SUPREME COURT OF NOVA SCOTIA
Citation: *R v LeBlanc,* 2021 NSSC 254

Date: 2021-08-18
Docket: PtH, No. 493290
Registry: Port Hawkesbury

Between:

Her Majesty the Queen
v.
Denise Marie LeBlanc

Trial Decision

Controlled Drugs and Substances Act
s. 5(1)

Judge:	The Honourable Justice Robin C. Gogan
Heard:	February 5, 2021 in Port Hawkesbury, Nova Scotia
Last Written Submissions:	April 30, 2021
Decision:	August 18, 2021
Counsel:	Wayne MacMillan, for the Applicant Thomas J. McKeough, for the Respondent

By the Court:

Introduction

[1] The accused, Denise Marie LeBlanc, stands charged by way of Indictment dated October 28, 2019, that she:

> Between July 9, 2017 and July 22, 2017, at or near Port Hawkesbury, Nova Scotia, September 2, 2020 did traffic in a substance included in Schedule 1 to wit hydromorphone contrary to section 5(1) of the *Controlled Drugs and Substances Act*.

[2] Prior to the trial of this charge, the accused made a ***Charter*** application alleging a breach of her s. 8 rights. She sought an order excluding evidence obtained from a search of the cell phone belonging to her former spouse Shea Slaunwhite. This evidence consisted of text message conversations allegedly between Slaunwhite and LeBlanc which the Crown sought to rely on at trial against LeBlanc. The ***Charter*** application was dismissed.

[3] The trial of this matter was held on February 5, 2021. The Crown offered the evidence of three police officers and a total of twenty-two exhibits. The defence offered no evidence. There was an Agreed Statement of Facts (*Exhibit 11*).

[4] A decision date was scheduled for May 5, 2021 but was adjourned due to the fact that the Supreme Court of Nova Scotia was then operating under an Essential Services Model as a result of the COVID 19 pandemic. A further decision date was set for July 9, 2021 but was adjourned as a result of the need for the Court to continue another trial then underway. The decision was scheduled for August 17, 2021. On that date, the accused did not appear.

[5] Jurisdiction and continuity of exhibits are not issues in this case. There are aspects of identification that are contested and will be addressed in this decision.

[6] What follows are my reasons. There is a brief review of the evidence, followed by my assessment of the evidence, conclusions and verdict.

Overview

Basic Principles - The Presumption and Burden

[7] At the outset, I wish to review some of the basic principles that guide my decision. Denise Leblanc enjoys the presumption of innocence, a presumption only displaced if the Crown proves her guilt beyond a reasonable doubt. Suspicion of guilt or a belief in probable guilt do not displace the presumption. Only proof

beyond a reasonable doubt can establish guilt. The Crown's heavy onus of proving guilt beyond a reasonable doubt never shifts.

[6] A reasonable doubt is based on reason and common sense which must be logically connected to the evidence or lack of evidence. Suspicion and probability fall far short of the reasonable doubt standard. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities.

[7] Denise LeBlanc does not have to prove anything to be found not guilty. The burden rests on the Crown to prove beyond a reasonable doubt that she committed the essential elements of the charge in this case.

Elements of the Offence

[9] The accused is charged with an offence contrary to s. 5(1) of the ***Controlled Drugs and Substances Act*** (the "***CDSA***"). This section provides that no person shall traffic in a substance included in Schedule I, II, III, IV or V. The word "traffic" is defined in s. 2 of the *Act* as, " in respect of a substance included in Schedules I – V, to sell, administer, give, transfer, transport, send or deliver the substance, to sell an authorization to obtain the substance, or to offer to do any of these things.

[10] In its case against LeBlanc, the Crown relies on s. 21(1) of the ***Criminal Code of Canada*** and alleges that the accused was a party to the offence of hydromorphone trafficking. Subsection 21(1) of the ***Criminal Code*** says that "everyone is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it. Subsection 21(2) deals with common intention. Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[10] The scope of party liability under s. 21 of the ***Criminal Code*** was discussed in ***R. v. Greyeyes***, [1997] 2 S.C.R. 825. In that case, the court expressed reluctance to sanction an approach which encourages convictions in cases where assistance was rendered solely to the purchaser of narcotics. The court held that more is required than incidental assistance in the sale by rendering aid to the purchaser. In that case, the accused did far more than act for a purchaser – he located the seller, brought the buyer to the site, and made introductions. The transaction would not

have taken place without his assistance and he demonstrated a concerted effort to effect the transfer of narcotics.

