`COURT FILE NO.: 11/08
DATE: 2009Jan 12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Jeffrey Parkinson	)	Self represented
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
Her Majesty the Queen	)	Annemarie Carere for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** November 13, 2008

Endorsement – Application for Judicial Review

The Honourable Mr. Justice T. D. Marshall

[1] This is an application for Judicial Review brought by Jeffrey Parkinson asking the court for an order in the nature of Mandamus. The application raises two issues: (1) whether the Justice of the Peace committed jurisdictional error in declining to issue process in regards to the alleged offences of mischief by two officers in the performance of their duties as police officers, and (2) whether the Justice committed a jurisdictional

error in permitting counsel for the crown, Mr. Pearson to cross examine the informant, Mr. Parkinson on his evidence.

[2] The facts are quite straight forward. The applicant commenced a private prosecution under Section 507.1 of the Criminal Code alleging that the two named officers of the Ontario Provincial Police committed a crime of mischief in assisting native protestors in barricading an occupation site in [redacted].

[3] This was a part of a number of related native occupations and protests that began with the occupation of Douglas Creek Estates in Caledonia.

[4] The primary section of the Criminal Code applicable here is Section 507.1. I set out the relevant parts of Section 507.1:

> 507.1(1) A justice who receives an information laid under Section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.
>
> (2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.
>
> (3) The judge or designated justice may issue a summons or warrant only if he or she
>
> (a) has heard and considered the allegations of the informant and the evidence of witnesses;
>
> (b) is satisfied that the Attorney General has received a copy of the information;

© is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and

(d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

(5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

(8) Subsections 507(2) to (8) apply to proceedings under this section.

[5] A hearing held under Section 507.1(1) is commonly referred to as a "pre-enquete" or a "pre-inquiry."

[6] The standard or test for issuing process under Section 507.1 as set out in 507.1(2) is whether the judge or designated justice considers that a case is "made out." If it is, then the justice "shall issue either a summons or warrant....."

[7] The test as set out in the authorities is, that after determining the information is valid on its face – to determine whether the evidence presented to the judge discloses a primia facie case of the offences alleged. See **R. vs. Whitmore, (1989) 51 C.C.C. (3d) 294 (Ont. CA).** See also **R. vs. Grinshpun, [2004] S.C.C.A. No. 579, File #30700,** leave to appeal dismissed. See the same case in **B.C.C.A 246, D.L.R. (4th) 428, 190 C.C.C. (3d) 483.**

[8] Those cases affirm that a prima facie case will not be established unless there is some evidence against the accused on all the essential elements of the charges.

[9] Beyond this, the justice has a discretion to refuse process where he or she forms the opinion that the informant or his witness's are not credible in the sense that they are mentally disordered or vexatious litigants. See **R. vs. Whitmore, 41 C.C.C. (3d) 555, at page 9 of 13.**

[10] Going to the next step – that is an application for mandamus, the reviewing judge must determine whether the pre-inquiry judge exercised his or her discretion judicially according to law. See **R. vs. Grinshpun, supra** referring to Re **Blythe and The Queen, (1973), 13 C.C.C. (2d) 192 (B.C.S.C.).**

[11] The Justice's reasons here were succinct. The Justice said under "Reasons for Ruling": *"Well, I'm not going to ask for submissions, Mr. Pearson, unless you want to make a few when I'm done. But, the bottom line is this, Mr. Parkinson: I am not going to issue process on the charges against the O.P.P. officers, and I will tell you why. First of all, I have heard viva voce evidence from you about the fact that you believe that the conduct of the O.P.P. officers was criminal, in that they were assisting in blockading of access to the property of* [redacted]. *I think what you have missed in your analysis of the situation that day is the intent. It was clear the intent from Mr. Montour* (a native protestor) *was to prevent further construction or access by the contractor to that property because of the belief that it was property they had no entitlement to, the builders and contractors. 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. And the video evidence, I think, in that video evidence, that's clear.*

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 a head injury that may or may not have residual effects on your health.

So for those reasons, I am not prepared to issue process.

[12] In regards to the first issue raised by the crown – that is did the Justice act judicially – the test, as I have said, for issuing process on a private information is whether or not there is a case for so doing – or is there prima facie evidence against each of the accused on each essential element of the charge. Here taken from her reasons, the only element of the offence of mischief that she dealt with was the issue of intent.

[13] Section 430(1)(d) of the Criminal Code of Canada., provides that *"Every one commits mischief who wilfully obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property."* **Criminal Code, Section 430 (1)(d) R.S.C. 1985, C. c-46.**

[14] Wilfully is defined in section 429 (1) of the Criminal Code for our purposes: *"(1)Every one who causes the occurrence of an event by doing an act or omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purpose of this Part, wilfully to have caused the occurrence of the event."*

[15] The word "wilful" here was clarified in the decision of Salhany, J. as he then was in **R. vs. Butler, (1984), 42 C.R. (3d) 268 (Ontario County Court).** He said at page 272-273: *"In my view, the word "wilful" means nothing more than intentional as opposed to accidental".* Justice Salhany went on: *"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."

[16] Here the evidence before the justice was a video showing the officers assisting the protestors in building a barricade. There was in my respectful view, some evidence as required by law.

[17] Again, in my view, this was an error in law and judicial review, here an order of mandamus should lie.

[18] The second issue put forward by the crown has, in reality, I find two parts or issues. (See paragraph 25 and following in crown's factum).

[19] On the first issue under Issue 2, that is whether it was proper for Mr. Pearson to cross-examine the informant on his evidence, I am of the view that it was proper. Section 507.1(3)(d) allows for that.

[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."*

[29] For all these reasons, I am satisfied that mandamus should be granted in this case.

[30] In closing, I accept that this was an unusual case, these cases appear before the justice of the peace but rarely – but here I do not think the test in regard to "some evidence" on the essential elements of mischief was properly applied. There was some evidence of intent.

[31] The justice referred to the officers being and I quote: *"there to diffuse the situation not to assist with stopping anybody from building or anything of that nature, but to keep the peace. And the video evidence I think, in that video evidence it is clear."* In my respectful view, the justice was at that point weighing the evidence, which it was not her role to do at the pre-enquete.

[32] For all those reasons, the application is granted.

Marshall, J.

Released: January 12, 2009