NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Keats*, 2016 NSCA 94

Date: 20161229
Docket: CAC 444859
Registry: Halifax

Between:

James Duncan Keats

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judges:	Beveridge, Hamilton and Bourgeois, JJ.A.
Appeal Heard:	September 22, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Hamilton and Bourgeois, JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Jennifer MacLellan, Q.C., for the respondent

Order restricting publication - sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

INTRODUCTION

[1] The appellant's trial counsel did not object to the admissibility of evidence that semen was discovered on swabs from the complainant's vagina. The trial judge relied, at least in part, on this evidence to find the appellant guilty of sexual assault.

[2] Armed with new counsel on appeal, the appellant claims that this evidence was inadmissible as hearsay, and the trial judge erred in law in relying on it to convict. The appellant wants a new trial.

[3] For the reasons that follow, I am not convinced the trial judge erred. I would dismiss the appeal.

[4] The foundation for the enigma was laid, at least in part, by what appears to be a growing trend of trying to introduce expert opinion evidence by way of an omnibus expert's report. I agree with the appellant—the icing on the forensic cake was supplied by careless presentation of the Crown's case.

[5] To understand the genesis of the enigma and why it was not identified and resolved at trial, I need to describe how the trial unfolded.

TRIAL EVENTS

Procedural Background

[6] The appellant was a paramedic. He was charged with two counts of sexual assault (s. 271) and two corresponding counts of breach of trust (s. 122) for events said to have occurred on September 1, 2012 and May 26, 2013.

[7] The Crown proceeded by indictment. The appellant elected trial in provincial court. He pled not guilty. The trial commenced before Her Honour Judge Claudine MacDonald on September 29, 2014.

[8] The appellant had made certain statements to the police. To gain admission, the Crown needed to persuade the trial judge in a *voir dire* (sometimes called a trial within the trial) that the statements were free and voluntary. In addition, the defence applied to have the statements excluded from evidence if they could

establish in the *voir dire* that the police had violated the appellant's rights guaranteed by the *Canadian Charter of Rights and Freedoms*.

[9] Counsel for the appellant at trial (not Mr. Seshagari) asked the trial judge to direct the Crown to proceed with the *voir dire* at the outset of the trial prior to the complainant testifying. She explained the impact as being "between essentially mounting a consent defence versus holding the Crown to the strict burden of proof." Trial counsel repeated her concerns about the timing of the *voir dire* on the tactical option of mounting a consent defence. The trial judge refused to direct the Crown on how to present its case.

The Evidence

[10] The complainant, BW, was the first witness. The bulk of her testimony was about the events of May 26, 2013. As of that date, she was 71 years old. She lived with her husband and her mother. Mrs. W was the primary caregiver for both her husband and her mother. All three had significant medical issues.

[11] Mrs. W suffered from angina, needed a double knee replacement and was going blind in one eye. The paramedics were frequent visitors to the household.

[12] On May 26, 2013, Mr. W fell. He could not get back up without assistance. Mrs. W could not help. She summoned help with her "life line". Emergency staff attended from the Fire Department and two paramedics arrived from Emergency Health Services (EHS).

[13] The two paramedics were Brandon Bellehumeur and James Keats, the appellant. By the time they arrived, the fire crew had Mr. W into a chair in the kitchen. Mrs. W left the kitchen as it was crowded, and she was experiencing a sensation of a heavy chest and angina pain. She said the young, black-haired good-looking paramedic (Brandon Bellehumeur) looked after Mr. W.

[14] Despite Mrs. W's complaint of chest pain, the appellant suggested that she walk upstairs to her bedroom to be examined. She complied. In the bedroom, she was directed to lay down on the bed.

[15] Mrs. W testified that the appellant unzipped her night dress and lifted her breast to use his stethoscope. He probed her abdomen, then unzipped her dress completely and took her panties down to her ankles. After probing her abdomen, he put his hand on her vagina. Digital penetration ensued. She said, "Don't do

that. I don't want you to touch me." He replied, "Oh, but you're going to feel so much better."

[16] Mrs. W described how the appellant swung her legs off the side of the bed, removed her panties, spread her legs, licked her clitoris, belly and kissed her. At some point Mrs. W thought the appellant wanted her to perform oral sex on him. She said, "No, this isn't going to happen. I don't do that." The appellant then turned her around, removed her dress and attempted anal intercourse.

[17] Mrs. W moved. The appellant penetrated her vaginally. He told her he was really going to make her feel better. She replied, "Please don't do this. I haven't had intercourse in 16 years. You're going to hurt me."

[18] The complainant described how intercourse was interrupted twice. First, by the arrival of her dog. Second, by Brandon Bellehumeur coming up the stairs. The appellant was said to have yelled to Mr. Bellehumeur to put the stuff into the van, "I'm almost finished".

[19] Sexual intercourse continued until "he was pleasured". She was not sure if he ejaculated. After the appellant left, she went to the bathroom. She thought that if he had ejaculated maybe his DNA was there. She used Q-tips to swab out everything that might be inside her. She felt cut and sore inside.

[20] The next day she contacted her family physician. He referred her to the Avalon Sexual Assault Centre. A "Sexual Assault Nurse Examiner" examined the complainant.

[21] The sole evidence elicited by the Crown from the complainant about exhibits was that after the police became involved, they took her sheets, underpants and nightdress. She said she could identify them if shown them. The one exhibit she was asked to identify at trial was Ex # 1, her nightdress.

[22] The complainant did not positively identify the appellant as the perpetrator.

[23] The complainant was extensively cross-examined about the inconsistencies between her evidence and her police statement, and her description of the sequence of events. She insisted that what happened was absolutely not consensual. Other details of the cross-examination will be added later.

[24] At the conclusion of Mrs. W's testimony, a *voir dire* was then held with respect to the admissibility of the appellant's statements. It was a "blended" *voir*

dire. That is, the trial judge was required to rule on the voluntariness of the statements and the claim the appellant's rights were infringed or denied. The Crown had the burden of proving beyond a reasonable doubt that the statements were free and voluntary. The appellant had the burden of establishing on a balance of probabilities that his rights were infringed or denied and, if they were, what remedy would follow.

[25] The *voir dire* lasted four days. The appellant was successful in his attempt to exclude his statements to the police. The trial judge found them not to be free and voluntary. In addition, she ordered them excluded as a remedy under s. 24(2) of the *Charter*.

[26] When the trial proper resumed, the Crown called ten witnesses. There is no need to recount all of their testimony. I will focus only on evidence relevant to understanding the arguments at trial and on the appeal.

[27] Katherine Murphy testified as a "forensic laboratory specialist". Her CV and qualifications were admitted by the appellant. The trial judge ruled that Ms. Murphy was qualified as an expert in the area outlined by the Crown. That outline was as follows:

> I am asking to have you qualified as a forensic laboratory specialist (reporting scientist) in the Biology Section, RCMP National Forensic Laboratory Services, dealing with the interpretation of body fluid and hair examination results, the interpretation and comparison on human DNA typing profiles, and the application of statistical significance to forensic DNA typing.

