
CANADA / JUDGMENT

R. v. Coban

2022 BCSC 961

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 961 R. v. Coban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Coban,

2022 BCSC 961

Date: 20220607

Docket: X078463

Registry: New Westminster

Regina

v.

Aydin Coban

Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: Scope of Bulmer Expert Evidence

Counsel for the Crown:

L.J. Kenworthy

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J.J. Saulnier

E. Holzman

Place and Dates of Hearing:

New Westminster, B.C.

May 17, 19, 20 and 24, 2022

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

May 30, 2022

Place and Date of Judgment:

New Westminster, B.C.

June 7, 2022

Introduction

- [1] On this application, the accused Aydin Coban seeks to limit the scope of the Crown's expert witness, Warren Bulmer. Mr. Coban does not object Mr. Bulmer testifying about the contents of his 112-page expert report dated March 14, 2022. His objection pertains to the content of Mr. Bulmer's three subsequent reports consisting of:
- (1) a 545-page PowerPoint presentation detailing his analysis of Facebook user account records and the embedded material, as well as his corresponding testimony;
 - (2) an analysis of the Facebook records for the Tomas Coco Pops account (Exhibit 4, pages 1-19); and
 - (3) an investigation of the IP address data from deleted videos (Exhibit 4, pages 20-30).
- [2] Mr. Coban submits that these portions of Mr. Bulmer's report are beyond his scope of expertise, unnecessary, and prejudicial.
- [3] The Crown takes the position that Mr. Bulmer's evidence is necessary to assist the trier of fact. They say Mr. Bulmer's PowerPoint presentation contains the factual summaries upon which he bases his opinion, and these summaries are based on the Facebook records that will be exhibits at trial. Further, they submit his evidence is necessary because the subject matter of his opinion is outside the experience and knowledge of the trier of fact. They also submit that given the nature of the evidence, there is no concern that the jury would give it undue weight.
- [4] On May 30, 2022, I advised the parties of my decision with reasons to follow. These are those reasons.

Background Facts

- [5] At trial, the Crown intends to rely on a large body of Facebook records. A voir dire was held to determine the admissibility of the Facebook records, and in a ruling indexed as R. v. Coban, 2021 BCSC 2428, I determined that the Crown is permitted to rely on the Facebook records at trial as real evidence or admissions by the accused. Some aspects of the records are admissible for narrative purposes. At the admissibility voir dire, Mr. Bulmer was qualified to provide expert opinion evidence on the operation and function of Facebook as a social media platform and the interpretation of user accounts. A copy of his expert report was filed as an exhibit.
- [6] On December 8, 2021, the Crown provided counsel for Mr. Coban with notice of their intention to call Mr. Bulmer as an expert witness. A copy of Mr. Bulmer's resume was provided together with notice of the areas of expertise, which were described as follows:
- (1) What cookies are and how they used [sic] by websites;
 - (2) How computers connect to the internet;
 - (3) The operation and function of Facebook as a social media network platform; and
 - (4) The interpretation of Facebook user accounts.
- [7] Counsel for Mr. Coban was also advised that Mr. Bulmer's anticipated evidence was as follows:
- As set forth in three reports/willsays disclosed on May 31, 2021, October 6, 2021 and November 3, 2021. Additionally, Mr. Bulmer will provide further analysis and opinion related to machine cookies common among relevant Facebook user accounts.
- [8] In preparation for the jury trial set to commence on June 6, 2022, the Crown has disclosed supplemental expert reports, which are the focus of this application. Indeed, as counsel for Mr. Coban was making his submission on Mr. Bulmer's PowerPoint presentation, he received supplemental reports 3 and 4. As a result, I granted counsel an opportunity to review those records before concluding his submissions.
- [9] Counsel for Mr. Coban accepts that Mr. Bulmer has experience in dealing with and analyzing the content of Facebook records, including the meaning of technical words, how Facebook accounts are established, what personal information is provided by the user, and how Facebook operates and maintains their records. They acknowledge that this evidence is likely outside the experience and knowledge of the jury.
- [10] I will deal with the specific objections to the admissibility of the supplemental reports in my analysis. I will now briefly discuss the governing legal principles.

