SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Kalai*, 2020 NSSC 351

Date: 20201113
Docket: Halifax, No. 488253
Registry: Halifax

Between:

Her Majesty the Queen

v.

Nader Mohamad Kalai

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	October 26-27, 2020, in Halifax, Nova Scotia
Oral Decision:	November 13, 2020
Written Decision:	December 4, 2020
Counsel:	David Schermbrucker, Crown Counsel Joel Pink, Q.C. and Ronald Pizzo, Defence Counsel

By the Court:

Overview

[1] In May, 2011, Canada imposed economic sanctions on Syria, prohibiting persons in Canada from investing in Syrian businesses. The Crown alleges that, on November 27, 2013, Nader Kalai ("Kalai") invested 15 million Syrian Pounds (approximately $140,000 CAD at the time) in Syrialink, a Syrian company. The Crown alleges that the transaction took place when Kalai was in Canada.

[2] The Crown has brought a pre-trial *voir dire* to determine the admissibility of the documents. However, in addition to the documents being admitted, the Crown seeks admission of the documents for the truth of their contents, either pursuant to the hearsay branch of the "documents in possession" doctrine, or pursuant to the "principled exception to hearsay".

[3] In my view, the documents are capable of meeting the authentication requirements under the *Canada Evidence Act*, R.S.C., 1985 c. C-5, ("*CEA*") and meet the standard for admissibility as documents in possession. However, I am not persuaded by the Crown's argument that the documents should be admitted under the "documents in possession hearsay exception" because the Crown has produced little or no evidence in support of the documents being admitted for the truth of their contents.

[4] As for the Crown's alternative argument that the documents meet the "principled exception to the hearsay rule", I find that, in the absence of any corroborating evidence external to the documents themselves, the Crown has not met the threshold for substantive reliability.

[5] Based on the evidence before me, the documents are admissible, but not for a hearsay purpose.

Facts

[6] Kalai is charged with one offence under section 3.1(c) of the *Special Economic Measures (Syria) Regulations* (SOR/2011-114). He is charged as follows:

> Nader Mohammed Kalai, on or about November 27, 2013 at or near the City of Halifax, in the Province of Nova Scotia or elsewhere in Canada did make an investment in Syria or a national of Syria not ordinarily residence in Canada, to wit: a payment of fifteen million Syrian Pounds to the benefit of Syrialink Joint Stock Company, thereby committing an offence under section 3.1(c) of the *Special Economic Measures (Syria) Regulations* (SOR/2011-114) and punishable under section 8 of the *Special Economic Measures Act*, S.C. 1992, c. 17.

[7] Section 3.1(c) of the *Special Economic Measures (Syria) Regulations* (SOR/2011-114) reads as follows:

> 3.1 Subject to section 3.2, it is prohibited for any person in Canada and any Canadian outside Canada to
>
> > (c) make an investment in Syria if that investment involves a dealing in any property, wherever situated, held by or on behalf of Syria, a person in Syria or a national of Syria who does not ordinarily reside in Canada;

[8] The Crown must demonstrate the following elements to prove the alleged breach of section 3.1(c) of the Regulations:

(a) Kalai made an investment in Syria;

(b) When he made the investment, he was a person in Canada (i.e., he was physically in Canada on the day of the alleged offence);

(c) That investment involves a dealing in property, wherever situated; and

(d) The property is held by or on behalf of:

i. Syria;

ii. a person in Syria; or

iii. a national of Syria who does not ordinarily reside in Canada.

[9] The Crown relies on a number of documents that were seized under judicial authorization on December 20, 2016, from Kalai's home in Halifax and from Kalai's Yahoo email account. It is the Crown's position that the documents are admissible at trial either as "documents in possession" and/or pursuant to the "principled approach to the admission of hearsay evidence".

[10] The documents are more closely described as follows:

1. Minutes of unordinary [*sic*, "extraordinary"?] general assembly of Syrialink Joint-Stock (private) Company held in Damascus on 12/2/2013, electronic printout and translated version.
2. Instructions for transfer of funds to Syrialink's account, November 27, 2013, electronic printout and translated version.
3. Byblos Bank Syria Transaction Receipt confirming transfer, dated November 27, 2013, electronic printout and translated version.
4. Printed document "Syria Link Real Estates" with notations; corresponding electronic copy and translated version.
5. Email from Michel Kalai dated November 7, 2013.
6. Printed Screenshot, List of Companies with handwritten annotations.

Issues

[11] The issues are as follows:

1. Has the authenticity of the documents been established?
2. Are the documents admissible as documents in possession?
3. Are the documents admissible under the hearsay branch of the "documents in possession" doctrine?
4. Are the documents admissible under the "principled hearsay exception"?

Analysis

Authentication

[12] The defence says the authenticity of the documents is a prerequisite to admissibility, with the onus to establish authenticity on the party tendering the evidence. Pursuant to the *CEA*, the person "seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be" (s. 31.1).[1] This section, and those following, "do not affect any

[1] The best evidence rule is satisfied by "proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored" (s. 31.2(1)(a)) or by way of a presumption under

rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence" (s. 31.7).

