SUPREME COURT OF NOVA SCOTIA

Citation: *Raymond v. Halifax Regional Municipality*, 2018 NSSC 149

Date: 20180620
Docket: Hfx No. 467138
Registry: Halifax

Between:

Michele Hovey Raymond

Appellant

v.

Halifax Regional Municipality

Respondent

D E C I S I O N

Judge: The Honourable Justice Christa M. Brothers

Heard: March 28, 2018, in Halifax, Nova Scotia

Decision: June 20, 2018

Counsel: Michele Hovey Raymond, self-represented appellant

Karen E. MacDonald and Ted Murphy, for the respondent

Jason T. Cooke and Sarah Baddeley (Articled Clerk), for the Office of the Information and Privacy Commissioner of Nova Scotia ("OIPC")

Brothers, J.:

Overview

[1] This decision relates to contemporaneous motions to quash subpoenas issued against:

- Nova Scotia Information and Privacy Commissioner, Catherine Tully (Tully);
- former investigator, Heather Burchill (Burchill);
- HRM employees, Rosemary MacNeil (MacNeil) and Kelly Denty (Denty); and
- solicitor for HRM, Karen MacDonald (MacDonald).

[2] The motions were filed by the Office of the Information and Privacy Commissioner of Nova Scotia (OIPC) and Halifax Regional Municipality (HRM). The context for these motions is described below.

[3] The underlying proceeding is an appeal advanced by the appellant, Ms. Raymond, pursuant to s. 494(1) of the *Municipal Government Act*, S.N.S. 1998, c. 18 (the *MGA*), in relation to a long-standing dispute involving a property located on Boscobel Road, in Halifax. The appellant has significant concerns with regards to a development in her area and its impact on her property rights, in particular a pre-existing right of way. Given this concern, the appellant sought information relating to the development *via* two applications for access to records, one on December 20, 2014, known as AR14-298 and one on August 14, 2015, known as AR15-263.

[4] In AR14-298, the appellant sought the following records:

- Full size copy of concept plan "Boscobel-on-the-Arm" (15 March 2012)
- All communications related to this plan, to/from all HRM departments and/or elected officials incl.
- Full text of Ekistics letter to development office (8 June 2012)
- All records related to changes between concept plan of 15 March 2012 and concept plan of 12 August 2012

[5] In AR15-263, the appellant sought the following records:

> All references in files #18130 & #17674
>
> To "PID 40774127", "40774127
>
> "85 Boscobel Road"
>
> "Boscobel House"
>
> "Michele Raymond", "Michelle Raymond", "Raymond-MacKinnon"
>
> "Raymond Property"
>
> "Existing Household"
>
> "Existing Households"
>
> "Right-of-Way"
>
> Other than occurrences on maps or plans.

[6] Every public body or municipality that receives a request for records (pursuant to Part XX – Freedom of Information and Protection of Privacy under the *MGA)* is directed to search for records which are responsive to the request. Responsive records, once identified, are disclosed unless an exemption is permitted under the *MGA.* The appellant made two applications for access to records.

[7] The pending appeal is from a decision of the Access and Privacy Officer, Nancy Dempsey, the responsible officer pursuant to s. 493 of the *MGA*. The decision is dated July 26, 2017.

[8] The five subpoenas subject to challenge were issued by the appellant, who is seeking additional information for introduction at the appeal *de novo*.

[9] Initially, the HRM withheld records under a variety of cited exemptions, including that the records contained third party information. There was an informal resolution process which resulted in disclosure of much of the withheld information. What remained at issue were records withheld under certain stated exemptions, and the appellant's claim that the search for records by the HRM was not adequate. The HRM conducted a second search for records in response to the appellant's initial concern about search adequacy. The appellant continues to maintain this concern.

[10] The appellant sought a review of the HRM Access and Privacy Officer's decision regarding access to records pursuant to s. 32 and s. 34 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (*FOIPOP*). The

review is done by the OIPC. The OIPC, through Tully, the Commissioner, issued Review Report 17-05 outlining fourteen recommendations with regards to disclosure of records. After consideration of these recommendations, Dempsey rendered a decision regarding the requested records. It is this decision of the HRM Access and Privacy Officer that is subject to appeal to this Court, scheduled for June 26, 2018.

Issues

[11] The issues in both motions are as follows:

1. Does the Court have jurisdiction to quash a subpoena in this type of proceeding?
2. What is the test for quashing the subpoenas?
3. Should the subpoenas be quashed?

