
CANADA / JUDGMENT

R. v. Coban

2021 BCSC 2297

COURT

Supreme Court of British Columbia

DECIDED

25 November 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 2297 R. v. Coban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Coban,

2021 BCSC 2297

Date: 20211125

Docket: X078463

Registry: New Westminster

Regina

v.

Aydin Coban

Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Admissibility of

Ante Mortem Statements

Counsel for the Crown:

L.J. Kenworthy

H.M. Guinn

M. Daigle

Counsel for the Accused:

J.J. Saulnier

E. Holzman

Place and Dates of Hearing:

New Westminster, B.C.

October 13-15 and 22, 2021

Place and Date of Judgment:

New Westminster, B.C.

November 25, 2021

Table of Contents

Introduction.. 4

Background Facts.. 4

The Governing Legal Principles.. 6

State of Mind Exception to the Hearsay Rule. 7

The Position of the Parties - State of Mind Exception.. 10

Principled Exception to the Hearsay Rule. 12

Necessity. 12

Threshold Reliability. 13

The Position of the Parties - Principled Exception to the Hearsay Rule. 18

Analysis.. 19

Tab 1, Skype Messages. 20

Items 1-7: Skype messages sent December 4, 2009 (Category A) 20

Tab 2, Facebook Messages. 21

Items 1-4: Facebook messages sent December 27, 2010 between 8:56 and 10:00 p.m. (Category A, Category B) 21

Item 5: Facebook status update posted April 24, 2011 at 6:19 p.m. (Category A) 23

Item 6: Facebook comment posted April 24, 2011 at 6:24 p.m. (Category B) 23

Item 7: Facebook comment posted April 24, 2011 at 8:40 p.m. (Category A, Category B) 24

Item 8: Facebook comment posted April 24, 2011 at 8:41 p.m. (Category B) 25

Item 9: Facebook comment posted April 25, 2011 at 2:19 p.m. (Category B) 26

-
- Item 10: Facebook comment posted April 25, 2011 at 6:16 p.m. (Category A) 27
- Item 11: Facebook status update posted April 29, 2011 at 9:25 p.m. (Category A, Category B) 27
- Item 12: Facebook status update posted April 30, 2011 at 6:43 p.m. (Category A, Category B) 28
- Item 13: Facebook status update posted May 2, 2011 at 9:16 p.m. (Category B) 28
- Item 14: Facebook wall post on May 4, 2011 at 9:29 p.m. (Category A) 29
- Item 15: Facebook message on October 21, 2011 at 2:58 p.m. (Category A, Category B) 29
- Item 16: Facebook wall post on October 21, 2011 at 3 p.m. (Category A) 30
- Items 17 and 18: Facebook messages on October 21, 2011 at 3:05 p.m. (Category A) 31
- Item 19: Facebook status update posted October 22, 2011 at 9:15 a.m. (Category A, Category B) 31
- Item 20: Facebook comment on October 22, 2011 at 11:35am (Category A) 33
- Item 21: Facebook status update on October 23, 2011 at 5:16 p.m. (Category B) 33
- Item 22: Facebook status update on October 27, 2011 at 8:14 p.m. (Category A, Category B) 34
- Item 23: Facebook status update October 28, 2011 at 3:58 p.m. (Category B) 34
- Item 24: Facebook comment on October 28, 2011 at 4:06 p.m. (Category A) 35
- Item 25: Facebook status update on October 28, 2011 at 4:06 p.m. (Category A, Category B) 35
- Item 26: Facebook comment on October 28, 2011 at 4:51 p.m. (Category A, Category B) 36
- Item 27: Facebook comment on October 28, 2011 at 7:27 p.m. (Category A) 36
- Item 28: Facebook message on October 29, 2011 at 3:17 p.m. (Category A) 37
- Items 29, 30, 31 and 32: Facebook messages on November 12, 2011 at 10:33 a.m. (Category A, Category B) 37
- Item 33: Facebook message on November 12, 2011 at 10:39 a.m. (Category B) 38
- Item 34: Facebook message on November 12, 2011 at 10:44 a.m. (Category B) 38
- Item 35: Facebook status update on November 12, 2011 at 11:29 am (Category A, Category B) 38
- Items 36, 37 and 38: Facebook messages on November 13, 2011 at 12:57, 1:00 and 1:24 a.m. (Category A, Category C) 40
- Items 39 and 40: Facebook messages on November 13, 2011 at 1:28 and 1:29 a.m. (Category A, Category C) 40
- Items 41, 42, 43 and 44: Facebook messages on December 12, 2011 at 6:41 p.m. to 6:44 p.m. (Category A, Category B, Category C) 40

Conclusion.. 41

Introduction

- [1] The accused, Aydin Coban, is alleged to have sextorted an underage girl, A.T., over the internet between January 2009 and October 2012. He is charged with several offences under the Criminal Code, R.S.C., 1985, c. C-46, including extorting and criminally harassing A.T., as well as possession and distribution of child pornography.
- [2] On this application, the Crown applies to have hearsay statements made by A.T. admitted as evidence at trial for the truth of their contents. The hearsay statements consist of 51 electronic communications from A.T. between 2010 and 2012, including Skype and Facebook messages, as well as Facebook wall posts and status updates. The Crown relies on the principled exception to the hearsay rule for the majority of the messages that pertain to the charges of extortion, luring, criminal harassment, and possession and distribution of child pornography. The Crown also relies on a traditional exception to the hearsay rule known as the present state of mind exception for the messages pertaining to the charge of criminal harassment.
- [3] The defence acknowledges that the necessity requirement is established, as A.T. is deceased. While they agree that some of the statements are admissible, they take the position that the majority of the statements should not be admitted because A.T. is not a reliable witness. Essentially, they submit that there is no circumstantial reliability in these messages and posts, because they were created by a teenage girl who was attempting to explain an embarrassing situation to her family, friends, and people she did not know on social media. They submit there is nothing inherently reliable about social media communications and, given the situation, A.T. was motivated to cast herself in a favourable light. Further, they submit that inconsistencies in the statements, together with extrinsic evidence, undermine the accuracy and reliability of the statements.

Background Facts

- [4] For the purposes of this application, I rely on the background facts set out in the Crown's written submissions. However, since I have not heard any evidence, this summary should not be considered findings of fact for the purposes of the trial.
- [5] Between 2009 to 2012, A.T., aged 12 to 15, was the victim of a persistent campaign of online sextortion by an individual whose true identity was unknown to her. This individual came into possession of videos and images of A.T. exposing herself on a webcam and tried to use those materials to compel her to provide pornographic "shows" on her webcam. This individual, using 21 different phony usernames and accounts, sent electronic messages to A.T., her family, friends, and other people on social media. These messages were sent using Facebook, Skype, YouTube, and Gmail.

- [6] The Crown submits the sextortion occurred during four episodes: November to December 2009, December 2010, April to May 2011, and October to November 2011. In each episode, a similar methodology was employed: First, A.T. was contacted directly and then, when she did not comply with the demand for pornographic shows, the sextortionist used Facebook or email to distribute the explicit material to her family, friends, and others connected to her social media. The sextortionist also displayed an explicit image of A.T. as a Facebook profile picture.
- [7] As this was occurring, A.T. communicated with her family and friends through the social media platforms Facebook and Skype. The Facebook communications included status updates, wall posts, and comments displayed on A.T.'s Facebook wall, which were visible to all those connected to her on Facebook. A.T. also used Facebook to send private messages to specific individuals. A.T. sent all of the Skype messages privately and directly to another Skype user.
- [8] The messages are reproduced in the Crown's book of materials, which has been marked as Exhibit #1 on this voir dire. The seven Skype messages are set out in Tab 1 and pertain to the first episode (from November to December 2009). The 44 Facebook messages, set out in Tab 2, pertain to the three other episodes occurring between December 2010 and November 2011. The Crown has categorized the statements, based on the purposes for which they are tendered, as follows:

Category (A) statements: The messages show that: (1) [A.T.] was receiving and reading the threatening messages sent by the sextortionist at the outset of each sextortion episode; (2) she was aware that the sextortionist was actively distributing the Explicit Materials during the second, third and fourth sextortion episodes; and (3) she was aware that the sextortionist used an explicit image of her as a profile picture during the fourth sextortion episode.

Category (B) statements: These messages are evidence of [A.T.'s] subjective mental state during the second, third, and fourth sextortion episodes. These messages show to what extent she was tormented and feared for her safety as a result of the sextortionist's conduct.

Category (C) statements: In these messages, [A.T.] describes seeing the sextortionist display an explicit image of her as a profile picture on Facebook, which is evidence that he possessed the digital file relating to that image.

