

Haldimand County (Cayuga)
ONTARIO SUPERIOR COURT OF JUSTICE
(CAYUGA - *Criminal Proceedings*)

BETWEEN:

Jeff Parkinson (Applicant)

and

HER MAJESTY THE QUEEN (Respondent)

FACTUM of Jeff Parkinson (Applicant)
Mandamus Application returnable October 31, 2008

Sections

- 1) R. v. Edge
- 2) Transcript of July 22, 2008 pre-enquête
- 3) Mark Vandermaas' Police Service Complaint
- 4) Jeff Parkinson's Private Prosecution documents used by Civil Lawyers
- 5) UCARE documents used by Crown during pre-enquête

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AMENDED NOTICE OF APPLICATION for Order of Mandamus

(Rules of the Ontario Court of Justice in Criminal Proceedings, Form 1)

TAKE NOTICE that an application will be brought at 10 a.m./ p.m. on the 31 day of October, at Courtroom no. 1, 55 Munsee St., Cayuga, Ontario, for an order granting an **Order of Mandamus**.

Summary of Application:

On July 22, 2008 Jeff Parkinson presented evidence at a Private Prosecution case against two OPP officers. The Applicant believes that several errors were committed both in the actions of the Crown and in the failure of the Justice of the Peace in disallowing certain evidence.

Request to Represent or to have Standing:

Gary McHale requests Standing in the Application as the outcome directly affects several Private Prosecutions filed by Mr. McHale.

Background information for Application:

- 1) In May of 2007 the Applicant video taped an illegal occupation of a development in Hagersville. This video tape shows the senior OPP officer at the scene stating that he was 'dealing with an illegal occupation'.
- 2) This video tape shows Floyd Montour erecting a barricade to stop the owner from entering his property. The video tape also shows two OPP officers aiding Mr. Montour as he erected the illegal barricade.
- 3) The Applicant filed a police service complaint but it was rejected since he is not the owner of the construction site. The Applicant filed an appeal to OCCPS but it was turned down for the same reason.

- 4) Soon afterward the Applicant filed Private Prosecution charges against the two officers.
- 5) During the Pre-enquête the Crown aggressively defended the OPP and even suggested to the court that maybe the owner of the construction site wanted the OPP to build the barricade.
- 6) The Applicant then went to the owner and got a video statement to be used in court. The owner expressively states on the video that he is issuing the statement to be used in court and when directly asked whether he wanted the OPP to build a barricade – he states ‘no’.
- 7) This video evidence was then used in a private prosecution case against Floyd Montour for Mischief. The Crown in that case didn’t object to the video nor demanded that the owner be present to cross-examine. The mischief charge was certified.
- 8) The Applicant re-filed against the two OPP officers based on this new video evidence. Once again during the Pre-enquête, which is the basis of this application, the Crown aggressively defended the OPP.
 - a. Instead of directly dealing with the evidence before the court the Crown aggressively challenged the character and motives of Mr. Parkinson. Although there was nothing within the Private Prosecution documents that spoke about anything but the legal issue of Mischief the Crown turned the proceedings into a debate over the Crown’s perceived view of Mr. Parkinson’s political views.
 - b. Furthermore, the Crown directly challenged Mr. Parkinson’s Police Service record. The lack of any Police Service record apparently meant Mr. Parkinson wasn’t qualified to understand why these officers were involved in helping someone commit Mischief.
 - c. During this aggressive cross-examination of Mr. Parkinson the Crown misrepresented the documents he used against Mr. Parkinson by claiming they were from CANACE. The Crown didn’t provide Mr. Parkinson or the Court with these documents. The documents DO NOT say they are from CANACE but are from <http://ucare.wordpress.com>.
 - d. The Crown also presented a court ruling it claims was related to the case Mr. Parkinson was presenting. The Crown once again failed to provide Mr. Parkinson or the court with a copy of this case.
 - e. The Crown also presented what it claimed was a Police Service Complaint from Mark Vandermaas. Once again the Crown didn’t provide the Applicant or the court with a copy of this document. Somehow a Police Service Complaint filed by Mark Vandermaas has some bearing on whether the evidence supports criminal charges against two OPP officers.
 - i. Mark Vandermaas filed his police service complaint in ‘confidence’.
 - ii. No investigation has started in regards to this complaint.
 - iii. It could be argued that the introduction of this document is a violation of the Privacy Act.

