

CANADA / JUDGMENT

Wood v. McCauley

2023 BCSC 968

COURT

Supreme Court of British Columbia

DECIDED

6 March 2023

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2023 BCSC 968 Wood v. McCauley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wood v. McCauley,

2023 BCSC 968

Date: 20230306

Docket: M134198

Registry: Vancouver

Between:

Scott Wood

Plaintiff

And

Frank McCauley, South Coast British Columbia Transportation Authority

and Coast Mountain Bus Company Ltd.

Defendants

Before: The Honourable Mr. Justice Elwood

Oral Ruling on Voir Dire No. 1

Counsel for the Plaintiff:

P. Cote

Counsel for the Defendants:

Y.H.A. Ng

A.K. Sandhu

Place and Date of Hearing:

Vancouver, B.C.

March 6, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 6, 2023

- [1] THE COURT: This is an oral ruling on a voir dire in a motor vehicle action trial to determine the admissibility of a certificate of an analyst.
- [2] The plaintiff, Scott Wood, objects to the admissibility of a certificate of an analyst dated August 12, 2011. The certificate was marked for identification following the examination in chief of Constable, now Corporal, Jonathan Gillis of the RCMP. Corporal Gillis led an investigation into a motor vehicle accident on July 11, 2011, which is the subject matter of this trial. The objection is on the basis that the certificate contains hearsay and opinion evidence.
- [3] Corporal Gillis testified that blood was withdrawn from Mr. Wood following the motor vehicle accident by medical personnel at the Royal Columbian Hospital, utilizing a blood kit provided to the RCMP. A certificate of a qualified medical practitioner who caused blood samples to be taken, along with the subject certificate of an analyst, were filed in criminal proceedings against Mr. Wood on charges that his ability to operate a motor vehicle was impaired by alcohol and the concentration of alcohol in his blood exceeded 80 milligrams.
- [4] On October 18, 2013, Judge Rideout of the Provincial Court ruled that the demand made by Constable Gillis at the hospital was invalid and in violation of s. 8 of the Charter. Judge Rideout also found that the subsequent taking of blood from Mr. Wood in the face of the invalid demand was a violation of s. 7 of the Charter.
- [5] In reasons for judgment dated February 3, 2014, Judge Rideout held that the admission of the certificate evidence would have a serious negative impact on the repute of the administration of justice and, as such, excluded the certificate evidence from the criminal trial under s. 24(2) of the Charter.

- [6] Counsel for Mr. Wood confirms that, in this civil trial, Mr. Wood does not object to the admissibility of the certificate on Charter grounds. Instead, as stated, he objects on the basis that the certificate contains hearsay evidence and opinion that can only be admitted through an expert report by a qualified expert in accordance with the provisions of the Rules of Court.
- [7] The defendant tenders the certificate as evidence of Mr. Wood's blood alcohol concentration on July 11, 2011. The defendant relies on s. 42 of the B.C. Evidence Act, which creates a statutory exception to the rule against hearsay for business records.
- [8] In the certificate, Sarena McHugh-Borden states that she is a person designated pursuant to subsection 254(1) of the Criminal Code by the Attorneys General of British Columbia and Canada as an analyst. Ms. McHugh-Borden states that on August 9, 2011, she received, via the National Forensic Services Vancouver Evidence Management, a sample of blood initially received on July 28, 2011, which was contained in a sealed envelope container, as defined in s. 254(1) of the Criminal Code, and then cites what I will call a sample identifier.
- [9] In this trial, Constable Wade Young testified that he transported a blood sample from the Burnaby RCMP detachment to an RCMP lab on Heather Street in Vancouver. Constable Young made no note of the file number or sample identifier, nor did he provide any photographs of the samples he transported.
- [10] In the certificate of analyst, Ms. McHugh-Borden certifies:
- THAT I made an analysis of the said sample of blood on the 11th of August 2011 at Vancouver in the Province of British Columbia and the result of my analysis is 243 milligrams of alcohol in one hundred millilitres of blood.
- [11] Mr. Wood submits that this statement is not only hearsay, but also opinion.
- [12] In criminal proceedings, a certificate of this nature is admissible under what is now s. 320.31(2) of the Criminal Code, which states:
- (2) The result of an analysis made by an analyst of a sample of a person's blood is proof of their blood alcohol concentration or their blood drug concentration, as the case may be, at the time when the sample was taken in the absence of evidence tending to show that the analysis was performed improperly.
- [13] Section 42 of the B.C. Evidence Act on which the defence relies in this action provides, in subsection (2), that:
- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
- (a) the document was made or kept in the usual and ordinary course of business, and

- (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[14] In *R. v. Smith*, 2011 ABCA 136, the Alberta Court of Appeal held that:

Reports of blood alcohol level testing done in hospital are admissible as evidence in a criminal trial for all purposes under s. 30(1) of the Canada Evidence Act . . .

[15] Section 30 of the Canada Evidence Act is generally similar although not identical in wording to s. 42 of the B.C. Evidence Act.

[16] In *Smith*, an information technician with the hospital in question provided an affidavit in which she deposed that she had knowledge of the ordinary books and records of the hospital, and that these books and records are made in the ordinary course of business. She attached the toxicology report, which she deposed was made in the usual and ordinary course of business by the hospital.

