

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

His Majesty the King

-and-

N.B.

Restriction on Publication: By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness. See the *Criminal Code*, s. 486.4.

Reasons for Decision on Pre-Trial Application, Admissibility of Demeanour Evidence

Heard at Yellowknife: April 22, 2025

Written Reasons filed: October 9, 2025

**REASONS FOR DECISION OF THE
HONOURABLE JUSTICE M. DAVID GATES**

Counsel for the Crown: A. Paquin, J. Kelly

Counsel for the Respondent: A. Lind

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REASONS FOR DECISION

INTRODUCTION AND OVERVIEW

[1] The Accused, N.B., is charged with sexual offences alleged to have taken place in Tulita and Yellowknife, Northwest Territories, between August 2007 and March 2012.

[2] The trial of this matter before a jury commenced on April 22, 2025, in Yellowknife.

[3] During the case for the Crown, the witness, C.K. was called to testify. C.K. is the wife of T.E., one of the complainants in this matter. Before calling her, the Crown asked to enter into a *voir dire* to determine the admissibility of C.K.'s proposed evidence regarding T.E.'s demeanour when she first questioned him regarding possible sexual abuse by the Accused. C.K. testified during the *voir dire*. Following

oral submissions from both the Crown and the Defence, I ruled that her evidence was admissible before the jury, subject to appropriate instructions as to its proper use. I indicated that written reason would follow. These are my reasons for decision.

FACTS

[4] T.E., was born and raised in Meander River, Alberta. In August 2008, he moved to Tulita, Northwest Territories, to complete his schooling. He lived with the Accused, the Accused's wife, K.B. (T.E.'s aunt), and their three children. At the time, T.E. was 16 years of age. While in Tulita, the Accused acted as his guardian, teacher and coach. T.E. remained in Tulita until he completed high school in approximately January, 2010.

[5] T.E. had first met the Accused in Meander River, where the Accused worked as a teacher. The Accused began a relationship with the K.B. and they later married. While the Accused was not T.E.'s teacher in Meander River, he coached T.E. in basketball for two years and acted as a mentor and confidant. In 2004, the Accused accepted a teaching position in Tulita at Chief Albert Wright School. He taught high school, acted as the school's guidance counsellor, and served as the coach of the school's boys' basketball team.

[6] The Accused is charged with sexual exploitation and sexual assault in relation to T.E. The Crown alleges that the Accused performed oral sex on T.E. while the two were staying in a hotel in Yellowknife, in September 2009. The Crown also alleges that the Accused repeatedly kissed T.E. on the lips after bringing him into his bedroom, turning out the lights and engaging in what was presented as mentoring or counselling sessions. According to the Crown, these kissing incidents took place before and after the oral sex incident.

[7] The same alleged sexual misconduct underlies the additional charge of sexual exploitation. The Crown asserts that the Accused was in a position of trust and that his touching of T.E. was for a sexual purpose.

[8] T.E. first fully disclosed these allegations in a statement given to the police in April 2021, more than a decade after the events are said to have occurred.

[9] Around 2019, C.K. spoke to her husband after hearing from T.E.'s aunt that the Accused would get boys drunk and take advantage of them. According to this aunt, this information came from K.B. (the Accused's wife), who had reportedly heard it from B.Y., another complainant in this matter. Having learned that B.Y. lived at the Accused's home at around the same time as T.E., C.K. decided to speak to her husband about what she had heard.

[10] C.K. testified that when she questioned T.E. about possible experiences with the Accused he appeared “very shocked”: he sat back, his eyes widened, he was initially unable to speak, and he avoided eye contact, looking at the floor. She stated that she had never seen him react in this manner. Based on his body language and facial expressions, she thought that he seemed embarrassed and ashamed, as if he was trying to shake the whole thing off. According to C.K., T.E. swore when he learned of B.Y.’s allegations. He then told her that the Accused had tried to kiss him whenever he approached him with a problem. C.K. described his voice as flat and without emotion. After a brief discussion with her, T.E. said that he did not want to talk further about the matter and immediately left the room, shaking his head. C.K. described him as “closing down”, appearing numb and emotionless. C.K. did not learn about the alleged oral sex incident until T.E. later provided a statement to police, while she was present.

[11] Later, when the police contacted T.E. to provide a formal statement, he initially told C.K. that he was ready to do so. In the days leading up to the meeting, however, he told her that he could not go through “the whole court thing”. C.K. again described him as shutting down and not listening to her. She testified that he eventually agreed to speak with the police after she encouraged him to deal with his trauma and move his life forward.

THE POSITION OF THE PARTIES

[12] The Crown maintains that credibility and reliability will be the main issues in this trial and that the Defence is expected to argue that T.E. and the other complainants fabricated these allegations and colluded with one another. The Crown contends that T.E.’s emotional response during this first disclosure will be very important for the trier of fact to consider. It argues that C.K.’s observations of T.E.’s demeanour are circumstantial evidence of his emotional state, and that may assist in explaining why he did not disclose any of these events for over a decade. The Crown acknowledges that a limiting instruction will be required to explain to the jury how they may deal with this evidence of demeanour, but contends that the evidence is admissible. Finally, the Crown notes that C.K. and T.E. have been in a longstanding relationship, placing her in a strong position to describe his behaviour.

