SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Burton*, 2017 NSSC 3

Date: 2017 01 05
Docket: Hfx No. 443267
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Shawn Burton

Restriction on Publication: S. 486.4 and 539 CC

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	December 5, 6 and 12, 2016, in Halifax, Nova Scotia
Counsel:	Robert Kennedy, for the Crown Peter Planetta, for the Defence

By the Court:

Overview

[1] February 2, 2014 was Super Bowl Sunday. A series of text messages were exchanged between the accused, Robert Burton, and the complainant, R.P., on February 2 and 3, 2014, about R.P. attending at Burton's residence for a Super Bowl party. R.P. alleges that Robert Burton then sexually assaulted her the night of that Super Bowl party. Mr. Burton was charged with sexual assault. He has elected to be tried in the Supreme Court of Nova Scotia by a judge sitting alone.

[2] This decision concerns the admissibility of the multiple text messages and the transcripts of the multiple text messages. The Crown argues that the series of text messages introduce the lead up to the alleged sexual assault and also constitute admissions by Mr. Burton subsequent to the incident. The Crown wants to introduce those text messages for the truth of their contents at Mr. Burton's sexual assault trial.

[3] Mr. Burton objects to the admission of those text messages. He says:

> The text messages in this case come before the Court in such a dubious manner that their reliability and weight are minimal. The abject failure of the police to adequately preserve the evidence renders it worthless.
>
> The fatal shortcoming to the Crown's position is highlighted in paragraph [3] of their brief. No steps were taken to properly seize the messages in a way that would ensure their accuracy or authenticity. Some blurry photographs were taken and then Cst. Johnson transcribed some hard copy illegible photographs, with the assistance of the original blurry and illegible photographs which no longer exist. This is not re-recordings of audio intercepts, it is not the official cellular service provider printouts in *Calnen* or *Cater* or any other authority located for these submissions.

Facts

[4] From the evidence heard on the *voir dire* in relation to the admissibility of these text messages, it would be fair to say that the R.C.M.P.'s methodology for capturing the text messages in this case was questionable. Because of decisions made by the R.C.M.P. regarding the collection of this evidence there are questions as to the completeness of the text message exchanges and the accuracy of the transcripts of the texts.

[5] R.P. attended at the Lower Sackville R.C.M.P. Detachment on February 7, 2014, to make a complaint that she had been sexually assaulted. Her complaint was taken by Cst. Laura Seeley and Cst. Wayne Johnson.

[6] Seeley was a seven-year member of the R.C.M.P. on February 7, 2014. Johnson was working only his second shift as an R.C.M.P. officer on that date. Seeley was Johnson's training officer. Prior to joining the R.C.M.P., Johnson had been a member of the Military Police for 25 years.

[7] R.P. told these police officers that her cell phone contained text messages that could be of interest. She gave her phone to Seeley who then read the text messages. Seeley then gave the phone to Johnson and asked him to read the text messages. This is when the police made a series of unusual decisions that have led to the defence making an application to exclude the text messages.

[8] Once Johnson had reviewed the text messages, Seeley told him to use his personal iPhone to take pictures of the text messages depicted on the screen of R.P.'s phone. Johnson then used his personal iPhone to take photos of the text messages on R.P.s phone. R.P.'s phone was returned to her at the conclusion of her police interview.

[9] Once R.P. left the R.C.M.P. Detachment following her interview, she believed that the R.C.M.P. had taken everything that they required from her cell phone. She then sat in her vehicle in the R.C.M.P. parking lot and deleted the text message exchanges between herself and Burton.

[10] On February 8, 2014, the 30 pages of text message photos Johnson had taken with his iPhone were printed by the police. The quality of the printed photos was poor and many of the texts in the photos were illegible.

[11] On that same day Seeley directed Johnson to use the photos of the text messages on his iPhone to help create a transcript of the text messages. Johnson then took each page of the printed text messages and wrote his transcription underneath the photo of each text. When something was difficult to read on his own iPhone Johnson used his fingers to enlarge the photo on his screen and then either wrote the word on the printed copies or noted that the particular text was "unreadable" within the transcription.

[12] Seeley asked R.P. to return her cell phone to the police on March 11, 2014. Once Seeley again had the phone she took it to the R.C.M.P. "Tech Crime" Unit to

request that they retrieve and print off the texts. Tech Crime was unable to retrieve the now deleted texts from R.P.'s Nokia cell phone.

[13] During his police interview of February 9, 2014, which Burton concedes is admissible, he was shown a one-page summary of some aspects of the 30 pages of the text messages in question. That summary is reproduced below:

> R.P. – Last night was a little messed up
>
> Rob – I feeling shitty about last night…so out of line…so sorry
>
> R.P – I'm confused…I was sleeping…do not know what to think
>
> My pills knock me out Rob. You know this. I don't get it.
>
> Rob – I have not stopped thinking about how you must feel and I do know how your pills affect you…feel so low right now…so sorry
>
> R.P. – I trusted you. I don't know what to say. I don't know what to feel right now. Have you ever woke up with someone inside of you?
>
> Rob – This is so shitty. You should know that it was not my intention to hurt you in any way…I know that it was selfish of me and it was wrong…
>
> R.P. – You were fucking me while I was asleep. I was out. And you decided to have sex with me. Are you fucking serious Rob?
>
> Rob – I was convinced that it was going to have a different outcome an exciting one but it wasn't which made it such a wrong decision that I made
>
> R.P. – Leave me the fuck alone
>
> Rob – I should have protected you. I failed you so bad.

[14] While being shown the one-page summary, the following exchange took police between Burton and the police:

> Q. I just typed out the text messages.
>
> Mean anything to you? You're not gong to give me anything, are you?
>
> A. Am I allowed to have a copy of that?
>
> Q. No, but you will get one.
>
> A. Okay.
>
> Q. In disclosure. If there's… it's right from yours and her phone. So …
>
> A. <u>No, I do remember that conversation I had with her.</u>
>
> Q. Was there a verbal conversation that she didn't tell me about?
>
> A. Of course.

> Q. After that night?
>
> A. During that night. Of course, right? You know, things that happened after that and before she went home, you know? So you … you'll sit with me all night, won't you? [Emphasis added]

[15] Johnson had emailed a copy of the photos from his iPhone to Seeley. Those emails were not produced on the *voir dire*. Johnson was asked by the Crown sometime during the Spring of 2016 to provide them with his personal iPhone. Johnson can no longer find the iPhone he used to take the photos.

