SUPREME COURT OF NOVA SCOTIA
Citation: *R.v. Webber*, 2018 NSSC 342

Date: 20180912
Docket: CRH 462516
Registry: Halifax

Between:

Her Majesty the Queen

v.

Renee Allison Webber

Voir Dire #6 – Admissibility of Text Message
Restriction on Publication: ss. 486.4, 486.5, 517(1) and 539(1) of the *Criminal Code of Canada*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 11, 2018, in Halifax, Nova Scotia
Oral Decision:	September 12, 2018, in Halifax, Nova Scotia
Written Release:	May 9, 2019, in Halifax, Nova Scotia
Counsel:	Cory Roberts and Erica Koresawa, for the Crown Donald C. Murray, Q.C., for the Defendant

Overview

[1] During the complainant's cross-examination, the Defence proposed to put into evidence a text message between participants referred to by the usernames "Meek Mula" and "Madii". The exchange began after midnight on November 22, 2015, and continued until after 10:00 a.m. on November 22, 2015.

[2] The number associated with the user "Meek Mula" was identified by the complainant as her number and her contact name. The complainant gave evidence concerning her portion of the text conversation. The Defence sought admission of the messages from "Madii", to be used by the jury for the truth of their contents, without having the author of those text messages testify.

[3] I provided by bottom-line decision during trial denying the admission of the texts from Madii for the truth of the contents but allowing the Defence to put those messages to the complainant on cross-examination. I indicated my written reasons would follow. What follows are those reasons.

[4] For context I first reproduce the entirety of the text conversation.

The Texts in Issue

Participants: Meek Mula [lip emoticon, bird emoticon], Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:00:29 AM (UTC-4)

Body:

Madi????

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:00:38 AM (UTC-4)

Body:

Yeah

From: "Meek Mula"

Timestamp: 22/11/2015 12:00:40 AM (UTC-4)

Body:

I'd be weak if this isn't u

From: Madii [lip emoticon x 2]

Timstamp: 22/11/2015 12:000:47 AM (UTC-4)

Body:

This is

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:00:52 AM (UTC-4)

Body:

Lmao

From: “Meek Mula”:

Timestamp: 22/11/2015 12:00:55 AM (UTC-4)

Body:

Oh thank god

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:00:57 AM (UTC-4)

Body:

Hahahahja

From: “Meek Mula”

Timestamp: 22/11/2015 12:01:01 AM (UTC-4)

Body:

What u doing

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:01:12 AM (UTC-4)

Body:

Not much what bout u

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:01:14 AM (UTC-4)

Body:

:)

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:01:18 AM (UTC-4)

Body:

Getting ready

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:01:31 AM (UTC-4)

Body:

She’s Getting me a G of white

From: “Meek Mula”

Timestamp: 22/11/2015 12:02:02 AM (UTC-4)

Attachments: #1: chats/imessage/attachements715/IMG_5783.jpeg

Body:

From: “Meek Mula”

Timestamp: 22/11/2015 12:02:04 AM (UTC-4)

Body:

Bored and waiting for him to leave so I can sneak over

From: “Meek Mula”

Timestamp: 22/11/2015 12:02:12 AM (UTC-4)

Body:

Omg

From: “Meek Mula”

Timestamp: 22/11/2015 12:02:18 AM (UTC-4)

Body:

Wanna go splits on it

From: Madii [lips emoticon x 2]

Timestamp: 22/11/2015 12:03:41 AM (UTC-4)

Body:

Sure girl

From: Madii [lips emoticon x 2]

Timestamp: 22/11/2015 12:03:51 AM (UTC-4)

Body:

Well do our thang get $$

From: “Meek Mula”

Timestamp: 22/11/2015 12:04:20 AM (UTC-4)

Body:

Goal: a g [praying hands x 4]

From: “Meek Mula”

Timestamp: 22/11/2015 12:04:29 AM (UTC-4)

Body:

For each of us

From: “Meek Mula”

Timestamp: 22/11/2015 12:04:33 AM (UTC-4)

Body:

Hopefully more

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 12:05:25 AM (UTC-4)

Body:

[100 emoticon x 4]

From: “Meek Mula”

Timestamp: 22/11/2015 12:06:12 AM (UTC-4)

Body:

I’m all ready except makeup but my cheeks are burning up

From: “Meek Mula”

Timestamp: 22/11/2015 12:07:01 AM (UTC-4)

Attachments:

#1: chats/iMessage/attachments715/IMG_2280.jpeg

Body:

Red af

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 2:06:51 AM (UTC-4)

Body:

Say your calls gonna be here in like 10 mins so they leave

From: “Meek Mula”

Timestamp: 22/11/2015 2:07:45 AM (UTC-4)

Body:

I don’t have one rn for sure tho he’ll be mad if I make him leave for nothing

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From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 3:45:33 AM (UTC-4)

Body:

Donezo

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 4:34:09 AM (UTC-4)

Body:

Come over

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 6:34:53 AM (UTC-4)

Body:

U good?!

