SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. C.C.*, 2017 NSSC 312

Date: 2017-12-05
Docket: *SFSNCFSA* No. 99050 and 104784
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

C.C. and R.M.

Respondents

MID-TRIAL RULING

TO PUBLISHERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

Prohibition on publication
1. 94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Oral Mid-trial Ruling:	October 13, 2017, in Sydney, Nova Scotia
Written Release:	December 5, 2017
Counsel:	Danielle Morrison for the Applicant Gregory Englehutt for the Respondent, C.C. Coline Morrow for the Respondent, R.M.

By the Court:

BACKGROUND

[1] I delivered an oral mid-trial ruling with brief reasons on the admissibility of certain records in this proceeding on October 13, 2017. These written reasons further expand upon my ruling.

[2] The records at issue are those maintained by the Department of Community Services, Child Welfare division. The Minister relies on these records not only to provide background and context to the current proceeding, but as evidence of long-standing risk presented by these parents.

[3] My ruling arises in the context of a final review hearing for the youngest child involved in this child protection proceeding, for whom the Minister has advanced a plan for permanent care. The Minister also seeks a finding that an older sibling is a child in need of protective services.

[4] The Minister asks the Court to accept the complete record, comprising computerized (ICM) notes created by various social workers assigned to the file, as evidence to prove the truth of the entries, without the need to hear from the workers or third parties whose conversations are recorded therein.

[5] The notes contain several types of hearsay: first hand - observations and steps taken by workers who handled the file but will not be called to testify. Second hand – workers' conversations with third parties and children, as well as verbal reports received from police and healthcare professionals. Third hand - where a person (for example a foster parent) reports another persons' comments (such as a physician) to a worker who did not testify.

[6] The Respondents are opposed to admission of the entire ICM record, arguing that it contains hearsay which is inadmissible and prejudicial.

[7] The Minister acknowledges that some of the notes constitute and contain hearsay, but argues that they are admissible as an exception to the general rule. The Minister presents the following arguments in support of her case:

- The ICM notes are "business records" within the meaning of the Nova Scotia **Evidence Act**, RSNS 1989, c. 154, s. 23, and admissible as a result under this statutory exception to the common law hearsay rule;

- Under Section 23, business records are admissible to prove the truth of their contents; that is, the occurrence of the act, transaction, occurrence or event described in the record;

- The circumstances of the keeping of such records, including the lack of personal knowledge of anyone testifying as to such records, goes to weight and not admissibility;

- The records would be, and are otherwise admissible in any case, under the common law exception to he hearsay rule, as described by the Supreme Court of Canada in **Ares v. Venner**, [1970] SCR 608.

[8] C.C. advances two specific grounds of objection:

- The case notes should not be admitted in their entirety. If there is a specific aspect of the notes which the Minister seeks to have admitted, a *voir dire* should be held to address that issue.

- In the alternative, C.C. objects to portions of the notes. Her objections fall into five categories: a) anonymous or confidential referrals; b) notes entered by workers who did not testify; c) notes containing statements of third parties who did not testify: and d) notes containing opinion evidence.

[9] C.C. identified a specific list of objectionable entries in the notes. I ruled on the admissibility of each entry as described by C.C.

[10] In addition to C.C.'s arguments, R.M. raises several other objections: a) the information contained in the notes is irrelevant; b) the notes are an incomplete record; and c) an earlier business record advanced by the Minister was not admitted into evidence, so the court's ruling on that record should apply to the ICM notes.

[11] R.M. did not identify specific entries in the records to which he objects, but agreed with the list C.C. provided.

ISSUES

1. Do the ICM notes contain hearsay?
2. Are the ICM notes business records, admissible as *prima facie* proof of their contents?
3. If the ICM notes constitute business records, are they all admissible as an exception to the rule against admission of hearsay?
4. If portions of the notes are *prima facie* admissible, but the Respondents challenge those entries, are the Respondents required to call the author of that entry?
5. Do the court's earlier rulings apply to the ICM notes?

Issue 1: Do the ICM notes contain hearsay?

