

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

JEREMY KEEVIK and JEWEL KEEVIK

REASONS FOR JUDGMENT
of the
HONOURABLE CHIEF JUDGE ROBERT GORIN

| | |
|---------------------------|------------------------------------|
| Heard at: | Yellowknife, Northwest Territories |
| Date of Decision: | February 9, 2023 |
| Date of Written Judgment: | February 9, 2023 |
| Counsel for the Crown: | Jared Kelly |
| Defence Counsel: | John Hale & Lyndon Stanzell |

[Ruling on Admissibility of Video Evidence pursuant to S. 30 of
the *Canada Evidence Act* (R.S.C., 1985, c. C-5)]

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A. INTRODUCTION

[1] Both accused are charged with assault causing bodily harm on the person of L.T. in Inuvik on May 29th, 2021. It is alleged that they committed the assault on the steps and landing area immediately outside of the “Midtown Market” store located in Inuvik.

[2] The Crown seeks to enter a video recording of the alleged assault as evidence through s. 30 of the *Canada Evidence Act* (“CEA”). Both accused oppose the evidence being admitted.

[3] For the following reasons I have concluded that the video recording is admissible.

B. ANALYSIS

[4] In support of its application, the Crown submits a USB drive containing the video recording that is attached as an exhibit to an affidavit of a lawyer employed by The North West Company LP, the owner of the Midtown Market. The affiant states that:

- a. He is employed by “The North West Company LP” as legal counsel;
- b. Exhibit “A” to his affidavit are copies of records (USB flash drive containing CCTV footage) made in the usual and ordinary course of business of The North West Company LP;
- c. He has compared the copies to the original records and determined that they are true copies; and
- d. It is not possible or reasonably practicable to produce the original records since the original records are required to be maintained as the permanent records of his employer for internal company purposes.

[5] The Crown takes the position that the requirements of s. 30 of the *CEA* are made out. I agree.

[6] S. 30 of the *CEA* states:

30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

[. . .]

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one 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, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits;

[. . .]

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on

production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4 [dealing with records kept in a form which require explanation to be understood], any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

[. . .]

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section,

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (*affaires*)

copy and **photographic film**, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and **photographic film** includes a

photographic plate, microphotographic film or photostatic negative; (*copie et pellicule photographique*)

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; (*procédure judiciaire*)

record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

[7] Both accused argue that without specific evidence that the recording is accurate or has not been altered in any manner, the video-recording is inadmissible.

[8] In the case of *R. v. Smith*, 2011 ABCA 136, the Alberta Court of Appeal made certain observations that are helpful in the present matter. In that case, the specific issue was the level of proof that can be provided by a business record in s. 30. The court stated:

18 [. . .] to suggest that records such as the toxicology report in question here - which are used to make life and death decisions in hospitals - must nonetheless be considered unreliable until proven reliable by other evidence at a trial, in other words essentially corroborated by that evidence, runs counter not only to the realities of modern medicine but also to the goal of s. 30 of the CEA.

19 In this context, hospital records are not only reliable, given that the makers of the records depend on them on a day-to-day basis, but they are often necessary. The modern reality of large healthcare operations is that the volume of cases or transactions staff are involved in precludes the personal recollection of specific cases or data. *In this sense, calling the record keeper or maker would add little evidentiary value to the business record. Moreover, the admission of documents made in the ordinary course of business has the added benefit of avoiding the "cost and inconvenience of calling the record keeper and the maker": R. v. Martin* (1997), 152 Sask R. 164 at para. 49, [1997] 6 W.W.R. 62 (C.A.).

20 The prerequisites for admissibility created by s. 30(1) of the CEA were met at trial in relation to the toxicology report. [. . .]

23 [. . .] *S. 30(1) of the CEA expressly applies to all business records, which, by definition, includes hospital records.* Further, there is no provision in s. 30(1) or elsewhere which expressly or implicitly limits its applicability to proving facts only to the standard of a balance of probabilities, as the trial judge concluded.

