

SUPREME COURT OF YUKON

Citation: *R. v. J.J.P.*, 2018 YKSC 8

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S.C. No.: 17-01513
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16-01514A
16-01514B
16-01513
17-00700
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

J.J.P.

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

Before Mr. Justice R.S. Veale

Appearances:

Noel Sinclair
Susan E. Bogle
Vincent Larochelle

Counsel for the Crown

Counsel for the Defence

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): I am going to order that the Crown is entitled to cross-examine Dr. Lohrasbe. It is interesting that the civil rules clearly provide for that.

[2] I am not going to make any particular ruling on whether the civil rules are necessarily applicable, but they are certainly helpful in determining what should take place in this proceeding.

[3] Instead, I am going to rely on the decision of Bellefontaine J. in *R. v. Stratton*, [2010] O.J. No. 6323, from the Ontario Court of Justice, who gave an excellent oral decision on the precise matter before us.

[4] His first paragraph indicates why it is applicable to this proceeding. He says:

1 The crown has asked for direction from the court, requesting that they be permitted to cross-examine the psychiatrist who prepared the court-appointed assessment on this dangerous offender application, and whom they propose to call as a witness. For the reasons that follow, I am prepared to allow them to cross-examine Dr. Bradford.

[5] Then I quote from para. 10:

10 I am allowing the crown to cross-examine for the following reasons. The rationale is underlying the rule confining counsel to direct examination are substantially weakened when the witness is a psychiatrist appointed by the court. The witness can no longer be presumed to be favourable in interest to the questioner. The questioner has no inside advantage with the witness, as both parties will have equal access to the report filed, and the witness appointed for preparation purposes. Finally, a professional witness appointed by the court cannot reasonably be seen to be likely to agree with the questioner just because he has been called to the witness stand by the questioner.

[6] He continues in paras. 18 through 22 to say the following:

18 In my opinion, to give effect to my broader obligation to protect community interest in a dangerous offender proceeding, I am more likely to receive the broadest range of information on these points and the most accurate information on these points if Mr. Saliwonchuk is permitted to cross-examine Dr. Bradford rather than being confined to direct examination.

19 The complexity of the evidence and the need to deconstruct it into a form that can be legally weighed and evaluated makes cross-examination a more effective tool to present the evidence. Accordingly, I view allowing cross-examination by the crown of the court-appointed expert to be consistent with the purpose of approach to the dangerous offender regime.

20 This approach is also, in my view, consonant with other statutory sentencing provisions, which including s. 724(3)(c) which provides that in sentencing proceedings, that either party may cross-examine any witness called by the other party. While I appreciate that I, as the court, am not a party to the proceedings, having made the appointment, and selected an assessor who now needs to be called as a witness, I consider the spirit of this section to support the crown being able to cross-examine a witness who is being called at someone else's behest.

21 In my view, allowing the crown to cross-examine is also appropriate given the unusual evidentiary rules of the dangerous offender proceeding. The assessment has been ordered by the court, it has been sent to the court, received by it, and should be filed as evidence available to the crown and defence pursuant to s. 752.1(2).

22 Neither the crown nor the defence need to call Dr. Bradford for the purpose of introducing his report or his evidence. This is a radical departure from the traditional adversarial evidentiary process, where the expert would be called in direct examination by a party to provide his evidence, and adopt his report before it is filed. That need not be done here by virtue of the report being automatically admissible by statute.

[7] And finally, he concludes in para. 26:

... Considering all of the foregoing, I will direct the crown to call Dr. Bradford, and allow him to cross-examine Dr. Bradford, and have the defence cross-examination to follow with right of reply to the crown.

[8] I think that is the fairest way. I thank Judge Bellefontaine for such an excellent decision.

[9] MR. LAROCHELLE: Thank you, Your Honour.

[10] And just for the record, are you directing the Crown to call the expert or simply allowing him to cross-examine him with cause?

[11] THE COURT: Well, this is what Judge Bellefontaine did. He directed the Crown to call. That is just serving to get Dr. Lohrasbe before us. I am going to make that direction.

[12] I am sure the Crown will not object, as long as the Crown has the right to cross-examine.

VEALE J.