IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Ministry of Social Development and Poverty Reduction) v. Choquette,* 2024 BCSC 2098

Date: 20241119
Docket: S136086
Registry: Kelowna

Between:

His Majesty the King in Right of the Province of British Columbia

Plaintiff

And

Dylan Anthony Choquette

Defendant

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	M. Salt F. De Lima
No other appearances	
Place and Date of Hearing:	Kelowna, B.C. October 21, 2024
Place and Date of Judgment:	Kelowna, B.C. November 19, 2024

[1] This is an application brought by the Province of British Columbia ("Province") for default judgment and for a permanent injunction preventing the defendant from attending at the West Kelowna office of the Ministry of Social Development and Poverty Reduction of British Columbia located at 3685 Hoskins Road in West Kelowna (the "Ministry Office").

Background

[2] The background of this matter is that following a verbal altercation between the defendant and Ministry staff in January 2022, in which it is alleged that the defendant subjected Ministry workers to profanities, the Ministry sent a letter to the defendant warning him that his behaviour was not acceptable and would not be tolerated.

[3] There were similar incidents between February and March 2022 and following an incident at the beginning of May 2022, a second letter was sent to the defendant which prohibited him from attending at the Ministry Office, and instead provided him with advice as to how he could engage third parties to interact with the Ministry.

[4] By the end of December 2022, there had been a total of 20 documented incidents involving the defendant. On December 29, 2022, this action was commenced and an application was made for an interim injunction that would prohibit the defendant from attending at the Ministry Office. The defendant was personally served with both the notice of civil claim and the application for an interim injunction. An interim injunction was granted on January 30, 2023, for a period of one year. The defendant was personally served with the order on March 13, 2023.

[5] During 2023, there were a total of six interactions between the defendant and Ministry staff. In January 2024, the Province applied for an extension of the interim injunction which was granted for a period of 180 days. The defendant was served with both the notice of application and the order upon entry. Due to a lack of court time, the interim order has been extended on a couple of occasions pending this hearing.

[6] Five or six days before this hearing, the Province had the RCMP deliver copies of the materials for this application, even though the defendant has never filed a response.

This application

Default judgment

[7] The first aspect of the Province's application is the application for default judgment.

[8] An application for default judgment may be made under Rule 3-8(1):

> (1) A plaintiff may proceed against a defendant under this rule if
>
> > (a)that defendant has not filed and served a response to civil claim, and
> >
> > (b)the period for filing and serving the response to civil claim has expired.

[9] In this case, the Province does not seek a monetary award for damages. Rather, the only relief it seeks in addition to the default judgment is the permanent injunction.

[10] If a defendant does not file a response to a civil claim within the time permitted, he is deemed to admit the facts as set out in the notice of civil claim.

[11] I am satisfied that the effect of the admissions in this case are that the defendant is deemed to have admitted that he attended at the Ministry Office when he was prohibited from doing so, rendering him a trespasser.

[12] I am therefore satisfied that an order for judgment in default of a response may be granted.

Permanent Injunction

[13] The Province also seeks a permanent injunction.

[14] In *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46, the Court provided at para. 72 a detailed summary of the considerations relevant to the granting of permanent injunctions:

> **72** I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
>
> (i)Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
>
> (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
>
> (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
>
> (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
>
> (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[15] This test has been adopted by the Court in British Columbia, including in *Grosz v. Guo*, 2020 BCSC 997 at para. 74, and *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc*., 2022 BCSC 15 at para. 630.

[16] The legal principles are not in issue; rather, the concern in this case is the evidence upon which the Province relies.

