SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Wilson*, 2024 NSSC 118

Date: 20240423
Docket: CRH No. 525263
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Thomas Wilson

Respondent

D E C I S I O N

Judge: The Honourable Justice Denise Boudreau

Heard: December 5, 2023, and February 16, 2024, in Halifax, Nova Scotia

Counsel: Alex Keaveny, for the Appellant
Matthew Conrad, for the Respondent

By the Court:

[1] This is a Crown appeal of a decision of Judge Elizabeth Buckle of the Nova Scotia Provincial Court, dated June 13, 2023, acquitting Mr. Wilson of the following charge:

> 3. And further at the same time and place aforesaid Thomas Wilson, being a blaster with direction and control of a blasting operation, failed to make a blast log for the blast that occurred on February 7, 2019, that included the information required by section 13(5) of the *Blasting Safety Regulations*, contrary to section 13(1) of the *Blasting Safety Regulations*, thereby committing an offence contrary to section 74(1)(a) of the *Occupational Health & Safety Act.*

Background

[2] At all material times, Mr. Wilson was a blaster for a company called Atlantic Road Construction and Paving Limited (hereinafter "ARCP"), in relation to a project at Pepperell Street in Halifax from November 2018 to February 2019.

[3] The provincial *Blasting Safety Regulations* require that a) a blaster must make a "blast log" for each and every blast he effects; b) the blaster must give a copy of all such logs to his employer; and c) the employer must keep a copy of those logs for at least three years.

[4] In March 2019, the provincial Department of Labour (hereinafter "DOL") issued an order to ARCP to produce all blast logs for all blasts conducted by their

company on the Pepperell Street project. Documents were produced further to that order.

[5] One of those documents purported to be a blast log signed by Mr. Wilson, in relation to blasts on February 7, 2019. The document indicated that he had conducted two blasts on that day, one at 9:04 a.m. (involving eight holes, with no misfire) and one at 9:37 a.m. (involving 16 holes).

[6] However, video of the events of that day appeared to show that the blast at 9:04 a.m. had involved 24 holes and had misfired. That video (along with *viva voce* witnesses' evidence) showed that 16 holes were then re-connected and refired (the 9:37 a.m. blast).

[7] It was the Crown's contention that the blast logs which were completed and filed were erroneous and, therefore, represented breaches of the *Regulations* by Mr. Wilson. Those were the allegations that led to a number of charges against Mr. Wilson, including the charge that is before this Court.

[8] Mr. Wilson had a trial in Provincial Court before Judge Buckle in relation to these charges. During the trial, various copies of blast logs were presented to the Court in a number of ways. One exhibit, Exhibit 16, was purported to be a full set of the blast logs provided by ARCP to DOL (as a result of the order). That set was

brought and presented to the Court by Officer Terry Duggan, who had received the documents from ARCP.

[9] The trial judge determined that the documents that had been provided to her by the Crown, purporting to be Mr. Wilson's blast logs, were not admissible as such. She found that the documents were not originals and further that they did not meet the test of the "best evidence rule". Given that decision, the charge against Mr. Wilson in relation to the blast logs (Count 3 hereinabove) could no longer be supported. The trial judge acquitted Mr. Wilson of this charge.

[10] The Crown appeals from that decision to this Court.

[11] Originally the Crown's Notice of Appeal listed three counts for which it sought a new trial, with three specific grounds of appeal (one for each of Counts 3, 4, and 5). However, in its brief the Crown confirmed that it was only appealing the acquittal on Count 3. In its brief, the Crown put forward three issues as the grounds for this appeal:

> 1. The trial judge erred in finding that the colour photocopies tendered as **Exhibits 6, 7, 8 and 16** were not admissible due to the documents in possession or best evidence rule.
>
> 2. The trial judge erred in finding that the colour photocopies tendered as **Exhibits 6, 7, 8 and 16** were not admissible as they were not "true" copies of "Mr. Wilson's originals".
>
> 3. The trial judge erred in law in finding a reasonable doubt that the colour photocopies tendered as **Exhibits 6, 7, 8 and 16** were "Mr. Wilson's complete blast logs" and in requiring that the Crown prove the exhibits were "Mr. Wilson's complete blast logs".

Standard of Review

[12] The parties are not in agreement as to the appropriate standard of review engaged in this appeal. The Crown submits that all questions raised in this appeal are questions of law or questions of mixed fact and law. Consequently, the standard to be applied as to all questions is correctness (*R. v. Martin*, 2015 NSSC 8; *R. v. Araujo*, 2000 SCC 65). The respondent is of the view that at least some of the issues raised in this appeal relate to purported errors of fact (e.g., whether the Court's copies were "true" copies of an original). It points out that findings of fact are subject to deference and should not be disturbed absent palpable and overriding error.