[16] Both Johnson and Seeley said that they used Johnson's personal iPhone because the R.C.M.P. cameras available to them were of a lesser quality than the iPhone camera. They said that the R.C.M.P. cameras were normally kept in the police vehicles, it was February and the cameras would be cold and therefore more likely to either malfunction or result in poor photos being captured.

[17] Seeley testified that: she did not take screen shots of the texts with R.P.'s own phone; she did not take any notes during a discussion with R.P. prior to taking her recorded statement because she was consoling her instead; she did not seize Burton's phone when she arrested him and did not subsequently request a warrant to seize Burton's phone; and she did not request a production order to seize the texts from either R.P.'s own cellular service provider or the cellular service provider for Burton because she believed this would only produce dates and times and not the content of the texts.

Burden of Proof

[18] In discussing the burden of proof regarding preliminary questions of fact in respect of admissibility, Sopinka J., speaking for the majority in *R. v. Evans*, [1993] S.C.J. No. 115, stated:

> 31 In this respect I see no reason to require a higher standard of proof than is applied in determining preliminary questions of fact in respect of admissibility. The determination of a preliminary question of fact in respect of both authenticity and admissibility is a prelude to access to the contents of the statement as proof of the truth thereof. If the standard of proof on a balance of probabilities is appropriate to determine a preliminary question of admissibility, there is no reason to exact a higher standard due to the mere fact that the determination is shifted to the fact-finding stage of the trial. The appellant quite candidly conceded that this was the appropriate standard. It might be suggested that in the former case it is the trial judge in his or her capacity as judge of the law rather than as the trier of fact who

> determines the question, whereas in the latter case it is the trier of fact, either the judge or the jury. In my view, while this is a distinction between the two kinds of determination it is not a relevant distinction. This Court has affirmed that preliminary questions of fact by the trier of fact may be decided on a balance of probabilities. In *R. v. Carter*, [1982] 1 S.C.R. 938, the trial judge charged the jury in a conspiracy case that before resorting to evidence of the acts and declarations of co-conspirators of the respondent accused, the jury were obliged to determine in accordance with the criminal standard that the respondent was a member of the conspiracy charged. This Court allowed the appeal by the Crown on the ground that the trial judge had erred as to the standard to be applied to the preliminary question of membership in the conspiracy. The appropriate standard was on a balance of probabilities. The Court ruled that once this standard was satisfied the acts and declarations of co-conspirators were evidence admissible against the accused in accordance with the well-known exception to the hearsay rule.
>
> 32 In my opinion, this is the correct approach to be applied in respect of the authenticity of admissions. If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. While the contents of the statement may only be considered for the limited purpose to which I have referred above in the first stage, in the second stage the contents are evidence of the truth of the assertions contained therein.

[19] Therefore, the burden is on the Crown to prove on a balance of probabilities that transcripts of the text messages and the text messages are admissible.

Best Evidence Rule

[20] The Crown says that the text messages are admissible under the best evidence rule.

[21] *McWilliams Canadian Criminal Evidence* states:

> 24:40.20.10 — Historical Context
>
> The maxim that "best evidence must be given on which the nature of the case permits" or the so-called best evidence rule can be traced to 1700 and the English case of *Ford v. Hopkins*. While the rule that a party produce the original where it intends to prove its contents (i.e. the documentary originals rule) is a manifestation of (and indeed predates) the best evidence rule, the latter was seen by many in the 18th and 19th centuries as a fundamental rule of admissibility for all evidence. It

was part of a theory of evidence advanced by the likes of Lord Chief Baron Gilbert who wrote the first evidence treatise in 1720 that favoured real evidence over testimonial evidence. As evidence historian Stephan Landsman notes:

> The pre-eminent category of proof was documentary and was to be preferred to oral testimony.

A best evidence theory for all evidence did not prevail and was used only in the context of documentary evidence. As the English Court of Appeal held in the oft-cited case of *R. v. Wayte*:

> [I]t is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not.

However, the name continues to be used even though what we are talking about is the documentary originals rule. As Delisle, Stuart and Tanovich observe, "jettisoning its use completely in favour of the name 'documentary originals rule' would bring much needed clarity".

24:40.20.20 — Modern Day Relevance

The importance of the documentary originals rule is in decline. Where the original does not exist or is very difficult to produce, copies or secondary evidence may be admitted. The tendering party must provide an explanation for why the original is not available. For example, in R. v. Swartz, the Ontario Court of Appeal adopted the following passage from McCormick:

> If the original document has been destroyed by the person who offers evidence of its contents, the evidence is not admissible unless, by showing that the destruction was accidental or done in good faith, without intention to prevent its use as evidence, he rebuts to the satisfaction of the trial judge, any inference of fraud.

Courts have been liberal in applying the "difficulty" requirement to extend it to cases where the police could have seized the evidence but failed to do so. For example, in R. v. After Dark Enterprises Ltd., the Alberta Court of Appeal held:

> The learned trial judge says that the prosecution cannot call any other evidence if real evidence on the same point was available to be seized and was not seized. That extends the best evidence rule far beyond its original purpose, which was simply to avoid fraud and forgery, into a large alteration of practice and procedure in courts today. We do not accept it.

[22] In *Watt's Manual of Criminal Evidence*, Justice David Watt describes the best evidence rule as follows:

> Commentary
>
> In its *original* form, the best evidence rule required the best proof that the nature of the thing would afford. What remains of it, in essence, is a requirement that, to prove the contents of a document, the original should be tendered, if available. A copy will *not* suffice. As primary evidence, the best evidence is required. It includes duplicate originals. When the original is *unavailable*, secondary evidence may be admitted.
>
> The best evidence rule is *not* engaged when a document is *not* tendered as proof of its contents. The rule does not extend to situations where the purpose for which the evidence is adduced is to show that a person had notice or knowledge of the contents of the document.
>
> *Secondary* evidence is admissible by exception in cases where:
>
> > i. the original document existed, but was later lost or destroyed;
> >
> > ii. statutory exceptions permit its introduction, as for example, *C.E.A.* ss. 29 and 30; or
> >
> > iii. the original is in the possession of a third party from whom production cannot be compelled.

