

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 2220

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Supreme Court of British Columbia

DECIDED

15 November 2021

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2021 BCSC 2220 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2021 BCSC 2220

Date: 20211115

Docket: 27393-115

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling re Application No. 115 - Admissibility of FGL/SportChek Records

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

November 8-10, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 15, 2021

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Introduction

[1] The Crown seeks to tender company records relating to several clothing items as business records pursuant either to the Canada Evidence Act, R.S.C. 1985, c. C-5 [CEA] or at common law.

[2] Dean Wiwchar, against whom the Crown intends to tender these records at trial, opposes their admission on both bases.

background facts

[3] On January 17, 2012, Sandip Duhre was murdered at the Café One restaurant located at the Sheraton Wall Centre Hotel in Vancouver, B.C. The Vancouver Police Department ("VPD") began an investigation.

[4] Det. (now Sgt.) Sally Davies of the VPD reviewed CCTV footage from the Sheraton Wall Centre Hotel and surrounding areas. The shooter was wearing a very distinctive jacket that was mainly grey with lime green on the top third and the right arm of the jacket.

[5] Some online searching led Det. Davies to believe that the jacket worn by the shooter was a Men's Firefly Edge Core Insulated Jacket ("Firefly Jacket") and that it was available for sale at SportChek stores.

[6] Detectives from the VPD made a series of enquires of Ms. Lisa Van Oosten of FGL Sports Ltd. ("FGL"), the parent company of a number of chain retail stores in Canada, including SportChek. Ms. Van Oosten testified on this voir dire.

[7] The FGL records the Crown seeks to have admitted can be grouped into three categories:

a) records with respect to style details;

b) records with respect to a transaction at SportChek Metrotown; and

c) records with respect to Sims Forbes Men's Insulated Pants.

a) Style Details Records

- [8] In January 2012, Det. Hyde of the VPD contacted Ms. Van Oosten. He requested sales data regarding the Firefly Jacket with a very limited timeframe of January 1 to 17, 2012. Ms. Van Oosten emailed him the data he had requested.
- [9] In June 2012, Det. (now Sgt.) Dykman contacted Ms. Van Oosten and requested all transaction records for the Firefly Jacket prior to February 2012, cash and card, but limited the geographic area to the Lower Mainland of BC. Ms. Van Oosten emailed him a 19-page document containing 50 transactions that met those parameters. The first page of the document contained a screen capture of style details relating to the Firefly Jacket. Ms. Van Oosten obtained this record through the FGL web-based portal (the "Portal"). She used a snipping tool to paste a copy of the image from her computer screen into a Word document, along with some other records relating to sales transactions.
- [10] The Crown seeks only to tender the screen capture of the style details on the first page of this document, with the addition of the title "Firefly Jacket".
- [11] On July 25, 2012, police executed a search warrant on a locker associated to Mr. Wiwchar. A pair of Sims Forbes Men's Insulated Pants (the "Sims Pants") was seized.
- [12] In November 2013, Det. Dykman contacted Ms. Van Oosten and requested records relating to Sims Pants for a two-month period from December 1, 2011 to January 31, 2012, for all of Canada. Ms. Van Oosten emailed Det. Dykman a screen capture of the style details relating to the Sims Pants, along with a spreadsheet containing sales data relating to the pairs of Sims Pants that met those parameters. The Crown seeks to tender Ms. Van Oosten's screen capture of the style details of the pants.
- [13] In November 2017, Det. Dykman undertook a second review of all of the clothing items that had been observed and/or seized during an April 2012 search of a Surrey safe house associated to Mr. Wiwchar to confirm whether any corresponded to items purchased during a sales transaction of interest on December 18, 2011 at the Richmond Centre SportChek store. As a result of online searching, Det. Dykman believed that one of the items observed in the Surrey safe house, a green striped beanie hat, was likely one of the items present on the transaction record.
- [14] In November 2017, Det. Dykman emailed Ms. Van Oosten a screen capture of a sales transaction record from December 18, 2011 (an enlargement from a screen capture she had previously provided him) and enquired about the item listed as "UA Striped Bean" with its corresponding UPC code. Ms. Van Oosten emailed Det. Dykman confirming that this item was an "Under Armour Beanie Hat". She provided a screen capture of style details in relation to the hat, as well as a screen capture image of the hat that she had obtained from a colleague in the Purchasing Department. She does not recall the name of the person she obtained the image from or what computer system they obtained it from.