The Court's Jurisdiction to Quash Subpoenas

[12] While there is no express provision in the *Civil Procedure Rules* to quash subpoenas in these circumstances, the Court has inherent jurisdiction to quash subpoenas based on its necessary ability to control and prevent abuses of its own processes. A summary of this inherent power was discussed by Rosinski, J. in *Howatt v. Chandler*, 2016 NSSC 216:

> 16 Where there have been applications to quash a properly issued subpoena, though the Rules are silent on the quashing of subpoenas, our Courts have held that the evidentiary burden is first on the party who requested issuance of the subpoena to establish a link of relevance between the proposed witness and an issue in the proceedings; once satisfied, the burden shifts to the opposing party to show good cause, such as oppressiveness or abuse of power, as to why the subpoena should be quashed - *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 20, per Associate Chief Justice Smith, citing Justice Tidman's decision in *Bowater Mersey Paper Co. Ltd. v. Nova Scotia (Minister of Finance)*, [1991] N.S.J. No. 114.
>
> 17 As Justice Tidman observed in *Bowater Mersey*, this Court's power to quash subpoenas arises under common law. More specifically, it arises under this court's inherent jurisdiction to control the court's process, in order to ensure the just determination of legal disputes. Surely, if this court has the jurisdiction to compel a non-resident witness to testify within Nova Scotia, it must also have the jurisdiction to compel a resident-party to litigation in Nova Scotia to attend for an IME outside Nova Scotia, but within Canada.

[13] Further, in *Ocean v. Economical Insurance Co*., 2010 NSSC 20, the court articulated the test and the burden of proof when quashing a subpoena.

> 6 Our *Civil Procedure Rules* are silent on the issue of the quashing of a subpoena. In *Bowater Mersey Paper Co. Ltd. v. Nova Scotia (Minister of Finance)* (1991), 106 N.S.R. (2d) 416 (S.C.) Tidman, J. held that when dealing with a motion to quash a subpoena the evidentiary burden is first on the issuer of the subpoena to establish a link of relevance between the proposed witness and the issues in the proceeding. The burden then shifts to the opposing party to show good cause why the subpoena should be quashed. His Lordship stated at para. 10:
>
> > ... if the issuer establishes a link of relevance between the proposed witness and the issue in the proceedings, he is entitled prima facie to have a subpoena issued. The burden then shifts to the attacker to show good reason, such as oppressiveness or abuse of power, why the subpoena should be quashed.

[14] Public officials are subject to these principles and are *prima facie* compellable if the party wishing to enforce the subpoena can show that the information the official has is relevant and necessary to the proceedings. (Alan W. Mewett and Peter J Sankoff, *Witnesses* (Carswell: Toronto, 1991) (loose-leaf revision 2015-3) at 5-4.

[15] Having set out the test to be applied, I will turn to the two motions and deal with them separately.

The OIPC's Motion

Legislation

[16] Before considering each specific subpoena, a review of the applicable legislation is helpful to understand the context in which relevance is being assessed.

[17] Part XX of the *MGA* governs freedom of information and protection of privacy in the municipal context. Incidentally, many of the provisions in Part XX of the *MGA* mirror provisions in the *FOIPOP Act*.

[18] Tully has been subpoenaed to give evidence at the scheduled appeal and to bring records with her to the appeal.

[19] Tully has not rendered any decision in this matter. Her report is not the subject of appeal. Acting as a Review Officer under the *MGA*, Tully prepared a report pursuant to s. 492 of the *MGA*, which provides:

> Duties of review officer on completing review
>
> 492(1) On completing a review, a review officer shall
>
> (a) prepare a written report setting out the review officer's recommendations with respect to the matter and the reasons for those recommendations; and
>
> (b) send a copy of the report to the responsible officer, and where the matter was referred to the review officer by
>
> (i) an applicant, to the applicant and to any third party notified pursuant to this Part, or
>
> (ii) a third party, to the third party and to the applicant.
>
> (2) In the report, the review officer may make any recommendations with respect to the matter under review that the review officer considers appropriate.

[20] Tully's report was provided to the Access and Privacy Officer, Dempsey. It was Dempsey who rendered a decision, which is subject to appeal.