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 6:47:57 AM (UTC-4)

Body:

???

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 6:48:07 AM (UTC-4)

Body:

Wasn't it a hh call?

From: "Meek Mula"

Timestamp: 22/11/2015 6:58:50 AM (UTC-4)

Body: He's staying till 8 for 520

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 7:10:48 AM (UtC-4)

Body:

Nice [smiley face with sunglasses emoticon] there u go baby girl

---

From: "Meek Mula"

Timestamp: 22/11/2015 7:31:25 AM (UTC-4)

Body:

He's in the shower rn he's fucked off Coke he was sweating and shit

---

From: "Meek Mula"

Timestamp: 22/11/2015 7:31:45 AM (UTC-4)

Body:

I gotta tell u about it when he leaves in like a hour

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 7:31:54 AM (UTC-4)

Body:

Lmao okay

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 7:32:05 AM (UTC-4)

Body:

Better text Kyle lol and tell him how lon he's staying

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 7:46:32 AM (UTC-4)

Body:

U good ma

From: "Meek Mula"

Timestamp: 22/11/2015 7:49:28 AM (UTC-4)

Body:

I need a smoke like I'm balling my Eyes out

From: "Meek Mula"

Timestamp: 22/11/2015 7:52:28 AM (UTC-4)

Body:

Come out

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 9:01:13 AM (UTC-4)

Body:

What's up

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 9:01:14 AM (UTC-4)

Body:

U doing that call

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 9:14:07 AM (UTC-4)

Body:

??

From: “Meek Mula”

Timestamp: 22/11/2015 9:14:41 AM (UTC-4)

Body:

300 for that dirty call lol I’m giving him the a dress now

From: Madii [lip emoticon x 2]

Timestamp: 22/11/2015 9:14:42 AM (UTC-4)

Body:

?

From: Madii [lip emoticon x 2]

Timestamp: 11/22/2015 10:35:45 AM (UTC-4)

Body:

Save 100$ for yourself

From: Madii [lip emoticon x2]

Timestamp: 22/11/2015 10:35:50 AM (UTC-4)

Body:

Don’t tell Kyle

From: Madii [lip emoticon x 2]

Timestamp: 10:36:02 AM (UTC-4)

Body:

…I’m getting a plan tigarger

From: Madii [lip emoticon x 2]

Timestamp: 11/22/2015 10:36:14 AM (UTC-4)

Body:

Togather*

From: “Meek Mula”

Timestamp: 22/11/2015 10:41:46 AM (UTC-4)

Body:

Come to my room

Defence Position

[5] The Defence argues that the texts are admissible for their truth on one of two grounds:

1. Under the principled exception to the hearsay rule; or,
2. As a document in the possession of the complainant.

[6] The Defence argues that these texts are probative of M.S.'s drug use and how she spent the money the defence says she earned as a sex worker.

[7] The Defence seeks to introduce texts from "Madii" for a hearsay purpose, to be used as factual assertions. The texts were clearly made out of court and the Defence seeks to prove the facts asserted in the texts. The Defence reviewed several cases including *R. v. Munroe*, 2016 NSCA 16, and *R. v. Bradshaw*, 2017 NSSC 35.

[8] The Defence argues that *R. v. Calnen*, 2015 NSSC 319, is applicable. In that case, the Crown sought to introduce cellphone text messages between the victim and a third party in which the victim expressed concerns for her safety in relation to the accused. The texts were ruled admissible.

Law and Analysis
The Principled Exception to the Hearsay Rule

[9] The text messages, referenced as chat -715.txt. contain hearsay evidence. The author of one portion of the conversation "Madii" will not be called to testify in this case. Hearsay evidence is presumptively inadmissible. These texts from "Madii" are hearsay in keeping with *R. v. Khelawon*, 2006 SCC 57, and many other decisions:

(a) The statement is adduced to prove the truth of its contents; and,

(b) There is no contemporaneous opportunity to cross-examine the declarant.