Governing Legal Principles

- [11] Expert opinion evidence is presumptively inadmissible, subject to certain exceptions. It is admissible (subject to satisfying the two-stage admissibility framework set out below) where the subject matter of the opinion is outside the trier of fact's experience and knowledge, and where the expert will assist the trier of fact in reaching a correct conclusion about the issue: *R. v. Scott*, 2018 BCSC 1739 [Scott] at para. 54. The party tendering the evidence must establish its admissibility on a balance of probabilities: Scott at para. 52; see also *R. v. Abbey*, 2009 ONCA 624 [Abbey 2009] at para. 71, leave to appeal ref'd, [2010] S.C.C.A. No. 125.
- [12] The function of an expert is "to provide the trier of fact with a ready-made inference, which due to the technical nature of the subject", the trier of fact is unable to reach themselves: Scott, para. 55. If the trier of fact can draw their own inference without the assistance of an expert, the expert's evidence is "unnecessary or superfluous": Scott at para. 55.
- [13] The framework or legal principles governing the admission of expert opinion evidence were articulated in *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 (SCC), wherein the Supreme Court of Canada set out the oft-cited four-part test for threshold admissibility. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess], the Supreme Court of Canada clarified the test for admissibility, largely adopting the approach set out by Justice Doherty in *Abbey 2009*; the Court set out a two-stage analytical framework, which Justice Cromwell (writing for the Court) described as follows:
- [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) Relevance at this threshold stage refers to logical relevance: *Abbey (ONCA)*, at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see *D. M. Paciocco and L. Stuesser, The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.
- [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

- [14] In summary, an expert's role is to assist the court by providing an independent, impartial, and unbiased opinion on matters outside the knowledge and experience of the trier of fact; an expert should never assume the role of an advocate, and an expert's duty to the court overrides their obligation to the party tendering them as a witness: White Burgess.

Analysis

Should Mr. Bulmer be permitted to rely on the PowerPoint presentation during his testimony?

- [15] The Crown theory is that Mr. Coban was the author of all of the Facebook records and the different Facebook identities are in fact his aliases. The Crown intends to have Mr. Bulmer rely on a PowerPoint presentation as a demonstrative aid, which will enable him to explain the basis for his findings to the jury with reference to the records. The PowerPoint is organized into twelve books. Each book contains excerpts from the particular Facebook record in question together with an analysis of how its content, particularly cookie IDs and IP addresses, compare with the content of the other Facebook records.
- [16] The defence objection to these records has several components. First, Mr. Coban submits it is not necessary for Mr. Bulmer to provide a detailed analysis of the Facebook records in order for the trier of fact to understand the evidence. In support of his position, he refers to the fact that RCMP Cpl. Devine was able to create a chart setting out the same type of information contained in Mr. Bulmer's PowerPoint. Further, he submits that in any event, Mr. Bulmer's PowerPoint presentation is based on Cpl. Devine's investigative chart and it is not the result of Mr. Bulmer's independent expertise. He submits it is not necessary for Mr. Bulmer to provide expert opinion evidence about the contents of the records because an investigator is capable of providing that type of evidence. Further, he submits the jury will be capable of analysing the data contained in the Facebook records; they do not require assistance from Mr. Bulmer.
- [17] The Crown explained that Mr. Bulmer was not provided Cpl. Devine's; rather, they say he was given charts prepared by the Crown, which contained the Facebook records in a useable format to assist his review of those records. Further, they clarified that the charts filed by counsel for Mr. Coban on the application were created by defence counsel; they were not the same charts the Crown provided to Mr. Bulmer. As I understand it, the charts provided by the Crown were provided in a format that permitted the user to organize the data into various categories, as is reflected in the charts filed by the defence.
- [18] I am satisfied that the contents of the PowerPoint presentation were derived from Mr. Bulmer's review of the Facebook records, and they are independent of what was done by either Cpl. Devine or the Crown. Obviously, there are similarities in the information contained in all the documents because the source of the information - the Facebook records - is the same. However, the information pertaining to the geolocating of the various IP addresses is unique to Mr. Bulmer's report. As I will discuss, I have determined that information is admissible.

- [19] Counsel for Mr. Coban also submits that the PowerPoint is not necessary for the trier of fact to understand the Facebook records evidence and conduct the required analysis. They submit the PowerPoint is essentially a presentation of the Crown theory through the testimony of an expert witness. The defence argues that once the jury is provided Mr. Bulmer's evidence regarding the various components of Facebook records (such as cookie IDs and IP addresses), the jury will be capable of analyzing the records themselves.
- [20] The Facebook records are voluminous and the content is dense. Mr. Bulmer's evidence regarding the components of the records, with reference to specific examples from those records, is necessary in order for the jury to fully understand the content so they can make the correct judgment about his evidence and its foundation. I appreciate that some of Mr. Bulmer's evidence will be fact rather than opinion evidence. However, an expert who is permitted to give their opinion must also be permitted to explain fully the grounds upon which they formed their opinion, as to exclude such evidence deprives the jury of the ability to assess the weight to be given to the expert opinion (see *R. v. Abbey*, [1982] 2 S.C.R. 24, 1982 CanLII 25 (SCC) at 45-46).
- [21] Counsel for Mr. Coban also argues the jury will use the PowerPoint as a substitute for conducting their own examination of the records. I do not agree. First, the common-law voluminous documents rule holds that it is proper for a competent witness who has reviewed a mass of voluminous evidence to state summarily the net result of their review: *R. v. Scheel*, [1978] O.J. No. 888, 1978 CanLII 2414 (ONCA). Second, it is important that the trier of fact be in a position to examine the evidence in a reasonable and intelligent manner. As noted by Justice Fairburn (as she then was) in *R. v. Kanagasivam*, 2016 ONSC 2250, when considering the admissibility of demonstrative aids "in long, complex cases, a trial judge has the discretion to allow summaries and aids to go to the jury to assist them with understanding the evidence 'reasonably, intelligently and expeditiously'" (para. 47).
- [22] The same rationales work together in this case, where the expert opinion evidence is based on the review of a large volume of records. Mr. Bulmer's PowerPoint and anticipated testimony will not "usurp the functions of the trier of fact" (*R. v. Sekhon*, 2014 SCC 15 at para. 45). Rather, considering the significant volume of Facebook records, the PowerPoint will provide a necessary means for the jury to comprehend the analytical process Mr. Bulmer engaged in to form his opinion and to assess the weight to be accorded to it. The summary of the voluminous documents forming the basis of Mr. Bulmer's opinion is necessary to facilitate the jury's reasonable, intelligent, and expeditious understanding of his expert evidence and its foundation.

