

MEMO:

TO: Provincial Court Staff

FROM: Chief Judge Nancy K. Orr

DATE: December 13, 2016

RE: Public Access to Court Documents

The General Principles and Policies for Public Access to Court Files and Documents were adopted and came into effect on January 1, 2013. There have been several changes to the Criminal Code since that time, and after consulting with Judge Douglas and Judge Lantz, we have agreed that the following updates to that document are necessary.

As of July 23rd, 2015, the Criminal Code was amended regarding victims. Some of the amendments provide for publication bans to be ordered on application of the Crown or the victim - or in some cases, a witness at trial. The situations in which such publication bans can be ordered is much wider than in the past, and in particular, the provisions regarding victims under the age of 18 should be noted. A summary and the relevant provisions are attached to this memo for ease of reference. Care should be taken in respect of these changes.

Currently, section **2.1 General Principle of Public Accessibility** provides that an information is not made available to the public/media until there is proof that the accused was served process with respect to the offence alleged and where the offence is one for which a publication ban could be issued, then that information is not made public UNTIL after the accused has appeared in court and the prosecutor has been given an opportunity to apply for a publication ban. The 2015 amendments expands that application to the victim as well as the prosecutor, at least in the sense of ensuring the victim knows he or she can make that application if the Crown does not. An information, where a publication ban could be requested, is **NOT** to be made public until such time as the Crown/victim has had the opportunity to do so- normally at the first court appearance. Otherwise, a publication ban is of little use if the name of the victim has already been on the front page of the newspaper or on tv or radio.

Since the Criminal Code was amended in July, 2015, a Return to Justice is no longer required in respect of a Production Order. The provisions in respect of a record relating to a Complainant or Witness remain unchanged. However, Section 2.2.5 in respect of Production of Document will now provide:

2.2.5 Production of Document

A judge or justice of the peace may order a person to produce a document or prepare a document from data under the care and control of a person. The proceedings for and documents produced are publicly accessible if:

- the production order has not been sealed by court order; and
- the informant named in the information to obtain has confirmed to court staff that the production order has been executed.

If you have any questions, don't hesitate to contact me.

(SGD) Nancy K. Orr
Chief Judge of the Provincial Court of Prince Edward Island

Summary of the July 23, 2015 changes re: publication bans

Publication bans may be granted under s.486.4 of the Code to protect the identity of complainants and witnesses when the accused is charged with certain specified offences – generally of a sexual nature. The Bill amends the list of qualifying offences in s.486.4 to include all historical sexual offences in the Code if the alleged conduct involves a violation of the complainant’s sexual integrity and that conduct would be a listed offence if it had occurred on or after the coming into force of the new definition.

Moreover, Bill C-32 makes publication bans for victims under the age of 18 years mandatory on application regardless of the offence with which the accused is charged (now such publication bans are mandatory on application but only in regard to the listed sexual offences in s.486.4 and only in relation to witnesses under the age of eighteen years and complainants).

Under the new ss.486.4(2.1) and (2.2) of the Code, the judge is required to inform the victim of his or her right to apply for the order and to make the order upon the application of the victim or the prosecutor.

Section 486.5 of the Code governs the making of publication bans in cases **other than** those captured by s.486.4. Under s.486.5, upon the application of the prosecutor, a victim or a witness, the court may order that the identity of the victim or another witness not be published.

Bill C-32 lowers the standard under which such orders may be made. First the basis upon which such orders may be made has been changed from a determination that the order is necessary for the proper administration of justice to it being in the interest of the proper administration of justice (amended s.486.5(1) of the Code). Second, one of the listed factors to be applied in deciding whether to make the publication ban order is “whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed” and the Bill changes that factor to read, “whether there is a real and substantial risk that the victim or witness would suffer harm if their identity were disclosed” (s.486.5 (7)(b) of the Code).

Similar provisions and tests apply in relation to publication bans concerning other justice system participants involved in proceedings pertaining to certain criminal organization offences, terrorism offences, and offences under the Security of Information Act.

The following are the amended provisions- they are now found in Martin's 2017 Criminal Code:

Order restricting publication - sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 - other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.