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R. v. 2934752 Canada Inc.

In the Matter of an appeal under section 135 of the Provincial Offences Act, R.S.O. 1990, c. P-33; Her Majesty the Queen (Appellant) and 2934752 Canada Inc., carrying on business as Highland Transport (Respondent)

Ontario Court of Justice (Provincial Division)

Masse Prov. J.

Judgment: May 20, 1997

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Counsel: *Thomas M. Byrne*, for Ontario Ministry of Transportation

J. Williamson (Agent), for Highland Transport

Subject: Public; Evidence

Motor vehicles --- Offences and penalties — Offences — Overweight vehicle

Accused trucking company was charged with various Highway Traffic Act offences after transportation inspection officer found vehicle was overweight — At trial, officer did not produce Ministry records regarding vehicle or photocopy of vehicle registration, but relied on his memory and notes of contents of documents produced by driver — Accused brought motion for non-suit on basis that there was no legally admissible evidence proving it was registered owner of vehicle — Non-suit was granted and Crown appealed, claiming that oral testimony of officer as to particulars of vehicle registration and documents produced to him by driver was not hearsay but admissible evidence — Appeal dismissed — Fact that driver carried documents purporting to show that vehicle was registered to accused company was not proof of their contents — It was incumbent on Ministry to prove registered ownership of vehicle by means of documents in its possession — **Where original documents in Ministry records are not readily available, "secondary evidence" in form of certified copies are admissible under s. 210(7) of Highway Traffic Act** — Documents found in possession of driver, who was not accused, were not admissible against accused and, not having been certified to be accurate by Registrar, were not "best evidence" available — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 210(7).

Motor vehicles --- Offences and penalties — Offences — Miscellaneous offences

Accused trucking company was charged with carrying insecure load, contrary to s. 112(2) of Highway Traffic Act, after transportation inspection officer found vehicle was overweight — At trial, officer did not produce Ministry records regarding vehicle or photocopy of vehicle registration, but relied on his memory and notes of contents of documents produced by driver — Accused brought motion for non-suit on basis that there was no legally admissible evidence proving it was registered owner of vehicle — Non-suit was granted and Crown appealed, claiming that photocopies of documents tendered by officer, which he testified were true copies of those produced to him by driver, should have been admitted into evidence under s. 25 of Truck Transportation Act — Appeal dismissed — Fact that driver carried documents purporting to show that vehicle was registered to accused company was not proof of their contents — It was incumbent on Ministry to prove registered ownership of vehicle by means of documents in its possession — **Where original documents in Ministry records are not readily available, "secondary evidence" in form of certified copies are admissible under s. 210(7) of Highway Traffic Act** — Record before court was insufficient to permit review of decision by justice of peace to refuse to admit into evidence photocopies of documents made and certified by officer to be true copies — Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 112(2), 210(7) —

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Truck Transportation Act, R.S.O. 1990, c. T.22, s. 25.

Evidence --- Preferential rules — Best evidence rule

Accused trucking company was charged with various Highway Traffic Act offences after transportation inspection officer found vehicle was overweight — At trial, officer did not produce Ministry records regarding vehicle or photocopy of vehicle registration, but relied on his memory and notes of contents of documents produced by driver — Accused brought motion for non-suit on basis that there was no legally admissible evidence proving it was registered owner of vehicle — Non-suit was granted and Crown appealed, claiming that photocopies of documents tendered by officer, which he testified were true copies of those produced to him by driver, should have been admitted into evidence — Appeal dismissed — "Best evidence rule" requires party to produce best evidence it has to prove fact — When document is adduced into evidence to prove truth of its contents, original document, if available, must be produced — Contents of document and truth thereof may, in certain circumstances, be proven by production of "secondary evidence" — Under s. 210(7) of Highway Traffic Act, certified copies of documents are admissible where original is not readily available — It was incumbent on Ministry to prove existence and contents of documents in its possession — Documents in driver's possession did not necessarily reflect status of Ministry records and, not having been certified to be true copies of Ministry records, were not "best evidence" available — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 210(7) — Truck Transportation Act, R.S.O. 1990, c. T.22, s. 25.