[21] Dempsey is considered the responsible officer. Section 493 of the *MGA* outlines the duties of the responsible officer in rendering a decision and what use can be made of the review officer's report (i.e. Tully's report):

> Duties of responsible officer on receipt of report
>
> 493(1) Within thirty days after receiving a report of a review officer, the responsible officer shall
>
> (a) make a decision to follow the recommendation of the review officer or any other decision that the responsible officer considers appropriate; and
>
> (b) give written notice of the decision to the review officer and the persons who were sent a copy of the report.
>
> (2) The responsible officer shall give notice, in writing, to the persons who were sent a copy of the report and the decision of the responsible officer, of their right to appeal the decision of the responsible officer to the

> Supreme Court of Nova Scotia within thirty days of the date of making the decision.
>
> (3) Where the responsible officer does not give notice within the time required, the responsible officer is deemed to have refused to follow the recommendation of the review officer.

[22] It is the decision of the Respondent, the HRM, through the Access and Privacy Officer, Dempsey, that has been appealed pursuant to s. 494 of the *MGA*.

[23] As a result of the application of s. 495 of the *MGA*, the appeal is a hearing *de novo*. The Information and Privacy Commissioner, acting as a review officer, is not a party to the appeal.

[24] The relevance of any evidence from Tully and Heather Burchill, a former investigator at the OIPC, is considered in light of the disclosure provisions in s. 495(1)(b), 495(2), and 495(3) of the *MGA*:

> Powers of Supreme Court
>
> 495(1) On an appeal, the Supreme Court of Nova Scotia may
>
> (a) determine the matter *de novo*; and
>
> (b) examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Part.
>
> (2) Notwithstanding any other Part or any privilege that is available at law, the Supreme Court of Nova Scotia may, on an appeal, examine any record in the custody or under the control of a municipality, and no information shall be withheld from the Court on any grounds.
>
> (3) The Supreme Court of Nova Scotia shall take every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the Court or any person of any information
>
> (a) or other material, if the nature of the information or material could justify a refusal by a responsible officer to give access to a record or part of a record; or
>
> (b) as to whether a record exists, if the responsible officer, in refusing to give access, does not indicate whether the record exists.

Relevance

Catherine Tully and Heather Burchill

[25] A review of the subpoenas issued to Tully and Burchill identifies what records are being sought by the appellant:

> Catherine Tully:
>
> All records related to OIPC review of HRM access requests AR 14-298 and AR 15-263, including but not limited to files, file notes, letters, email and text messages, meeting logs, phone logs.
>
> …
>
> Heather Burchell [sic]:
>
> All records related to OIPC review of HRM access requests AR 14-298 and AR 15-263, including but not limited to files, file notes, letters, email and text messages, meeting logs, phone logs.

[26] Ms. Raymond stated in oral argument that her purpose in having the subpoenas issued was that she would receive "answers" and "records would appear". What underscored this motion was the appellant's belief that the HRM was hiding documents or not adequately searching for records requested. The appellant stated that she wanted to feel assured disclosure was complete. The Appellant stated that she was concerned the HRM would not bring all the necessary records to court and would not comply with its statutory obligations under s. 495(2) of the *MGA*. Her suspicions concerning the HRM's actions, or lack thereof, punctuated the motion. These are serious allegations made without any evidential foundation.

[27] The appellant argues that the subpoenas of Tully and Burchill should stand because:

1. They are necessary to know whether the OIPC had access to all the relevant records.
2. They are necessary to know if the Commissioner ordered production of all records for her examination that she is authorized to order by virtue of s. 38 of *FOIPOP*.
3. They are necessary to obtain Information relating to AR 15-263 and the appellants concern regarding the HRM's assertion that the appellant previously abandoned this listed request for records.

[28] In the covering letter addressed to the prothonotary, which accompanied the subpoenas, the appellant also stated that she believed Tully and Burchill had relevant evidence. In particular, she stated:

> Former OIPC Investigator Heather Burchill
> re closing of AR 15-263, and combination with AR 14-298
>
> Information and privacy Commissioner Catherine Tully
> re materials received for review

[29] The appellant filed two affidavits, one dated February 23, 2018, the other dated March 19, 2018, in support of her position that the individuals subpoenaed have relevant evidence bearing on issues on appeal.

[30] Tully's report, attached as Exhibit A to the affidavit of Amanda George, is 21 pages long and concludes with thirteen specific findings and fourteen recommendations concerning access to records. Tully rendered no decision, and legislatively could not render a decision. The decision of the responsible officer, Dempsey accepts some of the Tully recommendations and rejects others. Dempsey, the Privacy Officer at the HRM, could accept, reject, or partially accept any recommendations. The Tully report, with recommendations, is before the court on this statutory appeal, not as the subject of the appeal but as background information and speaks for itself.