[15] The Crown seeks to tender the screen capture of the style details of the Under Armour Beanie Hat and the screen capture of the image of the hat. Ms. Van Oosten isolated her screen capture of these style details and the image she obtained from her colleague on a single page, and entitled it "Under Armour Beanie Hat".

b) Metrotown SportChek Transaction Records

[16] During the April 2012 search of the Surrey safe house, police found a number of firearms, a licence plate connected to the getaway vehicle used in the Duhre murder, along with other items of interest, including some SportChek clothing and shoes. A SportChek receipt with the date March 27, 2012 was photographed but the details of the specific items were not legible.

[17] In paragraphs 44 and 45 of Exhibit 102 in the trial, Admissions Regarding Juanita Hyslop, the accused have admitted that Mr. Wiwchar purchased some items from the Metrotown SportChek on March 27, 2012, and that several of those items were found by police in the Surrey safe house and the black Caravan parked in its associated underground parking lot. A record of the debit card portion of the transaction was appended to the admissions. The transaction number that appears on this record is #8718.

[18] Det. Dykman requested that Ms. Van Oosten provide the transaction records from the SportChek store at Metrotown Eaton Centre from March 27, 2012.

[19] On April 18, 2012, Ms. Van Oosten sent him a 31-page document setting out the sales transactions from that store on that date. She testified that it was a report she generated from an FGL program called AuditWorks and that the original source of the data in AuditWorks is from the Point of Sale ("POS") data from the retail stores. The Crown seeks to tender the record for transaction #8718. Although the record spans three pages, the Crown intends to tender a more readable one-page document containing the same data and with the title "Metrotown Transaction #8718" added.

c) Sims Pants Records

[20] In November 2013, Det. Dykman requested transactions records for sales of the Sims Pants during a two-month period, December 2011 and January 2012. Ms. Van Oosten testified that she used an FGL software program called Micros Retail XBR to obtain the sales data with these parameters, then converted it to an Excel spreadsheet so it could be emailed to Det. Dykman. Within this Canada-wide spreadsheet was a smaller BC-only spreadsheet, also obtained from XBR and converted to Excel so it could be sent to Det. Dykman. Ms. Van Oosten testified that original source of the data for both the AuditWorks and XBR programs is the POS data.

[21] Ms. Van Oosten looked up each of the transactions from the BC spreadsheet in the AuditWorks program. She then made screen captures of those transactions, put them into a Word document and emailed them to Det. Dykman. She agreed in cross-examination that she missed producing the record for one of the 126 items in the spreadsheet: Transaction

#1990 that appears on line 6 of the BC spreadsheet does not have a corresponding transaction record. She also readily agreed that when using her snipping tool, she cut off some of the digits from the first transaction on page 56 of Tab 11. It reads "61" and the rest of the digits appear to be cut off.

[22] Det. Dykman asked Ms. Van Oosten to cross-reference the transaction records of the Sims Pants with Firefly Jacket purchases to see if any of those transactions for Sims Pants also contained a Firefly Jacket. Ms. Van Oosten did so and found only one transaction met that search requirement. This transaction occurred on December 18, 2011 at Richmond Centre, transaction #8281. The Crown seeks to tender a document with this one record on a page in a slightly enlarged more readable size, with the title "Richmond Centre Transaction #8281 -- December 78, 2017".

[23] Ms. Van Oosten gave evidence with respect to how FGL data is obtained and accessed. With respect to the Portal, she testified:

Q All right. I'm going to ask you a few questions about the computer systems that you use to do your job. I understand that one of them that you use frequently is a web based portal, and that you access product information through that portal. Can you explain in some further detail just what this portal is, and what it does?

A This -- it's a web-based portal that centralizes all transactions detail, like transaction information, such as product description, UPC, size, colour, inventory stat -- status, and product and [indiscernible/videoconference] documents.

Q And so you use this portal to access information, such as you've just described, about your products?

A Yeah.

Q And does it have inventory information on there as well?

A Yes, it does.

Q And who would access -- who would actually access the portal?

A The store staff would use it to look up product for customers, or -- or the store, and so -- and staff at the office would use this to look up product as well.

Q All right. And so you're one of the staff at the office, and there are retail clerks in the stores?

A Yes, there is.

Q And both types --

A Yes.

Q -- both types of employees access the portal?

A Yes.

Q All right. What is the business purpose of the portal? Why do you have it?

A Inventory. Just inventory. To look up inventory.

Q Is it -- is it used then if you have some information about an item and you want to get more information?