[13] Without providing a specific authority, the Crown argues that the *CEA* authentication provisions do not apply to documents in possession of the accused. *R. v. Avanes*, 2015 ONCJ 606, is an authority to the contrary. The issue in *Avanes* was the authenticity of a DVD containing information extracted from several smart phones found in the accused's possession. The Court rejected the Crown's argument that the *CEA* authentication provisions were concerned only with hearsay, and thus did not govern admissibility of the contents of the DVD as documents in possession *simpliciter*.[2] The Crown did not call the technicians who created the DVD to give evidence at the authentication hearing. The defence objected, but the Court held that there was sufficient circumstantial evidence of authenticity to satisfy the Crown's burden, and that "[n]o single or 'optimal' witness is strictly required" (see para. 66). The Crown was "not simply putting forward a mass of documents and asking the Court to rely on their face alone to infer their authenticity" but had shown "a number of ways in which other evidence tendered in this trial acts as circumstantial evidence that the electronic documents are what they purport to be" (see para. 67).

[14] The authentication requirement for electronic documents is inconsistent with the general rule that a document found in the possession of the accused does not require authentication, as the Saskatchewan Court of Appeal said in *R. v. Lola*, 2020 SKCA 103:

> [60] With respect to documents found in the X-Trail, Mr. Lola submits that the note signed by Ms. Moon was inadmissible because it had not been authenticated. Documents found in the possession of an accused are admissible as non-hearsay original circumstantial evidence to prove the accused's connection with the matter therein... This document found in the vehicle was relevant for the fact of its existence as real or tangible evidence relevant to a material issue – whether Mr. Lola had a sufficient connection to the vehicle to permit the court to be satisfied, beyond a reasonable doubt, that the accused was in possession of the drugs. <u>It was not necessary to prove the truth of the contents of the document or authenticate it for it to be admissible</u>. The same principles apply to the other documents, such as the business cards and the letter of authorization.

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s. 31.4 (s. 31.2(1)(b)). Section 31.3(b) creates a presumption of integrity "if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it..."

[2] *Avanes* at paras. 16, 40-52.

[*Emphasis added*]

[15] By contrast, as noted in *Avanes*, *supra*, the relevant *CEA* provisions provide no apparent exception for electronic documents found in the possession of the accused. That being said, assuming authentication is necessary, the caselaw makes it clear that the burden is a light one.

[16] In *R. v. Hirsch*, 2017 SKCA 14, the Appellant argued that the trial judge had improperly admitted screen captures of images allegedly from his Facebook page, without authentication. The images originated from a friend of the complainant, and the complainant gave evidence that she recognized the page, though the accused had "blocked" her. The Appellant argued that the images should have been authenticated pursuant to the *CEA* procedure, which had not been specifically raised at trial. The Saskatchewan Court of Appeal said:

> [18] … In my assessment, s. 31.1 of the *Canada Evidence Act* is a codification of the common law rule of evidence authentication. The provision merely requires the party seeking to adduce an electronic document into evidence to prove that the electronic document is what it purports to be. This may be done through direct or circumstantial evidence ... Quite simply, to authenticate an electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be ... That is, while authentication is required, it is not an onerous requirement. In *Watt's Manual*, the author notes at 1115:
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> > The *burden* of proving authenticity of an electronic document is on the person who seeks its admission. The *standard* of proof required is the introduction of evidence *capable* of supporting a finding that the electronic document is as it claims to be. In essence, the threshold is met and admissibility achieved by the introduction of *some* evidence of authenticity.
> >
> > [*Emphasis in original*]
>
> As this suggests, the integrity (or reliability) of the electronic document is not open to attack at the authentication stage of the inquiry. Those questions are to be resolved under s. 31.2 of the *Canada Evidence Act*—i.e., the best evidence rule, as it relates to electronic documents...

[17] The complainant's evidence "was *capable* of authenticating the screen captures as a record of Mr. Hirsch's Facebook page. While it might have been preferable to have the complainant's friend testify as to authenticity, there was sufficient evidence of authentication before the trial judge for him to reach the conclusion that he did …" (see paras. 19-21). As to the integrity of the document

– the "best evidence" rule – the Court noted that the *CEA* dispensed with the need for an original record, and added that section 31.3(b) "provides for a *presumption of integrity* in the circumstances where a party has established that the electronic document the party seeks to adduce into evidence was recorded or stored by another party who is adverse in interest to the party seeking to introduce it." (see paras. 22-24)

[18] In *R. v. C.B.*, 2019 ONCA 380, the Ontario Court of Appeal considered authentication of electronic documents. The case involved an appeal of the trial judge's ruling that certain text messages used by the defence on cross-examination had not been authenticated. Watt, JA said, for the Court:

> [67] For electronic documents, s. 31.1 of the CEA assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, the party must adduce evidence capable of supporting a finding that the electronic document is what it purports to be... Under s. 31.1, as at common law, the threshold to be met is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.
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> [68] To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the CEA, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does not limit how or by what means the threshold may be met. Its only requirement is that the evidence be capable of supporting a finding that the electronic document "is that which it is purported to be." That circumstantial evidence may be relied upon is well established... This accords with general principles about proof of facts in criminal proceedings, whether the facts sought to be established are preliminary facts on an admissibility inquiry or ultimate facts necessary to prove guilt.