[11] More recently, this section of the ***Criminal Code*** was considered by our Court of Appeal in ***R. v. Johnson***, 2017 NSCA 64 at paras 54 to 82.

Issue

[10] The issue in this case is whether the Crown has discharged its burden of proof beyond a reasonable doubt.

[11] The most contentious point in this case is whether electronic conversations contained on the iPhone seized from Slaunwhite when arrested on July 21, 2021 are admissible evidence in this trial. If not, there is no basis to convict LeBlanc. If so, there remains an issue about what these conversations ultimately prove.

Position of the Parties

The Crown

[8] It is the theory of the Crown that LeBlanc and Slaunwhite were jointly involved in the trafficking of hydromorphone.

[9] The Crown relies on the agreed statement of facts to establish that on July 21, 2017, the police stopped Slaunwhite in the Strathlorne area of Inverness

County and arrested him for possession for the purpose of trafficking. Drugs including hydromorphone were found in Slaunwhite's vehicle when searched (see para. 5 of the Agreed Statement). An iPhone was also seized from Slaunwhite.

[10] The electronic contents of Slaunwhite's phone were subsequently analyzed. The Crown relies heavily on the text message conversations in *Exhibit 12* and summarized in various other exhibits to establish the party liability of LeBlanc. It is the Crown submission that the totality of the text message evidence clearly shows that she was actively involved in trafficking with Slaunwhite.

Denise Marie LeBlanc

[11] Conversely, the accused says that she should be found not guilty. She says that she is entitled to be presumed innocent until such time as the Crown has discharged its burden and the Crown has not done so.

[12] LeBlanc makes a number of specific submissions. First, she says that although she consented to the introduction of the electronic content of Slaunwhite's iPhone, she did otherwise not consent to its admissibility. She says that the hearsay content of the electronic conversations is presumptively inadmissible and the Crown did not overcome this presumption. Without these

conversations, there is no evidence that she was a party to trafficking in hydromorphone.

[13] LeBlanc further argues that even if the conversations are admissible, the most that can be said is that they support only incidental involvement in Slaunwhite's activity. Finally, LeBlanc makes that point that the expert reviewed only limited evidence from the electronic conversations as a basis for his opinion and it is not appropriate for the Court to now consider and interpret other parts of the conversations without the benefit of the expert's opinion as to what those conversations mean.

[14] Before leaving a review of the parties' positions, let me note here that when the evidence concluded on the trial date, the parties asked to sum up in writing. Upon review of those written submissions, the Court required clarification and asked the parties to answer questions and review some additional authorities. Both the Crown and defence provided subsequent written submissions. All of the written and oral submissions have been considered.

Analysis

Review and Assessment of the Evidence

[15] I intend at this point to review the evidence presented in this case. My review is not intended to refer to all of the evidence or even all of the most significant evidence. I note here that I have reviewed and considered all of the evidence from the three Crown witnesses as well as the twenty-two exhibits entered, including the Agreed Statement of Facts (*Exhibit 11*).

[16] Before reviewing the evidence in this case, let me comment on the context which comes from the Agreed Statement of Facts and the majority of the exhibit evidence. The subject of the original investigation was Slaunwhite. He was stopped on July 21, 2017 and arrested for possession for the purpose of trafficking. A search was conducted. A variety of items were found in Slaunwhite's vehicle, including a pill crusher, phones, cash and pills. Subsequent analysis confirmed that the substances included hydromorphone.

[17] There was an iPhone in Slaunwhite's possession when arrested. A search warrant was obtained to search the phone. It was analyzed and ten days of electronic conversations were extracted containing about twelve thousand text messages.

[18] LeBlanc made a ***Charter*** application prior to trial challenging the admissibility of the electronic conversations extracted from Slaunwhite's iPhone.