[28] Ms. Murphy explained that the biology work is divided into three units: Evidence Recovery; Analytical Unit; and Reporting Unit. Search technologists are members of the Evidence Recovery Unit. They retrieve the exhibits from the locker to examine them to determine if blood or semen are present. The technologists would then take samples and submit them to the Analytical Unit, which in turn use a chemical process (Polymerase Chain Reaction) to develop DNA typing profiles.

[29] It is this DNA typing profile data that Ms. Murphy receives. She then processes the data with a software package. She interprets the results, draws conclusions, assigns statistical significance to them and writes a report.

[30] The Crown introduced a number of documentary exhibits when Ms. Murphy testified. Six were described as "Reports". She was the author of three. Her

Reports were dated August 26, 2013 (Ex # 7), November 21, 2013 (Ex # 8), and January 6, 2014 (Ex # 9). For each of these Reports, there was backup documentation, also labelled as Reports (Ex. #'s 4, 5, and 6 respectively). These contained the requests for forensic analysis, the working notes of the Evidence Recovery and Analytical Units, Ms. Murphy's work product, and copies of emails and fax transmissions relevant to each of Ms. Murphy's three Reports.

[31] For our purposes, an overview of Ms. Murphy's three Reports suffices. The exhibits submitted for analysis from the RCMP investigators were examined in the Edmonton and Vancouver laboratories. Ms. Murphy interpreted and compared the genetic data in Halifax.

[32] In Ms. Murphy's Report dated August 26, 2013 (Ex # 7), she recounted that human semen was found on one of the Q-tips. The presence of semen on all other swabs taken or supplied by the complainant could not be confirmed. A DNA profile extracted from the swabs was compared to a known sample from Mrs. W. In laymen's terms, it matched.

[33] Ms. Murphy's Report, dated November 21, 2013 (Ex. # 8), set out the results of DNA testing done on the bedding, clothing and some other items. Ms. Murphy set out her opinion that all of these exhibits contained DNA matching that of the complainant. Mixed DNA profiles were found on the bedding. It was consistent with the DNA of the complainant and a male.

[34] On November 26, 2013, the police obtained a blood sample (by warrant) from the appellant. Ms. Murphy's final Report, dated January 6, 2014 (Ex. # 9), set out her comparisons of the appellant's DNA profile from that sample to the DNA found on the complainant's bedding. It matched.

[35] Appellant's trial counsel made no objection to the admissibility of the Reports identified and entered (Exhibits 4 to 9) via the testimony of Ms. Murphy. Her cross-examination focussed on the potential for transference of DNA from blood or semen, either from one person to another, or between items. Ms. Murphy acknowledged that this was possible. There were variables, such as how much DNA is involved and the type and length of the contact.

[36] Counsel asked about the impact thickness of the blood or semen may have. Ms. Murphy explained that she was not an expert in semen. The following is the exchange:

Q. Okay. And I think you mentioned earlier it would also partly depend on the amounts of the blood or semen, for example, that would have an impact. Correct?

A. Yes. That's correct.

Q. And with respect to blood or semen, would you agree that the thickness of either would also have an impact?

A. Well, if there's a contact between the fluids ... I'm not certain on that. I wouldn't know.

Q. Okay. Well, let's take ...

A. I don't think so.

Q. ... one fluid; for example, semen. So if you have semen of varying thicknesses, for example, would you agree that it might be easier to transfer one over the other, depending on the thickness?

A. Your Honour, I'm not really aware of there being differences in thicknesses of semen, but I'm not ...

Q. Okay.

A. ... an expert in that regard, so ...

Q. Okay. Fair enough.

A. ... I don't really know.

…

Q. Okay. So as far as the exhibits that were sent for analysis, you'd agree that you can't tell whether or not any DNA on those exhibits was the result of transfer or direct contact, should we say?

A. That's correct. I can't make any comment about that.

[37] Heather Janssens was one of the "search technologists". It was her notes that recorded that sperm were observed on the Q-tip swabs from the complainant. This, and other observations by Ms. Janssens, made their way into Ms. Murphy's first Report dated August 26, 2013 (Ex # 7).

[38] Appellant's trial counsel took no objection to Ms. Janssens offering opinion evidence as an expert. The trial judge ruled she could give such evidence as a:

> …Forensic Search Technologist in evidence recovery, employing specific biological and chemical tests based on accepted protocol as for the search, recovery, and identification of forensically significant biological material and to conduct the search and recovery of non-biological material, and to document findings and input data for each case to generate detailed case notes and conduct

> technical reviews and/or administrative reviews of files, and assist in training Forensic Search Technologists Understudies.

[39] The Crown referred Ms. Janssens to Ex # 3, the chain of custody report. She identified it as the document that shows every person who had dealings with any particular exhibit. Her name showed up frequently as dealing with various case exhibits in her role as a search technologist in the Forensic Laboratory Services in Edmonton.

[40] Ms. Janssens said her job was to recover exhibits from the locker and examine them. In general terms, she:

> …analyze[s] evidence from crime scenes for biological material such as blood, semen, saliva, and possible biological material such as contact DNA. And I also search and recover non-biological material such as building products or safe products ... and glass.

[41] She also described how there are checks and balances in the laboratory. Within her section, other qualified members would complete a review of her file. Specific to her work in this case, the Crown asked Ms. Janssens about her work product:

> Q. Okay. And we heard from Katherine Murphy earlier today in relation to the various procedures. And through her we tendered three of these sets that deal with each of her reports. Would your work product be buried in these packages somewhere?
>
> A. I think so. I would just like to double-check ...
>
> Q. Yeah.
>
> A. ... to ensure.

[42] Ms. Janssens testified that the review forms that are normally part of her work notes were not present in Ex # 4. The only evidence about her notes that record what she did and found is this:

> Q. Is there anything here that's yours?
>
> A. There are pages ... page 16 to 26. So this would have been ... okay. That's ... sorry. The notes that I had made at the time of my examinations, there is a copy of those ...
>
> Q. Okay.

> A. ... just not the final review sheet. But in order for the reporting scientist to receive my information, it has to be technically reviewed by a colleague.
>
> Q. Okay. And that's ...
>
> A. So the ...
>
> Q. ... standard.
>
> A. That's absolutely standard. So these ... this is where my notes ...
>
> Q. This is page 17. We'll assume that's correct.
>
> A. Yeah. And I was the examiner, so this is a copy of what I would have made at the time of my exam.

[43] At page 20 of her notes (AB p. 162), she wrote that she did a semen examination on Ex 0002-AA (also labelled as PE6-3B), described as swab one and swab two. The result was positive. Her notes record the following "Micro (direct): rare spermatozoa observed (light epithelial cells and heavy other cellular material- bacteria and debris)". Her examination of the other exhibits was negative for semen.

[44] Counsel for the appellant asked Ms. Janssens no questions.

[45] Ms. Connie Leung also testified as an expert. She was the biology analyst in Vancouver who developed the DNA profiles from the various exhibits. Crown counsel never referred Ms. Leung to her work product, nor even if it appeared at all in any of the exhibits. Again, there were no objections or even questions from trial counsel for the appellant.