[19] In *R. v. Ball*, 2019 BCCA 32, the issue was the authenticity of certain Facebook Messenger messages. The police had recovered the electronic communications, but not the metadata. The Court considered the application of general principles of evidence law to the admission of electronic documents:

> [69] In many cases, electronic documents are tendered to prove the truth of a statement allegedly input into a computer (for example, Mr. Ball's alleged statement that "I lit the basement on fire"). In these circumstances, general hearsay rules apply. Relevant content might also include information created mechanically by the computer, such as coded Internet Service Provider information or date and time stamps (for example, the history timeline shown on the photographed Facebook messages). "Computer by-product evidence" of this kind is original or real evidence, not hearsay. Depending on the circumstances, expert evidence may be required to explain the meaning of the computer-

> generated information or the accuracy or reliability of the generating technology, although, in the absence of cause for doubt, circumstantial evidence or lay witness testimony is often sufficient. Regardless, expert evidence is not required to explain generally how commonplace technologies such as Facebook, text messaging or email operate if a lay witness familiar with their use can give such testimony...
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> [70] The statutory rule relating to authentication codifies the common law authentication rule. The burden of proof is on the tendering party and the threshold is low: is there evidence, direct or circumstantial, to support a finding that an electronic document is what the tendering party claims it to be? If so, the document is adequately authenticated, although this does not necessarily mean that it is genuine. That is a question of weight for the fact-finder which often turns on determinations of credibility...
>
> [*Emphasis added*]

[20] The Court, in *Ball, supra,* went on to consider the *CEA* provisions, explaining their descent from the "best evidence" rule (see paras. 72-73) and noted that "Canadian courts adopt a functional approach to interpretation and application of the statutory framework . . . (see para. 75). The Court refers to *R. v. Donaldson*, 2016 CarswellOnt 21760, [2016] OJ No. 7153 (Ont. Ct. J.), a case where admissibility was denied due to unsatisfactory evidence of authenticity. For instance, "[a]fter noting the absence of any investigation to determine the account from which the Facebook messages in question were secured and the vague authentication evidence, Justice Paciocco held the statutory requirements were not met and declined to admit the evidence." (See para. 78)

[21] To a similar effect, Gogan, J., in *R. v. Bernard*, 2016 NSSC 358, refused to admit photographs of Facebook posts where "no steps were taken to search the computer of the accused nor was there any attempt to access the Facebook account of the accused directly, at the police detachment, or anywhere else." (See para. 40). The Court, in *Ball, supra,* went on to observe that the Facebook messages were "extremely important Crown evidence" but had not been subject to a *voir dire*, and had not been subject to the required admissibility inquiry. There were several admissibility issues, including that the Crown proffered the electronic documents in photographic form through a witness "who had no personal knowledge of their source or origins", and the officer who took the photographs was not called as a witness (see para. 83). Further, this was not a case where there was no evidence to the contrary; rather, the Appellant alleged that the messages were created by the attesting witness who, he claimed, had accessed his Facebook account on a computer he did not own. Further, there was no evidence, direct or circumstantial,

regarding the accuracy or reliability of the computer-generated time stamp . . .". (See para. 85). As in *Bernard*, "no one investigated whether the messages were recorded using Mr. Ball's computing device, although police knew he claimed they were 'faked' and was advancing a defence of false confession." (See para. 86). The Court of Appeal concluded that the trial judge erred because "the admissibility of the photographs was not scrutinized and, unlike the circumstances in *Hirsch*, it is not clear on the record that all prerequisites were established to the necessary standard." (See para. 88).

[22] In arguing authentication, the defence further cites *R. v. Andalib-Goortani*, 2014 ONSC 4690, where a photograph showing the complainant was anonymously posted to a website. The Crown sought to introduce the photograph into evidence. Experts for both the defence and the Crown testified that some properties of the image had been altered through the process of being uploaded, and neither could say to which site it was first uploaded, nor whether the image had been automatically stripped of its metadata during uploading or whether the metadata was intentionally removed. The Court held that the image had not been authenticated.

Conclusion on Authentication

[23] The Crown is not required to authenticate electronic documents on a balance of probabilities. As the Court stated in *Avanes*, *supra*, "s. 31.1 does not impose a balance of probabilities burden on the party seeking the admission of the evidence. Rather, it refers to 'evidence capable of supporting a finding that the electronic document is that which it is purported to be.' That is a recitation of the common law's concept of authentication, which imposes a low standard." (See para. 56). As the Court said in *Ball*, "the threshold is low: is there evidence, direct or circumstantial, to support a finding that an electronic document is what the tendering party claims it to be? If so, the document is adequately authenticated, although this does not necessarily mean that it is genuine. That is a question of weight for the fact-finder which often turns on determinations of credibility." (See para. 70).

[24] In this case, there is no mystery as to the origin of the documents before the Court. The defence does not dispute that the documents adduced by the Crown are identical to the documents retrieved from a computer found in the accused's home. The defence focused primarily on the alleged lack of specific evidence connecting the accused to the documents themselves. For the purposes of authentication, this

does not rebut the Crown's argument that the evidence is capable of supporting the finding that the documents are what they are alleged to be.