- [9] I will now proceed to discuss the legal principles that govern my analysis. I will also summarize the positions of the parties.

The Governing Legal Principles

- [10] The messages the Crown seeks to tender for the truth of their contents are hearsay and presumptively inadmissible. The Crown reasonably concedes this. In *R. v. Bradshaw*, 2017 SCC 35 [Bradshaw], the Supreme Court of Canada summarized the reason for the hearsay rule at para. 1:

Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because -- in the absence of the opportunity to cross-examine the declarant at the time the statement is made -- it is often difficult for the trier of fact to assess its truth. Thus hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.

- [11] There are two general exceptions to the hearsay rule. First, there are "traditional exceptions", which are "categorical exceptions developed through the common law over time" in circumstances where the hearsay evidence is thought to present minimal dangers: Bradshaw at para. 22. Second, the more flexible "principled exception" allows the admission of hearsay evidence if the "party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities": Bradshaw at para. 23.
- [12] Since the Crown is relying on both a traditional exception and the principled exception to the hearsay rule, I will discuss the legal principles that apply to each separately.

State of Mind Exception to the Hearsay Rule

- [13] The state of mind exception is a traditional exception to the hearsay rule. It covers evidence that is adduced to demonstrate "the intentions, or state of mind, of the declarant at the time when the statement was made": *R. v. Starr*, 2000 SCC 40 [Starr] at para. 168. Statements may only be admitted under this rule if (1) the declarant's state of mind is relevant, (2) the statement is made in a natural manner, and (3) the statement is not made under circumstances of suspicion: *R. v. Griffin*, 2009 SCC 28 [Griffin] at para. 59. The statement must also be contemporaneous with the state of mind it is tendered to prove: *R. v. Candir*, 2009 ONCA 915 (leave to SCC ref'd: 2012 CanLII 22174) [Candir] at para. 56.
- [14] The declarant's state of mind may be express or inferred from a statement: Candir at para. 56; *R. v. Smeltzer*, 2021 ONSC 4927 [Smeltzer] at para. 37. For example, in Griffin, the Court inferred from the fact that the accused stated "[i]f anything happens to me it's your cousin's family" that the declarant feared the accused, and the hearsay statement was admissible as proof of that fear: Smeltzer at para. 37.
- [15] Where the state of mind exception is used, the statement is only admissible as proof of the declarant's state of mind--it is not admissible as proof of "'past acts or events referred to in the utterances' or some 'anterior factual assertion' underlying the present state of mind or intention": *R. v. Millard*, 2017 ONSC 5701 at para. 16; see also Starr at para. 169.
- [16] The meaning of "circumstances of suspicion" has "not received great attention in the jurisprudence" since Starr, where it was confirmed that this criterion formed part of the test: Smeltzer at para. 42. However, as noted by Lacelle J. in Smeltzer at paras. 43-45, the case law provides some guidance:

In *R v Brooks*, 2015 ONSC 7350, the court held at para 25 that "[s]uspicious circumstances are circumstances that call into question the reliability of the out-of-court utterance or conduct."

The case law provides some examples of "circumstances of suspicion". In *Starr*, the court held that the declarant's statement (that he intended to go meet the accused) was inadmissible because it was made under circumstances of suspicion. The surrounding facts allowed for the possibility that the declarant was lying to the recipient. In the earlier case of *R v Smith*, 1992 CanLII 79 (SCC), [1992] 2 SCR 915, the Supreme Court similarly concluded that the deceased declarant may have had a motive to lie to the recipient of the statement and held that two of the four statements at issue were not admissible under the state of mind exception.

In *R v J.T.*, 2014 ONCA 321, the court was considering the admissibility of a hearsay statement made by the mother of the complainant in a sexual assault trial. The court held at para 33:

Although S.C.'s knowledge of the alleged relationship between [her daughter] and the appellant [her former common-law spouse] may have been relevant, her statement was not made in circumstances free of suspicion. We do not know the foundation for her statement. It was made just a few months before S.C. and the appellant separated, at a time when their relationship was already strained. S.C. could have misperceived the relationship between her daughter and the appellant, or could even have impliedly lied about the relationship. In these circumstances, her statement was made under "circumstances of suspicion" and was not admissible under the state of mind exception.

[17] In assessing whether a potential motivation to lie creates "circumstances of suspicion", the question is not whether A.T. was motivated to lie, generally, or about anything. The question is whether she was motivated to lie about her state of mind at the relevant time, as this is what the statements are being tendered to prove (or as Bradshaw describes it, this is the material aspect of the statements). In this case, the Category B statements are tendered only to establish A.T.'s state of mind (that she felt tormented and feared for her safety). This is the portion of the statement that raises hearsay dangers, precisely because it is tendered for its truth: Bradshaw at paras. 4, 47, 57.

[18] *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915 [Smith], provides guidance on how to conduct an analysis. In *Smith*, the Court found that the deceased may have had a motive to lie about whether the accused had returned to pick her up (the material aspect of the statements) because she may have wanted to conceal her activities, allay her mother's fears, or avoid her mother arranging a ride for her from a man who had previously abused her. She could also have been mistaken, as she might have seen a vehicle that resembled the accused's. Two statements about the accused having returned to pick her up were thus excluded as insufficiently reliable under the principled approach. However, she had said in two earlier phone calls that the accused had left her and she wanted a ride home (the first call), and that he had still not returned (the second call). These statements were admissible under the traditional exception to show her state of mind (e.g., that she wanted to come home). They were also admissible under the principled exception for their underlying

factual assertions (e.g., that the accused had left her) because she had no reason to lie about this.

- [19] Even if the statements fall within the traditional "state of mind" exception, they must still be excluded if the defence demonstrates they are unreliable or unnecessary. In *Starr*, Iacobucci J., writing for the majority, found that although evidence falling within a traditional exception is presumptively admissible, it "may still be inadmissible if it is not sufficiently reliable and necessary": *Starr* at para. 106. The Court confirmed this principle unanimously in *R. v. Khelawon*, 2006 SCC 57 [Khelawon], writing that although evidence falling within a traditional exception remains presumptively admissible, it "may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case": *Khelawon* at para. 42. The Court emphasized that such challenges will only succeed in "rare cases" (at para. 42). A party seeking to exclude such evidence bears the burden of showing it is inadmissible: *Starr* at para. 214.
- [20] Even if I find that the evidence is admissible under a traditional exception and the challenges to its reliability and necessity fail, I maintain the discretion to exclude it if its prejudicial effect overwhelms its probative value: *R. v. Cote*, 2018 ONCA 870 at para. 31. Watt J.A. explained this principle succinctly in *Candir* (at para. 59):

A party who meets the requirements of a listed or the principled exception to the hearsay rule removes its exclusionary features as a barrier to admissibility. But ascension over one barrier to admissibility does not preordain reception. A trial judge has a residual discretion to exclude otherwise admissible evidence, including admissible hearsay, where its impact on the trial process (cost) exceeds its value to the correct disposal of the litigation at hand (benefit). The prejudicial effect of the evidence may overwhelm its probative value. Introduction of the evidence may involve a significant expenditure in time, not commensurate with the value of the evidence. The evidence may mislead because its effect on a trier of fact, especially a jury, may be disproportionate to its reliability [Emphasis added]

- [21] Likewise, if I do not find the evidence admissible under a traditional exception, I may nonetheless find it admissible under a principled exception.

The Position of the Parties - State of Mind Exception

- [22] The Crown submits, and the defence concedes, that whether A.T. feared for her safety is material to the criminal harassment charge.
- [23] The Crown submits that these statements fall within the traditional exception as they describe A.T.'s contemporaneous state of mind, her state of mind is relevant, the statements are made in a natural manner, and they are not made under circumstances of suspicion: *Griffin* at para. 59. The Crown submits that these statements are also the best evidence of A.T.'s fear, as they are direct evidence from A.T. herself. They submit that this is not a "rare case" where a presumptively admissible statement falling within a traditional exception ought to be excluded for lacking in necessity or reliability: *Khelawon* at para. 42.

[24] Although the defence concedes that evidence of A.T.'s state of mind is relevant to the criminal harassment charge, they assert that while the statements suggest A.T. was fearful, the extrinsic evidence suggests she did not feel threatened. They state in their written submissions:

there is extrinsic evidence to suggest AT's feelings were more nuanced. The extrinsic evidence shows AT liked attention, good or bad. She continued risky behaviour such as posting explicit content online. She did not change her privacy settings or delete contacts she did not know. We submit this suggests AT's comments about her emotional reaction to the extortion might not be fully accurate.

