

CANADA / JUDGMENT

R. v. Coban

2021 BCSC 2303

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2303 R. v. Coban IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Coban, 2021 BCSC 2303 Date: 20211126 Docket: X078463 Registry: New Westminster Regina v. Aydin Coban Before: The Honourable Madam Justice Devlin Reasons for Judgment - Application to Cross-examine Shannon Chance Counsel for the Crown: L.J. Kenworthy H.M. Guinn K. LeNoble Counsel for the Accused: J.J. Saulnier E. Holzman Place and Dates of Hearing: New Westminster, B.C. November 18-19, 2021 Place and Date of Result given to Parties with Reasons to Follow: New Westminster, B.C. November 22, 2021 Place and Date of Judgment: New Westminster, B.C. November 26, 2021

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] Mr. Coban's jury trial is set to commence on January 4, 2022. At trial, the Crown intends to rely on a large body of Facebook records. Counsel for Mr. Coban opposes the admission of all Facebook records other than those from A.T.'s Facebook account. A voir dire has been declared to determine whether the various Facebook records the Crown seeks to tender at trial meet the requirements of the Canada Evidence Act, R.S.C. 1985, c. C-5 [CEA] and whether they are admissible.
- [3] The Crown takes the position that these records are electronic records and relies on ss. 31.1-31.3 of the CEA to prove their integrity and authenticity. Once these CEA requirements are met, the Crown says that some of the records are admissible automatically for narrative purposes where they are not relied on for their truth. Where records are tendered for their truth, the Crown will tender them as real evidence, or alternatively, business records pursuant to s. 30 of the CEA; and as admissions of the accused. In support of their application, the Crown has filed several affidavits, including three affidavits sworn by Shannon Chance, a custodian of records at Facebook Inc. ("Facebook").

- [4] Counsel for Mr. Coban seeks leave to cross-examine Ms. Chance on her affidavits pursuant to s. 31.6(1), or in the alternative, s. 30(9) of the CEA. These Reasons concern the defence application to cross-examine Ms. Chance.
- [5] On November 22, 2021, I advised the parties that the application to cross-examine Ms. Chance was denied with reasons to follow. These are those reasons. The Relevant CEA Provisions
- [6] With respect to electronic records, s. 31.6(1) of the CEA sets out that a party may rely on an affidavit to establish the integrity of the document (including to trigger a presumption under s. 31.3, which the Crown relies on in this case). Pursuant to s. 31.6(2), a party may cross-examine a deponent of an affidavit as follows:
- (a) as for right, if the deponent is an adverse party or is under the control of an adverse party; and
 - (b) with leave of the court, in the case of any other deponent.
- [7] Additionally, the statutory business records rule set out in s. 30(1) allows the admission of business records if certain criteria are met. Section 30(9) of the CEA provides: Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.
- [8] The parties agree that the factors to be considered in the exercise of the court's discretion to grant cross-examination--whether under ss. 31.6(2) or 30(9), both of which are relied upon--are identified in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995 [Cowichan Valley]. Although *Cowichan Valley* was dealing with an application of Rule 22-1(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 in a civil proceeding, it does provide some guidance. At para. 27, Justice Pearlman stated: Factors to be considered in the exercise of the court's discretion include whether there are material facts in issue; whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue: *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882 at para. 6; *0371984 B.C. Ltd. v. Alpha Aviation Inc.*, 2014 BCSC 1815 at para. 23.
- [9] Further, Pearlman J. stated at para 29: Minor discrepancies in the evidence, or conflicts that may be resolved by reference to documentary evidence will not warrant the exercise of the court's discretion. However, where there is conflicting evidence on a material fact in issue which would result in the inability of the judge hearing the petition to decide the case, cross-examination will be ordered: *Morlacci v. British Columbia Energy, Mines and Petroleum Resources*, [1994] B.C.J. No. 3300 at paras. 8 -11 (S.C.); *Cadboro Investments Ltd. v. Canada West Insurance Co.* (1987), 18 B.C.L.R. (2d) 352 (B.C.C.A.) Discussion

