Court of Appeal No.: C50442

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF a Judicial Review pursuant to the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;
AND IN THE MATTER OF the *Police Services Act*, R.S.O. 1990 c. P. 15;
AND IN THE MATTER OF Superintendent K. MacDonald
AND IN THE MATTER OF Inspector A. Jevons.

B E T W E E N:

COMMISSIONER, ONTARIO PROVINCIAL POLICE

Respondent/ Appellant in Appeal

-and-

KENNETH MACDONALD AND ALISON JEVONS

Moving Parties / Respondents in Appeal

MOVING PARTIES FACTUM
(Motion to Receive Fresh Evidence)

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BETWEEN:

COMMISSIONER, ONTARIO PROVINCIAL POLICE

Appellant

-and-

KENNETH MACDONALD AND ALISON JEVONS

Respondents

INDEX TO FACTUM OF THE MOVING PARTIES
(Motion to Receive Fresh Evidence)

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FACTUM OF THE MOVING PARTIES
(Motion to Receive Fresh Evidence)

PART I – NATURE OF THE MOTION

1. The Respondents in Appeal ("Respondents") seek to adduce fresh evidence regarding events that have occurred since the application for judicial review was heard by the Divisional Court. The fresh evidence details the recent actions of the Appellant in Appeal ("Appellant") in seeking reprisal against another defence witness, (Ret.) Inspector Keith Messham. The Respondents respectfully submit that this evidence is highly relevant to the issues raised within the appeal, and address the motive of the Appellant in

originally commencing an application for judicial review. In order to fairly determine the issues in this proceeding the evidence should be admitted.

PART II – THE FACTS

Chronology of Proceedings Below

2. The Respondents repeat and rely upon the facts as plead in paragraphs 1 to 78 of their factum on the main appeal. For ease of reference, the relevant facts from the proceeding below, as they relate to Inspector Messham, are briefly reproduced below.

3. On October 2, 2008, Mr. Falconer advised the prosecution and Justice Montgomery that a defence witness, Inspector Messham, had inadvertently provided a copy of an internal investigation report to junior counsel. As a result of this disclosure, prosecution counsel advised Justice Montgomery that Inspector Messham's conduct may have breached the confidentiality obligations contained in Section 80 of the *Police Services Act*.

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 12, Tab 2 of the Moving Party's Motion record; Transcript of October 2, 2008

4. The Respondents were concerned that Inspector Messham would be the target of reprisals for his inadvertent error. As such, Mr. Falconer placed his concerns on the record and sought assurances from the prosecution and investigating officers that they would not recommend that *Police Service Act* charges be initiated against Inspector Messham. The prosecution advised the Tribunal that it would not recommend charges against Inspector Messham; however, the investigating officer, Superintendent Van Zant declined to issue the same assurance.

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 13, Tab 2 of the Moving Party's Motion record; Transcript of October 2, 2008

Fresh Evidence

5. On January 22, 2009, while the full panel of Divisional Court was still under reserve, Mr. Falconer was advised that Chief Superintendent Scott Todd had been assigned to conduct a criminal investigation into whether a defence witness, Inspector Messham, had committed a criminal offence in relation to his inadvertent error described on the October 2, 2008 transcript.

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 11, Tab 2 of the Moving Party's Motion record

6. On January 27, 2009, Mr. Falconer wrote to the Deputy Minister of Community Safety and Correctional Services, John Burke, enclosing the Subject Officers' complaint pursuant to Part VI of the *Public Service of Ontario Act*, 2006. The Disclosure of Wrongdoing complaint form is the means by which current and/or former employees in public service, including the Ministry of Community Safety and Correctional Services ("Ministry"), are legally able to report wrongdoing to the Ethics Executive (Deputy Minister of the Ministry) and the Integrity Commissioner. The complaint alleges that Commissioner Fantino, while still under cross-examination, engaged in acts of reprisals against defence witnesses, including Inspector Messham.

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 14, Tab 2 of the Moving Party's Motion record

7. On February 9, 2009, counsel for Inspector Messham, Scott Fenton, sent a letter to Chief Superintendent Scott Todd advising him that it was his, "firm belief that the criminal investigation that [Todd] was instructed to carry out has been directed for a wholly improper purpose and as a means of directing reprisal against [Messham] for testifying as a defence witness in the MacDonald/Jevons matter".

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 15, Tab 2 of the Moving Party's Motion record

8. The Deputy Minister declined to investigate the complaint on the grounds that the matter was appropriately dealt with under the *Police Services Act*. As a result, The Subject Officers, pursuant to section 116(b) of the *Public Service of Ontario Act*, 2006 submitted their complaint to the Integrity Commissioner, Lynn Morrison, on the basis that complaint was not being dealt with appropriately by the Deputy Minister.

> Affidavit of Odi Dashsambuu sworn March 27, 2009, at para. 16, Tab 2 of the Moving Party's Motion record

9. On April 7, 2009 counsel for the Appellant advised the Respondents that the investigation into Inspector Messham was concluded and that a decision was made not to lay any charges. On May 15, 2009, Inspector Messham was advised that the Ontario Provincial Police had decided to deny him his Retirement Badge based purely on the fact of the ongoing criminal investigation (which was ultimately discontinued) at the point of his retirement.

> Affidavit of Odi Dashsambuu sworn June 17, 2009, at para. 38 and 39, Tab 3 of the Moving Party's Motion record

10. The above noted facts are recited in the Affidavits of Odi Dashsambuu sworn March 27, 2009 and June 17, 2009. The March 27, 2009 affidavit was filed with this Honourable Court in opposition to the Appellant's motion to stay the proceedings below. The June 17, 2009 affidavit was file with this Honourable Court in support of the Respondents' motion to lift a stay of the Divisional Court's costs ruling.