[31] The appellant seeks to know whether Tully had access to all documents in reaching the recommendations in her report. There is no nexus drawn between this issue and the issues on the appeal. Given the Tully report is not subject to appeal, I am not satisfied the subpoena seeks relevant information.

[32] To seek evidence from Tully and Burchill is to go behind the OIPC report, which is not permitted. The information, and what the OIPC considered in reaching its recommendations, is not appropriate subject matter for a subpoena. Deliberative secrecy applies here. The process undertaken to come to the recommendations should not be disclosed; such an order for disclosure could potentially have a chilling effect.

[33] The appellant argues that she needs to know what information was considered and presented to the OIPC. This argument is specifically dealt with in the case law concerning deliberative secrecy. As Cromwell, J.A. (as he then was)

stated in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37:

> 1 Members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions. This rule of deliberative secrecy protects their time and independence and promotes candid collegial debate.

[34] In *Cherubini, supra*, the court determined that how or why an administrative tribunal reached a decision was protected by deliberative secrecy. While administrative tribunals cannot rely on this principle to the same extent as judicial tribunals, I find in this matter the protection exists. The appellant has offered no valid reason to lift deliberative secrecy in this instance.

[35] Although the report of the OIPC is one of recommendations and not a decision *per se*, the principles regarding the compellability of administrative decision makers and deliberative secrecy applies. This is supported by *Commission scolaire de Laval c. Syndicate de l'enseignement de la region de Laval*, 2016 SCC 8, and *Cherubini, supra*. In *Cherubini*, Cromwell J.A. said:

> 14 The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them...
>
> 15 At the core of the principle is protection of the substance of the matters decided and the decision-maker's thinking with respect to such matters: *Tremblay v. Quebec (Commission des affaires sociales)*,[1992] 1 S.C.R. 952 at 964-65. Deliberative secrecy also extends to the administrative aspects of the decision-making process - at least those matters which directly affect adjudication - such as the assignment of adjudicators to particular cases: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 per McLachlin J. (as she then was) at 831-33.
>
> 16 The Supreme Court has confirmed that deliberative secrecy is the general rule for administrative tribunals. However, the Court has also made it clear that administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals: *Tremblay* at 968.

[36] Most of the documents sought through the subpoenas would go to the preparation of the recommendation report, a deliberative function. Also, such a release of information would be contrary to section 4(2)(e) of *FOIPOP*.

[37] Also, the OIPC is expressly not a party to this statutory appeal. The legislature is presumed to have turned its mind to this and purposively did not

include the OIPC as a party. Why would the Commissioner have relevant information as a witness?

[38] Even if the question of what was received and reviewed by Tully is relevant, the subpoena is unnecessary to obtain that information. The information is arguably in the record.

[39] There is also no information put forward by the appellant to support the assertion that the Commissioner did not have all necessary information before it when creating the report containing the recommendations.

[40] Whether the Commissioner ordered production of all records for examination or not is irrelevant to the appeal *de novo*.

[41] The appellant also argues that the OIPC witnesses and records are necessary to determine why the HRM asserts the appellant agreed to abandon the review request known as AR 15-263. The appellant says no such agreement was reached between her and the HRM. There is no nexus explained or drawn between the OPIC and the HRM and the appellant with regards to this so-called agreement. How the OIPC's witnesses could assist in this question and issues raised by the appellant and what relevance it has to the appeal has not been articulated.

[42] The appellant alleges that Burchill, an OIPC investigator asked if she would agree to close AR 15-263 on the basis that questions about records would all be dealt with in relation to the review of AR 14-298. She says the HRM now maintains that AR 15-263 is closed and that she agreed to this. This is an issue between the parties, not the OIPC or its investigators. There are other ways to answer these questions and other people who would have answers, not the OIPC investigator.

[43] In her February 23, 2018, affidavit, the appellant states that all the subpoenas are necessary because she maintains that the HRM is withholding responsive documents to both AR 14-298 and AR 15-263. Importantly, the appellant has not sufficiently articulated the basis of her suspicion, aside from Exhibit A to her affidavit of March 19, 2018. This spreadsheet purports to be a list of completed Access Requests from January 2014. The appellant suggests this spreadsheet evidences that a thorough search for records was not conducted in relation to AR 15-263. However, this is an argument which can be advanced on the appeal without the necessity of the witnesses from the OIPC.

