Citation: *R. v. James,* 2025 YKTC 45

Date: 20250808
Docket: 24-00185
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

KASHIES CHARLES ANDREW JAMES

Publication of any document, or broadcast or transmission in any way of an application made, evidence taken, information given, representations made or the decision of a judge, unless ordered otherwise, under s. 278.93 of the *Criminal Code* is prohibited pursuant to s. 278.95 of the *Criminal Code*.

Appearances:
William McDiarmid — Counsel for the Crown
Kevin Drolet — Counsel for the Defence

RULING ON APPLICATION

[1] Kashies James ("Mr. James" or the "Applicant") is charged with committing the offences of sexual assault and touching for a sexual purpose. These offences are alleged to have occurred on or about June 25, 2023. The complainant, in respect of these charges, was a person under the age of 16. The Crown proceeded by way of indictment.

[2] Mr. James previously made an application pursuant to ss. 278.1 to 278.91 of the *Criminal Code* for production of various RCMP occurrence reports and related

investigative files. After an expedited process, on May 2, 2025, production of some of the records that Mr. James sought was ordered by Deputy Judge Gill in *R. v. James*, 2025 YKTC 18. The records were received by Mr. James on May 5, 2025. The trial on these charges was set to proceed on May 7, 2025.

[3] On the day of trial, Mr. James brought a written application to determine the admissibility of the records produced to him following the above-noted ruling. Oral submissions were made by Mr. James' counsel and the Crown prosecutor on May 7, 2025. The Crown filed a written Response on June 19, 2025.

[4] Sections 278.93 and 278.94 of the *Criminal Code* set out the two-stage procedure for such an application:

1. Section 278.93 governs the application for a hearing;
2. Section 278.94 governs the hearing to determine the admissibility of the evidence.

[5] This ruling addresses the first stage only, namely, whether to grant the application for a hearing under s. 278.94 to determine the admissibility of the evidence.

Analysis

[6] Pursuant to s. 278.93, the Applicant seeks to adduce records produced to him following the ruling made under ss. 278.1 to 278.91. The procedural requirements for the first stage of this application are set out in s. 278.93. The Crown concedes that the test at this stage is met, namely, that the procedural requirements have been met and the records are capable of being admissible. However, even where the Crown agrees

that the procedural and substantive requirements of s. 278.93(4) have been met, the Court must still make a finding before proceeding to the second stage (*R. v. Barton*, 2019 SCC 33, at para. 68).

[7] To allow the application for a hearing, s. 278.93(4) requires, first, that I am satisfied that the application accords with the procedural requirements of s. 278.93(2):

i. the application must be in writing, setting out detailed particulars of the evidence sought to be adduced and the relevance of that evidence to an issue at trial;
ii. a copy of the application must be provided to the prosecutor and the clerk of the Court; and,
iii. notice of the hearing must be given to the prosecutor and the clerk of the court at least seven days before the hearing.

[8] As required, the application was in writing and a copy was provided to the prosecutor and clerk of the Court.

[9] The requirement for detailed particulars of the evidence sought to be adduced is necessary to ensure that judges are equipped to meaningfully engage in the necessary analysis (*R. v. R.V.,* 2019 SCC 41*,* at para. 48). In this case, the application filed by Mr. James simply described the records as RCMP records obtained in an unrelated criminal investigation involving the complainant. At my request, copies of the records were filed as part of the application, with the intention of meeting the requirement for detailed particulars (*R. v. W.G.,* 2025 ABKB 58, at para. 18). The records include copies of posts from a social media platform, various RCMP reports, and a USB stick. I note

that the USB stick provided by the Applicant's counsel is not functional and, despite requesting several times that a functional copy be provided, the Court has been provided neither with a functional copy nor a description of its contents, leaving me without the required detailed particulars.

[10] In respect of the social media posts and RCMP reports, the application sets out that these records are relevant to trial issues, namely, the complainant's credibility, including misrepresentations about her age and reliability. I have reviewed these records, and, upon a facial consideration, I am satisfied that the relevance of the records to an issue at trial has been adequately articulated in the application, namely the complainant's credibility, reliability, and issues surrounding the complainant's age relevant to
Mr. James' defence. In relation to the USB stick, as the contents have not been described to me and I am unable to view it, the Applicant has not satisfied me of its relevance.