[12] In **R. v. Khelawon** [2006] 2 S.C.R. 787, the Supreme Court of Canada defined hearsay as a witness' out of court statements, unless and until adopted in court under oath or solemn affirmation. Hearsay is presumptively inadmissible at trial, because it deprives a party of the right to test the evidence under cross-examination.

[13] Although the principles of hearsay and its exceptions has evolved in the past few decades, **Ares v. Venner** remains the leading case authority regarding admission of records. In **Ares** the plaintiff in a medical malpractice case sought to introduce hospital records, containing entries made by nurses during his hospital stay.

[14] The Supreme Court noted that the entries are hearsay, but were made by healthcare providers with personal knowledge of the matters being recorded, and they were recorded contemporaneously while under a professional duty to make the entry or record. The Court concluded that such records can be received in evidence as *prima facie* proof of the facts contained therein.

[15] In **R. v. Khan** [1990] 2 S.C.R. 531 the Court dealt with the admissibility of a child's spontaneous declarations made out of court, and whether such statements are admissible as an exception to the hearsay rule. Justice McLachlin (as she was then) outlined what has become known as the "principled approach" to admitting

hearsay evidence. This approach involves consideration of the necessity and reliability of the evidence, which provides a more flexible test for admission.

[16] In Nova Scotia, the Court of Appeal most recently addressed the issue in **R. v. Keats**, 2016 NSCA 94. There, the objection was in relation to notes made by a technologist, who was qualified to offer opinion evidence as an expert at trial. However, during her testimony, she was not asked about her notes. Another expert relied on those notes in providing an opinion. On appeal, the accused argued that because the notes were not adopted by the technologist, they constituted inadmissible hearsay which should have been excluded.

[17] The Court of Appeal determined that the notes were admissible as business records pursuant to the common law.

[18] In the case before me, the Minister did not call all workers who entered notes on the ICM system to testify at trial. The unavailability of some former workers and the implications of a lengthy witness list are the main reasons the Minister chose not to do so. In support, the Minister relies on the decision of Judge Milne in **Nova Scotia (Community Services) v. M.F.** 2009 NSFC 16 where his Honour noted that "It is sometimes impossible, inconvenient, or expensive to arrange to bring a first-hand witness to court."

[19] Many courts have cautioned that trial fairness cannot be sacrificed at the altar of expediency. In **Prince Edward Island (Director of Child Protection) v. C.P**., 2014 PECA 18 the Court of Appeal overturned the lower court decision because the judge allowed "hearsay and highly prejudicial evidence of limited or no probative value to bleed into his reasoning…. [and] the trial judge's finding on disposition is rendered unsafe by the admission of highly prejudicial hearsay evidence."

[20] Despite the Minister's invitation to the court to admit the records in bulk and determine the appropriate weight to be assigned to them, I declined to do so. To paraphrase Justice Lynch in **Nova Scotia (Community Services) v. T.S.**, 2015 NSSC 65, inadmissible evidence should not be admitted, let alone weighed. And though judges are routinely required to hear evidence on a *voir dire* which might be ruled inadmissible, there remains the danger (and the perception) that a bulk filing like this might contain prejudicial evidence that could "bleed into" a judge's reasoning.

[21] The ICM notes clearly constitute hearsay evidence, which is inadmissible. The question is whether they fall within an exception.

Issue 2: Are the ICM notes business records, admissible as *prima facie* proof of their contents?

[22] The Minister argues that the ICM notes constitute a business record which falls within an exception to the hearsay rule. The Minister bears the onus of proof in advancing this argument.

[23] Business records are admissible at common law because of the nature of their recording. Like in **Ares**, a nurse who administers medication to a patient must record that on the patient file. It is part of a nurse's professional responsibilities to record all steps taken in the patient's care and observations made at the time of treatment. That nurse has personal knowledge of what has gone on and has no motive to mislead in making the notes. The circumstances of their recording gives rise to a high circumstantial guarantee of reliability.