[23] The best evidence rule was considered in *R. v. After Dark Enterprises Ltd.* (1994), 157 A.R. 398 (Alta. C.A.). In *After Dark Enterprises* the court was dealing with a by-law prosecution for displaying scenes of nudity without a permit. The officers testified that they had watched a video display at the accused's store and laid charges on the basis of what they observed. Kerans J.A., speaking for the unanimous court, stated:

> 6 As we understand it, the best evidence rule provides, first of all, what we might call an admonition that real evidence is usually more reliable than human evidence. This aspect of the matter is, as some of the authorities say, merely a wise counsel to triers of fact. It has nothing to do with admissibility.
>
> 7 In some cases, however, the real evidence is not produced and no explanation is given by the witness, or the party adducing the witness, why they fail to produce the real evidence. In cases of that sort, the question arises whether or not evidence, other than that real evidence, should be admitted to establish what could have been established by examination of the real evidence. There is some dispute in the authorities at this point whether what we might call the "substitute" evidence is admissible. Some authorities say that it is not admissible; other authorities say that it may be admissible but that, in the absence of any reasonable explanation of the failure to produce the real evidence, an adverse inference should be drawn about the reliability of the "substitute" evidence.

> 8 In our respectful view, we do not need to enter into that issue for the purposes of this case. The circumstances of this case clearly offer a reasonable explanation for the failure of the by-law officer to produce the videos that he saw at the store. It was uncontested fact, and so found by the learned Queen's Bench judge, that the prosecution never had possession of them. The officer did not seize them, and he did not buy them.
>
> 9 The learned Queen's Bench judge was driven, as a result, to argue that the Crown had a duty to seize the evidence. That function has led to a dispute between counsel before us as to what the power of seizure was in the circumstances, an issue that we need not get into today. The reason is that we are not prepared to accept this extension of the best evidence rule. The learned trial judge says that the prosecution cannot call any other evidence if real evidence on the same point was available to be seized and was not seized. That extends the best evidence rule far beyond its original purpose, which was simply to avoid fraud and forgery, into a large alteration of practice and procedure in courts today. We do not accept it. There was a reasonable explanation at this trial for the failure of the Crown to produce the tapes in question, and this was that they remained in the possession of the accused and were never in the possession of the Crown. We make the ancillary point that these tapes, apparently, are in the possession of the party making the objection. We doubt very much whether one can, as it were, sit on the evidence and, at the same time, object that it has not been produced.

[24] In *R. v. J.S.C.* 2013 ABCA 157, the Alberta Court of Appeal again considered the best evidence rule in a case where a video recording was not produced at trial but where police officers were permitted to testify as to what they had seen on the video recording.

[25] In that case, the police had observed video footage that provided circumstantial evidence of identification. The police requested copies of the video footage. The police were mistakenly provided incorrect video. When the mistake was discovered, the police were requested to obtain the correct footage but they failed to follow up. Neither the original video footage, nor the copy, were available to be viewed at trial. In considering the best evidence rule, the unanimous court in *J.S.C.* stated:

> 14 The appellant argues that evidence of what the police officers observed in the video violates the best evidence rule. The best evidence rule provides an admonition that real evidence is usually more reliable than human evidence: *After Dark Enterprises* at para 6. In that case this court found that the testimony of what by-law officers had seen on a video in a store was admissible evidence about the contents of the video. The Crown never had possession of the videos. The appellant contends that the trial judge erred in relying on *After Dark Enterprises* as in that case there was a clear and reasonable explanation for the Crown's failure to produce

> the video at trial, whereas here, the trial judge found that the Crown acted negligently. He also says that in *After Dark Enterprises* the party who objected to the admissibility of the impugned evidence was in possession of the videos and could not be allowed to "sit on the evidence, and at the same time, object that it has not been produced": para 9.
>
> 15 In *After Dark Enterprises* this court rejected the contention that the prosecution could not call any other evidence if real evidence on the same point was available to be seized and had not been seized. It commented that to do so would extend the best evidence rule far beyond its original purpose, which was simply to avoid fraud and forgery: at para 9. What is common to both cases is that the video was simply not available, and the Crown has provided an explanation as to why the video was not available.
>
> 16 In our view the best evidence rule does not preclude the admission of *viva voce* evidence of persons who observed the video (see *R. v. Pham*, 1999 BCCA 571 at paras 18-25, 139 C.C.C. (3d) 539). However, the evidence may vary greatly in its weight and reliability. In this case, the trial judge was entitled to admit the evidence of the police officers who testified about what they observed in the video, and to give it the appropriate weight. It was only one item among several pieces of evidence which the trial judge found to be confirmatory of the identification evidence.

[26] In *R. v. Ghotra*, [2015] O.J. No. 7253 (Ont. S.C.J.), Durno J. also considered the best evidence rule and noted:

> 142 Watt's Manual of Criminal Evidence, 2015, (Carswell, Toronto) notes at 11:02 that in its original form the Best Evidence Rule required the best proof that the nature of the thing would afford. What remains of it, is that to prove the contents of a document the original should be tendered if available. A copy will not suffice. As primary evidence, the best evidence is required. It includes duplicate originals. When the original is unavailable, secondary evidence may be admitted. Where the document is not tendered as proof of its contents, the rule is not engaged.
>
> 143 In *R. v. Swartz* (1977), 37 C.C.C. (2d) 409 the Court of Appeal canvassed several authorities in relation to the Best Evidence Rule, including *Halbery*, 4th Ed., where it was noted that any strict interpretation of the principle had long been obsolete. The rule was only of importance in regard to the primary evidence of private documents.
>
> 144 The Court of Appeal adopted the comments of the Federal Court in *United States v Knolh*, 379 F. 2d. 427 (1967) that a technical and rigorous application of the Best Evidence Rule made no sense and was not required where the trier finds that a proper foundation has been laid for it, and that the re-recording is authentic and accurate. The Court of Appeal's analysis was affirmed by the Supreme Court of Canada. *R. v. Papalia*, [1979] 2 S.C.R. 256.

145 In *R. v. Shayesteh* (1996), 31 O.R. (3d) 161 the Court of Appeal again examined the rule noting:

> The oral communication itself is the fact which is sought to be proven in evidence. When considering any proposed method of proof, the old principle known as the "best evidence rule", in my view, can still provide a useful starting point. The rule may be used, not so much as a criterion for determining questions of admissibility and exclusion with respect to any item of evidence sought to be adduced, but as a general guide for choosing the appropriate method of proof. The parties (usually the Crown) should endeavour to put forth the best evidence "that the nature of the case will allow" (17 Hals., 4th ed., pp. 8-9, para. 8) for consideration by the triers of fact. Such evidence can then be supplemented by secondary evidence to the extent that such secondary evidence remains relevant. What particular use will be made of the evidence during the course of the trial then becomes essentially a matter of discretion for the trial judge depending on the particular circumstances of any given case.