She alleged that her *s.* 8 ***Charter*** rights were infringed and sought exclusion of the electronic conversations from the evidence at trial. In a prior decision, her application was dismissed on the basis that the electronic conversations were the product of a lawful search of Slaunwhite's iPhone.

[19] At trial, the electronic conversations were introduced into evidence. There was no objection raised at the time of introduction or at any time during the Crown's examination of witnesses that touched on these conversations. Subsequently, when written submissions were received, the defence took the position that the electronic conversations were inadmissible hearsay. On the day originally scheduled for a decision, the Court instead heard from the parties on the issues raised by their written submissions. I will return to this issue later in these reasons.

[20] The first witness called was Constable Darren Legere who was the exhibit officer in the related case against Slaunwhite. Through Cst. Legere, a number of exhibits were introduced including a variety of pills in various colors, along with the associated certificates of analysis. All of this evidence established that oxycodone, hydromorphone, methadone were the substances in Slaunwhite's possession when he was arrested on July 21, 2017.

[21] On cross-examination, Cst. Legere confirmed that he was not involved in the arrest of the accused. All of the exhibits he handled and tendered though him were seized from Slaunwhite.

[22] The next witness was Detective Constable Jim Moody who testified virtually. D/Cst. Moody was qualified on consent to give opinion evidence in the field of hydromorphone drug trafficking including drug pricing, packaging, paraphernalia, street names for various drugs, and drug jargon. D/Cst. Moody was the author of a report dated March 2019 that originated in the case against Slaunwhite. His report was *Exhibit 12(c)* in this proceeding. As his report indicates, he was asked to review items seized from a vehicle in Strathlorne, Nova Scotia on July 21, 2017. The items included hydromorphone pills with a street value of between $1,300 and $2,020.00 and a cell phone.

[23] D/Cst. Moody was provided with text messages extracted from the seized cell phone. His report and his testimony dealt with three conversations he concluded were relevant to his opinion. These conversations were between two people – the user of the seized cell phone and a person programmed into the phone as Denise at 902-221-6642. D/Cst. Moody reviewed these three text message conversations and formed the opinion that each conversation was consistent with hydromorphone trafficking. These conversations are extracted at pages 3, 4, and 5

of *Exhibit 12(c)*. In his view, the amount of hydromorphone seized, in conjunction with the text messages were consistent with trafficking and inconsistent with personal use.

[24] On cross-examination, Cst. Moody was directed to the conversations extracted in his report. It was his view that the user of the seized phone appeared to have the pills. He maintained that the conversations were two people talking about price of hydromorphone pills and transactions. D/Cst. Moody said that person in the incoming messages did not appear to be a "middleman".

[25] The final witness for the Crown was Cst. Ashley Beattie. Cst. Beattie is an RCMP officer with the Port Hawkesbury detachment. She reviewed text messages extracted from Slaunwhite's iPhone. These electronic conversations were provided to her on a disc that contained the download of all of the messages extracted from the phone - what was referred to during the trial as the "master download" (*Exhibit 12*). The messages in the master download covered ten days and over twelve thousand messages. Cst. Beattie prepared summaries of the messages (*Exhibit 12a, 12b, 12c*), one of which was designed to establish that the incoming messages were from LeBlanc (*Exhibit 12b*). *Exhibit 12d* is a hard copy of the summary of *Exhibit 12b*. Another summary were the messages used by Detective Cst. Moody in his report (*Exhibit 12c*)

[26] There were photographs of a woman contained in the summary of messages in *Exhibit 12d*. Those photos were contained in messages sent from someone programmed into the phone as Denise. The photos were at *Tab 1a, 5d, and 8e*. Cst. Beattie identified the women in those photos as Leblanc. The subject matter of the conversations in *Exhibit 12d* were personal in nature and supported the identity of the author of the incoming messages as LeBlanc. The messages contained in the summary in *Exhibit 12d* are easily cross-referenced to the master download (*Exhibit 12*).

[27] On cross-examination, Cst. Beattie confirmed that she provided D/Cst. Moody with text messages to review. She did not provide all the text messages, just those that she thought were relevant to his opinion.