[17] The evidence regarding the defendant's interactions with the staff of the Ministry Office is set out in an affidavit of David Rice, the former manager of the Service Delivery Division of the Ministry. His evidence includes the following at paras. 6-9:

> 6. SDPR maintains an Incident Reporting and Tracking system (the “IRT”) for recording interactions with the individuals that come into the West Kelowna Office to receive social assistance services. This includes recording and tracking incidents where individuals are acting in a manner that causes safety concerns. IRT entries are made by SDPR Staff in the usual and ordinary course of business and are made at the time an incident occurs or shortly thereafter. The IRT entries are then kept on file. In my position as a manager within the Service Delivery Division, I receive email notifications each time a SDPR Staff member makes an IRT entry.
>
> 7. SDPR maintains files through an Integrated Case Management system (KAT) for each individual who uses SDPR services in order to maintain accurate contact information and other necessary information to deliver services to that individual. SDPR Staff members may add ICM entries to an individual’s file to record specific interactions. ICM entries are made by SDPR Staff in the usual and ordinary course of business and are made at the time an interaction occurs or shortly thereafter. Attached and marked as Exhibit “B” is a true copy of the ICM entries for Mr. Choquette’s file.
>
> 8. As part of the application process for assessing whether an individual qualifies for various social assistance services, SDPR keeps record of whether an individual has any significant assets in the form of real or personal property. Our file for Mr. Choquette indicates that he does not currently have any significant assets.
>
> 9. If an individual behaves in an aggressive manner towards SDPR Staff or creates safety concerns, SDPR may take the following steps in accordance with the Standard Operating Procedure for Third Party Administration Referral - Supervisor policy:
>
>   a. SDPR Staff will report behaviour which is then reviewed by a supervisor to determine if the client has behaved in an unacceptable manner.
>
>   b. The Supervisor will identify all SDPR Staff members involved and ensure they complete an IRT entry.
>
>   c. The Supervisor will then determine how to proceed based on whether there have been previous incidents involving the client. This includes:
>
>   i. Issuing a verbal warning to the client.
>
>   ii. Issuing a written warning letter to the individual informing them that aggressive behaviour towards SDPR Staff is not acceptable.
>
>   iii. Issuing a Third Party Administration Contractor Referral to the individual informing them that they will have to engage the services of a third party to collect their social assistance. This also includes providing the individual with information on Third Party Administration procedures.
>
> Attached and marked as Exhibit “C” is a true copy of the Standard Operating Procedure for Third Party Administration Referral - Supervisor policy and a Third-Party Policy and Procedure document.

[18] Mr. Rice's affidavit then goes on to attach as exhibits to his affidavit various entries on the Ministry's incident report and tracking system, or IRT, regarding the various interactions between Ministry staff and the defendant. The following are two examples or extracts from the IRT, highlighted by counsel during submissions:

> [May 30, 2022] Banned client entered office 433 carrying a large wooden object (like a shelf) over his shoulders. He approached a counter that was raised and stated he wanted his cheque. Staff informed client that he needed to leave the office as he was banned. Client ignored staff, went to another counter and asked for his cheque. Client was informed that if he did not leave, RCMP would be called. Client responded with saying 'go ahead call, they won't show up or do anything.' Client used the wooden object to knock over the plexiglass shield on counter and then slammed the wooden object against the exit door to open it as he left the office. Client was also verbally abusive when in the office. RCMP was called and attended office, but client had already left.
>
> . . .
>
> [June 30, 2022] Client came in to office and handed Worker a Ministry cheque. Worker looked up cheque and noticed it was issued a couple months prior, and it had since been cancelled. The client had done an SR for a Lost/Stolen for the cheque and it was re-issued to office 433 in June. According to notes on client file, the client signed an HR0024 and picked up the re-issued cheque. The cheque was cashed (according to MIS). Worker advised client of this information. Client became very agitated and stated that he did not get this money. Client stated that he was wanting to cash the cheque here at the office. Worker advised the cheque was cancelled. Client began to swear. Worker asked client to watch his language. Client agreed. Client then asked for his cheque. Worker explained he was re-issued this money and the cheque was cashed. Client became increasingly more agitated and started swearing in his frustration. Client stated he would have to go to court. Client walked away swearing and angry. Client aggressively opened the door to the vestibule to pick up his belongings. Client yelled from the vestibule, "I'm going to shoot you girls!"

