

SUPREME COURT OF YUKON

Citation: *R. v. Anderson*, 2009 YKSC 78

Date: 20091127
Docket S.C. No.: 09-01506
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CHARLES LESLIE ANDERSON

Before: Mr. Justice L.F. Gower

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:

Melissa Atkinson
Malcolm Campbell

Appearing for the Crown
Appearing for the Accused

REASONS FOR DECISION DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): For the record I should put forward the comment that I made at the pre-trial conference, that I am sitting on this matter of necessity, since there is no other resident judge in the jurisdiction and Justice Stach has not yet arrived. I do have a conflict of interest with respect to Constable Fenske, but it is in the public interest for this matter to be spoken to sooner rather than later, given that two of the principal witnesses for the Crown are out of the jurisdiction and would otherwise be traveling here at significant expense.

[2] I am going to treat this as a joint application for an adjournment. It is unfortunate that there was not an earlier opportunity for counsel to discuss the conduct of the trial and confirm which witnesses would be required by the defence.

[3] For the record, again, I say that Mr. Campbell's notice of his *Charter* application in relation to the DNA warrant was only received and read by Ms. Atkinson, the Crown, on November 24th and it was only at that time that she noted Constable Drover would be required for cross-examination by the defence. She immediately attempted to have Constable Drover, who now resides in Whitehorse, subpoenaed and received word back by e-mail that Constable Drover is "not medically fit to testify" without further details.

[4] I gather that Constable Drover has been in that status for a number of months now, going back as far as June of 2009. It is not clear on the evidence or the submissions, or to the knowledge of counsel, whether that status is likely to change any time soon. So at the moment we do not know whether Constable Drover will become available to testify, and that is problematic in view of the factors that the Court must consider under the well-known case of *R. v. Darville*, [1956] O.J. No. 104. But I am hopeful that counsel will be able to find out more information about that in the next few days. If it turns out that Constable Drover is not going to be medically fit for an indefinite period going forward, then I would suggest counsel put their minds to other options, such as the possibility of an agreed statement of facts as to what she might say in relation to the DNA warrant, or to find some other means of having the questions answered that defence counsel wish to put to her in relation to her involvement on that issue, whether that is by way of commissioned evidence or some other less formal

procedure. I think that needs to be explored, and I think it needs to be explored as soon as possible, because there is simply no point in setting this matter down for another four or five days in the spring if we are back in the same boat then as now.

[5] So I am, in summary, going to allow the adjournment.

GOWER J.