[25] The defence filed a number of documents which they say support the view that A.T. was unreliable and an attention seeker. They say despite her claims on social media that she was concerned for her own well-being, she refused to follow recommendations to take down her social media presence. For example, the defence referred to the contents of an October 26, 2011 Coquitlam RCMP General Occurrence report written by RCMP Cst. Sedgman, which described a discussion he and Cst. Schadeck had with A.T. and her father regarding messages from "Tyler Boo". The report states that A.T. had over 1100 friends on her Facebook account and "refused to delete her Facebook account as she would 'lose all of the likes and comments on her photographs as she has had her facebook account all of her life". The report also states that A.T. "admitted she likes the attention from the older males she attracts when she is online".

[26] The defence also referred to an excerpt of a statement A.T.'s mother provided on October 12, 2012, in which she stated A.T. wanted attention. The defence submits that the fact that A.T.'s own mother described her as someone who sought attention demonstrates that A.T. was prone to exaggeration in order to garner attention. However, when I review this excerpt, it is apparent that her mother is describing how A.T. revealed that she felt depressed and anxious and that she was experiencing suicidal thoughts. Her mother stated, "I wanted to know if she was really saying it because she meant it, or saying it because she wanted attention" because she viewed it as a fine line: "Is it attention seeking, or do you truly have a disorder?" Out of concern, she called her pediatrician and a psych assessment was ordered.

[27] Further, the defence submits that the social media posts, which were addressed to the 1000 or more people on A.T.'s social media, cannot meet the requirements for the traditional exception because they were not made in a natural manner. Rather, they submit that A.T. wrote the posts to cast herself in a favourable light given the embarrassing situation she found herself in. They say the posts were made in circumstances of suspicion and thus do not meet the requirements from Griffin. They say even if they meet the requirements of the traditional exception, they ought to be excluded for lacking in reliability. The defence submits that there is nothing about the statements that suggests they are inherently trustworthy, and they argue the opposite is true.

- [28] As I discuss in my analysis section, I do not agree with the defence submission that A.T.'s messages were intended to make her look better in the eyes of those on her social media because of the bad decisions she made. While I agree that she may be attempting to explain her predicament and in doing so, generate both additional attention and sympathy, I do not find this gives rise to circumstances of suspicion. The defence seems to suggest that if A.T. was actually concerned about all the social media attention, she would not have further contributed to it. While communicating on social media platforms may seem unconventional, the reality is that young teenagers like A.T. do so naturally.
- [29] I am also cognizant of the need to avoid stereotypical thinking in this case, and am thus not prepared to draw a negative inference about A.T.'s credibility based on how the defence suggests she ought to have reacted to the sextortion episodes. As noted by the Supreme Court of Canada many years ago in *R. v. D.D.*, 2000 SCC 43, "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" (at para. 65). In my view, this reasoning is equally applicable when considering a teenager's reaction to sextortion.

Principled Exception to the Hearsay Rule

- [30] Hearsay evidence may exceptionally be admitted into evidence if "the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities": *Bradshaw* at para. 23.

Necessity

- [31] Necessity is to be "given a flexible definition, capable of encompassing diverse situations": *Smith* at 933-934. The question is whether the hearsay evidence is "reasonably necessary" to prove a fact in issue: *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531 at 546. As A.T. is deceased, the Crown submits--and the defence concedes--that this criteria is met. However, the defence contends that A.T.'s evidence is not necessary where it merely summarizes or rephrases something that is already in evidence. As noted by Epstein J.A. at para. 73 of *R. v. Rhayel*, 2015 ONCA 377, the criterion of necessity does not permit the reception of evidence that is "merely repetitious" of other evidence already before the court, and for that reason has little or no probative value. On the other hand, however, there is no "bright line rule that enjoins all cumulative hearsay": *R. v. Mohamad*, 2018 ONCA 966 (leave to SCC ref'd: 2019 CanLII 89641) [*Mohamad*] at para. 123 [emphasis in original].
- [32] A.C.J.O. Fairburn's recent comments in *R. v. Rowe*, 2021 ONCA 684 [*Rowe*] provide guidance on this issue. Fairburn A.C.J.O. found a trial judge had erred in his assessment of admissibility by equating necessity with "what he thought the Crown needed to 'make out its case'" (at para. 40). She explains at paras. 41-43:

Under the principled exception to the rule against hearsay, necessity is not measured by the overall strength of the case of the party seeking admission of the statement for the truth of its contents. That is, "[t]he criterion of necessity [] does not have the sense of 'necessary to the prosecution's case': R. v. Smith, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915, at p. 933.

Rather, necessity is measured by availability. Sometimes a hearsay statement becomes unavailable because a witness goes missing, dies, or is otherwise unavailable to testify. And sometimes a statement becomes unavailable because a witness is present and available to testify, but refuses to do so or, as in this case, recants the earlier statement. In the case of a recantation, the "recanting witness holds the prior statement, and thus the relevant evidence, 'hostage': R. v. B. (K.G.), 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at p. 799. In these circumstances, necessity arises from the unavailability of the testimony that would otherwise reflect the content of the prior relevant statement: Khelawon, at para. 78.

Accordingly, "[w]here a witness recants from a prior statement, necessity is established": R. v. Youvarajah, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 22. It is that simple.

Threshold Reliability

- [33] Bradshaw reminds us that the focus of the admissibility voir dire is on threshold reliability and not on ultimate reliability. As Justice Karakatsanis writing for the majority explains, "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": Bradshaw at para. 42. Threshold reliability may be established by showing procedural reliability or substantive reliability or a combination of the two.
- [34] To determine threshold reliability, a trial judge considers whether the statement is sufficiently reliable to overcome the dangers arising from the difficulty in testing it and assessing the declarant's perception, memory, narration, or sincerity: Bradshaw at para. 26. By contrast, the trier of fact determines the ultimate reliability--or the extent to which a statement should be believed and relied upon--at the conclusion of trial, after they have considered the entirety of the evidence: Bradshaw at paras. 39-42; Khelawon at paras. 3, 50. In a criminal jury trial, it is "constitutionally imperative" that questions of ultimate reliability be left with the jury: Khelawon at para. 50.
- [35] In Bradshaw, Karakatsanis J. explained procedural reliability as follows:
- [28] Procedural reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (Khelawon, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (Khelawon, at para. 76; Hawkins, at para. 75; Youvarajah, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (B. (K.G.), at pp. 795-96). However, some form of cross-examination of the declarant, such as

preliminary inquiry testimony (Hawkins) or cross-examination of a recanting witness at trial (B. (K.G.); R. v. U. (F.J.), [1995] 3 S.C.R. 764), is usually required (R. v. Couture, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95).

[36] Regarding substantive reliability, the majority said:

[30] A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy (Youvarajah, at para. 30; R. v. Smith, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (Khelawon, at paras. 4, 62 and 94-100; R. v. Blackman, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).

[37] As explained in Rowe, "[p]rocedural and substantive reliability do not exist in mutually exclusive silos, but rather work in tandem to overcome hearsay dangers" such that strength in one area (procedural or substantive reliability) can compensate for weakness in the other (at para. 45).

[38] The threshold reliability standard is high because a statement "must be sufficiently reliable to overcome the specific hearsay dangers it presents": Bradshaw at para. 32. However, the standard is not as high as absolute certainty: Bradshaw at para. 31.

[39] In evaluating substantive reliability, a trial judge can only rely on corroborative evidence if that evidence shows "when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement": Bradshaw at para. 44. The majority summarized a four-step framework to determine whether corroborative evidence is of assistance in the substantive reliability inquiry (Bradshaw at para. 57):

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
4. determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[40] To rely on corroborative evidence, the corroborative evidence itself must also be trustworthy: Bradshaw at para. 50. It must "go to the truthfulness or accuracy of the material aspects of the hearsay statement": Bradshaw at para. 45 [emphasis in original]. As Hourigan J.A. explained in *R. v. Tsega*, 2019 ONCA 111 (leave to SCC ref'd: 2019 CanLII 107002) at para. 25 [emphasis in original]:

To be clear, the corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement, as the purpose of the corroborative evidence is to mitigate the need for cross-examination on the very point for which the hearsay evidence is tendered: Bradshaw, at para. 45.

[41] Corroborative evidence that is "equally consistent' with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance" and does not make the statement any more inherently trustworthy: Bradshaw at para. 48. The majority in Bradshaw emphasized that corroborative evidence must be able to "rule out any plausible alternative explanations on a balance of probabilities"--even speculative explanations (at paras. 48, 49). Lauwers J.A., writing for the court in *R. v. McMorris*, 2020 ONCA 844 [McMorris] explains, however, that "[a]ny speculative explanation must be plausible on a balance of probabilities and any speculative explanation that does not survive such scrutiny is to be rejected" (at para. 34).

