCA 873, we read on page 3:

[10] The respondents also rely upon language in *Southam Inc. v. Coulter*, (1990), 75 O.R. (2d) 1 (C.A.) where the court, referring to passages from *Dowson*, held at p. 7 that “a prosecution commences only after a justice of the peace has decided to issue process”. It may be that in some contexts a prosecution only commences with the issue of process but that does not answer the question of when a prosecution is instituted. The laying of the information before a justice of the peace is the first formal step taken in the proceedings before the Provincial Offences Court and in our view constitutes the institution of the proceedings.

- 14) Parliament has used two words in the c.c.c and other Acts which are 'instituted' and 'commenced'. The Supreme Court accepted the view that 'commenced' means after the issuing of process. Court already had 'well-accepted meaning' (pg. 9 of R. v. Linamar) of the word 'instituted' as being when the information is laid before a Justice of the Peace.
- a. Several Criminal Code sections have the word 'instituted' which regards consent before certain charges can even be filed. Thus Parliament understands that the word 'instituted' is to be understood as when an information is laid before a Justice.
  - b. The section new 579.1 c.c.c does not have the word 'instituted' but the word 'commenced'.

**Review 507.1 c.c.c.:**

- 15) Since the 1983 Supreme Court Ruling section 508(1) has been amended and changed to 579(1). These changes were done in 1985. However, since these changes Parliament has made additional changes to enact a special section just for private prosecution - 507.1.
- a. In 1986 the Law Reform Commission published Working Papers which reviewed private prosecution as stated in section 4a of this writeup.
  - b. In 2002, Parliament added two sections regarding prosecutions which are 507.1 and 579.01.
- 16) The same words 'hear and consider' that the Supreme Court believed were important are found in 507.1(3a)
- 17) Parliament appears to limit the function and authority of the Crown 'to cross-examine and call witnesses and to present any relevant evidence at the hearing' as seen in 507.1(3d). In fact, 3d serves no purpose with the introduction of 579.01 which states:

If the Attorney General intervenes in proceedings and does not stay them under section 579, he or she may, without conducting the proceedings, call witnesses, examine and cross-examine witnesses, present evidence and make submissions.

- 18) The difference between 507.1(3d) and 579.01 is the Attorney General's authority to 'intervene' in the 'proceedings'. 507.1(3d) gives the Attorney General the 'opportunity' to present evidence which is far from the right to 'intervene' in the proceedings.

### **Mr. Pearson's attitude towards members of CANACE**

- 19) On July 22, 2008 Mr. Pearson appeared as the Crown during Jeff Parkinson's pre-enquête on a charge of mischief against two OPP officers who were aiding Native Protesters in building a barricade to stop the illegal owner from accessing his property.
- 20) Mr. Pearson effectively convinced the Justice not to issue process based on a character attack upon Mr. Parkinson and provided the court with a defence for the two officers.
- 21) The Justice's decision not to issue process was appealed via a Mandamus and on Jan. 12, 2009 Judge Marshall ruled in favour of Mr. Parkinson's Mandamus Order which resulted in the two OPP Officers facing the criminal charge of mischief.
- 22) For the purpose of this application it is the attitude of Mr. Pearson, as demonstrated by his actions during the pre-enquête, that showed a bias towards the members of CANACE which included Jeff Parkinson, Gary McHale and Mark Vandermaas.

### **Crown is replacing the role of the Justice of the Peace:**

- 23) The Crown knows the Justice cannot weigh the evidence nor consider possible defense so, in effect, the Crown is pre-judging the pre-enquête using the methods they know the Justice is not permitted to do.

- a. The Crown introduced the Ardoch Algonquin First Nation case which the Crown saw as a possible defense against charges being laid.
- b. Based on this view no charges can ever be filed against any police officer, Crown attorney or Aboriginal person. All cases are therefore an 'abuse of process'
- c. It should be noted that the Ardoch Algonquin First Nation case did not find the native protesters innocent of criminal charges.

24) The Crown is also denying the Justice the right to judge whether a case is vexatious or abusive. Instead of presenting such an argument as the Crown did in the pre-enquette with Jeff Parkinson, which was then reviewed by Order of Mandamus, the Crown is bypassing the Justice and making the ruling themselves thereby causing such a ruling to not be reviewable by Order of Mandamus.