

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

Cite as: R. v. Lee, 2011 NSPC 5

**Date:** January 31, 2011

**Docket:** 2119017 - 2119019

**Registry:** Halifax

Her Majesty the Queen

v.

Sherri Dawn Lee

**DECISION**

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** January 31, 2011

**Decision:** January 31, 2011

**Charges:** Theft (x1) and Fraud (x2)

**Counsel:** Mark Heerema - Crown Attorney  
Peter Katsihtis - Defence Counsel

**By the Court:**

**Introduction**

[1] Ms. Lee is charged that between March 31, 2008 and April 1, 2009 she stole more than \$5000 from Embrace Spa (contrary to section 334(b) of the *Criminal Code*), where she was employed, and that during these dates she also defrauded

Embrace Spa of a sum of money exceeding \$5000 (contrary to section 380(1)(a) - one count) and a sum of money not exceeding \$5000 (contrary to section 380(1)(b) - one count).

[2] On July 2, 2010, Ms. Lee elected Provincial Court and pleaded not guilty. Her trial is scheduled for five days: March 7 through 11, 2011.

[3] Mr. Heerema advised at a pre-trial on December 9, 2010 that there had been disclosure of thousands of documents detailing business transactions at Embrace Spa during the relevant time period. Mr. Heerema indicated the Crown would be seeking to have the “Voluminous Documents” exception to the rule against hearsay applied so that a spreadsheet prepared from the Spa’s raw data could be admitted at Ms. Lee’s trial without the need for the thousands of source documents to be tendered into evidence. I have also referred to this spreadsheet as a summary.

[4] The Crown’s Application was set for January 31, 2011. Mr. Heerema filed a very helpful written submission with cases that have considered the “Voluminous Documents” exception to the hearsay rule. At the start of the hearing of the Application, Mr. Katsihtis indicated that having reviewed the Crown’s brief, his client was not opposed to the admissibility of the summary of the financial data instead of the approximately 15,000 documents that went into its preparation. In light of Ms. Lee’s position and the clearly applicable law on the issue the spreadsheet in question will be admitted into evidence at trial with no requirement that the source documents be tendered.

[5] Notwithstanding that the controversy in this case was resolved by consent, I have accepted the parties' invitation to prepare a written decision as this particular admissibility issue is quite uncommon.

### **The Crown's Application**

[6] Susan MacMillan works as a forensic accountant. In June 2008 the owner of the Embrace Spa contacted her to perform a forensic audit, advising that there were cash flow issues and expressing a concern about misappropriation of funds.

[7] Ms. MacMillan subsequently prepared a report for the Crown that is not the subject of the "Voluminous Documents" Application. Ms. MacMillan's report apparently contains opinions that were not advanced at the hearing. I was informed that she will be put forward by the Crown at trial as an expert witness and the issue of her qualifications and the admissibility of her report will be addressed at that time. A schedule attached to Ms. MacMillan's report is the summary or spreadsheet that the Crown seeks to have admitted pursuant to the "Voluminous Documents" exception to the rule against hearsay. It was tendered without Defence objection as Exhibit 2 on the Application.

[8] Ms. MacMillan testified on January 31 at the Crown's Application without objection from the Defence. The purpose of her evidence was to explain what documentation she examined to prepare the spreadsheet and how she prepared it. With reference to a sampling of the financial documents maintained by Embrace Spa, Ms. MacMillan was able to show the types of documentation she examined in the

process of preparing her summary for the relevant period, which was March 18, 2008 - March 31, 2009. She explained that each business day at Embrace Spa produced approximately 40 pages of documentation including a computer generated tabulation of transactions (created by a software programme used by the spa called “SAM”, Spa Accounting Management), a Daily Deposit Report prepared by employees at the end of each day, and all the raw receipts for the Visa, Mastercard, American Express, and debit payments for services. (The “SAM” print-out and the Daily Deposit Report also recorded cash payments by Spa clients.)

[9] There is agreement that the Embrace Spa financial documentation examined by Ms. MacMillan for the forensic audit constitutes over 15,000 documents. Ms. MacMillan explained that these source documents “backed” the summary she prepared tabulating the money recorded as paid by clients to Embrace Spa and the deposits made to the bank. Ms. MacMillan’s summary totals 8 pages.

[10] According to Ms. MacMillan’s summary, for the relevant period, Embrace Spa recorded receiving more money from clients than appeared on deposit at the bank. For the purposes of this Application it is unnecessary for me to more fully detail Ms. MacMillan’s testimony explaining the process she undertook in preparing her spreadsheet document.

[11] Several matters were the subject of agreement or consensus between Crown and Defence on this Application:

(1) The Defence acknowledged that Ms. MacMillan’s spreadsheet contains no

opinions. Ms. MacMillan just recorded financial data, for example, money paid to the Spa by clients and deposits made to the bank. There is nothing in Ms. MacMillan's spreadsheet that suggests or implies why there is a discrepancy between what Embrace Spa was paid by clients and what was deposited at the bank, nor is there anything to indicate who may have been responsible for this occurring. Ms. MacMillan's totals for the relevant period are nothing more than a quantification of the amount of the difference. As Mr. Heerema stated in his brief at paragraph 17: "The spreadsheet prepared by Ms. MacMillan is a summary of numbers contained within the documents...It is a tally, nothing more."