- f. The Crown's actions could be called a 'bushwhacking' of Mr. Parkinson. Based on this new attitude of the Crown, no member of CANACE should be allowed to file any Private Prosecution in the Province of Ontario.

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". However, this right can be abused. It is sometimes necessary for the Attorney General to intervene and conduct or stay the prosecution to prevent the harms that may flow from such prosecutions, for example:

- 1) *the harm suffered by a defendant who is factually innocent;*
 - 2) *the harm to the court system caused by a frivolous prosecution.*
- 3) The purpose of Private Prosecutions is 'a valuable constitutional safeguard against inertia or partiality on the part of authority.' As such;
 - a. The basis of certifying the Private Prosecution charge is based solely on whether the evidence supports the claim.
 - b. The purpose of the Crown is to represent the public interest and not to act as the defence council of OPP officers.
 - c. The lack of Police Service experience has no bearing on whether a private prosecution case has merit or not.
 - d. The Informant's political views have no bearing on whether the case has any merit or not.
 - e. The fact that the Informant may have other options available to address any wrong doing has no bearing on whether the case has any merit or not.

Case Law related to Private Prosecutions:

- 1) Reviewing of **R. v. Edge, 2004 ABPC 55** sets out the procedures and limitations of Private Prosecution Pre-enquête. (Tab 1 is the full text of R. v. Edge)

- 2) The case concerned Mr. Durand, the informant, who applied before the Alberta court relating to an information charging Officer Christopher Edge with an offence of assault.
- 3) 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.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."

- c. [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."
- d. [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."

- e. [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."

- f. [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."

- g. 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."

- 4) In the case *Lupyrypa v. The Queen*, 2008 ABQB 427 (CanLII), a Constable Kehler faxed in his Application for Information as allowed under 508.1 of C.C.C. The officer never appeared in court and Justice of Peace Carr signed the Information.
- a. The Crown's view in Mr. Parkinson's case that the witness must be available for cross-examination is unsupported by the *Lupyrypa v. The Queen*.
- b. Hearsay knowledge is permissible. In *Whitmore #1(R. v. Whitmore)* (1987), 41 C.C.C. (3d) 555 (Ont. High Court), Ewaschuk J. described the process at a s. 507 hearing at pp. 564-5:

In the vast majority of cases, the justice should question the informant, the more so where the informant has only hearsay knowledge of the charge, to decide whether process should issue.

Summary of Evidence:

- 1) Video of Sgt. Phil Carter stating that he is dealing with an illegal occupation.
- 2) Video of Floyd Montour building a fence to block access to property in Hagersville.
- 3) Video of Mr. Montour waving to the OPP officers to help him with the fence and video of the officers aiding Mr. Montour.
- 4) Video of the owner stating he had not authorized Mr. Montour or the OPP to stop access to the property.
- 5) Personal eye-witness statement by Jeff Parkinson who videotaped the whole event and spoke to Sgt. Carter.

Justice of the Peace erred in her Ruling:

The Justice of the Peace made four errors in her ruling:

- 1) The Justice of the Peace 'engaged in speculation' about the motives of the OPP officers who helped Mr. Montour. In her conclusions she states (Tab 2 pg 25 of Factum):

It is clear from what I have seen on the tape that the officers were there to defuse the situation, not to assist with stopping anybody from building or anything of that nature, but to keep the peace.

- a. In the crown's Case Book pg. 20 of tab 4 (R. v. Toma – British Columbia Court of Appeal - 2000) see para. 110, 111, 112 which reads in part:

In those passages, Toma submits, the trial judge fell into error by speculating on what explanation there might be for his action consistent with culpability. In the first instance, the trial judge speculated that Toma was "getting nervous" or was "perhaps already feeling remorse"... [111] In my view, the trial judge was obviously in error when she engaged in speculation about what might account for the evidence on the two matters Toma's counsel had raised in argument.