[28] On the basis of its three witnesses and the exhibits tendered, the Crown rested. The defence did not object to any of the evidence introduced by the Crown on any grounds and offered no evidence.

The Evidentiary Issues

[29] For the first time in final submissions, LeBlanc raised a number of issues challenging the admissibility of the electronic conversations contained in *Exhibit 12*. To be clear, these issues should have been resolved in a *voir dire* but were not.

The Crown had consent from the defence to admit the electronic conversations without calling the police officer that conducted the extraction of the data from the seized iPhone. It was only after the Crown had closed its case and provided written submissions on the basis of these text messages that the defence articulated an objection to the proposed use. What ensued was a further appearance for oral submissions as well as a series of further post trial submissions. The end result is that the first part of this decision deals with the various admissibility issues raised by the defence.

[30] The Crown sought to admit the electronic conversations to establish that LeBlanc was engaged in drug trafficking activity with Slaunwhite. This required that the conversations first be authenticated as conversations between Slaunwhite and LeBlanc, and second, that the content of those conversations be admitted for its truth. Although LeBlanc agreed that the electronic conversations were those extracted from the phone seized from Slaunwhite's possession, in the end there were no further concessions made respecting the authenticity or admissibility of the conversations.

Authentication and Best Evidence – The Canada Evidence Act

[31] The Crown did not specifically address the requirements of s. 31 of the *Canada Evidence Act* during the course of the trial. Since the conversations were electronic evidence, the Crown must meet the authenticity and best evidence requirements under ss. 31.1 to 31.8 of the *Act*. The relevant sections follow:

> **Authentication of Electronic Documents**
>
> 31.1 Any 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.
>
> **Application of Best Evidence Rule – Electronic Documents**
>
> 31.2 (1) The best evidence rule in respect of an electronic document is satisfied (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or (b) if an evidentiary presumption is established under section 31.4 applies.
>
> (2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.
>
> **Presumption of Integrity**
>
> 31.3 For the purpose of subsection 31.2(3), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic is recorded or stored is proven
>
> (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating property or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system,
>
> …
>
> **Application**

> 31.7 Sections 31.1 to 31.4 do not effect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

[32] Beginning with authentication, I note the recent decision of the Ontario Superior Court of Justice in ***R. v. Rashid***, 2021 ONSC 3433, at para. 88:

> [88] Authentication is the showing by the proponent of the evidence that the thing or item proffered really is what the proponent claims it to be. In the absence of authentication, the item lacks relevance. Authentication requires the introduction of some evidence, either direct and/or circumstantial, that the item is what it purports to be. For electronic evidence or documents, the burden is on the party that seeks admission to lead some evidence capable of supporting a finding that the electronic document is what it purports to be. This threshold requirement is not onerous: *R. v. C. B.*, at paras. 63-68.

[33] Reference is also made to the analysis in ***R. v. Martin***, 2021 NLCA 1.

[34] The Agreed Statement of Facts (*Exhibit 11*) establishes that Slaunwhite was in possession of an iPhone when stopped and arrested on July 21, 2017. LeBlanc agrees that the electronic conversations that the Crown seeks to admit are the those extracted from that cell phone. Cst. Beatty reviewed the electronic conversations and organized extracts of those conversations into various categories (*Exhibit 12(d)*). This evidence included photographs of a man and a women embedded in the text conversations. Cst. Beatty testified that the women in the photos was LeBlanc and that portions of the text exchanges dealt with the personal relationship between Slaunwhite and LeBlanc. I conclude that there is both direct and

circumstantial evidence to support that the text message conversations are what they are purported to be – text message conversations between Slaunwhite and LeBlanc. The outgoing messages are from Slaunwhite. The incoming messages from "Denise" are from LeBlanc.

[35] Moving to the best evidence requirements, I consider the defence concession that the electronic conversations were extracted from Slaunwhite's iPhone. This concession dispensed with the evidence of the police officer that extracted the data from Slaunwhite's iPhone. A review of the extensive electronic conversations reveals coherent and apparently complete conversations over a ten day period ending July 21, 2017. In my view, this is sufficient, in the absence of evidence to the contrary, to employ the presumption in s. 31.3(a) and satisfy s. 31.2(1)(a).

