**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R. v. MacKenzie, Guptill*, 2024 NSPC 24

**Date:** 20240412
**Docket No:** 8555089 to 8555096
**Registry:** Dartmouth

His Majesty the King

v.

Jeremy MacKenzie and Morgan Guptill

**DECISION ON MOTION TO QUASH SUBPOENA/s. 700(2) *CRIMINAL CODE***

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| **Judge:** | The Honourable Judge Jill Hartlen |
| **Heard:** | April 3, 2024, Dartmouth, Nova Scotia |
| **Decision:** | April 12, 2024 |
| **Charges:** | *Criminal Code:*<br>s. 430(1)(c)<br>s. 264(2)(c)(i)<br>s. 372(3)<br>s. 423.2(1)(b) |
| **Counsel:** | Emma Woodburn and Madeline Smilie-Sharp, for the Crown<br>Sherif M. Foda and Rick Frank, for Jeremy MacKenzie<br>Morgan Guptill, representing herself – no standing in the application. |

**By the Court:**

## 1 Overview

[1] In a pre-trial *Charter* motion brought on behalf of Mr. MacKenzie, the Crown has subpoenaed two lawyers, Barry Whynot, Director of Nova Scotia Legal Aid, and Damian Penny, a private lawyer in Halifax, Nova Scotia, who provided on-call duty service for Nova Scotia Legal Aid on the night of March 22, 2022. Mr. MacKenzie brought a motion to this court to quash these subpoenas. Alternatively, he wants me to excuse the witnesses pursuant to s. 700(2) of the CC. This is my decision on that motion.

## 2 Background

[2] By way of background, Mr. MacKenzie brought a 10(b) *Charter* application claiming that the implementational component of his right to counsel was not honoured by the police after his arrest on March 22, 2022. He filed the 10(b) motion in August 2023. The hearing into this motion started on January 31, 2024 and evidence was called throughout the day in relation to this 10(b) *Charter* motion. Mr. MacKenzie completed his evidence on the motion on January 31, 2024. Mr. MacKenzie did not testify on the motion.

[3] In the course of pursuing this 10(b) *Charter* application Mr. MacKenzie has attempted to demonstrate through the cross-examination of police witnesses that he did not receive any consultation with any lawyer after his arrest, let alone the lawyer of his choice, which was Mr. Stan MacDonald, K.C..

[4] On February 1, 2024, after essentially all the evidence on the 10(b) motion was in, the Crown disclosed a typed note by Cst. Adam Power wherein Cst. Power, who was the booking officer on the night of March 22, 2022, made a text note in Versadex that Mr. MacKenzie: "contacted a lawyer at approx. 11:16 pm on March 22, 2022". The name of the lawyer is not provided nor does Cst. Power stipulate that it is duty counsel. The Crown then called Cst. Power as a witness for the Crown on the 10(b) motion. Cst. Power has no memory of the events surrounding that entry.

[5] The Crown's theory, based on the new disclosure, is that Mr. MacKenzie consulted with on-call duty counsel. Everyone agrees that Legal Aid duty counsel that night was Damian Penny. The Crown has asked Legal Aid to confirm if Mr. MacKenzie talked to Mr. Penny on March 22, 2022, but Legal Aid refuses to do so without a waiver from Mr. MacKenzie.

[6] It appears as if everyone but Legal Aid agrees that the metadata (name of counsel; time and duration of call) associated with a counsel call is not covered by solicitor-client privilege. Mr. MacKenzie agrees with the Crown that the metadata associated with such a call would not be solicitor-client privileged but nonetheless is unwilling to provide the waiver required by Legal Aid.

[7] The Crown has subpoenaed both Mr. Barry Whynot and Mr. Damian Penny and wants me to find a waiver of solicitor-client privilege such that both witnesses are compelled to provide information about whether Mr. MacKenzie had contact with Damian Penny that night.

## 3 **Mr. MacKenzie's position**

[8] Prior to the two witnesses taking the stand for the Crown, Mr. MacKenzie brought a motion to quash the subpoenas. Alternatively he wants the court to otherwise excuse these two witnesses from testifying. He claims it has not been demonstrated that the witnesses have material information. He says the Crown is fishing because it is pure speculation that when Cst. Power wrote the word "lawyer" that he was referring to Legal Aid duty counsel. Mr. MacKenzie argues that to allow the Crown to compel the attendance of a representative of Nova Scotia Legal Aid in these circumstances would amount to an overbroad search power over the database of Nova Scotia Legal Aid. He argues that the

Crown conduct would, in effect, conscript the privilege-holder, Nova Scotia Legal Aid, against one of its purported former clients during a *Charter* motion on the basis of speculation. He says the issuing Justice had no jurisdiction to issue a subpoena to compel solicitor-client privileged material, even if it exists: *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860. He says the trial judge has jurisdiction to excuse the witness under s. 700(2) of the *Criminal Code* and/or in circumstances where it is demonstrated the subpoena is an abuse of process: *R. v. Maleki*, 2006 ONCJ 401. He says the Crown is engaged in an abusive and impermissible fishing expedition: *Raymond v. Halifax Regional Municipality*, 2020 NSSC 316.