[25] Further arguments from the defence dealt with the alleged inconsistencies arising from the metadata of the documents, or lack thereof. The defence argued that, because of these alleged discrepancies, there was literally no evidence that the documents are what the Crown claims they are. In particular, the defence points to the apparent inconsistency between the November 2013 date on the instruction letter, and the metadata indicating that the document was created in 2011. The Crown agrees that there is no clear explanation for this, and says it should be assumed to be a mistake. In my view, this apparent inconsistency is better viewed as a matter of weight, going to the genuineness of the document, than one of authenticity. There is evidence that this document was found on a computer in the accused's home, that it contains the accused's name and a signature that the Crown alleges is that of the accused, and that it is dated November 2013. In my view, this is sufficient for authenticity.

[26] Similarly, the defence attacks the Crown's translation of the bank receipt, alleging that the translator's placement of the word "Swift" on the translation could lead to a misleading impression of the meaning of the document. In my view, this, too, is a matter of weight rather than authenticity. The location of this document on a computer in the accused's home, in a downloads folder, along with other documents referencing the same businesses, is sufficient as evidence capable of supporting the conclusion that it is what the Crown says it is. Again, the cases make clear that the bar is low and, for these documents, I find their possession by the accused meets that burden.

[27] In summary, the defence is demanding a degree of proof of the genuineness of these documents that is not supported by the standard in the *CEA* and the caselaw. In this case, the Crown has not simply put forward a mass of documents to be authenticated on their face, but has shown circumstantial connections between the individual documents (e.g. references to the same people and companies, and apparent monetary figures being repeated). Further, the Crown has led evidence linking the documents to the accused, with the documents being found on a computer in his home. This is sufficient for the low threshold of evidence necessary to authenticate the documents. The Crown has met its burden to authenticate the documents.

Documents in Possession

[28] Documents in the accused's possession are generally admissible in proof of the accused's knowledge of their contents, pursuant to the "documents in possession" doctrine. Additionally, they may be admissible as proof of the truth of their contents where the accused "has recognized, adopted or acted upon" the documents.[3] The Nova Scotia Court of Appeal summarized the doctrine in *R. v. Wood*, 2001 NSCA 38, at para. 114:

> 114 There are three elements of the doctrine. First, it must be shown that the document was actually or constructively in the possession of the accused. Second, if such possession is established, the document will be admissible to show the accused's knowledge of its contents, his connection with and state of mind with respect to the transaction to which it relates. Third, if it is established that the accused has recognized, adopted or acted on the document, it becomes admissible for the truth of its contents under the admissions exception to the hearsay rule...

[29] Pursuant to s. 4(3)(a) of the *Criminal Code*, a person "has anything in possession when he has it in his personal possession or knowingly (i) has it in the actual possession or custody of another person, or (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person."

[30] The Crown says the accused's possession of the documents is established by their presence on the computer in his home, so that "the contents of the documents are admissible to connect him circumstantially to the transaction in issue. This is the first permissible use of documents in possession, as "circumstantial evidence of the accused's involvement in the transactions to which they relate." (see *R. v. Black*, 2014 BCCA 192, at para. 40).

[31] As the Ontario Court of Appeal said in *R. v. Bridgman*, 2017 ONCA 940, in respect of text messages:

> [72] If a document found in possession is elicited for a non-hearsay purpose – as original circumstantial evidence showing the accused's connection to or complicity in a matter – then the hearsay rule is not activated ... This is true even where documents may contain out-of-court statements that can be understood as express or implied assertions if tendered for the truth of the assertion.
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> ....

[3] Justice David Watt, *Watt's Manual of Criminal Evidence* (Westlaw online) at §11.06.

> [76] Of course, resort to this doctrine cannot constitute an end-run-around the hearsay rule. If the circumstantial value of the evidence turns on the truth of the assertion made by the non-testifying texter, then the traditional hearsay concerns will be present.
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> [77] If, though, the relevance of the evidence does not depend on the truth of the assertion, the text messages may be admitted on the basis that they constitute original circumstantial evidence relevant to an issue at trial. By way of example only, text messages may constitute original circumstantial evidence connecting the accused to a location, transactions, or people, or demonstrating knowledge, state of mind and so on. I emphasize that these are only examples and should not be considered a complete or aspirational list.

[32] The Crown submits that the documents are circumstantial evidence of the accused's "knowledge of and connection to the transaction at issue," and his involvement with the companies involved in the bank transfer.

[33] The defence argues possession is not established by the fact that the letter and the receipt were found on a computer in the accused's home. There is no evidence that the accused "interacted with or used the computer", and the user path on which the documents were stored under a user profile in another name.

[34] The defence relies on *Bridgman* for the proposition that possession is not established "by simply showing that the electronic document is stored on an electronic device owned by a person." But the passage counsel quotes relates specifically to the hearsay use of the documents, not their use as circumstantial evidence of the accused's knowledge of their contents (see *Bridgman*, *supra,* at paras. 87-88). In fact, the Ontario Court of Appeal in *Bridgman* appeared to have no difficulty with the finding that the text messages were in the possession of the accused:

> [48] Even if the appellant had testified on the *voir dire*, it would not have made a difference to admissibility. There was considerable evidence that the incoming texts were directed to the appellant. It was his phone. He was in possession of it at the time of his arrest. The appellant's first name is Arthur. One of the text messages was directed to "Art my friend".

