SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Public Prosecution Service) v. Howe*, 2016 NSSC 207

Date: 2016-08-09
Docket: Halifax No. 453774
Registry: Halifax

Between:

Nova Scotia Public Prosecution Service

Applicant

v.

Lyle Howe, the Nova Scotia Barristers' Society, and a Hearing Panel appointed pursuant to the *Legal Profession Act*, SNS 2004, c. 28, as amended SNS 2010, c. 56

Respondents

Restriction on Publication: See Order of July 29, 2016

Judge: The Honourable Justice James L. Chipman

Heard: July 28 and 29, 2016, in Halifax, Nova Scotia

Counsel: Peter C. McVey, Q.C. for the Applicant
Jeanne Sumbu, for Lyle Howe
Marjorie Hickey, Q.C. and Daniel Wallace, for The Nova Scotia Barristers' Society
Scott Sterns, (watching brief) for the Hearing Panel

IT IS ORDERED THAT pursuant to Section 44(3) of the *Legal profession Act* no person shall publish or broadcast any information that identifies or may tend to identify any of the following persons who are identified during this hearing:

1. Any clients of Mr. Lyle Howe;
2. Any co-accused of clients of Mr. Lyle Howe;
3. Any clients of Mr. Robert Hagell.

By the Court:

Overview

[1] The Nova Scotia Public Prosecution Service made an application in Special Chambers to quash seven Crown Attorney subpoenas authorized for issuance by the Hearing Panel in *The Nova Scotia Barristers' Society v. Lyle Howe*. The parties to the proceeding, Lyle Howe and the Nova Scotia Barristers Society, opposed the application. In particular, Mr. Howe argued the Hearing Panel was in lawful exercise of its authority when it authorized the subpoenas to be issued. The Nova Scotia Barristers' Society, in addition to arguing that absent exceptional circumstances the Court should refrain from intervening in an interlocutory decision of the Hearing Panel, took the position that (argued by way of a preliminary motion) that the application was premature.

[2] Following submissions, on July 29, 2016, I rendered an oral decision allowing the preliminary motion of the Nova Scotia Barristers' Society with written reasons to follow. These are my reasons.

Background

[3] Nova Scotia Public Prosecution Service (PPS) counsel Mr. McVey filed an affidavit (inclusive of 22 exhibits) sworn July 22, 2016. The Nova Scotia Barristers' Society (NSBS) lawyer Ms. Hickey filed an affidavit (inclusive of five exhibits) sworn July 26, 2016. The affiants were not cross-examined.

[4] The affidavit evidence confirms the Hearing Panel has heard evidence over the course of approximately 25 days beginning in December, 2015 and continuing until late last month. At the time of the Special Chambers application, the NSBS had yet to close its case, but anticipated doing so in early August. As part of their case, the NSBS called the following Crown Attorneys:

1. Melanie Perry;
2. Michelle James;
3. Alicia Kennedy;
4. Robert Kennedy;
5. Timothy McLaughlin;
6. Cheryl Byard;
7. James Giacomantonio; and

8. Scott Morrison.

[5] With the exception of Mr. McLaughlin (who is a Crown Attorney with the Federal Prosecution Service), all of the above are PPS Crown Attorneys. In addition to the above, prior to closing their case, the NSBS anticipated calling PPS Crown Attorney Bill Gorman.

[6] Given that the hearing has gone on for 25 days, Ms. Hickey estimates that the transcript of proceedings before the Hearing Panel is in the order of 5,000 pages. Ten of the exhibits appended to Mr. McVey's affidavit provide transcript excerpts:

Letter	**Pages**
D	3,450 – 3,568 3, 692 – 3,716
G	4,156 – 4,204 4,236 – 4,291 4,247 – 4,248
I	1,807- 1,866
K	348 – 353 403 – 408
L	629 – 633 696 – 700 728 733 – 753 760 771 – 781 834 – 835 899 – 927
M	1,202 – 1,206 1,280 – 1,283 1,298 – 1,319 1,330 1,339 – 1354 1,359 – 1,360 1,381 – 1,384 1,927 1,950 – 1,955 2,356 – 2,399
N	2,971 – 2,972 3,007 – 3,052 3,069 – 3,072 3,085 – 3,190