[42] The court in *R. v. Newsham*, 2019 BCCA 126, acknowledged that the Bradshaw framework is a restrictive approach that "seems to require that each piece of corroborative evidence work independently to overcome the hearsay dangers raised by the statement in order to merit consideration at the admissibility stage" (at para. 29). The B.C. Court of Appeal has recognized elsewhere that Bradshaw sets a "high bar" (*R. v. Poony*, 2018 BCCA 356 [Poony] at para. 27) and that it creates a "markedly stringent standard" (*R. v. Moir*, 2020 BCCA 116 (leave to SCC ref'd: 2020 CanLII 92506) at para. 88) for the use of corroborative evidence to assess substantive reliability. In *Poony*, Newbury J.A., writing for the Court, explained at para. 27:

The real significance of Bradshaw in my view is its articulation of the high bar to be applied to corroborative evidence that may be used to establish threshold reliability at the second or substantive stage. As we have seen, it is not enough at this stage that the corroborative evidence is relevant to the case. In order to be admitted, it must now be such that "it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement": at para. 44. Thus it must "mitigate the need for cross-examination, not generally, but on the point that the hearsay is tendered to prove": at para. 45. Conversely, evidence that is "supportive of the truth of the statement, but also consistent with alternative explanations, does not add to the statement's inherent trustworthiness": at para. 48. [Emphasis in original]

[43] In a substantive reliability analysis, corroborative evidence works "in conjunction with the circumstances in which the statement was made to overcome the specific hearsay dangers raised by the tendered statement": Mohamad at para. 104.

- [44] A court should also consider contradictory or conflicting extrinsic evidence at this stage, as such evidence is relevant to threshold reliability: Bradshaw at para. 38. Mainella J.A. explains at para. 73 of *R. v. Hall*, 2018 MBCA 122 [Hall], "the circumstances of the case (including contradictory evidence)" are considered alongside corroborative evidence. These considerations inform the court's "cumulative assessment": Hall at para. 74. To determine whether a statement is substantively reliable, the ultimate question is whether "the circumstances, and any corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy": Bradshaw at para. 40 [emphasis in original]; Hall at para. 74.
- [45] The presence or absence of a motive to lie goes to the circumstances in which the statement was made. This factor was considered in *R. v. Blackman*, 2008 SCC 37 [Blackman]. In *Blackman*, the Court confirmed that this is a relevant consideration, but that it is merely one relevant consideration whose influence will vary based on the circumstances of the case. The Court in *Blackman* emphasized that the focus must be "not on the presence or absence of motive, but on the particular dangers arising from the hearsay nature of the evidence" (at para. 42).
- [46] Where there is evidence suggesting a motive to lie, this weighs against reliability, whereas the absence of evidence is a neutral factor, and the proven absence of motive is a positive factor suggesting reliability: *R. v. Czibulka*, 2004 CanLII 22985, [2004] O.J. No. 3723 (leave to SCC ref'd: [2004] S.C.C.A. No. 502) [Czibulka] at paras. 43-47. To determine whether a person had a motive to lie, courts have considered the relationship between the declarant and the person to whom the statement was made, the nature of the relationship between the declarant and the person about whom the statement was made; and the general circumstances in which the statement was made: *Czibulka* at paras. 37-40. Ultimately, the question remains whether the circumstances, together with the corroborative evidence, provide a rational basis to reject alternative explanations for the statement other than the declarant's truthfulness or accuracy: Bradshaw at para. 40.
- [47] Finally, as noted above, a trial judge retains the discretion to exclude otherwise admissible hearsay where its prejudicial effect overwhelms its probative value: *Candir* at para. 59.
- [48] The parties agree that procedural reliability is not in issue in this case. Rather, the central question is whether substantive reliability is established.

The Position of the Parties - Principled Exception to the Hearsay Rule

- [49] The Crown seeks to admit the Category A and C statements pursuant to the principled exception to the hearsay rule.
- [50] The Crown seeks to tender the Category A statements as evidence that A.T. was aware that she was being sent threatening messages by the sextortionist, who was subsequently displaying and distributing links to explicit images and videos of her. They say this is relevant to the *actus reus* of the charges for extortion, luring, and criminal harassment.

- [51] They submit that these statements are relevant, that the circumstances in which they were made make them inherently trustworthy, and that corroborative evidence confirms the messages are accurate depictions of the sextortion episodes. They submit that the statements were related to contemporaneous events and made without much opportunity for reflection, nor did A.T. possess a motive for being untruthful. They argue that "[i]ssues regarding the accuracy of some of the finer details (e.g. dates, the number of people on Facebook who received links) do not detract from the fact that the material aspects of these messages were fundamentally correct" and corroborated. They say these "[s]mall inaccuracies" are properly dealt with at the ultimate reliability stage, when the trier of fact can evaluate all of the evidence. They say the only plausible explanation is that the Category A statements are true.
- [52] The Crown also seeks to tender the Category C statements as evidence that the accused possessed the explicit materials that were distributed to A.T.'s friends, family, and others, which they submit is relevant to the actus reus of the charges for possessing child pornography and possession of child pornography for distribution or sale. They say these statements are corroborated by an investigative screenshot taken of Austin Collins' Facebook page at the relevant time, which shows an image of A.T. exposing her breasts. They submit that no significant hearsay dangers are raised in the circumstances. They say the only plausible explanation is that the Category C statements are true.
- [53] In their written submissions, the defence opposed the admission of both categories of statements; however, during submissions they conceded the admissibility of the Category C statements dealing with the Austin Collins messages. The defence disagree with the Crown about the import of the "small inconsistencies" in A.T.'s statements, and state that these inconsistencies ought to be considered as part of the threshold reliability analysis, even if the inconsistencies concern "factual issues that the Crown may or may not be seeking to lead for the truth".
- [54] The defence says that social media is inherently unreliable, and that this is especially so in A.T.'s case, as she was a young person motivated to make herself look good in an embarrassing situation. They say she was motivated to lie or deceive, and that she was attention seeking. They submit that no characteristics of the statements make them inherently reliable or dispel this motive to lie: The statements were not made naturally or spontaneously, but were rather deliberately crafted in writing, with some statements repeatedly copy-pasted to the same people. They say if A.T. was cross-examined, she would have been questioned about her reliability and credibility, and her evidence might have changed significantly.
- [55] With the position of the parties and the governing legal principles in mind, I turn to my analysis.

Analysis

- [56] I will conduct my analysis with reference to the messages contained in Exhibit #1. As I conduct my analysis and refer to the content of the social media messages and posts, I may only refer to the material aspects of the hearsay statement. My analysis should therefore be read in conjunction with the entire message set out in Exhibit #1. I consider the legal tests stated above to determine whether each message is admissible pursuant to the traditional state of mind exception and/or the principled exception, as the case may be.
- [57] Applying the Bradshaw framework, when considering the Category A statements, the question is whether the corroborative evidence and the circumstances, together, provide a rational basis to reject alternative explanations, such that the only likely explanation is A.T.'s truthfulness about the material aspects of the statement (that is, that she received and was aware of the threatening messages and/or that she was aware that explicit images of her were being distributed by the sextortionist). The same test applies with respect to Category C statements, except the material aspect of these statements is different: In these cases, the statement is tendered to prove that the sextortionist possessed explicit images of A.T. In both cases, if there is a likely alternative explanation other than the one offered by the Crown (for Category A, that A.T. received the messages; for Category C, that the extortionist possessed the explicit images), then the statements lack substantive reliability and I must not admit them. For Category B statements, I must be satisfied that the statements are made in a natural manner absent circumstances of suspicion, that they refer to a state of mind that is relevant to the issues in the case, and that the state of mind referred to is contemporaneous with the statement made. I must also be satisfied, for Category B statements, that the indicia of reliability and necessity are not lacking in the circumstances of the case, although the defence has the burden of raising serious concerns to this effect in order to overcome the presumptive admissibility of such statements under the traditional state of mind exception.