[13] In my view, the salient points of the trial judge's decision in relation to the first two grounds identified by the Crown (relating to the admissibility of evidence) are matters of mixed fact and law. The judge made findings in relation to the documents before her, and then applied legal principles to conclude that those documents were inadmissible. Those legal principles (e.g., the best evidence rule) are easily extractable. Therefore, I find that the appropriate standard by which those decisions/questions should be assessed is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

[14] As to the third ground (whether Exhibits 6, 7, 8, and 16 were Mr. Wilson's "complete" blast logs, and whether the Crown was required to prove that they were so), I find that the Judge Buckle's decision on those points was not decided on the grounds of admissibility, but rather the weight she was prepared to give the documents, given that she was not satisfied that they were complete. In my view, such decisions are entitled to significant deference, as per Justice Cromwell's decision in *R. v. Grouse*, 2004 NSCA 108:

> [41] ... There is also no question that determining the facts, drawing inferences from them and assessing the weight to be given to the evidence are to be treated with great deference on appeal even where, as in the case of appeals from conviction, the court has appellate jurisdiction in relation to questions of fact: see **Buhay**; **Fitton**. These principles are set out by Charron, J.A. (as she then was) in **R. v. Moore-McFarlane** (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) at para. 68 where she stated that the judge's finding of voluntariness is entitled to deference on appeal and "... should not be interfered with in the absence of legal error in determining the test, or overriding and palpable error with respect to the facts." (Emphasis added)

Evidence

[15] I must start with an explanation as to why the grounds of appeal make reference to certain exhibits in particular, and what those exhibits actually were.

[16] As I have previously noted, a review of the full transcript of the trial shows that Exhibit 16 was put forward by the Crown as the full copy of the blast logs seized from ARCP. They were brought to the Court by Officer Terry Duggan of the Department of Labour (the last witness called by the Crown). He testified that

the documents he brought forward were the complete set that he had received from ARCP.

[17] However, before that, other Crown witnesses who testified were shown certain individual blast logs and were asked questions about them. Exhibits 6, 7, and 8 were examples of such. The Crown advised that each of those exhibits originally came from one large bundle (which was eventually identified as Exhibit 16).

[18] The Crown called Craig McPherson as a witness at this trial. Mr. McPherson testified that he was the health and safety manager for ARCP. He was the person who received the Compliance Order from the DOL, and he was the person who took on the responsibility of responding to that order.

[19] Mr. McPherson testified as follows:

> **Q.** So, Mr. McPherson, can ... did you have any ... did you assist or have any role in ARCP's response to this compliance order?
>
> **A.** I did.
>
> **Q.** Can you explain to Her Honour your role and what you did?
>
> **A.** So my role in this would be tracking down these required documents and just being an intermediary I guess between myself and Terry, try to get him what he was looking for.
>
> **Q.** And when you say "Terry" who are you referring to?
>
> **A.** Terry Duggan, the inspector who is, I believe, I got this either from directly or indirectly.
>
> (Appeal Book, Tab 25, pp. 394-5)

…

Q. Mr. McPherson, we were talking about your responding to the Department of Labour's compliance order and I wanted just to back up for a moment and have you explained to us how ARCP manages its documents.

So let's start with the request for in the exhibit, Exhibit 12, requested "All blast logs for all the blasts that have taken place for the work site at the location known as 6030 Pepperell Street." So, first of all, did you respond to that request?

A. Yes.

Q. And what did you provide?

A. Blast logs.

Q. All right. Can you please just elaborate on that?

A. I believe I ...

Q. Let me put it this way.

A. … gave them the documentation that they ... the documentation that they asked for.

Q. So just to be clear, the request was "All blast logs for all the blasts that have taken place for the work site at the location known as 6030 Pepperell Street". To the best of your recollection did you provide all blast logs for all the blasts that have taken place for the work site at the location known as 6030 Pepperell Street?

A. Yes.

(Appeal Book, Tab 25, pp. 406-7)

…

MR. KEAVENY: All right. Do you know where the ... were they ... like the blank form that you are aware of, was it an electronic document or was it paper document?

A. It was a paper document.

Q. And where were the paper documents kept? How did you access them?

A. They were in a folder in a cabinet.

Q. Okay. And folder in a cabinet ...

A. That's where I would go to get them.

Q. And where was the cabinet located?

A. It was at that time ... I think it was in like the kitchen area which ...

Q. Okay.

A. ... go to the office.

Q. And where was the kitchen located? Essentially, was the street ... civic address for this location?

A. Oh, 6 Belmont Avenue in Eastern Passage.

Q. And what is that address?

A. That's our office and our ... yeah.

Q. When you say "our office"what do you mean by that?

A. ARCP's office. My employer's office.

Q. All right. How many offices does ARCP have in the Metro area?

A. Just the one that I'm aware of.

Q. Okay. So if you refer to being at the office, is it always going to refer to that office?

A. Yes.

Q. Okay. And do you work in that office?

A. Yes.

Q. All right. So this cabinet that's ... you said was in the kitchen area?

A. Yes.

Q. So what is kept in this cabinet? What is it?

A. I know that's the cabinet that I went to when I needed to get blasting logs. That's the cabinet I was directed to to open ... to get the logs.

Q. All right. And so if I understand correctly then, when you say to get the logs, do you mean the blank forms or the completed forms?

A. No, the completed ones.

Q. Okay. So just to be clear. So are both the blank and the completed forms kept in this cabinet?

A. I don't know where the blank ones were ...

Q. Okay

A. ... I just know that the ... there were completed ones in that cabinet.

Q. You said you were directed to that cabinet. Directed by who?

A. I don't remember.

Q. Okay. So you were directed to go to this cabinet and that's where you found blast log forms? Is that ... that's your evidence?

