IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Kennedy, 2008 NSPC 73

Date: December 10, 2008
Docket: 1848740; 1848741; 1848742;
1848743; 1878744; and 1878745
Registry: Sydney

Her Majesty the Queen

v.

James Kennedy

DECISION ON VOIR DIRE

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	November 19 & 20, 2008
Oral decision:	December 10, 2008
Charges:	Fisheries Act section 78
Counsel:	David Iannetti - Crown Attorney Ralph Ripley - Defence Attorney

By the Court:

[1] James Kennedy has been charged with failing to ensure that the VMS (Vessel Monitoring System) used on his fishing vessel was operational, contrary to ss. 22(7) of the Fishery (General) Regulations, SOR/93-186.

[2] The Crown has sought to have entered as evidence a document produced by JouBeh Technologies Limited, as part of the MetTrac Vessel Monitoring System. The matter for determination in the voir dire, is the admissibility of that document. The issues are whether the document is one for which notice under s. 30 of the Canada Evidence Act is required, and if so, whether that notice should be waived by the court.

[3] The document sought to be entered is a printout of a computer screen. It pertains to the vessel operated by the accused. The document contains a reference in the comment section of the document, alleged to have been entered on the system on October 5, 2006. The comment reads: “James called to suspend”. One of the issues at trial will be whether Mr. Kennedy had a working VMS on his vessel. The comment is then of more than peripheral significance.

[4] The document marked as Exhibit VD1 was provided to defense counsel the day before the commencement of the trial. The document was sought to be entered into evidence on the first day of the trial. The Crown acknowledges that this was not within the time required under s. 30 of the Canada Evidence Act. The Crown asserts that the document is not one that would require notice to be given under s. 30. If it is,

the Crown argues that the court should exercise its discretion to admit the document under ss. 30(7) of the Canada Evidence Act.

[5] If the document is not one for which notice under s. 30 is required, it's admissibility would be grounded in one of the exceptions to the hearsay rule. The Supreme Court of Canada in R .v. Khan [1990] 2 S.C.R. 531 established the principled exception to the hearsay rule. The exception is based on the principle and policy that underlies the hearsay rule itself. It reflects and encompasses many of the older common law specific exceptions. The issue is whether there are circumstantial guarantees of reliability and necessity.

[6] As Justice Cromwell noted in R .v. Wilcox [2001] N.S.J. No. 85, 2001 NSCA 45, 192 N.S.R. (2d) 159, 152 C.C.C. (3d) 157, 49 W.C.B. (2d) 198, before addressing the principled approach, the court should consider whether the document in question is admissible under statutory or traditional hearsay exceptions. The review of the traditional exceptions may help to inform the analysis under the principled approach. The common law rules themselves are based, to a great extent, on the same principles and policies considered as part of the more modern principled exception.

[7] The common law exception under which this document is sought to be entered is referred to as the business records exception. The requirements for admission under that exception are as set out by the Alberta Court of Appeal in R. v. Monkhouse [1988] 1 W.W.R. 725. A document is admissible under the exception if it is an

original entry made at the time of the event, in the routine of business, by a person who had a duty to make the record and who had no motive to misrepresent.

[8] In this case, the evidence is that the comment was entered by a former employee of JouBeh Technologies, Mike Labrador. Employees were required to maintain records of calls made by clients, and could make notations in the computer system or could make a notation on paper.

[9] The evidence is that the comment entry on the computer was made at the time of the event, in the routine of business, by a person with no apparent motive to misrepresent. The more troubling question, is whether Mr. Labrador was under a duty to make this particular document. He was under a duty to make a note of the call, but could have made the note either in electronic form on the computer or in paper form, or presumably in both.

[10] The duty to maintain the record, at common law, is considered to be one of the circumstantial guarantees of the document's trustworthiness. The person making the record would, practically, fear some kind of discipline from his or her employer if the record that he or she was required to keep, were to contain inaccuracies.

[11] Mr. Labrador was required to make a record of contact with the client. In that sense, Exhibit VD1 is a document that he was under a duty to make.

[12] In another sense, however, he was not required to make this particular form of record. He was required to keep a record, but not this record.

[13] This may be significant because the guarantee of trustworthiness is founded on the requirement that the document be accurate and complete. The guarantee of accuracy is reduced when the document is merely one the two potential recordings of the same information. The document may be accurate in what it records, but it does not necessarily record the entire relevant transaction.

[14] It may be, however, that the document would be admissible under the traditional business records exception. It is a record that Mr. Labrador was under a duty to make, regardless of the manner in which he chose to make it.