24 *There is nothing in s. 30(1) that requires viva voce or other evidence to be tendered to bolster the admissibility of a business record simply because it is created as a result of scientific process. The CEA does not provide that evidence admitted under s. 30(1) can be used only in limited ways but, rather, expressly makes it admissible in the same manner as oral evidence would be admissible in the same case. Evidence admitted under s. 30(1) is prima facie evidence of the truth of what is asserted.* The majority of the Supreme Court of Canada in *R. v. Proudlock*, [1979] 1 S.C.R. 525 concluded that *prima facie* evidence is sufficient to establish guilt in the absence of evidence to the contrary. The fact it is *prima facie* does not mean that it is conclusive. The trier of fact may, despite this *prima facie* evidence, find a reasonable doubt based on other evidence led at trial.

25 *The mere fact that the results of blood alcohol testing can be admitted into evidence by methods other than s. 30 of the CEA does not mean that s. 30 cannot be used, so long as the prerequisites for its application have been made out: see s. 30(11), CEA.* In some cases oral evidence of the reliability of test results has been received: see *R. v. Redmond* (1990), 54 C.C.C. (3d) 273 (Ont. C.A.). But it does not follow that type of evidence is mandatory.

[Emphasis Mine]

[9] It is not contentious that the video footage provided in the affidavit is from a video system that is in operation at the Midtown Market for the purposes of security. The recordings are plainly part of a record that is kept by The North West Company LP in the ordinary course of its business. There is no requirement to call the record keeper or maker. I conclude that the requirements set out in s. 30 are made out.

[10] In support of the accused position that it is necessary to establish that the video evidence has not been altered or changed in order for it to be admissible, they rely on *R. v. Chevannes*, 2011 ONCJ 754, a case decided by the Ontario Court of Justice. In *Chevannes*, the court stated:

16 On the question of admissibility of the D.V.D. copy of the security camera videotapes from the apartment building, I have concluded that the test for admissibility of this type of evidence is not met by simply asking the manager of a video monitoring system for a

copy to be filed with the Court as evidence of what is depicted thereon even if a police witness can testify that the D.V.D. copied from the security videotape is an accurate reproduction. The weight of case authorities would suggest there is an evidentiary precondition to admissibility - that is - proof that the original videotape accurately depicts the scene being recorded and that the recorded images have not been altered or changed during the production of the videotape. The prosecutor is correct in arguing that the modern trend is to admit all reliable and probative evidence: in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.), at paragraph 18, Cory J. commented:

18 Similarly in *R. v. L. (D.O.)*, 1993 CanLII 46 (SCC), [1993] 4 S.C.R. 419, L'Heureux-Dubé J., in concurring reasons, noted that the modern trend has been to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result. She observed that this is most likely to be achieved when the decision makers have all the relevant probative information before them. She wrote at p. 455, that "[i]t would seem contrary to the judgments of our Court (*Seaboyer*, [1991] 2 S.C.R. 577, and *B. (K.G.)*, [1993] 1 S.C.R. 740) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth seeking process".

However, the Court in *Nikolovski* proceeded to establish guidelines for admissibility of videotape evidence at paragraph 28 of the same judgment:

28 Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

17 I can well understand the challenges faced by the Crown in authenticating the footage recorded by an unstaffed security camera. However, the recording device in *Nikolovski* was an automatic security camera that recorded a robbery of a convenience store. The uncontradicted evidence of the store clerk who testified that the videotape "showed all of the robbery" was sufficient relevant, probative evidence to properly authenticate the videotape. In the instant case there is no evidence proffered by the Crown to meet the burden of proof required for the admissibility of the D.V.D. recording and accordingly it is ruled inadmissible in this case.

[11] In *R. v. Bulldog*, 2015 ABCA 251 the Alberta Court of Appeal rejected the interpretation of *Nikolovsky* set out in *Chevannes* – that proof is required that the video recording accurately depicts the scene being recorded and that the recorded images have not been altered or changed – holding that it was not required to have proof that a video recording is not altered before admitting it into evidence – so long as the recording was authenticated through other means, including circumstantial evidence. At para. 37 the court stated:

37 [. . .] A trial judge is entitled to authenticate a video recording by using circumstantial evidence of one or more witnesses, provided such evidence establishes to the requisite standard of proof that the video in question is a substantially accurate and fair depiction of what it purports to depict. . . .

