

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

CRAIG MacNEARNEY

and

KIM MacNEARNEY

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Transcript of Ruling on Adjournment Application  
delivered by the Honourable Chief Judge R.D. Gorin,  
sitting at Yellowknife, in the Northwest Territories,  
on November 23rd, A.D. 2009.

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APPEARANCES:

Ms. D. Vaillancourt: Counsel for the Crown  
Mr. J. Bran: Counsel for Craig MacNearney  
Mr. N. Homberg: Counsel for Kim MacNearney

(Charges under s. 5(2), 7 CDSA)

1 THE COURT: The Defence applies for an  
2 adjournment of the Preliminary Inquiry which was  
3 set to today's date.

4 There have been a number of past appearances  
5 in this matter. It appears that the matter was  
6 first set for Preliminary Inquiry on July the  
7 7th. A full day was estimated as the time which  
8 would be required. I was the judge who set the  
9 matter to July the 7th. On July 7th I adjourned  
10 the matter over at the request of Defence counsel  
11 to today's date. The matter was adjourned  
12 because Defence was not prepared to proceed, but  
13 also because there were a large number of  
14 witnesses who the Crown anticipated calling.  
15 That was the reason for the lengthy adjournment  
16 to today's date and the reason why two days have  
17 actually been set aside.

18 I look at the notice of issues and witnesses  
19 which has been filed in this case. No notice, as  
20 required in the Criminal Code, had been filed  
21 before the 19th of November, 2009. So the actual  
22 notice comes at the 11th hour.

23 Section 536.3 of the Criminal Code states  
24 that:

25 If a request for a preliminary  
26 inquiry is made, the prosecutor or,  
27 if the request was made by the

1           accused, counsel for the accused  
2           shall, within the period fixed by  
3           rules of court made under section  
4           482 or 482.1 or, if there are no  
5           such rules, by the justice, provide  
6           the court and the other party with a  
7           statement that identifies  
8           (a) the issues on which the  
9           requesting party wants evidence to  
10          be given at the inquiry; and  
11          (b) the witnesses that the  
12          requesting party wants to hear at  
13          the inquiry.

14          In this case, the notice filed by Mr. Bran on the  
15          19th day of November states that:

16                 The following matters are in issue  
17                 at the Preliminary Hearing:

18                 (a) mens rea of the offence  
19          that is, the criminal intent; and  
20                 (b) actus reus of the offence.

21          I will take that to mean the offences, because  
22          there are actually two offences charged in both  
23          instances, and a list of 13 witnesses follows.

24                 Mr. Bran concedes that the notice does not  
25          legally require the Crown to call these  
26          witnesses. It does not bind the Court. It  
27          simply advises the witnesses that the requesting

1 party, in this case Mr. Bran's client, wants to  
2 hear at the inquiry.

3 I think that if Mr. Bran wanted to hear from  
4 all of these witnesses and wanted to ensure that  
5 these witnesses were called either by the Crown  
6 or himself, he should have subpoenaed them. My  
7 understanding, based on the submissions of  
8 counsel, is that there was no express undertaking  
9 by the Crown that all of these witnesses would be  
10 called. The matter may have been adjourned over  
11 to today's date so that all of those witnesses  
12 might be available, but the Crown has the  
13 discretion as to which witnesses it calls at a  
14 Preliminary Inquiry. 536.3 of the Criminal Code  
15 does not change that.

16 As I have said, there was no express  
17 undertaking. The case law in this jurisdiction  
18 clearly establishes that one of the reasons for a  
19 Preliminary Inquiry is to allow the accused  
20 discovery of the Crown's case, but, at the same  
21 time, that purpose does not obligate the Crown to  
22 call witnesses from whom Defence wishes to hear.  
23 The application for an adjournment is denied.

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Certified to be a true and  
accurate transcript pursuant  
to Rules 723 and 724 of the  
Supreme Court Rules.

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Jill MacDonald, RMR  
Court Reporter