PRIVATE PROSECUTIONS – Gary McHale, Informant

Background

Mr. Gary McHale has laid two Informations at the Ontario Court of Justice, Cayuga, Ontario, under s. 504 *Criminal Code* against Floyd Montour and Ruby Montour. He then sought to have process issued under s. 507.1 *Criminal Code*. A *pre-enquête* hearing took place regarding both of these Informations on June 17, 2008.

Cases Considered

Friesen v. R., [2007], Court File M210/07, (Ont. S.C.J.)
Haida Nation v. British Columbia (Minister of Forests), [2004], 3 S.C.R. 511, 2004 SCC 73 (S.C.C.)
Lynk v. Ratchford, [1995], N.S.J. No. 238 (N.S.C.A.)
R v. Edge, [2004], A.J. No. 316 (Alt. Prov. Ct.)
R. v. Grinshpun, [2004], 190 C.C.C. (3d) 483 (B.C.C.A.)
R. v. Jones, [1970], 2 C.C.C. 374 (B.C.S.C.)
R. v. Maitland, [1984], 42 C.R. (3d) 206 (Ont. H.C.)
R. v. Manuel, [2008], B.C.J. No. 557, BCCA 143 (B.C.C.A.)
R. v. Noel, [2004], NBCA 80 (N.B.C.A.)
R. v. Pierce, [2004], O.J. No. 192 (Ont. S.C.J.)
R. v. Southwick, [1967], 2 C.R.N.S. 46 (Ont. C.A.)
R. v. Whitmore, [1990], 51 C.C.C. (3d) 294 (Ont. C.A.)
Southam Inc. v. Coulter, [1991], 60 C.C.C. (3d) 267 (Ont. C.A.)
Robb v. York Region, [2005], O.J. No. 198 (Ont. S.C.J.)
Vancouver Sun (Re), [2004] SCC 43 (S.C.C)

Information Regarding Floyd Montour:

It is alleged that Floyd Montour on or about the 23 day of May, 2007, at Hagersville, Ontario, in the said region:

Count #1: Did commit the offence of mischief while obstructing, interrupting or interfering with any person in the lawful use, enjoyment or operation of property, contrary to the *Criminal Code*, s. 430(1)(d), and further,
Count #2: On or about the 12th day of May 2008 at Haldimand County in the said region did commit the offence of extortion, contrary to the *Criminal Code* s. 346(1), and further,
Count #3: On or about the 12th day of May 2008 at Haldimand County in the said region did commit the offence of mischief while obstructing, interrupting or interfering with any person in the lawful use, enjoyment or operation of property contrary to the *Criminal Code*, s. 430(1)(d), and further,
Count #4: On or about the 12th day of May 2008 at Haldimand County in the said region did commit the offence of intimidation, contrary to the *Criminal Code*, s. 423(1), and further,
Count #5: On or about the 13th day of May 2008 at Haldimand County in the said region did commit the offence of mischief while obstructing, interrupting or interfering with any person in the lawful use, enjoyment or operation of property, contrary to the *Criminal Code*, s. 430(1)(d).

Information Regarding Ruby Montour:
It is alleged that Ruby Montour on or about the 12th day of May, 2008, at Haldimand County in the said region:

Count #1: Did commit the offence of extortion, contrary to the *Criminal Code*, s. 346(1), and further,
Count #2: Did commit the offence of mischief by wilfully instruct, interrupt or interfere with any person in the lawful use, enjoyment or operation of property, contrary to the *Criminal Code*, s. 430(1)(d), and further,
Count #3: Did commit the offence of intimidation by blocking or obstructing a highway, contrary to the *Criminal Code*, s. 423(1)(g), and further,
Count #4: On or about the 13th day of May, 2008, at Haldimand County, did commit the offence of mischief by wilfully instruct, interrupt or interfere with any person in the lawful use, enjoyment or operation of property, contrary to the *Criminal Code*, s. 346(1).

To be amended Aug 20th Court #4

Receiving an Information
A private person has the right to lay a charge for a summary conviction offence as well as an indictable offence under s. 504 and 795 *Criminal Code*: *R. v. Southwick* (1967), 2 C.R.N.S. 46 (Ont. C.A.); *Lynk v. Ratchford*, [1995] N.S.J. No. 238 (N.S.C.A.). As has been stated above, Gary McHale laid the two Informations regarding Floyd Montour and Ruby Montour as a private person.

Considering Process
Issuing process in private prosecutions for federal offences is governed by s. 507.1 of the *Criminal Code*. Section 507.1 of the *Criminal Code* mandates that a formal *pre-enquête* with evidence under oath be held when process is considered on a private complaint.

A *pre-enquête* may also be referred to as a pre-inquiry and pre-hearing. They can only be heard by a justice of the peace who has been designated by the Chief Justice: s. 507.1(1) *Criminal Code*. All Ontario justices of the peace have been so designated by the Chief Justice.

Procedure at *Pre-enquête*
A *pre-enquête* is a formal hearing. The Informant testified under oath and on the record about the allegations which give rise to the charges against Ruby Montour and Floyd Montour. Other witnesses were called by the Informant to come and testify at the hearings. They also testified under oath and on the record. In addition to the Court hearing the sworn testimony of witnesses, documentary evidence was provided by Mr. McHale to the Court. The court viewed video DVDs, and a copy of one DVD was provided to the Court, containing material relevant to these proceedings.