- 2) The Justice erred by considering possible defenses the OPP Officer may have towards the charge of Mischief. In Tab 1 of factum (R. v. Edge, 2004 ABPC 55), pg 22, para 104 states:

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.

- 3) The Justice erred when she considered the motives and/or character of the Mr. Parkinson. In her ruling she states (tab 2 pg 25 of Factum):

The viva voce evidence that I heard from you would suggest that there is – as much as you would have the court believe that there is no animosity between you and the O.P.P., certainly is not substantiated by the comment that you made, that you believe that the O.P.P., because of, somebody told you that they caused you some kind of head injury that may or may not have residual effects on your health.

- a. Mr. Parkinson's motives and character have no bearing on whether there is a *prima facie* case. In Tab 1 of factum (R. v. Edge, 2004 ABPC 55), pg 21, para 103 states:

Mr. Durand's [the informant] evidence constitutes direct evidence of the elements of the offence. Mr. Durand's conduct was not admirable. He lied to the police and directed profanities at the officers. His actions interfered with the police and bordered on obstruction. He was somewhat intoxicated at the time he dealt with the officers and has difficulty remembering a great portion of what happened after the stuns was administered. These problems will no doubt affect the ultimate weight to be given to his evidence. The informant has a possible financial interest because he has instituted a civil suit against the Edmonton Police Service. However, in this hearing, because I have direct evidence of all the required elements I am precluded from weighing the evidence.

- 4) The Justice erred when she weighed the evidence when she stated on pg 22, tab 2:

The COURT: I'm prepared to hear it, but as I said, the weight of it's undermined because it's not sworn evidence and there's no opportunity to cross-examine.

In Tab 1 of factum (R. v. Edge, 2004 ABPC 55), pg 21, para 100, 2nd last para in 100 states:

The judge does not weigh the evidence or consider any defences to the charge in coming to determination whether a prima facie case exists. If a prima facie case has been established, the judge must issue process.

Furthermore, this evidence would be considered hearsay (although it was also videotaped) and hearsay evidence is allowed during Pre-enquêtes. In Tab 1 of factum (R. v. Edge, 2004 ABPC 55), pg 10, para 46, 2nd para in 46 states:

In the vast majority of cases, the justice should question the informant, the more so where the informant has only hearsay knowledge of the charge, to decide whether process should issue. Often an inquiry of a few minutes will suffice.

Crown's Role in the Justice of the Peace's Errors:

The Crown played a key role in providing the Justice with information that is irrelevant to the Pre-enquête. Although the crown stated at the opening of the pre-enquête that 'the Crown is not intervening in the matter but will be assisting the court as contemplated by section 507.1", the Crown, in fact, had come prepared to challenge Mr. Parkinson's character,

motives and his experience in regards to law enforcement. The following is a summary of the Crown's cross-examination:

- 1) Not one question was related to the evidence in relationship to a mischief charge.
- 2) Crown's questions introduced possible defences which the Justice is not permitted to consider. It should be noted that in the Crown's Factum pg 6 para. 15 the Crown listed out evidence that was given during cross-examination and not one of the items listed relates to any of the essential elements of a mischief charge.
- 3) Crown's questions introduced the lack of police experience Mr. Parkinson has which is irrelevant to the pre-enquête.
- 4) Crown's questions introduced Mr. Parkinson's motives and character which are irrelevant to the pre-enquête.
- 5) The Crown failed to provide Mr. Parkinson or the court with copies of documents they read from during the pre-enquête.
- 6) The Crown mislead both Mr. Parkinson and the court as to the source of documents. See Tab 5 for documents used by the Crown which clearly state they are from Ucare.wordpress.com not CANACE.
- 7) The Crown used documents they legally did not have the right to use. See Tab 3 which shows the Police Service Complaint by Mark Vandermaas filed with the Ministry of Community Safety and Correctional Service. The Ministry's stamp is on the top of the copy and as such this document is a private document between Mr. Vandermaas and the Minister.
- 8) Outside the pre-enquête the Crown shared Mr. Parkinson's Private Prosecution documents with the civil branch of the Attorney General's Office to be used against Mr. Parkinson and Mr. McHale in civil cases. (See Tab 4)