A. Yeah. Yeah.

Q. Okay.

A. That's where I ... that's where the blast log forms were stored, yes.

Q. Okay. And did you provide completed blast log forms to the Department of Labour?

A. I provided what was in the folders that were in the cabinet.

Q. Okay, that's my question. So the answer is you did provide some?

A. I provided, yes.

Q. Did you provide ... so the blast log forms you provided to the Department of Labour, did they all come from that cabinet or did they come from other places as well?

A. I can't ... I don't recall.

Q. All right. So you recall completed forms being stored in this cabinet?

A. Yes.

Q. All right. And you recall what else is in this ... was in this cabinet?

A. No.

Q. Okay. And you said the cabinet was in the ... near the kitchen area?

A. Yes.

Q. Is it anyone's ... is that in anyone's particular workspace or who has access to that cabinet?

A. It's in a general place. I guess anybody could walk by and have access to it.

Q. Okay. All right. And in responding to the request for all blast logs for all the blasts that have taken place for the work site at the location known as 6030 Pepperell Street, who did you speak with to ensure that you had all the blast logs from all the blasts?

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

Q. Did you ever speak with Thomas Wilson?

A. I don't remember.

Q. All right. When you say you don't ... so just explain then what you do remember about it. You remember getting them from the cabinet?

A. Vaguely. I went to the cabinet; that's where they're stored. Do I remember specifically the time and the date? No.

Q. Okay. Let me ask it this way. When you are responding to the compliance order ...

A. Right.

Q. ... were you ... like I wanted to explain to the Court like sort of the extent of your efforts. Like how did ... how would you satisfy yourself that you'd had what was being requested and required?

A. How did I satisfy myself?

Q. Like, for example, when you were trying to respond to this order, were you trying to be as accurate and complete as possible?

A. Yes.

Q. Okay. And why?

A. I was replying/responding to an order, a compliance order.

Q. All right.

A. I have no reason to not try to get the information that was being requested of me.

Q. All right. So just ... if you can ... this is what I want you to explain is so what does that look like? Like how did you ensure that you had found all the records that were available?

A. I ... I don't remember the steps that I took to ensure how I had the documents, the actual documents. I ... the documents that were in the filing cabinet were the ones I took and photocopied and sent.

Q. All right. And do you recall having any contact with Thomas Wilson in your efforts to identify all of the required blast logs?

A. I don’t.

(Appeal Book, Tab 25, pp. 410-416)

…

Q. And in your search for the requested blast logs, did you determine ... can you say whether or not ARCP had any kind of, you know, tracking form or any kind of process to ensure that blast logs are received? (Inaudible) had documentary steps to take to make sure a blast log gets submitted.

A. My understanding is they came from Tom and from Tom they were placed in a folder. The folder was identified based on the job. Who did that I do not know. And the folder was then placed in the cabinet.

Q. So when you say "identified by job," what do you mean by "identified"?

A. Just our internal job codes. We code our jobs by number. So 21–005 would be a job number ...

Q. Okay. So you're ...

A. … so that they would …

Q. … saying that it would be the log is coded by job?

A. That's correct, yeah.

Q. Okay. And then placed in the folder in the cabinet?

A. Placed in a file folder and then placed in the cabinet, yes.

Q. Okay. If I could see. Now Mr. McPherson...

A. Yes.

Q. ... do you recall approximately how many blast logs you provided to the Department of Labour?

A. No.

Q. Okay. Can you say whether it was more than 50?

A. More than 50? I can't say for certain if it was more than 50 but that seems like a lot.

(Appeal Book, Tab 25, p. 422-423)

[20] Mr. MacPherson was then shown some of the blast logs which had already been exhibited to the Court. He was able to recognize that the documents appeared, in a general sense, to be ARCP blast logs. However, he was unable to confirm that the specific documents being shown to him were the documents he had photocopied and provided to the Department of Labour:

Q. Now we have here ... I'm not sure what the map is but this is a 316-page document.

A. Yes.

Q. Does this refresh your memory as to how many blast logs you provided to the Department of Labour?

A. No, it doesn't refresh my memory about that at all, no.

Q. All right. And looking at ... going back to page 1 again, we see "December 12th or 13th, 2018, location 6030 Pepperell." Now, are you able to say whether this is one of the blast logs you provided to the Department of Labour?

A. No.

Q. And to be clear, are you saying that it isn't one or you don't remember?

> **A.** I couldn't ... that particular blast log with that date, I ... in time, I cannot tell you that I ... that was in the documents that I sent, no.
>
> **Q.** All right. Do you know how … do you recall how the actual documents, the blast log documents, themselves were provided to the Department of Labour?
>
> **A.** No.
>
> (Appeal Book, Tab 25, pp. 426-427)

[21] The Crown also called as a witness Officer Duggan, the investigator with the Department of Labour. Mr. Duggan testified that he issued the Compliance Order addressed to ARCP. During his testimony Mr. Duggan was shown (among other things) a red folder with blast logs contained therein (marked as Exhibit 16). Mr. Duggan confirmed that Exhibit 16 was the documents that had been provided to him in (partial) response to the Compliance Order.

[22] At the conclusion of the trial, both counsel made extensive submissions as to the admissibility of the documents in Exhibit 16, and the individual blast logs in Exhibits 6, 7, and 8. The trial judge found these documents were not admissible.

