

File No:

ONTARIO SUPERIOR COURT OF JUSTICE
HALDIMAND COUNTY - CAYUGA - *Criminal Proceedings*

BETWEEN:

Gary McHale

Applicant

and

HER MAJESTY THE QUEEN

Respondent

NOTICE of STINCHCOMBE/CHARTER APPLICATION

(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 23 day of April, at Courtroom no. 600, at John Sopinka Court House 45 Main Street, East, Hamilton, Ontario, for an order granting an **Order of Mandamus**.

Summary of Application:

- 1) This application seeks a new Preliminary Inquiry and various disclosure material from the Crown regarding the charge of Counseling Mischief not Committed that was filed against me for an event on Dec. 1, 2007.

NOTE: This application was originally heard before Judge Marshall in Sept. 2009 and was adjourned after one full day of arguments. Due to Judge Marshall's passing this application has been amended and re-filed.

Background:

- 2) Throughout the months of October and November 2007, Doug Fleming held a series of events in Caledonia to bring public exposure to the growing number of illegal smoke shops in the area.
- 3) Mr. Fleming's primary means of creating this exposure was to set up an illegal smoke shop out of the back of his truck in various areas in Caledonia to force the police to answer questions and to start enforcing the law.
- 4) On Dec. 1, 2007, Mr. Fleming took a different approach by advertising a rally in the local newspaper to encourage residents of Caledonia to join him in a rally at one of the illegal shops.
- 5) I attended this rally, organized by Mr. Fleming, to give moral support to the idea that laws are to be enforced regardless of one's Race.
- 6) On Dec. 7, 2007, I was charged with Counseling Mischief not committed based on video evidence taken by Turtle Island News at this rally.
- 7) Although the OPP fully knew these events were organized and lead by Doug Fleming, it is clear from the evidence that as early as Nov. 16, 2007 the OPP had instructed their officers to find some way to lay charges against me due to the fact that somehow I am to be blamed for every event that occurs in Caledonia.
- 8) Commissioner Fantino testified that he and other senior OPP officers always identify me as the leader/cause of everything in Caledonia. The stated goal of the OPP, since Dec. 2006, has been to find some way to force travel restrictions upon me even if I had committed no criminal act.
- 9) Prior to any allegations of wrong doing by me, Commissioner Fantino started emailing officers within the first 20 minutes of the rally directing his officers to arrest me.
- 10) Emails from the Commissioner instructed his officers to disregard the 'timid' and 'feeble' crown and to overlook 'legal nuances'. At one point the Commissioner sent out an email

stating, "I feel like doing what LA Police Chief Darryl Gates go out and arrest the goof myself" - Mr. Fantino testified the goof he was referring to was me.

- 11) Supt. Dennis, in an email states, "There is not an officer in the OPP who would not like to arrest him [Gary McHale]."
- 12) Disclosure released to me on Jan. 22, 2010 revealed that Insp. Renton was ordered to arrest me, regardless of the evidence, because of the fear the OPP had regarding a backlash that would occur because the OPP had to arrest Clyde Powless (a known native protest leader).

Supt. Ron Gentle states, "I spoke to Bill Renton around 1630 and he has a couple of issues. First, the assault of McHale by Bullet [Clyde Powless] was caught on all kinds of video as people turned the cameras on when the action happened. Unfortunately, the alleged assault committed by McHale, to this point, is not on video. The best we have is the victim claiming verbally to have been assaulted on at least one tape. We have witnesses on both sides that say he did and didn't commit an offence. We continue to interview witnesses and view video voluntarily provided to us. Unfortunately, the Commissioner may have been told of some things in the first instance that may have been assumptions on the part of some."

"We want to ensure, when we arrest and charge Bullet [Clyde Powless] we do the same with McHale to eliminate any of the usual issues. There are those who fear charging Bullet will be counterproductive - I disagree..."