A Yes, it is.

Q Does FGL still use the same portal that was used in 2012?

A No, it's no longer in use.

Q All right. And how does information or data get entered into the portal?

A IT would load that into it daily -- nightly

Q Okay. And by IT, you mean information technology people?

A Yes.

Q Okay. And then how would one access the portal to get data and records out?

A There's a log in information, so you'd enter a user name and password.

Q Okay. And then what type of information would you use to query, to make a query?

A You could enter either the SKU or the UPC or a product description.

Q Okay. Can you also enter a style number?

A Yes, you can.

[24] Ms. Van Oosten was asked in cross-examination about the process by which data was loaded into the Portal:

Q And you testified that information was loaded in to that web-based portal nightly.

A Right, yes.

Q That -- and -- and you mentioned that was done by -- I think you mentioned the words IT, so a technical team of some kind; correct?

A Right, yes.

Q So you have no involvement personally in that process; correct?

A No, I do not.

Q Okay. And you were not -- you wouldn't have been present when that occurred, obviously.

A No.

Q So you're not able to tell us whether, for instance, any problems occurred in putting the information into the web portal.

A No, but there -- each -- so each store has a computer that is used for -- each transaction that shows up in AuditWorks, in all of our systems, is local time, because there is a backup computer at each store. So say the power went out, immediately the -- there's a backup generator at the store, all the data is retained, and then everything is -- is able to be recalled later. So they -- I'm not an IT person --

Q Right.

A -- but that data is backed up in Winnipeg at our Winnipeg backup generators, and all of that data is fed into all of these systems. But I can't testify how that works because I'm not an IT. But it's all fed daily.

Q Right. You don't have knowledge about how that process of feeding, to use the term that you -- that you used, works. You don't understand that yourself.

A No.

Q And if there had been problems in that process, you wouldn't be able to tell us; correct?

A That data is -- the data is -- if there was a data issue, we would contact an IT and ask them to resolve it.

Q Right. But I'm -- I'm talking about the feeding. The feeding process, you're not present for that, you don't understand it, because that's not your job title; correct?

A Right. But everything -- everything -- all of these programs all result -- all work -- again, it's the same data from the stores. So that data has -- is very integral to our business, so if there was an issue, they would let us know.

[Emphasis added.]

[25] Ms. Van Oosten also testified about other tools to access the POS data, AuditWorks and XBR. She described AuditWorks as "data management software, a centralized transaction tool" that is used to access sales data from stores. POS data is entered into the AuditWorks program nightly by the IT department. Use of the program requires a log in ID and password, and data can be accessed through queries such as transaction date, store, and transaction number.

[26] XBR is an exception-based reporting tool used by loss prevention professionals to identify anomalies in POS data that may be identified as fraud. As with AuditWorks, the IT department imports POS data into XBR nightly. Also similar to AuditWorks, multiple points such as transaction date, store number and UPC code can be used to access the POS data. If the data was going to be exported to someone else within or outside the company who did not have the XBR program, it would first need to be converted into an Excel spreadsheet.

[27] With respect to the information she provided to Det. Dykman, Ms. Van Oosten testified that she obtained the transaction details using AuditWorks, most likely using the date, store number or transaction number as her data points. She then used a snipping tool to snip the screenshot out of AuditWorks and put it into a Word document.

POSITIONS OF THE PARTIES

[28] The Crown submits that there are three available pathways for the admission of the FGL records:

- a) As business records under s. 30 of the CEA and electronic records under ss. 31.1 to 31.8;
- b) Pursuant the business records exception to the rule against hearsay at common law; and
- c) Pursuant to the principled approach to the rule against hearsay.

[29] Mr. Wiwchar opposes the admission of the records. With respect to the CEA, his principal objection is that the Crown has not tendered sufficient evidence to establish that the records were created in the usual and ordinary course of business. Further, he contends that some of the records are amalgamations of information, and that the Crown has also failed to show that the prohibition in s. 30(10)(a)(i) with respect to records made in the course of an investigation does not apply. As for the common law exceptions, Mr. Wiwchar submits that the Crown has failed to establish that the records were made contemporaneously by someone having personal knowledge of the matters being recorded who was under a duty to record them. He says as well that the Crown has also failed to establish that the records are necessary and reliable.

DISCUSSION

[30] Business records are an exception to the rule against hearsay evidence. Authority for their admission derives from both statute and the common law.

