

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Cite as: R v. Leggette, 2014 NSPC 57**

**Date:** July 25, 2014

**Docket:** 2704276 and 2704277

**Registry:** Halifax

Her Majesty the Queen

v.

Blake Leggette and Victoria Henneberry

**DECISION ON WHETHER TO CONTINUE TO EXCLUDE FAMILY  
MEMBERS WHO HAD BEEN SUBPEONAED AS WITNESSES**

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** July 24, 2014

**Decision:** July 25, 2014

**Charges:** section 235 of the *Criminal Code*

**Counsel:** Christine Driscoll and Sean McCarroll, for the Crown  
Terrance G. Sheppard for Blake Leggette  
Patrick Atherton for Victoria Henneberry

**By the Court:***Introduction*

[1] Courtrooms in Canada are presumptively open to the public. Access is restricted in only limited and exceptional circumstances. Security threats, disruptiveness, the safeguarding of confidentiality and privacy, and protection of privilege can be grounds for restricting access. Prospective witnesses can be excluded subject to an order for exclusion imposed by the judge.

[2] On February 27, 2014, Blake Leggette and Victoria Henneberry were formally charged with the first degree murder of Loretta Saunders. Committal to trial is in issue. Members of Ms. Saunders' family have been attending the Preliminary Inquiry which began on Monday, July 21.

[3] On July 21 I imposed, at the request of Crown and Defence, an exclusion of witnesses who had been subpoenaed to appear. All subpoenaed witnesses have had to remain outside the courtroom until called to appear. I have been advised that the excluded witnesses include three members of Ms. Saunders' family whom the Crown subpoenaed at the request of Mr. Sheppard, acting for Blake Leggette.

[4] At the end of the Crown's case yesterday, I was advised that Mr. Sheppard had determined he did not require the evidence of the three Saunders' family witnesses and they were not called to testify.

[5] At the conclusion of the evidence portion of this Preliminary Inquiry yesterday, the Crown indicated that the three family members wished to be present this afternoon during the submissions by counsel on the issue of committal and during my decision, which I will be reserving to August 1 at 9:30 a.m. Ms. Driscoll advised that in the event of committal, the Crown would not be calling

these family members to testify at trial. The Crown has no issue with the family members being in attendance.

[5] Mr. Atherton, representing Ms. Henneberry, takes no position on whether the family members should be permitted to be present.

[6] Mr. Sheppard's position is that the family members should continue to be subject to the order to exclude witnesses. He advised that "there is that distinct possibility that one or more of them may be called" as witnesses in the event of a trial. Mr. Sheppard submits that the exclusion of these three family members should continue so that they are not privy to the reviewing of the evidence that will necessarily occur in the course of the submissions of counsel. A review of evidence will also occur in my decision.

[7] Although Mr. Sheppard did not elaborate, it is my understanding he is concerned that Mr. Leggette's right to a fair trial could be compromised by evidence that has been influenced or contaminated through exposure to other evidence relating to the case.

[8] As counsel are aware from an email I sent later yesterday afternoon, after I considered various legal principles following court, I decided that the three family members should not be excluded from the courtroom during submissions and my decision. The following in brief are my reasons, starting with some organizing principles.

#### *The Order to Exclude Witnesses*

[9] An order to exclude witnesses is a discretionary order of the Court. (*R. v. Dobberthien*, [1975] 2 S.C.R. 560) It is invariably made when requested by one or both parties. "The immediate object or purpose of an order excluding witnesses is

to prevent any possibility that any witness expected to testify will not, by reason of hearing others testify beforehand, to an extent, alter, modify or change that which he or she would otherwise state. This applies in either civil or criminal proceedings and especially where credibility is in issue.” (*R. v. Dulle*, [2008] S.J. No. 394 (P.C.))

### *The Conduct of the Preliminary Inquiry*

[10] The *Criminal Code* has given Preliminary Inquiry judges broad powers to “regulate the course of the inquiry in any way that appears to the justice to be consistent” with the *Criminal Code*. (section 537(1)(i)) A Preliminary Inquiry judge is required to conduct the proceedings in a manner that ensures that rights conflicts arising at common law are “identified and resolved.” (*R. v. N.S.*, [2012] S.C.J. No. 72, paragraph 7) I find that the rights to be resolved in the context of this exclusion of witnesses issue are the rights of victims and members of the public to attend court proceedings and the fair trial rights of Mr. Leggette.

### *The Open Court Principle*

[11] An overarching principle that applies is the open court principle. As stated by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2:

The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the

courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

*The Special Interests of Victims in Court Proceedings*

[12] Victims of a crime have a special and intimate interest, beyond that of the general public and the media, in the judicial processes relating to the persons accused of the crime. Ms. Saunders' family members have a wholly legitimate interest in being present during the submissions I will be hearing this afternoon and the decision I will be rendering in a week's time. There would have to be compelling reasons for me to exclude them from these aspects of the Preliminary Inquiry. The Preliminary Inquiry will determine who, if either of the accused, will be committed to stand trial for Ms. Saunders' homicide and whether, if there is to be a trial, it will be a trial for first or second degree murder or some other related offence.

[13] The *Criminal Code* does not contain a definition of "victim" that is relevant to the issue I am deciding. Although expressed in the context of section 486.5 publication bans, Parliament has referred to "society's interest in encouraging...the participation of victims, witnesses, and justice system participants in the criminal justice system." The encouragement of the appropriate participation of victims in the criminal justice system is consistent with the objectives of the "open court principle" to which I referred earlier.

*Mr. Leggette's Fair Trial Rights*

[14] The implications for Mr. Leggette's fair trial rights of permitting the three family members to be present in court have not been established beyond the diffuse concerns that possible evidence might be affected. I find these concerns to be speculative and further note there is no certainty the family members will even be called to testify at trial.

[15] There are remedial options for Mr. Leggette should the three family members be called to testify at trial and it is shown that their evidence had been affected by their presence in court during the submissions and decision at the Preliminary Inquiry. I find that no prejudice could reasonably result that could not be overcome, for example, by a caution to the jury. (*R. v. Donszelmann, [2014] A.J. No. 493, (Q.B.) paragraph 44*)

[16] I find that a balancing of the respective rights I have discussed does not favour excluding the family members who have such a compelling interest in being present.

### *Final Thoughts*

[17] In conclusion there is a relevant point I wish to make although it has not been dispositive of the issue. The order for exclusion of witnesses relates only to the Preliminary Inquiry. If there is a trial, a new order will have to be sought, if one is required, relating to the witnesses to testify at trial. The trial judge will have to determine the scope of that exclusion order. As the three family members have not been called to testify at the Preliminary Inquiry, the authority of the subpoenas

requiring them to attend as witnesses is spent. They are now no longer potential witnesses in this proceeding to which the exclusion order applies. They are family members of a homicide victim. This raises the question of what authority I would have to exclude them from the submissions and my decision especially in the absence of a very persuasive case being made for me to do so. It may have been enough for me to conclude that the order for exclusion of witnesses no longer applies to them and that it would be an arbitrary exercise of my discretion to continue to exclude them. However, I have chosen to determine the issue in accordance with the “balancing rights” analysis I have given. The three previously excluded family members are free to be present for the submissions of counsel and my decision.