[46] Cst. Rod Francis was the exhibit officer. He identified and introduced a host of documentary and physical exhibits. These included the complainant's bedding, the sexual assault test kit, and its contents. Counsel for the appellant had no questions.

[47] Two witnesses from the Avalon Centre testified, Paula Nickerson and Susan Wilson. Both offered opinion evidence. Again, counsel for the appellant consented.

[48] Ms. Nickerson examined the complainant on May 27, 2013. She identified the questionnaire and guide that she had used to complete and document her examination (Ex # 21). It recorded her receipt of three swabs from the complainant. They were wrapped in saran wrap. Ms. Nickerson did not open

them. They were put into the sexual assault kit which was sealed pending hand-over to the RCMP.

[49] She observed, documented, and photographed a notable abrasion to the complainant's posterior fourchette, a common area to be injured in a sexual assault. In cross-examination, Ms. Nickerson acknowledged that such an abrasion can be caused by other things. The only thing she could say was that friction caused the injury.

[50] Ms. Wilson described the receipt at the Avalon Centre of the sexual assault kit from Ms. Nickerson, and how it is stored pending disposal or hand-over to the police.

[51] Although she had no direct involvement in the complainant's examination, the Crown asked Ms. Wilson about the size and location of the injury to the complainant's vaginal opening. She testified that it is a common point of injury in a sexual assault, as it is typically the first point of contact. Furthermore, that the complainant's injury to her posterior fourchette was very large—one of the largest she had seen.

[52] The only questions put to Ms. Wilson by the appellant's trial counsel had to do with the continuity of the contents of the sexual assault kit she had turned over to Cst. Diane Hartery of the RCMP.

[53] Cst. Hartery testified she had received the nightdress and bedding directly from the complainant on May 29, 2013, and the sexual assault kit from Ms. Wilson on May 30, 2013. There was some discrepancy between Cst. Hartery and Ms. Wilson about whether the sexual assault kit was sealed on being turned over or had been opened for Cst. Hartery to ensure its contents were complete.

[54] Cst. Hartery was also involved in taking the blood sample from the appellant and its submission for analysis. The defence asked Cst. Hartery no questions.

[55] Brandon Bellehumeur was an important witness for the Crown and for the appellant. He was the paramedic who looked after the complainant's husband and later checked on the complainant's mother. He confirmed the identity of the appellant as his partner who attended the W residence on May 26, 2013.

[56] He also confirmed that the appellant went upstairs to the complainant's bedroom for a total of 20-25 minutes. However, Mr. Bellehumeur was adamant

that at no time did the appellant yell out to him that he "was almost done" and that Mr. Bellehumeur should take the gear to the vehicle. In fact, he was sure that he had actually entered the complainant's bedroom. He said the complainant was in bed, under the covers, with the appellant kneeling beside her.

[57] The Crown intended to close its case on March 31, 2015. The appellant's trial counsel stated the defence evidence would be complete that day as well. On March 31, the Crown called witnesses who tendered business documents about the paramedics' visit, their duties and employment with EHS. The appellant's partner, in relation to the September 2012 allegation, testified.

[58] At the close of the Crown's case, the appellant elected not to call evidence. Summations were adjourned to May 26, 2015—almost two months later.

The Summations

[59] Prior to May 26, 2015, both parties filed briefs to address the thorny legal issue of whether a paramedic, such as the appellant, was an official for the purposes of s. 122 of the *Criminal Code*. That issue was subsequently settled by this Court's decision in *R. v. Cosh*, 2015 NSCA 76.

[60] There is no need to review in detail all the parties' submissions. It is the defence submissions that have the most relevance to the disposition of the appeal.

[61] Trial Crown's argument was short and to the point. Counsel acknowledged the weakness of their case against the appellant on the September 2012 allegation. In relation to May 26, 2013, he argued the complainant's testimony should be accepted. It was supported by the abrasion of her posterior fourchette and the presence of semen. The identity of the appellant was made out by the DNA from the bedding, and the evidence of the other paramedic, Brandon Bellehumeur. The differences between his version and the complainant's were not important.

[62] Appellant's trial counsel focussed on what she labelled striking differences between the evidence of the complainant and Mr. Bellehumeur, and the seemingly inconsistent versions about the sequence of the sexually assaultive conduct by the appellant.

[63] At the end of the day, she submitted that the complainant's evidence was not reliable enough to sustain a conviction. Trial counsel acknowledged the existence

of evidence from other witnesses and exhibits that the trial judge would have to consider.

[64] With respect to the posterior fourchette abrasion, she pointed out the concession by Ms. Nickerson that such an abrasion can be caused by other things. Counsel suggested to the trial judge that the abrasion could have been caused by the complainant herself, either when she used Q-tips to swab herself, or when the complainant had difficulty self-catheterizing.

[65] Defence counsel raised concerns about what she referred to as the "lack of authentication" of the swabs Mrs. W said she took. She said this:

> Speaking of the Q-tips that ... that Mrs. W herself was indicating that she had used to swab herself, my assumption is that those swabs are found as part of Exhibit 17 which I understand was the bulk of the sexual assault test kit and I want to be clear. We heard from ... from one of the SANE nurses, Paula Nickerson, who was indicating that Mrs. W, when she came in to be examined the next day, walked in with these swabs that she had taken on her own. We heard there that there were three swabs not the five that Mrs. W had indicated. Wasn't sure if they were bundled individually or wrapped together but either way, they were wrapped up in plastic. **And all that's well and good except Mrs. Nickerson never actually identified the swabs themselves as being the ones that she retrieved from Mrs. W. Mrs. W herself did not authenticate the swabs as being the ones that she had used herself**. They weren't really ... they weren't shown to either witness because I haven't seen them. Like I said, I presume they're in that Exhibit 17 box but I don't know.
>
> We don't know whether there was cross-contamination between swabs and how they were collected, how they were transported, we don't know any of that. So for all the good the ... **the swabs do us, I'd suggest that they ... they do us no good, no help whatsoever, because without having those swabs properly identified and authenticated by Mrs. W herself who took them or even by the SANE nurse who then took them from her, we're missing a piece of the puzzle.**
>
> [Emphasis added]

[66] Similarly, trial counsel raised concerns over the lack of identification by the complainant and the police of the bedding that had been subject to DNA testing. The thrust of the submission is that even if the evidence were admissible, no weight should be accorded to it. She put it this way:

> [. . .] It doesn't help us with respect to were those, in fact, the bedsheets that were on the bed at the time of the alleged assault. Were they, in fact, the same