- [10] Defence counsel asks the court to grant them leave to cross-examine Ms. Chance because both the authenticity and integrity of the Facebook records are in issue. While they suggested that there is some basis to establish Ms. Chance was under the control of the Crown to justify cross-examination pursuant to s. 31.6(2)(a), their primary position was that they should be granted leave to cross-examine Ms. Chance because there are significant inconsistencies and irregularities in the records. For example, while Ms. Chance states the records were generated on a particular date, an examination of the records reveals that some of the records were generated on an earlier date than what she deposes. In support of their position, they rely on the evidence of Mr. Bulmer, the Crown's Facebook records expert, who testified that some of the records appeared "odd", with reference to the date ranges of the search parameters. They submit these irregularities suggest there are issues with the integrity of the documents--perhaps due to human intervention in the creation of the PDF documents. Further, they submit there is a basis to believe that some of the records were produced as part of an investigation and they seek to question Ms. Chance regarding her knowledge of a Facebook internal investigation. Given that s. 30(10)(a)(i) excludes records produced during an investigation from being admitted as business records under s. 30(1), this would be relevant to the ultimate admissibility of the documents to the extent that the Crown relies on the business records exception. While not an exhaustive list, some of the areas for cross-examination identified by defence counsel include the following: · What does Ms. Chance mean when she states Facebook produced "responsive" records? · Did she make the 2013 records? Who printed the records? · Does she know what records were produced in 2013 or only what was requested? · Why was there a three-day gap in the 2013 records between the date the records were generated (2013-10-11, 19:50:19 UTC) and the date they were created (2013-10-14, 10:09:43 UTC)? · How much human intervention was involved in the production of these records? · Why is it Facebook cannot externally render the details of the disclosure reflected in the Facebook system? · Why did Facebook produce records in 2018? · Can she explain the discrepancies between the 2013 and 2016/2018 records produced for the same accounts?
- [11] I agree with the Crown that there is no basis to find Ms. Chance, an employee of Facebook, a private company, is under the control of the Crown; therefore, s. 31.6(2)(a) has no application and leave is required to cross-examine Ms. Chance, whether pursuant to s. 31.6(2)(b) or s. 30(9). The Crown submits that the defence has not established basis to embark upon a cross-examination of Ms. Chance. They argue that the discrepancies identified by defence counsel can be resolved by reference to the documentary evidence filed on the application. In the Crown's submission, many of the proposed areas of cross-examination are irrelevant and they will not assist the court to determine the ultimate issues of authenticity, integrity, and admissibility.
- [12] The Crown reviewed one Facebook account, "Alice McAllister", in their submissions to provide an example. They examined the records for 2013, 2016, and 2018 to demonstrate that any discrepancies in the records did not impact the actual data produced. While I do not intend to set out all of the details of the comparison of the records, I am satisfied that a

careful review of these records demonstrates that although the presentation of the data is slightly different, the actual content of the data is the same. Some slight differences in the amount of information is easily explained by the fact that the date range for the search is different. For example, the 2013 documents generated on October 11, 2013 in response to a search warrant have a date range of 2010-12-01 to 2013-10-11 while the 2016 documents generated on June 9, 2016 in response to a mutual legal assistance ("MLAT") request have a date range of 2010-09-28 to 2011-01-06. The records generated on June 12, 2018 in response to a further court order related to the MLAT had a date range of 2004-01-01 to 2018-06-05. As the Crown's review of these records demonstrated, while the form of the records differ, the substance (that is, the data contained in the records) remains the same. While some records have more data than others, the data is consistent as between the various records.