[36] In the end, although not specifically addressed at trial, I find that the evidence complies with the s. 31 of the *Canada Evidence Act*. However, I agree with the defence position that merely meeting these requirements does not make the electronic documents admissible. The admissibility of electronic evidence also depends on the purpose for which it is tendered and any related rule of evidence: David M. Paciocco, "*Proof and Progress: Coping with the Law of Evidence in a Technological Age*" (2013) 11 C.J.L.T. 181 at 193.

Hearsay Exceptions - Admissions and the Principled Exception

[37] In this case, the Crown proffers the electronic conversations for the truth of the content of the conversation. The messages sent from LeBlanc are admissible as party admissions. On this point, reference is made to the analysis of Arnold, J. in ***R. v. Burton***, 2017 NSSC 3, at paras. 33 – 47 and the many authorities cited in his reasons.

[38] The messages sent from Slaunwhite are hearsay and presumptively inadmissible. This presumption can only be displaced where the evidence fits within an exception to the rule or satisfies the principled exception. On this point, there was disharmony between the Crown and defence as to whether, or to what extent, the defence had consented to admission of Slaunwhite's text messages. The Crown noted that the defence did not object to admissibility during trial. The defence noted that the Crown did not seek a *voir dire* to determine admissibility and cannot now do so.

[39] There are several cases that guide the substantive and procedural assessments. In ***R. v. Gerrior***, 2014 NSCA 76, the issue was the admissibility of text messages sent to the accused's cell phone. The trial judge admitted the messages in a decision released prior to the decision of the Supreme Court of

Canada in ***R. v. Baldree***, 2013 SCC 35, a decision which required implied assertions to survive a principled hearsay analysis to gain admission. The Court of Appeal undertook such an analysis on appeal. Beveridge, J.A. reasoned as follows:

> [45] The danger in admitting hearsay is that the evidence may not be true. A trier of fact may be misled by relying on such evidence that has not been tested in court by in-court cross-examination that could expose problems with perception, memory, narration and sincerity (***R. v. Kelawon***, 2006 SCC 57, at para. 2).
>
> [46] Here, two of the out-of-court statements were recorded by the mobile service provider, and reproduced by means of a production order. There could be no dispute about the completeness of the communication or the absent declarant having misperceived the actual exchange of information contained in the text messages, nor accurately recalling what was said. In my opinion, this goes a long way toward satisfying the threshold requirement of reliability.
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> …
>
> [49] The Crown is right to suggest that the evidence about necessity could have been stronger …
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> …
>
> [53] Further, even if accurate coordinates surfaced on these declarants, it seems rather fanciful that the declarants would have testified about their text communications with the appellant.
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> [54] The appellant does not dispute that the criteria of necessity and reliability work in tandem. That is, if the reliability of the evidence in issue is sufficiently established, the necessity requirement can be relaxed (*Baldree* at para. 72). Any deficiencies concerning the necessity of admitting calls without the declarant's presence at trial is overcome by the evidence demonstrating the reliability of the out of court communications.

[40] In ***Gerrior***, the text messages were admitted after the principled analysis with the Court of Appeal finding that they were highly probative evidence.

[41] In ***R. v. Calnen***, 2015 NSSC 319, a *voir dire* was held to determine admissibility of a series of text messages from a deceased declarant. Chipman, J. considered the decision in ***Gerrior***, and the subsequent decision in ***R. v. Howell***, 2014 BCSC 2196 in which Griffen, J. commented on the reliability of text messages at para. 51:

> [51] But the point of referring to the above passage in *Baldree* is that written messages are inherently more reliable than oral statements repeating someone else's statement because the written form reduces the risk that an intermediary will have made an error in repeating the statement. Here, five of the text messages suggest involvement in the sale of methamphetamine described as "side", based on the opinion evidence of Corporal Helgeson. The number of passages to this effect enhances the reliability of the circumstantial evidence that the person in possession of the phone had some knowledge of or involvement in the transactions to which those messages relate.