[24] The business records exemption has been codified in the Nova Scotia **Evidence Act**, R.S.N.S. 1989, c. 154 s. 23, which reads:

> Business records
>
> 23 (1) In this Section,
>
> (a) "business" includes every kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;
>
> (b) "record" includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) Evidence to the effect that the records of a business do not contain any record of an alleged act, condition or event shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such records of all such acts, conditions or events at the time or within reasonable time thereafter and to retain them.
>
> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

> (5) Nothing in this Section affects the admissibility of any evidence that would be admissible apart from this Section or makes admissible any writing or record that is privileged.

[25] In order to find that the notes constitute a business record for this purpose, I must determine whether the notes are kept in the usual and ordinary course of the workers' duties, made by someone with personal knowledge of the act, occurrence or event recorded, and at the same time, or within a reasonable time, after the act, occurrence or event transpired. I should also be satisfied that the records were made by a person with no motive to mislead (**Keats**, *supra)*).

[26] I find many of the ICM notes meet all these requirements, and are admissible as *prima facie* proof of the truth of their contents.

Issue 3: If the ICM notes constitute business records, are they all admissible as an exception to the rule against admission of hearsay?

[27] The Minister argues that **all** information contained in the ICM notes is admissible as *prima facie* proof of the truth of its contents. So for example, where statements made by children to a worker or foster parent are recorded in the notes, the Minister asks the court to accept the records as proof that the child's statements as recorded are true.

[28] Section 23 does not go that far. It does not permit admission of what is essentially second and third-hand hearsay statements in records, as proof of the truth of those statements. **The Evidence Act** is not intended to allow, via the back door, evidence that would not be otherwise admissible.

[29] In seeking admission of the ICM notes, the Minister also relies on the principled approach, according to the test enumerated in **R. v. Khan** (*supra*). This is a functional approach to admitting hearsay, using indicia of necessity and reliability.

[30] The key to finding necessity used to be the unavailability of the evidence contained in the out-of-court statement. The modern approach does not require that the witness be dead or incompetent, only that it's necessary or expedient to introduce the evidence in this way.

[31] I will deal with the recordings according to the type of objection raised.

ANONYMOUS REFERRALS/UNNAMED SOURCES

[32] The Minister argues that admission of these notes are necessary, because with the source being unnamed, it makes locating them as witnesses difficult. She also argues that the referral information is reliable, because unnamed sources can be prosecuted under Nova Scotia's child protection legislation if they make malicious referrals.

[33] However, as the Respondents point out, the unnamed third parties are under no professional duty to report the truth. They could lie, or embellish and misrepresent things, and there is no way for the Respondents to test their statements without knowing the source and being able to question them.

[34] The Minister further argues that anonymous referrals are investigated and the results as recorded in the notes speak to their ultimate reliability. In other words, the results of the investigation corroborate the unnamed person's report. In my view, that argument must fail. If the referral is substantiated after investigation, the only relevant evidence is the results of the investigation. The fact that an unnamed person may have called with suspicions is not relevant.

[35] Irrelevant evidence is inadmissible. It does not become relevant and admissible because later developments prove the truth of the referrals. It is not relevant that a dozen calls were made anonymously, reporting that a parent is using drugs. If the parent later acknowledges drug use, that is relevant. A referral does not prove anything, and is only relevant insofar as it explains why the Minister investigated.

[36] Justice Lynch in **T.S.** addressed the issue of anonymous referrals, in the context of an interim hearing. Although that decision involved a different test at the interim stage of a proceeding, the court's comments with respect to anonymous referrals apply equally to this case. As Justice Lynch noted, "the anonymous referral information cannot be considered by the court for the truth of its contents – it is hearsay and there is no basis to find it credible or trustworthy." Such evidence cannot be found credible or trustworthy because the source is not named. These portions of the business records are not admissible.

THIRD PARTY REPORTS (NON-PROFESSIONALS)

[37] Even conceding that necessity may be met, there is no evidence that third parties (including foster parents) are under a professional duty to report only the truth. There could be alternative explanations for their statements. As C.C.'s counsel points out: "reliability is about subjectivity, perception, and bias". The only way to test their statements is to hear from the witness in court. These portions of the business record are not admissible.