P	1,577 – 1,626
S	2,141 – 2,203
U	2,141 – 2,330

[7] In the result, the Court has but only a small sampling of the voluminous evidence and submissions which have come before the Hearing Panel. Accordingly, I have very little context with which to judge the PPS's submissions. In any event, for the reasons which will become clear, I do not propose to interfere with the Hearing Panel's decision to issue the subpoenas. Indeed, the Court is loathe to intervene at this stage in this interlocutory challenge to the Hearing Panel's authority.

[8] During argument, Mr. McVey confirmed that when Melanie Perry, Michelle James, Alicia Kennedy and Robert Kennedy appeared before the Hearing Panel, they did not have legal counsel with them. When the Federal Crown appeared, he was accompanied by legal counsel and the PPS also attended the hearing on this date (June 29, 2016).

[9] Three PPS Crown Attorneys (Cheryl Byard on July 18; James Giacomantonio on July 19; and Scott Morrison on July 25) who appeared before the Hearing Panel had PPS legal counsel present.

[10] PPS counsel's attendance came in the wake of their June 24, 2016 letter addressed to the Hearing Panel. This 12-page letter (exhibit E of Mr. McVey's affidavit) provides their position in relation to the PPS witnesses Mr. Howe requested in a letter to the Hearing Panel dated June 20. In their June 24 correspondence, Mr. McVey and his co-counsel, Glenn R. Anderson, Q.C., make essentially the same arguments (as to why Mr. Howe's requested subpoenas should not be granted) to the Hearing Panel that have been made on this application.

[11] During Ms. Byard's testimony, there was one objection raised by PPS counsel. During Mr. Giacomantonio's testimony, PPS counsel did not object. When Mr. Morrison gave his evidence, Mr. McVey objected, as follows:

Lyle Howe	Right, you could have charged [redacted] with aggravated assault when you did the charge review, correct?
Scott Morrison	Ah…
Peter McVey	The Crown has an objection, third party objection [51:54]
Peter McVey	I've signalled, I've signalled quite clearly a month ago that questions can't go to exercises of prosecutorial discretion
Donald	Prosecutors don't lay charges.

Murray*	
Peter McVey	This is a, well have him repeat the question, this is an issue of what he could have pursued, what he could have pursued, it's a pure exercise of discretion. Given the Kreiger case, Anderson, Henry, I have them all here, the P… (?) case was a coroner's inquiry where somebody tried to do exactly the same thing after a death. It's simply not permitted under the Constitution of Canada which is not a small thing. So I would ask that the questions be limited to the facts, as in what did you actually do, what happened from that [52:40] No problem with that. I'm letting it all roll with this witness and other witnesses, but he cannot examine the witness on why or that what if's or anything that goes to an exercise of prosecutorial discretion. The courts can't even do that never mind administrative tribunals. Now I can continue, but the law is clear, it's strong in the Supreme Court of Canada law.
Ronald MacDonald**	Thank you Mr. McVey, we won't view this in any way asking questions about prosecutorial discretion. What's he's asking about it do the facts, were they capable of justifying perhaps a different charge in different situations, but don't in any way ask this witness to talk about his exercise of discretion. It's just simply could these facts have been prosecuted in a different way and have they been in different circumstances. And having been a prosecutor for most of my career, uh, that's our decision on the matter, so thank you very much, you can have a seat.
Peter McVey	Well I'll continue to listen chair and I'll sit down but if the cross-examination goes across the line we'll be asking that the witness be excused and if we apply to another body where… the law will be applied (?)
Ronald MacDonald	Mr. McVey these questions do not, these questions do not impact prosecutorial discretion. He's asking the witnesses if on these facts could they have, could they, could they, could they be a, could they also be this type of charge, that's not a prosecutorial discretion charge. That's a question on a legal point. That's just not a prosecutorial, he's not asking this witness why didn't you charge him with this, he's asking this witness could it have been this type of charge or that type of charge. So, thank you very much, we've ruled against you.