[23] The trial judge started her decision by correctly noting that the "completeness" of documentation does not affect its admissibility (pp. 13-14):

> The Crown argues that the documents contained in exhibits three, six, seven, and 16 are Mr. Wilson's blast logs for the incidents and they fall short of what is required in Regulation 13(5) so they are not “blast logs” as required by Section 13(1). The Defence argues these documents are not admissible. Further and related, the Defence argues the Crown has not established that these were Mr. Wilson's "complete" blast logs, meaning that it has not been shown that there were not other documents that would have formed part of the logs.

In my view, these issues are related but are not identical. Ultimately, the Crown wants to prove that the documents in question are Mr. Wilson's complete blast logs for the two blasts in question. **Whether they are complete or not is not, in my view, an admissibility question. It's relevant to the question of whether the Crown has proven the charge but not ... does not impact whether what the Crown has presented is ... is admissible and, if so, for what purpose.** …

(Emphasis added)

[24] The trial judge went on to say (p. 14):

… So I'll deal first with the admissibility of the documents in exhibits three, six, seven, eight, and 16. Sorry, not eight, 16.

The Defence argues the documents are not admissible because they do not comply with the common law "best evidence rule" or the business records exception under section 23(1) of the **Nova Scotia Evidence Act**. Documents cannot be admitted unless they are "proven", meaning authenticated. Authentication requires the Crown to prove that the document is what it purports to be. …

[25] At page 15, she continued:

The "document original rule"... the documents originals rule or the "best evidence rule" is engaged when a document is tendered as proof of its contents. Here, the Crown seeks to prove that the documents it tendered are Mr. Wilson's blast logs so here the rule is engaged. …

[26] The trial judge continued (pp. 19-20):

The common law best evidence rule requires me to first determine whether any of the documents are originals and if not, whether they fit into any of the exceptions noted above. Authentication and admissibility in this context are not all or nothing propositions. What is required to authenticate a document is linked to the question of what the Crown seeks to prove with the document. So is the best evidence rule.

Here the Crown seeks to prove that the documents that were presented to the Court were created by Mr. Wilson as his blast logs for the blasts at issue. Therefore, at the first stage of the analysis of the best evidence rule, the Crown must establish that one of the versions of the documents are the original of the document created by Mr. Wilson.

> The Crown submits that the documents in exhibit 16 are originals and contain Mr. Wilson's blast logs for the site, including the logs at issue for February 7, 2019. The Crown submits that the direct and circumstantial evidence establishes that the documents in Exhibit 16 followed following path.
>
> First, that Mr. Wilson authored the documents, then provided them to ARCP as he was required to by Regulation 13(3); that ARCP kept the logs received from Mr. Wilson as it was required to do by Regulation 13(4); that Mr. MacPherson produced the documents to Officer Duggan in response to a compliance order issued to ARCP which is contained in Exhibit 12; and then they were presented to the Court.
>
> …

[27] The trial judge next concluded that the Crown has not proven the documents to be "originals" (pp. 21-25):

> I am not satisfied that any of the documents produced are originals of what Mr. Wilson created. The documents in Exhibits 3, 7, and 8 are clearly not originals of what he created. I am satisfied that the documents in Exhibit 16 are originals of what the Department of Labour and Advanced Education received. Officer Duggan identified the documents and the red folder they were in as what was delivered to his office, apparently in response to a compliance order issued to ARCP. That makes them admissible as proof of what the DLAE received but that is not what the Crown wants to use them for.
>
> I am not satisfied that they are originals of what Mr. Wilson created. First, the documents in Exhibit 16 do not appear on their face to be originals. They have yellow highlighting and coloured ink which is consistent with them being originals. However, the documents in Exhibit 16 also have marks on them suggesting that they were copied from documents that had been in a three-ring binder, specifically they have small circular marks appearing at regular intervals in the margin of some documents so it appears that at some point before they were presented in court the documents were in a three-ring binder.
>
> The evidence does not allow me to say when. …
>
> …
>
> I'll examine the chain of custody in reverse order. As I said, I am satisfied that the documents in Exhibit 16 are originals of what Officer Duggan received. Mr. McPherson could not recall whether he provided the blast logs by email or in hard copy and he was not shown Exhibit 16. However, Officer Duggan testified that Exhibit 16 was hand delivered to his office and I accept that evidence. He did not know who delivered the folder but I am satisfied by the surrounding

> circumstances that those documents were provided to him by Mr. McPherson in response to the compliance order.
>
> However, I am not satisfied that what Mr. McPherson provided were the originals of what ARCP possessed. First, the order did not require that ARCP produce originals and the Department of Labour and Advanced Education accepted email copies of other documents so clearly was prepared to accept copies.
>
> Mr. McPherson had very little recollection surrounding the documents, however his evidence suggests that what he provided to the Department of Labour and Advanced Education, whether by email or in hard copy, were copies, not originals. …
>
> I am also not satisfied that what ARCP had in its possession were Mr. Wilson's original blast logs. …

[28] Having made that finding, the trial judge then addresses the issue of the admissibility of "copies" rather than originals (p. 26):

> Given that I am not satisfied the documents are originals of Mr. Wilson's blast logs, the issue becomes whether the Crown has satisfied any of the exceptions to the best evidence rule. In my view they have not. The Crown argues generally that the documents are admissible if they are true copies. Proving that they are true copies is necessary where the Crown seeks to rely on secondary evidence. However, it is not sufficient to satisfy the exceptions to the best evidence rule.