[42] Chipman, J. admitted the text messages in question after concluding at para. 27 that "Canadian courts have generally seen fit to allow the admission of texts as an exception to the hearsay rule.

[43] More recently, in ***R. v. Bridgman***, 2017 ONCA 940, the issue was considered once again in the context of a drug trafficking case. There, police seized a cell phone incident to arrest and extracted the text messages. The messages were admitted for the truth of their contents. The issue at trial was

admissibility of the incoming messages. As in the present case, the defence took the position that these were presumptively inadmissible hearsay and made a tactical decision not to object on this basis until well into in the trial with a jury. Nevertheless, a *voir dire* was conducted and the text messages were admitted. The accused later testified in the trial proper that he did not use the texting function on his phone and was not the intended recipient of the messages. Nevertheless, he was convicted and appealed.

[44] On appeal, the Ontario Court of Appeal considered various issues flowing from the admission of the text messages at trial and found no error. The threshold reliability of text messages was noted beginning at para. 53:

> [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, the others also take on clarity. For example: "C'mon bud reply the ol lady is bugging she doesn't get her own til Monday so far ur on our xmas list don't 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] 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 received were anything but an accurate reflection of the statements made.
>
> [55] The quantity of the messages, repeating patterns of requests for different types of drugs, only enhances their threshold reliability.
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> …

> [56] This court has previously accepted that where there are multiple drug calls, threshold reliability may be enhanced …
>
> [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 the originators of the communication are asking for drugs.

[45] As to necessity, the court noted evidence as to why the police did not track down the declarants and adopted the reasons in ***Baldree***, ***Gerrior*** and ***Kelawon*** to the effect that necessity and reliability "intersect and should not be considered in isolation". There was no basis to claim prejudice from the admission of the text messages as the "probity of the evidence does not create prejudice". No error was found in the admission of the text messages and the appeal was dismissed.

[46] Returning to the present case, the outstanding question is whether the portion of the text message conversation originating on Slaunwhite's cell phone should be admitted. The answer to this question is in a principled analysis of the evidence. Admittedly, this analysis should have taken place before the end of the trial. However, it seems to me a misunderstanding about the scope of the defence consent, combined with a lack of timely objection, resulted in the requirement for an ex post facto analysis.

[47] Nevertheless, I now conclude that these text messages are admissible. Consistent with the cited authorities, I find the electronic conversation, as recorded in the text messages to be highly reliable. It is challenging to contemplate what possible impact could come from cross-examination. Threshold reliability is established.

[48] As to necessity, the situation here is somewhat unique. This is not a case where the hearsay declarants are unknown or difficult to locate. There was little evidence adduced on this point. The Agreed Statement of Facts and the defence concession cumulatively support that the messages are those extracted from the Slaunwhite cell phone and the content of the messages themselves support that the relevant conversations are between Slaunwhite and LeBlanc. Slaunwhite's phone was seized when he was arrested for drug trafficking on July 21, 2017 while in possession of hydromorphone pills. In this context, I consider it unlikely that Slaunwhite would have submitted to a meaningful cross-examination. I also consider that the lack of evidence on this point is compensated by the high degree of threshold reliability of the text message format of the electronic conversations. There can be no dispute that the conversation is highly probative. No cogent argument was advanced that the probity was outweighed by the any prejudice to

the accused. The messages are admitted into evidence and shall now be considered in the context of all the evidence offered at trial.

Determination

[49] Having resolved the evidentiary issues, I turn to a final analysis as to whether the Crown has proven its case beyond a reasonable doubt.

[50] It is the Crown theory that LeBlanc and Slaunwhite were jointly involved in the trafficking of drugs. In its view, there is ample evidence in the electronic conversations that LeBlanc was "actively involved in the drug trade". Conversely, the defence argues that LeBlanc must be found not guilty as the most that can be said is that she rendered aid to potential purchasers.