> bedsheets that Mrs. W had collected and provided to the officers. I mean, to be fair, normally it would be officers that would be doing this. **Normally a stereotypical case, I suppose, is when there's a so-called crime scene, the officers go and there's an exhibit officer who is in charge of seizing everything and it's very clear that then that officer can testify I took those sheets off the bed from the bedroom on that date. We don't know any of that.**
>
> We might expect that there would be DNA from Mr. Keats in the bedroom somewhere because he was in the bedroom, according to Mr. Bellehumeur and according to Mrs. W. **So if the Court were to find the bedsheets, those exhibits to be admissible and given any weight, I suggest it really doesn't matter because the DNA doesn't tell us again much of anything other than that he was there. But again, I'm not suggesting that the Court should afford any weight to those exhibits because without that proper authentication, I don't think that the Court really can make any use of them whatsoever, and similarly for the swabs. And any testimony that we heard from any of the other witnesses about when Mrs. W told me she swabbed herself or Mrs. W brings in a box with her bedsheets and her nightdress, again it ... it's hearsay which normally is fine in the sense that it's not being submitted for its truth and it helps to tell the story but in this case, it's ... it's pretty significant. In fact, according to my notes, the only exhibit that was even marked when Mrs. W was on the stand was, in fact, Exhibit 1 which was her nightdress.**
>
> [Emphasis added]

[67] The trial judge reserved her decision until June 24, 2015. On that date, she delivered an oral decision. She acquitted the appellant of all charges save the May 26, 2013 sexual assault of Mrs. W in her bedroom. It is to this decision I turn.

The Trial Judge's Oral Decision

[68] At the outset of her decision, the trial judge reviewed the evidence. She then addressed the submissions by the defence:

> The Defence position here is that the Crown has not proven this charge beyond a reasonable doubt. **With respect to the Q-tips, Ms. MacAulay points out that Ms. Nickerson was never asked to identify the three swabs allegedly turned over to her by Ms. W. Further, she argues that there might be cross-contamination from the swabs.**
>
> As for the forensic testing of the bedding or the sheets, Ms. MacAulay refers to the fact that this evidence was brought to the RCMP by the complainant herself, giving rise to potential contamination issues. **Further, Ms. W was never asked in Court to identify the sheets as being the ones that were indeed on her bed at the time of the alleged offence.**

> **Defence counsel submits that no weight should be given to any evidence with respect to the findings as a result of the Q-tip examination or the sheets, given the issues with respect to possible contamination and lack of authentication.**
>
> With respect to the posterior fourchette abrasion which I referred to earlier, Ms. MacAulay on behalf of her client suggests a thorough cross-examination of the complainant that this abrasion might have been caused by the complainant herself when she was using the Q-tips to swab herself or as a result of her self-catheterization which she must do as a result of a medical condition.
>
> [Emphasis added]

[69] The trial judge recognized the force of defence counsel's submissions about the reliability and credibility of the complainant. With respect to the issues about continuity or authentication of the exhibits, she reasoned as follows:

> [. . .] First with respect to the forensic evidence, as I mentioned earlier, the sheets were turned over to the police by ... to Officer Hartery by the complainant. And the fitted sheet was found to have DNA from both Mr. Keats and Ms. W.
>
> **I'm satisfied that the bedding that was turned over to the RCMP by Ms. W is the same bedding which was examined by the lab, returned to the police, and introduced into Court. I'm also satisfied that this was the bedding that was on the complainant's bed at the relevant time.**
>
> I realize she was not asked to identify it in Court. But when I consider all of the evidence when it relates to these particular exhibits - that is, the bedding - as I said, I'm satisfied that the bedding referred to was indeed the bedding that was on the complainant's bed on the ... at the time of the offence.
>
> It's worth noting, however, that the probative value of this evidence is slight. I agree with Ms. MacAulay on this point. This evidence if accepted establishes that Mr. Keats was in the bedroom, nothing more.
>
> Other evidence establishes that Mr. Keats was the paramedic in the bedroom with the complainant. Indeed, even if I were to disregard the DNA results obtained from the fitted sheet, it would have no impact on my decision insofar as this charge is concerned.
>
> **Dealing next with the Q-tips, I am satisfied that the Q-tips used by Ms. W were turned over by her to Paula Nickerson. Further, the evidence establishes that Ms. Nickerson placed these Q-tips into the sexual-assault kit which Susan Wilson gave to Cst. Hartery, this kit being sent to the forensic laboratory for examination.**
>
> …

> I note as well that the DNA typing profiles obtained from these three exhibits - that is, the Q-tips - matched that of Ms. W. No witness gave *viva voce* evidence to the effect that, you know, "these are the Q-tips which I gave to."
>
> **However, considering all the evidence, I am satisfied that the Q-tip swabs which Ms. W took were the ones which were analyzed by the lab. With respect to contamination, semen was found only one exhibit, only one exhibit, one Q-tip, PE-63B OR 0002. There was no contamination.**

[70] The trial judge rejected the suggestion that the posterior fourchette abrasion was caused by the complainant:

> With respect to the posterior fourchette abrasion, Ms. W was questioned about this. And it's clear from her evidence that neither her insertion of swabs into her vagina nor her self-catheterization could have caused this type of injury described as a friction injury on her posterior fourchette.

[71] The trial judge accepted the evidence of Brandon Bellehumeur. This led her to conclude that the complainant was mistaken, confused, or not truthful where she testified that the appellant had yelled to Mr. Bellehumeur, diverting his entry into the bedroom.

[72] Mindful of inconsistencies and the evidence of Mr. Bellehumeur, the trial judge accepted some of the complainant's evidence. The evidence of the semen and the posterior fourchette abrasion were key to the trial judge's reasoning to convict. She put it this way:

> As previously mentioned, I accept some of the complainant's evidence. When I consider all of the evidence ... and this, of course, includes the semen was found on the Q-tip, the abrasion to the right side of her posterior fourchette, I am satisfied beyond a reasonable doubt that Mr. Keats had sexual contact with the complainant, that this included kissing, touching her vagina, inserting his finger in her vagina, licking her clitoris, and one act of sexual intercourse.
>
> The Crown must prove beyond a reasonable doubt that the complainant did not consent to the sexual activity. The evidence of the complainant was, in her words, it was absolutely non-consensual. I accept her evidence that she did not fight Mr. Keats. She did not physically resist him. I also accept her evidence that she told Mr. Keats she did not want him to touch her.
>
> Considering all of the evidence, I am satisfied that the Crown has established beyond a reasonable doubt that the complainant did not consent to this sexual activity. There was, in the words of 273, no ... or the Crown has established beyond a reasonable doubt that there was, as I said in the words of Section 273,

> no voluntary agreement on the part of the complainant to engage in any sexual activity with Mr. Keats.

[73] With this background, I turn to the appeal proceedings.

APPEAL PROCEEDINGS

Positions of the Parties

[74] The appellant's sole ground of appeal is the complaint that the trial judge was legally wrong to rely on the semen evidence because Ms. Murphy's report, and her *viva voce* testimony about semen, were inadmissible as hearsay.

[75] Ms. Murphy had no first-hand knowledge of the existence or absence of semen. She was called to present the DNA evidence, not offer expert opinion evidence about semen being found by a search technologist working in a laboratory in Edmonton.

