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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
HER MAJESTY THE QUEEN	)	Brent Davidson
	)	for the Crown
- and -	)	
	)	Adam Pinx
DYLAN LENNON ATKINSON and	)	for Maxim Dale Garneau
JASON DAVID TONY LAWREN KIRTON,	)	
	)	
accused	)	Judgment delivered:
	)	May 30, 2017

In the Matter of the Contempt Proceedings against Maxim Dale Garneau

TOEWS J.

[1] Maxim Dale Garneau (Garneau) was subpoenaed by the Crown to give evidence in respect of charges brought against Dylan Lennon Atkinson (Atkinson) and Jason David Tony Lawren Kirton (Kirton) arising out of an incident that occurred on or about March 29, 2014. The two accused jointly faced charges which included break and enter to commit robbery with a firearm, aggravated assault, committing an assault with a weapon, and unauthorized possession of a firearm along with various other related

charges all arising out of the same incident. Garneau was named as the victim in some of those counts and his testimony was crucial to the Crown's case.

[2] Although Garneau did not appear at the trial as required, he had provided testimony at the preliminary hearing and a transcript of his evidence was admitted into evidence at the trial following a motion by the Crown and a ruling by the court. That evidence was a significant factor in the determination of the guilt of Atkinson and Kirton at the trial of this matter.

[3] On October 19, 2016, Garneau was personally served with a subpoena to attend court for the purposes of giving material evidence at the trial of Atkinson and Kirton. The trial commenced on Monday, November 28, 2016 and was scheduled to conclude on Friday, December 9, 2016. When Garneau did not appear at the required time and place, I issued a warrant for his arrest on November 28, 2016. Garneau was subsequently arrested on the warrant and remains in custody on the strength of this warrant. He had also been facing other charges in Provincial Court but those matters have now been dealt with.

[4] Counsel for Garneau provided the court with materials prior to the May 23, 2017 hearing date in respect of this matter and on that date Garneau attended court with counsel in order to answer for his failure to attend as required. After considering the fact that he had been personally served to attend court, but that he had failed to do so, I cited him for contempt and the show cause hearing proceeded at that time. At the hearing Garneau gave evidence, raising a defence of duress and says the Crown failed to prove the offence beyond a reasonable doubt.

[5] For the reasons that follow, I reject the defence of duress and find Garneau guilty of contempt of court.

Law of Contempt

[6] The law of contempt has been succinctly summarized by the court in ***R. v. Bidesi***, 2015 BCSC 2532, [2015] B.C.J. No. 2981 (B.C. Sup. Ct.) (QL), in oral reasons provided by Butler J. regarding the contempt of Joshua Martinez and include a summary of the elements of the defence of duress by Greenberg J. in ***R. v. C.M.B.***, 2010 MBQB 269, 260 Man.R. (2d) 152. Greenberg J.'s reasons in turn were based on the decision of the Supreme Court of Canada in ***R. v. Ruzic***, 2001 SCC 24, [2001] 1 S.C.R. 687.

[7] The summary by the court in ***Bidesi*** provide as follows (at paras. 5-8):

> **5** A witness who refuses to be sworn or to testify may be cited for contempt and, once cited, bears the onus of showing cause why a conviction should not follow. In such a case, the witness is immediately put to his defence because there can be no doubt that the failure to testify in response to a subpoena is sufficient to prove the offence: *R. v. Cohn* (1984), 13 D.L.R. (4th) 680 (Ont. C.A.). An accused who raises a defence of duress bears an onus to present evidence to show cause, however, it is only an evidentiary onus. As explained by LeBel J. in *R. v. Ruzic*, [2001] 1 S.C.R. 687 at para. 100:
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> > 100 ... The accused must certainly raise the defence and introduce some evidence about it. Once this is done, the burden of proof shifts to the Crown under the general rule of criminal evidence. It must be shown, beyond a reasonable doubt, that the accused did not act under duress.
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> **6** In *R. v. C.M.B.*, 2010 MBQB 269, Greenberg J. at paras. 23 and 24 summarized the elements of the defence of duress based on the decision in *Ruzic*:
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> > [23] In *Ruzic*, the Court held that to raise a defence of duress, an accused must show that he acted as a result of threats of death or serious bodily harm to himself or another person. The person who made the threats does not have to be present when the offence is committed and the threats do not have to be of immediate harm but there must be a temporal connection between the threats and the harm threatened

> such that the threat would have been operating on the accused's mind at the time he committed the offence.
>
> [24] The Court also held that an accused cannot rely on duress if he had a "safe avenue of escape". Whether there was a safe avenue of escape is determined by a subjective-objective standard, that is to say, the circumstances should be assessed from the point of view of a reasonable person similarly situated to the accused.

