COURT FILE NO.: 17/2008
DATE: 2009July2

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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Gary William McHale	)	Self-represented
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Applicant	)	
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- and -	)	
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Her Majesty the Queen	)	Andrew Bell and Annemarie Carere, for the
	)	Respondent
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Respondent	)	
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	)	**HEARD:** June 11, 12, 29 and 30, 2009

The Honourable Justice T. D. Marshall

REASONS FOR JUDGMENT

[1] This is an application for mandamus. It concerns the private prosecution and the facts are not in dispute.

[2] On August 19, 2008, Gary McHale swore private informations against 3 named individuals.

[3] Each information alleged the commission of two counts of the indictable offence of common nuisance contrary to section 180 of the Criminal Code.

[4] These informations came before His Worship Justice of the Peace P. Welsh in Cayuga on October 7, 2008 for a pre-enquete pursuant to Section 507.1 of the Criminal Code.

[5] At the outset of the hearing, the crown purported to withdraw all 3 informations. The justice of the peace took no objection to the withdrawals and gave the following reasons:

Reasons for Judgment

The Court: *"Well, part of what you are saying is correct, Mr. McHale, but part of it is not."*

"The crown has a duty, a duty that is legislated, as been commented by Mr. Pearson, in the Crown Attorneys Act, (S.11(d)). *And they have a duty to look at files and informations, particularly, not just private complaints, but complaints laid by law enforcement as well, informations laid by law enforcement, as to whether or not, 1) it is in the interest of justice to proceed with those; or 2) is there a reasonable expectation of conviction should it go to a trial. That is their responsibility. That is what part of their job is to do.*

And it is an important job, because if they did not exercise that legislative responsibility, the criminal justice system would be in reverse. It is already slow. We all know that. So the fact that Mr. Pearson, as a representative of the crown, has made that determination, that is his responsibility, it is his responsibility by law.

And there is no need, you do not have to agree with the decision that he made, and you may not be happy with it, but it is his right to make that decision and to have these matters withdrawn without me hearing any evidence with regards to the matter.

Mr. Pearson: "I could advise Your Worship that the authority for the proposition of the Attorney General or his agent may stay proceedings after the laying of, or an information and before the issuing, issuance of process, that is before the hearing as to the issuance of process, is the case of Campbell v. Ontario, *reported at 1987, 35 C.C.C. (3d) 480."*

The Court: "Thank you. Anything else you wish to say Mr. McHale?"

Gary McHale: "He hasn't provided me with that case so I..."

The Court: "That's alright, he's just quoted it. The reality is the matters are going to be withdrawn, Mr. McHale."

Gary McHale: "Okay."

The Court: "That is the reality. You do not have to like it but that is just the way it is."

Gary McHale: "Can I, can I say one more comment on this?"

The Court: "Sure, Mr. McHale. Go ahead."

Gary McHale: "The Alberta case I gave you made a point that the parliament made an issue of the fact that the whole point of private prosecution was to safeguard against the fact when police or when the crown...."

The Court: "Folks, you'll have to stand outside please. Thank you."

Gary McHale: "When the police or when the crown will not lay charges..."

The Court: "Um-hum."

Gary McHale: "...that was the whole point of private prosecutions."

The Court: "Yes."

Gary McHale: "It was a safeguard for democracy itself."

The Court: "Okay. Mr. McHale, the, the police lay informations, all right? Based on investigation establishing whether or not reasonable probable grounds exist, they will lay an information before a justice at which time they will then complete an investigation hopefully, and put that investigation before the crown."

"It is two separate sets of circumstances, it is two separate entities of the criminal justice system. Once that case leaves a police or law enforcement agency and goes to the prosecutor, it is no longer the police's case; it is the crown's case. And they are the final determiner as to whether or not that case will be put before a trier of fact. And, as I previously said, that is not only their responsibility and their job, it is legislated that they must do that."

"So the fact that you have given me, this court, some decision from an Alberta court is fine, and I understand what you're saying. But the reality is, is that the crown has exercised their legislative duty and right to withdraw these charges, and they are being withdrawn."

Gary McHale: "Okay."

The Court: "Is that the ones you wish to intervene in?"

Mr. Pearson: "Yes."

The Court: "All right. Thank you."

[6] Mr. McHale asks the court to find that the justice of the peace made jurisdictional errors by refusing to hear his evidence and denying him certain procedural rights. Moreover, he argues that, in any event, the crown does not have the discretion to withdraw a private information during a section 507.1 hearing.

[7] The crown argues it has the unfettered discretion to withdraw an information at any time after it has been laid. In the alternative or in addition to that common law authority, the crown relies on section 11(d) of the *Crown Attorneys Act*, R.S.O. 1990, which the crown submits allows it to withdraw a private information as part of its supervisory jurisdiction over private prosecutions.

[8] The crown suggests that as a result of its withdrawal of Mr. McHale's informations, the justice of the peace had no jurisdiction to exercise and therefore could not have exercised it inappropriately.