Tab 1, Skype Messages

Items 1-7: Skype messages sent December 4, 2009 (Category A)

- [58] On December 4, 2009, A.T. sent a direct message to Joe at 20:11. She sent a similar message to Dan at 20:15 on the same day. In both messages, A.T. sent copies of two messages she received from the sextortionist. The first was a message she received on Facebook from Daimon Luci demanding she provide her Skype or he would "send this video to all [of her] family.". The second message she attached was a message she received on Skype from marzattack1, which stated:

Last chance or I start sending the videos to everyone in ur facebook, school and newspaper in ur city. Try me if u wanna ..-marzattack1, 04.12.2009 15:46

- [59] With reference to the marzattack1 message, she wrote in her message to Joe, "and now he found my skype and look", and in her message to Dan, she wrote "and thn I got this today". She then pasted the marzattack1 message into the conversation.
- [60] The Crown seeks to tender these pursuant to the principled exception as evidence that A.T. received the threatening messages in question. The defence agrees that the first part of the messages to Joe and Dan, where she provides the Daimon Luci message, is admissible: The fact that A.T. received the Daimon Luci message on her Facebook account is corroborated through her Facebook records. However, the defence submits that the marzattack1 message is not admissible as there is no corroboration.
- [61] Given the circumstances in which this statement was made, with reference to the contents of the earlier Facebook message, there is no reason to doubt that A.T. was being truthful about the receipt of the message from marzattack1. The defence suggestion that she fabricated the marzattack1 message is implausible and inconsistent with the circumstances in which the statement was made. There is no apparent motive for A.T. to fabricate this message when she was in the midst of being actively sextorted by Daimon Luci. I find this suggestion is both speculative and implausible on a balance of probabilities, considering the comments at paras. 33-34 of McMorris. There is no plausible alternative explanation to account for A.T.'s inclusion of the marzattack1 message in her messages to Joe and Dan other than her actual receipt of the message.
- [62] I am satisfied that threshold reliability has been established. These messages are admissible to establish that A.T. received the threatening messages in question.

Tab 2, Facebook Messages

Items 1-4: Facebook messages sent December 27, 2010 between 8:56 and 10:00 p.m. (Category A, Category B)

- [63] On December 27, 2010, A.T. sent an identical direct message to four individuals. The Crown seeks to have these messages admitted under both the principled exception and state of mind exception. The material aspect of the message the Crown is seeking to tender under the principled exception, to establish that A.T. received the messages in question, is as follows:

he came back and messaged me, and if i didn't do stuff with him on cam, he would send it to teachers, coaches, friends, and family

- [64] The Crown also seeks to tender the portion of the message in which A.T. wrote "I recked my life over" as a state of mind exception, to demonstrate A.T.'s feelings in response to the extortion.

- [65] The Crown submits that these messages relate to a series of messages that A.T. received from December 19 to 22, 2010, from "whatsthisman11", which threatened to distribute explicit videos and images of her. The messages also demanded that she perform "shows" on Skype. The Crown relies on the whatsthisman11 messages as corroboration of the material portions of these four Facebook messages.
- [66] The defence submits these messages are inherently unreliable: They point to other portions of the message where they say A.T. makes inconsistent statements regarding when and to whom she exposed her breasts: Elsewhere in the message, A.T. states that she flashed "about a year" ago; yet, the defence points to other messages where she refers to flashing 3 years ago. There is no dispute that A.T. did expose her breasts on social media. The fact that she is not precise on the exact date she did so does not detract from the reliability of her statement. As I discussed earlier in these reasons, the focus of my analysis is on the material aspects of the statements that Crown seeks to tender for their truth. It is these portions of the statements that give rise to hearsay dangers.
- [67] I am satisfied that the corroborative evidence rules out any alternate explanations for the material aspects of the statement. There is no basis to question A.T.'s truthfulness or accuracy about the fact that she received a message threatening to distribute explicit images to her friends and family if she did not perform "shows", as these aspects of the statement are consistent with the whatsthisman11 messages. I am satisfied this portion of the statement is admissible under the principled exception to the hearsay rule.
- [68] With respect to the statement "I reeked my life over", I agree with the Crown that this statement was made in a natural manner, absent any circumstances of suspicion. While A.T. is referring to events in the past, the statement reveals her present state of mind concerning what has occurred. Even if the language is flamboyant, it does not equate with A.T. being untruthful as to how she felt at that moment. This portion of the statement is admissible under the state of mind exception.

Item 5: Facebook status update posted April 24, 2011 at 6:19 p.m. (Category A)

- [69] On April 24, 2011 at 6:19 p.m., A.T. posted a status update on her Facebook account. The underlined portions of the message are what the Crown is seeking to tender pursuant to the principled exception:

Can everybody report this guy, he is blackmailing me, and its really appreciated if you guys do me a huge favour and report him.<3 thanks .

<http://www.youtube.com/user/door1ordoor2>

[70] As this is a Category A statement, the Crown seeks to tender it as proof that A.T. received threatening messages from door1ordoor2. Defence counsel acknowledges that the content of this statement is sufficiently corroborated through the YouTube messages A.T. received between April 22 and 29, 2011 from door1ordoor2. I am satisfied that this message meets the threshold reliability standard and is admissible for the truth of its contents.

Item 6: Facebook comment posted April 24, 2011 at 6:24 p.m. (Category B)

- [71] A.T. posted a comment on her Facebook page which stated "He is harassing me". The Crown seeks to tender this under the state of mind exception. The Crown argues it is important to consider that this statement was made at the time A.T. was receiving messages from door1ordoor2 through YouTube as discussed above with respect to Item 5.
- [72] The defence submits that this statement does not satisfy the state of mind exception. They submit there is no detail as to what A.T. means when she refers to being "harassed", and they are unable to pursue that line of questioning in cross-examination. Further, as discussed earlier, the defence says the fact that A.T. posted this statement on her Facebook account for all to see detracts from the sincerity and hence reliability of the comment. They argue that if A.T. indeed felt harassed, she would not post it on the internet for all to see. I disagree: The evidence establishes that A.T. considered her contact on social media vitally important, and this was precisely how she communicated with her friends.
- [73] Considering that this message was posted after A.T. received several messages from whatsthisman11 threatening to distribute explicit videos and images of her, I am satisfied that this statement was made in a natural manner and that it was directly connected with her receipt of those messages. There is no suggestion that this statement was made in suspicious circumstances. Rather, this statement is an expression of how A.T. felt in relation to the messages she was receiving at the time. I am satisfied the statement is entirely natural and accords with logic and human experience.
- [74] This statement is admissible under the state of mind exception.

Item 7: Facebook comment posted April 24, 2011 at 8:40 p.m. (Category A, Category B)

- [75] A.T. posted a comment on her Facebook page approximately two hours after she posted that "he is harassing me", as discussed above with reference to Item 6. In this comment, she writes:

Made a big mistake, and this guy has been torchering me for a year,
recked my entire life, lost everything, because people thought I made that video, cried myself to sleep for a long time. It never goes away

[76] The Crown seeks to tender the underlined portions of the statement above under the state of mind exception.

[77] A.T. then explains that she has recently received a message from door1door2--she writes "I get this message " and copies the door1door2 message she received on April 23, 2011:

Same old stuff of 'hey I am back, miss me, how is your new school Westview Secondary, I have a new flash video of you, let's see if you challenge me again to fuck your life up, blahblahburp'. The usual blackmail crap :D Pick: - Door 1, you do 5 shows for me, 30 mins each and then I disappear forever, no one will ever know about it. - Door 2, I fuck your life up at this new school, just like last time. And then after all that, I come back when you are settled at your newer school to do it again :D One week to decide. The suspense is killing me!!!...

[78] The Crown seeks to tender the description of the door1door2 message, beginning with "I get this message", under the principled exception to the hearsay rule as evidence that A.T. received the message in question. The defence concedes that the portion tendered under the principled exception is sufficiently corroborated and can be admitted under the principled exception to the hearsay rule. I agree.

[79] With respect to the state of mind exception, these statements were posted two hours after A.T. posted "He is harassing me", which I have found is admissible under the state of mind exception. When I consider the statements in Item 7 and Item 6, together with the circumstances unfolding at that time, I am satisfied that these statements were made in a natural manner and not under circumstances of suspicion. Rather, they reflect how A.T. was feeling after receiving further harassing messages. These statements are admissible under the state of mind exception.

Item 8: Facebook comment posted April 24, 2011 at 8:41 p.m. (Category B)

[80] On April 24, 2011 at 8:41 p.m., A.T. posted a comment on her Facebook page that stated:

Can you guys please help me, im very scared, I don't want this to happen again, please report,comment and tell him to stop

[81] This message was posted immediately after Item 7 and reflects the same concern regarding the receipt of harassing messages as discussed above. I see no merit in the defence submission that this message and others like it were crafted to generate attention and sympathy. The defence submits that if A.T. sincerely wanted the messages to stop, she would have closed down all of her social media. They suggest that her refusal to do so shows that she was not fearful or that she did not wish for them to stop. Further, they argue that her decision to communicate her concerns to over 1000 people on her Facebook account is more consistent with attention-seeking behaviour. As discussed above, I disagree: I draw no inference from the fact that A.T. remained active on social media, nor from her decision to communicate her concern with her many Facebook friends. A.T. was a teenager and a prolific user of social media; as noted above, she considered social media vitally important and she spoke to friends through social media often. Further, as I discussed earlier in these

Reasons, there is no one way in which a victim of sexual extortion and cyberbullying, particularly a teenage girl, can be expected to react.