[9] Mr. MacKenzie further argues that Mr. Whynot's and Mr. Penny's testimony is not helpful for the decision I have to make on the 10(b) motion. He argues that the law is clear that once Mr. MacKenzie asked to speak to counsel of choice, the police must make reasonable efforts to put Mr. MacKenzie in touch with the requested counsel before the police can suggest alternate counsel, including duty counsel. He says the onus is on the Crown to establish "reasonable efforts". He says only the police know what actual efforts they made to contact Stan MacDonald. Whether or not it was reasonable for Mr. MacKenzie to stop waiting for Stan MacDonald and pivot to alternative counsel depends on

whether the efforts the police made to contact Stan MacDonald were reasonable. For this determination, Mr. Whynot and Mr. Penny do not assist the court, argues Mr. MacKenzie.

## 4 Crown position

[10] The Crown acknowledges that Mr. MacKenzie did not speak with Stan MacDonald on March 22, 2022. The Crown concedes that the "lawyer" referenced in Cst. Power's note is not Stan MacDonald. The Crown argues that the relevance of the information that Mr. Whynot and Mr. Penny possess is plainly obvious. The Crown says that a call to "a lawyer" at 11:16 at night in these circumstances almost certainly means that lawyer was Legal Aid duty counsel. The Crown says that the information possessed by Mr. Whynot and Mr. Penny – whether it does or does not confirm that Mr. MacKenzie received a call with duty counsel will be of assistance to the court and that it will be difficult for the court to determine the issues on the 10(b) *Charter* motion without the information possessed by these witnesses. The Crown reminds the court that it is Mr. MacKenzie's onus to establish a 10(b) *Charter* breach and argues that the Crown should not be fettered by Mr. MacKenzie in its response to his motion.

[11] Alternatively, if relevance is not found, the Crown argues that Mr. MacKenzie is acting in bad faith and his actions are precluding the Crown from demonstrating the relevance of the witnesses. The Crown also argues that Mr. MacKenzie cannot assert a privilege over a call he is attempting to argue never happened.

[12] The Crown says in these circumstances, I should not quash the subpoenas or excuse the witnesses.

## 5 The Witnesses

[13] As far as I am aware, Mr. Whynot and Mr. Penny have not applied to quash their subpoenas in Supreme Court. Neither have asked the court to be excused from their subpoena obligations.

## 6 The Issues

[14] The issues are:

1. Do I have the jurisdiction to entertain this application?
2. If so, should I quash the subpoenas or otherwise excuse the witnesses under s. 700(2) of the CC.

## 7 Quash a Subpoena

[15] Section 698 of the *Criminal Code* sets out a pre-condition for issuing a subpoena: the issuing judicial officer must be satisfied that the person "is likely

to give material evidence in a proceeding". The only recourse for quashing a subpoena is on certiorari to a superior court. I do not have the jurisdiction to quash a subpoena.

8 **700(2) *Criminal Code***

[16] Turning to Mr. MacKenzie's argument that I should excuse the proposed witnesses under s. 700(2) of the *Criminal Code*.

[17] With respect, I do not interpret s. 700(2) of the *Criminal Code* as giving me the jurisdiction to do what Mr. MacKenzie is requesting.

[18] Section 700(2) of the *Criminal Code* states:

> *A person who is served with a subpoena issued under this Part shall attend and shall remain in attendance throughout the proceedings unless he is excused by the presiding judge, justice or provincial court judge.*

[19] As stated, I do not interpret this section the way that Mr. MacKenzie has urged me to interpret it. Section 700(2) focuses entirely on the subpoenaed witness' obligations to the court and does not provide an avenue for one party to essentially apply to quash a subpoena issued for a witness for the other party. Also, because s. 700(2) sets out the obligations of the subpoenaed person, it follows that only the subpoenaed person can make an application to be excused

under s. 700(2) such as was the case in *R. v. Maleki*, 2006 ONCJ 401, a case relied upon heavily by Mr. MacKenzie.

[20] I am also mindful of what the contrast between s. 700(2) *Criminal Code* and s. 537(1.01) *Criminal Code* indicates about Parliament's intention. Section 537(1.01) sets out the powers of a judge sitting as a preliminary inquiry judge to regulate and restrict the witnesses who may be called at the preliminary inquiry. If Parliament had intended to confer on trial judges the ability to refuse to hear from witnesses for reasons other than purely formal or scheduling-related matters, if could have included in s. 700(2) wording similar to that in s. 537(1.01).

[21] I do not read s. 700(2) as vesting jurisdiction in a provincial court judge to consider the application being made by Mr. MacKenzie and as a result, I do not have the jurisdiction to decide Mr. MacKenzie's motion with respect to Mr. Whynot and Mr. Penny's subpoenas. Mr. MacKenzie is trying to use s. 700(2) to indirectly do something that requires an application to a superior court.

[22] That being the court's decision on issue #1, I cannot decide issue #2.

Jill Hartlen, JPC