[29] The Court then goes on to address, in broad terms, the fact that originals *could* have been obtained here. As a result, she goes on to conclude that anything other than originals in the case before her would therefore be unacceptable (p. 27):

> So even if I were satisfied that the documents in Exhibits 3, 7, 8, and 16 were true copies, I would not admit them because they do not comply with the best evidence rule or any of the exceptions to that rule.

[30] The Court goes on to further address the admissibility of copies (pp. 27-28):

> However, I also find that the documents in Exhibits 3, 7, and 8 are not true copies. They do not capture all the information that is on the documents in Exhibit 16. The documents in Exhibit 16 have markings made in coloured ink and in yellow highlighter. The yellow marks do more than highlight text, they're used as a marker and information ... and contain information. Exhibits 7 and 8 are not color copies, they don't capture the different colored ink or the highlighter. The documents in Exhibit 3 capture the colored ink but not the yellow highlighter. I have no evidence that Exhibit 16 is not a true copy of the original but I also have no evidence that it is.
>
> Under the **Canada Evidence Act,** to admit a copy of a document, the party tendering it must provide an affidavit that sets out the source from which the copy was made, that attests to the copy's authenticity, and that is made by the person who made the copy, that's Section 30(3)(a). So even if this proceeding was governed by the **Canada Evidence Act**, I don't have sufficient evidence to satisfy myself that the copies before me are true copies.
>
> Therefore, I have concluded that the documents do not meet the best evidence rule and are not admissible to prove that they are the logs completed by Mr. Wilson. …
>
> …

[31] The Court then goes on to address, in the alternative, her analysis if the documents *were* admissible for the purpose sought by the Crown (pp. 29-32):

> If they were admissible for that purpose, I would not have been satisfied that they were the entirety of Mr. Wilson's blast logs for the incidents in question. ...
>
> … Taken at its highest, Mr. Thompson's evidence is capable of establishing that the pre-printed forms in Exhibits 6, 7, and 8 and by extension those in Exhibit 16, are "ARCP's complete blast log forms."
>
> However, what needs to be proven is that these documents are Mr. Wilson's complete blast log, meanings that they include all parts of what Mr. Wilson completed as his blast log. In my view, Mr. Thompson's evidence does not establish that. Mr. Thompson's evidence assists the Crown by explaining his process when he completed blast logs, however, while with ARCP he only completed 15–20 blast logs himself and did not complete any of the forms at issue in this case. …
>
> Mr. McPherson's evidence also assists the Crown but again does not establish that what was produced was the entirety of what Mr. Wilson created. I'm satisfied that Mr. McPherson produced everything from the cabinet in the kitchen and that is where he understood the blast logs were stored. He knew what the blast

> … what the ARCP blast log form looked like, he understood what was required by the compliance order, and had no reason not to try to get what was requested of him. However, he had a poor recollection for what steps he took to comply with the order. He could not recall who he spoke with to ensure that he got complete blast logs, he could not recall whether he ever spoke with Mr. Wilson, he did not know if Mr. Wilson used those forms on site, he did not know whether Mr. Wilson used his own forms or, if so, what his forms looked like.
>
> So as a result, the documents are not admissible. If they were admissible, they would not satisfy me that they were Mr. Wilson's complete blast logs, and as such I find Mr. Wilson not guilty of count three.

Analysis

[32] As I have already noted, the first two grounds of appeal relate to the admissibility of the documents:

> 1. The trial judge erred in finding that the colour photocopies tendered as **Exhibits 6, 7, 8 and 16** were not admissible due to the documents in possession or best evidence rule.
>
> 2. The trial judge erred in finding that the colour photocopies tendered as **Exhibits 6, 7, 8 and 16** were not admissible as they were not "true" copies of "Mr. Wilson's originals".

[33] I will deal with those two issues together.

[34] The trial judge based a large part of her decision on the admissibility of the documents on the common law “best evidence rule”. Historically, as she noted, this rule operated to require that originals of documents be tendered in court, with certain exceptions.

[35] I accept, as has been argued by the appellant, that this rule has been relaxed in its modern application. Lord Denning himself, many years ago in *Garton v. Hunter*, [1969] 1 All E.R. 451, noted at p. 453:

> That old rule has gone by the board long ago. … Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

[36] In *R. v. Betterest Vinyl Manufacturing Ltd.*, [1989] B.C.J. No. 2324 (BCCA), the Court noted that in modern times the best evidence rule is acknowledged to have a more relaxed application:

> 27 In *Phipson on Evidence*, 13th ed. (1982) the effect of the **best evidence rule** is said to go more to weight than to admissibility (at page 70):
>
> > In the present day, then, it is not true that the **best evidence** must, or even may, always be given, though its non-production may be a matter for comment or affect the weight of that which is produced.
>
> 28 The following passage at page 71 also illustrates how the **rule** is applied:
>
> > In *Kajala v. Noble*, *The Times*, March 13, 1982 the Divisional Court said that the only remaining instance of the **rule** was that if an original document was available in one's hand it must be produced. …
>
> 29 The strongest argument by text writers against the strict application of the **rule** is found in *Wigmore on Evidence* Vol. IV Chadbourn Revision (1972). At paragraph 1191 on page 434 it is contended that where the accuracy of a copy is not disputed there is no justification for refusing its admission:
>
> > What is most needed today, for this **rule** in general, is flexibility. This could be given by the following provision...: Production of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not *bona fide* dispute the contents of the document and no other useful purpose will be served by requiring production.