[19] There are other examples in the exhibits of similar ilk.

[20] The difficulty with this evidence is that Mr. Rice has no personal knowledge of the events deposed to. He was not there. Nor is there any sworn evidence from any of the Ministry staff as to what happened in the Ministry office on the various dates referred to.

[21] The only evidence of events subsequent to the granting of the injunction is found in a similar affidavit from an acting manager, Ms. Beverly Andrews, who refers

to some incidents in 2023. However, her evidence is the same as that of Mr. Rice, in that it does not contain anything within her personal knowledge and simply exhibits additional notations from the IRT.

[22] The Province argues that the business records exception to the hearsay rule applies, and that the court may and should rely on the notations in the Ministry's IRT system as proof of the events referred to. The Province relies on British Columbia's *Evidence Act*, R.S.B.C., 1996, c. 124, ss. 42(1), (ii) and (iii):

> **42** (1) In this section:
>
> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> "document" includes any device by means of which information is recorded or stored;
>
> "statement" includes any representation of fact, whether made in words or otherwise.
>
> (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.
>
> (3)Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility. . . .

[23] They say that the records are made contemporaneously or shortly thereafter by Ministry staff into the IRT system and refer to paragraph 6 of Mr. Rice's affidavit that says that these sorts of recordings are made in the ordinary course of business. The Province also says they are reliable because there is no reason for the Ministry staff to report anything other than what happened.

[24] Section 42 of British Columbia's *Evidence Act* creates a hearsay exception for business records. These provisions are in addition to the common law business records exception but do not replace it. At common law, statements made by a

person under a duty to another person to do an act and record it in the ordinary practice of the declarant's business or calling are admissible in evidence, provided they were made contemporaneously with the facts stated and without motive or interest to misrepresent the facts: *Ares v. Venner*, [1970] S.C.R. 608, S.C.J. No. 26 (S.C.C).

[25] The common law exception remains an important adjunct to the statutes. It applies to both "oral and written" statements and extends to "opinion" evidence in certain situations. The principles and intentions underlying the common law exception with respect to business records are the same as those underlying statutory exceptions: *R. v. Smith*, 2011 ABCA 136 at para. 15.

[26] Examples of categories that are admitted under the business records exception include: "ledger accounts, time-cards, pay-roll records, and other routine commercial records": *Oswald v. Start Up SRL,* 2020 BCSC 205 at para 22.

[27] However, a strict interpretation of the language of s. 42 of the *Evidence Act* expands the scope of the exception beyond routine financial information.

[28] For a document to be admitted into evidence under the business records exception of the *Evidence Act*, the party tendering the document must prove all of the elements in s. 42, that the document was:

a) made contemporaneously;

b) by someone having a personal knowledge of the matters being recorded;

c) by someone who has a duty to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business; and

d) that the matters which are being recorded must be the kind that would ordinarily be recorded in the usual and ordinary course of that business: *Oswald* at para. 19.

[29] On their face, the IRT entries included in the Province's affidavits fall within the broad scope of the business records exception in s. 42 of the *Evidence Act*. However, the principled approach to the admission of hearsay evidence applies to traditional hearsay exceptions.

Principled Approach

[30] Application of s. 42 of the *Evidence Act* requires consideration of the principled approach to the admission of hearsay. If records are not admissible under the traditional common law exception or under statute, they still may be admitted if the principled approach is satisfied: *R. v. Lemay*, 2004 BCCA 604.

[31] The principled approach can apply to negate the admissibility of a hearsay statement under the traditional exceptions to the hearsay rule: *Oswald* at para. 25, citing *R. v. Starr*, 2000 SCC 40 at para. 106.

