

ONTARIO SUPERIOR COURT OF JUSTICE

HALDIMAND COUNTY - CAYUGA - *Criminal Proceedings*

BETWEEN:

Gary McHale (Applicant)

and

HER MAJESTY THE QUEEN (Respondent)

NOTICE OF APPLICATION FOR AN ORDER OF MANDAMUS

TAKE NOTICE that an application will be brought at ____ a.m./ p.m. on the ____ day of _____, at Courtroom no. _____, 55 Munsee St., Cayuga, Ontario, for an order granting an **Order of Mandamus**.

Background:

- 1) In August 2008 I filed private prosecution charges against three government officials with 1 count of Nuisance 180(2)(a) and 1 count of Nuisance 180(2)(b).
- 2) On Oct. 7, 2008 I arrived to present the evidence in this case before a Justice of the Peace. The Crown stayed the charges before any evidence was given.
- 3) The Crown quoted from two sources to justify their right to stay the charges. The Crown didn't provide the court or me with copies of the documents they quoted from.

Case for this Application:

- 4) The Crown has NO authority to prevent evidence from being presented before a Justice of the Peace.
- 5) The Crown's authority to stay charges can only be done after an Information has been processed by a Justice and not before.
- 6) In **Dowson v. R., 1983 CanLII 59 (S.C.C.)** we read the following:

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...

The disparity between stays for summary convictions and those for indictable offences is undesirable and could not have been intended by Parliament. Such an anomaly is not, unfortunately so infrequent in the field of criminal procedure. Our lexicon is archaic and no longer corresponds to current institutions. Our changing sections are unfortunately often the result of patchwork on the part of draughtsmen. Furthermore, it is difficult for the courts to inject some logic and cohesion in a system where, as regards the charging process, the exception has become over the years the rule, where the exceptional procedures of direct indictment without a grand jury for the Northwest Territories is now, save in Nova Scotia, the system for the whole country. When faced with the choice between uniformity of procedure and greater political accountability for the exercise of a necessary but no less dangerous discretion to circumvent the courts and deny a citizen his right to bring another to court, I think I should, pending Parliament's decision to speak out in modern terms, prefer the latter and suffer some anomaly in the law which I imagine is temporary.

For these reasons I would allow the appeal, and order that a mandamus issue and be directed to his Worship Justice of the Peace Allen to proceed with a hearing pursuant to s. 455.3 of the Criminal Code on the nine charges contained in the information of the appellant Dowson.

- 7) Other Supreme Court of Canada rulings have relied upon this ruling to state that the Crown CANNOT stay private Prosecution charge before a Justice has issued process on the charges.

Buchbinder v. R., 1983 CanLII 60 (S.C.C.)

Criminal law—Procedure—Private prosecution—Stay of proceedings—Mandamus to compel hearing on informations—Whether Attorney General has power to stay proceedings any time after laying of information...

This case is, as regards the law, identical to that of *Dowson v. The Queen*, 1983 CanLII 59 (S.C.C.), [1983] 2 S.C.R. 144...

For the reasons set out in the case of *Dowson, supra*, I would allow the appeal, order the issuance of a mandamus directing his Worship Justice of the Peace Inderpaul Chandhoke to proceed with a hearing pursuant to s. 455.3 of the *Criminal Code*

Parliament's view of Private Prosecutions:

- 8) The reason why Parliament allows private prosecution is outlined in chapter 26 of the Federal Prosecution Service Deskbook - <http://canada.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch26.html>

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"...

This Application seeks the following Order:

- 9) I am requesting that the Court authorize that I am allowed to get the transcripts and any documents from the Private Prosecution Pre-enquette that was heard on Oct. 7, 2008 in Cayuga in the case of Gary McHale v. three Government officials to be used in a Judicial Review or an Order of Mandamus.
- 10) I am requesting that the Court order the hearing of the evidence before a new pre-enquette.
- 11) I am requesting that the Court inform the Crown that they must share documents used during pre-enquettes with the court and the person filing the private prosecution.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

1. By service in accordance with rule 5, at Crown's Office 55 Munsee St., Cayuga, Ontario
Fax: 905-772-3494 Dated at,, this day of, (year).

Gary McHale

Tel: 905-692-6420