File 11/08

Haldimand County (Cayuga)

ONTARIO SUPERIOR COURT OF JUSTICE

(*CAYUGA - Criminal Proceedings*)

BETWEEN:

Jeff Parkinson (Applicant)

and

HER MAJESTY THE QUEEN (Respondent)

Order of Mandamus Motion

Additional FACTUM and Book of Authority of Jeff Parkinson (Applicant)

Mandamus Application returnable January 12, 2009

Tab 1 Additional Factum

Tab 2 *R. v. Peters*, 2007 CanLII 50878 (ON S.C.)

Tab 3 *R. v. K.D.S.*, 1999 CanLII 14154 (MB Q.B.)

Tab 4 *R. v. Garnett*, 1995 CanLII 2060 (BC S.C.)

Tab 5 *Stevenson v. The Queen*, 1983 CanLII 126 (S.C.C.)

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The Issues:

1) Does a Superior Court Judge have the authority to overturn the discretional ruling of a Justice of the Peace in a preliminary inquiry?

2) Is a ruling of a Justice of the Peace in a preliminary inquiry subject to review on a point of Law?

The Case Law:

3) It should be noted that there is not much Case Law on the subject matter directly related to private prosecutions. However, the Crown does use Order of Mandamus to overturn decisions at preliminary inquiries.

4) In the case *R. v. Peters*, 2007 CanLII 50878 (ON S.C.), the Crown used an Order of Mandamus to overturn the decision of a judge in a preliminary inquiry.

a. It should be noted that the Crown has other options available other than an Order of Mandamus to overturn the decision in a preliminary inquiry as stated in the following:

> [5] In *R. v. Thomson* 2005 CanLII 8664 (ON C.A.), (2005), 74 O.R. (3d) 721 at para 21 the Court of Appeal held:
>
> > Finally, I would point out that the Crown does have other remedies at its disposal in cases where committal is inevitable. Where the Crown wishes to assert that no result other than committal is legally possible, the traditional panoply of prerogative remedies provides an answer. An order of mandamus, requiring the preliminary inquiry judge to commit, is available to minimize unnecessary procedural wrangling or delay.

   i. Thus the Court of Appeal upheld the Crown's Right to use an Order of Mandamus to overturn a ruling of a judge at a preliminary inquiry.

b. In the case of *R. v. Peters* the Order of Mandamus was based on a error of Law as stated in para 4:

> [4] While the preliminary inquiry judge's concern for the charge to the jury and the jurors' task are understandable, they are inappropriate considerations at the committal stage. In addition, the task of weighing evidence and the inferences to be drawn from that evidence are reserved for the trier of fact: *R. v. Lafromboise* [2007] O.J. No. 4212 (Ont. C.A.)

   i. In this case the Crown's position was that a Superior Court Judge did have the authority to review a point of Law in regards to the discretional ruling of a Justice in a Preliminary Hearing.

   ii. It should be noted that this point of Law of the 'task of weighing evidence and the inferences to be drawn from the evidence are reserved for the trier of fact' is one of the key basis for this Order of Mandamus. This applies to point 1 and 4 of this application regarding the errors committed by the Justice of the Peace which reads as follows:

      1. The Justice of the Peace 'engaged in speculation' about the motives of the OPP officers who helped Mr. Montour.

      2. The Justice erred by considering possible defenses the OPP Officer may have towards the charge of Mischief.

      3. The Justice erred when she considered the motives and/or character of Mr. Parkinson.

      4. The Justice erred when she weighed the evidence.

c. This case of *R. v. Peters* resulted in the Superior Court Judge issuing an Order for the accused to appear in court. The ruling was not for another Justice to conduct a new preliminary hearing. See para. 6 and 7 which states:

> [6] Given the respondent's concession that committal is inevitable, an order of *mandamus* shall issue, requiring the preliminary inquiry judge to commit the respondent for trial on the charge of break and enter with the intention to commit an sexual assault.
>
> 7] The respondent is ordered to attend at court 103 on November 28, 2007 at 10 a.m. to be traversed to the courtroom in which the preliminary inquiry judge is sitting, or to be remanded to another date when he is presiding if His Honour is not sitting on November 28, 2007.