The HRM Solicitor and HRM Witnesses

Testimony of the HRM Solicitor

[44] The subpoena served on MacDonald dated December 18, 2017, directs her to appear as a witness at the appeal hearing and directs her to produce records. In particular, the subpoena requires her to produce:

> All HRM records related to "Boscobel-on-the-Arm" development, including but not limited to: files, file notes, meeting notes, log books, phone logs, plans, emails, letters, text message and other communications.

[45] In response to the subpoena, MacDonald deposes in her affidavit:

> 25. As the Solicitor representing HRM, I have provided opinions and advice in relation to the handling of this appeal. This advice has been given on a solicitor/client basis and in the context of litigation.
>
> 26. I have no knowledge, other that the knowledge acquired as a result of my role as Solicitor for HRM, of the information requested in Ms. Raymond's Access Request.
>
> 27. I have no knowledge of records responsive to Ms. Raymond's Access Request that have not already been disclosed to her or to the Court in sealed volumes.
>
> 28. I have not had any involvement with the search for records responsive to Ms. Raymond's Access Request. The search is coordinated by HRM's Access & Privacy Office.
>
> 29. I have not corresponded with the OIPC on this matter. I have not made any agreements on behalf of HRM with the OIPC. I have attached as Exhibit "F" a true copy of the letter sent by Heather Burchill to Ms. Raymond advising her in writing of the informal resolution she reached with respect to Access Request 15-263. Nancy Dempsey is copied on the letter.

[46] In explaining why the subpoena directed to MacDonald is required, the appellant states as follows in her motion brief:

> 41. There is clearly some obstruction in the route of information from HRM, however, and I believe Ms. MacDonald is the only person who can explain this, so as to ensure there is no impediment in the flow of future disclosures form the municipality.

[47] The appellant argues that there has been conflicting information from HRM about the existence of records. She says there was an initial denial of records concerning communications about a right-of-way, but such communications were provided later.

[48] In addition, the appellant argues that initial records, which were described by the HRM as "duplicative and nonresponsive", were later said to be responsive, but withheld based on sections of Part XX of the *MGA*.

[49] The appellant further submits that the HRM's resistance to disclose has been pervasive and argues the HRM's solicitor's testimony is necessary for the appellant to advance her appeal and to determine what the HRM has disclosed, what it has not disclosed, and why.

[50] MacDonald filed an affidavit dated February 1, 2018. She deposed that she was not involved in this file until April 27, 2015, when the appeal of the Access and Privacy Officer was filed with this court. MacDonald was counsel on a motion to adjourn the appeal, as the appeal was not then properly before the court. She was not again involved in the proceeding until August 21, 2017, when the Notice of Appeal from the Dempsey decision was filed.

[51] For the reasons that follow, the subpoena for MacDonald is quashed.

[52] While accepting the evidential requirements for a motion to quash a subpoena, as contained in *Bowater Mersey Paper Co. v. Nova Scotia (Minister of Finance)* (1991), 106 N.S.R. (2d) 416, [1991] N.S.J. No. 114, I note that the test for such motions is qualified in the circumstance of subpoenas directed to legal counsel. As stated in *Ocean, supra*:

> 10 More recently, the Ontario Court of Appeal dealt with the issue of the compellability of opposing counsel to testify in *R. v. 1504413 Ontario Ltd.*, 2008 ONCA 253. That case involved an alleged breach of a municipal regulation and the building of a deck without a building permit. The Court of Appeal stated at para. 13:
>
> > There is abundant authority for the proposition that the practice of calling counsel for the opposing side to testify against his or her client is the exception and should be avoided whenever possible. When it is done, as in this case, involuntarily on the part of the counsel summonsed, it is highly undesirable and the court should be extremely wary of permitting it to happen ...

