

ONTARIO COURT OF JUSTICE

5 HER MAJESTY THE QUEEN

v.

10 OLUWAREMILEKUN SAMUEL AREMU

15 R U L I N G

BEFORE THE HONOURABLE JUSTICE R. KELLY  
on May 8, 2018, at TORONTO, Ontario

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APPEARANCES :

J. Gorda

Counsel for the Crown

30 Oluwaremilekun Aremu

Self Represented Accused



ONTARIO COURT OF JUSTICE

E X H I B I T S

EXHIBIT NUMBER

ENTERED ON PAGE

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1.  
R. v. Aremu  
Ruling  
Kelly J.

TUESDAY MAY 8, 2018

R U L I N G

KELLY J.: (Orally)

At Mr. Aremu's trial, the Crown seeks to introduce Call Detail Records and Cell Site Records relating to two phone numbers. The records were obtained from Rogers Wireless under production orders issued in August 2015 and February 2016.

Mr. Gorda accepts that, since the Crown did not have evidence to meet the notice requirement in s. 30(7) of the *Canada Evidence Act*, the statutory business records exception was not available as a route to admissibility of the records. He submitted, however, that the records meet the criteria for admissibility under the common law business records exception, which does not have a notice requirement. Mr. Gorda also referred to case law that supports the characterization of the records as real evidence that does not trigger the hearsay rule.

**Context**

I begin with some brief context. This trial is happening in the year 2018. The records at issue relate to phone calls made in 2015. These are

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computer-generated records: they were created and stored electronically and without human intervention. There can be no serious question about the reliability of the records. These records are far different than the handwritten entries in some of the early business records cases or even records like nurses' notes or payroll records as seen in case law from late in the 20th century.

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In saying this, I emphasize that in this ruling I am only concerned with threshold reliability and the admissibility of the records. Issues of interpretation and weight are for a different time.

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**Classifying the Evidence as Real Evidence or "Documentary" Evidence**

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I am going to first address Mr. Gorda's submission that the records can be classified as real evidence.

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There is support in recent authorities for the proposition that where electronically stored information was recorded by an automated process, the evidence is real evidence, not hearsay. An example is automated cell phone billing records. Where, however, the electronically stored information is created or input by human beings as a record of their observations or statements,

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then the evidence is not real evidence and is not  
admissible for its truth without some other rule  
of admissibility such as the business records  
exception in section 30 of the *Canada Evidence  
Act*: see *R. v. Clark* [2016] ONSC 3564 at paras.  
44-47, *R. v. Hall* [1998] B.C.J. No.2515 (S.C.),  
*R. v. Mondor* [2014] ONCJ 135 at para. 17, G.  
Underwood & J. Penner, *Electronic Evidence in  
Canada* (Toronto: Carswell, 2013) at page 12-2,  
para. 12.2.

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I find these authorities to be persuasive. In my  
view, it is sensible in this day and age to  
classify cell phone records, like the ones before  
me, as real evidence. Indeed, it can be somewhat  
artificial to analyze them under traditional  
hearsay principles.

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I am satisfied that the Rogers records - in  
particular, the Call Detail Records and the Cell  
Site Records - are real evidence that do not  
trigger the hearsay rule or any legal requirement  
for notice.

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If this is not correct and the records are  
hearsay evidence, I am also satisfied that they  
meet the criteria for admissibility under the  
common law business records exception: see *R. v.  
Hall* at paras, 35-43, citing *Ares v. Venner*,  
[1970] S.C.R. 608, *R. v. Huard* [2009] O.J.  
No.6520 at paras. 29-30 (S.C.J.).

**Common Law Exception to the Hearsay Rule**

5 Based on the affidavit and testimonial evidence  
before me, including exhibits nine, 20 and 21, as  
well as the testimony of Ms Jackson and Detective  
Constable Balice about her acquisition of the  
10 records under the production orders, I am  
satisfied of the following:

15 1) The computerized entries in the records can  
properly be seen as original entries - in  
other words, entries created by a computer  
system in real time, and with exact  
contemporaneity, as the events (*i.e.* the  
phone calls) were occurring;

20 2) The records were made in the routine and  
ordinary course of business by a person or  
entity who had a duty to make the records.  
In this case, the person or entity is Rogers  
Wireless and, as explained by Ms Jackson,  
25 the company had a duty to create and  
preserve accurate records to bill their  
customers and otherwise conduct their  
business;