PROFESSIONALS/HEALTHCARE PROVIDER REPORTS

[38] Initially I determined that these reports should be excluded as double hearsay. After further reading, however, I amended my decision based on the case of **Setak Computer Services Corp. v. Burroughs Business Machines Limited**, (1977) 76 D.L.R. 3rd 641 (Ont. H.C.). **Setak** was not cited by counsel but was referenced in an article appended to C.C.'s submissions. It was cited recently by the Nova Scotia Court of Appeal in **R. v. Howe**, 2017 NSSC 199.

[39] In **Setak,** the court found that business records which reference the comments of professional third parties are admissible for the truth of their contents. Likewise, I find that the comments of third party professionals contained in the notes are necessary and reliable. Necessity in this case includes expediency, given that this proceeding is already well past the deadline set out in the legislation.

[40] Further, the comments recorded by workers were made by professionals such as other social workers, a school principal, police officers, and physicians, all of whom are subject to their own professional regulations. They can be expected to report accurately what they observed, and what steps they took. They are neutral participants and observers who have no "axe to grind". These factors enhance the reliability of those notes, and makes them admissible as *prima facie* proof of the truth of their contents.

STATEMENTS ATTRIBUTED TO THE CHILD

[41] Necessity is not an issue given the age of the child, but the child is under no obligation to be truthful, and there is a myriad other explanations for why a child might say something negative (or perceived to be negative) about the parents, the home, etc. The Minister therefore bears the onus of demonstrating under the principled approach why the child's statements should be admitted. This is normally done through the process of a *voir dire* (which was the process used

earlier in the trial when the Minister sought to introduce another statement from the same child).

[42] However, rather than request a *voir dire* to deal with the admissibility of the child's second statement, the Minister asks that it be admitted as part of the business record as proof of what the child said. Only in the alternative does the Minister seek a *voir dire*. Given my ruling above, I allowed the Minister this option in relation to the child's statement. It is otherwise inadmissible.

OPINION EMBEDDED IN REPORTS

[43] As earlier cases have noted, admitting evidence under a hearsay exception does not trump other rules of evidence. A hearsay statement that contains inadmissible opinion or repeats inadmissible hearsay should not be admitted into evidence (see **R v Couture** [2007] 2 S.C.R. 517).

[44] Opinion evidence may be admitted under certain conditions, none of which were met in this case. Thus, the opinions contained in the notes are not admissible. The Minister says she is not relying on expert opinion evidence in the records in any event, so the point may be moot.

[45] Finally, R.M. says that the probative value of the notes is "far outweighed by the danger of prejudice, confusion on the issues, and incorrect information coming before the court, … and makes it very difficult if not impossible for the respondents to answer."

[46] I reject that argument. Historical evidence of parenting deficits and other risks has long been recognized as relevant in child protection proceedings. Disclosure of the notes was made, and worker's affidavits were filed. That disclosure satisfies the requirements of the legislation and is allows litigants to answer the case to be met. I do not accept that its "impossible for the respondents to answer" the Minister's case if the records (as redacted) are admitted. Exercising my discretion, I decline to exclude the notes in their entirety.

[47] Here, that part of the problem in dealing with the ICM records is that they were tendered in bulk (or as Judge Melvin described it in **Minister (Community Services) v. S.J.R.**, 2014 NSFC 20 "holus-bolus"). The records comprise two large volumes of materials, approximately 4 - 5 inches thick and covering several years of involvement. The Minister did not identify specific entries on which she relies to prove certain facts. This made the job of Respondents' counsel in

identifying objectionable entries all the more difficult, and gives rise to the issue I've identified as #4 below.

Issue 4: If portions of the notes are *prima facie* admissible, but the Respondents challenge those entries, are the Respondents required to call the author of that entry?

[48] In **Ares** (*supra)*, the Court noted that, had the respondent wanted to challenge the accuracy of the nurse's notes, the nurses were present in court and available to be called as witnesses.

[49] Similarly, in the case of **R. v. Keats** (supra)the Court noted that the accused had the opportunity to question the technician whose notes were at issue, because she testified.