- [82] In my view, this message is admissible under the state of mind exception on the same basis as Items 6 and 7.

Item 9: Facebook comment posted April 25, 2011 at 2:19 p.m. (Category B)

- [83] On April 25, 2011 at 2:19 p.m., A.T. posted another comment on her Facebook page that appears to follow Items 7 and 8, which were posted the night before. The Crown seeks to tender the underlined portion of the following statement under the state of mind exception:

This has happend before, and he ruened my life in another town, it was hell, the cops didn't go anything, they tried tracking his ip but the guy blocked it.

- [84] I agree with the Crown while this statement has elements of retrospection, it reflects her current mental state in response to the messages she had received from door1ordoor2, as discussed in relation to Item 7, above. While the content of this message, like many of A.T.'s messages, may generate further attention and sympathy, I cannot agree with the defence that this is a basis to exclude this statement. I am satisfied that this statement reflects A.T.'s genuine state of mind at the time she was experiencing the harassing messages. It was made in a natural manner and not under circumstances of suspicion. I find this statement is admissible under the state of mind exception.

Item 10: Facebook comment posted April 25, 2011 at 6:16 p.m. (Category A)

- [85] In this message, A.T. refers to messages being sent by Kody Maxson to others. Between December 23 and 24, 2010, "Kody Maxson" distributed messages to approximately 111 individuals on Facebook that contained a link to an explicit video of A.T. The defence conceded that this message is sufficiently corroborated and admissible under the principled exception to the hearsay rule as evidence that A.T. received the messages in question. I agree. This message is admissible for that purpose.

Item 11: Facebook status update posted April 29, 2011 at 9:25 p.m. (Category A, Category B)

- [86] On April 29, 2011, A.T. posted a status update on her Facebook page apologizing to everyone who received a picture of her. The Crown seeks to admit this post under the principled exception as well as the state of mind exception. The defence concedes that portions of the message are admissible under the principled exception, but opposes the portion the Crown seeks to tender under the state of mind exception. That portion is as follows:

. and I didn't want this to happen, hope you guys can still be there for me, and help me through this.

[87] Considering the circumstances in which this statement was made, I am satisfied that the statement was made in a natural manner, after A.T. learned that explicit images of her had been widely distributed. As noted earlier, while this message may generate more attention and sympathy towards A.T., I am not satisfied that the statement was made under circumstances of suspicion. I find that this statement reflects A.T.'s state of mind at the time she was experiencing the harassing messages. It is admissible under the state of mind exception.

Item 12: Facebook status update posted April 30, 2011 at 6:43 p.m. (Category A, Category B)

[88] In this Facebook status update, A.T. advises "this guy is still at it" and she asks everyone who is receiving the message "please im begging everyone, do not send to anybody". The Crown seeks to have this message admitted under the principled exception and state of mind exception.

[89] In my view, this message is similar to the status update posted at 9:25 p.m. on April 29, 2011. As stated earlier, while this message may bring more attention and sympathy due the situation A.T. is in, I do not consider that a basis to doubt the sincerity or accuracy of the message. Rather, this message reflects A.T.'s belief that her extorter is continuing to distribute messages containing an explicit image of her. The defence contends that because A.T. had, in other messages, forwarded a link of the images to others, this provides a basis to doubt the sincerity of this message. I disagree: The fact that A.T. forwarded the link to others does not detract from the sincerity of this message, as when read in their proper context, those messages illustrate that A.T. was showing others what had been happening to her.

[90] I am satisfied that this message meets the threshold reliability standard for admissibility under the principled exception. I am also satisfied that the portion of the statement underlined above is admissible pursuant to the state of mind exception.

Item 13: Facebook status update posted May 2, 2011 at 9:16 p.m. (Category B)

[91] A.T. posted a status update to her Facebook page as follows:

I'll admit, you completed your goal. Ruening my life, hurting me, making me cry and feel bad for what I did. Congrats, you ruened my life. But someday, your gonna get something back.

[92] The Crown seeks to have the underlined portion of this statement admitted under the state of mind exception. I infer that this message was intended to refer to A.T.'s extorter, whom she knew had access to her Facebook page from the various messages she had received.

[93] The defence submits this message does not reflect A.T.'s state of mind, and rather, it is a general announcement for all who have access to her Facebook page to see. It is, in the defence's submission, merely another example of A.T.'s effort to generate attention and not reflective of her actual state of mind. I agree with the Crown that nothing about the circumstances in which this statement was made warrants it being found an exception to the

presumption of admissibility under a traditional exception to the hearsay rule: There are no circumstances of suspicion here because A.T. had no reason to lie about the material aspects of this statement (that is, her feelings about the extortion). I draw no inference from the fact that this statement was posted as a Facebook status update. I find this statement is admissible under the state of mind exception.

Item 14: Facebook wall post on May 4, 2011 at 9:29 p.m. (Category A)

- [94] This message was a wall post to A.T.'s Facebook page that contained an image depicting Facebook user "Miranda Todd" and telling others not to respond to that user. The defence concedes that this message is admissible under the principled exception. I agree, this message is admissible.

Item 15: Facebook message on October 21, 2011 at 2:58 p.m. (Category A, Category B)

- [95] This is a direct message from A.T. to Samantha King, in which she states:

Hey i need u to delete tyler boo, he is a pedo and harassing me and part of the cops trying to track him .hes 60 year old pedo

- [96] The Crown seeks to have the underlined portion of this message admitted under the principled exception as evidence that A.T. received the messages in question. It seeks to admit the bolded portion (he is .harassing me) under the state of mind exception. The Crown submits this message is corroborated by the fact that on October 21, 2011 "Tyler Boo" messaged A.T. and said "sup camwhore, been a while I have your new school, new schoolmates blahblah you know the drill. So 3 shows of 15 minutes and then I wont send".
- [97] Considering the Bradshaw framework, including the timing and content of this statement and the corroborating message from Tyler Boo, I am satisfied that this statement is substantively reliable. It is tendered for the purpose of establishing that A.T. received the messages in question, and A.T.'s message to Samantha King comes after A.T. received a harassing message from Tyler Boo earlier the same day. I note that the defence argued this message was not necessary as the Crown could rely on other evidence establishing the exchange between A.T. and Tyler Boo. However, that is not a relevant consideration when deciding the admissibility of the message pursuant to the principled exception. As stated at para. 41 of Rowe, "necessity is not measured by the overall strength of the case of the party seeking admission of the statement for the truth of its contents".
- [98] I am also satisfied that A.T.'s statement "he is harassing me" is a reflection of her state of mind as a result of having received the message from Tyler Boo. It meets the requirements in Griffin. This portion of the message is also admissible under the state of mind exception.

Item 16: Facebook wall post on October 21, 2011 at 3 p.m. (Category A)

[99] The Crown seeks to have this wall post to A.T.'s Facebook page admitted under the principled exception to the hearsay rule as evidence that A.T. was receiving the threatening messages. In this post, A.T. wrote:

Everyone who gets a friend request from "Tyler Boo" do not accept he is a 60 year old pedofile, blackmailer, that has been blackmailing me for years and I just got another message again. Please do me that favor

[100] The Crown submits the underlined portions of this statement are directly related to the fact that A.T. received a message from Tyler Boo on October 21, 2011. The fact that this statement takes the form of a wall post for all with access to A.T.'s Facebook page to read does not render it unreliable; to the contrary, this is consistent with the message being a warning to "everyone" not to accept Tyler Boo's friend request. In my view, considering the Bradshaw framework as discussed above, this message is admissible under the principled exception. I am satisfied that the only likely explanation for this statement, considering that it is corroborated by the Tyler Boo messages on October 21, 2011, is that A.T. was being truthful about the nature of the messages she had received from Tyler Boo.

Items 17 and 18: Facebook messages on October 21, 2011 at 3:05 p.m. (Category A)

[101] This is a direct message from A.T. to Jenna Forster regarding the message from Tyler Boo. This message follows immediately after A.T. direct messaged Samantha King and posted on her own Facebook wall about the Tyler Boo message. She says:

He sent it out to everyone in poco and he's gonna do it again in ridge if i don't put on a show for him

[102] I infer from this message that she is referring to the person who has been harassing her on the various social media platforms. The defence argues that this message is an example of how unreliable A.T. is, as she refers earlier in the message to flashing once "about 4 years ago", yet in other messages she provides different timeframes. While I acknowledge there are some minor discrepancies in A.T.'s reference to when she initially exposed her breasts on the internet, those discrepancies do not detract from the accuracy of the material aspects of this statement. This statement is only tendered for the purpose of establishing that A.T. received the threatening messages in question. Having considered the Bradshaw framework, the only likely explanation for this message is that A.T. in fact received the messages she refers to. Therefore, it is admissible under the principled exception.