[32] The principled approach to the admission of hearsay evidence requires a consideration of whether the preferred evidence is reliable and necessary. In *McGarry v. Co-operators Life Insurance Co*., 2011 BCCA 214 at paras. 65 to 68, the Court endorsed use of the principled approach to the hearsay rule in applying s. 42 of the *Evidence Act* by considering the necessity and reliability in each particular case, as opposed to applying "ossified rules" of evidence. The Court in *McGarry* went on to refer to the source of the information, including who prepared the document, and whether the document appeared on its face to have been prepared in the ordinary course of business when determining whether it should be considered reliable.

Necessity

[33] Traditionally, the necessity component of the business records exception to hearsay was justified on the declarant no longer being available to give evidence. Today, necessity is also grounded in the fact that the declarant's identity may be unknown in a large business enterprise, or that the attendance in court of that person, even if known, could not add anything to what was previously recorded in

the document. Under the principled approach, the "necessity" requirement is satisfied where it is "reasonably necessary" to present the hearsay evidence to obtain the declarant's version of events.

[34] In this case, the declarants are the employees of the Province who recorded the IRT reports. The identities of the declarants are known, they are available to give evidence, and their personal evidence would be important to ensure the statements recorded in the IRT are fulsome and reliable. It follows that it is not reasonably necessary for the Province to present the hearsay evidence under the business records exception in s. 42 of the *Evidence Act* because the witnesses are available to provide the evidence directly.

Reliability

[35] Business record hearsay statements are presumed to be reliable where the maker of the writing and the informant or informants are both acting in the usual and ordinary course of business: *Olynyk v. Yeo*, 55 DLR (4th) 294 (B.C.C.A). As noted by the Alberta Court of Appeal in *Smith* at para. 14:

> It would appear that the rationale behind [section 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. Records thus systematically stored, produced and regularly relied upon should, it would appear under s. 30, not be barred from this Court's consideration simply because they contain hearsay or double hearsay.

[36] There is an important distinction between automatically generated information, such as bank records and credit card statements, and information created by way of human intervention, such as hospital patient notes and employee log notes. Automatically generated information should be treated as real evidence and is admissible under the business records exception provided it is authenticated, whereas information created or observations recorded by way of human intervention raise hearsay issues, such as a motive or interest to misrepresent the facts.

[37] In this case, the notations in the IRT are observations recorded by way of human intervention and raise hearsay concerns affecting their reliability. There are some indicia of reliability including information surrounding the creation of the records, and a business policy obligating employees to record the information. However, the information posted to the IRT is not the type of automatic information or information that is subject to frequent checking and cross-checking that carries an inherent circumstantial guarantee of accuracy. Employees could be motivated to potentially misrepresent or overstate the facts in recording their observations in order to support further action from the Province. There is no suggestion that a posting is subject to independent scrutiny. Considering how the information is being recorded, and the purpose the information is recorded for, the IRT records are not the type of information that have hallmarks of reliability that the business records exception is intended to apply to. There is no opportunity to challenge the veracity of the records if they are simply admitted to prove the truth of the contents through the manager's affidavit.

[38] There is no evidence to suggest that the evidence could not otherwise have been led by way of affidavits from the various employees. There can be no concern about anonymity for the Ministry workers because they are identified by name in the affidavit.

[39] In conclusion, under a principled approach to the business records hearsay exception codified in s. 42 of the *Evidence Act*, the Province's IRT records are not reasonably necessary and do not have sufficient indicia of reliability so as to afford the Court a satisfactory basis for evaluating the truth of their contents. Therefore, the evidence remains inadmissible hearsay.

Conclusion

[40] It does not follow that just because the statements in the notice of civil claim are deemed to be true because they were not opposed, that the evidence is admissible for proving that the defendant intends to continue the wrong. At best, the failure to respond to the notice of civil claim constitutes an admission that the

defendant attended the Ministry Office when he knew he was prohibited from doing so. It does not inform the question of whether he is likely to continue to do.

[41] The application for a permanent injunction is dismissed.

"Wilson J."