Evidence --- Documentary evidence — Secondary evidence — Types — Certified copies — General

Accused trucking company was charged with various Highway Traffic Act offences after transportation inspection officer found vehicle was overweight — At trial, officer did not produce Ministry records regarding vehicle or photocopy of vehicle registration, but relied on his memory and notes of contents of documents produced by driver — Accused brought motion for non-suit on basis that there was no legally admissible evidence proving it was registered owner of vehicle — Non-suit was granted and Crown appealed, claiming that photocopies of documents tendered by officer, which he testified were true copies of those produced to him by driver, should have been admitted into evidence — Appeal dismissed — Under "best evidence rule," where original document is available, it must be produced — Contents of document and truth thereof may, in certain circumstances, be proven by production of "secondary evidence" — Under s. 210(7) of Highway Traffic Act, certified copies of documents are admissible where original is not readily available — It was incumbent on Ministry to prove existence and contents of documents in its possession — Documents in driver's possession did not necessarily reflect status of Ministry records and, not having been certified to be true copies of Ministry records, were not "best evidence" available — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 210(7) — Truck Transportation Act, R.S.O. 1990, c. T.22, s. 25.

Cases considered by *Masse Prov. J.*:

Garton v. Hunter (1968), [1969] 2 Q.B. 37, [1969] 1 All E.R. 451, [1969] 2 W.L.R. 86, 67 L.G.R. 229, [1969] R.A. 11 (Eng. C.A.) — considered

MacDonnell v. Evans (1852), 138 E.R. 742, 11 C.B. 930, 21 L.J.C.P. 141, 16 Jur. 103, 18 L.T.O.S. 421, 3 Car. & K. 51 (Eng. C.P.) — considered

R. v. Anderson (1929), 21 Cr. App. R. 178, 142 L.T. 580 (Eng. Ct. of Crim. App.) — considered

R. v. Betterest Vinyl Manufacturing Ltd. (1989), 52 C.C.C. (3d) 441, (sub nom. *Canada v. Betterest Vinyl Manufacturing Ltd.*) [1990] 2 C.T.C. 292, (sub nom. *Canada v. Betterest Vinyl Manufacturing Ltd.*) 42 B.C.L.R. (2d) 198, (sub nom. *Canada v. Betterest Vinyl Manufacturing Ltd.*) [1990] 2 W.W.R. 751 (B.C. C.A.) — considered

R. v. Brown (1975), 11 O.R. (2d) 7, 64 D.L.R. (3d) 605, 30 C.C.C. (2d) 300 (Ont. H.C.) — distinguished

R. v. Colavita Construction Ltd., 1993 CarswellOnt 3661 (Ont. Prov. Div.) — followed

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R. v. Shayesteh, 111 C.C.C. (3d) 225, 31 O.R. (3d) 161, 94 O.A.C. 81, 1996 CarswellOnt 4226 (Ont. C.A.) — considered

R. v. Treacy, [1944] 2 All E.R. 229, 60 T.L.R. 544, 30 Cr. App. R. 93 (Eng. C.A.) — referred to

R. v. Watt, [1966] 2 O.R. 726, 49 C.R. 261, [1967] 1 C.C.C. 188 (Ont. C.A.) — referred to

R. v. Wayte (1982), 76 Cr. App. R. 110 (Eng. C.A.) — considered

Statutes considered:

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

s. 16(3) — referred to

s. 16(4) — referred to

s. 104(1) — referred to

s. 112(2) — pursuant to

s. 116(1)(c) — pursuant to

s. 210(7) — considered

s. 210(8) — referred to

s. 210(9) — referred to

s. 210(10) — referred to

s. 210(11) — referred to

s. 210(12) — referred to

s. 210(13) — referred to

Provincial Offences Statute Law Amendment Act, 1993, S.O. 1993, c. 31

Generally — referred to

Truck Transportation Act, R.S.O. 1990, c. T.22

s. 22(1) — referred to

s. 22(2) — referred to

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s. 23 — referred to

s. 24 — referred to

s. 25 — considered

Regulations considered:

Highway Traffic Act, R.S.O. 1990, c. H.8

Electronic Documents, O. Reg. 499/94

Generally

Words and phrases considered

best evidence

As a general rule, when a document is adduced into evidence to prove the truth of its contents, then it is subject to the "best evidence rule". This means that, where the original document is available, then it must be produced. [. . .]

The "best evidence rule" is really just a rule of common sense that dictates that, where a party has evidence concerning a fact to be proven, then that party must produce the best evidence it has available to prove that fact.