Item 19: Facebook status update posted October 22, 2011 at 9:15 a.m. (Category A, Category B)

- [103] This is a status update on A.T.'s Facebook page regarding the message she received from Tyler Boo. On October 22, 2011, "Tyler Boo" sent A.T. a lengthy message in which he explains that he is the person who made her change schools and who had her door kicked in by the cops. The message also said "you will go through the exact same thing all over, or you can give me 3 shows and I will disappear forever". The message then lists names and says the message will also be sent to "principal/teachers/students of maple ridge sec.". The Crown seeks to tender portions of this status update as proof that A.T. received the message in question.
- [104] A.T.'s status update is an edited version of the longer message she received from Tyler Boo. The defence submits this message is not reliable because it is an edited version of the actual message and contains assertions that are not factually correct. For example, in her message A.T. states "I made a mistake 3 years ago" and she says "the guy blackmailed me"; but in other messages she says she flashed 200 guys four years ago. As I have discussed earlier, while there are some discrepancies, they do not impact on the portion of the message that is material on this application. Indeed, the material aspect of this message accurately depicts the content of the message A.T. received from Tyler Boo on October 22, 2011. While A.T. did edit out a portion that referred to her producing child porn, that does not render the statement unreliable.
- [105] I note that the original message from Tyler Boo ends with "so your answer", whereas A.T.'s status update ends with "so your choice do you want your life ruined and to go through hell again?" I agree with defence counsel that this portion of the status update does not align with the actual message received from Tyler Boo. However, the rest of the statement is corroborated by the Tyler Boo statement, such that the only likely explanation is its truth. I admit the status update for the purposes sought by the Crown, on the condition that the entire status update is put before the trier of fact. This way, any discrepancy between the content of the original Tyler Boo message and the status update can be dealt with at the ultimate reliability stage, when the trier of fact can evaluate all of the evidence.
- [106] The Crown also seeks to tender the following portion of the statement to establish A.T.'s state of mind:
- I got my life ruined and I really don't want it to happen again, because it was the most hardest thing I have ever went through
- [107] This portion of the message precedes the section where she sets out the details of the message she received from Tyler Boo. While I acknowledged this statement has elements of retrospection, it was made at the time she was receiving yet another harassing message regarding her past activity and it reflects her state of mind at the time of writing the statement ("I really don't want it to happen again"). The defence submits that A.T.'s statement does not align with her conduct: They submit that, despite her claims that she

did not want it to happen again, A.T. continued to use social media platforms, which indicates otherwise. As noted, I disagree, and I draw no inference from A.T.'s subsequent social media use. I am satisfied that this portion of the statement was made in a natural manner and not under circumstances of suspicion and is therefore admissible under the state of mind exception.

Item 20: Facebook comment on October 22, 2011 at 11:35am (Category A)

[108] A.T. posted a comment to her Facebook page advising that "he sent the picture out" with a request that people not distribute it and asking them to report the picture, if received, to their parents or the police. Between October 22 and 29, 2011, Tyler Boo distributed messages to approximately 18 people on Facebook with a link to images/videos of A.T. The defence concedes and I agree that this message is admissible under the principled exception to the hearsay rule.

Item 21: Facebook status update on October 23, 2011 at 5:16 p.m. (Category B)

[109] A.T. posted a status update on her Facebook page, which is directed towards the "pedophile" she believes is harassing her. The Crown seeks to have the following portions of this statement admitted under the state of mind exception:

You are ruining a young girls life that did absolutely nothing to you It's gonna be hard for me to show my face, because before you made me lose everything, school family, friends, and cheer... im in tears.

[110] The defence submits this message is an exaggeration crafted to generate sympathy and attention. They also submit that it is unreliable because it is sent out broadly and not directly to the sextortionist. I do not agree. Rather, considering that this message was posted soon after A.T. had advised through a comment on her Facebook page that "he sent the picture out", it appears to be a genuine reflection of how she was feeling at the moment. Whether she intended for the sextortionist or others to read it does not alter this material element. While, like the other messages, the content may generate both attention and sympathy, I find it was made in a natural manner and not under circumstances of suspicion. Therefore, the statement is admissible to establish A.T.'s state of mind.

Item 22: Facebook status update on October 27, 2011 at 8:14 p.m. (Category A, Category B)

[111] A.T. posted a status update to her Facebook page advising "so he sent my picture out to a few people, and is going to do it to everybody on monday" which the defence concedes is admissible under the principled exception to the hearsay rule. The Crown also seeks to have admitted as state of mind the portion of the message stating:

Please I need anybody to be here for me and to support me, I'm feeling like shit, that he's gonna ruin my life.. And just tears are coming out

[112] In my view there is no basis to exclude this portion of the statement. It is clearly an expression of how A.T. was feeling at the moment, knowing that explicit images of her had been distributed. I find this statement to be a natural reaction by a teenaged girl who is being subjected to cyberbullying. This portion is admissible under the state of mind exception.

Item 23: Facebook status update October 28, 2011 at 3:58 p.m. (Category B)

[113] This was another status update to A.T.'s Facebook page. The Crown seeks to have the portion "the guy is gona keep doing this" admitted as state of mind. Elsewhere in this message, A.T. states that she might probably delete her Facebook and adds that she "blocked" the person in question. The defence submits this statement is not reliable because A.T. did not in fact delete her Facebook account. They also argue that the statement does not refer to her present state of mind. I agree with defence that it is difficult to infer A.T.'s state of mind from this statement when viewed in the context of the message. This brief statement does not reveal A.T.'s contemporaneous mental state and I therefore find it is not admissible to establish her state of mind.

Item 24: Facebook comment on October 28, 2011 at 4:06 p.m. (Category A)

[114] This message is a comment posted to A.T.'s Facebook page about Tyler Boo's messages on Facebook. In the message, A.T. states "people will get the video that he took of me on webcam", which the defence says is problematic because there is no evidence that the video was actually obtained as A.T. suggests. The defence submits this aspect of the message is not reliable.

[115] As discussed previously, there is evidence to establish that between October 22 and 29, 2011, Tyler Boo distributed messages to various people on Facebook. However, the problem with this particular message is that it contains an assertion that Tyler Boo obtained a webcam video; yet, none of the evidence can corroborate that as a fact. The problem with this assertion is that the defence does not have an opportunity to cross-examine A.T. on the accuracy of the statement. Applying the Bradshaw framework, I am not satisfied that this statement is substantively reliable. Therefore, it is not admissible.

Item 25: Facebook status update on October 28, 2011 at 4:06 p.m. (Category A, Category B)

- [116] This is a status update on A.T.'s Facebook page where she requests that people block Tyler Boo from Facebook as he is the person who has been blackmailing her. As discussed earlier, there is ample corroborative evidence that Tyler Boo had sent out messages with links to explicit images/videos of A.T. This message demonstrates that she is aware the messages have been distributed. Considering the Bradshaw framework, I am satisfied that the message is admissible under the principled exception.
- [117] The Crown also seeks to admit the portion "please help me :(this is such a horrible feeling for me" admitted as state of mind. The defence submits this statement does not establish A.T.'s state of mind. As I understand their submission, this is on the same basis as their opposition to other state of mind statements - that is, A.T. is exaggerating and crafting the statement to generate both attention and sympathy. I see no merit in this position. As I have stated earlier, while these types of statements may generate both attention and sympathy towards A.T., this does not detract from the fact that the statement contains A.T.'s expression of feeling harmed and upset by the messages. Therefore, I am satisfied this portion of the statement is admissible to establish A.T.'s state of mind.

Item 26: Facebook comment on October 28, 2011 at 4:51 p.m. (Category A, Category B)

- [118] In this comment posted to A.T.'s Facebook page minutes after Message 25, A.T. states:
I'm like balling my eyes out, he sent it out, and he gonna keep doing it , for the rest of my life :'(
- [119] The portion of the statement "he sent it out" is admissible under the principled exception to the hearsay rule as there is an abundance of corroborative evidence to establish that the message was in fact sent out.
- [120] I agree with the Crown that the remaining portion of the message is admissible under the state of mind exception. This statement supports the inference that A.T. was distressed over the fact that an explicit image of her had been distributed and concerned that the harassment would continue. Considering the circumstances, I find this statement was made in a natural manner responsive to the situation A.T. was facing at that moment.