[17] At trial, the Crown called a forensic alcohol expert who addressed the absorption, distribution, and elimination of alcohol from the body, as well as the effect of alcohol on one's ability to operate a motor vehicle.

[18] The Alberta Court of Appeal held that the toxicology report was admissible:

[20] The prerequisites for admissibility created by s. 30(1) of the CEA were met at trial in relation to the toxicology report. First, that section provides that in order to be admissible, a business record must have been made in the usual and ordinary course of business where oral evidence in respect of that matter would be admissible in a legal proceeding [cites omitted]. There is no question here that had the person who drew the blood and tested it given oral evidence of that fact and the results, that evidence would have been admissible. Therefore, the requirement of the section "[w]here oral evidence in respect of a matter would be admissible in a legal proceeding ..." was met.

[21] Second, Ms. Firth's affidavit evidences that the toxicology report was made in the usual and ordinary course of business of the hospital. Therefore, the requirement that the record be "made in the usual and ordinary course of business" was met. . . .

[19] Initially in the case at bar, the defence did not provide any evidence addressing the prerequisites of s. 42 of the B.C. Evidence Act. However, since the objection to the admissibility of the certificate was not flagged by Mr. Wood prior to the trial, I granted the defence leave to file an affidavit by a person with knowledge of the circumstances.

[20] In the limited time that they had to obtain an affidavit, defence counsel were unable to obtain an affidavit by an analyst at the RCMP lab on Heather Street or the current RCMP lab in Surrey. Instead, they were able to obtain an affidavit by Carolyn Kirkwood, who was a forensic chemist working for the City of Vancouver Health Department.

- [221] Ms. Kirkwood deposes that while she was actively employed at a forensic lab, she was also an analyst designated under the Criminal Code. She goes on to depose that the subject certificate, which she exhibits to her affidavit, would be the type of document that she or another analyst would prepare to record the results from toxicology testing, recording the amount of alcohol in a blood sample pursuant to the Criminal Code, while in the employ of a forensic lab in the context of an investigation.
- [222] Ms. Kirkwood further deposes that a certificate of this nature is made by the analyst who completed the testing, generally within a day or two after the completion of the testing.
- [233] Mr. Wood argues that Ms. Kirkwood's affidavit does not provide sufficient evidence that the certificate meets the criteria of s. 42 of the Evidence Act for two reasons: first, Ms. Kirkwood worked at a different lab than the lab that apparently produced the certificate in issue; and second, Ms. Kirkwood does not provide any timeframe for her experience as an analyst, and so her evidence cannot be assumed to speak to the practices at the Heather Street lab in 2011.
- [244] In my view, there is merit in Mr. Wood's submissions. I think it is unwise to extrapolate the practices at one lab at an unspecified time to conclude that a document created at a different lab, possibly at a different time, was, in the language of the statute, "made in the ordinary course of business" of that lab.
- [255] However, even if I was to extrapolate Ms. Kirkwood's evidence to the practices of the Heather Street lab, I would not find that the certificate was created in the usual and ordinary course of business within the meaning of the statutory exception to the rule against hearsay.
- [266] Section 42 of the Evidence Act must be interpreted in light of its purpose. Generally, hearsay evidence is not admissible because the methods by which its reliability is normally tested - by cross-examination for example - are not available in relation to it. However, in some circumstances, because of the way that it originated, a hearsay statement may be inherently reliable or subject to sufficient testing, such that the concerns surrounding hearsay are eased and admission is justified. Business records can be considered inherently reliable when they are created in a context in which they are relied upon in the day-to-day affairs of a business.
- [277] As noted by an Ontario judge in *R. v. Grimba* (1977), 38 C.C.C. (2d) 469 at 471:
- It would appear that the rationale behind [s. 30] for admitting a form of hearsay evidence is the inherent circumstantial guarantee of accuracy which one would find in a business context from records which are relied upon in the day to day affairs of individual businesses, and which are subject to frequent testing and cross-checking.
- [288] In *Smith*, the Court of Appeal noted that toxicology reports are used by doctors and nurses to make life and death decisions in hospitals: see paragraph 18.

- [29] The certificate of an analyst prepared under the Criminal Code is not, in my view, made in the day-to-day affairs of a forensic lab. It is not subject to the common use and reliance in the ordinary course of business that is the foundation of reliability for the statutory business records exception. Instead, the certificate in issue was created for the purpose and use in an investigation and subsequent prosecution of Mr. Wood for impaired driving.
- [30] Parliament has seen fit to create a separate statutory exception for these certificates in criminal law proceedings, presumably to address the scourge of impaired driving. However, that does not mean that the documents are admissible for all purposes; specifically, it does not mean that they are admissible as business records in a civil proceeding for damages between private parties.
- [31] No other exception was offered by the defendant for admitting the document for the truth of its contents. In my view, the certificate is admissible only for the fact that the RCMP obtained an analyst's certificate with this result, and not for the truth of the fact that Mr. Smith had a blood alcohol concentration of 243 milligrams in 100 millilitres of blood.

"Elwood J."

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