- [13] A review of the 2016 records together with the other material filed on this application addresses some of the other discrepancies identified by defence counsel. For example, defence counsel submits that because the 2016 records contain duplicate records, generated on two different dates, there must be a flaw in the computer system or an error caused by human intervention. Pages 1 to 24, which are a duplicate of pages 25 to 47, indicate they were generated on June 9, 2016. Pages 25 to 47 indicate that they were generated on February 19, 2015. In her October 21, 2021 affidavit, Ms. Chance stated that the records generated on June 9, 2016 were an exact copy of the records kept by the automated systems of Facebook. They were, in her words, a "true and accurate representation of the data stored on the System at that time" [my emphasis].
- [14] Defence counsel seek to question Ms. Chance as to how there could be two different sets of records. However, a review of the material filed on this application resolves this issue: The emails filed as Exhibit 2 on this application to cross-examine Ms. Chance establish that on February 19, 2015 at 11:26 a.m. (PST) the RCMP contacted Facebook and requested that they preserve various accounts, including the "Alice McAllister" account. Mr. Bulmer testified that investigators make preservation requests to ensure Facebook records are not destroyed before a judicial authorization is obtained. The duplicate pages with the earlier generation date--Pages 25 to 47 of the 2016 records--were generated on February 19, 2015 at 12:10 p.m. (PST), or approximately 30 minutes after the RCMP sent Facebook a preservation request. The date range in the 2015-generated records is the same as the records generated in 2016, which explains why these records are duplicative of one another. The entire 47-page document reflects the data stored on the system at that time. I agree with Crown counsel that this review of the 2016 records together with the other documentary evidence addresses the issues raised without the necessity of hearing from Ms. Chance.

- [15] Mr. Bulmer also testified that Facebook revised the format they used to produce documents for law enforcement, which accounts for some of the differences in the presentation. While there were some aspects of the Facebook records Mr. Bulmer was not familiar with, that certainly cannot support a claim that the records are inaccurate or compromised. Indeed, Mr. Bulmer stated that while there appeared to be some errors in the date range on some of the documents, he had no reason to believe all the records were inaccurate.
- [16] I also see no need to hear from Ms. Chance as to why there was a 3-day gap between the date the records were generated in 2013 and when the PDF was created. The focus of this admissibility voir dire is on the authenticity and integrity of the data produced. As the comparison of the records has demonstrated, the data contained in the 2013-generated records are identical to the data produced in the 2016-generated records where the date range overlaps. There is no indication that the system was not operating properly; the fact that the same data is captured in both sets of records when the overlapping time period is queried would, if anything, suggest the system was working exactly as expected. The defence has provided no credible reason why more information about this 3-day delay would assist me to determine the authenticity, integrity, or admissibility of these records.
- [17] I also see no basis to examine Ms. Chance about what she may have known about an internal Facebook investigation: There is nothing in Ms. Chance's affidavit to suggest she had any knowledge of any such investigation. This proposed area of examination is purely speculative.
- [18] It would not assist me in the determination of the authenticity, integrity, or admissibility of these records to hear from Ms. Chance as to why she believes the records were responsive to the request. I have been provided with sufficient information to make this determination without Ms. Chance's assistance--namely, copies of the relevant requests together with the records produced. Whether the records produced were responsive to the request does not, in any event, impact on the authenticity, integrity, or admissibility of the documents themselves.

Disposition

- [19] The focus of the substantive application is on the admissibility of the Facebook records, including their authenticity and integrity. To establish authenticity pursuant to s. 31.1 of the CEA, there must only be some evidence capable of supporting a finding that the electronic documents is what it purports to be. To establish integrity pursuant to s. 31.2 and the presumption in s. 31.3(a), there must only be evidence "capable of supporting a finding that at all material times the computer system was operating properly", absent evidence to the contrary. This presumption of system integrity is not affected by evidence of minor discrepancies or errors in the documents unless they raise a reasonable doubt about the computer system's ability to store, record, and display data: *R v. Oland*, 2015 NBQB 245 at paras. 79-80. The defence has not satisfied me that the discrepancies in question could raise a reasonable doubt in this regard. The threshold to establish the authenticity and integrity of

electronic documents is low. Defence counsel has not established that cross-examination of Ms. Chance would serve a useful purpose or elicit evidence that would assist to determine these authenticity or integrity issues. Having considered the content of Ms. Chance's affidavit together with the documentary evidence filed on this hearing, I am not satisfied that there is a basis to exercise my discretion to order the cross-examination.

[20] Therefore, the application to cross-examine Ms. Chance is denied. "Devlin J."

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