(2) The Crown is not precluded from tendering as exhibits any of the underlying documents that are relevant to its prosecution of the case, and

(3) The Defence, which has copies of each of the more than 15,000 documents, is entitled to tender source documents itself if it chooses to do so. Mr. Katsiitis confirmed that he has received disclosure of the source documents in an accessible format, on CD. As Mr. Heerema noted in his brief at paragraph 18: "The accused could cross-examine Ms. MacMillan in an informed manner on some or all aspects of the spreadsheet, including the calculations she relied upon. Moreover, the accused could seek to tender some or all of the source documents through Ms. MacMillan."

## The Law

[12] The leading Canadian case on the admissibility of summary documents as an exception to the hearsay rule where there is voluminous raw documentary evidence is *R. v. Scheel*. ([1978] O.J. No. 888) The charge of fraud against Mr. Scheel arose out of the failure of Mr. Sheel to manufacture and deliver to clients pallets that had been ordered and partially or fully paid for. The prosecution alleged a fraudulent scheme to obtain money from the victims, with Mr. Scheel never intending to supply the pallets. A chartered accountant prepared certain summaries including an analysis of sales, a statement of known receipts and disbursements, and accounts receivable for a two month period. On appeal from conviction, Mr. Scheel argued that the summaries should not have been admitted at his trial. He contended that the “original documents from which they were compiled constituted the best evidence, and that the summary would tend to overwhelm the jury.” (*Scheel, paragraph 12*)

[13] The Ontario Court of Appeal held that the summaries were admissible to assist the jury understand “the entire picture represented by voluminous documentary evidence”, evidence that had also been admitted. (*Scheel, paragraph 13*)

[14] *Scheel* therefore dealt with the admissibility of summaries to help explain a very large number of documentary exhibits that had themselves been tendered into evidence. Due to the fact that the primary source documents were in evidence, the Ontario Court of Appeal found it unnecessary to resort to the “Voluminous Documents” exception to the hearsay rule discussed by Wigmore although the court did note what Wigmore had had to say on the subject:

Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements -- as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger -- it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.

Most courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available: (Wigmore 4th ed. Vol. IV at p. 535)

[15] It can be seen that Wigmore emphasized the practical benefits of admitting summaries provided that the source documents are either tendered at trial or at least disclosed to the Defence so the underlying material can be examined (what comes to mind is examination by an expert), or used for cross-examination purposes.

[16] Mr. Heerema submitted in his brief that the Wigmore criteria are met in this case: (1) there are a very large number of detailed business records that would be impractical to present to the court; (2) a competent witness has examined the documents and summarized them; and (3) the documents have been made available to the accused.

[17] In *R. v. Agyei*, the Ontario Court of Justice considered the admissibility of a fraud investigator's spreadsheet compiled from bank records containing relevant

information about credit card holders. The fraud investigator testified that her spreadsheet was a summary of bank records she had reviewed. She had verified the information contained in the source records and was satisfied it was accurate. The court found that a spreadsheet of this nature was admissible “for practical reasons associated with tendering multiple documents at trial and to allow for the convenience of trials.” *Scheel* and the same passage from Wigmore noted above were cited. (*R. v. Agyei*, [2007] O.J. No. 3914, paragraph 26) In *Agyei*, the court directed that the defence was entitled to apply for production of the documents used by the fraud investigator because the source documents had not been tendered into evidence.

[18] Obviously such a production order is unnecessary where, as in this case, the source documents have all been made available to the accused through disclosure.

[19] The authority of *Scheel* is reflected by the cases that have followed it, for example, *R. v. Shaw*, [2004] N.B.J. No. 285 (NBQB) and *R. v. George*, [1993] A.J. No. 798 (Alta. P.C.) There is however a clear distinction between admissible summaries of source data and inadmissible computer-generated opinions derived from source data. As noted in *George*, the application of the term “opinion” can properly be applied to a computer-generated product where the computer “...through a programme, processes and interprets the information [put into it] to arrive at a conclusion which can be the subject of reasonable debate by humans...” (*George*, paragraph 34) *George* concluded: “...the evidentiary acceptability of summaries does not extend to computer products which involve interpretations that may be the subject of legitimate debate. Such products are expressions of opinion and are subject to the rules of evidence relating to opinions.” (*George*, paragraph 37)



[20] In summary then, where voluminous source data is used to create a condensed spreadsheet of financial information, containing no interpretation or opinions, the source documentation does not have to be tendered into evidence, although Crown or Defence are not precluded from doing so. The law appears settled that in such circumstances a spreadsheet will be admissible under the “Voluminous Documents” exception to the rule against hearsay, provided that the Defence has received the source documents through disclosure. Although it is difficult to imagine disclosure not including such source documents, it would remain open to an accused to make an application to the court for production.

[21] Finally, notwithstanding the applicability of the settled law in this case, the issue of admissibility of a summary for the truth of its contents may have to be assessed on its merits given the particular facts of any document-heavy case.