[35] The defence also cites *R. v. Ahmad*, [2009] O.J. No. 6154, 2009 CanLII 84777 (Sup Ct J), where the documents in issue were found on the hard drive of the accused's computer. The Court said, at paras. 17 and 18:

> 17 In my view, once possession of the item is established (which in the case of a document requires proof of knowledge of the item but not of its contents) the

> doctrine provides that knowledge of the contents of the item may be inferred by the trier of fact based on a consideration of all of the evidence. However, this is permissive not mandatory and the trier of fact is free to reject such an inference if they decide it is not warranted... In a criminal case possession of the item will be governed by the definition of possession found in s. 4(3) of the *Criminal Code*... Proof of knowledge of the item, as a constituent element of possession of the item, may be by inference from circumstantial evidence.
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> 18 Mr. Ansari does not dispute that there is adequate evidence to establish his possession of the items of computer media that contained the articles and videos. They were stored on an external hard drive and on discs found beside his computer in his bedroom. There is ample evidence to support the conclusion that these items were in his personal possession. Based on the doctrine of documents in possession, I conclude that is sufficient to render the documents and videos admissible provided their content is relevant and they are not excluded by another rule of evidence.
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> [*Emphasis added*]

[36] *Ahmad* supports the view that possession can be established by the document's presence on a storage device, such as a computer, in the accused's home. *R. v. Hersi*, 2014 ONSC 1368, stands for the same principle. In *Hersi*, the Court said:

> [29] Mr. Hersi does not dispute that the documents in issue were on his computer, or that he had the computer with him when he was arrested at Pearson Airport. However, he does not admit knowledge of the contents of the documents, or that he was even aware of their presence on his computer. And he specifically does not admit transferring various documents from his computer to a USB key which he then gave to the undercover officer.
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> [30] In my view, whether Mr. Hersi had knowledge of the contents of the computer and what weight, if any, is to be given them is for the jury to decide. At the very least, the evidence is capable of supporting the inference that he was in possession of the documents and that he conducted the internet searches. He had the laptop with him when he was arrested. It revealed a user profile for "Mohamed Hersi", along with a spreadsheet titled "Hersi" that contained a worksheet of hours worked and pay received. Several of the documents found on the computer are identical to the documents Mr. Hersi copied onto a USB key for the officer. Although Mr. Hersi maintains ... that other people had access to the computer and therefore he may not have been aware of all its contents, there is no evidence before me to that effect. The evidence that does exist strongly suggests the opposite, i.e. it was he and he alone who used the laptop. See *Ahmad*, paras. 18-23.

[*Emphasis added*]

As such, the documents were admissible for the non-hearsay purpose as documents in possession, subject to relevance.

[37] In summary, the defence position is that possession has not been proven, and therefore admissibility as circumstantial evidence of knowledge of the contents is not established.

[38] Based on the authorities, I find that the presence of documents on a computer in the accused's home (some of which referenced the accused) is sufficient to connect him to their contents for the purpose of admissibility as documents in possession.

Recognized, Adopted, or Acted Upon

[39] The Crown seeks to use the documents not only for the non-hearsay purpose of connecting the accused to the transfer, but for the hearsay purpose of proving the occurrence of the transfer itself. The Crown stated frankly in the hearing that there is no other evidence of the transaction. The Crown must therefore establish that the accused recognized, adopted, or acted upon the documents.

[40] The "documents in possession" doctrine contemplates admissibility of documents in proof of the accused's knowledge of their contents. It does not follow that such documents are admissible for the truth of their contents. This is only possible where the accused has "recognized, adopted or acted upon" the document, in which case the document is admissible under the admissions exception to the hearsay rule.[4]

[41] The question then becomes what constitutes "recognizing, adopting, or acting upon" a document?

[42] The accused points to various frailties in the evidence going to adoption, recognition, or action:

- the receipt is "at its best ... after-the-fact evidence of a transaction" and cannot be said to have been recognized, adopted, or acted upon by the accused;

[4] Justice David Watt, *Watt's Manual of Criminal Evidence* (Westlaw online) at §11.06; *R. v. Wood*, *supra*, at para. 114.

- the receipt does not refer to the instruction letter; the receipt indicates that it was mailed to "Nader and/or Merriam Kalai in Damascus";

- the metadata suggests that the 2013 letter was actually created in 2011, while the metadata for the receipt gives a creation and modification date of 2013; as a result, counsel says, the connection between the receipt and the instruction letter "is tenuous at best."

[43] The Crown conceded in oral argument that there is no clear basis on which to find that some of the documents were recognized, adopted, or acted upon. The transfer instruction contains a signature alleged to be that of the accused. The Crown submits that this amounts to adoption. The Crown says the authenticity of the signature is a matter for trial. Crown counsel says there will be evidence at trial to verify the signature as that of the accused. As a result, there is no evidence before me, other than a bare assertion, that the signature on the instruction letter and the handwriting on certain other documents is that of the accused.

[44] The Crown submits that the criteria can be established by opening, downloading, and saving electronic documents, as was apparently done with documents 1, 3 and 5 (or by printing, annotating, and retaining documents, as with documents 4 and 6). According to the Crown, saving the Minutes of the Syrialink meeting, along with other corporate minutes, is "clear evidence of recognition." Even if this is the case, there is no specific evidence that the accused was the person who opened, saved or downloaded the documents. There is, however, evidence suggesting that the accused was not the only person with access to the computer, at least in the form of the user profile.