[12] That said, it is important to note that *Nikolovski*, *Chevannes*, and *Bulldog* the Crown was *not* seeking admission of the video evidence through s. 30. As stated in *Smith*, supra at para. 25, the mere fact that evidence can be admitted by methods other than through s. 30 of the *CEA* does not mean that s. 30 cannot be used, so long as the prerequisites for its application have been made out.

[13] In *R. v. Brar*, 2020 ABCA 398, the appellant had been charged with fraud over \$5000 as a result of four cheques that were drawn on accounts that had insufficient funds. At trial, the Crown relied on s. 29 of the *CEA*, tendering video stills and video generated by the bank’s surveillance cameras through a bank employee, who testified that another individual had provided the videos upon her request. The trial judge convicted the appellant, finding that he was the person depicted in the video evidence of the transactions on which the charges were based.

[14] The Court of Appeal rejected the appeal and held that the statutory requirements of s. 29 were made out. The court stated:

38 While technology constantly evolves, there is no principled reason why s 29 is not up to the task of applying to modern computerized bank records, which includes digitally captured and stored video surveillance. This again, is also premised on the fact that s 29 was enacted and functions to make it easier for copies of (evolving) bank records to be admitted into evidence, without the necessity of producing the original records, or the original record maker.

[. . .]

41 There is nothing in the evidence that would lend support to a finding that Ms Bishop's affidavit was either sloppy or technically erroneous, and there was no contradictory evidence from which to infer that the digital surveillance records of TD are any less reliable than other bank records, or are otherwise unworthy of being considered a record under s 29 of the CEA. *Moreover, the definition of "record" in s 30 of the CEA applies to any "business", of which financial institutions are a part:*

30(12) In this section,

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (affaires)

...

record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

Subsections (3) and (4) do not apply to this appeal.

42 As the appellant has fairly conceded that the video stills derived or "pulled" from the ordinary DVD surveillance videos of a bank, and the videos themselves, are "records" for the purpose of s 29 of the CEA, it is not therefore necessary to discuss admission under s 30. *However, it is clear that the legislation and the case law, speaks to a low threshold for the admission of records under both ss 29 and 30 of the CEA.* Safeguarding this low threshold under s 29 would not, by necessity, hold an affiant or witness to a higher standard of "personal knowledge", rather than merely general knowledge of a financial institution's records.

[...]

45 The trial judge's decision to admit the affidavit evidence under s 29 of the CEA as having complied with the statutory preconditions therein, is not in error. In making her decision, the trial judge relied on *MacMullin*, which "stressed the high standard of reliability imputed to the records of the financial institutions". She further reviewed the key requirements set out in s 29 and *MacMullin*, and found that Ms Bishop was an employee of TD, who adequately swore that she had knowledge of the matter, and that the documents annexed to the affidavit were true copies of the ordinary records of the

institution, made in usual and ordinary course of business, and were in the care and control of TD. Moreover, in my view, Exhibits A-1 through A-8 also fit within the definition of a business record under s 30(12), and are true copies of TD's business records.

46 The trial judge held that the requirements of s. 29 had been met, quoting the findings of Germain, J in *MacMullin* at para 123, to the effect that:

To remain consistent with the objective of interpreting ss 29 and 30 in a way that does not lead to absurd results suggests that the admissibility threshold for these documents, once they are authenticated by an affidavit confirming that they represent a true copy of the institution's file, should be relatively low. This line of reasoning and conclusion is appropriate for applications of both CEA, ss 29 and 30, in a current business climate.

47 *I agree. I further agree with MacMullin at paras 124-5, that there is a distinction between threshold reliability and ultimate reliability of the records:*

I believe a proper interpretation of these CEA provisions should also account for the common law principles that were codified by Parliament. In that sense, my approach is to be consistent with the expanding legal authority from the Supreme Court of Canada on the principled exception to the hearsay rule which draws a distinction between threshold reliability and ultimate reliability.