146 The *Canada Evidence Act*, s. 31.2, addresses electronic documents as follows:

> (1) The best evidence rule in respect of an electronic document is satisfied:
>
> (a) on proof of the integrity of the electronic document system by or in which the electronic document was recorded or stored; or
>
> (b) if an evidentiary presumption established under s. 31.4 applies,5
>
> (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.

147 The Best Evidence Rule does not preclude the admissibility of the Notepad or Camtasia copies of the conversations. I reach that conclusion for the following reasons.

148 First, without necessarily accepting the applicant's argument that the original of the conversations was stored on Yahoo's server somewhere, the officer made both the Notepad and Camtasia copies herself and has testified how they were made. They are copies of the original conversations. What the accused suggests is required is a certified copy of what is on Yahoo's server. While not certified, I have the officer's evidence that she made the copies, initially from the texts that she participated in creating on her own computer and was accessible through using her computer on the dates indicated earlier and then from what Yahoo has on its server months later using her Yahoo email account. While there are errors in both copies, there is no suggestion that the Notepad copy did not come from the texts the officer and "respect_power" created or that the Camtasia copy came from somewhere other than Yahoo's server. The officer's evidence provides an evidentiary basis upon

> which I find the copies are admissible. She has explained why she did not attempt to contact Yahoo. In these circumstances, I am not persuaded the admission of both copies offends any common law or statutory rule. The errors in the two copies go to weight, not admissibility.
>
> 149 Second, in the alternative, the officer created parts of the text messages on her computer and copied them herself from her computer. She participated in the conversation. She has testified that what was recorded are the conversations that occurred and that the contents are accurate with the two errors noted. Her evidence is the best evidence of these conversations. I agree with the Crown that the issue is one of completeness or the weight to be attributed to her evidence regarding the contents of the conversations.

[27] In *R. v. Duncan*, 2016 ONSC 1126, Code J. also considered the best evidence rule and determined:

> 28 In my view, given the above circumstances, secondary evidence as to the contents of the original Unitpool records is admissible pursuant to the "best evidence" rule. The only question is whether Mr. Corsi's recollection of those contents, as opposed to a hard copy, is admissible. This issue, which concerns the form of the "best evidence," is discussed in Lederman, Bryant, and Fuerst, *The Law of Evidence in Canada, supra*, at pp. -3:
>
> > Secondary evidence has been admitted when the court is satisfied that the original document existed and it has been lost or destroyed. Proof of its loss or destruction need not be made by direct evidence, but may be proved circumstantially by showing that a reasonably diligent search has been made in the places where the document was likely to be found.
> >
> > ...
> >
> > In *R. v. C. (J.S.)*, the Alberta Court of Appeal concluded that the best evidence rule was not a bar to the admissibility of testimony describing the contents of a video that was unavailable to be played at trial due to administrative/investigative error. Commenting on an earlier decision in *R. v. After Dark Enterprises Ltd.*, the Court noted:
> >
> > > In *After Dark Enterprises* this Court rejected the contention that the prosecution could not call any other evidence if real evidence on the same point was available to be seized and had not been seized. It commented that to do so would extend the best evidence rule far beyond its original purpose, which was simply to avoid fraud and forgery: at para 9. What is common to both cases is that the video was simply not available, and the Crown has provided an explanation as to why the video was not available.
> > >
> > > In our view the best evidence rule does not preclude the admission of *viva voce* evidence of persons who observed the video (see *R. v.*

> *Pham*, 1999 BCCA 571 at paras 18-25, 139 C.C.C. (3d) 539). However, the evidence may vary greatly in its weight and reliability. In this case, the trial judge was entitled to admit the evidence of the police officers who testified about what they observed in the video, and to give it the appropriate weight. It was only one item among several pieces of evidence which the trial judge found to be confirmatory of the identification evidence.
>
> ...
>
> A party tendering secondary evidence need not negate every possibility of the existence of the best evidence. Loss or destruction need not be proved directly or circumstantively where it is impossible or highly inconvenient to produce the original, for example, where the characters are on something such as a wall, monument, or other thing which cannot very well be removed. So far as admissibility is concerned, there are no degrees of secondary evidence, and oral evidence of the contents of a paper from a person who has read it and a copy of the document are put exactly on the same footing. While more weight may be attached to a copy of a document than oral evidence of it, there is no requirement to account for copies before oral evidence can be adduced [Emphasis added].

[28] Although discussing the admissibility of text messages in a different context, that is in the context of a *Charter* application, Rosinski J. stated in *R. v. Burns*, 2014 NSSC 436:

> 104 At the hearing I also inquired of counsel, regarding their positions on whether, presuming the text messages, and associated references in Mr. Burns police statement, were not permitted into evidence, would KJA and Mr. Burns (if he testified) in their testimony at trial, still be entitled to refer to the text messaging in any event based on their recollection of the text message contents? I indicated to counsel that Justice Abella at para. 5 in *R. v. Telus Communications Co.*, 2013 SCC 16, stated: "Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process." However, I note that if Mr. Burns and KJA had spoken on the telephone, there would be no record of what they said, and at trial they would both be permitted to, and have to, testify from recollection as to what they said.

[29] Justice Rosinski went on to consider the defence claim of negligence regarding the R.C.M.P. and the connected claim that the evidence should be excluded as a result. In rejecting the defence motion to exclude the evidence in the context of a *Charter* application Rosinski J. commented on the defence complaints regarding police efforts to collect the texts:

