

# SUPREME COURT OF YUKON

Citation: *R. v. Kaswandik*, 2012 YKSC 23

Date: 20120327  
Docket S. C. No.: 11-01504  
Registry: Whitehorse

BETWEEN:

**HER MAJESTY THE QUEEN**

AND:

**JOHN AUGUST KASWANDIK**

Before: Madam Justice M.L. Benotto

Appearances:  
Keith Parkkari  
Lynn MacDiarmid

Counsel for the Crown  
Counsel for the Defence

## **RULING ON APPLICATION TO AMEND UNDERTAKING DELIVERED FROM THE BENCH**

[1] BENOTTO J. (Oral): Mr. Kaswandik is charged with assault, uttering a threat and uttering threat of death. The complainant is his wife. They are going through a family law matter which, I am told, has been adjourned until these charges have been tried in June of this year.

[2] Mr. Kaswandik brings this application to vacate the undertakings given in May of 2011, shortly after these charges were laid and he was arrested. The primary thrust of this application has to do with the undertakings preventing him from contacting the complainant directly or indirectly. This, he argues, makes access visits to his three-year-

old daughter, M., difficult and cumbersome. It also, he argues, undermines his claim for joint custody.

[3] The facts underlying the allegations are fully set out in the transcript of the preliminary inquiry. To somewhat oversimplify, the accused and the complainant were involved in an argument, he allegedly made threats, she left the home in fear and ultimately went to a shelter. She did not want him charged. He was charged and the conditions were agreed to by way of undertaking. Mr. Kaswandik submits that the no contact clause only appeared after he pleaded not guilty. He infers he is being penalized for this.

[4] The current access arrangements to M. are that Mr. Kaswandik sees her every weekday. To accommodate the no contact undertaking he picks her up from her daycare in the late morning and returns her to the daycare in the afternoon at either 3:00 or 3:15. On holidays or when daycare is closed, he hires an “intermediary” to facilitate access. I am told that this was ordered in the context of the family law proceedings. I note that the access issues will be back before the Court on May 23rd. I also note that Justice Veale recommended just last week that a custody and access report be prepared.

[5] The applicant argues that the no contact undertaking makes his access visits occasionally fall into confusion if the intermediary has a conflict or has difficulty arriving. The no contact undertaking also resulted in an unfortunate and awkward situation when M. had to be taken to the Emergency Room at the hospital.

[6] It is against this background and the submissions of counsel for the applicant and for the Crown that I examine the nine undertakings and order as follows:

[7] Undertakings 1 and 2, these are the reporting conditions; indeed they are the standard reporting conditions in most undertakings. Although the applicant asserts that they are “onerous,” there is no evidentiary basis for a change. The Bail Supervisor has the discretion to direct the manner and the frequency of the reporting. There will be no change.

[8] Undertakings 3 and 4 represent the no contact with the complainant clauses. Undertaking 3 says that he is to “Have no contact directly or indirectly or communicate in any way with L.M., except with the prior written permission of the Bail Supervisor after consultation with Victim Services, the Spousal Abuse Program, Family and Children Services and the Royal Canadian Mounted Police.”

[9] On consent of the Crown, there will be an exception to this undertaking for medical emergencies. I add another exception. It is to be strictly interpreted, and is as follows:

3. Mr. Kaswandik may contact the complainant directly concerning the health and welfare of the child in writing only. The writing may be by e-mail if the parties have access to e-mail, or by letter sent by mail or public courier company. Such communication can only be on the subject of M.’s health and wellbeing, and such communication is not to exceed one time per week.

[10] Undertaking number 4 requires that he not attend at the complainant's residence. Given the volatile background, I see no reason or basis to change this undertaking.

[11] Number 5 and 6 relate to alcohol consumption. On consent of the Crown, these two conditions are deleted.

[12] Condition 7 is that he remain in the Territory; 8 is he deposit his passport; and 9 is a firearm prohibition. There is no evidentiary basis to amend 7, 8 or 9.

[13] Counsel, I believe that covers everything in the application, so there is nothing further for me to do.

[14] MS. MACDIARMID: Just for clarification. The order will be drafted by -- it will be a standard undertaking that you will sign?

[15] THE CLERK: That is correct, Your Honour.

[16] MS. MACDIARMID: And in terms of number 3, the exception, it's specifically concerning health and welfare of the child. Just for clarification, does that include issues surrounding access or time with the child? It's just --

[17] THE COURT: No, you are going to be back, before probably Justice Veale, in another month and a half or so, and so that will be accommodated there. He has also requested a custody and access report, so I am going to leave it through that process. So the issue is the health and the welfare of M. As I have said in my reasons, they are intended to be strictly enforced. Anything else, counsel?

[18] MR. PARKKARI: I just wanted to clarify, because the application is brought under 523, it will be an undertaking to this Court and not an undertaking to the police officer. So the undertaking to the police officer will be vacated.

[19] THE COURT: Okay. That is fine, it makes sense. Thank you all.

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BENOTTO J.