[10] Hearsay is presumptively inadmissible because of the dangers, such as misperceived or wrongly remembered facts, unintentionally misleading statements, or knowingly false statements.

[11] The Court in *R. v. Tremblay*, 2012 BCSC 2105, analysed how hearsay evidence is admissible when the evidence does not fall within the traditional exceptions:

[29] I now turn to consider the statements the Crown seeks to admit which do not fall within a traditional exception. For all of the statements, there is no question that the criterion of necessity has been met in the circumstances of this case. The statements which are sought to be admitted are from the two deceased girls. Their statements about their actions, physical condition and state of mind are relevant to the charges. The Crown has no other way to adduce this evidence.

[30] The serious issue here is whether the Crown has satisfied the onus of showing that the statements meet the reliability requirement. Of course, as explained in *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at para. 75, threshold reliability is distinct from ultimate reliability:

> 75 The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.

[31] As the Crown's argument suggests, there are two primary ways in which threshold reliability can be satisfied. The first is by showing there are adequate substitutes for testing the reliability of the hearsay statement. The second is by showing, through the circumstances surrounding the making of the statement, that it has sufficient inherent trustworthiness. As Charron J. noted at para. 92 in *Khelawon*, the inquiry that must be made on the *voir dire* is different depending on which approach is taken to the reliability analysis:

> ... When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not...

[32] The circumstances under which the statements were made in this case are not such that I could conclude there is a sufficient basis to assess the statements' truth and accuracy. That can properly occur only where the statement is made in circumstances where there is a satisfactory guarantee of accuracy and truthfulness. At the very least, the statement would need to have been recorded in some fashion. Casual telephone conversations which do not fall within the traditional exceptions will typically require an examination of both the inherent trustworthiness and the likely truth of the statement. Of course, the latter inquiry

> must be limited to threshold reliability and not intrude on the question of ultimate reliability.
>
> [33] In *Khelawon* at para. 4, the Court concluded that all factors which may be relevant can be considered on an admissibility inquiry including the presence of supporting or contradictory evidence. The decision in *R. v. Blackman*, 2008 SCC 37, confirms that corroborative evidence can be used to assess threshold reliability.
>
> [34] With these principles in mind, I turn to consider the relevant factors relating to the hearsay statements which are not covered by the traditional exceptions.
>
> [35] I will start by examining the text messages in Conversations 3 to 8 inclusive. These are all conversations between Ms. Jackson or Ms. Lalonde and their friends. The circumstances of the messages have similarities to the circumstances which apply to the traditional exceptions. The statements are spontaneous and were made in response to inquiries from friends. The statements deal with simple subjects, including what they are doing and where they are. Examples of statements dealing with what the girls are doing include: "waiten 4 justine"; "DRINKING HBU?"; "They bein drunk"; "drinkin hbu?" and "Justine is fucking hammered". Examples of statements discussing where the girls are and where they are going include: "we at the gazebo"; "Near metro, what u doing?"; "Me Kayka and Justine, well wanna meet at 22nd?" and "were wit god."
>
> [36] These text messages are spontaneous statements made in friendly, casual conversation. Such statements are typically made quickly with little forethought. It is evident that the text messages were sent contemporaneously with the activities described. All of these factors give a degree of reliability to the statements.
>
> [37] There is, of course, a downside to spontaneity and informality. There is no need to be truthful in this kind of communication. It is common to joke, be imprecise, inarticulate or sarcastic in text messages. For example, A.D. asks Ms. Jackson, after being told that the girls are being drunk, "Are you as drunk as them?" and she replies, "Ha ha no." Is this sarcasm or a truthful statement? The informality of the medium can clearly impede clarity and, perhaps, reliability.
>
> [38] However, there is no evidence before the court that the girls have any reason to be untruthful about the content of the messages. Quite simply, these were innocuous statements about routine activities for the girls. They are telling their friends what they are doing, where they are going and who they are with.

[12] Similarly, the texts in this case are between two individuals who know each other. These individuals are seemingly located in the same vicinity in the same hotel. These messages were exchanged during a short period of time initially and then continued sporadically throughout the rest of the early morning. They are

spontaneous statements. They are casually made. They were informal. The question is are they truthful. In casual, spontaneous conversation people do commonly joke and are imprecise and inarticulate.