[76] The appellant acknowledges that Ms. Janssens was an expert, qualified to testify about looking for, recovering and identifying significant biological material, including, of course, semen and spermatozoa. However, Ms. Janssens was never asked by the Crown the steps and processes involved in examining the exhibits for the presence of biological material. Nor did she in fact specifically testify that she observed spermatozoa. The Crown merely asked Ms. Janssens to identify the presence of her notes in Ms. Murphy's bundle of paperwork. At no time, did she adopt those notes as part of her testimony.

[77] The appellant concedes that had the Crown done so, there would be no ground of appeal.

[78] The Crown counters that this highly technical argument, not raised at trial, is a flawed understanding of the law of hearsay. In particular, unproven facts found within an expert's report that he or she obtained and relied upon does not offend the rule against the admission of hearsay. If it was legal error, the curative *proviso* (s.686(1)(a)(iii)) should be applied.

[79] In advance of the hearing of this appeal, the parties were asked to make submissions on the question whether Ms. Janssens' work product was admissible as a business record under the common law. Both filed detailed written submissions in advance of the hearing.

ANALYSIS

Admissible as part of an expert's report

[80] The appellant's argument focuses on the admissibility and use of hearsay in expert reports. He contends that it is error for a judge to rely on unproven facts set out in an expert's report. The presence of sperm recited in Ms. Murphy's report was unproven. Hence, entitled to no weight. For this he cites the well-known decisions from the Supreme Court of Canada of *R. v. Wilband*, [1967] S.C.R. 14, *R. v. Abbey*, [1982] 2 S.C.R. 24, and *R. v. Lavallee*, [1990] 1 S.C.R. 852.

[81] The Crown replies that the appellant's summary of the law about unproven facts in experts' reports is incomplete. It omits the unanimous decision of the Supreme Court of Canada in *R. v. B.(S.A.)*, 2003 SCC 60, and a host of other cases that support, without offence to the proscription against the admissibility of hearsay, an expert's reliance on information from other sources in formulating their opinion (*R. v. Terceira* (1998), 123 C.C.C. (3d) 1 (Ont.C.A.); *R. v. Worrall* (2004), 189 C.C.C. (3d) 79; *R. v. Prosser*, 2015 NBCA 7, leave to appeal to SCC refused, [2015] S.C.C.A. No. 121; *Kennedy v. Cordia (Services) LLP*, [2016] UKSC 6).

[82] I have no doubt about the soundness of the proposition that an expert can rely on matters or sources within his or her field of expertise in the profferring of their opinion. But in the circumstances of this case, it does not make Ms. Janssens' observations admissible via Ms. Murphy's reports. I will explain.

[83] In *Lavallee*, Justice Wilson, drawing on *R. v. Abbey*, summarized the principles that govern the admissibility and weight of expert opinion where the expert has relied on information not otherwise proven in court (para. 66):

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[84] Justice Sopinka, in a concurring judgment, expressed concern over the apparent contradiction in saying an expert's opinion is admissible, but is entitled to no weight. He drew a distinction between evidence that an expert obtains and acts upon within the realm of their expertise, and evidence that an expert gets from someone, such as a party to the litigation. The lack of independent proof of the former type of information or evidence need not sap the weight of the opinion; but with the latter, absence of proof may obliterate the weight of the opinion. He wrote:

> [82] The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*).
>
> [83] In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608. In *R. v. Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances. (See also *R. v. Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely [page 900] used and acknowledged as reliable by experts in that field.")
>
> [84] Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:

> ... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

[85] In *R. v. B.(S.A.)*, *supra*. paternity testing by DNA evidence was crucial to the Crown's case. Much of the litigation centered on the constitutional challenge to the DNA warrant provisions. There was also an issue about the Crown's DNA expert. She testified about the test results of the accused's DNA to that of the child of the complainant. There were nine samples. Two were used as controls. Analysis was conducted on the remaining seven. One was damaged. Five samples were consistent with the appellant being the father, with it being ten million times more likely he was the father than another random Canadian male.

[86] One sample was inconsistent. The expert opined that this was a mutation. They are well-documented in paternity testing, and international guidelines provide that at least two exclusions have to be found before "parental exclusion can be determined". She opined it was forensically significant that five samples showed a match.

[87] Berger J.A., in dissent in the Alberta Court of Appeal, would have ordered a new trial on the basis that there was no independent proof that the inconsistent sample was a mutation.

[88] Justice Arbour wrote the unanimous reasons for judgment in the Supreme Court. She rejected the proposition that the expert could not rely on the international guidelines for her opinion that the incongruent result was a mutation. In doing so, she referred with approval to Justice Sopinka's reasoning in *Lavallee*:

> [62] The appellant submits that the trial judge ought to have given no weight to the DNA expert's evidence, as it relied on an unproven assumption that the non-matching test sample was a mutation. Sopinka J. in his concurring judgment in *R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 899, stressed that courts ought to distinguish between evidence that an expert obtains and acts upon within the scope of his or her expertise, and evidence that an expert obtains from a party to the litigation touching a matter directly in issue. He suggested that where the expert relies on the former type of "unproven" evidence, the weight of the expert opinion need not be discounted.
>
> [63] In my view, it is clear that the expert's reliance on the international guidelines was reliance on information obtained and acted upon within the scope of her expertise. It was entirely open to the appellant to challenge the expert on

> that issue. Absent such a challenge, the expert was entitled to refer to the sources within her field of expertise to explain and support her conclusions. Berger J.A., dissenting at the Court of Appeal, is correct that the record offers little information about the international guidelines referred to by the DNA expert (para. 131). However, her expert evidence was tested according to the normal processes of the adversarial system. Dr. Szakacs was cross-examined by the defence, and the trial judge was satisfied that the current standards in technology and competence had been met. It was open to the trial judge to give the opinion of the expert the weight that he considered appropriate and there is no basis upon which this Court could interfere with his assessment of that evidence. The trial judge was alive to his obligation to weigh carefully and appropriately the evidence tendered by the DNA expert. …

[89] These principles are relied upon in *Terceira*, *Worrall*, and *Prosser*. The law appears to be the same in the United Kingdom (*Kennedy v. Cordia (Services) LLP*, *supra*. In all of these, the expert relied upon the work of others, or knowledge, within the expert's field. I am not satisfied that is the case here.

[90] Ms. Murphy gave opinion evidence interpreting the significance of DNA profiles. There was insufficient biological material to develop a DNA profile from what was described as semen found on the swab. The work done by Ms. Janssens, and the application of her skilled knowledge and training to find semen, was not relied upon or used as a building block for Ms. Murphy's opinion.

[91] The trial judge's qualification of Ms. Murphy as a "forensic laboratory specialist" was broad. I earlier quoted the terms. For ease of reference, I repeat them:

> … a forensic laboratory specialist (reporting scientist) in the Biology Section, RCMP National Forensic Laboratory Services, dealing with the interpretation of body fluid and hair examination results, the interpretation and comparison on human DNA typing profiles, and the application of statistical significance to forensic DNA typing.