> 112 I am unaware of any reported decision, in which the police have been found unacceptably negligent in similar circumstances. No court has gone as far as to say that the circumstances in the case at Bar meet the threshold for effectively imposing an obligation of disclosure or production on the Crown for evidence that "should have been seized", breach of which is a breach of s. 7 of the *Charter*. Most recently our Court of Appeal dealt with an allegation of "unacceptable negligence" and loss of evidence which had been in the possession of the police (taser video) in *R. v. Boliver*, 2014 NSCA 99, per Bryson, JA. at paras. 32 - 34. Some courts have concluded that a failure to seize or secure evidence may amount to negligence which could underpin a claim of prejudice to an accused's right to make full answer and defence: *R. v. Abukar*, 2009 ABPC 136; *R. v. Shewchuk*, 2014 ABPC 141; *R. v. Gill*, 2014 SKQB 176.
>
> 113 I conclude that the law has not gone that far, nor should it. There was no duty on the Constable to view the text messages and seize the phone. Not having viewed the texts or seized the phone, the phone and necessarily the text messages on that phone, were not transformed into "fruits of the investigation", and therefore no latent obligation of disclosure or production crystallized until June 28, 2011 when the phone was seized.
>
> 114 Even presuming that, on June 17 - 18, 2011 the phone was then effectively in the hands of the police, thus crystallizing a later obligation of disclosure or production, in the circumstances I do not find that Constable Parasram's actions or inactions cumulatively amount to negligence, much less so, to unacceptable negligence.
>
> 115 I conclude that it was reasonable for the Constable to make a notation of the evidence as he did, as there was no material risk identified in the evidence, to suggest that the text messages would not survive on KJA's phone until a major crime unit investigator could meet with her. I infer that the Constable would have known or believed that the text messages may also be available by seizing Mr. Burns' phone, or possibly by accessing production orders to obtain records from service providers. I infer that the Constable was aware that KJA needed her phone for work, and given the reality of the modern and personal importance of mobile phones, he would have been reluctant to deprive her of the phone. The Constable was also acting in accordance with an established protocol for sexual offense allegations, that intends to limit the amount of investigation done by the initial officer receiving the complaint. At his level of experience, the Constable may understandably, and quite properly in this case in my view, have been deferential to the strict wording of the protocol.

[30] As noted in the cases, the *Canada Evidence Act*, R.S.C. 1985, c. C-5, makes specific provision for a best evidence rule in respect of electronic documents: s. 31.2. In his *Manual of Criminal Evidence*, Justice Watt summarizes the relevant provisions in the following terms, at s. 31.1:

> Section 31.2 describes how the *best evidence rule* is satisfied in connection with electronic documents in general, and, in particular, electronic documents in the form of a printout. In general, the best evidence rule is satisfied by *proof* of the *integrity* of the appropriate electronic documents *system*, or through any evidentiary *presumption* established by regulation under s. 31.4. Hard copies of electronic documents satisfy the best evidence rule, in the absence of evidence to the contrary, by usage or reliance.
>
> Section 31.3 creates a *rebuttable presumption* of integrity for an electronic documents system, which may help satisfy the best evidence rule in relation to an electronic document under s. 31.2(1)(a). The presumptions created by regulation under s. 31.4 do likewise under s. 31.2(1)(b).
>
> Sections 31.5 and 31.6 may be considered together. Under s. 31.5, evidence of business standards, procedure, usage, or practice, about recording or storage of electronic documents, may be received to determine the admissibility of an electronic document. This evidence may be adduced by affidavit under s. 31.6 with the rights of cross-examination given by the section.
>
> Section 31.7 limits the application of ss. 31.1-31.4 to the rules relating to authentication and best evidence. [Emphasis in original.]

[31] I am aware that there are provisions that relate specifically to electronic information and the best evidence rule. This issue has not been argued by either counsel. I am satisfied on facts of this case that the *Canada Evidence Act* provisions relating to electronic documents and the best evidence rule have no impact on my analysis in this decision.

[32] As a general rule, all relevant evidence is admissible. The weight to be ascribed to each piece of admissible evidence is determined once all the evidence on the trial has been tendered. In my opinion, the best evidence rule does not preclude the admission of the text messages in this case for the truth of their contents. The police made curious decisions regarding the preservation of the text messages. As a result the text messages in their most original form are not available for trial. However, the police testified about what they observed when they reviewed the text messages. Johnson testified about how he came to take photos of the texts and then print the photos of the texts, how he created the handwritten the transcripts and the accuracy of the transcripts. R.P. testified as to what she could recall regarding the contents of the text messages and the accuracy of the transcripts. Burton admits a text conversation with R.P. There is an adequate evidentiary foundation to allow the admission of the text messages and the text message transcripts.

Admissions As An Exception To The Hearsay Rule

[33] If the text messages do not offend the best evidence rule, Burton argues that they should be excluded on the grounds that they are hearsay. Burton says that the transcripts are not reliable because of the police ineptitude in properly preserving the actual texts. He also argues that the prejudicial effect of admitting the text transcripts far outweighs their probative value.

[34] The Crown says that the texts are admissible since they are admissions by Burton. The Crown says that admissions are a recognized exception to the hearsay rule and as a result, barring exceptional circumstances (which the Crown says do not exist in this case), are not subject to a principled analysis.

[35] The issue of the admissibility of admissions as an exception to the hearsay rule was considered in *Evans*, where Sopinka J. stated:

> 24 The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, supra, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.
>
> 25 The general rule is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as the judge of the law rather than as the trier of fact. See *R. v. B. (K.G.)*, *supra*, at pp. 783-84. If factual questions must be resolved, a *voir dire* may be required. The applicable standard of proof in both civil and criminal cases is on a balance of probabilities: *R. v. B. (K.G.)*, at p. 800.

[36] In *R. v. Moon* [2016] A.J. No. 523 (Alta. P.C.), the accused was charged with sexual assault. The Crown wanted to introduce voice mail and text messages allegedly sent from the accused to the complainant before and after the incident for the truth of their contents. In ruling the messages admissible, Cummings Prov. Ct. J. considered the hearsay aspect of the accused's argument and stated:

> 49 The Court cited *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40 (S.C.C.), for the proposition that hearsay evidence is presumptively inadmissible unless it falls

under an exception to the hearsay rule. If evidence falls within a traditional exception, it is admissible since it incorporates sufficient findings of necessity and reliability. Where an exception does not meet the requirements of necessity and reliability of a principled approach, in rare cases, this approach may prevail over the hearsay rule if it justifies the exclusion of the hearsay evidence.

50 The Court also cited *R. v. Khelawon*, [2006] 2 S.C.R. 787, 2006 SCC 57 (S.C.C.), where the Supreme Court held the traditional exceptions to the hearsay rule remain in place, and if the evidence falls under these exceptions, it is admissible. Hearsay evidence may still be admitted if necessity and reliability are established. The requirements of necessity and reliability constitute the so called "principled approach" or the principled exception to the hearsay rule.