Necessity and Reliability

[13] When considering reliability and necessity I am guided by *R. v. Bridgman,* 2017 ONCA 940, where the issue was whether incoming text messages from unknown phones could be entered by Crown counsel as part of their case. The defence objected, arguing that these incoming text messages were presumptively inadmissible hearsay. The Ontario Court of Appeal commented as follows at paragraph 63:

> [63] Moreover, threshold reliability and necessity work in tandem. The more reliable a statement, the less important the necessity analysis may become. The criterion of necessity and reliability are said to intersect and "should not be considered in isolation": *Khelawon,* at para. 77. As they coexist in this symbiotic relationship, they may impact one another: *Khelawon,* at paras. 77, 86; and *Baldree,* at paras. 72, 96. The trial judge did not err in finding this to be the case here.

[14] In *Bridgman, supra,* the text messages coming in to the accused's phone were from individuals looking to purchase substances. The Court of Appeal upheld the trial judge's decision to admit the texts.

[15] The Court must engage in a principled analysis. I have considered whether the texts fall into a common-law exception to the hearsay rule. I have concluded that no common-law exception applies. I must go on to assess the necessity and the reliability of this evidence. Unlike in *Calnen, supra*, the declarant is not deceased. I must be careful not to separate the factors of necessity and reliability. I accept that there is a more permissive stance provided by the courts when the evidence is tendered by the accused. However, the court cannot abandon the threshold reliability inquiry in these circumstances.

[16] I have not heard any reason why the declarant cannot be called as a witness. In *Bridgman, supra*, the trial judge who admitted a number of text messages relied on the unlikelihood that a declarant would testify about their desire to purchase drugs. The trial judge concluded that the twin criteria of threshold reliability and necessity had been met. Based on this, it is clear that the court can draw assumptions that people may not come to court to testify about alleged conduct that is criminal in nature. On the face of these text messages, there is an apparent discussion between

the complainant and "Madii" about obtaining or purchasing cocaine. Given the subject matter of the text messages and the conclusions reached in similar circumstances in *Bridgman, supra*, I am satisfied that the criteria of necessity has been met.

[17] The court must also, at the same time, consider the issue of reliability. The court considers both procedural and substantive reliability. In this case, it is difficult to find a rational basis to evaluate the statements made in the text messages sent by "Madii". In terms of substantive reliability, I have not heard or been provided anything other than the texts, chat-715.txt and evidence from the complainant about her time with "Madii". This evidence about the circumstances does not provide a basis to reject alternative explanations other than the truthfulness or accuracy of the texts.

[18] The difficulty with the text messages is much of them utilize acronyms and abbreviations as well as emoticons. There is no clear way for a jury to determine the meaning of some of the texts from "Madii". It would engage presumptions and assumptions.

[19] As stated in *R. v. Munroe*, 2016 NSCA 16, merely because a comment or statement is made in the form of the text message does not, by virtue of it being written down, so to speak, and preserved, allow it to be immune from the principled hearsay considerations. As stated in by the trial judge in *R. v. Munroe*, "[i]f the statement is hearsay if made in court, it is equally hearsay if made in a text message" (para. 12).

[20] The difficulty here is that there is no way to test the reliability of the declarant's, that is "Madii's", assertions. The author of these texts will not testify or be cross-examined in the presence of the jury so that they can assess the declarant's credibility.

[21] In *R. v. Gerrior*, 2014 NSCA 76, our Court of Appeal considered the admissibility of text messages on an accused's cellphone. The court held that the messages were admissible under the principled exception to the hearsay rule. The Crown sought to use the text messages to support the conclusion that the accused was trafficking in cocaine. The Court concluded that a number of text messages could go to support reliability. In particular, the court said the following:

> [43] Justice Fish [in *R. v. Baldree*, 2013 SCC 35] 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.

[22] Here there is only one text exchange. There is also no other surrounding evidence.

[23] I have also considered the broader picture, which is that "Madii" could have been lying to, or joking with, the complainant. The court simply is not sure. In the circumstances, the court will allow the Defence to utilize the text message to cross-examine the complainant, and for the context of the responses provided, but not for the truth of the portions of the text coming from "Madii".

Documents in Possession

[24] The Defence argues that the texts from "Madii" are admissible as proof of the truth of the contents because they are in possession of the complainant. The Defence argues that the complainant recognized, adopted and acted upon the document and consequently, it is admissible as an exception to the hearsay rule.

