COURT FILE NO.: 25/09
DATE: 2009-12-31

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
GARY McHALE	)	Self-Represented
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
ONTARIO ATTORNEY GENERAL	)	Mr. Andrew Bell and Ms. Annemarie Carere, Representatives of the Ontario General of Ontario, Office of the Director of Crown Operations
Respondent	)	
	)	Christopher Diana, Counsel for the Police Commissioner of the Ontario Provincial Police
Intervener	)	
	)	**HEARD:** November 5, 2009 and reserved

REASONS FOR JUDGMENT

CRANE J.

[1] This is an application in the nature of mandamus brought pursuant to Section 507 .1 (5) of the *Criminal Code of Canada* to this Court to compel the designated justice of the peace to issue a summons to the accused named in an information sworn by the Applicant.

[2] The initiating circumstance of the proceedings was an e-mail of Mr. Craig Grice, a councillor of Haldimand County, sent from the Haldimand County account to a constituent, Mr. Jason Smith, Applicant's Book of Records, Tab 2.

[3] The Grice e-mail was posted two days later on 7 April 2007, on a website titled "McHale Communications". On this same day an email was sent to the Mayor and the councillors of Haldimand County Council all individually named. This is a letter of two pages concluding with the words; "Yours truly, J. Fantino, Commissioner."

[4] It is upon this latter communication that Mr. McHale has laid an information pursuant to Section 504 of the *Criminal Code of Canada.* The charge alleged is that the 7 April 2007 communication of Commissioner Fantino constituted an offence under Section 123 (2) of the *Criminal Code of Canada* by influencing or attempting to influence a municipal official in municipal activities (Section 123 (1)(a) thru (d)) by means of threats (Section 123 (2)(b)).

[5] Section 504 C.C.C. provides that a justice shall receive an information provided the provisions of that section are complied with. This process of compliance by the justice is not a part of the record on this application, however, the implication is that the compliance was made.

[6] The matter went to the next step by way of referral to a justice designated pursuant to section 507.1 (1) to consider whether to compel the appearance of the accused on the information.

[7] Justice of the Peace, David Brown, on a pre-enquete hearing on 11 August 2009 at Cayuga, Ontario heared evidence and the submissions of the informant and of counsel for the

Attorney General of Ontario. He refused to issue a summons or warrant under section 507.1(2). It is this refusal as to count 2 of the information that is the subject of this application for judicial review for relief in the nature of mandamus, pursuant to Section 507.1 (5) C.C.C.

REVIEW OF THE HEARING

[8] The transcript of the proceedings at the pre-enquete held on 11 August, 2009, by the Justice of the Peace is contained under tab 5 of the applicant's Book of Records. In my view, Brown, J.P.; has correctly set out the test he is to apply pursuant to section 507 of the *Criminal Code*. He puts his inquiry as follows:

> Before considering the evidence given at this pre-enquete, I will outline the test to be applied. The test to be applied is that there is some evidence on each of the essential elements of the alleged offence. The evidence does not have to be overwhelming; it does not have to be probable. Simply, there has to be some evidence on each of the essential elements of the alleged offence. This is an extremely low threshold and does not involve the trying of any issues, the assessment of the credibility of any witnesses, the weighing of any evidence, or the analysis of any possible defences. It is analogous but not identical to the test on the preliminary inquiry as enunciated in the case of U.S.A. v. Sheppard. In the context of that test, I will examine the evidence presented by Mr. McHale.

[9] The British Columbia Court of Appeal considered the *Code* requirements setting the process as tests, *R. v. Grinshpun*, 190 C.C.C. (3d) 483, paras. 32 to 34;

> **The Tests**
>
> 32. In considering whether to issue process, a Provincial Court judge must first determine if the information is valid on its face and, secondly, determine whether the evidence presented to the judge discloses a prima facie case of the offences

alleged. (*F. (R.) v. R.* (1998), 38 R.F.L. (4th) 328, [1998] B.C.J. No. 1163 (B.C. C.A.); *R. v. Whitmore* (1989), 51 C.C.C. (3d) 294 (Ont. C.A.).)

33. A *prima facie* case will not be established unless there is some evidence against the accused on all the essential elements of the charges. This requirement was fully discussed by Stewart J. in *F. (R.) v. R.* (October 23, 1997), Doc. New Westminster X049317 (B.C. S.C.). His comments were subsequently approved by this Court on appeal (*supra*).

34. On *mandamus* the reviewing judge must determine whether it can be said that the pre-inquiry judge exercised his or her discretion judicially, according to law. (*Blythe v. R.* (1973), 13 C.C. C. (2d) 192 (B.C. S.C.), approved in *F. (R.) v. R.* (C.A.), *supra*.)

[10] The learned Justice of the Peace categorized the essential elements of the subject offence under count 2 as follows: (transcript, tab 5, page 57)

1. A threat;
2. Intended to cause a "municipal official" to fail to perform an "official act"; and
3. Causation (i.e. there is some evidence that the municipal official was influenced by the threat).