30 3) The records were made by "a recorder with  
personal knowledge of the thing recorded as  
a result of having done or observed or

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formulated it": see *Hall* at para.35. This is an example of how the hearsay analysis can be artificial when applied to cell phone records in this day and age. But for these computer-generated cell phone records of unquestioned threshold reliability, I do not think it is a stretch to find that they were created by "a recorder with personal knowledge", namely, Rogers computer network itself: see *R. v. Marini*, [2006]O.J. No. 4057 at para. 72 (S.C.J.);

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4) Rogers is disinterested in these proceedings and has no motive to fabricate or misrepresent.

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I am satisfied that the Crown has established that the Rogers records are admissible under the common law business records exception, which, again, has no legal notice requirement.

**Principled Approach to the Hearsay Rule**

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Finally, although Mr. Gorda did not rely on the principled approach to the hearsay rule, I will simply say that I am inclined to the view that an argument can be made that the Rogers records meet the twin criteria of necessity and threshold reliability: see *Marini* at paras. 71-73, *R. v. Li* [2013] ONCA 81 at paras. 43-44.

I turn now to issues of authentication and the

best evidence rule.

**Electronic Documents in the *Canada Evidence Act***

5 The Rogers records before me are electronic documents within the meaning of section 31.8 of the *Canada Evidence Act*.

10 The person seeking to admit an electronic document has the burden to prove its authenticity by evidence capable of supporting a finding that the electronic document is what it is purported to be: see section 31.1 of the *Canada Evidence Act*.

15 Here, it may be that I could take judicial notice that these are Rogers records, but I do not need to. Detective Constable Balice testified that she received these records under the production orders. Further, the affidavits from Rogers representatives and the testimony of Ms Jackson authenticate the records. For any or all of these reasons, the Crown has proved the authenticity of the records.

25 The best evidence rule is satisfied for an electronic document on proof of the integrity of the electronic document system by or in which the electronic document was recorded or stored, and in the absence of evidence to the contrary, the integrity of an electronic documents system is proven if it is established that the electronic document was recorded or stored in the usual and

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5 ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to produce it: see Sections 31.2(1)(a) and 31.3(c) of the *Canada Evidence Act*.

10 The matters referred to in section 31.3 may be established by affidavit: see section 31.6(1) of the *Canada Evidence Act*.

15 Here, the affidavits of the Rogers representatives and the testimony of Ms Jackson establish that Rogers recorded and maintained the call detail records, cell site information and subscriber information in the usual and ordinary course of business under its electronic records system.

20 Rogers is not a party to the proceedings and did not record or store the information under the control of the Crown.

**Conclusion**

25 In conclusion, I am satisfied that these electronic documents have been authenticated and that they comply with the best evidence rule.

30 The evidence establishes that the Rogers records contain electronically stored information - in other words, information created, recorded and stored by an automated process as opposed to information created or input by a human being

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5 recording his or her observations. The records  
are therefore real evidence, not hearsay, so  
resort to a hearsay exception is not required.  
10 But if the records are hearsay, I am satisfied  
that they meet the criteria for admissibility  
under the common law business records exception.  
If it were necessary to decide the issue, I would  
be inclined to the view that the records also  
15 meet the twin criteria for admissibility under  
the principled approach to the hearsay rule.  
For these reasons, the records admissible as  
evidence in the trial.

\* \* \*

20 THIS IS TO CERTIFY THAT  
the foregoing is a true and  
accurate transcription from my  
recordings made herein, to the  
best of my skill and ability.

*Linda McDonnell* (deemed as original signature)

.....  
Linda McDonnell,  
25 Certified Court Reporter and  
Ministry Certified ACT.

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

*Evidence Act*

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I, Linda McDonnell,  
*(Name of Authorized Person)*

certify that this document is a true and accurate transcript of the recording of

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R. v. AREMU in the Ontario Court of Justice  
*(Name of Case)* *(Name of Court)*

held at 1911 Eglinton Avenue East, Scarborough  
*(Court Address)*

taken from Recording 4813\_411\_20180508\_093605, which has been

certified in Form 1.

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May 18, 2018 Linda McDonnell (deemed as original signature)  
*(Date)* *(Signature of Authorized Person(s))*

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