

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

LEVI PEETOOLOOT

Transcript of a Ruling (s. 486.3 C.C. - appointment of  
counsel) made by The Honourable Judge R. Gorin, in  
Yellowknife, in the Northwest Territories, on the 7th  
day of April, A.D. 2006.

APPEARANCES:

Mr. M. Himmelman: Counsel on behalf of the Crown

Ms. P. Taylor: Counsel on behalf of the Accused

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Charges under ss. 279(2) C.C., 271 C.C. 266 C.C.  
and 145(2)(a) C.C.

BAN ON PUBLICATION OF COMPLAINANT/WITNESS PURSUANT TO  
SECTION 486 OF THE CRIMINAL CODE

1 THE COURT: This is my decision on the  
2 Crown's application to have counsel appointed for  
3 the purpose of cross-examining the complainant at  
4 the accused's preliminary inquiry.

5 Mr. Peetooloot is charged with unlawful  
6 confinement, sexual assault and common assault.  
7 The date on which the offences are alleged to  
8 have happened in Yellowknife is July the 29th,  
9 2005. He is also charged on a separate  
10 Information with failing to attend court on  
11 December the 13th, 2005. That was one of the  
12 dates which had been scheduled for his  
13 preliminary inquiry on the first set of charges  
14 that I have mentioned.

15 On the first three charges there have been  
16 11 court appearances prior to today's date.

17 On these charges the accused had elected to  
18 be tried by a judge and jury. He maintains that  
19 election at this particular point. Because of  
20 that initial election, a preliminary inquiry in  
21 this court was required. The preliminary inquiry  
22 was first scheduled for November the 18th of last  
23 year. On November the 18th it was adjourned to  
24 November the 23rd. On November the 23rd it was  
25 adjourned to December the 13th. It appears that  
26 the accused has never retained counsel.

27 The court record indicates that on December

1 the 13th a warrant was issued for the accused's  
2 arrest when he did not attend court. It appears  
3 that the warrant was exercised, that is, the  
4 accused was arrested on the warrant on March 22nd  
5 of this year in Taloyoak.

6 Because he is charged with failing to attend  
7 court, the onus is now on the accused to show  
8 cause why he should be released from pre-trial  
9 detention on conditions with or without bail or  
10 otherwise. In other words, he is now in a  
11 "reverse onus" situation, as it is typically the  
12 Crown that would bear the onus of showing why the  
13 accused should be detained pending his trial.

14 It appears that the accused has not  
15 attempted to show cause why he should be  
16 released. He is currently being held in custody  
17 on a Form 19 remand warrant. I do not see a Form  
18 8 on the court file at this particular point.

19 As I have indicated, the accused has not yet  
20 retained a lawyer; arrangements have not yet been  
21 finalized even though he is in custody at this  
22 particular point.

23 An order appointing counsel to cross-examine  
24 the complainant was previously made. However, as  
25 noted by Chief Judge Bruser, the previous order  
26 was arguably made without jurisdiction due to the  
27 fact that it was made prior to the coming into

1 force of section 486.3 of the Code. The Court  
2 that made the earlier order had been advised by  
3 the Crown that the section was in force when it  
4 was not, although the Crown counsel in question  
5 later advised of his error.

6 Clearly I do have the jurisdiction, that is,  
7 the power to order that counsel be appointed for  
8 the purpose of such cross-examination. The  
9 applicable section is 486.3(2). For the benefit  
10 of counsel, that would be in the supplement.

11 I find that the prerequisites have been made  
12 out. The Crown has made the necessary  
13 application to allow me to have jurisdiction.  
14 Under the circumstances, given the nature of the  
15 charge, I am satisfied that the order is  
16 necessary to obtain a full and candid account  
17 from the witness. In making this determination,  
18 I take into account the factors which are set out  
19 in subsection 486.1(3) of the Code, as I am  
20 required to do. Because I am satisfied that the  
21 order appointing counsel for the purposes of  
22 cross-examining the complainant is necessary to  
23 obtain a full and candid account from the  
24 witness, subsection 486.3(2) requires that I  
25 "shall" make the order. Because I am so  
26 satisfied, I have no discretion. Therefore the  
27 order will go.

1           The clerk will make the necessary  
2           arrangements to retain counsel. Obviously the  
3           lawyer who is appointed will have to be  
4           compensated. He or she cannot simply be pressed  
5           into service by the court.

6           I have a letter on the court file from the  
7           Executive Director of the Legal Services Board,  
8           in other words Legal Aid. The letter was written  
9           as a result of the earlier order made prior to  
10          section 486.3(2) coming into force. That letter  
11          indicates that the board will not be paying the  
12          fees of counsel who are appointed pursuant to  
13          section 486.3. I certainly do not have the  
14          jurisdiction or the power to order that the Legal  
15          Services Board pay. In my view, just as the  
16          executive branch of government should not attempt  
17          to interfere with the judicial branch, the  
18          judicial branch should not attempt to interfere  
19          with the executive. So I make no comment on the  
20          position of the Legal Services Board as expressed  
21          through its Executive Director.

22          However, as is clear, section 486.3 of the  
23          Code allows a judge of the Territorial Court to  
24          appoint counsel and where certain criterion are  
25          met, as they have been in the present case, the  
26          section is mandatory, not merely permissive.

27          As I have already stated, counsel should not

1 be pressed into involuntary service and clearly  
2 counsel should be compensated if counsel is not  
3 salaried by a government department or board.

4 As stated, the section does not expressly  
5 give me the power to order that a particular  
6 government department or board pay a lawyer's  
7 fees, so I do not know if payment will come from  
8 Legal Aid, the Territorial Department of Justice,  
9 Court Services, or from the Federal Department of  
10 Justice.

11 Presumably there would be a conflict if the  
12 Federal or Territorial Department of Justice were  
13 simply to provide one of its lawyers to act on  
14 behalf of the accused since both departments are  
15 responsible for the prosecution of criminal or  
16 quasi criminal charges, although the same could  
17 not be said for the Legal Services Board which is  
18 theoretically independent of the Territorial  
19 Government for that very reason.

20 However, I will point out the obvious, and  
21 that is that ultimately it will be the taxpayer  
22 who will be picking up the tab regardless of  
23 which department or board pays.

24 The clerk should take immediate steps to  
25 retain counsel, and the clerk should let counsel  
26 know that his or her fees will be covered,  
27 assuming that the lawyer in question works for a

1 private firm. Presumably, the fees will be  
2 covered at the lawyer's full private rate and not  
3 at the reduced legal aid rate.

4 I note parenthetically that one of the  
5 original rationales for the implementation of the  
6 legal aid program was to save the government  
7 money by allowing for a reduced rate. Before  
8 legal aid was implemented, the courts often  
9 simply appointed counsel who were then able to  
10 charge their full private rate rather than a  
11 reduced rate. I will not opine on the topic.

12 I am directing that a transcript of these  
13 proceedings be prepared forthwith and that the  
14 following persons be provided with copies of the  
15 transcript: Firstly, the Territorial  
16 Government's Deputy Minister of Justice; the  
17 Assistant Deputy Minister with the relevant  
18 responsibilities; the Director of Court Services  
19 for the Territorial Department of Justice; the  
20 Executive Director of the Legal Services Board,  
21 that is Legal Aid; the Regional Director of the  
22 Federal Department of Justice here in  
23 Yellowknife; Chief Judge Bruser; and of course  
24 there should be a copy for the court file as  
25 well.

26 As I noted earlier, if Mr. Peetooloot  
27 ultimately realizes his intentions to retain

