IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

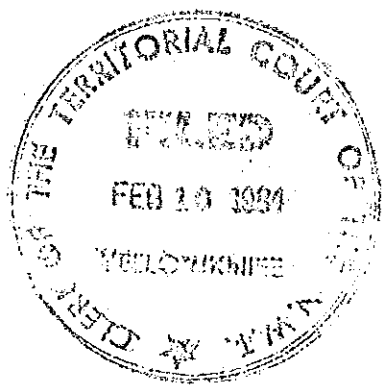
GORDON TREVOR BURROUGHS

and

GEORGE BRADEN

Heard at Yellowknife, N.W.T. on January 4, 1984

Reasons filed: February 10, 1984



REASONS FOR JUDGMENT

of

His Honour Judge R. M. Bourassa

On the 28th of December, 1983, Gordon Trevor Burroughs (hereinafter referred to as Burroughs) appeared before a Justice of the Peace for the Northwest Territories, and pursuant to Section 455 of the Criminal Code of Canada laid an Information in writing alleging that George Braden had committed an indictable offence, contrary to Section 111 of the Criminal Code of Canada, in these words:

> "The informant says that George BRADEN, Minister of Justice and Public Services, Government of the Northwest Territories, on or about the 3rd day of November, A.D. 1983, at or near the City of Yellowknife in the Northwest Territories, DID UNLAWFULLY breach the (public) trust by failing to provide an acceptable reason for his failure to obtain a specific record from the Ministry of Transport of the Government of Canada and thereby did commit an offence, contrary to Section 111 of the Criminal Code of Canada."

Burroughs now appears before me (January 4, 1984), pursuant to Section 455.3 of the Criminal Code of Canada requesting that process issue.

> "455.3
> (1) A Justice who receives an Information, other than an Information laid before him under Section 455.1, shall
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> (a) hear and consider, ex parte,
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> (i) the allegations of the informant, and
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> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

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(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him to answer to a charge of an offence.

(2) No Justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A Justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence upon oath; and

(b) cause the evidence to be taken in accordance with Section 468 in so far as that section is capable of being applied.

(4) Where the Justice considers that a case is made out for compelling the accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) disclose reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused."

The informant Burroughs was heard and his evidence transcribed and documents filed on the 4th of January, 1984, and based on that material I must determine whether or not to issue a summons or warrant to compel Braden to appear to answer to the charge. The only statutory 'test' or guideline delineating my discretion is contained in Subsection 1(b) "where he considers that a case for so doing is made out..." a summons (or warrant) shall issue. There is no statutory indication of the level

of proof required, the burden of proof, or parameters to be considered in the exercise of the Justice's discretion, however, case law affords some assistance in this matter.

It is clear that this discretion is to be exercised judicially in *Evans v. Pesce and Attorney General for Alberta*, 8 C.R., p. 201, Riley, J. comments at page 214: "...all he is required to do under the Code, is hold a hearing, fairly listen to the representatives of the applicant, and then within the discretion granted to him, come to a determination.", and further at page 216, quoting and approving a passage in *Marcil v. Lanctot*, (1914), 20 R.L.N.S., 237, 25 C.C.C., 223, 28 D.L.R. 380, where Charbonneau J., stated:

> "The magistrate in this case discharges the duties of a Judge and of a public officer. He first examines the complaint to ascertain if there has been an offence, he can even make some kind of a preliminary inquiry if he thinks fit, and if he decides that there is sufficient cause prima facie, he must issue the warrant."

The Ontario Court of Appeal, Gale, C.J.O., Kelly and Arnup, JJ.A. in *Regina v. Allen*, 20 C.C.C., 2d, p. 447, when dealing with an appeal involving an interpretation of Section 455.3 state at page 448:

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> "In our view the determination which is made by the Justice under s. 455.3(1) is a determination, to be made judicially, whether on the evidence which is placed before him upon that hearing a case for the issue of a summons has been made out."

Another parameter was set out by the British Columbia Supreme Court in *Regina v. Jones, Ex Parte Cohen*, 2 C.C.C., (1970), p. 374, which dealt with an interpretation of Section 455 (formerly 440(1)) where Ruttan, J. states:

> "The case here comes down to the narrow point of whether or not the Magistrate did enter on a hearing of the evidence of this issue and make his decision based thereon, or whether he was governed by extraneous considerations which prevented him from a hearing within his jurisdiction on the merits.",

the proposition being that it is improper for a Magistrate to consider extraneous matters.