[50] In the case of **Nova Scotia (Minister of Community Services) v. J.P.** [2017] N.S.F.C. 4, Judge Dewolfe dealt with the Minister's request to admit case recordings as business records. The records were admitted as *prima facie* proof of their contents, but the Minister offered to make available any employees who contributed to the case recordings for cross-examination at the request of respondent's counsel. The same is true in **S.J.R.** (*supra*).

[51] Other than the three workers who testified in this case, the Minister did not offer to make other workers available for cross-examination on the ICM notes. The Minister takes the position that once the ICM records are ruled admissible as *prima facie* proof of their contents, the burden shifts to the Respondents to test that evidence by calling as a witness any person who made an entry with which they disagree.

[52] I agree with the comments of MacDonald, J. in **Children's Aid Society of Halifax v. L.H.** [1988] N.S.J. No. 507 (NSCC) (appeal dismissed [1989] N.S.J. No. 107 (NSSCAD)) at paragraph 28 wherein he stated:

> The onus ought not to be on the appellant herein to call witnesses on their part, or as their own, to question them on matters which they might have been reported to have said which forms part of the "business record". This to me would impose all sorts of difficulties with regard to how the witness would be handled and encumber the whole system.

[53] In my view, it is not the Respondents' responsibility to subpoena witnesses whose statements appear in the ICM notes. The Respondents in child protection

cases are unlikely to have the resources to bring these witnesses to court. This also raises the question of whether the Respondent can cross-examine their own witnesses, as alluded to in **L.H.** (*supra*).

[54] In support of her position, the Minister points out that the Respondents in protection cases rarely file a plan or affidavit. She argues that this leads to unpredictability in the presentation of her case, requiring more evidence, longer hearings, increased cost, unnecessary use of court time, and inconvenience.

[55] However, the Minister should only lead evidence relevant to the issue to be determined. It need not require longer hearings. Also, the Minister is free to call rebuttal evidence if new issues arise in the Respondents' case, so there is no real unpredictability. It may be inconvenient, but that comes with the responsibility the Minister carries in these cases.

[56] Finally, R.M. argues that the ICM notes do not reflect a complete record of transactions on the file. For example, he testified that he made calls to workers that are not reflected in the notes. An incomplete record may merit less weight if I accept R.M.'s evidence, but it is not inadmissible for that reason. I must ultimately weigh all admissible evidence in determining whether the Minister has proven her case.

Issue 5: Do the court's earlier rulings apply to the ICM notes?

[57] Earlier in the trial, I made rulings on the admissibility of business records proffered by the Minister. One of those rulings involved police records, R.M. advised that he would agree to a record of conviction for a particular incident being tendered by consent, rather than require the officer to testify. The Minister insisted on hearing from the officer, and after completion of the officer's evidence, asked to tender police records of the incident. I declined to admit them.

[58] In doing so, I relied on the best evidence rule, as well as **R. v. Khelawon** *(supra)*, in which the Supreme Court noted that an earlier witness statement is not evidence; the witness' testimony is the evidence. It can be tested in the usual way through cross-examination. A hearsay issue arises when the witness does not repeat or adopt information contained in the out of court statement, and the statement itself is tendered for the truth of its contents.

[59] In this case, I had the sworn *viva voce* evidence of the police officer. If there was information contained in the records which was not elicited in court, I inferred

that it was irrelevant. Otherwise the Minister would have asked the officer about it. Conversely, if there was additional information contained in the records which is relevant to this case, the Minister should have asked the officer under oath about it. The same holds true for the anger management counsellor's notes.

[60] My earlier rulings were specific to the evidence adduced by the Minister through those two witnesses. R.M. suggests that those rulings translate to the ICM notes. Insofar as the ICM notes contain second-hand hearsay which is not otherwise admissible, I agree. Otherwise, different issues arise with the ICM notes, so a separate ruling is necessary.

CONCLUSION

The ICM notes are admissible as a business records exception to the hearsay rule. Statements attributed to persons, other than professionals who relayed information to workers and workers' own observations and acts, are not admissible. The Minister will redact the ICM notes with this ruling in mind, and make a copy available for the Respondents and the court.

MacLeod-Archer, J.