PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Riles*, 2020 NSPC 2

Date: 2020-01-14
Docket: 8320745
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Antonio Ronald Riles

Judge:	The Honourable Judge Paul B. Scovil, JPC
Heard:	October 11, 2019, in Bridgewater, Nova Scotia
Decision	January 14, 2020
Charge:	Section 145(5.1) of the **Criminal Code of Canada**
Counsel:	Sheena O'Rielly, Crown Attorney David Hirtle, Defence Counsel

By the Court:

[1] The question that this decision must answer is whether this Court is able to take judicial notice of an Undertaking Given to a Peace Officer or an Officer in Charge in order to prove the Undertaking itself.

[2] Antonio Riles is charged under section 145(5.1) with failing to comply with an Undertaking Given to an Officer in Charge by having contact with an individual named in that Undertaking as someone whom Mr. Riles may not contact.

[3] At trial, the Crown sought to have the Court take judicial notice of the original Undertaking Given to the Officer in Charge and that this judicial notice would serve as proof of the Undertaking itself. Mr. Riles objected. The issue was then set over for briefs and a decision by this Court.

FACTS:

[4] Mr. Riles was apparently charged that on March 4, 2019, he had possession of a weapon contrary to an order under section 117.01(3). He was released on March 6, 2019 on an Undertaking Given to An Officer in Charge on a form 11.1. That Undertaking contained a clause that the accused was to have no contact or

communication with a named female individual. He was also not to go to her residence or place of employment.

[5] On March 7, 2019, the Crown alleges that the accused breached the Undertaking by texting the individual that he was not to have contact with. As part of the Crown's case the Crown moved to admit into evidence the original Undertaking Given to An Officer in Charge. The admissibility of the Undertaking was challenged by Mr. Riles.

[6] The Undertaking to an Officer in Charge had on it's face, a line crossed through it in pen with the notation, "Replaced by Order #2209317". Also, on the Undertaking the clause setting out the condition for non-contact with the female individual or from going to her residence or place of employment were markings in pen crossing out the no contact clause with the notation, "deleted Apr. 10/19".

ISSUE:

[7] The sole issue in this decision is the admissibility of the Undertaking sought by the Crown to be put into evidence. In essence, how does a document such as an Undertaking to an Officer in Charge become admitted into evidence?

CROWN POSITION:

[8] The Crown took the following position regarding the admissibility of the Undertaking:

1. That this was the original Undertaking and "section 36 of the **Canada Evidence Act** allowed for engagement of a common law exception; in this case for a judicial recording or public document".
2. That the Court should be able to look at its own proceedings and records without calling the court clerk who read the undertaking conditions to the accused at the time of issuance. Further, it is an original court document.

DEFENCE POSITION:

[9] The defence argues that the Court cannot take judicial notice of the Undertaking if the Crown has not first proved that the Undertaking has been confirmed by a Justice of the Peace, pursuant to section 508 of the **Criminal Code**.

Law:

[10] Before a document can be admitted into evidence, aside from being relevant and material, it must be proved. "Proved", in this sense, would mean the document must be produced and authenticated. Here, the Crown cannot simply put a document forward and indicate, for example, "there it must be admitted into

evidence". The document must be authenticated or in other words it must be established that it is what it purports to be.

[11] Authenticity of a document can be established in several ways. The most common in our Courts are formal admissions of an opposing party under 655 of the **Criminal Code**. The Crown could contact opposing counsel in advance and ask if there would be agreement that the Undertaking to an Officer in Charge be admissible as opposed to other more cumbersome methods. The defence, knowing proof is inevitable, usually admits the document in order to reduce and streamline trial time. There was no such agreement here.

[12] Another method often used would be proof of the document pursuant to avenues available under the **Canada Evidence Act**. In that situation, notice is provided of intention to admit a document into evidence at the trial and the notice is served on an accused at least seven days in advance. This would take place under section 24, 25 or 26 of the **Canada Evidence Act**. Again, this was not done here.

[13] The Crown could call the officer who released the accused to testify as to the authenticity of the Undertaking and that it was signed by the accused.

[14] Other methods could include having someone attest to the handwriting and verify that the signature matches that of the accused. Not a practical nor common method of introduction.