[51] One of the issues raised by the defence relates to the opinion of D/Cst. Moody. His expert report (*Exhibit 12(c)*) contained the opinion that the extracted conversations with "Denise" at a specified telephone number were about the sale of hydromorphone capsules and pills and that the totality evidence reviewed was "highly indicative of possession for the purpose of trafficking". To be clear, that opinion considered the conversations with LeBlanc but was in relation to Slaunwhite. In other words, it was D/Cst. Moody's opinion that Slaunwhite was in possession hydromorphone for the purpose of trafficking. He relied on the selected

text message conversations involving LeBlanc to inform his opinion about Slaunwhite's activity.

[52] The evidence established that D/Cst. Moody did not review all of the text messages extracted from the Slaunwhite cell phone. Rather, he was provided only those messages that Cst. Beattie determined were relevant to his opinion. The defence is of the view that this taints the opinion in that the full spectrum of the relationship was not examined as part of the formation of the opinion. In response, the Crown urges the use of common sense in the review of those parts of the conversations in evidence but not reviewed by D/Cst. Moody. It attached relevant extracts of the electronic conversations to its post trial submissions.

[53] D/Cst. Moody's report was initially prepared for the prosecution of Slaunwhite. His report and opinion were consistent that Slaunwhite (referred to in the report as the "user of the seized cell phone") was the one in possession and that the conversations extracted were in relation to the sale of pills and capsules in his possession. D/Cst. Moody's opinion was offered, in part, to interpret the coded conversations with LeBlanc and explain the meaning of certain terms and expressions. His report does not contain any specific opinion about the level of involvement of "Denise" - just that she was involved in conversations about the

sale of capsules and pills in Slaunwhite's possession. His direct examination at trial did not offer anything more substantive than his written opinion.

[54] When cross-examined, D/Cst. Moody was asked about how he would characterize the involvement of the person sending messages to Slaunwhite regarding the sales. For convenience, the following is an extract from the cross-examination of D/Cst. Moody:

> [55] **Defence Counsel:** Officer I'm going to direct you to page 5 of your report. That's the question … sorry conversation from July 21, 2017, you had spoken about in your direct examination.
>
> [56] **D/Cst. Moody**: Yes.
>
> [57] **Q.** Now in this conversation we have the outgoing messages it appears that someone who's talking about that they are involved in the drug trade? You'd agree with that?
>
> [58] **A**. Yes.
>
> [59] **Q.** And the incoming messages are just someone that's seemingly having a conversation with someone that's involved in the drug trade, correct? They're not necessarily indicative of being in the drug trade themselves, the incoming messages?
>
> [60] **A.** No the messages appear … the person sending the outgoing messages are the ones that are making the deal.
>
> [61] **Q.** Okay. And the person on the incoming message are just having a conversation with him?
>
> [62] **A.** The … about … about the pending transaction.
>
> [63] **Q.** Yes. But you would agree that out of the two of them it's the person that's sending the outgoing messages that's most likely involved in the drug trade, correct?

[64] **A.** Well it sounds like they were getting some directions from the person sending the incoming messages but … the person with the phone sending the outgoing messages was the one that appears to have the … had the pills.

[65] **Q.** Okay. And if we go back to page four and we tie to that conversation, again it appears that the person sending the outgoing messages is the person that's involved in the drug trade, correct?

[66] **A.** Primarily. But I think there's still … the two people in the conversation are talking about price.

[67] **Q.** Okay. They both know that … someone's involved in the drug deal, we can agree on that?

[68] A. Yes.

[69] **Q.** Okay. And officer, in all the investigations you've done I'm sure you're familiar with the concept of a middleman in drug transactions?

[70] A. Yes.

[71] **Q.** So there can be someone that's not involved in the drug trade necessarily but they made connections between a buyer that they know and a seller that they know?

[72] **A.** Correct.

[73] **Q.** And they might never have drugs that pass through their hands, they might never have money that passes through their hands, all they do is make the connection between the two?

[74] **A.** That's right.

[75] **Q.** But then sometimes there are other middlemen that'll go farther and they'll almost act like a salesman and maybe they're going to get a percentage of whatever drug sales they line up, correct?

[76] **A.** That happens as well, yes.

[77] **Q.** Okay. Now there was no sort of indication that this person in the incoming messages was in any kind of relationship like that with person selling the drugs, correct?

[78] **A.** Not that I recall. No.