[9] The issue before the court is therefore the scope of the crown's discretion to withdraw an information or informations in a private prosecution at the pre-hearing stage.

[10] The issue is deceivingly simple but as will be seen, it raises broader policy implications and touches on matters of fundamental importance to the administration of justice and private prosecutions in particular.

[11] Both Mr. McHale and the crown referred to a number of cases to support their position. I now turn to some of those cases.

[12] The first case and the leading one in my view, *R. v. Dowson,* [1983] 2 S.C.R. 144 had a factual setting quite similar to the case at bar.

[13] In that case, the crown purported to stay proceedings after a private information had been received but before the justice of the peace had completed an inquiry.

[14] The court held that section 508(1), now 579, did not empower the Attorney General to stay proceedings at any time after an information was laid. The court stated that the power to stay begins only after a summons or warrant is issued. See *R. v. Dowson,* supra, at page 157.

[15] The court reasoned 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. Parliament, the court found, has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. *R. v. Dowson,* supra, at page 155. The court concluded that in the absence of a clear and unambiguous text taking away that right, the right should be protected.

[16] Indeed, section 508 was replaced with the current section 579. Section 508 stated "at any time after an indictment has been found," whereas the new section states that a stay may be entered "at any time after proceedings in relation to an accused or defendant are commenced." I will return to the *Dowson* case.

[17] The crown referred the court to the case of *Campbell v. Attorney-General of Ontario,* [1987] O.J. No. 68 (H.C.J.). In that case, the plaintiff sought a declaration that the stay of

proceedings directed by the Attorney General in a public prosecution was void and of no force and effect.

[18] It is not clear at what stage the crown sought to stay the proceedings, but it appears it was after process had issued. In *Campbell,* the judge concluded, and the Court of Appeal agreed, that the plaintiff did not have the status or standing to review the prosecutorial discretion of the Attorney General. See *Campbell v. Attorney-General,* [1987] O.J. No. 338 (C.A.).

[19] The trial judgment provides a useful review of the law regarding the Attorney General's discretion to stay proceedings and its importance. The judge concludes that the power to stay is fundamental and has long and historic roots in our law.

[20] Justice Craig then states at paragraph 28 that the amendments brought about by the *Dowson* decision to section 579 "permit the Attorney General to direct a stay at any given time after an information is laid."

[21] Aside from this brief statement, there are no reasons given as to the effect of the changes in the wording of section 579 as compared to section 508 or indeed if that conclusion was necessary for the matter then before the court. This is clear since in the penultimate sentence the court concludes that: "For all the above reasons, the action cannot succeed because the plaintiff lacks standing and the issues are not justiciable; the action is therefore dismissed." But more important, in the case before me, the crown bases their power on withdrawing the information as opposed to entering a stay – as was the case in *Campbell.*

[22] Under the circumstances Justice Craig's finding appears to be obiter.

[23] For those reasons – and with respect to those who might find differently, I would not follow the decisions in *Campbell* in this case.

[24] I would add in passing that I am not so certain that the wording of 579 contains the required clarity that *Dowson* appears to demand. Section 579 could have said "after a private information is laid and before the pre-enquete" as opposed to "commenced" – that would have indeed been clear and unambiguous. In any event, here we are dealing with a withdrawal rather than a stay. The stay is for another day.

[25] In *R.v. Alrifai,* (2008), 235 C.C.C. (3d) 374, (Ont. C.A.), Watt J.A. heard an appeal of a Superior Court justice's dismissal of an application for a writ of mandamus in which the appellant had sought to force the justice of the peace to review an information.

[26] That matter was under the *Highway Traffic Act,* R.S.O., 1990, c.H.8. The Act prohibited institution of a prosecution for an offence under s. 39.1(9) without the consent of a police officer. The appeal was dismissed.

[27] The court was concerned with the difference between "instituted" and "commenced" and accepted that a prosecution "commences" only after a justice of the peace has decided to issue process – but is "instituted" when the information is laid.

[28] I might say that the conclusion here, though the case is distinguishable on its facts, tends to contradict the conclusion reached in *R. v. Campbell.* See also *R. v. Devereaux, (1996) 48 C.R. 194 (Ont. C.A.).*

[29] It is clear on the cases considered that the crown has a broad discretion to withdraw its own information prior to the entry of a plea. See *R. v. Morton; R. v. Fach*, [2003] O.J. No. 6066 (S.C.J.); *R. v. Dick*, [1968] 2 O.R. 351 (H.C.J.). The crown's discretion to withdraw their own informations is not at issue here.

[30] Indeed, the word withdraw itself indicates a retraction – of ones own. We are dealing here with a case that began as a private prosecution and the narrower question of whether the crown can withdraw a private citizen's information at the pre-enquete .