PART III – ISSUES AND THE LAW

11. Subsection 134(4)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, permits this Honourable Court to admit fresh evidence on an appeal. It provides:

> 134. (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ...

(b) receive further evidence by affidavit, ... or in such other manner as the court directs; ...

to enable the court to determine the appeal.

12. The four part test for admission of fresh evidence on appeal was set out by the Supreme Court of Canada in *R. v. Palmer* as follows:

(i) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

(ii) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(iii) The evidence must be credible in the sense that it is reasonably capable of belief, and,

(iv) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

R. v. Palmer, [1980] 1 S.C.R. 759 (S.C.C.) at pg. 13, Tab 18 of the Respondents' Book of Authorities; *Monteiro v. Toronto Dominion Bank*, [2005] O.J. No. 4749 (Ont. Sup. Ct.) at para. 3, Tab 19 of the Respondents' Book of Authorities; *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (Ont. C.A.) at para. 53, Tab 20 of the Respondents' Book of Authorities; *Chiang (Trustee of) v. Chiang*, [2009] O.J. No. 41 (Ont. C.A.) at paras. 73-77, Tab 21 of the Respondents' Book of Authorities.

12. While it may be unusual to admit evidence on appeal which was not in existence at the time the matter was originally heard, an exception was articulated by McKinlay J.A. in *Sengmueller v. Sengmueller* at paragraph 10:

Most of the cases dealing with the admission of fresh evidence on appeal involve evidence which, though in existence prior to trial, for some reason other than lack of diligence, was not tendered at trial. This case involves evidence which did not exist prior to trial. One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such

evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections are valid and compelling. However, in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted. In my view in the particular and unusual circumstances of this case, this is such a case. This court admitted evidence not inexistence at the time of trial in *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 at p. 17, 72 D.L.R. (3d) 464 (C.A.), stating:

> The competing considerations, on the one hand, are the public interest in finality to litigation, and, on the other hand, the affront to common sense involved in a Court shutting its eyes to a fact which falsifies the assessment.

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208 (Ont. C.A.) at pg. 4, Tab 22 of the Respondents' Book of Authorities.

13. Thus, where the evidence did not exist at the time of the original hearing, this Honourable Court will exercise its discretion to admit the fresh evidence where:

(i) The evidence is necessary to deal fairly with the issues on appeal; and

(ii) To decline to admit the evidence could lead to a substantial injustice in the result.

Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155 (Ont. C.A.) at para. 6, Tab 23 of the Respondents' Book of Authorities.

14. The evidence sought to be admitted relates to the conduct of the Appellant after the Divisional Court heard the application for judicial review. The fresh evidence regarding the applicant's conduct is detailed in two affidavits filed by the Moving Party in separate motions before this Honourable Court that have not been seriously contested by the Appellant. As such, the evidence is credible and the validity of its content cannot reasonably be contested.

15. This Honourable Court is entitled to examine the motives behind the commencement of any appeal, including an appeal that seeks a recusal of an adjudicator. It is respectfully submitted that as a matter of fairness, this Honourable Court should not entertain the Appellant's appeal when it appears that the purpose of the original motion and the Application is oblique or improper.

> *Authorson Litigation guardian of) v. Canada (Attorney General)* [2002] O.J. No. 2050 (Div. Crt.) at para. 4, Tab 2 of the Respondents' Book of Authorities; *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821 at para 29, Tab 6 of the Respondents' Book of Authorities

16. The fresh evidence sought to be filed by the Moving Party will assist this Honourable Court in assessing the motives of the Appellant in commencing the application for judicial review and pursuing the appeal.

PART IV – ORDER REQUESTED

17. The Respondents request an order abridging the time for service of the notice of motion, motion record and factum under Rule 3.02 and an order providing that the motion is properly returnable before the panel hearing the appeal under Rule 61.16(2) of the *Rules of Civil Procedure*

18. The Respondents request an order admitting into evidence the redacted copies of the affidavit of Odi Dashsambuu, and the exhibits thereto, sworn March 27, 2009 and June 17, 2009.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 28th day of August 2009.

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SCHEDULE "A"

AUTHORITIES

1. *R. v. Palmer*, [1980] 1 S.C.R. 759 (S.C.C.)
2. *Monteiro v. Toronto Dominion Bank*, [2005] O.J. No. 4749 (Ont. Sup. Ct.)
3. *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (Ont. C.A.)
4. *Chiang (Trustee of) v. Chiang*, [2009] O.J. No. 41 (Ont. C.A.)
5. *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.)
6. *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.)
7. *Authorson Litigation guardian of) v. Canada (Attorney General)* [2002] O.J. No. 2050 (Div. Crt.)
8. *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821

SCHEDULE "B"

STATUTORY PROVISIONS

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Powers on appeal

134.(1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

R.S.O. 1990, c. C.43, s. 134 (1).

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

EXTENSION OR ABRIDGMENT

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

R.R.O. 1990, Reg. 194, r. 3.02 (2).

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

R.R.O. 1990, Reg. 194, r. 3.02 (3).

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

MOTIONS IN APPELLATE COURT

Rule 37 Applies Generally

61.16 (1) Rule 37, except rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made) and rule 37.17 (motion before commencement of proceeding), applies to motions in an appellate court, with necessary modifications.

O. Reg. 263/03, s. 6 (1).

Motion to Receive Further Evidence

(2) A motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence) shall be made to the panel hearing the appeal.

R.R.O. 1990, Reg. 194, r. 61.16 (2).

Commissioner, Ontario Provincial Police
Applicant/Appellant

-and-

Kenneth MacDonald and Alison Jevons
Respondents/Respondents in Appeal
Court of Appeal File No. C50442

COURT OF APPEAL FOR ONTARIO

Proceedings commenced in TORONTO

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