R. v. TEDROS FESSAHAIE *2009 NWTTC 10*
File: T-1-CR-2009000112

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

Respondent

- and -

TEDROS FESSAHAIE

Applicant

REASONS FOR DECISION
of the
HONOURABLE JUDGE B. E. SCHMALTZ

Application for copies of Victim Impact Statements

These Reasons are subject to Publication Restrictions pursuant to s. 486.4 of the *Criminal Code*

Heard at: Yellowknife, Northwest Territories
July 17, 2009

Reasons filed: July 27, 2009

Counsel for the Crown: Glen Boyd

Counsel for the Government of the Northwest Territories: Roger Shepard

Counsel for the Applicant: Paul Falvo

(Charged under ss. 151 and 271 of the *Criminal Code*)

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A. BACKGROUND

[1] Tedros Fessahaie (the Applicant) is charged with 1 count of sexual touching of a person under the age of 16 contrary to section 151, and 1 count of sexual assault contrary to section 271 of the *Criminal Code*. Both charges relate to the same complainant, and the trial is set to proceed on July 29, 2009. On the Court file there are two sealed envelopes labeled *Victim Impact Statement*, one from "MC" and one from "AC secondary victim"; both envelopes are marked "To remained [sic] sealed until finding of guilt".

[2] The Applicant has brought an application for an order granting disclosure of the Victim Impact Statements, and a declaration that certain provisions of the Northwest Territories *Victim Impact Statement Program* are unconstitutional and of no force and effect. The Applicant submits that disclosure of these statements is necessary in order for him to make full answer and defence. The Applicant has filed an Affidavit in support of this application. The Applicant, the Crown, and the Government of the Northwest Territories all filed written argument and authorities, and presented oral arguments on this Application, at the end of which I reserved my decision.

B. ISSUES

[3] Two issues arise on this Application:

(i) Does Step 5 of the *Victim Impact Statement Process* established by the Government of the Northwest Territories providing for the distribution of a Victim Impact Statement after a finding of guilt prevent an accused from making full answer and defence and thereby offend section 7 of the *Charter*?

(ii) Does section 722.1 of the *Criminal Code* allow the clerk of the court to provide copies of a Victim Impact Statement that has been filed with the court before a finding of guilt?

C. ANALYSIS

The Victim Impact Statement Process

[4] Section 722 of the *Criminal Code* states:

> 722(1) For the purpose of determining the sentence to be imposed on an offender … the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.
>
> (2) A statement referred to in subsection (1) must be
>
> (a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and
>
> (b) filed with the court.

[5] Section 722.1 of the *Criminal Code* states:

> 722.1 The clerk of the court shall provide a copy of a statement referred to in subsection 722(1), as soon as practicable after a finding of guilt, to the offender or counsel for the offender, and to the prosecutor.

[6] Steps 4 and 5 of the Victim Impact Statement Process[1], relating to the procedures established by the Government of the Northwest Territories pursuant to section 722(2)(a) of the *Criminal Code*, state, in part:

Step 4

[1] Tab 1, Brief on behalf of the Government of the Northwest Territories

COMPLETED VIS PLACED IN SEALED ENVELOPE AND SENT TO RCMP DETACHMENT OF APPROPRIATE COURT REGISTRY

- Victims complete their VIS, place it in the pre-addressed envelope provided by the RCMP, seal it and either mail it or deliver it to the address marked on the envelope.

- VIS envelopes addressed to and received by the RCMP are held **unopened** on the case file until a finding of guilt.

…

Matters heard in Territorial or Supreme Court

- VIS envelopes addressed to and received by the NWT Court Registries are opened and three copies of the VIS are placed in a sealed envelope on the appropriate file. The VIS *remains sealed* until a finding of guilt.

- If an accused is found not guilty, the unopened VIS envelope remains on the file.

Step 5

VIS DISTRIBUTION AFTER A FINDING OF GUILT

- After a finding of guilt, the Court Clerk or RCMP gives copies of the VIS to: the Judge (or JP); the Crown Prosecutor (if any); and the offender.

…

[7] The Victim Impact Statement Guide [2] states, in part:

What is a Victim Impact Statement?

- A Victim Impact Statement tells the court how the crime has affected you. …

- A Victim Impact Statement is about the impact of the crime on you: it is not about the accused or about what you feel should happen to them if they are found guilty.

…

- A Victim Impact Statement is not about what happened during the crime – that is in the statement you gave to the police as evidence about the crime.

…

When is your Victim Impact Statement used?

- Your Victim Impact Statement is kept on file with the court. It is used if the accused is found guilty.

…

- Your Victim Impact Statement is not used if the RCMP do not lay charges, or if the charges are dropped, or if the accused is found not guilty.

How is your Victim Impact Statement used?

- Your Victim Impact Statement is used in court at the Sentencing Hearing. …

[2] Tab 3, Brief on behalf of the Government of the Northwest Territories

[8] In paragraphs 14 and 15 of his Affidavit filed in support of this Application the Applicant states that AC observed the complainant soon after the alleged sexual assault and telephoned the police "in connection with these matters", and therefore she may have relevant knowledge concerning the allegations. The Applicant submits that because AC has not provided a statement and he believes that AC may have "relevant knowledge" concerning the allegations, therefore he is entitled to AC's Victim Impact Statement. There is no allegation of what the "relevant knowledge" is or that the "relevant knowledge" is contained in the Victim Impact Statement; nor is there any assertion that the Victim Impact Statement is relevant, nor how such statement may impact on his ability to make full answer and defence. The argument is without foundation.

[9] The Applicant makes no reference to any relevance at all of the Victim Impact Statement of MC. The Applicant simply states that he wants his counsel to review all statements made by MC in connection with this matter to allow him to make full answer and defence to the charges against him. No other basis for disclosure of MC's statement is referred to in the Applicant's affidavit, or in the Pre-Hearing Brief filed by the Applicant.