> 11 The Court stated further at para. 16 and para. 17:
>
> > **Whether as a matter of custom or policy, issuing a summons to counsel for the opposite party to testify against his or her client is virtually unheard of and should not be done absent the most exceptional circumstances.**
> >
> > At a minimum, such circumstances would require a showing of high materiality and necessity (assuming that the proposed evidence is otherwise admissible). Although not exhaustive, necessity in this context will involve considerations such as the importance of the issue for which the testimony is sought, the degree of controversy surrounding the issue, the availability of other witnesses to give the evidence or other means by which it may be accomplished (such as the filing of an agreed statement of fact), the potential disruption of the trial process and the overall integrity of the administration of justice.
> >
> > [Emphasis added]
>
> 12 I am satisfied that these comments by the Ontario Court of Appeal are applicable whether a subpoena has been issued in a criminal or a civil case. The danger of interfering with the solicitor/client relationship and the risk that solicitor/client privilege may be breached exists whether the proceeding is criminal or civil in nature.

[53] The appellant has not demonstrated any exceptional circumstances which support this subpoena. There is no non-privileged, relevant information counsel would have that other compellable witnesses do not have. There is no explanation for why counsel is necessary as a witness and others could not provide the material evidence the appellant seeks to introduce.

[54] The appellant alleges non-disclosure of records in a separate civil action. There is no explanation of how that is relevant to this statutory appeal. It is further alleged that an HRM employee, Rosemary MacNeil disclosed phone logs late. There is no explanation of how MacDonald could speak to this issue. Any evidence given would be hearsay and furthermore, MacDonald deposes at paragraph 28 of her affidavit that she was not involved in the search for records.

[55] The appellant is also not able to establish that MacDonald is a necessary witness. With regards to all issues on which the appellant seeks evidence, there are other witnesses who would or could have direct evidence on the topic.

[56] In its brief, the HRM identifies the other compellable witnesses who would more likely have relevant evidence:

> - With regards to the disclosure of Ms. MacNeil's phone logs, Ms. MacNeil herself is the best witness;
> - For the informal resolution of 15-263, Nancy Dempsey or Ms. Raymond herself are better witnesses.
> - On Ms. Raymond's concerns about the adequacy of the search, the employees conducting the search are better witnesses, as is Ms. Dempsey, who directed the search.
> - To the extent that disclosure in a separate civil action is at issue in this FOIPOP appeal, Ms. Raymond is available as a witness to detail the discrepancies. She should direct any further questions to the HRM employees who authored any documents that may have later been disclosed. They are the appropriate witnesses

[57] In *R v Harris* (1994), 93 C.C.C. (3d) 478, [1994] O.J. No. 1875 (Ont. C.A.), the Ontario Court of Appeal commented on the burden placed on the issuing party to establish relevance of a subpoenaed witness. The Court held that it was not sufficient for the party calling the witness to demonstrate that they might have material evidence. Instead, the party must establish that it is likely that the witness would give material evidence. Accordingly, *Harris, supra*, prevents a party from engaging in a fishing expedition.

[58] I have scrutinized the circumstances and have decided that the evidence of MacDonald is not necessary to this proceeding, and whether intentionally or not, the issuance of this subpoena would disrupt the proceeding. Furthermore, to allow the subpoena would be to countenance a fishing expedition.

[59] In *Williams v. Stephenson*, 2005 BCSC 450, Goepel J. held at para. 56:

> 56 If a subpoena is challenged, the onus is on the party proposing to call a witness to establish that the witness is likely to give material evidence on an issue before the court: *Re Stupp et al. and The Queen* (1982), 70 C.C.C. (2d) 107 (Ont. H.C.J.) at 121. This is particularly so when the proposed witness is counsel for the opposing party. If Mr. Zworski is called as a witness he obviously cannot continue as counsel. A party should not be deprived of his or her choice of counsel without good cause: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. If it was otherwise, a party could disrupt at random the orderly course of a civil action and cause severe prejudice to the other side by merely issuing a subpoena to their counsel and forcing them to retain new representation.

[60] After considering all the arguments, I find no reason to deprive the HRM of the counsel of their choice. Furthermore, there were statements made by the appellant that could be taken, and were taken by the HRM, as attacking the integrity of counsel. To the extent those were made, I reject any such suggestion by the appellant and note there was a complete absence of evidence supporting such comments.

Denty and MacNeil

[61] The subpoena issued for Kelly Denty seeks her attendance at the appeal hearing and production of the following records:

> All records related to "Boscobel-on-the-Arm" development, including but not limited to: files, file notes, meeting notes, log books, phone logs, plans, letters, text and email messages and other communications.