Are the geo-locating portions of Mr. Bulmer's Report Admissible?

- [23] I turn now to consider the geolocating material contained in the PowerPoint and the related documents embedded in the electronic version. There is no issue with Mr. Bulmer explaining what an IP address is, nor how IP addresses can be manipulated to appear associated to a location other than where the user is located.

- [24] However, Mr. Bulmer went beyond a review of the contents of the Facebook records and conducted an investigation into the IP addresses using various IP address look-up websites. The results of his investigation for each Facebook record are included as part of his PowerPoint. In addition, a large body of material was embedded into the PowerPoint, which contained what I describe as Mr. Bulmer's working papers. These working papers appear to contain the results of his geolocating investigation. While few details are provided regarding the methodology employed, it appears Mr. Bulmer basically inputted a given IP address from the Facebook records into an IP address look-up tool on the internet, which then generated the reports.
- [25] I agree with counsel for Mr. Coban that the results of Mr. Bulmer's investigation into the IP addresses are beyond the scope of his proposed expertise regarding Facebook records. In addition, the proposed geolocating evidence is not opinion evidence but rather the results of an internet search. Therefore, all reference to the results of the geolocating investigation conducted by Mr. Bulmer must be removed from the PowerPoint and from Mr. Bulmer's anticipated testimony.
- [26] In summary, Mr. Bulmer will be permitted to rely on a PowerPoint presentation subject to the required amendments identified above. Specifically, Mr. Bulmer will not be permitted to testify regarding the results of his geolocating research and all reference to that research must be removed from the PowerPoint and embedded material. The list of cookie IDs and IP addresses embedded in the PowerPoint can remain.

Can Mr. Bulmer refer to his supplemental analysis of the Tomas Coco Pops Facebook Record?

- [27] Counsel for Mr. Coban accepts that the first portion of this report (pages 1-8) fall within the scope of Mr. Bulmer's expertise. I agree. However, pages 9-18 contain the same type of geolocating details as contained in the PowerPoint. From my review of this portion of the report, Mr. Bulmer appears to have conducted a WHOIS look-up for the IP addresses to investigate the address. In another section of the report entitled "Characteristics of IP Addresses", he states the results were obtained from a "reliable IP Geolocation tool and database". In addition to this being beyond the scope of his purported expertise, there are no details as to the exact methodology of the geolocation tool and database used, and consequently, their reliability cannot be assessed by the trier of fact.

- [28] Pages 9-19 of the Tomas Coco Pops Facebook records supplemental report is inadmissible.

Is Mr. Bulmer's report on the IP data from deleted screenshots admissible?

- [29] In addition to providing an expert opinion report on the Facebook records, Mr. Bulmer also produced a report containing the results of his investigation into the IP addresses located on screenshots of deleted videos. The most obvious problem with this proposed evidence is that the screenshots from the deleted videos are not part of the Facebook records. Additionally, as noted above with reference to other items, this section of the report is not expert evidence; rather, it is the result of Mr. Bulmer using "multiple tools with their associated

databases" to investigate the location of the various IP addresses. In other words, the report contains the results of Mr. Bulmer's internet research into the various IP addresses. This goes beyond the scope of Mr. Bulmer's expertise and it employs tools of unknown reliability.

- [30] The Crown is not permitted to rely on Mr. Bulmer's investigation of the IP data from the deleted screenshots.

Summary of Conclusions

- [31] Mr. Bulmer's PowerPoint is admissible subject to amendments removing all reference to geolocating research of the various IP addresses in the Facebook records.
- [32] The Tomas Coco Pops Facebook records supplemental report is admissible subject to the removal of all geolocation data.
- [33] Mr. Bulmer's report on the IP data from deleted screenshots is not admissible.
- [34] Should any further issues arise with respect to the admissibility of Mr. Bulmer's evidence, further submissions may be made by counsel.

"Devlin J."

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