[10] I find two fatal flaws on this Application: first, neither the evidence relied on nor the submissions made provide any foundation to conclude that either Victim Impact Statement may be likely relevant to any issue at trial; and second, there is no connection between the Victim Impact Statements filed and the Applicant's ability to make full answer and defence.

Interpretation of section 722.1 of the Criminal Code

[11] The Applicant at paragraph [17] of his brief argues:

> "Section 722.1 of the Criminal Code stipulates that a VIS must be disclosed after a finding of [g]uilt. It does not, however, prohibit disclosure before a finding of [g]uilt. This leaves open the possibility that a VIS could be disclosed before a finding of [g]uilt."

[12] Parliament amended section 722.1 in 1999[3]. Prior to the amendment, the section read:

> 722.1 The clerk of the court shall provide a copy of a document referred to in section 721 or subsection 722(1) as soon as practicable after filing, to the *offender* or counsel for the *offender* as directed by the court, and to the prosecutor. (my emphasis)

[13] Burrows, J. stated in *Fedirko*[4] at para. 15:

> Prior to the amendment, s. 722.1 appeared to require the statement to be provided to the defence as soon as practicable after it was filed with the clerk. The provision was not entirely clear. It actually called for the statement to be provided to the "offender" not the "accused". Presumably and accused is not accurately called an offender until after conviction.

[14] I agree with this observation, i.e. that prior to the amendment, the section was not entirely clear. I would, however, find the argument that even prior to the amendment the section directed that the Victim Impact Statement should only be disclosed after a finding of guilt very compelling in that prior to a finding of guilt there is no "offender". In any event, Parliament has now made it clear. The section is mandatory, i.e. the clerk *shall* provide copies of the Victim Impact Statement to the offender and the prosecutor *after a finding of guilt*.

[15] The rule of statutory interpretation that to express one thing is to exclude another is applicable to this situation. This is referred to by both the Crown and the Government of the Northwest Territories as the rule of implied exclusion. Being that section 722.1 specifically says that copies are to be distributed after a finding of guilt, implicitly means they are not to be distributed before. I agree with this position.

[16] Further, and this may simply be looking at the implied exclusion rule from a different angle, but to find that the section allows for a Victim Impact Statement to be distributed before a finding of guilt, would render the words "after a finding of guilt" unnecessary in the section. If the phrase was not to be interpreted as providing copies *only* after a finding of guilt, then why put the phrase in at all? Such an interpretation, i.e. an interpretation that finds words unnecessary or of no effect, should be avoided.

Potential Problems with the Current Process

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[3] S.C. 1999, c. 25, s. 18

[17] It may be that the procedure set out in section 722.1 and followed by the process established by the Government of the Northwest Territories can lead to potential problems, as articulated by Charbonneau, J. in *McKay*[5], however the process is the procedure required by the *Criminal Code*. If such procedure were to result in a violation of the Applicant's right to make full answer and defence, which there is no evidence of, then such violation would not be as a result of the provisions of the Northwest Territories *Victim Impact Statement Program*, but a result of the statutory provision. Even if I were to find that the Applicant's right to make full answer and defence was violated, which I do not, the Applicant's Notice of Motion does not challenge the constitutionality of section 722.1 of the *Criminal Code*.

[18] Much of the Applicant's argument went to procedures and practices of the Victim Impact Statement Program, and the potential problems that may arise if the instructions relating to completing and filing a Victim Impact Statement are not followed. Problems may well arise, and it may well be as Charbonneau, J. says the current process creates a risk of such problems which may result in a situation which is not in "the witness's best interest, [and] not in the accused's best interests"[6], but the situation does not, without evidence or foundation, lead to the conclusion that in this case the procedures are unconstitutional and therefore of no force and effect.

[19] Both the statements of Charbonneau, J. in *McKay*, and of Burrows, J. in *Hoeving*[7] are germane to this case. Charbonneau, J. said:

> … [I]t might be worth some consideration on the part of those who are responsible for making laws and administering them to see if there wouldn't be a way that might alleviate somewhat some of the risk.

Burrows, J. expresses a similar position:

> [The Applicant] also argued that if a victim does not follow the instructions and includes information relevant to guilt or innocence in the victim impact statement a mistrial could conceivably be ordered when the statement is disclosed after conviction. [The Applicant] suggested that the resulting waste of resources could easily be avoided without significant harm by permitting the accused access to the victim impact statement prior to

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4 *Fedirko* v. *Alberta*, [2004] A.J. No. 12, 350 A.R. 139 (Q.B)
5 *R*. v. *McKay*, 2008 NWTSC 58

6 *Supra*, page 165, ll. 34-42, Tab 1, Pre-Hearing Brief of the Applicant
7 *R*. v. *Hoeving* (2007), 427 A.R. 345 (Q.B.)

> trial. Weighing the advantages and disadvantages of the alternatives as to the timing of the disclosure of victim impact statements is Parliament's role, not mine.

[20] I agree. Further, even if problems could arise with the current procedure, the Applicant in this case has failed to demonstrate, to provide any foundation or evidence that the procedure will have or is even likely to have any effect on his ability to make full answer and defence in this case.

D. CONCLUSION

[21] The Application for an order granting disclosure of the Victim Impact Statements filed by AC and MC is dismissed; further the Application for a declaration that certain provisions of the Northwest Territories *Victim Impact Statement Program* are unconstitutional and of no force and effect is dismissed.

Bernadette E. Schmaltz
Territorial Court Judge

Dated this 27th day of July, 2009, at the
City of Yellowknife, Northwest Territories

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