[62] MacNeil's subpoena requiring her attendance also requires production of records similar to the Denty subpoena, but is more extensive:

> All HRM records related to "Boscobel-on-the-Arm" development, including but not limited to: files, file notes, meeting notes, log books, phone logs, plans, letters, text and email messages and other communications.
>
> Please ensure that these include any and all related correspondence and notes of HRM staff Mark Innis, Kevin Warner, Hugh Morrison and Ashley Blissett.
>
> Please bring full size copies of all plans, including Ekistics Development Concept plan of 19 December 2011.

[63] In the covering letter to the prothonotary, seeking the issuance of these subpoenas, the appellant states:

> HRM Development Officer Rosemary MacNeil re alternative versions of concept plan and missing material
>
> HRM Development Officer Kelly Denty re alternative versions of concept plan and missing material

[64] When considering the relevance of the potential evidence from these two witnesses, and considering the submissions contained in the appellant's brief and those made in oral argument, it appears that the information is sought to determine if adequate searches were conducted by the HRM previously and if any other records exist.

[65] The difficulty is that the subpoenas cast a wider net than the original requests for access to records. The subpoenas filed in this statutory appeal cannot be utilized to circumvent the process to request records from public bodies as set forth in the *MGA*. Such would be a collateral attack on the statutory provisions of the *MGA*.

[66] The subpoenas requiring these witnesses to attend and answer questions can stand. The appellant may have questions about the adequacy of search methods to argue whether all relevant records were obtained, but to utilize the subpoenas to seek further searches of a wider class of records at this stage is not permitted under the *MGA*.

Newly Filed Affidavits

[67] Additionally, the appellant had seven additional subpoenas filed on June 11, 2018. Four of these subpoenas are identical to the December 18, 2017, subpoenas save and except for the corrected date of June 26. These four subpoenas are for Karen MacDonald, Kelly Denty, Catherine Tully, and Heather Burchill. Another subpoena has been issued for Rosemary MacNeil. This subpoena, issued on June 11, 2018, is also identical to the December 18, 2017, subpoena, aside from referencing a new hearing date of June 26, 2018, and the date for the Ekistics Development Concept plan is listed as June 19, 2011, and not December 19, 2011, as found in the original subpoena.

[68] Three new subpoenas were also filed in relation to three additional individuals, Nancy Dempsey, D'Darcy Decoste, and Kevin Gray.

[69] I will not deal with the three new subpoenas, but I will deal with the five newly filed, replicated subpoenas. These subpoenas were filed by the appellant despite the fact a decision of this court was pending in relation to this motion to quash the original subpoenas. This is clearly an abuse of process by the appellant.

[70] Civil Procedure Rule 88 applies.

> Scope of Rule 88
>
> 88.01 (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.

(2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.

(3) This Rule provides procedure for controlling abuse.

Remedies for abuse

8.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

(2) A person who wishes to make a motion under section 45B of the *Judicature Act* may do so by motion in an allegedly vexatious proceeding or a proceeding allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

[71] The original subpoenas are quashed, and the refiled subpoenas do not provide the appellant with a means of subverting the court's decision. The issue of their status is *res judicata*, and the newly issued subpoenas in relation to Karen MacDonald, Kelly Denty, Catherine Tully, and Heather Burchill are expunged from the court file. The appellant has had an opportunity to be heard on the issues both through filing written arguments and oral arguments.

Conclusion

[72] The appellant has not met the test of relevance and necessity with regards to the various subpoenas as discussed in these reasons. Consequently, the following is ordered:

1. The subpoena for Catherine Tully dated December 18, 2017, is set aside and quashed;
2. The subpoena for Heather Burchill, dated December 18, 2017, is set aside and quashed;
3. The subpoena for counsel, Karen MacDonald, dated December 18, 2017, is set aside and quashed;
4. The portions of the subpoenas for Kelly Denty and Rosemary MacNeil dated December 18, 2017, requiring them to bring certain records to the hearing of the appeal are set aside and quashed.

Costs

[73] These motions were applications in Chambers and the Court's award of costs is guided by Tariff C. I have wide discretion and am to consider what is just and appropriate in the circumstances.

[74] These two motions were heard in more than an hour but less than a day. Both applicants were successful in quashing subpoenas. Given the volume of materials required for the motions and the time expended, I am satisfied that it is just and appropriate to award costs to the successful parties according to Tariff C. Parties who are successful in court should have the benefit of costs.

[75] Costs are payable by the appellant to the OIPC forthwith in the amount of $500.00.

[76] Costs are payable by the appellant to the HRM forthwith in the amount of $500.00.

Brothers, J.