5) In the case of *R. v. K.D.S.*, 1999 CanLII 14154 (MB Q.B.) it states the following regarding the Crown's use of Order of Mandamus to overturn discretional rulings in preliminary inquiries: para 12 to 14

> [12] Section 606(4) has been judicially interpreted. In my view the correct interpretation of the section is that expressed in *R. v. Garnett* (1995) 15 MVR (3d) 198, a decision of the British Columbia Supreme Court in Chambers. The accused Garnett was charged with two *Criminal Code* offences, having care and control of a vehicle while impaired and having care and control of a vehicle while his blood alcohol reading exceeded 80 milligrams of alcohol in 100 mililitres of blood. At trial, crown and defence counsel agreed that an appropriate disposition would be a guilty plea to driving without due care and attention, an offence under s. 149 of the *Motor Vehicle Act of British Columbia.* The trial judge, a provincial court judge, refused to accept the plea on the ground that he lacked jurisdiction. Consequently, the crown and defence applied for an order of *mandamus* directing the provincial court judge to accept the proposed plea, and in doing so relied upon the provisions of s. 606(4) of the *Criminal Code.*
>
> [13] Lamperson, J. allowed the application, granting the order of *mandamus.* He said the following at pp. 199 and 200 of the reported decision:
>
>> I have concluded that the word "offence" as used in s. 606(4) is broad enough to embrace offences created by provincial legislation, provided such an interpretation does not run afoul of any rules of constitutional law by invading the legislative sphere of the province. It should be noted in this regard that s. 606(4) is procedural in nature in that it does not create any substantive offence.
>>
>> Because the limitation period for the laying of charges under the Motor Vehicle Act had expired, it is impossible for the crown to stay the Criminal Code charges and lay a new information under the Motor Vehicle Act. Consequently, the plea must be taken under the existing information….It should be noted in this regard that s. 606(4) can only be invoked if the prosecutor consents and the accused chooses to plead guilty to such an offence….The practical effect of s. 606(4) is that it permits guilty pleas under provincial statutes in a forum that has jurisdiction and is confined to situations where both the crown and the defence agree, **subject to the trial judge's overriding discretion not to accept the plea** if he is satisfied that the consent of the prosecutor is an unreasonable exercise of prosecutorial discretion.

[14] The case of *R. v. Lauweryssen* (1992) 41 MVR (2d) 305, a decision of the Alberta Court of Queen's Bench, is to the same effect. In that case, the accused was charged with dangerous driving. He pled not guilty to the *Criminal Code* offence but guilty to the offence of careless driving contrary to s. 123 of the *Highway Traffic Act of Alberta.* The provincial court judge held that he did not have jurisdiction to enter a conviction under the *Highway Traffic Act* as a result of a plea to a charge under that *Act* when the original charge was under the *Criminal Code.* The crown applied for an order of *mandamus* with *certiorari* in aid, requiring the provincial court judge to deal with the matter pursuant to s. 606(4) of the *Criminal Code.* The application was allowed, the court finding that s. 606(4) was sufficiently broad to permit a plea of guilty to an offence under a statute other than the *Criminal Code.*

6) In the case (1979), 26 N.B.R. (2d) 581, 55 A.P.R. 581 the court granted a Crown's application for an order of mandamus to compel the trial judge to proceed with the charge against the appellant Stevenson. The appeal was dismissed.

    a. This case was upheld by the Supreme Court in *Stevenson v. The Queen*, 1983 CanLII 126 (S.C.C.).

7) These cases point to the authority of a Superior Court Judge to review points of Law and even discretionary rulings of preliminary inquiry rulings. The Crown throughout Canada has used Order of Mandamus to overturn rulings by Justices in preliminary inquiries.