Essential Elements of the case:

The Justice of the Peace's ruling demonstrates that all the essential elements of mischief had been committed at the construction site when she stated (pg 25, tab 2):

It was clear the intent from Mr. Montour was to prevent further construction or access by the contractor to the property because of the belief that it was property they had no entitlement to, the builders and contractors.

Regarding the question of intent by the OPP officers:

Crown's Case Book tab 4, pg. 4 (R. v. Toma – British Columbia Court of Appeal - 2000) see para. 14 which states:

*Mischief has been held to be an offence of general rather than specific intent. In R. v. Butler (1984), 42 C.R. *3d) 268 (Ont. Co.Ct.), in which drunkenness was raised as a defence, Salhany J., as he is now, said at 272-273:*

In my view, the word "wilful" means nothing more than intentional as opposed to accidental. In other words, just as there cannot be an assault, which is a crime of general intent, if a person stumbles against another, because he did not intend to apply force, similarly there can be no mischief if a person accidentally falls against a wall and damages it. In my view, it is not necessary for the Crown to demonstrate that the accused committed the crime of mischief with evil or corrupt intention.

General intent and not evil or corrupt intent is all that needs to be demonstrated for a charge of mischief. The video evidence demonstrated general intent because it showed the following:

- 1) The officers did not stumble and grab the fence.
- 2) The officers were not compelled at gun point to grab the fence.
- 3) The officers moved with the intent to grab the fence.

Furthermore, the evidence presented demonstrated the occupation was illegal and thus building a fence which stopped access to the rightful owner was an offense.

The officer's role that day, even if this needs to be addressed, was to maintain law and order. That role was fulfilled by being present at the site and at no time does this imply that aiding in mischief is a job requirement of an officer.

Finally, the Police Service Act and the OPP Officer's Oath of office includes the duty to 'prevent offenses' which cannot be understood as aiding in mischief.

In concluding however, the motives and job description of the OPP officers is irrelevant to the pre-enquête since possible defenses and the weighing of evidence is not permitted. The only relevant evidence during a pre-enquête is whether there is 'some evidence' to support all the essential elements of the charge.

Conclusions:

Private Prosecutions have been made available by the will of Parliament to allow average citizens the right to file charges when the established authorities will not. As such, pre-enquêtes are conducted with the view that average people do not arrange evidence in the way that Police and the Crown do. The burden of proof of such evidence is merely that 'some evidence' is available for each of the essential elements in the charge.

The Crown's role is to ensure there is 'some evidence' for each of the essential elements and it is not the goal of the Crown to operate as defense lawyers for the accused.


Since average people have little legal experience it is also reasonable to accept that the Crown would follow established rules of evidence and established rules of pre-enquête. Many of the Justices rely on the Crown's experience to aid them during pre-enquêtes and as such the role of Crown to follow established rules is even more important.

These established rules include:

- 1) Possible defenses are irrelevant.
- 2) The character and motives of the Informant is irrelevant.
- 3) The sharing of documents quoted from is required.
- 4) The Informant need not be the victim of the crime nor have a vested interest but merely have evidence of each of the essential elements of the charge.
- 5) All documents and evidence used during a pre-enquête are in-camera and as such cannot be shared or used in civil cases without a court order.

Application for Mandamus:

- 1) The Applicant requests that the court instruct a new Pre-enquête 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.
- 2) The Applicant requests that the court remind the Crown what their role is during a pre-enquête and that they are required to follow the same rules as Mr. Parkinson – i.e. provide copies of documents used or quoted from.
- 3) The Applicant requests that the court re-confirm the established rules mentioned in the conclusion above.
- 4) The Applicant requests that the court remind the Crown that sharing private prosecution documents is not permitted without a Court Order.



Jeff Parkinson