[31] The Law Reform Commission of Canada in 1986 published Working Paper 52 on private prosecutions. The commission endorsed the desirability of maintaining private prosecutions, saying:

> *In any systems of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring participation.*

[32] The paper, at page 21, quoted Glanville Williams: "[t]he power of private prosecutions is undoubtedly right and necessary in that it enables the citizen to bring even the police or Government officials before the criminal courts, where the government itself is unwilling to make the first move." The Paper points out that "control of the charging process is of crucial importance."

[33] In 2002, Parliament, evidently in response, amended the Criminal Code to include section 507.1. It sets out a procedure to be followed before process is issued in a private prosecution. The section itself may be taken to indicate that withdrawal of a private information by the crown before the matter is heard by the justice of the peace was not contemplated by Parliament.

[34] In my view, similar policy rationales inform both the conclusions in the Working Paper and the Supreme Court's holding in *R. v. Dowson*. Both emphasize the necessity of ensuring the Attorney General's accountability by enhancing the legislative capacity to superintend the exercise of his or her power while still "amply" accommodating the strong policy consideration that supports the power to stay and indeed withdraw informations.

[35] Nowhere does section 507.1 contemplate the Attorney General withdrawing the information before the pre-enquete. The procedure set out in s. 507.1 carefully lays out the role of the Attorney General at the pre-enquete. This procedure would be of little or no value if the crown could withdraw private informations before the hearing. Private prosecution would be rendered a vestigial appendix still affixed – but without use to the body of our law, or so practically ineffective to pave the way for their actual abandonment. This we should not, and need not do.

[36] Turning to the crown attorney's contention that section 11(d) of the *Crown Attorneys Act*, R.S.O. 1990, c.C. 49, allows for the pre-enquete withdrawal, section 11(d) reads as follows:

> *11. "The Crown Attorney shall aid in the local administration of justice and perform the duties that are assigned to Crown Attorneys under the laws in force in Ontario, and, without restricting the generality of the foregoing, every Crown Attorney shall,*

...(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; [Emphasis added.]

[37] The crown's argument on s. 11(d) of the *Crown Attorneys Act,* R.S.O. 1990, c.C49 is premised on the following statement from *Bradley et al. and the Queen,* [1975] O.J. No. 2374 (C.A.) at para. 27:

"The Attorney General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statue in this country, is parallel to but not in substitution for the role of the Attorney General, and where the two roles come into conflict, the role of the Crown prosecutor is paramount, where in his opinion the interest of justice require that he intervene and take over the private prosecution." [Emphasis added.]

[38] The facts in *Bradley*, are however quite different from the facts of this case. In that case, the crown wished to continue the charges - the "interest of justice" required that the crown proceed. What the interest of justice demands here is different. In *Bradley,* one private citizen had sworn an information against another private citizen for intimidation whereas here a private citizen has sworn an information against public officials. This is one of the very situations for which private prosecutions have been preserved.

[39] As well, to allow the crown to withdraw an information at the pre-enquete by giving s. 11(d) a broad and generous interpretation would, in my opinion, allow for conflict between the

provincial and federal legislation as regards the role of the Attorney General under s. 507.1. If this court were to accept that the *Crown Attorneys Act* gave the crown the authority to intervene in the manner contemplated here, it would improperly expand the scope of the provision beyond the clear language in s. 507.1.

[40] We should prefer the interpretation of section 11(d) that allows it to operate without conflict with the *Criminal Code*. See *Canada Attorney General v. Law Society of British Columbia,* [1982] 2 S.C. R. 307.

[41] Finally, the crown has argued that to grant the remedy sought here would be otiose and futile because any process issued would simply be stayed by the crown pursuant to its authority under section 579. Therefore, the remedy being discretionary, should not be granted.

[42] I do not accept that submission. It is entirely contrary to the reasoning of the Supreme Court of Canada in *Dowson.* .

[43] But I would add this: in my view the right to set out before an independent judicial officer allegations such as these (in camera) is no effete formality. Indeed, it may be seen as a bulwark of democracy for the reasons set out in *Dowson,* and in the Working Paper I have made reference to above.

[44] In my respectful view, the matter before the court is an important one and one that has not been directly addressed in the jurisprudence.

[45] This case raises the important issue of a citizen's right to lay criminal informations against public officials and for those informations to be heard before an independent judge. This is a long held and hard fought right.

[46] Indeed, Alexander Hamilton wrote in The Federalist Papers at page 78: *"Considerate men....ought to prize whatever will tend to....fortify that temper in the courts (independence); as no one can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."*

[47] For all of these reasons, I would answer the question raised here – that yes there has been an excess of jurisdiction on the part of the justice of the peace and the crown attorney - such that mandamus should issue.

[48] I therefore allow the application. The matter will be returned to a justice of the peace for a hearing pursuant to section 507.1 of the *Criminal Code* on the various charges contained in the informations of Mr. McHale.

T. D. Marshall, SCJ

Released: July 2, 2009

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

Gary William McHale

Applicant

- and –

Her Majesty the Queen

Respondent

REASONS FOR JUDGMENT

The Honourable Justice T. D. Marshall

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