I have as well considered the decision of *R. v. Lapinsky*, (1966) 3 C.C.C., p. 97, 47 C.R., p. 346, 54 W.W.R., p. 559.

Brian Harris in the 8th Edition of *The Criminal Jurisdiction of Magistrates*, in addressing this matter, sets out further considerations which with respect I would adopt.

> "In the exercise of his discretion whether or not to accede to an application for the issue of a summons a Justice must at the very least ascertain:

(i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present;

(ii) that the offence alleged is not out of time;

(iii) that the Court has jurisdiction;

(iv) whether the informant has the necessary authority to prosecute.

In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious. Since the matter is properly within the Magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances. The Magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet: no charge has been made."

Clearly all of the relevant circumstances must be considered, and any approach to this issue of whether or not to issue process must not be bound up in a list of conditions or formalities.

With respect to the matter at hand; based on the information and evidence I have before me, it appears that the applicant believes himself aggrieved as a result of a trial held in 1978. He believes that a witness perjured himself at that time to his (Burroughs') detriment. To rectify the

alleged wrong the applicant entered into correspondence and discussions with the Department of Transport (employer of the alleged perjurer), the Department of Justice, Yellowknife, the Yellowknife R.C.M.P. Detachment, and the Department of Justice in Ottawa, for the express purpose of having the alleged perjurer charged and brought to trial.

The applicant speaks of a contract entered into between himself and Mr. Braden whereby the latter committed himself to solving the applicant's problems:

> "I wrote to Mr. Braden advising him that I was not satisfied with the explanation given by both the R.C.M.P. and the Crown Prosecutor for not prosecuting the Ministry of Transport officials who testified in Court against myself while under oath...Well, it is my understanding that this is a contract. I went to him and asked him for assistance, and he told me what to do. I wrote back to him and he failed to comply, at which time...He failed to respond to my letter, and I waited two months for a reply at the end of which time I wrote him a note indicating that either if he could not give me the specific record required that I - or a reasonable explanation why he can't obtain this record, that I could see no alternative but to lay a charge against him under Section 111 of the Criminal Code of Canada."

Burroughs is dissatisifed because Mr. Braden did not comply with his wishes and now seeks to coerce Braden into so doing.

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On the 14th of November, 1983, Burroughs appeared before a Justice of the Peace and laid an Information in identical terms to the one before me, and process was issued. The matter came before Chief Judge J.R. Slaven in Territorial Court on December 20th, 1983, at which time Crown Counsel advised the Court that pursuant to Section 508 of the Criminal Code, the Attorney General was intervening directly, and a Stay of Proceedings dated the 19th of December, 1983, was filed with the Court.

Dealing with the points of law to be considered, I make the following findings: The alleged offence is an indictable one and there is no specific provision in the Criminal Code restricting the invocation of this Section within certain time limits such as six months in the case of summary conviction offences; this matter is properly before me pursuant to Section 455.3, and I have the jurisdiction to hear it. At this point in time the applicant has the right to prosecute and the intervention of the Attorney General by way of granting permission is not required. The applicant has the authority to lay an Information pursuant to Section 455, which provision states: "Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an Information in writing and under oath before a Justice...". (My emphasis)

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There is absolutely no evidence before me, contained in the Information itself or on the evidence and exhibits before me indicating an abuse of public trust or an attempt by Mr. Braden to mislead or, in fact, to do or not do anything that would smack of criminality or an abuse of his official position for personal gain, one of the limits described by deWeerdt, J., in *R. v. Dennis, Kubin and Frank*, (1983) N.W.T.R. 235, (1983) W.C.D. 230. Additionally, the Information itself may be mortally deficient for the same reasons described by deWeerdt, J., in *R. v. Dennis, Kubin and Frank*.

Finally, I note from the exhibits that the applicant has made numerous threats of criminal proceedings and has been pursuing this matter of alleged wrongdoing since 1982.

On the material before me and my understanding of the law, and after a careful consideration of the matter, I am unable to come to any other conclusion than that the essential ingredients of the offence are simply not present, much less are they described, and secondly, that the claim by the applicant is purely vexatious and mischievous and designed to embarrass or coerce the accused into satisfying the applicant's insatiable demands.

For these reasons I refuse to issue process.

R. M. Bourassa
Judge
Territorial Court