[45] The Crown says there are external indicators of reliability. For example, the Crown submits the relationship between the accused and his nephew is relevant context for the e-mail (see document 5), in which the tenor of the nephew's comments is that the accused "deserves a good share of the business profits because of his contribution to the business."

[46] Additionally, the Crown submits that the presence of the documents in the computer's "downloads" folder indicates that someone deliberately opened e-mails and downloaded the documents. Finally, the accused's name appears on several of the documents; the Crown asserts that this fact supports the view that he was the person who handled them.

[47] In my view, the Crown has adduced little or no evidence to support admission of these documents under the "documents in possession hearsay exception". Something more must be required for a document in possession to be admitted for its truth.

Reliability Under the Principled Analysis

[48] The Crown submits that if the Court finds that the accused did not recognize, adopt, or act upon the documents, they can nevertheless be admitted under the "principled hearsay analysis", in that it is both necessary and reliable to admit the documents. It is not disputed that there is no other way for these documents to be put before the Court. The defence does not dispute that necessity is established. However, reliability is in dispute, particularly for documents 1-3.

[49] The underlying concerns that motivate the general exclusion of hearsay were summarized by Warner J. in *Hutchinson v. R.L. Macdonald Investments Ltd.*, 2018 NSSC 248:

> [15] There are four specific concerns related to hearsay evidence. They relate to the declarant's perception, memory, narration and sincerity. In *R. v. Baldree*, 2013 SCC 35 ("*Baldree*"), at para. 32, Justice Fish wrote:
>
> > [32] First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[50] The majority in *R. v. Bradshaw*, 2017 SCC 35, described threshold and ultimate reliability as qualitatively distinct concepts (see para. 41), and explained the focus in assessing threshold reliability:

> [40] ... [I]in assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process... At the threshold stage, the trial judge must decide on the availability of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason, where procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement, substantive reliability is concerned with whether the circumstances, and any

> corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

[51] Threshold reliability may be approached as a matter of "procedural" or "substantive" reliability (although these are not mutually exclusive), but in any event "the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents …" (see *Bradshaw*, at para. 32). When the two approaches are used in a complementary way, "[g]reat care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers (see *Bradshaw*, at para. 32). Watt, J.A., summarized the two approaches in *R. v. MGT*, 2017 ONCA 736:

> [116] A proponent can overcome hearsay dangers and establish threshold reliability by showing, on a balance of probabilities, either that there are adequate substitutes for testing truth and accuracy (procedural reliability), or there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)...
>
> [117] *Procedural* reliability requires adequate substitutes for personal presence, the oath or its equivalent and contemporaneous cross-examination. This is so that the trier of fact has a satisfactory basis to internally evaluate the truth and accuracy of the hearsay statement. Proxies for traditional safeguards include video recording the statement; an oath or its equivalent; a warning about the consequences of lying; and, usually, some form of cross-examination of the declarant, such as at the preliminary inquiry, or of a recanting witness, at trial...
>
> [118] *Substantive* reliability is established if the hearsay statement is inherently trustworthy. To determine whether a statement is inherently trustworthy, we are to consider the circumstances in which it was made and any evidence that corroborates or conflicts with it. The standard for substantive reliability is high. This requires that a judge or court be satisfied that the statement is so reliable that contemporaneous cross-examination of the declarant would add little, if anything, to the process ...
>
> [*Emphasis in original*]

[52] In *Hutchinson*, Warner, J. endorsed a list of considerations derived from Paciocco and Stuesser's *Law of Evidence*. With respect to substantive reliability, the relevant considerations include whether the statement was made spontaneously, naturally, without suggestion, reasonably contemporaneously with the events, by a person who had no motive to fabricate, by a person with a sound mental state, against the person's interest in whole or in part, by a young person who would

likely not have knowledge of the acts alleged, and where there is corroborative evidence. The Court should also consider any safeguards in the making of the statement that would help expose any inaccuracies or fabrications, such as whether the person was under a duty to record the statements, whether the statement was made to a public official, whether the statement was recorded, and whether the person knew the statement would be publicized.

[53] The Crown cites *Bridgman*, *supra*, for the proposition that the existence of a written record of the communications – in that case, a number of text messages – "reduced the importance of cross-examination to test their reliability" and "the existence of multiple conversations of the same nature . . . reduced the likelihood of coincidence." In that case, the text messages in issue consisted of thirty incoming messages (the admissibility of outgoing messages as admissions was conceded) received over a three-day period (see paras. 9-11). The incoming messages came from nine different phones. There was evidence at trial that certain terms used in the message had colloquial meanings relating to drug transactions (see paras. 12-13). The Court of Appeal commented on the alleged incompleteness of the messages:

> [51] Notably, the admissibility ruling was made before any of the evidence upon which the appellant relies was elicited. During the *voir dire*, the defence attacked threshold reliability only on the basis that the Crown had not, by that point, called evidence regarding the meaning of the terms used in the text messages, like "p" and "oxy". The completeness of the text message record was not challenged during the *voir dire*.
>
> [52] Even if the expert had been asked about the completeness of the record during the *voir dire*, it would not have made a difference to threshold reliability. Although the appellant advances the incontrovertible position that in some situations, where parts of conversations are missing, statements may be taken out of context, this is not one of those cases ...
>
> [53] Standing alone, many of the text messages are clear and open to little interpretation. For instance, questions like, "do you whant those things the p", "you don't sell harder than oxys right", and "can I buy a few sleeping pills off you tomorrow", require little effort by way of interpretation. When considered in context, others also take on clarity. For example: "Cmon bud reply the ol lady is bugging she doesnt get her own til Monday so far ur on our xmas list dont ruin it"; or an incoming message saying "[w]e need u again today" from a person who had written and asked for "p's" the previous day.