- a) Canada Evidence Act

- 1. Business Records

[31] Section 30(1) of the CEA Canada Evidence Act provides that business records are admissible where made in the usual and ordinary course of business:

30(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

[32] As s. 30(11) provides, the CEA provisions supplement, not replace, the common law in this area.

[33] The terms "business" and "record" are both defined in s. 30(12):

(12) in this section,

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise

"record" includes the whole or part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced

- [34] I find that the records Ms. Van Oosten accessed through the Portal and from which she sourced the data in order to create the documents for Det. Dykman are business records within the meaning of s. 30 of the CEA. Ms. Van Oosten gave evidence as to how the data was input into the system by the IT department in the ordinary course of business. This is prima facie evidence that the records were made in the usual and ordinary course of that business or undertaking.
- [35] Similarly, with respect to the POS data, Ms. Van Oosten testified how it was sales data from the registers at retail stores that was created at the time of the transactions and how it was integral to the business of the company. The data was uploaded nightly by the IT department, fed into the FGL POS system and then imported into AuditWorks and XBR. Ms. Van Oosten accessed this data to create the documents she provided to Det. Dykman. Again, I find that this evidence meets the requirements of s. 30 of the CEA.
- [36] Mr. Wiwchar contends that the Crown has tendered insufficient detail about how the data was entered (as opposed to retrieved) and cites two Provincial Court decisions, *R. v. Nardi*, 2012 BCPC 318 and *R. v. Bellingham*, 2002 ABPC 41. I do not accept this argument. Firstly, a high level of detail is not a prerequisite to admissibility pursuant to s. 30 of the CEA as long as there is some evidence to satisfy the requirements. Secondly, the provision does not require evidence of how the data was input; it simply requires that that process occur. And I am satisfied that was done here.
- [37] In essence, Mr. Wiwchar argues that there is no evidence of how the inventory description was created. I do not accede to this argument. Ms. Van Oosten's evidence is that the inventory was entered into the system by the IT department. I accept her evidence.
- [38] As noted by J. Douglas Ewart in *Documentary Evidence in Canada* (Carswell Legal Publications, 1984), at p. 85, "[g]one is the requirement that there be a strict duty to a third person: instead, a record made by anyone conducting a business or undertaking, employer or sole proprietor as well as employee or casual assistant is prima facie admissible if made in the usual and ordinary course of that business or undertaking".
- [39] I am satisfied that the fact that the records comprise printouts from computer-stored information does not raise any concerns. This issue was addressed in *R. v. Hall*, [1998] B.C.J. 2515 (S.C.) at para. 52, where Justice Owen-Flood concluded that a computer printout came within the definition of a "record":

For the purposes of this application, I am persuaded that the computer records were mechanically created for the respective telephone companies' usual and ordinary business purposes. The information reproduced was recorded as a reference source, kept as part of its internal audit system and so kept for that purpose at the relevant time. Insofar as computers are concerned, I see no merit in the arguments based on the alleged distinctions between copies and records. In view of the evidence in the case at bar I find that distinction is a meaningless one. The law must be applied in accordance with the rapidly changing reality of today notwithstanding that it was drafted in the past. For this Court to hold in the context of this application that the printouts were not admissible would be to ignore the realities of the computer age, wherein technological change has rendered the former distinctions between originals and copies a moot distraction in many areas.

[Emphasis added.]

See also *R. v. Haevischer*, 2013 BCSC 2518 at para. 33, citing *Hall*.

[40] Mr. Wiwchar submits that the Crown has failed to show that the prohibition in s. 30(10)(a)(i) does not apply to certain of the records, most specifically those relating to the beanie. That provision exempts "a record made in the course of an investigation or inquiry" from the business record regime.

[41] Section 30(10)(a)(i) was considered in *Haevischer* at paras. 35-36, where Justice Wedge wrote:

[35] Nor do I accept that the records offend s. 30(10)(i) of the Act. That subsection prohibits adducing a record made in the course of an investigation. The law is well settled that the subsection does not prevent the retrieval or prohibit the retrieval of information from previously recorded information that was not itself recorded in the course of an investigation. In this regard, I refer to *R. v. Hall*, cited above, and *R. v. Marini*, [2006] O.J. No. 4057 (S. Ct. J.).

[36] In the present case, some of the information was recorded even before the offences took place. All of the information was simply recorded as part of the Balmoral security system and stored on the server until a request was made to print it off. I am satisfied these records were not created during an investigation within the meaning of s. 30(10) and are not caught by the prohibition in that section.