[13] The Defence concedes that C.K.’s observations relative to T.E. are admissible and have some probative value. However, it challenges C.K.’s interpretation of those observations. The Defence also raised concerns about what C.K. may have said to T.E. prior to observing his reaction. Finally, the Defence maintains that C.K. should be cautioned not to make statements in front of the jury that would amount to an opinion on the Accused’s guilt.

ANALYSIS

[14] It is well established that lay witnesses may testify about facts they have personally perceived, typically matters they have seen or heard. However, opinion evidence is presumptively inadmissible. Except where a recognized exception applies, only experts may give evidence requiring specialized knowledge. As the Supreme Court explained in *R v DD*, 2000 SCC 43, at para. 49, the Supreme Court noted that: “[A] basic tenet of our law is [therefore] that the usual witness may not give opinion evidence but testify only to facts within his knowledge, observation and experience.”

[15] In *R v Collins*, 2001 CanLII 24124 (Ont. CA), the Court explained that in the law of evidence, an opinion means an “inference from observed fact.” In *The Law of Evidence*, Paciocco, Paciocco & Stuesser, 8th ed, (Toronto: Irwin Law, 2020), at p. 234, the authors further clarify the distinction between facts and inferences:

The distinction between inferences and facts is important is important to the law of evidence, to the extent that it can be drawn. In our system of trial, it is the neutral, impartial trier of fact who is to determine what inferences or conclusions to draw from the facts. The role of the witness is ordinarily to describe observed facts that the impartial trier of fact will then use to draw their own inferences or conclusions.

[16] As the jurisprudence recognizes, the distinction between fact and opinion is not always easily drawn. In *R v Graat*, 1982 CanLII 33 (SCC); [1982] 2 S.C.R. 819, at 835, the Court observed: “the line between ‘fact’ and ‘opinion’ is not clear”. Historically, lay opinion been permitted in such matters as the identification of handwriting, persons or objects; the apparent age of a person; physical condition, including illness and death; and a person’s emotional state, such as appearing depressed, angry, aggressive, or affectionate. Court have also traditionally accepted lay opinion on estimates of speed and distance, the value of certain items, and their overall condition (for example, whether new or used).

[17] In *Graat*, however, the Court went further, permitting several lay witnesses to express opinions, based on their observations, about whether the accused’s ability to drive was impaired. At p. 841, Dickson J. (as he then was) held that lay witnesses may offer their personal observations as opinions when they “are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly.”

[18] Professor Paciocco (as he then was) has suggested a useful framework for determining when lay opinion evidence should be received. The court should ask:

(1) Is the trier of fact in as good a position as the witness to draw the inference or conclusion? (2) Is the inference or conclusion one that persons of ordinary experience are able to make? And (3) Does the witness have relevant experiential capacity to draw the inference or form the conclusion? This last consideration does not require expertise in the technical sense, but it does involve an assessment of the witness's life experience and familiarity with the described behaviour, and therefore has a basis for commenting on his demeanour.

[19] I am mindful of the general rule against oath-helping, which prohibits a witness from expressing an opinion on whether another witness is telling the truth. The jurisprudence clearly establishes that credibility assessment rests exclusively with the trier of fact, whether judge or jury.

[20] Demeanour evidence has also been permitted in the specific context of delayed disclosure of sexual assault. In *R v S.(W.)*, 1994 LanLII 76 (SCC); [1994] 3 S.C.R. 521, the Court held that “[T]he complainant’s emotional condition at the time of the disclosure may be relevant and admissible provided that the evidence is confined to what was observed and does not stray into inferences about the complainant’s truthfulness.”

[21] I accept the Defence submission that some aspects of C.K.’s evidence represent conclusions she has drawn from her observations. The issue, however, is whether those conclusions fall within the recognized exceptions for lay opinion evidence. As refined in *Graat*, lay opinion is admissible where the witness’s words operate as a compendious description of facts too subtle or complex to narrate separately. Applying the three considerations suggested by Professor Paciocco: (1) the trier of fact is not in as good a position as C.K. to draw inferences about T.E.’s emotional state, because it is about her ability, through experience, to translate subtle behavioural cues into a description comprehensible to others; (2) the conclusions she expressed - for example, that he appeared shocked or “closed down” - are the kinds of ordinary assessments that fall within the scope of permissible lay opinion as articulated in *Graat*; and (3) her experiential capacity as his spouse of ten years placed her in a strong position to draw such inferences.

CONCLUSION

[22] In this instance, I am satisfied that C.K.’s evidence regarding her observations of T.E. at the time of her questioning him about possible sexual abuse is admissible. For the most part, her proposed evidence consists of factual observations. Where she draws inferences about his emotional state - for example, that he appeared shocked, “closed down” or numb - those inferences fall within the recognized exceptions for lay opinion, as refined in *Graat*. Her long familiarity with T.E. and her experiential

capacity as his spouse provide a proper foundation for these observations and inferences. In summary, her testimony constitutes admissible lay opinion, based on a compendious description of facts that would otherwise be too subtle or complex to narrate.

M. David Gates
J.S.C.

Dated in Yellowknife, NT this
9th day of October, 2025

Counsel for the Crown: A. Paquin, J. Kelly
Defence Counsel: A. Lind

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