[37] I accept that this statement of the "best evidence" rule, as it stands today, is accurate. Clearly, if an original document is in the hands of a person wishing to tender that document, the original should be tendered. Barring that scenario, *prima facie* a copy "may" be acceptable if it meets certain criteria.

[38] In that context, where the trial judge in the case at bar appears to suggest that originals *must* always be produced, I tend to agree that such would likely represent an overly strict application of the modern best evidence rule. Courts everywhere have found that copies *may* be an acceptable alternative as evidence, depending on the circumstances.

[39] However, in saying that, I hasten to note that even the relaxed "modern" rule does not make of the Courts a free-for-all. It is entirely incorrect to believe that any random document can simply be brought into a courtroom and handed forward as evidence. With the greatest of respect to Lord Denning, there still remains a place for the Court to act as a gatekeeper as to the admissibility of documentary evidence; and this, even more so in cases where the document is purportedly being entered for the truth of its contents. I would also add that where documents are being entered in a criminal trial by the state against a criminal defendant, such requires an even more careful consideration of whether the document(s) meet an

appropriate standard, particularly where the documents form a crucial part of the prosecution's case.

[40] Let us remember first principles: a document brought before the Court must be authenticated. There has to be evidence which satisfies the Court that the document "is what it purports to be". In a very basic sense, where one purports to possess a copy of an original, there must be evidence that that document is, in fact, a copy of that original.

[41] As an example, the *Canada Evidence Act* provides the evidence that is required to support the contention that a document is, in fact, an accurate copy of an original, in circumstances where that *Act* applies. Section 30 of the *Canada Evidence Act* refers to copies of "business records", and requires evidence from the person who copied the records, to the effect that the copy is "authentic". Section 29 refers to bank records; similarly, it requires evidence that the copies are "true" copies.

[42] McWilliams, *Canadian Criminal Evidence, Fifth Edition*, notes:

> 24.5
>
> The authenticity of the document may be established through an admission by the opposing party including a formal admission. Alternatively, the tendering party can call the creator of the original or the person who made the copy or someone who witnessed the document being written.

> ... authentication or genuineness is protected to some degree by the obligation on the proponent to provide the original where it exists, a rule known as the document originals rule. However, secondary evidence or copies are now admissible where the original cannot be produced and a satisfactory explanation has been provided (*e.g* no bad faith); or, where requiring the originals would cause unnecessary inconvenience.
>
> 24.6
>
> The importance of the documentary originals rule is in decline. Where the original does not exist or is very difficult to produce, copies or secondary evidence may be admitted. The tendering party must provide an explanation for why the original is not available.
>
> 24.8
>
> As a general rule, the party tendering a copy is required to prove that it is a true copy of the original. This is normally done by producing a certified copy or evidence that the copy has been compared to the original (i.e. an examined copy). The law with respect to proving the faithfulness of copies was once fairly detailed because before the advent of photocopiers and other technologies, copies were made by hand, and so there was more potential for error. Modern copy-making technologies are generally reliable, and courts are now less likely to strictly require a party to lead evidence supporting the reliability of copies. And so, where a photocopy or carbon paper has been used to make the copy, there is no requirement that there be a comparison between the copy and the original.
>
> ...
>
> However, if there is any suggestion that the copy may have been intentionally altered, or that there are pages missing, the party tendering the copy will need to lead evidence in support of the copy's faithfulness. In addition, where a case involves allegations of fraud, forgery or false pretenses, the validity of documents will likely be at issue, and the court will be stricter about requiring proof of the truth of copies.

[43] That last sentence highlights my earlier point: where the documents are material elements of the prosecution's evidence in a criminal case, the Court will be "stricter" in the requirements. I note here the case of *R v. Wilson*, 2023 NSSC 80. That matter involved very similar criminal charges, and many of the same parties as in the present case, including Mr. Wilson himself. In that case the trial

court also refused to admit blast logs as against Mr. Wilson, for many of the same reasons as did the trial court here. That decision was upheld on appeal to our Court.

[44] As another example, the Court in *Betterest, supra*, had the following evidence before it:

> 40 In view of the foregoing it is my opinion that the **photocopies** of original documents then in the possession of Mr. Kirk and the documents marked for identification during the taking of the evidence of Mr. Gould should have been admitted in evidence as part of the case for the Crown. Mr. Kirk explained why the **photocopies** were made and said that he compared the **photocopies** with the originals to ensure that the **photocopies** were accurate. In my opinion that evidence, if accepted by the trier of fact, provides a sufficient basis for the admissibility of the **photocopies**. Mr. Gould identified the documents presented to him as being familiar to him in his capacity as accountant for the corporate respondent. (Emphasis added)

[45] Therefore, and to repeat, while I agree that the best evidence rule has in modern times been somewhat relaxed, there continues to be a requirement that a tendered document be authenticated, that it be "what it purports to be". In the case of a copy of a document, at the very least a Court must be presented with evidence that satisfies it that the copy is an accurate and true copy of its original. This is a relatively low bar to meet but it remains. Furthermore, this requirement is all the more crucial when the document is an essential element in the case, as it is in the case at bar.