[54] As for the absence of cross-examination, the Court of Appeal said:

> [54] It is hard to imagine how a cross-examination would probe any serious issues about perception, memory, narration, or sincerity in relation to the above statements. They were committed to a permanent electronic record. Although the expert acknowledged that there could be text messages missing, there was no evidence that the messages retrieved were anything but an accurate reflection of the statements made.

[55] The quantity of messages further supported threshold reliability:

> [55] The quantity of the messages, repeating patterns of requests for different types of drugs, only enhances their threshold reliability... The majority in *Baldree* relied upon a passage taken from I.H. Dennis, *The Law of Evidence*, 4th ed. (London: Thomson Reuters/Sweet & Maxwell, 2010), at p. 708, to make the point that one or two callers might be mistaken, "or might even have conspired to frame the defendant as a dealer, but it defied belief that all the callers had made the same error or were all party to the same conspiracy".
>
> [56] This court has previously accepted that where there are multiple drug calls, threshold reliability may be enhanced... The principle is simple. The more people who write to someone about obtaining drugs, the less likely it is that the declarants are all suffering from the same misperception, wrongly remembering something, engaged in unintentionally misleading behaviour, or all knowingly making false statements.
>
> [57] Although every hearsay question is informed by its own facts, one statement about obtaining drugs may be explained by some alternative explanation – a wrong number, a wrong impression, or a wrong understanding. But multiple statements that have the same theme may render implausible any explanations other than that the originators of the communication are asking for drugs.

[56] The Court of Appeal found that no error was established in the trial judge's finding of threshold liability. In *R. v. Gerrior*, 2014 NSCA 76, the Nova Scotia Court of Appeal held that text messages were admissible in similar circumstances (see paras. 48-55).

[57] The Crown submits that the critical documents – the transfer instruction and the receipt (documents 2 and 3 respectively) "are formal banking documents. The instruction is signed and the transaction receipt bears the bank logo. The two documents are closely related and corroborate the reliability of each other." Additionally, the Crown says, the other documents "demonstrate a continuing and significant interest in both Syrialink and Castle Invest Holdings consistent with the transaction in issue." Pointing to the patterns of text messages in *Bridgman* and *Gerrior*, which "tended to rule out the concern that one such request was sent to

the wrong person", the Crown adds that "the consistent and ongoing relationship between Mr. Kalai, Castle Invest Holdings and Syrialink makes it clear that there is no mistake – the documents are exactly what they appear to be."

[58] I am not convinced by this analogy. The drug communication cases tend to involve exchanges of messages between the device seized from the accused and numerous third parties. It does not follow that multiple documents found in the same place have the same effect on the reliability analysis.

[59] The defence argues that the instruction letter, the receipt, and the spreadsheet are inadmissible under the principled exception. With respect to procedural reliability, the accused says "there are no satisfactory proxies or substitutes for the personal presence of the person who drafted the Bank Letter, Bank Receipt or Spreadsheet."

[60] According to the accused, the three documents essentially exist on their own without context. There is no evidence, external to the documents themselves, suggestive of when the documents were created, who created or modified the documents, in what circumstances the documents were created or modified and how the documents ended up on the computer. These problems are particularly acute for the "Bank Letter" given that the metadata connected to the document demonstrates that it was last modified more than two years before the date of the alleged offence, despite the Crown putting the "Bank Letter" forward as a document made and used contemporaneous to the alleged offence.

[61] As a result, the accused submits there is no basis on which the trier of fact can rationally evaluate the truth and accuracy of the statements; I agree. As with the argument advanced under the second stage of the "documents in possession" analysis above, I find that the Crown's position on hearsay admission for a hearsay purpose must require more evidence than what the Crown has put before me.

[62] As to substantive reliability, the majority said in *Bradshaw, supra*:

> [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty"... Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process"... The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility

> that the declarant was untruthful or mistaken"...; "under such circumstances that even a sceptical caution would look upon it as trustworthy"...; when the statement is so reliable that it is "unlikely to change under cross-examination"...; when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about"...; when the only likely explanation is that the statement is true ...

[63] The majority went on to review the principles governing the use of corroborative evidence in assessing threshold reliability. Corroborative evidence "must go to the truthfulness or accuracy of the material aspects of the hearsay statement" and its function "at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but on the point that the hearsay is tendered to prove." (See para. 45). The corroborative evidence "must work in conjunction with the circumstances to overcome the specific hearsay dangers raised by the tendered statement ..." (see para. 47). In order to "to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination …" (see para. 47). This will be accomplished where the combined effect of the corroborative evidence in the circumstances "shows that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement ... Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist." (See para. 47). The majority went on:

> [48] In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement... Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it "eliminate[s] the hypotheses that cause suspicion"... In contrast, corroborative evidence that is "equally consistent" with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance... Adding evidence that is supportive of the truth of the statement, but that is also consistent with alternative explanations, does not add to the statement's inherent trustworthiness.
>
> [49] While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that,
>
> based on the circumstances and any evidence led on *voir dire*, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.