- 13) Also disclosed on Jan. 22, 2010 was the following email dated Dec. 3, 2007 by Deputy Commissioner Chris Lewis who states:

Ron: Confidential please. I'm with the boss at a dinner tonight and we're discussing McHale. He's enquiring about the timing of the charges. Is there any way that charges could be laid sooner than later?

- 14) Commissioner Fantino further told his officers that even if they are unsuccessful in court there is still value in laying a charge because "we [OPP] will be able to publicly expose him for the mischief-maker that he is..."
- 15) Furthermore, after several days of investigation the investigators attempted to lay a charge of assaulting a Police Officer against Clyde Powless. Commissioner Fantino ordered his officers not to file that charge and also wrote a character reference letter to be used by Clyde Powless in court inferring that I was to be blamed for Mr. Powless attacking me.
- 16) Although the Crown has informed the court that I was charged after several days of thorough investigation, Insp. Renton, the officer who decided to charge me, testified that from the time of the allegation the offense occurred until he decided to charge me was one minute.
- 17) I was formally charged on Dec. 7, 2007 with Counseling Mischief not Committed s. 464. Insp. Renton, the Crown and Judge Cooper at my pre-trial all stated they had never heard of such a charge.

- 18) The above details are the basis for three Charter Challenges that I filed before my trial started back on Nov. 20, 2008 which was changed into a preliminary hearing after the first day of evidence.
- a) Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
 - b) Section 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
 - c) Section 2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly;
- 19) Disclosure request is focused primarily on four areas:
- a) The Police investigation between Dec. 1, 2007 to Dec. 7, 2007 and the involvement of senior OPP officers and the Deputy Minister in my arrest.
 - b) The rally itself held on Dec. 1, 2007.
 - c) The eight week lead up to Dec. 1, 2007 when Insp. McLean ordered officers to start preparing the paperwork to arrest me and get travel restrictions upon me.
 - d) The Charter challenges support the fact that the OPP a) targeted me for arrest, b) investigated and arrested me based on my Race, c) arrested me to appease native protesters, d) arrested me to fulfill the political will of the Ontario Government and e) the OPP's goal was to limit my rights to freedom of assembly and freedom of speech.
 - i) The ultimate goal of the OPP is to limit my travel and thereby control my free speech.
 - ii) The OPP has little concern whether or not the charges will hold up in court.
- 20) Various written disclosure requests have been filed with the Crown's office and as of the date of this application several of these request have gone unanswered.

Legal Issues:

- 21) The Crown has been denying or delaying disclosure directly related to the charge against me. The Crown/OPP have hidden disclosure that is directly related to the investigation that lead to my arrest.
- 22) The Crown/OPP have a duty to provide all disclosure related to the investigation in why and how I was charged. The Crown is duty bound to provide proper disclosure prior to me entering my choice of election which occurred on Nov. 24, 2008. In 1986 the Ontario Court of Appeals stated in *R. v. Girimonte*, 1997 CanLII 1866 (ON C.A.):

In holding that Part XVIII does not give a justice the power to review Crown disclosure decisions, I should not be taken as diminishing in any way either the Crown's obligation to provide timely disclosure or the valuable role that a justice may play in resolving disclosure disputes at an early point in the proceedings. The Crown must make full disclosure as soon as is reasonably possible. An accused's decision to have a preliminary inquiry is no excuse for either delaying or curtailing disclosure: Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, G.A. Martin, Chairman (1993), at pp. 171-173...

In rare cases, the Crown will not have provided sufficient disclosure to allow the accused to make a reasonably informed election. If the Crown takes the position that the requested disclosure will be made, but requests further time to make that disclosure, a justice should adjourn the taking of the election and allow the Crown a reasonable time to fulfil its disclosure obligations. If the time needed to make proper disclosure is inordinate, any delay in the proceedings will count against the Crown. If there is a true disclosure dispute, that is the Crown refuses to produce material which the defence claims should be produced and is essential to the making of an informed election, a justice may adjourn the taking of the election to allow the accused to seek the appropriate remedy in the superior court. If it turns out that the Crown has improperly withheld disclosure, any delay caused by the bringing of that application in the superior court will count against the Crown.