* Panel member

** Panel Chair

[Excerpted from four-page unofficial Hearing Panel transcript provided to the Court by Ms. Hickey on July 29, 2016]

[12] In Mr. Howe's June 20 letter, he submitted an updated list with 57 witnesses, including several PPS staff ranging from the office receptionist to the

Director. In his affidavit at paras. 13-30, Mr. McVey provides background with respect to the submissions the Hearing Panel received from Mr. Howe, the NSBS and PPS before rendering its oral decision on July 21, 2016. In its decision, the Hearing Panel authorized the issuance of many of Mr. Howe's requested subpoenas including the following present and former PPS lawyers:

1. Eric Taylor, Crown Attorney;
2. Glenn Scheuer, Crown Attorney;
3. Alonzo Wright, Crown Attorney;
4. Perry Borden, Crown Attorney;
5. Denise Smith, Q.C., Deputy Director;
6. Art Theuerkauf, Q.C., retired Crown Attorney; and
7. Adrian Reid, Q.C., retired Crown Attorney.

[13] Through the affidavit evidence, the Court was provided with the transcript of the oral decision rendered on July 21 (transcribed the next day) along with the written decision of the Hearing Panel following up on its oral decision, which was issued on July 25, 2016.

Orders Requested

[14] By Amended Notice of Application in Chambers filed July 27, the PPS applied for the following:

1. Abridging the time period for notice, pursuant to *Civil Procedure Rule* 2.03;

2. Granting, if necessary, an interlocutory injunction under *Rule* 41.0(6) and s. 43(9) of the *Judicature Act*, RSNS 1989, c. 240, s. 1; and

3. Quashing the seven subpoenas referred to in para. 6.

[15] The NSBS filed its Notice of Contest on July 26 and the other Respondents filed their Notices of Contest on July 27. On July 26, there was a recorded telephone conference before Associate Chief Justice Smith, at which time procedural matters for the hearing were addressed. Importantly, ACJ Smith confirmed the Court would deal with the NSBS's request for a preliminary motion to be heard at the outset of the July 28 hearing.

Discussion

[16] The PPS says that the subpoenas should be quashed on one or more of the following grounds:

1. The witnesses have no evidence that is both relevant and not collateral to the charges brought against Lyle Howe before the Board;

2. The issuance of subpoenas for the witnesses by the Board and compelled oral evidence before the Board is not necessary within the meaning of Section 45(2)(a) of the *Legal Profession Act*; or

3. The scope of the inquiry desired by the Respondent, Lyle Howe by means of the disputed subpoenas is clearly *ultra vires* the lawful authority of the Board.

[17] The *Legal Profession Act*, SNS 2004, c. 28, s. 42 provides:

> **Powers of Hearing Committee**
>
> 42 (1) The Hearing Committee, and any hearing panel thereof, has all the powers conferred by this Act and the regulations in the discharge of its functions as well as the powers, privileges and immunities of a commissioner under the Public Inquiries Act.
>
> (2) A hearing panel may determine its own procedure and may
>
> (a) issue subpoenas and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the hearing panel considers necessary for the full consideration of a charge;
>
> …
>
> (d) administer oaths and solemn affirmations;
>
> (e) receive and accept such evidence and information on oath, affidavit or otherwise as the hearing panel in its discretion sees fit, whether admissible in a court of law or not;
>
> (f) prescribe the disclosure obligations of the parties prior to a hearing;

> (g) compel, at any stage of a proceeding, any person to provide information or to produce documents or things that may be relevant to a matter before it;

[18] The meaning of "necessary" in a statue governing the issuance of a subpoena is a question of statutory interpretation. (See *Frame v. Nova Scotia (Commission of Inquiry into the Westray Mine Disaster)*, [1997] NSJ No. 62 at paras. 4 and 9.)

