SUPREME COURT OF YUKON

Citation: *R v HD,* 2026 YKSC 21

Date: 20260327
S.C. No. 25-1504A
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

H.D.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Justice N. Devlin

Counsel for the Crown — David King and Karlena Koot

Counsel for the Accused — Kevin Drolet

REASONS FOR DECISION

Introduction

[1] The Crown applies, pursuant to *R v Kinamore*, 2025 SCC 19 at paras. 33-57 (“*Kinamore”*), to admit general evidence about the Complainant’s prior sexual history with the Accused, as essential to an understanding of its case. This hearing proceeded in writing per *R v JJ*, 2022 SCC 28 at para. 27. Having considered the application, the consent of the Accused, the factors set out in s. 276(3) of the *Criminal Code*, RSC 1985, c C-46 (“*Criminal Code*”), and the applicable principles, I am satisfied that the

proposed evidence is capable of admission and a full hearing for its admissibility should be held, subject to a number of concerns laid out in these reasons.

The function of the Stage 1 analysis

[2] The first stage of a prior sexual history evidence application does not determine ultimate admissibility. This preliminary step is meant to screen out those requests to raise other sexual activity which, on their face, are frivolous or overtly brought for an impermissible purpose: *Kinamore* at paras. 45-51.

[3] A further purpose of the Stage 1 hearing is to assess other potential s. 276 problems that are likely to arise, and give directions to address those issues. The protections and processes enacted in ss. 276 and 278.92-98, were designed to afford complainants a respectful judicial process, uninfected by sexist myths, while respecting the accused's right to full answer and defence: *R v Goldfinch*, 2019 SCC 38 at para. 2. Regrettably, though predictably to anyone familiar with the workings of criminal process, this well-intentioned regime frequently poses as much or more of an obstacle to justice for complainants as it does a protective benefit: see *Kinamore* at paras. 1 and 95.

[4] Specifically, the chronic failure to apprehend and address the myriad ways in which s. 276 issues can arise, coupled with the cumbersome process of complainant participation, delay and derail sexual assault trials with disheartening regularity across Canada. Therefore, courts conducting judicial pre-trials, case management conferences, and Stage 1 sexual activity and records production applications, have both the opportunity and the obligation to thoroughly review what evidence can, should, and

often must be determined admissible before trial. Doing so is essential to ensuring that sexual assault prosecutions go ahead in a timely and durable manner.

The Crown Case

[5] The Complainant and the Accused were in a long-term intimate relationship. The essence of the allegation appears to be that the Complainant began to decline the Accused's attempts at initiating sexual activity and that he responded by pressuring her to agree. She generally acquiesced. The expected Crown evidence is that this pattern continued over a number of months. It is alleged that her "giving in" to sexual activity she did not want became assaultive and criminal at some point in this sequence of refusal and pressure.

[6] The Complainant is also expected to testify that one form of sexual activity was painful for her, which the Accused knew and yet persisted in performing, despite her lack of consent.

[7] The Crown states in its application that it does not intend to lead evidence of the specifics of any prior, consensual encounter, only to avert to the existence of the relationship in general terms. It is not clear to me how this is realistic, given the way in which the allegation is framed in the application materials. That said, it is clear that the application passes Stage 1.

The Need for the evidence

[8] A primary question to be asked at the Stage 1 screening step is what work the subject evidence is meant to do. At the outset, this case makes little sense without understanding that it took place in the context of an ongoing sexual relationship. That is the premise of the Crown's application, and it is undeniably correct.

[9] Moreover, based on the application materials, it appears that the Crown's case is that the Complainant's reluctant agreement to sexual activity became legally ineffective as consent at some point in the face of persistent coercive pressure by the Accused.

[10] Critically, it does not appear, from the materials filed to date, that she simply said "no" and then did not resist when the Accused proceeded to touch her sexually: see *R v Ewanchuk*, [1999] 1 SCR 330 at para. 51 ("*Ewanchuk*"). Rather, the implication in the Crown's materials is that further dialogue on the topic of consent took place, though the nature of those communications is not described.

[11] Specifically stated, the Crown's theory is that the Accused "would pressure [the Complainant] to have sex with him and she would generally give in", and that "this activity continued until they broke up". In this vein, the Indictment is extremely broad and charges sexual assault for a period covering more than the entire last year of the relationship. The Crown's materials go on to state that: "the relationship <u>deteriorated</u> into one where [the Complainant] <u>no longer consented</u>" [emphasis added].

[12] This latter point, being that consent existed and then stopped, matters a great deal to the admissibility analysis. The history of sexual interaction between the parties appears necessary to prove that the Accused crossed the line from having sex with the Complainant which, while not her *preference*, she agreed to for other reasons, and sex that was criminally non-consensual. As described in the application, the Crown's case requires evidence of the *change* in sexual behaviours and communications over time. This necessarily captures some events which are not the subject matter of the charge.