[46] The Appellant has provided me with a few cases which, in my view, are interesting but distinguishable. In *R. v. Howe*, 2017 NSSC 199, documents had

been seized by police at a Hells Angels Motorcycle Club clubhouse in Québec, and from the residence of a person known to be the secretary for that chapter. The documents, at least on their face, purported to be portions of minutes of a Hells Angels chapter meeting. The police witnesses brought the seized documents before the Court and the Crown sought to introduce them for the truth of their contents.

[47] The decision in the *Howe* case did not turn on whether the documents were copies or originals. In fact, the Court noted that it could not know which of the two identical documents (seized from two locations) was the original and which was the copy, but that question was not material to its analysis in that particular circumstance. What was material in the *Howe* case, however, was that the Crown had called an expert witness in relation to the Hells Angels and their use of meeting minutes. That person was able to demonstrate to the satisfaction of the Court that the documents put before the Court were "what they were purported to be", i.e., minutes of a chapter meeting. The Court concluded that the documents were properly characterized as business records under the *Canada Evidence Act*:

> [15] It is clear that the maker of the "record" is not required to be present before the record can be admitted as evidence under s. 30 *Canada Evidence Act*.
>
> [16] I am satisfied that a "record" can be proved to be so on a balance of probabilities, in any manner that any other document could be proved. Thus, I am satisfied, having accepted Sgt. Isnor's expert opinion about the organizational structure of the Hells Angels and their requirements regarding minutes of meetings, etc., in combination with the facts that the documents were seized from what was clearly a Hells Angels South Québec Chapter secretary's business

> related documents binder, and earlier from the business office of their clubhouse, that these minutes are a "record" of the business that is Hells Angels Motorcycle Club.

[48] As noted, the Court accepted the evidence from the expert witness; such was very much material to the Court's further decisions as to the document being "what it purported to be" and admissible for its truth. That is entirely distinguishable from the case at bar.

[49] In *R. v. Burton*, 2017 NSSC 3, the Court was dealing with text messages between the accused and the complainant, which the police had viewed on the complainant's iPhone. Upon viewing them the police officer had photographed each of the messages with the camera on his own personal iPhone. Following this, the complainant had deleted the messages on her phone so they could no longer be retrieved from that location.

[50] The police officer printed the photographs he had taken. In places where the texts were illegible, the officer wrote in the missing word or words; he did so by enlarging the photos on his own phone. The photographs (including the officer's handwritten additions) were brought before the Court.

[51] The Court mentioned the best evidence rule in the context of electronic documents but concluded that those rules were not determinative in that case:

> [31] I am aware that there are provisions that relate specifically to electronic information and the best evidence rule. This issue has not been argued by either counsel. I am satisfied on facts of this case that the *Canada Evidence Act* provisions relating to electronic documents and the best evidence rule have no impact on my analysis in this decision.
>
> [32] As a general rule, all relevant evidence is admissible. The weight to be ascribed to each piece of admissible evidence is determined once all the evidence on the trial has been tendered. In my opinion, the best evidence rule does not preclude the admission of the text messages in this case for the truth of their contents. The police made curious decisions regarding the preservation of the text messages. As a result the text messages in their most original form are not available for trial. However, the police testified about what they observed when they reviewed the text messages. Johnson testified about how he came to take photos of the texts and then print the photos of the texts, how he created the handwritten transcripts and the accuracy of the transcripts. R.P. testified as to what she could recall regarding the contents of the text messages and the accuracy of the transcripts. Burton admits a text conversation with R.P. There is an adequate evidentiary foundation to allow the admission of the text messages and the text message transcripts.

[52] Once again, I find that case distinguishable on its facts. *Burton* did not, *per se*, involve an analysis of the best evidence rule, or the issue of originals versus copies. In *Burton* each witness was able to clearly explain their role in capturing the information contained in the messages, at each step of the process, right up to the point when a document was introduced in court containing the information. Each step further confirmed the basic reliability of the final court document as being “what it purported to be”. Witnesses were able to look at the document being presented to the Court and speak as to its being a reliable representation of the original messages.

[53] The case of *R. v. C.B.*, 2019 ONCA 380, also involved the authentication of text messages and, in particular, the inferences that could be drawn from the fact that the messages were from/to a certain number. Again, in my view, this is an entirely different situation from the case at bar. The case contains a discussion about the *Canada Evidence Act* and its application to electronic messages or documents. I would make the same comments in relation to the case of *R. v. Martin*, 2021 NLCA 1, which involved a discussion about photographs of Facebook messages.

[54] In the case at bar, the crux of the issue was that the documents before the Court were, quite clearly, copies. As such, some basic requirements needed to be met. Here Mr. MacPherson (the person who purportedly copied the originals) was unable to explain much about the process he had used to do so. He appeared to have no independent memory of those events, other than to indicate that he would have photocopied the documents which he found in a folder in a certain cabinet. He was "directed" to that particular cabinet (but he does not know by who).