The Attorney General's representative may appear at the hearing without being deemed to intervene in the hearing under s. 507.1(4) *Criminal Code*. During this hearing, the Crown was present as an observer, but did not participate in the hearing.

The principles to be applied in deciding whether process should issue are: "whether there is any evidence on each essential element of the charged offences, without engaging in any weighing of that evidence": *R. v. Pierce,* [2004], O.J. No. 192 (Ont. S.C.J.) applying *R. v. Whitmore,* [1990], 51 C.C.C. (3d) 294 (Ont. C.A.).

In Camera* and *Ex Parte

The hearing was held *in camera,* in accordance with the principles set out in *Southam Inc. v. Coulter,* [1991], 60 C.C.C. (3d) 267 (Ont. C.A.).

The hearing was held *ex parte*. The defendants were not notified that this hearing was taking place, as they had no right to be present or heard: s. 504(1)(a) *Criminal Code, Robb v. York Region,* [2005], O.J. No. 198 (Ont. S.C.J.).

Evidence at the *Pre-enquête*

All of the evidence heard in both cases was heard under oath pursuant to s. 507(3)(a) *Criminal Code* and applies by virtue of 507.1(8).

In addition, evidence was taken in accordance with section 540 *Criminal Code,* which applies to evidence taken at preliminary inquiries. This section applies to a *pre-enquête* to the extent that section is capable of being applied: s. 507(3)(b) *Criminal Code*. In particular, this means the evidence must be taken under oath and a record of the evidence made: s. 540(1)(a)(b). However, due to the *ex parte* nature of the *pre-enquête,* the accused individuals did not have an opportunity to cross examine the informant or any witness, something that is allowed at a preliminary inquiry: s. 540(1)(a) *Criminal Code.*

Discretion to Issue Process

A justice may issue process in the form of a summons or warrant only if the justice:

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
c) 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: s. 507.1(3) *Criminal Code.*

Section 507.1(2) *Criminal Code* provides that the justice shall issue process if the justice "considers that a case for so doing is made out." This language gives discretion to the justice to refuse to issue process if they are not satisfied, in the circumstances of the case, that it is appropriate. This may occur even where the informant has established a *prima facie* case.

A justice of the peace may not issue process unless a *prima facie* case, consisting of some evidence of every element of the offence, is made out: *R. v. Grinshpun,* [2004], 190 C.C.C. (3d) 483 (B.C. C.A.).

There is discretion not to issue process where the prosecution is found to be frivolous, oppressive, vexatious or abusive: *R v. Edge*, [2004], A.J. No. 316 (Alt. Prov. Ct.).

Most justices of the peace view their responsibility when considering process as including a determination of whether, in the totality of the circumstances, the matter is one the accused person should be called upon to defend in court. Is it a technical breach of minimal public consequences? Is it a result of a feud or ongoing dispute between two parties, which does not warrant the attention of the court? If the proceedings in any way suggest an abuse of the court process, process probably should not issue. However, if the informant appears to have a legitimate complaint, process should not be refused simply because the police have declined to lay a charge at the present time. In some instances, the police may be investigating charges of a similar nature, but will generally decline to provide this information to a complainant who may be considering private charges.

The Type of Process

If process is issued, the justice must determine what type of process to issue: a summons or a warrant.

The justice has jurisdiction to issue a warrant on a private prosecution: *Criminal Code* s. 507.1(2). The presumption in favour of a summons applies. A warrant should only be issued if a specific reason for issuing one exists.

Giving Reasons

Justices are required to give brief reasons for their decisions: *R. v. Maitland*, [1984], 42 C.R. (3d) 206 (Ont. H.C.). However, because it is a very early stage in the proceedings and the accused has had no opportunity to present a case against process being issued, it is prudent for justices to avoid including any findings of fact in their decisions.

Remedies Available to Informant and Accused

If process is issued, the accused may seek to have the information quashed when he or she appears in court. Alternatively, the accused may seek to have the crown intervene to withdraw the charge.

If a justice refuses process, the Informant may seek an order of *mandamus* from the Superior Court. If granted, the order will direct the justice to re-hear the matter: *R. v. Jones*, [1970], 2 C.C.C. 374 (B.C. S.C.).

If a justice refuses process, the Informant also has a right to seek process from another justice of the peace if new evidence is available: s. 507.1(7) *Criminal Code*. This means that a justice of the peace, before commencing such a re-hearing, must be satisfied that there is new evidence in support of the allegation.

If neither of these things is done within six months of process being refused, the information is deemed never to have been laid: s. 507.1(6) *Criminal Code*.

This means an informant cannot bring an application for judicial review of a decision to refuse process that was made more than six months previously: *R. v. Grinshpun*, [2004], 190 C.C.C. (3d) 483 (B.C. C.A.).

The Decision

Based on the testimony of the Informant and other witnesses that appeared before me on June 17, 2008, and after reading the documentary evidence, including authorities, and having viewed the video clips on the DVD, I am satisfied that the two Informations before me regarding Floyd Montour and Ruby Montour are valid and that the Informant Gary McHale has presented some evidence of all of the essential elements of the offences, i.e., a *prima facie* case.

Process will be issued.

I will instruct the Clerk of the Court today to prepare a summons for Floyd Montour and a summons for Ruby Montour, ordering them to appear in this Court regarding the charges that are on the two Informations laid by Mr. McHale.

Released: July 8, 2008, Ontario Court of Justice, Cayuga (Haldimand County), Ontario.

Signed: Justice of the Peace Dan M. MacDonald