[11] Section 278.93(4) requires that the application be given to the prosecution and clerk of the Court at least seven days in advance, or a shorter interval that may be allowed in the interests of justice. The application was not provided seven days in advance. However, I am satisfied that it is in the interests of justice to permit the application to proceed with a shorter notice period. Counsel advised that the existence of the records was not known to Mr. James until shortly before the trial dates and every effort was made by all involved to advance the application for production as expeditiously as possible in order to have a ruling before the trial dates. Once a ruling

was issued allowing the production of the records, Mr. James promptly filed this application. The Crown has not argued that it is prejudiced by the shortened notice.

[12] As the Applicant has not provided detailed particulars in relation to the evidence contained on the USB stick, nor satisfied me of its relevance, I dismiss the application as it pertains to the USB stick (*R. v. Goldfinch*, 2019 SCC 38, at para. 94). The remainder of this ruling relates only to the social media posts and the RCMP records.

[13] I must be satisfied that the records the applicant seeks to adduce are capable of being admissible under ss. 276(2) or 278.92(2) (*R. v. J.J.,* 2022 SCC 28*).* This is a low threshold, and one conceded by the Crown in this case. In making this determination, judges are to conduct a facial consideration and make a tentative decision concerning the admissibility of the evidence (*R. v. Barakat,* 2019 CarswellOnt 1822 (Ont. Ct. J.), at para. 18*)*. Any doubts that exist at this stage ought to be resolved at the second stage evidentiary hearing (*R. v. Ecker* (1995), 96 C.C.C. (3d) 161 (Sask. CA). Courts should be cautious in limiting the defendant's rights to cross-examine and adduce evidence; unless the evidence is clearly inadmissible, the Court should proceed to stage two (*Barakat*, at para. 18).

[14] The factors listed under s. 276(2) are whether the evidence is: (1) being adduced for the purpose of twin myth reasoning; (2) relevant to an issue at trial; (3) is of specific instances of sexual activity; and (4) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[15] The records in issue are RCMP records (notes and occurrence reports) and social media posts obtained through prior police investigations. The Applicant says the records will be relevant at trial to the complainant's reliability, credibility and the issue of whether the Applicant knew or was wilfully blind to the complainant's age. The Applicant describes the records, saying they:

a. provide real evidence emanating from the complainant that she actively misrepresented her age to members of the public;
b. contain evidence regarding the complainant's possession, use and abuse of alcohol;
c. include strong evidence of the complainant's readiness to lie to police for personal advantage;
d. include strong evidence of the complainant's inclination to lie in response to minor slights; and
e. demonstrate the complainant's willingness to make false accusations of serious malfeasances against others.

[16] Having reviewed the records for the purposes of this application, I am satisfied that they are capable of being admissible under s. 276(2). At this threshold stage, I am satisfied the records are not being adduced for the purposes of twin myth reasoning, are relevant to issues at trial, are of specific instances of sexual activity, and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[17] Turning to s. 278.92(2), in determining that the records are capable of being admissible, I have considered the importance of the records to the Applicant's right to make full answer and defence. The records relate to the issue of the complainant's age and that there is a reasonable prospect that the records will assist in justly determining the case.

[18] I have also considered the factors set out in ss. 276(3) and 278.92(3) and, at this first stage of determining whether the records are capable of being admissible, I find as follows. The records could be relevant to Mr. James' right to make full answer and defence and there is a reasonable prospect that they will assist in determining trial issues; again, this is largely in relation to trial issues concerning the complainant's age and credibility. On a facial consideration, the records are not related to discriminatory beliefs or bias. As the records are not medical, therapeutic, or counselling records, the admission of the records would not appear to adversely impact society's interest in the obtaining of treatment by complainants. Given the type of records in issue – RCMP records and social media posts – again, on a facial consideration, the impact on the complainant's personal dignity and right to privacy appears limited; similarly, her right to personal security, and full protection and benefit of the law seems to be minimally impacted.

[19] I must also consider society's interest encouraging the reporting of sexual assault offences. Some of the records in issue describe a previously reported allegation of sexual assault involving the complainant. While I take this into account, at this stage, unless the evidence is clearly inadmissible, I must be cautious in limiting the Applicant's

right to adduce evidence and conduct cross-examination. Doubts as to admissibility are to be resolved at the second stage evidentiary hearing.

[20] On the basis of the above, I find that the social media posts and RCMP records include evidence that is capable of being admissible and is relevant to trial issues. In relation to that evidence, I allow the s. 278.93 application for a hearing to proceed to a hearing under s. 278.94 to determine whether the evidence is admissible under ss. 276(2) or 278.92(2) of the *Criminal Code*.

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CAIRNS T.C.J.