Item 27: Facebook comment on October 28, 2011 at 7:27 p.m. (Category A)

- [121] In this comment, A.T. says:
My names amanda, and I did Everyone who gets the picture tell me and block him right away.
- [122] I agree with the Crown that this statement is admissible under the principled exception to the hearsay rule for the reasons set out above regarding Item 26. However, I do not agree with the Crown that "block him right away" is also supportive of an inference that A.T. is concerned about harassment. I am not prepared to admit that portion to establish A.T.'s state of mind.

Item 28: Facebook message on October 29, 2011 at 3:17 p.m. (Category A)

[123] This is a direct message between A.T. and Megan Hanson. Ms. Hanson advised A.T. that she received the video and A.T. replied "don't watch it delete it report it block him don't send it, or anything thank you so much". This exchange demonstrates that A.T. is aware that the messages containing her image are being distributed. I agree with the Crown that this message is admissible under the principled exception to the hearsay rule.

Items 29, 30, 31 and 32: Facebook messages on November 12, 2011 at 10:33 a.m. (Category A, Category B)

[124] Item 29 is a direct message between A.T. and Brittany Kaufmann in which Ms. Kaufmann advised A.T. that "Austin Collins" posted a message with links to a video/picture. The defence concedes that A.T.'s response to this message in which she states "just tell everyone to blockk him and don't send the video and pics" is admissible under the principled exception to the hearsay rule. I agree. There is ample corroboration for this statement in addition to the message from Ms. Kaufmann. For example, A.T. received a message from Austin Collins on November 12, 2011 stating "enjoy the shitfest sent to about 280 westview peeps ill be back". In addition, investigators created screenshots of Austin Collins' Facebook page, which had an explicit image of A.T. as his profile picture.

[125] During their exchange, Ms. Kaufmann asked A.T. if she was okay, to which A.T. responded "No I'm really not " (Item 30). The defence agrees that this statement is a genuine response to a question and is properly admitted to establish A.T.'s state of mind. I agree that this statement is a genuine response by A.T. and indicates that she is upset about her image being distributed. Similarly, I am satisfied that other statements made by A.T. in this exchange--"Yes.. blackmailed and life ruined:(" (Item 31) and "and he's gonna keep doing it for the rest of my life " (Item 32)--are admissible under the state of mind exception.

Item 33: Facebook message on November 12, 2011 at 10:39 a.m. (Category B)

[126] This is a direct message from Cassidy Lavergne to A.T., advising her that some links were posted to her Facebook wall. In response to this message, A.T. responded ":'(I'm so sad". I agree with the Crown that this statement establishes that A.T. is upset because another person has received links to explicit images of her. Therefore, it is admissible to establish A.T.'s state of mind.

Item 34: Facebook message on November 12, 2011 at 10:44 a.m. (Category B)

[127] This is a direct message from Kat Talia to A.T., advising her that "some kid is posting shit everywhere" to which A.T. responded "And I'm sitting here crying". I agree with the Crown that this statement is admissible under the state of mind exception. This message is similar to Item 33, as they are both immediate reactions by A.T. to the news that an explicit image of her had been distributed by Austin Collins.

Item 35: Facebook status update on November 12, 2011 at 11:29 am (Category A, Category B)

[128] In a Facebook status update, A.T. apologizes to everyone who has received the links from Austin Collins.

[129] The defence agrees that A.T.'s statement "I'm so sorry, everyone who got the links from austin collins" is admissible under the principled exception to the hearsay rule. However, they challenge the substantive reliability of the statement where A.T. states "he sent it to everyone in port coquitlam. Teachers, friends family" and the portion "now you guys all got the link".

[130] As I understand the defence position, their primary concern is not with the material aspects of this statement set out above but rather with other portions of the statement where A.T. refers to what occurred when she was 11 years old and describes what has happened to her since. As I have discussed, the focus on this application is whether the material aspects of the statement that Crown seeks to rely on for their truth are substantively reliable. In my view, the corroborative evidence (such as messages sent by Austin Collins), together with the previous messages (where A.T. explains that her images were widely distributed to teachers, family and friends at her previous schools), serves to address the hearsay concerns identified in Bradshaw: The only likely explanation for the hearsay statement is A.T.'s truthfulness and accuracy about the distribution of the explicit image to friends and family, as she describes.

[131] The Crown also seeks to have the following portion of the message tendered pursuant to the state of mind exception:

But right now I feel like shit, I feel so sad and sick.. That he's gonna do this for the rest of my life and there's nothing I can do.

[132] The defence takes the same position regarding the state of mind exception as they have with respect to various other status updates or wall posts: They submit this statement was made in circumstances of suspicion because it was posted as a status update on A.T.'s Facebook page for anyone with access to her Facebook to read. They submit this statement was not made naturally; essentially, they argue that A.T. did not make the statement in the way they would expect a person to do so if they seriously had concerns about being harassed. As I have discussed earlier, I see no merit in this submission, and I find A.T.'s method of communication does not detract from the reliability of the statement. In conducting my analysis, I am cognizant of the fact that A.T. chooses to communicate with others on various social media platforms. While this is not the type of discrete conversation considered in Griffin, there is nothing about the manner by which A.T. chose to communicate how she was feeling that leads me to conclude she had a motive to lie about her state of mind at the relevant time. I am satisfied this portion of her statement is admissible pursuant to the state of mind exception.

Items 36, 37 and 38: Facebook messages on November 13, 2011 at 12:57, 1:00 and 1:24 a.m.
(Category A, Category C)

[133] These are direct messages A.T. sent to Haden Harty and Felicia Bruno regarding the content of the messages sent by Austin Collins. The defence concedes that these statements are admissible under the principled exception to the hearsay rule. I agree that there is ample corroboration to support these statements. They are admissible.

Items 39 and 40: Facebook messages on November 13, 2011 at 1:28 and 1:29 a.m. (Category A, Category C)

[134] This is a direct message between A.T. and Di Est El, in which A.T. advised "He's using my fucking tits as his photo!" with a link to the Facebook page for Austin Collins. The defence submits this message is not necessary because there is other admissible evidence, including the screen shot of Austin Collins' Facebook page. As I have discussed earlier in these reasons with reference to Rowe, whether the Crown requires the evidence to prove their case is not a relevant consideration when determining threshold reliability.

[135] I am satisfied that this statement is admissible under the principled exception to the hearsay rule.

Items 41, 42, 43 and 44: Facebook messages on December 12, 2011 at 6:41 p.m. to 6:44 p.m.
(Category A, Category B, Category C)

[136] This is a direct message between A.T. and Liam Hilder. In this message, A.T. explains how the person obtained the explicit images of her. The material aspect of the message the Crown seeks to rely on are as follows:

he said if I didn't do more he would send it to all over poco, and he did.. People think I sent that photo of myself and it crushed n ruined me.

Now about a month ago at my new school in ridge he got my new info and posted it on over 300 kids at my new highschool

Now that picture on the internet will never go away and this guy will never leave me alone..I lost everything it sucks.

Its fucking hell.

And he put my tits as his profile phooto on facebook

[137] The Crown submits that the reference to "about a month ago" is a reference to the actions of Tyler Boo and Austin Collins distributing links to the explicit images of A.T. Further, the investigators obtained screen shots of Austin Collins' Facebook page, which had an explicit image of A.T. as his profile photo. Therefore, the Crown submits these statements are admissible under the principled exception, considering the Bradshaw framework.

- [138] The defence takes issue with the accuracy of the earlier portion of the message, which is not part of the material aspect the Crown is relying on in this application. As set out at para. 45 of Bradshaw "because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth". I agree with defence counsel that the first portion of the statement, such as "if I didn't do a show for him he would come kill me" is problematic. I find that portion of the statement should be edited out, as it may mislead the jury or otherwise cause needless prejudice to the accused. Therefore, the portion of the statement beginning with "hey Amanda" up to and including "So I was scared and just got it over with and did it" should be edited out of this statement. The remaining portions are admissible under the principled exception, as these aspects of the statement are extensively corroborated and supported by the surrounding circumstances, such that the only likely explanation for them is A.T.'s truthfulness.
- [139] In addition, I agree that the underlined portions of the statement set out above are admissible under the state of mind exception, as this is a genuine statement of A.T.'s contemporaneous state of mind and it is not made under circumstances of suspicion.

Conclusion

- [140] For the reasons set out above, the Crown is permitted to tender the majority of the statements that are the subject of this application either under the traditional exception or the principled exception to the hearsay rule. However, as there is a pending application regarding the admissibility of the Facebook records, there may be a need to reconsider some aspects of this ruling upon completion of that application.

"Devlin J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/22/2021BCSC2297.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-coban-2021-bcsc-2297>

Prepared on 29 October 2026 · Esheria