[15] There is recognition that a Court may be able to take judicial notice of its own document without further proof. This is the foundation upon which the Crown rests it's argument of admitting this Undertaking. The Crown relies on *R. v. Jesso* [2016] N.S.S.C. unreported; *R. v. C(W.B.)*, 2000 O.J. 397 (Ont. C.A.), affirmed by the Supreme Court of Canada (2001 SCC 17); *R v. Finestone* (1953), 107 C.C.C. 93 (S.C.C.); *R. v. P.(A.)*, (1996) C.C.C. (3d) 385 (Ont. C.A.); *R. v. Rowen*, [2013] O.J. No. 508 [Ont. S.C.J.]; *R. v. Bailey*, 2014 ONSC 5477, *R. v. Tatomir*, 1989 ABCA 233, *Craven v. Smith* (1869), L.R. 4 Ex. 146 (Eng. Exch.), *R. v. Aickles*, (1785), [1 Leach, 390 at p. 392, 168 E.R. 297 (Cr. Cas. Res.).

Defense Position:

[16] Mr. Riles argues two points. The first is that the document sought to be admitted by the Crown was not the document disclosed by the Crown. Secondly, that the document sought to be admitted by the Crown, ie the Undertaking Given to a Peace Officer, is not a court document which then the Court can take judicial

notice of. For the reasons below, I will not need to deal with the defence's disclosure concerns.

Analysis:

[17] Is an Undertaking of an Officer in Charge a court document which can be taken judicial notice of?

[18] Records produced and held by a Court can be taken judicial notice of. (See *R. v. Jesso*, [2016] N.S.S.C., unreported)

[19] In *Jesso,* the document in question was a recognizance that was directed by the Court in which an accused could gain his or her release. It is a court order. In *R. v. C(W.B.),* the question of admissibility dealt with a transcript of prior court proceedings as well as notations on the back of an indictment. These were again court generated documents capable of judicial notice. Similar situations occur in other cases referred to by the Crown.

[20] Here, the Undertaking to an Officer in Charge would not become a court document until confirmed by the Court. Such confirmation occurs, pursuant to section 508 of the **Criminal Code**. There was no evidence either on the Undertaking itself or from any other document or witness to show that the

Undertaking was confirmed under s. 508. It is therefore not proven to be a document of the Court.

[21] To hold otherwise would be to make a police officer a court official. If that were the case the objectivity of our Court would be called into question. Police are not part of the Court in the Canadian justice system. They may be officers of the Court, but they are not part of the Court.

[22] A similar common issue arises when an accused fails to appear after having been served an Appearance Notice or Promise to Appear. The Crown asks for a Warrant for the arrest of the accused. The Courts routinely inquire of the Clerk if the appearance document has been confirmed. If not, the matter goes back for re-service. If it has been confirmed a Warrant generally issues.

[23] I, therefore, find that the Undertaking of an Officer in Charge, in question before the Court, has not been proven to be a court document and I, therefore, cannot take judicial notice of it to admit it into evidence.

[24] The question also remains, is it a "public document" which could be admitted as a hearsay exception? This exception applies to documents prepared as part of a public duty. What quickly comes to mind are documents prepared by official registrars such as Probate or Divorce.

[25] This exception was considered in *R. v. P.(A.)*, (1996) 109 C.C.C. (3d) 385 (Ont. C.A.). There Justice Laskin stated, regarding proof of a Probation Order, as follows:

> **15** A "public document" means "... a document that is made for the purpose of the public making use of it, and being able to refer to it." *Sturla v. Freccia* (1880), 5 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof.
>
> > (i)the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;
> > (ii)the public official must have made the document in the discharge of a public duty or function;
> > (iii)the document must have been made with the intention that it serve as a permanent record, and
> > (iv)the document must be available for public inspection.

[26] I question if the officer is a public official as imagined by the Rule. Also, the Undertaking is a release document that is intended to provide an undertaking until confirmation by a court official. Undertakings, as well, may not be filed for some time, if at all, by police. That also raises the question, are these documents available for inspection. I am not satisfied that they are.

[27] In light of the above, I find that this Undertaking to an Officer in Charge does not meet the criteria for admission as a public document as an exception to the hearsay rule.

[28] The Crown has not argued that the principled exception to the hearsay rule applies here. There was no evidence of necessity or reliability regarding the document.

[29] At the end of the day, I cannot say that the Crown has proved, authenticated or in any way met the criteria required for the admission of the Undertaking Given to an Officer. Consequently, it will not be admitted into evidence. While the Rules of Evidence and the provisions of the **Canada Evidence Act** provide shortcuts on the road to a document's admissibility, they do not completely take away a requirement for authentication and proof of documentary evidence.

[30] In this specific matter, the notations contained on the face of the document also give rise to reliability concerns. If, as indicated on it's face, the Undertaking was replaced by an order, where and how did this occur? The notations on the Undertaking raise questions regarding the reliability of the document as proffered by the Crown.

Conclusion:

[31] For all these reasons the Undertaking to the Officer in Charge is not admitted into evidence.

Paul B. Scovil, JPC