APPEAL by Crown from judgment granting motion by trucking company accused of offences under *Highway Traffic Act* for non-suit.

Masse Prov. J.:

1 This is an appeal by Her Majesty the Queen in Right of the Province of Ontario, as represented by the Ministry of Transportation of Ontario (the Ministry), from the decision of Her Worship, Justice of the Peace Linda Gemmell presiding in the Provincial Offences Court, which decision was rendered on 10 April 1996, at Brockville Ontario.

2 The respondent, 293475 Canada Inc., (hereafter referred to as Highland Transport) is a trucking company conducting its business out of Markham Ontario. In late 1995, Highland was charged by way of certificates of offence with a number of offences under the *Highway Traffic Act*, R.S.O. 1990, c. H-8, described by their short-forms of charge as follows:

- | | | |
|-----|----------------------|---|
| (1) | September 27th 1995: | Overweight dual axle contrary to clause 116(1)(c) of the <i>Highway Traffic Act</i> of Ontario. |
| (2) | October 24th, 1995: | Insecure load contrary to subsection 112(2) of the <i>Highway Traffic Act</i> of Ontario. |
| (3) | November 3rd, 1995 | Insecure load contrary to subsection 112(2) of the <i>Highway Traffic Act</i> of Ontario. |
| (4) | November 3rd, 1995 | Insecure load contrary to subsection 112(2) of the <i>Highway Traffic Act</i> of Ontario. |

3 The transcript of the trial on the first count, which was held on 13 December 1995, discloses that an officer of the Min-

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istry of Transportation was conducting his duties at the Gananoque Inspection Station located on Highway 401 eastbound. His duties included the inspection of transport trucks in order to ensure compliance with applicable provincial statutes governing the use of highways and the transport trucking industry. On 27 September 1995, at 9:52 a.m., tractor-trailer entered the inspection station. Upon request, the driver of this tractor-trailer produced his driver's license and he also produced documents that purported to show that the vehicle in question was registered in the name of the respondent numbered corporation. The officer simply examined the documents and made notes of the particulars indicated thereon. He did not make a photocopy of the documents. The vehicle was found to be overweight for its particular axle configuration and consequently a charge of overweight dual axle was laid under clause 116(1)(c) of the *Highway Traffic Act*.

4 **At trial, the officer did not produce any Ministry records regarding the registration of the vehicle.** He simply relied upon his memory and the notes that he made of the contents of the documents that were produced by the driver. At the end of the Ministry's case, the respondent brought a motion for non-suit on the grounds that there was no properly admissible evidence before the court proving that the respondent was in fact the registered owner or operator of the vehicle. It was submitted that the only way for the Ministry to prove the registration would be to produce a certified copy of the Ministry records as permitted by subsection 210(7) of the *Highway Traffic Act*. It was argued that the evidence relied upon by the Ministry was hearsay and inadmissible. Without proof by way of admissible evidence of who is the registered owner of the vehicle, the Ministry has failed to adduce any evidence of a necessary element of the offence. The Ministry took the position that the driver of a transport truck is required by law to carry and produce the vehicle registration. It was argued therefore that the observations that the officer made of the documents that were produced to him were not hearsay and were admissible for the truth thereof. Even though registration may be proven by certified copies of Ministry records, that was not the only or exclusive way of proving registration.

5 The learned justice of the peace granted the non-suit. In so doing, she stated at pages 22-24 of her reasons for decision:

The applicable test to be applied in response to a motion of non-suit was enunciated by the Supreme Court of Canada in *United States of America v. Shepherd*. Therein, Mr. Justice Ritchie held that the question of sufficiency is to be determined according to whether or not there is any evidence (meaning, of course, any admissible evidence) upon which a reasonable jury, properly instructed in the law, could return a verdict of guilty. There is a provision under the *Highway Traffic Act* for the court to receive documents from the Ministry as evidence. Subsection 210(7) of the *Highway Traffic Act* states:

A copy of any writing, paper or document filed in the Ministry under this Act, or any statement containing information from the records required to be kept under this Act, purporting to be certified by the Registrar under the seal of the Ministry, shall be received in evidence in all courts without proof of the seal and signature and is proof, in the absence of evidence to the contrary, of the facts contained therein.