51 The approach is based on the twin criteria of necessity and reliability. In general, it applies in cases where hearsay evidence does not fall under a traditional exception. In rare cases, hearsay evidence which falls under a traditional exception may be excluded on the ground that it lacks necessity and reliability in the specific circumstances of the case. Even where the requirements of the principled approach are satisfied, the court has the residual discretionary power to exclude it if its prejudicial effect outweighs its probative value.

52 Finally, in *Soh*, at paragraph 50 the Court held the accused had failed to establish that the contested evidence constituted one of the rare cases where evidence falls under a valid exception to the rule by not incorporating the indicia of necessity and reliability required for hearsay evidence to be admissible. The Court found the evidence was necessary given the accused could not be compelled to testify at trial and was reliable because it provided a circumstantial guarantee of its trustworthiness.

[37] As the court went on to note in *Moon*:

57 As stated in *Starr*, the onus is on the party contesting the admissibility of hearsay evidence which normally falls under a traditional exception to satisfy the court that the evidence should nonetheless be excluded.

58 The Court then went on to address the argument raised by the Crown that the evidence was admissible as it fell under a traditional exception such that it contained direct admissions by the accused, relying upon *R. v. Evans*, [1993] 3 S.C.R. 653, [1993] S.C.J. 115 (S.C.C.). There, Mr. Justice Sopinka considered whether the accused's admissions actually constituted hearsay evidence and added the circumstantial guarantees of trustworthiness are irrelevant with regard to this category of exception since the accused cannot allege his own admissions were unreliable. The Court considered Sopinka J.'s comments and concluded that the exception regarding admissions by a party satisfies the requirements of the principled approach to hearsay rule.

[38] In *R. v. Khelawon,* 2006 SCC 57, the court considered the admissibility of hearsay evidence. Mentioned among the many issues identified by the court is the possibility that a hearsay statement may not have been accurately recorded and might be unreliable, as is Burton's argument in this case. Charron J. spoke for the unanimous court on this point and stated:

> 2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. <u>The statement itself may not be accurately recorded.</u> Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder. [emphasis added]

[39] R.P. testifed on the *voir dire* and will be testifying at trial. If the transcripts of the text messages are truly reflective of communications between R.P. and Burton, then a copy of that text conversation would be found on Burton's cell phone. The police did not seize Burton's cell phone or obtain a production order to access his text messages from his service provider. According to the evidence on the *voir dire*, Burton admitted that he had such a text conversation with R.P. and when shown the one-page summary said "No, I do remember that conversation I had with her." The unrefuted evidence presented to the court on the *voir dire* is that the photos of the texts and the transcripts created by Johnson represent communications between

Burton and R.P. immediately before and immediately following the alleged sexual assault.

[40] The reliability of R.P.'s recollection as to the details of this conversation is negatively impacted by the fact that she was provided a copy of Johnson's transcription of the text messages prior to testifying about them in court. On the *voir dire* R.P. was able to generally recall the overall tenor of the text messages and was able to read parts of the text messages, even when small portions of the text messages were put to her in cross-examination without having the rest of the text messages to provide context. However, the independence of her recollection is tainted by the fact that Johnson's handwritten transcripts were provided to R.P. before she testified. As R.P. said when cross-examined as to how much she could actually recollect of the text messages and how much she was relying on Johnson's transcripts:

> Q. Are you being aided in reading that by having reviewed the handwritten notes?
>
> A. I don't have any handwritten notes.
>
> Q. No, but you've reviewed them, right?
>
> A. Once I know something I cannot unknown it. I don't know how to, how do you take that away once there's… I…
>
> Q. And when you say once you know something you're referring…
>
> A. That I knew what texts were even before I saw… like I don't know…

[41] In *Khelawon*, Charron J. determined:

> 42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, s. 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

[42] Justice Charron went on to find:

> 49 The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

[43] The traditional exceptions to hearsay were elaborated on by Charron J.:

> 60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge

> determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

[44] The issue of an admission or confession as an exception to the principled analysis was touched on by Charron J.:

> 65 Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

[45] Justice Charron went on to find:

> 93 … In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility - it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.

[46] In *R. v. Violette*, 2008 BCSC 422, Romilly J. undertook a thorough analysis of admissions as an exception to the hearsay rule and stated:

> 63 Admissions, which in the broad sense refer to any statement made by a declarant and tendered as evidence at trial by the opposing party, are admissible as an exception to the rule against hearsay: *R. v. Foreman* (2002), 169 C.C.C. (3d) 489, 62 O.R. (3d) 204 (C.A.), citing J. Sopinka, S. Lederman and A. Bryan, *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont.: Butterworths, 1999), at p. 291. The Court in *Foreman* went on to quote from Sopinka J. in *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 664:
>
> > The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to

> cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in *McCormick on Evidence*, ibid., p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

64 The basic principles are also captured at pp. 327-328 of *Watt's Manual of Criminal Evidence* 2006:

> The admissions doctrine is more likely a product of the adversary system than the result of the application of the principles of necessity and reliability. Admissions are presumed truthful because they have been made by D and are tendered by P to advance its case. They are received as an exception to the hearsay rule as evidence of the truth of their contents.
>
> Admissions may be made orally, in writing, or by conduct by or on behalf of D. They need not be against D's interest when made. It is left to P to determine whether they will be tendered in evidence. D need not have personal knowledge of the fact(s) admitted, provided s/he exhibits a belief in the truth of the information conveyed. Admissions are evidence both for and against their maker, D, who is entitled to offer explanation(s) for having made them.
>
> Silence may also constitute an admission, at least where a denial would be the only reasonable course if D were not responsible as alleged. The principle does not apply, however, where D is in the presence of police at the material time.
>
> Failure to deny an accusation is not the only form of adoptive admission. Any words, conduct, action or demeanour that amounts to an acknowledgement of the truth of an accusation, in some instances even a denial, may constitute an adoptive admission, depending upon all the circumstances.
>
> The trial judge must determine whether there is any evidence that D, by words, action, conduct, or demeanour, has adopted a statement made in his/her presence as his/her own, before the trier of fact may find it to be an admission and make use of it as such.
>
> All the circumstances must be considered. The weight of the admission is for the trier of fact.