The Fundamentals of Justice

8) It is the Crown's stated position in this Application that even if the Justice of Peace erred on a point of Law the Superior Court has no authority to overrule that error.

9) The Crown has stated that as long as the Justice reviewed the evidence it doesn't matter whether the Justice erred in his or her understanding of the essential elements of the charge.

10) It is hard to imagine that Parliament entrusted such absolute authority in Justices of the Peace who generally have little experience on the legal nuances of the Criminal Code.

11) Such a view could be challenged under section 7 of the Charter of Rights and Freedoms as a violation of the principles of fundamental justice.

12) In most private prosecution cases the Justice of the Peace relies heavily upon the experience of the Crown to instruct the court as to how to conduct the preliminary inquiry.

    a. As such this puts a great responsibility upon the Crown to ensure the Justice does understand the legal nuances and in this case to correctly understand the legal nuances of the essential elements of the possible charge.

    b. Furthermore, the inability to review errors of Law of a Justice would, in all practical terms, transfer too much power to the Crown during a private

prosecution which could also be challenged under section 7 of the Charter as a violation of the principles of fundamental justice.

13) The will of Parliament is to allow private citizens who are not experienced at presenting legal cases the right to appear before the court to lay criminal charges.

a. The denial of any right to use an Order of Mandamus to review any error in Law by the Justice would in effect require the average person to be well versed in the legal nuances of the Criminal Code as he would have one 'kick at the can' to present his evidence.

b. Without the ability to seek a review of the points of Law in a Preliminary Inquiry the average person would in effect be subject to a greater chance of error in seeking justice due to the inexperience of a Justice of the Peace on the legal nuances of the Criminal Code. It is hard to imagine this was the intent of Parliament with respect to private prosecution as a 'safeguard' to democracy.

c. Furthermore, to restate para 3 of the Amended Mandamus Application:

> 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.*
>
> [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.131 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 selfhelp. 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 believe that this form of citizen/victim participation enhances basic democratic values while at the same it promotes the general image of an effective system of administering justice within the Canadian state."*

d. The very purpose of private prosecution was to allow citizens to bring even police and government officials before the criminal courts when governments [and their agents] are unwilling to take the first step. The Crown, by definition, is part of the Government that may be unwilling to proceed with such cases. Therefore, the Right to an Order of Mandamus to ensure proper procedures are followed and that the points of Law are upheld is vital to what Parliament intended.

Conclusions:

The Crown has the Right to introduce evidence and to ensure that the private prosecution is not misused by the applicant. However, that role is to ensure that the proper procedures and the proper points of Law are upheld.

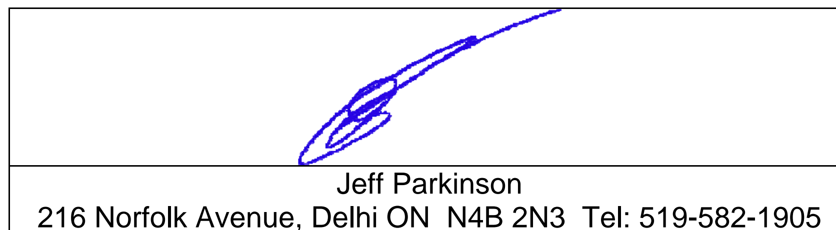
Parliament did not give the Crown absolute authority in a private prosecution but limited authority to ensure the Rule of Law was upheld. That balance of the Crown's right to introduce evidence and the citizens' right to seek justice via the court must be maintained.

Throughout our entire Justice System it is a clear will of Parliament to ensure proper checks and balances are in place to the point that Judges' rulings are subject to review on points of Law.

Application for Mandamus:

1) The Applicant requests that the court process the criminal code against the two officers based on the fact that some evidence was presented that addressed all the essential elements of the charge.

2) Failing the above request the Applicant requests that the court instruct a new Pre-enquette to be held based on the 4 errors by the Justice of the Peace and because of the actions of the Crown which lead to these errors.



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