[92] However, when asked about characteristics of semen, Ms. Murphy said she did not really know, as she was not an expert in semen (*infra*. para 36). In the circumstances of this case, I would not rely on the authorities cited by the Crown as justifying admission of the evidence that semen was present on the vaginal swab. But that is not the end of the analysis. In my view, the information set out in Ms. Janssens' notes is admissible based on both the modern view of the admissibility of hearsay, and the common law exception for business records. My analysis follows.

Are the observations of Ms. Janssens recorded in her notes hearsay?

[93] The underlying rationale for the rule presumptively excluding hearsay is the concern that unreliable evidence could skew the fact-finding process. Without a means to test the reliability and veracity of out-of-court statements, not made under oath, a danger exists that a trier of fact may go astray.

[94] The traditional exceptions, or the so-called pigeonholed approach, included an exception for business records. The exception for business records, and the modern principled approach of requiring reliability and necessity, are closely aligned. Both rely on the circumstantial markers of trustworthiness to demonstrate reliability and, hence, admission.

[95] As noted above, hearsay is presumptively inadmissible because of the inability to be assured of the reliability of the proffered evidence. Without an opportunity to cross-examine the author of the information, there is no avenue to test the reliability and veracity of the evidence (*Khelawon*, 2006 SCC 57 at para. 2).

[96] In this case, Ms. Janssens, the author of the notes, testified. Those notes were made out of court, and not under oath. They were a whisker away from avoiding controversy. The appellant concedes all it would have taken was one question, such as: "The notes you have identified, Ms. Janssens, do you adopt them as being true?"

[97] Absent that kind of query and her positive response, her notes were indeed a form of hearsay, but only just.

[98] Ms. Janssens described her experience and duties, including the following:

- She had examined tens of thousands of exhibits over her career, each time generating work product, but she had only testified as an expert on one other occasion.
- "There are standard operating procedures and protocols I follow in order to complete these procedures."
- "Within my section there's other qualified members and they would complete a review of the file."
- "In order for the reporting scientist to receive my information, it has to be technically reviewed by a colleague."

- "All reviewers would read the same information as well as the information that I have written down at the time of my examinations. And in order for them to complete a technical review, they would have to approve the procedures that I have followed and that … the different things that I have done with each exhibit."
- If she had committed an error or done something "not quite expected" in her testing, she would have been informed.

[99] The appellant had every opportunity to test Ms. Janssens' out-of-court observations recorded in her notes. He chose not to do so. It hardly behoves him now to say he wants to have this Court order a new trial, to give him the opportunity he eschewed. That is not how the adversary system works.

[100] Trial counsel made no objection to the introduction of Ms. Janssens' work product containing her observations and the summary of it in Ms. Murphy's report. Appellate counsel does not suggest that trial counsel was ineffective or somehow negligent in failing to object.

[101] Furthermore, he acknowledges that trial counsel has a duty to object to evidence that he or she believes to be inadmissible. It is an appropriate concession.

[102] It is counsel's plain duty to raise evidentiary issues at trial, with the caveat that the judge retains responsibility to ensure the trial is conducted according to law (see *R. v. T.(S.G.)*, 2010 SCC 20 at para. 36; *R. v. Lomage*, [1991] 2 O.R. (3d) 621 at pp. 138-9; *R. v. Baxter*, 2013 SKCA 52; *R. v. Ambrose* (1975), 11 N.B.R. (2d) 376 at para. 6, aff'd [1977] 2 S.C.R. 717).

[103] Instead, appellate counsel suggests that trial counsel's remarks in her summation amounted to an objection. He characterizes trial counsel's refrain from cross-examining Ms. Janssens as a tactical decision—keeping her powder dry until the end of the case. With respect, this suggestion is unsupported by any evidence, the record, or the circumstances at trial.

[104] The only mention by trial counsel to hearsay was quoted earlier (para. 66). For ease of reference I repeat it:

> [. . .] So if the Court were to find the bedsheets, those exhibits to be admissible and given any weight, I suggest it really doesn't matter because the DNA doesn't tell us again much of anything other than that he was there. But again, I'm not suggesting that the Court should afford any weight to those exhibits because without that proper authentication, I don't think that the Court really can make any use of them whatsoever, and similarly for the swabs. **And any testimony that we**

> **heard from any of the other witnesses about when Mrs. W told me she swabbed herself or Mrs. W brings in a box with her bedsheets and her nightdress, again it ... it's hearsay which normally is fine in the sense that it's not being submitted for its truth and it helps to tell the story but in this case, it's ... it's pretty significant.** In fact, according to my notes, the only exhibit that was even marked when Mrs. W was on the stand was, in fact, Exhibit 1 which was her nightdress.
>
> [Emphasis added]

[105] On any reasonable view of the submissions and the record, trial counsel focussed on the potential weakness of this evidence caused by the failure of the Crown to establish that the sheets and the swabs were identified by the complainant. It was not an objection to the admissibility of Ms. Janssens' work product that the trial judge somehow missed. The remarks of the Court in *R. v. deKock*, 2009 ABCA 225 are apt about clarity of objections:

> [25] Objections are not "a game of linguistic hide-and-seek, the object of which is to conceal the real meaning of the spoken word from the judge and see whether the judge can find it before counsel leaves the courtroom. A presiding justice is entitled to treat a statement by counsel as having that meaning which a reasonable person would infer from the statement. The trial judge did not expect to have to cross-examine counsel concerning the subtleties or nuances of a statement to the court in order to eliminate the possibility that some hidden meaning lurks in the background": *R. v. Heikel* (1992), 125 A.R. 298, [1992] A.J. No. 489 (QL); *R. v. Yelle* (2006), 384 A.R. 331, [2006] A.J. No. 557 (QL), 2006 ABCA 160 at paras. 34 – 35. [. . .]

[106] This quote is not set out as a criticism of trial counsel. I do not accept that her trial submissions were meant as any kind of objection to the admissibility of Ms. Janssens' work product that she found semen—just that no weight should be attached to that evidence absent the complainant identifying the relevant exhibits.

[107] The far more likely explanation for the failure to object at the time the evidence was led was trial counsel's belief that Ms. Janssens' evidence was admissible, coupled with her plan of perhaps mounting a consent defence—in which case the observed presence of semen would be irrelevant.