[42] Similarly, Justice Clark in *R. v. Marini*, [2006] O.J. No. 4057 (S. Ct. J.) addressed this argument in this way:

[32] In my view, the argument that the records offend ss. 30(10) of the Canada Evidence Act is unsound. Subparagraph 30(10)(i) prohibits adducing a record made in the course of an investigation or inquiry. In a like vein, subparagraph 30(10)(ii) prohibits adducing a record made in the contemplation of a legal proceeding. Neither subparagraph prohibits, however, simply retrieving from a stock of previously recorded information, a subset of that information that is useful for purposes of litigation, provided that the information was not

itself recorded in contemplation of litigation. Some of the information at issue here was clearly recorded before the offences even took place. To the extent that some of the events recorded occurred after the offences occurred, I am nonetheless satisfied that notwithstanding the police began to investigate almost immediately after the offences took place, the records were made, for the most part at least, at a time before the police had it in mind to investigate the specific Cantel subscribers whose records were later seized. Moreover, to the extent that is not the case, to my mind, inasmuch as the records were created automatically, the danger contemplated by the prohibitions in subparagraphs 30(10)(i) and (ii) does not exist.

[Emphasis added.]

[43] The same reasoning applies here. The data pre-existed the offences before the Court and were created for the purposes of FGL's business activities, including loss prevention. Ms. Van Oosten's actions in providing the data to Det. Dykman does not transform the information into records made in the course of an investigation.

2. Electronic Documents

[44] Sections 31.1 to 31.8 govern electronic documents. The provisions were enacted in 2000 as a codification of common law principles relating to authentication, a relaxed approach to the best evidence rule, and a presumption of integrity where one of three bases is established.

[45] Section 31.8 contains definitions that apply to the electronic records sections, including:

"computer system" means a device that, or group of interconnected or related devices one or more of which,

- (a) contains computer programs or other data; and
- (b) pursuant to computer programs, performs logic and control, and may perform any other function.

"electronic document" means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by or a computer system or other similar device. It includes a display, printout or other output of that data.

[46] All of the records the Crown seeks to tender were electronic form when Ms. Van Oosten captured them. I find that they satisfy the requirements for electronic documents as set out in ss. 31.1 to 31.8.

[47] Section 31.1 requires that the Crown establish the authenticity of the electronic documents it seeks to enter into evidence. The threshold for authentication in s. 31.1 is low as recognized in *R. v. Hirsch*, 2017 SKCA 14 at para. 18:

I am not persuaded by Mr. Hirsch's arguments on authentication and the related issue of authorship. In my assessment, s. 31.1 of the Canada Evidence Act is a codification of the common law rule of evidence authentication. The provision merely requires the party seeking to adduce

an electronic document into evidence to prove that the electronic document is what it purports to be. This may be done through direct or circumstantial evidence: The Honourable Justice David Watt, *Watt's Manual of Criminal Evidence*, 2016 (Toronto: Thomson Reuters, 2016) at 104 [Watt's Manual]. Quite simply, to authenticate an electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be (see: *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 at para 93, 400 DLR (4th) 723). That is, while authentication is required, it is not an onerous requirement. In Watt's Manual, the author notes at 1115:

The burden of proving authenticity of an electronic document is on the person who seeks its admission. The standard of proof required is the introduction of evidence capable of supporting a finding that the electronic document is as it claims to be. In essence, the threshold is met and admissibility achieved by the introduction of some evidence of authenticity.

[Emphasis added.]

[48] To similar effect is *R. v. Hamdan*, 2017 BCSC 676 at para. 44:

[44] This is a low threshold. A party seeking to admit an electronic document only need present "evidence capable of supporting a finding that the electronic document is that which it is purported to be". This is a lower threshold than proof that the electronic document is the same as the digital file which allowed for the display of a webpage. The party seeking to admit an electronic document does not need to prove that the electronic document is an exact and complete copy.

[Emphasis added.]

[49] Ms. Van Oosten testified that she extracted the electronic documents in question from various FGL computer systems. That is sufficient.

[50] Section 31.2(2) provides that a printout of a document is the best evidence available if it has been "used as a record of the information recorded or stored in the printout". I am satisfied that the FGL records constitute the best evidence available as they are printouts of stored documents that no longer exist. I accept Ms. Van Oosten's evidence on how that took place: *Hamdan* at para. 65, citing *R. v. Betterest Vinyl Mfg. Ltd.* (1989), 42 B.C.L.R (2d) 198 (C.A.) at 204.