[15] The potential for admissibility on that basis does not end the consideration of the matter however. It would be “presumptively admissible”. The traditional exceptions to the hearsay rule must be interpreted in a way that is consistent with the principled approach of assessing threshold reliability and necessity. R. v. Starr, (2000), 147 C.C.C. (3d) 449 (S.C.C.) para. 212, R .v. Wilcox, para 61.

[16] This may be an example of a situation where the common law business record exception to the hearsay rule intersects with and perhaps informs the consideration of the principled approach. The common law exception arose from the reality that in business, large quantities of information are routinely recorded by people who may not be able to readily be identified and who, if they were, would have no independent

recollection of the event or data recorded. They were under a duty to make the record at the time and under a duty to keep it accurately. That, in the wisdom of the common law, was seen as the circumstantial guarantee of trustworthiness in the document itself.

[17] The exception, however, is not limited to what is sometimes referred to as data entry. It may apply to both objective information and subjective observations. In Ares v. Venner [1970] S.C.R. 608, 73 W.W.R. 347, 14 D.L.R. (3d) 4, 12. C.R.N.S. 349, nurses' notes containing such observations were admitted. The considerations included the inconvenience of seeking out each person in a large institution who was responsible for creating each record. Given the nature of the record, the person who made it would likely have no recollection of it other than that provided by the note itself. The accuracy of the notations was guaranteed by the professional obligations of those involved.

[18] These considerations may be relevant to the application of the principled approach.

[19] In applying the principled approach to this document, the court must consider the hearsay risks in the document or statement. The court must then consider whether there are circumstantial guarantees against inaccuracy and fabrication, and finally whether the circumstances provide a sufficient basis to enable an assessment of the truth of the statement to be made.

[20] The record sought to be introduced is neither a mundane recording of a piece of data nor is it a subjective observation of opinion. It does not involve only the checking of a box or the recording of a number. Yet, it is not an expression of an opinion.

[21] Comments of this kind by their very nature beg questions. “James called to suspend” is not a statement that stands on it’s own like a recording of a deposit or a payment. It leaves open the questions, for example, of whether the suspension was to be immediate or at some later time, and whether the suspension was for a specific time period or of indefinite duration. It suggests that a conversation took place, during which other information might have been exchanged.

[22] It is not an expression of an opinion intended to be a full view of the impression of the person making the recording. It has neither the singular brevity of a number, nor the presumptive completeness of an expression of opinion based on observed and recorded data.

[23] There is the further complicating factor that the JouBeh Technologies did not require that employees create the record in the form presented. This may be a technical point in the consideration of the common law hearsay exception, but its relevance becomes more focused when applied to the consideration of the principled approach. The company permitted employees to record information in the computer system but also allowed records to be kept on slips of paper. It is quite conceivable

that the maker of the record may have entered some information into the computer system and supplemented it with an explanation on paper that may no longer exist.

[24] Both the nature of the record as a “comment” and the potential that it is not a full record mitigate against it being reliable as an accurate record of Mr. Labrador’s telephone contact with Mr. Kennedy.

[25] The ability to evaluate the truth of the statement contained in the document is compromised by the real potential that other records were maintained or that the document is only the partial record of a more complete conversation. On its face, the document leaves the impression of precision. There is no way to evaluate from the circumstances whether that impression is correct or entirely wrong.

[26] Even if this document would be admissible under the business records exception to the hearsay rule, on which I have made no finding, there are not sufficient guarantees of trustworthiness with respect to accuracy of the document and the circumstances do not allow for an evaluation of the truth of the statement in any way that does not involve either the arbitrary rejection or acceptance of completeness of the record.

[27] A second aspect of the principled approach to hearsay is the consideration of necessity. Necessity must be given a flexible definition. Unavailability of the evidence in non-hearsay form is not a strict requirement. High circumstantial guarantees of

reliability may offset the fact that the only reason for admitting the hearsay is convenience.

[28] In R. v. Wilcox, surpa., the Crown sought to have records introduced because the detailed nature of the record did not lend itself to a witness having an independent recollection of the entries and any testimony would be based on the information contained in the record itself. In that case, the person who produced the document was a witness and he could not give meaningful material evidence without the record. That fact established threshold necessity.

[29] The document in question here was not the work of an anonymous record keeper. It is not a situation in which considerable effort would have to be expended to find the person who made the record, only to find out that the record provided his only recollection of the event.

[30] Mr. Labrador, in this case, has not been called as a witness in the voir dire. He is a former employee of JouBeh technologies. There is no suggestion that he is not available for any reason. This is not a situation in which a recording could have been made by any number of individuals in the company. It was made by Mike Labrador.