Admissibility as a business record

[108] The notes made by Ms. Janssens are admissible as business records pursuant to the common law. In his most helpful text, *Documentary Evidence in Canada*, (Toronto: Carswell, 1984), Mr. J. Douglas Ewart set out the strict common law

requirements in place before the seminal decision of the Supreme Court of Canada in *Ares v. Venner*, [1970] S.C.R. 608:

> Notwithstanding the absolute necessity brought about by the death of the entrant, and the strong circumstantial guarantee of trustworthiness arising from the business creation and usage of the entries, the common law evolved seven strict requirements for admissibility under this exception. To be admissible, the record must have been: (i) an original entry, (ii) made contemporaneously with the event recorded, (iii) in the routine, (iv) of business, (v) by a person since deceased, (vi) who was under a specific duty to another to do the very thing and record it, (vii) and who had no motive to misrepresent the facts.
>
> pp. 46-47

[109] In *Ares v. Venner*, counsel for the defendant physician objected to the admission of nurses' notes. The nurses were present in court, but were not called to testify. Justice Hall for the unanimous Court found that the records and nurses' notes admissible and *prima facie* evidence of the truth of their contents. Hall J. refused to follow the conservative approach to judicial development of the law as espoused by the majority of the House of Lords in *Myers v. D.P.P.*, [1965] A.C. 1001, which had insisted on legislative action to dispense with the requirement of the declarant's death. Instead, Justice Hall adopted the minority view that the time had come to admit reliable business records without the need for legislative intervention. He wrote as follows:

> Although the views of Lords Donovan and Pearce are those of the minority in *Myers*, I am of opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job."
>
> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.
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> pp. 626-627

[110] Mr. Ewart summarized the common law rule following *Ares v. Venner* as follows:

> ...the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after *Ares* does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> p. 54

[111] This clear articulation of the common law test was approved in *R. v. Monkhouse*, [1988] 1 W.W.R. 725 (Alta. C.A.)[1] and by Cromwell J.A, as he then was in *R. v. Wilcox*, 2001 NSCA 45.

[112] The appellant made no submission that the notes of Ms. Janssens did not meet these requirements. There was a vague suggestion that because Ms. Janssens worked for the RCMP she might have a motive to misrepresent. I see no basis in these circumstances to give any credence to this suggestion.

[113] The appellant argues that because Ms. Janssens' work product would not be admissible under the *Canada Evidence Act*, R.S.C. 1985, c. C-5 as a record made in the course of an investigation or in contemplation of a legal proceeding (s. 30(10)(a)(i) and (ii)), the common law should not recognize admissibility of such records. He also argues that the Supreme Court of Canada in *Ares v. Venner* adopted the minority reasons in *Myers v. DPP*, which included what he cites as the requirement that the records in question be prepared "before dispute or litigation". These records would not qualify. Lastly, he argues that if examined under the principled approach, admissibility fails because necessity is not made out. I will address each in turn.

[114] First, failure to meet the statutory requirements are irrelevant to the determination of admission at common law. Section 30 of the *CEA* supplements rather than supplants the common law. Section 30(11)(b) expressly provides that the statutory admission of business records is in addition to and not in derogation of the existing rule of law with respect to admission of any record.

[115] Furthermore, there is no shortage of authorities that have clearly turned to the common law to admit business records that fail the *CEA* requirements (see: *R.*

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[1] With one modification, that the entry need not have been made by a recorder with knowledge of the thing recorded. An issue not relevant to this case.

v. Sunila (1986), 73 N.S.R. (2d) 308 (N.S.S.C.); *R. v. Monkhouse, supra*.; *Éthier v. Royal Canadian Mounted Police Commissioner*, [1993] F.C.J. No. 186 (C.A.); *R. v. Marini*, [2006] O.J. No. 4057; *R. v. Crate*, 2012 ABCA 144).

[116] With respect to the notion that the Canadian common law requires that the records must have been prepared before the existence of the dispute or litigation, I disagree. The appellant's suggestion rests solely on *Ares v. Venner*'s adoption of the minority position in *Myers v. DPP*.

[117] Before turning to those authorities, it is useful to note that, at least in Canada, I could find no authority that the test required that the record be made or prepared before the existence of the dispute or litigation. Instead, the common law test included the concomitant requirement that the declarant must have had no motive to misrepresent the content of the business record. Obviously, if the record was created before the existence of the dispute or litigation, then the maker of the record would likely have no motive to mispresent. But even if created after the date the dispute or litigation arose, a declarant may still have had no motive to misrepresent.

[118] I have already set out above the common law test summarized by Mr. Ewart, prior to *Ares v. Venner* (para. 108). The appellant identifies no authority that suggests Mr. Ewart's summary is wanting. It is in line with other authoritative works, such as *Wigmore on Evidence*, vol. 5, revised by James H. Chadbourn (Toronto: Little, Brown and Company, 1974 at §1522-28) and Sidney N. Lederman, "The Admissibility of Business Records: A Partial Metamorphosis" (1973) 11 Osgoode Hall L.J. 373 at p. 374.

[119] *McGillivray v. Shaw*, [1963] A.J. No. 96 (App. Div.) accurately summarizes the requirements pre-*Ares v. Venner*. Johnson, J.A., for the Court, wrote:

> [16] In tendering this memorandum the appellants relied upon the rule that entries made by a deceased person in the course of duty were admissible. The test to be applied when considering the admissibility of such evidence was stated by Brett, L.J., in *Polini v. Gray; Sturla v. Freccia* (1879), 12 Ch. D. 411 at pp. 429-30:
>
> > The principle of law relied upon is that which is stated first in the case of *Doe v. Turford*, (1832), 3 B. & Ad. 890, 110 E.R. 327. I will refer to the principle of law there enunciated by Chief Justice Tindal. It was desired to prove that a particular notice had been served on a particular day, and the evidence to prove it was an indorsement on the notice by the person who had served the notice that he had served it on a particular day, he being dead, but Chief Justice Tindal said: "This evidence was admissible on the ground that it was an entry made at the

> time" -- that is the first condition – "of the transaction" -- that is of the transaction which, according to the facts of the case, had been done or effected by the person who made the entry – "and made in the usual course and routine of business by a person who had no interest to misstate what had occurred." There are, therefore, four conditions: 1. **That it is an entry of a transaction effected or done by the person who makes the entry; 2. That it is an entry made at the time of such transaction or near to it; 3. That it is made in the usual course and routine of business by that person; and 4. That he was at that time a person who had no interest to misstate what had occurred.**
>
> [17] To these rules must be added one other, *viz.*, **that the person making the entry must have been under a duty to make it.**
>
> [Emphasis added]

[120] In *Myers*, the House of Lords faced the issue whether business records of cylinder block numbers connected to specific cars could gain admission as an exception to the hearsay rule. All agreed that the evidence did not fit within the existing business record exception because the Crown had not established that the maker of the business records was deceased.

[121] The majority declined the opportunity to change the requirement that the declarant must be deceased. Instead, amendment of the hearsay rule must be left to the legislature. The minority position was penned by Lord Pearce (Lord Donovan concurring with separate reasons).