[79] **Q.** Okay. I have no further questions.

[80] On the basis of the evidence of D/Cst. Moody, the most that can be said is that LeBlanc was aware of Slaunwhite's hydromorphone trafficking and involved in discussions with him about the deals he was making. There is no evidence in these conversations that LeBlanc was in possession of the pills or capsules, was initiating the transactions, or making money from assisting in the transactions. There is evidence that she was an intermediary of sorts, fielding inquiries from potential buyers about supply and prices. But Slaunwhite made the deliveries, handled the transactions, and controlled the money. I consider that Slaunwhite and LeBlanc were in a personal relationship at the time and he may have shared the trafficking proceeds with her for personal reasons. There is no clear and unequivocal evidence that Slaunwhite was formally sharing the proceeds of drug trafficking with LeBlanc.

[81] The Crown urges consideration of text message conversations beyond those that D/Cst. Moody reviewed and interpreted. I have considered those messages. I conclude that they are largely consistent with those reviewed by D/Cst. Moody. They support the conclusion that LeBlanc was aware of and acting as an intermediary in Slaunwhite's drug trafficking.

[82] There are instances where conversations could support the conclusion that LeBlanc was more involved, perhaps as a partner in or directing transactions. The

July 21, 2017 passage referred to by the Crown in its written submission is but one example. It is possible that it supports a joint trafficking enterprise. But there are other possible explanations or interpretations to these text message exchanges. Again, I consider that LeBlanc and Slaunwhite had a personal relationship and reason to discuss financial matters and personal logistics other than in a drug trafficking context. On the evidence, I am not prepared to conclude that the drug trafficking activity was a joint endeavour or the result of common intent. Perhaps it was, but I cannot be sure.

[83] The outstanding issue then is whether LeBlanc's activity as an intermediary is the basis for party liability in this matter. In order to determine this, I return to the decision of the Supreme Court of Canada in ***Greyeyes***. As noted above, ***Greyeyes*** settled the law respecting party liability to drug trafficking. In terms of the required acts, something more than incidental assistance to a purchaser is required. In terms of intent, the Crown must prove that the accused intended the consequences that flowed from his or her aid to the principal offender.

[84] In ***Greyeyes***, the accused demonstrated a "concerted effort on his part to effect the transfer of narcotics" and was convicted as a party to the offence of drug trafficking. At para. 39 of the minority decision in ***Greyeyes***, Cory, J. concluded his analysis:

> 39 Did the appellant intend to assist or encourage the sale? There can be no doubt that the appellant knew he was assisting in the illegal sale of narcotics, and that he intended to do so. His words and actions demonstrate that he deliberately set out to bring together the parties to the transaction and acted as the conduit for delivering the drugs from the seller to the buyer. The appellant may have been motivated solely by a desire to help the buyer, but what he intended to do was to facilitate the sale of narcotics, and this is a culpable intention. Since the appellant actually encouraged and assisted in the illegal sale of narcotics, and since he had the intention of doing so, he was guilty of trafficking as a party to the offence pursuant to s. 21(1)(b) of the *Code*.

[85] Returning to the present case, although I do not agree with the Crown position that evidence demonstrates a joint trafficking enterprise, I am prepared to conclude that LeBlanc provided something more than incidental assistance to purchasers. The totality of the evidence demonstrates repeated, consistent and intentional efforts to assist in bringing sellers to Slaunwhite to further his trafficking activity. Although it never appeared that LeBlanc controlled the hydromorphone supply or the proceeds of sales, she was nevertheless actively involved as a conduit for the transactions, settling prices, determining demand, and coordinating delivery.

Conclusion

[86] I find that the Crown has proven its case beyond a reasonable doubt. The evidence establishes that between July 9, 2017 and July 22, 2017 the accused, Denise Marie LeBlanc, carried out a variety of acts intending those acts to aid Slaunwhite in the trafficking of hydromorphone.

[87] Accordingly, I find LeBlanc guilty as a party to the offence of trafficking contrary to s. 5(1) of the *CDSA*.

[88] The matter is scheduled to return before me on August 20, 2021 at which time a sentencing date shall be set.

Gogan, J.