[31] It may indeed be expedient and convenient to have the document entered through the testimony of a current employee of the company. If there were circumstantial guarantees as to the reliability of the document, that may well be sufficient to satisfy the requirement of necessity. The nature of this document, as a

potentially incomplete record of a conversation between Mr. Labrador and Mr. Kennedy, and the circumstances surrounding the creation of the document, do not provide sufficient guarantees of threshold reliability as to allow expediency or convenience to satisfy the necessity requirement.

[32] Considered from a practical standpoint, this document is one that would have the affect of entering into evidence a potentially incomplete record of an important conversation between Mike Labrador and Mr. Kennedy, without allowing for cross examination of Mr. Labrador about the conversation. There is no reason to believe that Mr. Labrador could not have been made available. There is no reason to believe that he would have no recollection of the transaction apart from the record itself.

[33] The document meets neither the reliability nor the necessity aspects of the principled approach to hearsay.

[34] Having found that the document would not be admissible at common law, the issue is whether it should be admitted pursuant to the provisions of the Canada Evidence Act.

[35] Section 30 of the Canada Evidence Act, provides that a record made in the usual and ordinary course of business is admissible on production of the record itself. The statutory exception relaxes some of the stricter requirements of the common law business records exception. It compensates for that relaxation by adding a notice requirement at ss. 30(7). That subsection requires that notice be given at least seven

days before the production of the document and that the document be made available for inspection. Exhibit VD1 was not provided within the time required by ss. 30(7).

[36] The subsection is, however, prefaced by the words, “unless the court otherwise orders”. The Crown asserts that if notice were required under section 30(7), the court should waive that notice requirement.

[37] In the text, The Law of Evidence in Canada (Second edition, 1998) Sopinka, Lederman and Bryant, the authors, comment on when courts might exercise the discretion to waive the requirement under ss. 30(7).

> Under ss. 30(7) of the Canada Evidence Act, such notice, however, may be dispensed with by an order of the court. If the record is simple and not detailed, the court may well exercise its discretion and make an order allowing for the admission of the business record, notwithstanding the absence of notice, if it feels that the opposite party will not be severely prejudiced as a result of such lack of notice. (at p. 234)

[38] The manner in which that discretion is to be exercised, and the factors to be considered, have been matters on which there has been little by way of judicial comment.

[39] In R. v. Whynot [1975] N.S.J. No. 373, 12 N.S.R. (2d) 231 (NSSCAD), the court noted the provision under s. 30(7) and cited the text, Studies in Canadian Criminal Evidence - Salhany and Carter. Those authors concluded that judicial discretion to waive the notice requirement would be exercised by giving great weight

to the complexity of the record sought to be introduced. The court made no comment, however, on when or how that discretion should be exercised.

[40] While there have been cases in which courts have chosen not to exercise the discretion to waive the notice requirement of s. 30(7), they have not specifically addressed the considerations brought to bear in reaching that conclusion. R. v. Mudie (1974), 20 C.C.C. (2) 262 (Ont. C.A.); R. v. Frennette (1977) 23 N.S.R. (2d) 74 (NSSCAD); Setak Computer Services Corporation Ltd. v. Burroughs Business Machines Ltd. et al. (1977) 76 D.L.R. (3) 641 (Ont. H.C.); R. v. Rowbotham (1977), 33 C.C.C. (2d) 411 (Ont. Co. Ct); Aynsley v. Toronto General Hospital (1967), 66 D.L.R. (2d) 575 (Ont. H. C.); Markakis v. Minister of National Revenue (1986) 86 D.T.C. 1237 (Tax Court of Canada); R. v. Sheppard (1992) 97 Nfld. & P.E.I.R. 144 (Nfld SCTD).

[41] In R. v. Mahoney [1986] A.J. No. 818, 47 Alta. L.R. (2d) 185, 73 A.R. 226, 17 W.C.B. 289 (Alta C.A.), at sentencing, the Crown alleged two prior convictions. The accused did not admit the convictions. The Crown sought to prove them by tendering a copy of the computer record containing the criminal record. Counsel on behalf of Mr. Mahoney objected to the admission of the computer record because proper notice had not been given under s. 30 of the Canada Evidence Act. The trial judge admitted the document stating that the issue was the weight to be given to the documents.

[42] The Court of Appeal took note of the comments of Dubin, J.A. in R. v. Mudie, supra., in which he stated that because section 30 provides for an exception to the

general rules of admissibility, the evidence should not be admitted unless the statute is “strictly complied with.”

[43] The Court also noted the comments in Sopinka and Lederman, supra, that a court may waive the notice period if it feels that the opposite party has not been “severely prejudiced”.