- 23) The Crown has a greater duty to provide complete disclosure due to the fact that I am self-represented.
- 24) The Crown has received three requests for additional disclosure since Sept. 2009 and each time has failed to even reply to these requests.
- 25) Since this application was originally heard in Sept. 2009, the ongoing refusal of the Crown to even reply to disclosure requests demonstrates a willful denial of disclosure. This repeated failure of the Crown is a violation my Charter Rights and Freedoms.
- 26) The Crown's failure to provide timely disclosure has greatly affected my ability to cross-examine witnesses and to call witnesses.
- 27) Furthermore, of the 20 volumes of disclosure provided to me so far, at least 10 volumes were disclosed after my trial started and after I entered a decision on election. Much of this disclosure should have been provided prior to my election to enable me to have a greater understanding of the case against me before I made this decision.
- 28) It should be noted that it is quite possible that I could have been convicted of the charge when the trial started in Nov. 2008 without the Crown disclosing much of the material I now have.
- 29) A thorough list of outstanding disclosure items and the explanation why this disclosure is needed will be filed with the factum for this application.

Preliminary Hearing Issues:

30) The failure of the Crown to provide timely disclosure has directly affected my preliminary hearing in the following ways:

- a) Key witnesses have testified prior to my receiving disclosure of what these witnesses had knowledge of.
- b) Although the lead investigator, Insp. Renton, has already testified, I still have never received his note book which he read from when he was a witness.
- c) It was only after the Judge ruled on the admissibility of the Crown's video evidence did I receive disclosure that the source of the video may have altered the video prior to handing it to the OPP. I was denied four requests for the OPP video interview of two people who had the video in their possession for two days prior to the OPP receiving the video.
- d) On Nov. 28, 2008 I entered into an agreement with the Attorney General not to call certain OPP officers and in return the Attorney General would not seek to quash my subpoena for OPP Commissioner Fantino. At the time I had limited disclosure and agreed not to call certain officers only because I didn't have clear evidence that they were material witnesses.
 - i) OPP Supt. Ron Gentle was one officer I had wanted to subpoena and one which I agreed not to subpoena for my preliminary hearing.
 - ii) On March 16, 2010, Supt. Gentle has now been formally charged with obstructing justice as it is alleged that he directly contacted lead investigator Insp. Renton and instructed him to arrest me regardless of the evidence in order to appease native protesters.
 - iii) OPP Deputy Commissioner Chris Lewis was also charged with obstructing justice on March 16, 2010, in that he knew and approved of Supt. Gentle's interference in what the OPP called the "McHale Investigation". Emails disclosed only recently show that Deputy Commissioner Lewis informed Commissioner Fantino of the plan to arrest Gary McHale regardless of the evidence.
- e) Insp. Renton and Commissioner Fantino have already testified at the preliminary hearing prior to the Crown providing the disclosure that lead to Supt. Gentle's and Deputy Commissioner Lewis' charge.

31) The Crown's/OPP's failure to provide timely disclosure has denied me vital evidence needed to cross-examine witnesses in my preliminary hearing.

Application Requests:

- 1) The applicant seeks a s. 24(1) Charter remedy of dismissing the charge against me.
- 2) Alternatively the applicant requests a new preliminary inquiry be ordered along with granting my Stinchcombe request that is being filed with the factum of this application.
- 3) Alternatively the applicant requests the court grant the applicant's Stinchcombe request that is being filed with the factum of this application.
- 4) Due to the Crown's failure to fulfill their disclosure obligations I seek cost of this application and if the court grants #1 or #2 above, I also request cost of defence for the preliminary hearing already held.

The Applicant May Be Served With Documents Pertinent To This Application:

By service in accordance with rule 5, at John Sopinka Court House 45 Main Street, East, Hamilton, Ontario, Dated at Hamilton, March, this 19 day of 2010, (year).

Gary McHale
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