

R. v. Isaiah, 2010 NWTSC 11-2      S-1-CR-2009-000011

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

EDWIN ISAIAH

Transcript of the Ruling pursuant to s. 486.2(1) delivered  
by The Honourable Justice L. Charbonneau, in Fort Simpson,  
in the Northwest Territories, on the 2nd day of February,  
2010.

APPEARANCES:

Mr. J. MacFarlane:      Counsel on behalf of the Crown

Mr. D. Rideout:      Counsel on behalf of the Accused

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Charge under s. 271 C.C.

Ban on Publication of Complainant/Witness  
Pursuant to Section 486.4 of the Criminal Code

1 THE COURT: The Crown applies, pursuant to  
2 section 486.2(1) of the Criminal Code, to use a  
3 screen during the evidence of the complainant at  
4 this trial.

5 The complainant's date of birth is May 26,  
6 1992. She is 17 years old.

7 Provisions have existed for a number of  
8 years in the Criminal Code dealing with  
9 testimonial aids. Those provisions did not  
10 always read the way they do today. But  
11 Parliament has chosen to amend the provisions a  
12 few years ago, and a stronger direction has been  
13 given to the Court, and less discretion, in cases  
14 that involve witnesses who are under 18 years of  
15 age. It is instructive to compare the tests that  
16 are applicable when the witness is under 18 with  
17 the test applicable when the witness is over 18.  
18 I think it is a fairly significant distinction in  
19 the context of this application.

20 So what the Criminal Code says is that in  
21 proceedings involving a witness under the age of  
22 18, on application of the prosecutor,  
23 ... the court shall order that the  
24 witness testify ... behind a screen  
25 or other device that would allow the  
26 witness not to see the accused,  
27 unless the judge or justice is of

1       the opinion that the order would  
2       interfere with the proper  
3       administration of justice.

4       Whereas the second paragraph which deals with  
5       other situations says,  
6       ... in any proceedings against an  
7       accused, the judge may, on  
8       application of the prosecutor or a  
9       witness, order that the witness  
10      testify ... behind a screen or other  
11      device that would allow the witness  
12      not to see the accused if the judge  
13      or justice is of the opinion that  
14      the order is necessary to obtain a  
15      full and candid account from the  
16      witness of the acts complained of.

17      So the test is obviously very different when a  
18      witness is under the age 18 from when a witness  
19      is over 18.

20      When the witness is under 18, I am obligated  
21      to make the order unless I am satisfied that to  
22      do so would interfere with the proper  
23      administration of justice.

24 The defence is opposed to the order being  
25 made and points out that the witness is 17 years  
26 old, very close to the top end of the age range  
27 that this provision applies to. He also points

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1 out that there is nothing to suggest that there  
2 is a trust relationship or a relationship of  
3 authority between the complainant and the  
4 accused. He also points to the risk of the jury  
5 forming the wrong impression, or draw erroneous,  
6 prejudicial conclusions if they see that a screen  
7 is being used to prevent the witness from seeing  
8 the accused.

9 The paragraph that I am governed by,  
10 486.2(1), does not distinguish between very young  
11 witnesses and witnesses who are approaching 18.  
12 Parliament had to draw the line somewhere and it  
13 has drawn it at 18. The test applies if the  
14 person is under that age, no matter what age they  
15 are.

16 The factors that are put forward by defence  
17 counsel (age, nature of the relationship between  
18 the witness and the accused) are relevant when  
19 applications are brought under 486.2(2). But  
20 nothing in the provisions suggests that those are

21 relevant to applications brought under paragraph  
22 (1). So the fact that Parliament had chosen to  
23 identify these factors as part of what will be  
24 considered to decide if the device is needed to  
25 obtain a full and candid account of the witness,  
26 but does not refer to them as part of the other  
27 test, again reinforces the notion in my mind that

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1 the test under 486.2(1) is to be very strict and  
2 it is only in very narrow circumstances that the  
3 order will not be made when a witness is under  
4 18.

5 Now the concern about the impact that the  
6 device might have because this is a jury trial,  
7 and I think defence counsel fairly acknowledged  
8 that yesterday during submissions, would apply in  
9 any jury trial. Parliament could have devised a  
10 special legislative scheme to deal with jury  
11 trials or devise a different test to address that  
12 concern, but it has not.

13 In this case I do not have any evidence, nor  
14 any tangible reason - other than the fact this is  
15 a jury trial - to conclude that the use of the  
16 screen would interfere with the proper

17 administration of justice. In my view there is  
18 no basis upon which I can draw that conclusion,  
19 and so I will grant the Crown's application.

20 To hopefully alleviate the concerns  
21 expressed by defence counsel, I will instruct the  
22 jury in my charge about what using this device  
23 means and what it does not mean. In fact, I will  
24 also be giving them an instruction immediately  
25 before the start of the evidence so that they do  
26 not start forming opinions or hypotheses or  
27 improper conclusions when they see the device

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1 being set up.

2 So I am allowing this application.

3 .....

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5 Certified to be a true and  
6 accurate transcript pursuant  
7 to Rule 7 23 and 7 24 of the  
8 Supreme Court Rules of Court.

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9 \_\_\_\_\_  
10 Annette Wright, RPR, CSR(A)  
11 Court Reporter

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