

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the Criminal Code.

R. v. Harper, 2002 YKSC 12

Date: 20020227
Docket No.: 00-00593D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

THOMAS MOSES HARPER

NARISSA SOMJI

For the Crown

FIA JAMPOLSKY and GORDON COFFIN

For the Defence

**MEMORANDUM OF RULING
DELIVERED FROM THE BENCH**
(On the complainant testifying outside the courtroom)

[1] VEALE J. (Oral): The Crown applies under s. 486(2.1) of the *Criminal Code*, R.S.C. 1985, c. C-46 , to have the trial evidence of the complainant, who suffers from multiple sclerosis, heard in the chapel room at Macaulay Lodge. Defence is opposing this application.

[2] On February 25 in this case, I ruled that the complainant would not be so traumatized that she could not testify at all. However, I ruled that she should be examined at Macaulay Lodge, as she appeared to be capable of testifying in a controlled environment for the purpose of a competency inquiry. I ultimately ordered that she is competent to testify and, although she will be stressed, confused and agitated at times, it will not cause her harm.

[4] The Crown and the defence agree that the evidence of Dr. Anzarut, her neurologist, and Dr. Macdonald, her treating physician, can be considered for the purpose of this application. The defence did not wish the further opportunity of cross-examining either of the doctors.

[5] My reading of s. 486(2.1) is that a judge can order that a complainant or witness suffering from a mental or physical disability can testify outside the courtroom to obtain a full and candid account from the complainant. Or, alternatively, the complainant can testify in court behind a screen. The wording does not specifically permit the complainant to testify outside the courtroom and with a screen.

[6] As indicated in my earlier decision about this complainant, she has a chronic and progressive case of multiple sclerosis. Dr. Anzarut said that testifying will cause her to suffer emotional and physical stress, but he does not think it will be permanent. Dr. Macdonald, her treating physician, and the doctor most familiar with the complainant, states that the complainant functions best when she is in a routine, familiar environment. When out of such an environment, she becomes agitated and the stress could exacerbate her condition. Dr. Macdonald testified that the potential for harm is reduced if the examination takes place at Macaulay Lodge.

[7] Although I had some misgivings, I ordered that the complainant should testify for the competency inquiry, under s. 16, in a controlled environment. The terms were that a screen would be used at Macaulay Lodge, her social worker present, and Mr. Harper would be escorted by an R.C.M.P. officer. No objection was taken to those terms at that time.

[8] Macaulay Lodge is a continuing care residence for people with disabilities from the ages of 19 to well into their 80s, and perhaps older. It is not a private residence. In this case, both the mental and physical disabilities of the complainant are severe and testifying at Macaulay Lodge is necessary to obtain a full and candid account of the acts complained of, and I order that that testimony be taken at Macaulay Lodge under the same terms as set out above, without a screen.

[9] It will be a hearing of the court in public. If there is any difficulty with public access, that should be raised now.

[10] This ruling does not go beyond the narrow wording of s. 486(2.1), but I do find that the ruling is necessary for the proper administration of justice. The accused shall be able to observe the complainant as she testifies, without a screen, but he will be seated at the back of the small hearing room, just behind his counsel. His distance from the complainant will be no more than 15 to 20 feet.

[11] Ms. Somji, is there any issue with respect to public access?

[12] MS. SOMJI: I have to speak to the facility owners -- or operators. I also have to speak to -- they may have to speak to their own YTG counsel about what that facility is or isn't, and what they can or cannot --

[13] THE COURT: Well, I am a little taken aback that you have to make this inquiry now. Was there any objection raised to our last hearing?

[14] MS. SOMJI: I understand that they locked the doors.

[15] THE COURT: After we entered?

[16] MS. SOMJI: Yeah, and I don't know the legal -- I don't know the legal issues around the definition of this facility. I don't know if -- what the facility's views are. I mean, I suspect that if there are going to be a lot people and -- press in attendance, the facility may have concerns with respect to the privacy of their residents, and then I may be forced to make an application under 486.1 for a court -- closed court. On the other hand, maybe nobody will show up. So perhaps -- we do have a doctor -- well, we do have a doctor here if you would like to perhaps proceed with that evidence, and perhaps if we can just start at 2:30. I will call -- make some calls to the facility and then take it from there.

[17] MS. JAMPOLSKY: My Lord, just before we set down, there will be one more issue, which came up at the s. 16 inquiry. Section 486 allows for a support person to be in the room with the witness when they're giving evidence. However, s. 486.1.3 says that that person shall not be a witness in the proceeding.

[18] THE COURT: Okay. Just hang on a sec.

[19] MS. SOMJI: I think we can, Your Honour, that Elaine Senkpiel does not have to be there. I had, in fact, scheduled her this morning to try and proceed before the complainant potentially, so that she could be seated beside

her if necessary, but we didn't get her evidence in this morning, but I'm sure I can find other people close or intimate with the complainant that can sit beside her as a support person. So if that's the issue, that's fine. We'll find somebody else instead of the social --

[20] THE COURT: Does that satisfy you, then?

[21] MS. JAMPOLSKY: Yes, that was the only concern. Thank you, My Lord.

[22] THE COURT: Thank you.

VEALE J.