[55] Mr. MacPherson was shown the purported full set of documents in court (Exhibit 16). He was unable to confirm that they were copies of the original documents he had photocopied. He could not even say how many original documents he had photocopied, or even estimate their number.

[56] This seems, even on its face, to be wholly inadequate. Again, while I can accept that courts can and should be flexible with the notion of accepting "copies" versus "originals", surely some assurance of basic authenticity is required.

[57] Furthermore, in the present case, the documents at issue were the crucial part of the Crown's case; the information captured on those documents formed the basis for the charge itself. All the more reason for the Court to insist that the documents before it be, at the very least, shown to be "true" or "authentic" copies.

[58] The trial judge here noted that Exhibits 6, 7, and 8 could not be "true" copies due to the differences she noted with the full set at Exhibit 16 (highlighting, color copies versus black and white, etc.). The Crown submits that those particular differences are immaterial on the facts of this case, but, in my view, that submission misses the point. The issue is not whether the differences are material *in this particular case*. The more important point is whenever litigants seek to introduce copies rather than originals, there has to be some basic standard. That standard is the "true" copy of the original.

[59] That standard, as I have already said, is not a high bar. Differences such as the colour of the copy, or markings/highlighting, might be material in one case but not in another; that is the reason for the general rule. The reality is unless a *true*

copy is produced (with evidence that supports that it is a true copy), there is no possible way to know what might be missing, and what might be material or not.

[60] In relation to the full set of documents (Exhibit 16) the trial judge noted this:

> I have no evidence that Exhibit 16 is not a true copy of the original but I also have no evidence that it is.

[61] My understanding of this part of the trial judge's decision was that where the original was not before the Court, she required true copies to be put before her. She could not find that such had been done, and therefore refused to admit the copies. I agree with that part of her decision, and I support her decision on that basis.

[62] There are, with respect, other parts of the trial judge's decision which I acknowledge having more difficulty with. Her interpretation of the best evidence rule resulted in the following conclusion:

> So even if I were satisfied that the documents in Exhibits 3, 7, 8, and 16 were true copies, I would not admit them because they do not comply with the best evidence rule or any of the exceptions to that rule.

[63] The respondent acknowledges, and I agree, that this statement would represent an overly strict, and in my view incorrect, application of the modern "best evidence rule".

[64] However, I also agree that this comment was, in fact, *obiter* on the part of the trial judge; it was not the reason that she found the documents inadmissible.

She goes on to give her primary reason(s) for refusing to admit the document: that the documents had *not* been shown to be true copies. As a result, while the comment made above was unfortunate (and, to be frank, somewhat confusing to the issue), in my view, it had no impact on her ultimate decision.

[65] I therefore conclude that as to Grounds 1 and 2 put forward by the Crown the appeal is dismissed.

Completeness of the documents

[66] The Crown's last ground of appeal notes:

> 3. The trial judge erred in law in finding a reasonable doubt that the colour photocopies tendered as **Exhibits 6, 7, 8, and 16** were "Mr. Wilson's complete blast logs" and in requiring that the Crown prove the exhibits were "Mr. Wilson's complete blast logs".

[67] As I previously noted, early in her decision the trial judge (correctly in my view) identified that the issue of the "completeness" of the documents was an issue of weight, not admissibility.

[68] After that, the only other material reference in the decision in relation to the "completeness" of Exhibit 16 is found at the very end of the judge's decision relating to Count 3:

> So as a result, the documents are not admissible. If they were admissible, they would not satisfy me that they were Mr. Wilson's complete blast logs, and as such I find Mr. Wilson not guilty of count three. (Emphasis added)

[69] Although the trial judge does not explicitly use the word "weight", it is clear to me that the underlined part of that quote must relate to the Court's assessment of the weight of the evidence. In other words, my understanding of that passage of the decision is: a) the documents are inadmissible; b) in the alternative, if they are admissible, the Court is not satisfied that they are the complete set; c) in those circumstances, and in assessing the "weight" of the documents before it, the Court is not satisfied that they support the charge beyond a reasonable doubt; d) the accused is acquitted.

[70] Perhaps it would have been preferable for the trial judge to have provided more explanation as to why she felt that being unsatisfied that the set she possessed was complete, she was not prepared to convict Mr. Wilson on the evidence she had. On the other hand, her decision is, to some extent, self-explanatory. Her task was to determine if Mr. Wilson's guilt had been proven to her beyond a reasonable doubt, and without a confirmed full and complete set of blast log documents, she was not prepared to convict.

[71] As I have noted before, in this case the blast log documents were the very foundation of the Crown's case. The charge before the Court alleged that the

accused had improperly filled out that very documentation. The case rose and fell squarely on those documents, and the Court's assessment of their admissibility and weight. It seems that, without a confirmed full set of those documents, the trial judge was not prepared to find guilt beyond a reasonable doubt.

[72] As noted earlier, a trial judge hearing a criminal trial is owed a significant amount of deference when they come to the conclusion that the evidence before them does not satisfy them that a criminal conviction has been made out. I see no errors in this trial judge's findings of fact or understanding of the law in this regard.

[73] I dismiss that ground of appeal as well.

Boudreau, J.