Necessity and Reliability

[47] In *R. v. Cater*, 2014 NSCA 74, Saunders J.A. confirmed the decision of Derrick J. in admitting police intercepts for the truth of their contents. Judge Derrick had considered the issue of admissions in *R. v. Cater*, 2012 NSPC 15:

> 30 There is not a lot more to be said about the admissions exception to the prohibition against hearsay. The admissions exception is a complete answer to the issue of the admissibility of Kyle Cater's statements on the intercepts. I do not agree with Ms. Cooper's submission that for an accused's out-of-court statements to be accepted into evidence, they must not only qualify as admissions, they must also satisfy the requirements of the principled approach to hearsay. Obviously the accused, being non-compellable and entitled to remain silent, cannot successfully argue that the intercepted statements are not necessary. Nor can an accused complain about the unreliability of his or her own statements. (*Evans*, paragraph 24)

[48] Burton does not argue necessity. As the accused, he has a right to silence and cannot be compelled to testify. The police opted not to seize his phone and also chose not to obtain a production order to try to obtain the text information from his cellular service provider.

[49] In the instant case, Burton focuses his argument in one area: he argues that the efforts of the police to capture the texts was so poor as to make the texts and the transcripts unreliable.

[50] While there were many options available to the police to capture the texts that would have been superior to the route they chose, the medium relied on by the police to present the text messages does not render the evidence so unreliable as to prohibit its admission. All parties involved in the creation of the transcripts were available for cross-examination on the *voir dire* and could be available to testify at trial. R.P. says she can remember the text conversation and is also available for cross-examination.

[51] The Crown has proven on a balance of probabilities that the photos of the texts and transcripts of the texts are admissible. The weight to be given to the contents of the texts and the transcripts is something that will be determined once all of the evidence has been presented on the trial proper.

Probative Value vs. Prejudicial Effect

[52] In discussing the concept of probative value Moldaver J. considered the following in *R. v. Hart*, 2014 SCC 52:

> 94 Determining whether the probative value of an item of evidence outweighs its prejudicial effect requires engaging in a "cost benefit analysis" (*R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 21). That is, trial judges must assess "whether [the evidence's] value is worth what it costs" (ibid.). The first step in conducting this exercise, then, is to assess the value of the proposed evidence.
>
> 95 How are trial judges to assess the value of evidence? This requires more than asking whether the evidence is logically relevant; it necessitates some weighing of the evidence. After all, probative means "tending to prove an issue" and "questionable evidence will have less of that tendency" (*R. v. McIntyre*, 1993 CanLII 1488 (Ont. C.A.), at p. 2). It would be "artificial" and "self-defeating" for trial judges to ignore defects in the evidence during the assessment of its value (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (6th ed. 2011, at p.38)). Generally, what this weighing exercise requires will vary depending on the specific inferences sought to be drawn from a piece of evidence.
>
> 96 As one example, trial judges are routinely called upon to determine the admissibility of expert evidence. Part of the admissibility inquiry involves taking stock of the probative value of the proposed evidence. This requires weighing the evidence and assessing its reliability:
>
> > When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.
>
> (*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, 87, per Doherty J.A.)
>
> 97 Similarly, in *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.), Doherty J.A. held that otherwise admissible hearsay evidence may be excluded on the basis that its prejudicial effect outweighs its probative value. This can occur in circumstances where "the credibility or reliability of the narrator of the out-of-court statement is so deficient that it robs the out-of-court statement of any potential probative value" (para. 57). This Court endorsed that approach in *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 51.
>
> 98 Undoubtedly, weighing evidence in this way thrusts trial judges into a domain that is typically reserved for the jury. The jury, as the trier of fact, is ultimately responsible for weighing evidence and drawing conclusions from it. The overlap of roles cannot be avoided, but this is not problematic as long as the respective functions of the trial judge, as gatekeeper, and the jury, as finder of fact, are fundamentally respected. In conducting this weighing exercise, the trial judge is

> only deciding the threshold question of "whether the evidence is worthy of being heard by the jury" and not "the ultimate question of whether the evidence should be accepted and acted upon" (*Abbey*, at para. 89; see also Paciocco and Stuesser, at p. 38).

[53] Turning to the issue of prejudicial effect, Moldaver J. examined the issues of moral prejudice and reasoning prejudice in the context of a Mr. Big confession situation and stated:

> 107 On the other hand, the risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. Moreover, trial judges must bear in mind that limiting instructions to the jury may be capable of attenuating the prejudicial effect of this evidence.

[54] Justice Moldaver then explained how to compare the probative value to the prejudicial effect in the context of a Mr. Big operation:

> 108 In the end, trial judges must weigh the probative value and the prejudicial effect of the confession at issue and decide whether the Crown has met its burden. In practice, the potential for prejudice is a fairly constant variable in this context. Mr. Big operations are cut from the same cloth, and the concerns about prejudice are likely to be similar from case to case. As a result, trial judges will expend much of their analytical energy assessing the reliability of the confessions these operations generate.
>
> 109 Determining when the probative value of a Mr. Big confession surpasses its potential for prejudice will never be an exact science. As Justice Binnie observed in *Handy*, probative value and prejudicial effect are two variables which "do not operate on the same plane" (para. 148). Probative value is concerned with "proof of an issue", while prejudicial effect is concerned with "the fairness of the trial" (*ibid*.). To be sure, there will be easy cases at the margins. But more common will be the difficult cases that fall in between. In such cases, trial judges will have to lean on their judicial experience to decide whether the value of a confession exceeds its cost.
>
> 110 Despite the inexactness of the exercise, it is one for which our trial judges are well prepared. Trial judges routinely weigh the probative value and prejudicial effect of evidence. And as mentioned, they are already asked to examine the reliability of evidence in a number of different contexts, as well as the prejudicial effect of bad character evidence. They are well positioned to do the same here. Because trial judges, after assessing the evidence before them, are in the best position to weigh the probative value and prejudicial effect of the evidence, their decision to admit or exclude a Mr. Big confession will be afforded deference on appeal.

[55] A helpful discussion regarding the possible prejudicial effect certain evidence may have on a trial can be found in *R. v. Frimpong*, 2013 ONCA 243, where the unanimous court stated:

> 18 A trial judge can exclude evidence offered by the Crown where the prejudicial effect of the evidence outweighs its probative value. Evidence is prejudicial in the relevant sense if it threatens the fairness of the trial. Evidence may be prejudicial if it cannot be adequately tested and challenged through cross-examination and the other means available in the adversarial process. Evidence may also be prejudicial if there is a real risk that the jury will misuse the evidence (e.g. propensity evidence), or be unable to properly assess the evidence regardless of the trial judge's instructions. This latter form of prejudice must, however, overcome the strong presumption that jurors can and do follow the trial judge's instructions.