[11] On the element of a threat the Justice states:

> There is absolutely no doubt in my mind that this e-mail was perceived as threatening by the Mayor and by Councillor Grice and presumably by the other councillors. (Tab 5, page 56, line 14 – 18)

[12] In my observation, the Fantino email may reasonably be read as serious statements of a directing mind going to intent.

[13] The Fantino email states that Ms. Trainer and each of the named Councillors were not to support the public attendances of Gary McHale in Caledonia, nor to make statements of support of Mr. Mc Hale to the residents of Caledonia.

[14] The issue before the Justice on the pre-enquete was whether Julian Fantino made a threat to influence or in an attempt to influence Mayor Trainer and/or the Council of Haldimand County to perform or fail to perform an official act.

[15] The Justice found that there was evidence of a threat to satisfy the required test. Indeed as I read the reasons, he reported to make a finding that a threat was made.

[16] The Justice then considered the evidence as to whether the activity enjoined was an official act. His reasons indicate that he was unable to determine whether the element of an official act was established. In this exercise it appears that he was misdirecting himself away from the enumerated test.

[17] The Justice of the Peace seemingly weighed the evidence of "official act" to come to a determination, he concluded: (Tab 5, page 60)

> I find that the allegation is too vague and that the things alleged by the informant that the elected officials did not continue to do were not official acts within the meaning of section 123.

[18] The evidence on the record is that Councillor Grice sent an e-mail letter to his constituent using the official communication facility of Haldimand County Council. The content of the Grice communication was upon that Councillor's position with regard to public rallies carried on by the complainant in this information, Gary McHale. The letter of Julian Fantino to Council

made specific reference to the activity being the aforesaid Grice letter as that which is to be stopped. This evidence (the Grice letter) may reasonably be categorized as communication by an official upon an official channel, under the duties of that official (Councillor Grice) to communicate Haldimand County municipal business, and in particular Ward 3 business (the Town of Caledonia), to a constituent within that Ward. The further evidence on this record is that Mayor Trainer and Councillors, including Mr. Grice, had appeared as Municipal officials at public rallies held or organized by Mr. McHale. These rallies broadly speaking involved Mr. McHale's critical views on the standard of policing and policing policies for the Town of Caledonia (a part of the Municipality of the County of Haldimand). The letter of Julian Fantino would be reasonable read as to enjoined and prevent further such support and appearances in the future.

[19] Whether or not this evidence is conclusive as to the essential ingredient of an "official act" is an open question, seemingly of fact and law. However, in my view it is certainly evidence of an official act. Given that Parliament chose not to define official act with regard to this section, and on the submissions of counsel that no court of record has made a determination, in my view, this issue is not for determination on a pre-enquete, in camera hearing.

[20] On his element (3), the Justice stated that there was no evidence of causation between the email and the doing or not doing of the official act. He stated:

> I also find that there is no evidence of causation between the sending of the email and the doing or not doing of any official acts by the elected officials.
>
> That, in my view, is an essential element of the offence, and given that there is no evidence on that, I decide not to issue process in respect of count 2 of the information.

[21] The subject section of the *Criminal Code* in the information, section 123(2), does not have an essential element that the threat caused a change in the municipal officer's behaviour. This is put explicitly by the judgment in this Court of *R. v. Gyles* (2003), Carswell Ont. 3180. That case dealt with a charge under section 123(1) of the *Code*. The Court stating at paragraph 135 that:

> [I]t is irrelevant whether or not the resultant actions of Mr. Gyles were altered by the receipt of the money. It is clear from the decision in R. v. Gentile, [1993] O.J. No. 992 (Ont. Prov. Div.) that the Crown is not required to prove that any official actions were altered as a result of the benefit. One can well understand the principle underlying Parliament's decision not to make proof of a change in action an essential element of the offence. If officials could take money for doing what they were elected to do, it would, as the Crown put it, "reward the subtle".

[22] I observe on the record in this application there is evidence of influenced behaviour by the Mayor and County Council in response to the Julian Fantino letter. However, in my view this is not an essential element of the offence and it seemingly caused a misdirection of proceedings in the course of the pre-enquete hearing.

MANDAMUS

[23] This application does not require a determination as to whether the learned Justice of the Peace made an error in law, but whether or not the Justice exercised his discretion judicially in accordance with law. Mandamus is an extraordinary remedy which lies to a justice who having jurisdiction to be exercised, decline to act on a matter preliminary to the hearing on the merits (*R. v. Kipp* [1965], S.C.R. 57; *R. v. Toutissani* [2007], O.J. No. 1671)

[24] The record contains evidence on each of the essential ingredients of count 2 in the subject information. The learned justice of the peace declined to issue process. It is his duty to do so on this record, mandamus will issue to him.

CRANE J.

Released: December 31, 2009

COURT FILE NO.: 25/09
DATE: 2009-12-31

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

GARY McHALE

Applicant

- and -

ONTARIO ATTORNEY GENERAL

Respondent

BEFORE: **The Honourable Mr. Justice D.S. Crane**

COUNSEL: Gary McHale, Self-Represented

Mr. Andrew Bell and Ms. Annemarie Carere, Representatives of the Ontario General of Ontario, Office of the Director of Crown Operations

Mr. Christopher Diana, Counsel for the Police Commissioner of the Ontario Provincial Police, Intervener

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