[*Emphasis added*]

[64] Therefore, the proponent of hearsay relying on corroboration to establish substantive reliability must identify the material aspects of the statement that are tendered for truth; identify the specific hearsay dangers; consider alternative, including speculative explanations for the statement; and determine whether the corroborating evidence led on the *voir dire* excludes such alternative explanations (see *Bradshaw* at para. 57). The Supreme Court of Canada confirmed the limited use for corroborative evidence in establishing threshold reliability in *R. v. Larue*, 2019 SCC 25, affirming *R. v. Larue*, 2018 YKCA 9.

[65] I find that there is no evidence of the circumstances in which the receipt, the instruction letter, or the spreadsheet were created or modified, including who created, modified, or stored them. In the case of the instruction letter, the metadata undermines the assertion that it was created or modified within the offence period. The Crown has provided no corroborating evidence external to the documents themselves that can overcome the hearsay concerns, as required by *Bradshaw*. The seized documents found on the computer corroborate one another, but there are concerns regarding the trustworthiness of the documents since the corroborating evidence must be reliable itself (see *Bradshaw* at para. 74).

[66] This type of circular reasoning arising from attempting to corroborate the documents found on the computer by reference to one another was discussed by the Ontario Court of Appeal in a similar situation in *R. v. Portillo* (2003), 176 CCC (3d) 467, [2003] OJ No 3030 (ONCA), where the Crown attempted to place the accused at the scene of a homicide by reference to footprints found at the scene that were similar to prints from two shoes found near the accused's apartment. The inferences to be drawn were: first, that the shoes made the footprints; and, second, that the shoes belonged to the accused. Doherty, J.A. said, for the Court:

> 32 The "footwear" evidence had relevance only if both of the above inferences could be drawn. With respect to the first inference, that the shoes made the prints found at the scene, other evidence (e.g. hair and fingerprint evidence) connecting the appellant to the scene could only help in concluding that the shoes made the prints if the trier of fact had already drawn the second inference and concluded that the shoes belonged to Wilfredo Portillo. Without that latter inference, evidence that Wilfredo Portillo was at the scene had no logical connection to the question of whether those shoes made the prints. With respect to the second inference, that the shoes belonged to Wilfredo Portillo, evidence of the comparison between the prints found at the scene and the impressions from the shoes could assist in connecting those shoes to Wilfredo Portillo only if the jury

> had already drawn the first inference and concluded the shoes in fact made the prints at the scene.
>
> 33 The "footwear" evidence could assist in proving either of the factual inferences needed to give the evidence relevance, only if the Crown could first prove the other factual inference for which the "footwear" evidence was offered.
>
> 34 As indicated above, the evidence connecting Wilfredo Portillo to the homicide scene could not assist the jury in determining whether the shoes made the prints found at the scene unless other evidence established that the shoes belonged to Wilfredo Portillo. The only other evidence connecting Wilfredo Portillo to the shoes was the evidence that they were found in the vicinity of Wilfredo Portillo's apartment. That fact alone could not reasonably support the inference that the shoes belonged to Wilfredo Portillo as opposed to the many other people who had equal access to that area. Similarly, the evidence of the prints found at the scene could only assist in identifying Wilfredo Portillo as the owner of the shoes if there was other evidence from which it could be inferred that the prints were made by those shoes. The only other evidence, was the expert's evidence that the treads on the shoes were similar to the partial prints found at the scene. That evidence, standing alone, could not reasonably support the inference that those shoes made those prints. This is particularly so given the expert's frank concession that he could not say how many shoes had the same tread pattern. His evidence amounted to no more than an assertion that the shoes found near Wilfredo Portillo's apartment were among an undetermined number of shoes that could have made the prints at the scene of the homicide.

[67] In the case at bar, the accused submits, to use one of the documents on the computer to corroborate another document on the computer would require the Court to assume the truth of the corroborating document – which is also at issue. For instance, the instruction letter can only corroborate the receipt if the letter is assumed to be reliable, notwithstanding that the letter itself is also in issue, and is presumably to be corroborated by the receipt.

[68] To sum up, in the absence of any corroborating evidence external to the documents themselves, the Crown has failed to meet the threshold for substantive reliability. The documents have been put forward in a vacuum, with no evidence as to the circumstances of their creation, modification, or storage, beyond the evidence going to their possession by the accused. For the Court to find that the hearsay concerns have been addressed on a balance of probabilities would be to treat the finding that the documents were in the accused's possession as an automatic basis for hearsay admission as well. I am not prepared to make that leap based on the evidence before me. My concern in making the leap is supported by

the Crown's admission that there is no evidence beyond the documents that the impugned transaction even occurred – let alone that the accused was involved in it.

Conclusion

[69] I find that the documents have been authenticated by the Crown and are admissible as documents in possession but not for the truth of their contents. The Crown has not met their onus to have the documents admissible for the truth of their contents, either pursuant to the hearsay branch of the "documents in possession" doctrine, or pursuant to the principled exception to hearsay, specifically the reliability branch.

Bodurtha, J.