[13] It also requires quite specific evidence of particular sexual encounters, events, statements, or practices, so the end-point of consent can be determined at trial.

[14] Therefore, the evidence the Crown seeks to admit, and in fact much more evidence about prior sexual encounters, appears necessary for the Crown's case.

A defence s. 276 application hiding in plain sight?

[15] While the Accused has not brought an application, the full spectrum of the 'consent discussions' (implied to have taken place on the basis of the Crown's description of the charges), are clearly relevant to any defence.

[16] At a minimum, evidence about what the Complainant said and did in those situations where, in the words of the Crown, she "gave in" to his sexual advances, would be relevant to what the Accused may have honestly believed on those occasions where the Crown alleges that she did not communicate even reluctant consent. It may also be relevant to testing her credibility on the claim that she did not, in fact, subjectively consent: *Ewanchuk* at para. 29.

No prohibited use intended

[17] The Crown clearly does not advance any prejudicial reasoning against the Complainant from the proposed evidence. To the contrary, it appears the evidence will be that the Complainant's repeated, and possibly escalating, expressions of a lack of desire for sexual contact made her non-consent unmistakable at some point. This is literally the inverse of the prohibited reasoning described in s. 276(1)(a) and (b).

[18] However, if evidence emerges that there was a melange of reluctantly consensual and criminally non-consensual sex during the period covered by the Indictment, there is a possibility that the implication of consent in some situations could make it look like a minimal or baseline state of consent subsisted generally. This would

obviously run afoul of s. 276(1). More detailed materials are required to assess and manage this risk.

Conclusion

[19] On its face, it appears that this case can neither be prosecuted nor defended without evidence of the parties' sexual history. The evidence is not proposed to be used for prohibited reasoning, and the application is not frivolous. The application is therefore directed to a second stage hearing, with the Complainant entitled to participate. That hearing is set for April 14, 2026, per the prior discussions between the parties and the Court Trial Coordinator.

Direction for further materials

[20] This matter is being expedited to preserve trial dates in a case that is rapidly approaching the presumptive *Jordan* ceiling. There is a clear and present danger that this matter will go off the rails if the entirety of the other sexual activity evidence that may be necessary, or will inevitably be elicited, is not canvassed and managed. Consistent with the mandate granted me by the Supreme Court of Canada, in *Kinamore* at para. 44, I am requiring the parties to pursue clarity on these issues in advance of trial.

[21] The Crown is directed to file a further application record, specifying; (i) whether it alleges that *all* sexual activity between the parties in the time frame of the Indictment was non-consensual and, if not, then (b) what salient factual differences distinguish sexual activity to which the Complainant reluctantly but volitionally "gave in" to, and the acts that constitute the subject matter of the charge.

[22] If the Crown's case is that the Complainant expressed non-consent, and this was followed only by passive non-resistance, it should say so. However, the references in the application record to the Accused "insisting" or "pressur[ing]" the Complainant, and her "giving in", implies further two-way communication between them. More specificity is required to understand what of this evidence may be captured by s. 276 prohibitions.

[23] Similarly, the Crown's materials leave the strong impression that a defence of honest but mistaken belief will come into play, or that the Complainant's evidence of subjective non-consent will be challenged on the basis of her communications (verbal and non-verbal) in response to the Accused's inveigling her for sex.

[24] If the Crown does not allege that all of the sexual encounters between the parties in the time frame of the Indictment were non-consensual, the defence cannot simply rely on the mere breadth of the Indictment to discuss any and all sex during this period. Rather, it would need to also seek permission to lead such evidence under s. 278.94(4).

[25] Therefore, the Crown is directed to file further and better supporting materials, clarifying the nature of the evidence it intends to present to prove sexual assaults took place[1] by April 2, 2026, together with particularization as to whether all sexual activity during the period of the Indictment is alleged to be criminal or not, and if not, how the evidence is anticipated to differentiate between these.

[26] The Defence will then have until April 9, 2026, to file any s. 276 application of its own. The defence is cautioned that the absence of such an application, as informed by the Crown's particulars, will likely preclude it from reliance on other sexual activity evidence at trial in the manners discussed above.

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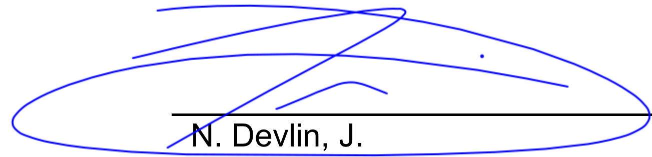
[1] Whether by way of transcripts from a preliminary inquiry, transcript of the complainant's statements, a summary of those, or other means.

[27] Any responding materials to a Defence application may be filed by April 13, 2026. All further materials shall also be served on counsel for the Complainant.

[28] Any Stage 1 analysis on any Defence application will be assessed at the outset of the April 14, 2026 hearing, informed by the principles set out above.



N. Devlin, J.