By example, the mortgage application received by a financial institution and placed on their file indicates the alleged net worth and status of the applicant. This item could be received by a court to prove that a document containing those statements was received by the financial institution much more readily than the document may be accepted as ultimate proof about the financial status of the individual. This details a reality that at the initial admissibility stage a trial court may have only a hint of the ultimate evidentiary purpose of the document. The document may turn out not even to require an assessment of that item's relevance to test the application of an exception to the hearsay rule. Instead, the only relevant and probative fact may be evidence of the document's very existence. On the other hand, it may be proffered as proof of an individual net worth or other detail. In a common sense way, it is reasonable to have the document admitted while still preserving for the ultimate trier of fact (in this case a judge sitting alone without a jury) the ultimate decision of what, if any, weight to give to the document when applied against the element the proponent of the document seeks to use it for.

[Emphasis Mine]

[15] The Alberta Court of Appeal's decision in *Brar* is based on its interpretation of s. 29 of the *CEA* and not s. 30. However, it is helpful in that it makes clear that video-recordings can be 'records' of a financial institution as that term is used in s. 30. It also draws the distinction between threshold reliability for the purposes of admissibility and ultimate reliability.

[16] The accused argue that *Brar* is distinguishable from the present case in that the evidence in *Brar* was admitted through s. 29 as opposed to s. 30. S. 29 states:

29 (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

[17] The accused point out that the scope of s. 29 is limited to financial institutions in contrast to s. 30 which applies to all organizations so long as the record is made in the usual course of business. They submit that due to the inherent reliability of the records of financial institutions they should be distinguished from the records of other businesses and organizations which have a lesser degree of reliability. Their position is to some extent supported by comments made by the Court of Appeal in *Brar*. Beginning at paragraph 37, the court stated the following:

[37] In *McMullen*, the Court found "that a computer print-out is a copy of a record kept by a financial institution". Citing the lower court, the Court held:

...Parliament has *indicated its faith in the reliability of the records of financial institutions* in whatever form they may have been kept through the years. I conclude, therefore, that the language used by Parliament in the Canada Evidence Act includes records kept in computers.

[...]

[39] More recently *R v MacMullin*, 2013 ABQB 741 at para 112 [*MacMullin*], citing *Best* and *McMullen*, found that "*Parliament has stressed the high standard of reliability imputed to the records of financial institutions; they are prima facie proof of the transactions they record.*" This finding was relied upon by the trial judge in this matter in admitting Ms Bishop's affidavit and its exhibits.

[40] *MacMullin* went on to provide at paras 115, 118, and 126:

CEA, ss. 29-30 are statutory provisions intended to reduce the barriers to the admissibility of business and banking records. These two sections have a long history in Canada and have been described as being pragmatic legislation to not inconvenience bankers but also to facilitate the reality that financial record documents are generally reliable as a consequence of the checks and balances inherent in the financial industry; these institutions have a reputation of reliability.

[Emphasis Mine]

[18] I note that paragraph [40] of *Brar* cites with approval para. 15 of *MacMullin* which speaks to the sections' intention to reduce barriers to admitting both *business and banking records*. Also, as noted at paragraph 42 of *Brar*:

42 [. . .] *it is clear that the legislation and the case law, speaks to a low threshold for the admission of records under both ss 29 and 30 of the CEA. Safeguarding this low threshold under s 29 would not, by necessity, hold an affiant or witness to a higher standard of "personal knowledge", rather than merely general knowledge of a financial institution's records.*

[Emphasis Mine]

[19] In my view, if video-recordings are admissible where the prerequisites of s. 29 are made out, there is no reason why they should not be admissible where the requirements of s. 30 are fulfilled. Once again, it is important to make the distinction between threshold and ultimate reliability.

C. CONCLUSION

[20] I conclude that the requirements of s. 30 of the *CEA* have been met and the video recording of the assault alleged to have been committed by both accused are admissible.

Robert Gorin
Chief Judge of the
Territorial Court

Dated at Yellowknife, Northwest Territories,

this 9th day of February, 2023.

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