[19] In *Frame*, Saunders, J. (as he then was) concluded that the insertion of the word "necessary" into the statutory language governing the issuance of a subpoena under Section 7(1)(a) of the *Interprovincial Subpoena Act*, attracted this interpretation: "'Necessary' means essential, indispensable, unavoidable and undeniable." (See *Frame* at para. 17.)

[20] The PPS provided the Hearing Panel with *Frame* on June 30, 2016; however, the July 21 and 25 decisions do not refer to it. While this is perhaps unfortunate, when I read the July 21 and 25 decisions along with the Hearing Panel's June 13 subpoena issuance decision, I do not find this to be a critical omission. It is certainly not enough to warrant, at this stage, the Court's interference with the Hearing Panel's determinations, which I will review below.

[21] In their July 25 written decision, the Hearing Panel set out the PPS' position as follows:

> The PPS suggested that Mr. Howe has not asked any of the PPS witnesses what they have to say, and thus cannot know what their evidence will be. They therefore suggest that Mr. Howe's attempt to subpoena these persons is the definition of a fishing expedition and not appropriate. They suggested that a witness must be at least linked to something specific. Overall, the PPS seemed to suggest that very few of the witnesses listed by Mr. Howe had any relevant evidence to offer.
>
> On the point of relevance, the PPS did not acknowledge that issues of bias and unfair discrimination were relevant to this hearing. Mr. Anderson, speaking on behalf of the PPS, stated that the only things relevant to the hearing were matters related to the charges. It would seem by his answers that the PPS takes the position that bias and unlawful discrimination should not be considered as issues necessary to a full consideration of the charges against Mr. Howe.

[22] In the decision, the Hearing Panel referred to their earlier decision of June 13, which is a 14 page decision setting out (in my view correctly) the applicable

test for the issuance of a subpoena. In the July 25 decision, beginning at the bottom of p. 8 and continuing to the top of p. 10, the Hearing Panel deals with the PPS personnel requested by Mr. Howe. With the exception of Martin Herschorn, Q.C. (PPS Director), the Hearing Panel authorizes subpoenas for all of the requested lawyers. As for the PPS employees, the Hearing Panel determines they are unnecessary.

[23] In my view, the Hearing Panel offers fulsome reasons for its decisions. Furthermore, and significantly regarding the NSBS preliminary motion that the Court rule on the issue of prematurity, the Panel states as follows at the close of their decision:

> Many of the witnesses to be called by Mr. Howe may have necessary evidence, but that evidence relates to discrete areas. This decision gives notice that we will enforce the limits of each witness and what they can speak to. In addition, we will also re-assess the necessity of all witnesses based on the evidence as it develops. In that sense we may revisit the witness list at a later time.

[24] The above is consistent with what the Hearing Panel stated earlier in their decision at p. 6:

> However, it is generally quite difficult to pre-determine where the line is crossed from being necessary to unnecessary. A Panel may have to hear from some witnesses before making the decision. Therefore, there may be situations where a subpoena will be issued for a witness but based on subsequent testimony this Panel may rule they are no longer necessary. Each case will turn on its own facts.

[25] It is important to note that no subpoenas have yet been issued. Rather, the Hearing Panel rendered its decision in the context of determining which witnesses, at the time, have necessary evidence to offer on Mr. Howe's behalf. The Hearing Panel initially set out the test for issuing subpoenas in its June 13, 2016 decision. It expanded on this ruling in its written decision at p. 5, finding that:

> … a subpoena should only be issued to a witness who is likely to have evidence that is necessary to have full consideration of the charge which may include having evidence about matters not directly related to the charges. This would include a consideration of a 'cost' of the evidence.