7 In summary, in the case of a failure to testify, the defence of duress is available when the witness acts under threats of death or serious harm; the threats and the harm threatened were operating on the witness's mind when he refused to testify; and the accused did not have a safe avenue of escape from the potential harm.

8 The circumstances are to be assessed from the perspective of a reasonable person in the position of the witness.

Garneau's Testimony

[8] Garneau testified that he will be 21 years of age on September 8, 2017. He has a grade 10 education and states that he did fairly well in school. He stated he was able to read the subpoena when it was placed in front of him at the hearing. He also testified that he had been diagnosed with an attention deficit disorder in the past, but the details of that diagnosis were not very clear or specific. In any event, I am satisfied that he could understand the proceedings and responded to questions put to him by his own counsel and counsel for the Crown.

[9] In his testimony, he confirmed that he had been assaulted by Atkinson and Kirton on or about March 29, 2014. He testified that he had been beaten about the head by the accused and that this wound required medical attention to close. He received this medical attention at a hospital in Winnipeg after he had been taken there by ambulance following the assault.

[10] Garneau testified that he had been scared about testifying at the preliminary hearing and had told the Crown of his concerns prior to that hearing. He said that he felt unsafe and that his life was on the line. The Crown attorney provided Garneau with contact information for both himself and the police.

[11] In order to ensure that Garneau was able to attend court for the preliminary hearing in Winnipeg, the police picked him up in the rural community where he lived the day before the trial and brought him to the Crown's office and subsequently to a safe location where he spent the night. The police drove him to court and waited until he was finished testifying. At that time they drove him back to his community. He testified that although he did not trust the police generally as a result of his interaction with the police on prior occasions, the police treated him properly in respect of his attendance at the preliminary hearing.

[12] Garneau also testified that prior to the preliminary hearing he had been threatened over social media, through his Facebook account about testifying at the preliminary hearing. He stated that he told the Crown and the police about the threat, but refused to allow the police on his social media account in order to investigate the threat.

[13] Garneau testified that after the preliminary hearing, he returned to Winnipeg sometime before the trial date. In Winnipeg he was visited three or four times by two unidentified individuals at the two different locations where he lived. These two individuals threatened him and advised him not to appear at the trial. He stated that as a result of the threats they made he assured them that he would not appear at the trial.

He testified that these threats came a month or two after the preliminary hearing and caused him to fear for his safety and the safety and property of his relatives where he was staying.

[14] Garneau testified that he did not contact either the Crown or the police because he did not think they could help and that in addition he had lost the Crown attorney's phone number. He said the last time that these two individuals contacted him was about 10 or 11 days before the trial through a social media account with Facebook. He said that he subsequently met with them and as a result of the meeting he was scared of them and decided to go home to his rural community. Ultimately he failed to attend court and made no attempt to contact the police or the Crown even though the Crown attorney's name and contact information were set out on the subpoena he was personally served with by the police on October 19, 2016.

Application of the Law

[15] Although ***C.M.B.*** involved a matter where the witness attended court but refused to testify while this case involves a failure by the witness to appear as required at the hearing, there is no substantive difference in respect of the applicable law in determining whether there should be a citation for contempt or the considerations relevant to determining whether the Crown has proven its case beyond a reasonable doubt.

[16] While the facts in this case and the decision of the court in ***C.M.B.*** have some marked similarities and although Garneau did receive certain threats, unlike the witness who was cited with contempt in ***C.M.B.*** but found not guilty after a hearing, here

Garneau had a "safe avenue of escape". Unlike his actions prior to the preliminary hearing where he reported the problem to the Crown and the police and as a result of which he received an appropriate degree of protection from the police, he did not report the threats he testified he received prior to the trial. There is no reason to believe that the Crown and the police would not have taken similar or indeed other steps, commensurate with the danger that these threats may have presented in order to protect Garneau, his family and their property.

[17] In this case, while the threats and the harm threatened were operating on Garneau's mind when he decided not to attend court to testify, he did have a safe avenue of escape from the potential harm, but chose not to pursue that route. Unlike the situation in ***C.M.B.*** where the Crown did not call any evidence to suggest that they could have protected him, in this case the evidence from Garneau himself is that when he did raise his fears with the Crown and the police prior to the preliminary hearing, they responded in an appropriate manner to deal with his concerns.

[18] Unlike the case in ***C.M.B.*** where the accused led evidence that the attempts of authorities to protect him in the past had failed, in this case, the Crown has demonstrated that steps had been taken to protect him and there is no reason to believe that the Crown and the police would not have continued with those efforts had he chosen to advise them of the threats that he was receiving before the trial.

[19] In summary, I am satisfied that the Crown has shown, beyond a reasonable doubt, that the accused did not act under duress and it has proven its case beyond a reasonable doubt. Garneau is unable to rely on the defence of duress and accordingly,

I find him guilty of contempt for failing to attend court in response to the subpoena at the trial of Atkinson and Kirton.

_____ J.