[44] The Alberta Court of Appeal recognized that it was common practice for the accused to admit prior convictions when asked. In cases where the accused person refuses to admit them, it was considered unreasonable to expect the Crown to have evidence of those convictions standing by. In Mr. Mahoney’s circumstances, the Court felt that the only manner in which the trial judge could have acted judicially in exercising his discretion would be to have granted an adjournment to give the defense de facto notice. Because no adjournment was granted the Court of Appeal found that the record of convictions was inadmissible.

[45] The Mahoney case is an example of the court considering the nature of the documents sought to be introduced, the surrounding circumstances and concern that there be compliance with the notice periods in the legislation.

[46] In R. v. Olsen [1984] O.J. No. 443, (Ont. Court of Justice) the court dealt with admissibility of a courier waybill. Notice of intention to produce the document was provided to the accused, but the notice was defective. It was provided on 6 clear days and not 7 clear days as required.

[47] Sparrow, Prov. Div. J., exercised the discretion under s. 30(7), stating:

> In my view, the reference by Dubin, J.A. to "strict compliance" does not mean that the court can never abridge the notice requirement, particularly when there is no evidence, or even an allegation of prejudice. Mr. Nicol frankly admitted that there was no prejudice caused by the one day delay. In fact, he only assumed the case and its disclosure package on the day of trial due to the illness of prior counsel, at which time he decided to forego even a brief adjournment in the interest of his client who was in custody. In the case of an admission of no prejudice, the most minimal of delays, and the simplicity of the document, I will formally admit it for the truth of its contents...(Para. 13)

[48] Section 30(7) establishes as a starting proposition that a document not provided within the specific time limits set out, will not be admitted. There must therefore be reasons present, particular to each case, why the requirement should be set aside. If that requirement were set aside or waived as a matter of course, it would make the time requirements essentially meaningless. Yet, the legislation contemplates that there are situations in which the strict application of the rules would be unfair and should be waived.

[49] The complexity of the document is of course a consideration. It should not be the only consideration that guides judicial discretion in this regard.

[50] A document provided in substantial but not complete compliance with the time requirements of the rule might be admitted through the exercise of discretion. A document that is provided through oversight with minor errors in form and for which a corrected copy was provided outside the time limits might be admitted. A document

that was disclosed and known to be relevant and for which there was practical, though not technical, notice under ss. 30(7), might be admitted. A document might be admitted if the person to whom notice was to be given attempted to evade service of the notice.

[51] The exercise of discretion must balance the presumption that the rule is there for a purpose and the recognition that rules sometimes defeat themselves by their overly strict application in every case.

[52] In this case, it is relevant how Exhibit VD1 came to be noticed. Nicole Bourgeois, an employee of JouBeh Technologies was called as a witness by the Crown. She provided Crown counsel with a copy of the document when she was first interviewed, on the day before the trial. The Crown disclosed the document upon receipt of it.

[53] This document is then an entirely new revelation, containing potentially critically relevant information. It was not a document of peripheral importance, nor was it a mundane recording of an observation. The nature of the document sought to be introduced should be a consideration.

[54] The failure to provide notice was not a failure to comply precisely with a technical requirement. It was not the result of a clerical error, an oversight or a forgetful witness. It was not a near run thing. There was no practical or effective notice. There were no efforts to serve notice that were thwarted by Mr. Kennedy or

his counsel. The circumstances surrounding the failure of the party seeking the waiver are also relevant.

[55] There is an almost seductive logic in the proposition that a failure to comply with a notice period can be rectified by an adjournment. Barring an unreasonable delay, prejudice to the opposing party could be virtually eliminated while allowing compliance with the notice requirements of the legislation. That would however allow logic to wrestle legislation to the ground.

[56] Subsection 30(7) imposes obligations on parties who seek to have documents admitted in evidence. Failure to meet those obligations will result in the document not being admitted. That is the operating premise. The court may waive the requirement, with or without an adjournment, but it is not enough to simply assert that because an adjournment is available, no real prejudice will arise.

[57] An adjournment may sometimes be part of an effective remedy. It cannot be used to routinely justify the removal of meaningful consequences from the failure to comply with the time limits. The nature of the document, the actions of the party seeking the waiver and the availability of an adjournment are all matters that should be considered. The issue is then, whether those considerations outweigh the concern that the time limits must have some meaning.

[58] The waiver of notice requirement under ss. 30(7) in the circumstances of this case would place too much emphasis on the availability of an adjournment as a

remedy and insufficient emphasis on maintaining the integrity of the notice requirements and the consequences of noncompliance. The document will not be admitted as evidence.

Jamie S. Campbell
Judge of the Provincial Court of Nova Scotia