

Citation: *R. v. J.K.E. and Canadian Broadcasting Corporation*, 2005 YKTC 31

Date: 20050414
Docket: 98-03784
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

Her Majesty the Queen

and

J.K.E.

and

The Canadian Broadcasting Corporation

Appearances:

Peter Chisholm and Edith Campbell
Fred Kozak and Matthew Woodley
Diane Oleskiw

Counsel the Respondent
Counsel for the Applicant
Counsel for J.K.E.

REASONS FOR DECISION

[1] This is an application by the Canadian Broadcasting Corporation (CBC) for access to the youth court records of J.K.E. and in particular, to the youth court record as it pertains to a conviction in 1999 on a charge of criminal negligence causing bodily harm.

[2] I am satisfied that by virtue of s. 163, access to youth court records and publication of identifying information are governed by Part 6 of the *Youth Criminal Justice Act*, 2002, c. 1 (the "Act") even if those records were created pursuant to the now repealed *Young Offenders Act.*, R.S.C. 1985, c. Y-1.

[3] Section 163 of the *Act* reads as follows:

APPLICATION TO DELINQUENCY AND OTHER OFFENDING BEHAVIOUR.

163. Sections 114 to 129 apply, with any modifications that the circumstances require, in respect of records relating to the offence of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, and in respect of records kept under sections 40 to 43 of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985.

[4] The *Act* prohibits the publication of any identifying information related to the young person subject to certain specific exceptions (s. 110). Similarly, access to youth records is restricted (s. 118) except to persons specified and authorized in the *Act* (s. 118(2), s. 119). Such access is time limited, referred to as the period of access (s. 119(2)), after which period records may be made available for limited purposes and only by order of a youth court judge (s. 123).

[5] The access periods referred to above vary from two months in the event the charge is withdrawn or dismissed or if found guilty and a reprimand is given to five years after the youth sentence has been completed in the case of an indictable offence.

[6] Section 119(9)(b) provides that if a young person is convicted of an adult offence during the period of access, Part 6 no longer applies to the record and the previous youth record shall be dealt with as a record of an adult.

(9) If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,

(a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;

(b) this Part no longer applies to the record and the record shall be dealt with as a record of an adult; and

(c) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

[7] Part 6 deals with publication (s. 110-112), fingerprints and photographs (s. 113), records (s. 114-124), disclosure (s. 125-127) and destruction of records (s. 128-129).

[8] I note that “record” is defined very broadly in the *Act* (s. 2):

“record” includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.

[9] The “record” would normally include information identifying the young person. I am satisfied that Parliament intended s. 119(9)(b) to permit the identification of the young person in circumstances where an adult could be identified.

[10] It is acknowledged by counsel for J.K.E. that J.K.E. has been convicted of an offence while an adult during the access period as it pertains to the 1999 youth conviction, the records for which are the subject of this application. Section 119(9)(b) therefore applies. The CBC, and indeed any other media representative or member of the public, now have access to J.K.E.’s youth record as though it were an adult record, subject to the following:

- a. The Court Access Guidelines as they apply to adult records; and
- b. Any modifications that the circumstances require, pursuant to s. 163 of the *Act*.

[11] The “circumstances” referred to in s. 163 may pertain to transitional problems relating to the *Young Offenders Act* and the *Youth Criminal Justice Act* or to the factual circumstances as they relate to J.K.E. at the current time.

[12] J.K.E. is currently charged with a serious criminal offence. J.K.E.’s preliminary hearing has not yet been completed. There has been some reference to the 1999 youth conviction in the evidence heard at the preliminary hearing. Crown counsel has advised that the 1999 youth conviction may be introduced as similar fact evidence in the event that there is a committal and the current charge goes to trial. Publication of the information in the youth record prior to the resolution of the outstanding charge against J.K.E. could, and in my opinion would, impact negatively on the fairness of J.K.E.’s trial.

[13] All counsel in this application are cognizant of the dangers of tainting the jury pool in small communities such as Dawson City. Mr. Kozak, for CBC, indicated that if access to the youth record were granted, publication of the information in that file by CBC would not occur until the trial on the current charge facing J.K.E. had been completed.

[14] *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, a decision of the Supreme Court of Canada, provides guidance on this issue. In the decision the court states at para. 73:

- Restrictions on publication should only be ordered to prevent a real and substantial risk to the fairness of the trial; and
- The statutory effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[15] I am satisfied that J.K.E.’s right to a fair trial would be negatively affected if the contents of her 1999 youth court record were published. In the circumstances, while access to the court record will be granted in accordance with the guidelines applicable to adult records, publication of the information

contained therein should be prohibited until the preliminary hearing is completed and J.K.E. is discharged or if J.K.E. is committed for trial, the trial is ended.

[16] I am satisfied that counsel appearing before me are cognizant of and sensitive to the potential for contempt of court proceedings, even in the absence of a restriction on publication. In *R. v. Froese and British Columbia Television Broadcasting System Ltd. (No. 3)* (1980) 23 B.C.L.R. 181, aff'g (1979), 50 C.C.C. (2d) 119 (B.C.S.C.), the B.C. Court of Appeal affirmed the decision of McEachern J. who held that:

It is therefore a grave contempt for anyone, particularly the members of what is now called the media, to publish, before or during a trial, any statements, comments, or information which reflect adversely upon the conduct or character of an accused person, or to suggest directly or indirectly that he has been previously convicted of any offence, or to comment adversely or at all upon the strength or weakness of his defence. The harm that may be done is incalculable because in most cases it is impossible to determine what effect, if any, such statements or comments may have upon the jury.

[17] There are other media who are not parties to this application. For that reason, my ruling on this application will apply to the file, not just the parties to this application, subject to further applications by interested parties to a judge having jurisdiction.

Conclusion:

[18] This is an application by the CBC to access the youth court file for J.K.E. dealing with J.K.E.'s conviction and sentencing for a charge of criminal negligence causing bodily harm dated November 18, 1999.

[19] The CBC, and indeed the general public, are entitled to access this file as if it were an adult file by virtue of s. 163 and 119(9) of the *Youth Criminal Justice*

Act and by virtue of the fact that J.K.E. has an adult criminal conviction during the access period defined in s. 119(2).

[20] That access will be governed by the Yukon Territorial Court Access Guidelines, copies of which have been made available to counsel.

[21] To minimize confusion or misunderstandings, I am directing that any access to J.K.E.'s file be handled by the Senior Court Clerk or a person designated by her.

[22] Publication of the contents of the youth court record that is the subject of this application, including the identity of J.K.E., will be prohibited until the preliminary hearing in the matter that is currently before this court is completed and J.K.E. is discharged or, if she is committed to trial, the trial is ended. This restriction is identical to the publication ban that is in effect with respect to the evidence heard at the ongoing preliminary hearing.

[23] This publication ban will be attached to the youth court record of J.K.E. as it pertains to a conviction in 1999 on a charge of criminal negligence causing bodily harm. This publication restriction should be considered an interim order, with leave to any interested party to apply to a judge having jurisdiction to amend or vacate the order.

Lilles T.C.J.