[25] The documents in possession rule was described by the Ontario Court of Appeal in *Bridgman, supra*, as follows:

> [68] The rule is designed to permit the admission of documents in two different circumstances for two different purposes.
>
> [69] First, the rule allows for the admission of documents found in personal, constructive or joint possession of an accused as original circumstantial evidence of their contents to establish the accused's connection to or complicity in the matter to which the documents relate: *Ansari*, at para. 116. Second, where evidence exists that the accused has recognized, adopted or acted upon the documents found in possession, the documents may be admitted as an exception to the hearsay rule, allowing the trier of fact to consider them for the truth of their contents. As noted in *B.C. Securities Comm.*, at p. 33, "if the party in possession has recognized, adopted or acted on the document an admission of acceptance of its contents as true may be inferred."

> [70] This court addressed the dual nature of the admissibility doctrine in *Turlon*. The court adopted as correct the following passage from Hodge M. Malek & Sidney L. Phipson, *Phipson on Evidence,* 18th ed. (London: Sweet & Maxwell, 2013), at 37-10, pp. 1326-27, which remains substantively unchanged today:
>
> > Documents which are, or have been, in the possession of a party will … generally be admissible against him as *original (circumstantial)* evidence to show his knowledge of their contents, his connection with or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions* (*i.e.* exceptions to the hearsay rule) to prove the *truth* of their contents if he has in any way *recognised, adopted or acted* upon them. [Emphasis in original.]
>
> [71] Text messages are documents containing out-of-court statements. I reject the position that *Baldree* forecloses their admissibility under the documents in possession rule. When text messages are found in possession, they may be considered for admission as either original circumstantial evidence or hearsay. It all comes back to the purpose for admission.
>
> (ii) Documents in Possession as Original Circumstantial Evidence
>
> …
>
> [75] *Baldree* does not disentitle a party from seeking the admission of a document found in possession as original circumstantial evidence. This includes text messages. The critical question is the purpose for which the document is tendered. It is up to the party seeking to admit the text messages to clearly articulate the non-hearsay purpose for which they are admissible.
>
> [76] Of course, resort to this doctrine cannot constitute an end-run-around the hearsay rule. If the circumstantial value of the evidence turns on the truth of the assertion made by the non-testifying texter, then the traditional hearsay concerns will be present.

[26] The Court must consider whether the documents in possession rule allows the admission of texts from "Madii" if the complainant adopted the incoming messages; that is, where the texter recognized the messages and acted upon them. Adoption occurs when an individual expressly or impliedly acknowledges the truth of the statement through words, actions, conduct or demeanor. Adoption can also be interpreted from silence. As stated in *Bridgman, supra,* the mere arrival of a text message does not equate with adoption. The court stated as follows:

> [87] Just because a text message arrives on a cell phone does not mean it has been adopted. Even where it can be said that a message has been read, this does not constitute adoption sufficient to generate an exception to the presumptive rule of inadmissibility.

> [88] Allowing such easy passage of hearsay evidence into a trial, merely because an out-of-court statement lands on an accused's electronic device, would seriously compromise trial fairness. An accused should not be rendered vulnerable to the whims of others and messages they may send by way of electronic communication. It cannot be that the mere act of receiving a message on one's electronic device constitutes the act of adoption, thereby transforming the statement into an adoptive admission.

[27] However here, the query is whether the document in possession applies to anyone other than an accused. The defence did not provide any caselaw to indicate it did.

[28] The Defence seeks the admission of the entirety of chat-715.txt including the text from "Madii" admitted to prove the facts asserted in her portion of the conversation, not just for context. While the complainant responded to the texts we do not know if she "acted" on the texts.

[29] I reviewed the two cases provided by the defence: *Bridgman, supra,* and *Calnen, supra.* I conclude that the exception to the hearsay rule known as "documents in possession" does not apply in this case. All of the cases provided to the Court for consideration involving this principle apply to an accused's evidence being admitted as original circumstantial evidence. That, however, is not what is being asked by the Defence. The Defence is asking that "Madii's" texts be admissible as proof of the truth of their contents. In reviewing the caselaw, in order for a document to be admitted for the proof of the truth of the contents of the document under the document in possession rule, a witness must:

1. Recognize the document;
2. Adopt the contents; or,
3. Act upon it.

[30] I have no evidence on this at this point.

Conclusion

[31] Based on the foregoing, while I did not permit the Defence to put into evidence the messages from "Madii" for the truth of their contents, I will permit the use of those texts in cross-examination to explore what the complainant did in relation to the receipt of these texts and to place her responses in context.

Brothers, J.