[51] Section 31.3 of the CEA addresses the presumption of integrity and sets out three ways in which the integrity of an electronic document can be established. Of relevance here is (c), which provides that the integrity of an electronic document is proven "if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it."

[52] This section of the CEA was considered in *R. v. Oland*, 2015 NBQB 245 at paras. 86 to 91:

- [86] The Court has also had an eye in the course of the foregoing analysis on Section 31.3 (c) of the Act. Recall that this provision provides an alternative means for establishing the integrity of an electronic documents system, "if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it". [Emphasis of Justice Walsh.].
- [87] I confess to an initial difficulty conceptualizing how the CDR, although an extract from source records that are made in the usual and ordinary course of business, could satisfy this alternative provision. However, any confusion is laid to rest when it is understood that the reference to "electronic document" is by definition reference to the data that is recorded or stored, "including a display, printout or other output of that data" and "data means representations of information or of concepts, in any form" (See: Section 31.8). I addressed this before in the context of explaining, as a separate inquiry, why the CDR met the requirement of a record under Section 30 (1).
- [88] In my opinion, when it comes to meeting the requirements of Section 31.3 (c), it is the data that must be shown to have been recorded or stored in the usual or ordinary course of business and not the document displaying that data, in this case the CDR. That is, it is not the CDR itself that must be shown to have been made in the usual or ordinary course of business but, rather, the data it contains, which in this case is simply displayed by the CDR. The difficulty is separating the notions of a document in the traditional sense and the information contained therein when in the form of a so-called "electronic document":
- I am satisfied that the spreadsheet program simply represented a medium by which the data could be captured and displayed in a fashion which could be presented to the parties and the Court. It is the data which represents the potential evidence and not the spreadsheet itself. (Saturley v. CIBC World Markets Inc., [2012 NSSC 226] at para. 50)
- [89] I am satisfied on a balance of probabilities that the "electronic document", i.e. the "data" displayed by the CDR, was recorded and stored in the usual and ordinary course of business of Rogers and that the CDR accurately reflects that data. There is no evidence to the contrary. The presumption of integrity has therefore been met.
- [90] In the end, I am satisfied both under Section 31.3 (a) (by evidence capable) and Section 31.3 (c) (on a balance of probabilities) that the information displayed in Rogers's CDR is the information regarding Richard Gland's iPhone that was accurately recorded and stored by those companies in the usual and ordinary course of their businesses. The presumption of integrity has not been rebutted. The statutory "best evidence rule" of Section 31.2 of the Canada Evidence Act has been met.
- [91] For all the reasons given, the tower information (the focus of objection by the Defence) contained within the Call Detail Record (CDR) for Richard Gland's iPhone is admissible under the Canada Evidence Act at trial, as is the other information contained therein.

[Emphasis added.]

- [53] I am satisfied that Ms. Van Oosten's testimony amply establishes that the FGL data was "recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it." There is, as well, no evidence to the contrary.
- [54] In the case of the style details relating to the Firefly Jacket, the Sims Pants, and the Under Armour Beanie Hat, Ms. Van Oosten made a screen capture of these items using a snipping tool from the electronic record she had on her computer screen from the FGL Portal. I accept that Ms. Van Oosten did not, in one instance of her use of the snipping tool, capture the entire number for the transaction, which, at first glance, appears to be an error but when checked against the document from which she made the exert, she missed two digits. However, I find that this does not affect the integrity of the record as a whole.
- [55] I accept Mr. Wiwchar's argument in respect of the description of the documents and that certain corrections must be made. I leave it for the Crown to clarify the transactions in both documents which resulted from the snipping errors to alter the description in the index.
- [56] In the case of the Metrotown SportChek records, Ms. Van Oosten used AuditWorks to search and obtain electronic records relating to sales transactions. Then she made a printout of those electronic records.
- [57] In the case of the Sims Pants sales records, she used XBR to search for and locate electronic records with specified time and location parameters. She converted the data to Excel and sent the electronic record to the police.
- [58] In the case of the Sims Pants transaction records, Ms. Van Oosten used AuditWorks to search for and locate the electronic records. She then made screen captures of certain electronic records on a computer screen, pasted them into a Word document and sent the document (composed of many electronic records) to the police.
- b) Common Law Approaches
- [59] Having concluded that the FGL records are admissible as business records pursuant to the CEA, it is not necessary that I go on to consider their admissibility at common law.

"Maisonville J."

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Prepared on 29 October 2026 · Esheria