[56] Justice Chipman reviewed the value of text messages in *R. v. Calnen*, 2015 NSSC 319:

> 19 In *R. v. Howell*, 2014 BCSC 2196, Justice Griffin made several helpful comments regarding the reliability and probative value of text messages:
>
> > [34] Because text messages are in written form, the Nova Scotia Court of Appeal in *Gerrior* found them to have a higher measure of reliability than hearsay evidence of oral cell phone conversations (at para. 46). Because of this, in the circumstances of that case, the requirement of necessity was relaxed (at para. 54), applying *Baldree* at para. 72.
> >
> > ...
> >
> > [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 messages 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.
> >
> > ...
> >
> > [56] I am also satisfied that the probative value of the evidence outweighs its prejudicial effect. In this regard, I do observe that some of the evidence in Exhibit A is of little probative value. However, since it is a single report, it is convenient to enter it for a limited purpose for those entries that are probative without attaching any weight to the irrelevant content, such as messages that are merely social and such as the column indicating the time

> of the messages, which is not accepted as accurate given the confusion with the notations "GMT" and "GMT minus 4", and of course, the report is not to be given weight with regard to the sequence of the messages.

20 Ultimately the Court found that *R. v. Baldree*, 2013 SCC 35, was not very helpful because text messages are inherently more reliable than phone calls. In that regard, Justice Griffin stated:

> [23] Since the evidence in *Baldree* did not fit within a traditional exception to the rule excluding hearsay evidence, in order to be admitted it needed to be shown it was both necessary and reliable. The Court held that neither aspect of the principled approach to the admission of hearsay evidence was established on the evidence in that case.
>
> [24] Here, we are dealing with text messages sent to a cell phone in which the messenger purports to be seeking to buy drugs. At first glance, it would seem counterintuitive to treat text messages seeking to buy drugs differently than oral requests to buy drugs over the same cell phone. Is not the implied assertion raised by this circumstantial evidence the same: that the declarant is asserting that the accused sells drugs? However, there are important differences on the facts and law here:
>
> > 1. On this *voir dire*, we are dealing with written statements. In *Baldree*, the Supreme Court of Canada emphasized that it was dealing with exclusively verbal statements and it was leaving to another day the issue of the applicability of the hearsay rule to inferences that can be drawn from nonverbal conduct (at para. 63).
> >
> > 2. On this *voir dire*, we are dealing with several statements made in the days or weeks prior to the accused's arrest. In *Baldree*, the statement was made by a single person after but close in time to the accused's arrest.

21 In *R. v. Gerrior*, 2014 NSCA 76, the Court of Appeal considered the admissibility of post-arrest text messages on the accused's cell phone. The Court upheld Judge Buchan's finding that the messages were admissible under the principled exception to hearsay. The appellant urged the Court to find that the trial judge erred in admitting the exchanges, arguing that *Baldree* changed the law about admissibility of such evidence.

22 Beveridge J.A., MacDonald C.J.N.S. and Bryson J.A. concurring, found that the number of text messages can support reliability:

> [43] Justice Fish was equally succinct in finding that the single call failed to meet the threshold for reliability:
>
> > [69] Nor is the single telephone call in this case sufficiently reliable. As Feldman J.A. found in the court below, "[t]here was no basis to say that the caller's belief was reliable without testing the basis for that belief by cross-examination" (para. 146). Indeed, this is not a

> situation "in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished": *Khelawon*, at para. 62, quoting *Wigmore on Evidence*, at s.1420

[44] But in the case at bar, there was not just one call, but three coded conversations, which in the uncontested opinion of Cst. Peddle, were about obtaining cocaine from the appellant. Does this make a difference? In these circumstances, I find that it does. Justice Fish specifically acknowledged that the existence of multiple calls could inform the analysis of necessity and reliability. He wrote as follows:

> [70] In concluding as I have, I take care not to be understood to have proposed a categorical rule for drug purchase calls. Although the call at issue here does not withstand scrutiny under the principled approach, this need not always be the case.
>
> [71] For example, where the police intercept not one but several drug purchase calls, the quantity of the calls might well suffice in some circumstances to establish reliability -- indeed, while "[o]ne or two might [be] mistaken, or might even have conspired to frame the defendant as a dealer", it would "def[y] belief that all the callers had made the same error or were all party to the same conspiracy": I. H. Dennis, *The Law of Evidence*, (4th ed. 2010), at p. 708.
>
> [72] Moreover, the number of callers could also inform necessity. The Crown cannot be expected, where there are numerous declarants, to locate and convince most or all to testify at trial, even in the unlikely event that they have supplied their addresses -- as in this case. And it is important to remember that the criteria of necessity and reliability work in tandem: if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed: see ***Khelawon***, at para. 86, citing *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, and *R. v. U. (F.J.)*, 1995 CanLII 74 (SCC), [1995] 3 S.C.R. 764. [Emphasis added]

...

[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 communications 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 towards satisfying the threshold requirement of reliability.

[47] Ultimate reliability, that is, the truth of the implied assertion that the appellant was a person who was trafficking in cocaine is a different issue--although it is clear that other evidence tending to confirm the truth (i.e., the

> ultimate reliability) of the implied assertion is relevant to the admissibility analysis (*R. v. Khelawon*, at paras. 93-100).
>
> [48] In this regard, the Crown points to the evidence within the text messages themselves, and to the considerable body of other circumstantial evidence, including a number of pre-arrest texts for commerce in cocaine, all of which tend to support the reliability of the implied assertion that the appellant was an individual who trafficked in cocaine. I agree.
>
> 23 This decision has been cited with approval in the *Howell* decision referenced above, and in *R. v. Savino,* 2014 MBQB 221.

[57] The photos of the text messages and the transcripts of the text messages do not fit within the traditional text message framework since the photos are blurry at times and both the photos and the transcripts are secondary evidence. That being said, the circumstances of the creation of the transcripts, the availability of the police and R.P. to testify and Burton's own statement all provide sufficient foundation for their admissibility. The strong probative value of the photos of the multiple text messages and the transcripts of the multiple text messages in this case far outweighs any possible prejudicial effect on the trial occasioned by the choice of the R.C.M.P. as to how they would preserve the text messages.

Conclusion

[58] The photos of the text messages and the handwritten transcripts of the text messages will be admitted as evidence on the trial proper.

Arnold, J.