[122] The passage relied on by the appellant is the following, as quoted in *Ares v. Venner*:

> I find it impossible to accept that there is any "dangerous uncertainty" caused by obvious and sensible improvements in the means by which the court arrives at the truth. One is entitled to choose between the individual conflicting *obiter dicta* of two great judges and I prefer that of Jessel M.R. **His dictum was as follows, 1 P.D. 154, 241: "Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases."** On that expression of principle he

> admitted the extension which has been acted on ever since in the Probate Division.
>
> p. 624 [Emphasis added]

[123] Lord Pearce was doing nothing more but quoting, with approval, the dictum of Master of the Rolls Jessel in *Sugden v. Lord St. Leonards* (1875), 1 P.D. 154. That case had nothing to do with business records; it expanded the hearsay exception to permit evidence of the deceased's declarations as to the provisions of his will, where that will had since been lost. Furthermore, Jessel M.R. was writing about the *general principles* that animate the existing hearsay exceptions, and should guide the courts in dealing with new situations. That is made clear by the comments by Lord Pearce that followed:

> That, I respectfully think, is the correct method of approach, particularly to a problem that deals with the court's method of ascertaining truth. **As new situations arise it adapts its practice to deal with the situation in accordance with the basic and established principles which lie beneath the practice.** To exalt the practice above the principle would be a surrender to formalism. Since this branch of the law is so untidy, there is but little appeal in "the demon of formalism which tempts the intellect with the lure of scientific order."
>
> While I give weight to the general explicit or implicit disapproval of further extension, expressed obiter in *Woodward v. Goulstone*, 11 App. Cas. 469, **I cannot accept that from 1886 no further evolution was possible in particular circumstances or sets of circumstances on the general principles expressed by Jessel M.R. Since that date life has greatly changed in various respects. With the necessity created by death the courts were familiar and they had evolved exceptions which dealt reasonably adequately with that phenomenon. With the necessity created by insanity Lord Aldon and Lord Cottenham had dealt and I cannot find that they have been overruled. The necessity created by mass production and modern business they could not then foresee.** They did not provide for the anonymity of modern industrial records and the difficulty of tracing those who made them. The individuality of persons in a large factory or business may be difficult or impossible to discover. They do many repetitive and almost automatic tasks concerning which no memory exists. Yet their composite efforts make machines and records whose complexity, efficiency, and accuracy are beyond anything imaginable in 1886. **In my view the anonymity of the recorder or the impossibility of tracing him create as valid a necessity as does his death for allowing his business records**

> **to be admitted. The principles on which the court sets out to discover the truth about these things remain unchanged, but the way in which those principles are applied must change if the principles are to be honoured and observed.**
>
> p. 625 [Emphasis added]

[124] Immediately following this excerpt from *Myers*, Justice Hall eschewed the majority approach of insisting on legislative action and adopted the minority views of Lords Pearce and Donovan that the Courts should mould the law to meet modern conditions. His reasons removed the requirement that the declarant be deceased. I will repeat his words:

> Although the views of Lords Donovan and Pearce are those of the minority in *Myers*, I am of opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job."
>
> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.
>
> pp. 625-626

[125] It is by no means coincidental that Lord Pearce's use of Jessel M.R.'s expression of the general principles was accepted by McLachlin J., as she then was, in *R. v. Khan*, [1990] 2 S.C.R. 531 to admit hearsay evidence of a child's declarations, but reduced those principles to two: necessity and reliability (para. 21).

[126] This leads to the last point taken by the appellant: the notes documenting Ms. Janssens' work product should not be admitted as they would fail the principled approach to hearsay. The appellant does not suggest that the notes of Ms. Janssens are not reliable, but because she was available as a witness, necessity is not met and the notes are inadmissible hearsay. He cites *R. v. Wilcox*, 2001 NSCA 45.

[127] I do not see how *R. v. Wilcox* assists the appellant. In that case, records kept by an employee, Mr. Kimm, were central to the Crown's case. The trial judge refused to admit the records. The Crown's case collapsed. Cromwell J.A., as he then was, described the appropriate approach to determining admissibility. The evidence should first be addressed under the traditional rules of evidence.

[128] The records kept by Mr. Kimm did not meet the common law exception as he had made the records contrary to his employer's instructions. Although arguably admissible under the *CEA*, Justice Cromwell preferred the principled approach (para. 58). He found they met the test.

[129] In terms of reliability, Mr. Kimm's testimony described how the records were kept, and his reliance on them. He was available for cross-examination, thereby providing ample opportunity for the trier of fact to assess what weight should be given to the records. In sum:

> [69] I would conclude that there are strong circumstantial guarantees of trustworthiness, both in the sense that the circumstances of the document itself tend to negate inaccuracy and in the sense that they permit the trier of fact ample opportunity to assess the evidence. Exhibit 24 therefore meets the threshold test of reliability for admission under the principled approach.

[130] With respect to necessity, Justice Cromwell stressed it is a factor that must be assessed in a flexible manner (paras. 70-71). It is well-accepted that reliability and necessity are not separate silos. They can interact on the ultimate issue of admissibility (see *R. v. Baldree*, 2013 SCC 35 at para. 72; *R. v. Gerrior*, 2014 NSCA 76 at para. 54).

[131] Justice Cromwell refused to apply the necessity criterion to defeat admissibility (para. 73)[2]. I would do the same here.

[132] For the reasons I set out earlier, I reject the appellant's companion argument that a finding of admissibility in this Court would somehow cause improper prejudice to the appellant, amounting to a miscarriage of justice. There is no evidence that trial counsel decided to forego cross-examination in the expectation that the trial judge would later be forced to exclude the results of Ms. Janssens' examinations. Trial counsel made no such argument to the trial judge.

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[2] See also: *R. v. Landry*, 2006 NSSC 47.

[133] To accede to the appellant's argument would be to permit counsel to remain mute at trial; decline the opportunity to challenge the reliability and credibility of evidence with the hope that if things go badly, they can then seek another trial to conduct the cross-examination they should have done in the first place.

SUMMARY AND CONCLUSION

[134] Trial counsel had every opportunity to challenge the admissibility of evidence that semen was found on swabs from the complainant's vagina. She did not. Instead, she suggested to the trial judge that no weight should be placed on the DNA and semen evidence because the complainant had not identified the exhibits that had been examined and tested.

[135] The trial judge dismissed the appellant's complaints about the lack of direct evidence connecting the exhibits to the complainant. She relied on the evidence of the physical injuries to the complainant's vagina, and the presence of semen on vaginal swabs to convict the appellant of sexual assault.

[136] The appellant now says the trial judge committed reversible error because the evidence about the presence of semen was inadmissible hearsay. A Report prepared by Ms. Murphy recounted the results of work done by other lab personnel, including Ms. Janssens' observation that she had found semen on vaginal swabs. When Ms. Murphy testified, she was not cross-examined about the reported presence of semen.

[137] Ms. Janssens also testified. She identified her notes found in one of Ms. Murphy's Reports. Her notes record her observation of semen on vaginal swabs from the complainant. She was not cross-examined. No objection was voiced at trial to the admissibility of any of this evidence.

[138] The appellant concedes that if Ms. Janssens had been asked to adopt the information set out in her notes as true, there would be no ground of appeal. Because this was not done, the documentary evidence containing that information was inadmissible hearsay.

[139] In the particular circumstances of this case, it was not inadmissible. The author of the notes, who personally made the observations recorded in them was present in court. The content of those notes was *prima facie* admissible for the truth of their contents. The dangers that animate exclusion of hearsay were

manifestly not present. The author was present. Her recorded observations could have been challenged. The appellant chose not to do so.

[140] The notes were business records made by a person who had a duty to make the record, done at the time, in accord with her personal observations who had no apparent motive to mispresent. They would also be admissible under the principled approach of reliability and necessity.

[141] Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Hamilton, J.A.

Bourgeois, J.A.