[27] As Ms. Hickey argued (in my view, accurately) at p. 16 of her brief:

> Unlike the *AGNS v. Moore* case where the Court concluded the complainant was on a fishing expedition, in the present case the Panel specifically addressed evidence already given in this hearing by Alicia Kennedy which may be connected to that of a proposed witness (at page 14); it noted that proposed witness Adrian Reid, Q.C. was a complainant in a matter that forms a specific charge in this hearing (page 15); it noted that an issue had arisen throughout the hearing to date about the existence of a policy that may or may not have applied specifically to Mr. Howe (page 15); and it tied in the other proposed witnesses to matters specifically heard in the testimony to date (page 14-15). The *Moore* case is distinguishable on this basis. Further, the Board in *Moore* had issued a specific decision stating that the Crown prerogative does not include the right of the Crown to refuse to comply with a subpoena. In the present case no such decision has been rendered by the Panel.
>
> The Society agrees with the PPS that subpoenas to witnesses should not be used for discoveries of Crown Attorneys. That is not what the Hearing Panel has ordered. The Panel's decision focuses on issues that were completely remote from any exercise of prosecutorial discretion. Nor does the decision invite wide ranging inquiry into the workings of the Crown. The Panel specifically tied its decision on each witness into matters already addressed during the hearing.

[28] It is apparent from their decision that the Hearing Panel was not making a final decision regarding evidence to be provided by the PPS Crown Attorneys who may be subpoenaed. The evidence reveals that Mr. Howe himself, in submissions to the Panel, made the point that he may be narrowing down the witness list as the hearing continues.

[29] In all of the circumstances, it is apparent that the PPS application is premature. In this regard, I note, as follows:

- no subpoenas have been issued;
- there is potential for some of the subpoenaed witnesses not to be called; and
- the Panel has made it clear they will be vigilant with respect to the specific evidence that may be called.

[30] Accordingly, I find the NSBS's arguments persuasive as well as the authorities they have put forward with respect to the notion of "ripeness". As Justice Ritter stated at para. 38 in *Edmonton Telephones Corp v. Stephenson*, [1994] 160 A.R. 352 (upheld on appeal (1994) 162 A.R. 139):

> A case is not "ripe" for a decision if it depends upon future events that may occur. There is little Canadian law dealing with the question of ripeness. However, it is my view that the principles relating to mootness are the same as those that affect the question of ripeness. In mootness there was a controversy between the parties which no longer exists. In the ripeness there is a potential or likely controversy which awaits a future event.
>
> [Emphasis added]

[31] Further, in *Dale v. Nova Scotia (Workers Compensation Appeals Tribunal)*, 2015 NSCA 71, Justice Farrar noted as follows at para. 27:

> Lorne Sossin in "Mootness, Ripeness and the Evolution of Justiciability", in Todd L. Archibald and Randall Scott Echlin, *Annual Review of Civil Litigation 2012* (Toronto: Carswell, 2012), at p. 96 provides useful guidance on the principles to be applied when considering whether there is an adequate factual foundation to permit a court to undertake a *Charter* analysis:
>
> > Whereas speculative questions involve disputes which will only arise if certain facts occur, abstract or academic questions arise where a dispute lacks a factual foundation altogether. The principle underlying this rule is that the adversarial system requires a factual dispute to which the relevant law can be applied. If there is no dispute, or if the relevant law cannot be so applied, the court should decline to hear the matter. Scarce judicial resources should not be allocated to resolve questions in which the parties have no live interest. ...
> >
> > [Emphasis added]

[32] Although Justice Farrar cited the above in the context of a *Charter* analysis, I find Prof. Sossin's words to be appropriate here. Indeed, it is my determination that the PPS's concerns have yet to manifest themselves and it remains to be seen if they will. The matter for which the PPS seeks judicial intervention is not ripe and I must therefore decline their request for the Court to intervene.

[33] Accordingly, it is not necessary for the Court to intervene at this time. If the Crown Attorneys are called and if evidence is elicited that offends the Crown prerogative or prosecutorial discretion or is irrelevant and if the Panel fails to intervene, it may then be appropriate for the PPS to then consider judicial intervention. In this regard, the PPS has made it clear that their counsel will be in attendance for all evidence of the Crown Attorneys and, if necessary, will raise objections. In the event that the PPS objections are appropriate but overruled by the Hearing Panel, then one may foresee a return application.

[34] If the parties to this application are unable to resolve costs, I will receive written submissions on or before September 30, 2016.

Chipman, J.