Ministry of Transportation officers have the authority and, in fact, it is their duty, to stop vehicles in order to conduct an inspection. They have the right to request of the driver any and all documents that are required by various statutes to be carried by the driver, to be produced to him on demand. The officer examines the documents, making notes for his report. After conducting his inspection of the vehicles, if he finds an infraction of a statute has occurred, the information he obtained from the documents regarding the ownership or operator of the vehicle may give him reasonable and probable grounds to believe that the person or company named therein is the owner or operator of the motor vehicle, and he may have reasonable and probable grounds to lay a charge or complete a certificate of offence against the person or company named. The fact that the driver carried with him, and produced, certain documents to the officer is not, in itself, proof of the truth of the contents of the documents. In my opinion, it should be noted that, for these charges, the person producing the documents is not the subsequent accused.

It is this court's opinion that there is no legally admissible evidence that the defendant, 2934752 Canada Inc., is the owner or operator of the motor vehicle involved in the charges before the court. In establishing a *prima facie* case against the defendant, the burden is on the Crown to produce admissible evidence on each of the essential elements of the charges. In my opinion, the admissible evidence required on this issue would be for the Crown to file with the court a certified

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true copy of the registration, proving ownership of the motor vehicle that is the subject of the charges before the court. This document is obtainable by the Crown from Ministry of Transportation records. In the charges before the court, the Crown has failed in its burden to establish a *prima facie* case against the defendant company; therefore the defendant's motion of non-suit is granted.

6 The same result followed with respect to all of the other charges that are now under appeal.

7 The Ministry advances two grounds of appeal:

(1) With respect to all counts: The ruling that the oral testimony of the Ministry of Transportation officer as to the particulars of the vehicle registration slip and CVOR certificate, or copies thereof, produced to him by the driver of the subject vehicle on the date of the alleged offences was inadmissible.

(2) With respect to the count alleging the offence of insecure load, dated October 24th 1995: Failing to admit into evidence the photocopies of documents tendered by the Ministry of Transportation officer that were certified by him to have been made by him and to have been true copies of documents produced to him by the driver of the vehicle involved in the commission of the alleged offence at the time of his inspection. These documents should have been admitted into evidence by the learned justice pursuant to section 25 of the *Truck Transportation Act*, R.S.O. 1990, c. T-22.

8 The Ministry argues that it is not hearsay for an officer to give evidence by oral testimony about documents that the officer observed, which must be carried in the vehicle and which must be produced on demand to the officer. In some instances, the driver of a vehicle may himself have only a copy of a document, and not the original document, in his possession. See, for example, subsections 16(3) and (4) of the *Highway Traffic Act*. While subsection 210(7) of the *Highway Traffic Act* may be resorted to in order to prove registered ownership or operation, it is not mandatory that the Ministry prove such facts in this way only. The Ministry may prove such facts by adducing *others admissible evidence* of such facts. The Ministry submits that the oral testimony of an officer, based on his or her notes or photocopies of documents such as driver's licences, CVOR (Commercial Vehicle Operator's Registration) certificates, vehicle registrations, *etc.*, is admissible evidence tending to prove such facts.

9 This case deals with the proof of documentary evidence. As a general rule, when a document is adduced into evidence to prove the truth of its contents, then it is subject to the "best evidence rule". This means that, where the original document is available, then it must be produced. As stated by Lord Chief Justice Hewart in *R. v. Anderson* (1929), 142 L.T. 580, 21 Cr. App. R. 178 (Eng. Ct. of Crim. App.), 29 Cox C.C., at page 181 [Cr. App. R.]:

It is an elementary rule that the contents of a written document, if they are to be proved, should be proved by production of the document and not by oral testimony.

10 The "best evidence rule" is really just a rule of common sense that dictates that, where a party has evidence concerning a fact to be proven, then that party must produce the best evidence it has available to prove that fact. However, the best evidence rule is not applied with inflexible rigidity. The following is written about the "best evidence rule" in Haslbury at 17 Hals. (4th), pages 8-9, paragraph 8:

That evidence should be the best that the nature of the case will allow is, besides being a matter of obvious prudence, a principle with a considerable pedigree. However, any strict interpretation of this principle has long been obsolete and the rule is now only of importance in regard to the primary evidence of private documents. The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the recollections of witnesses, is clear, although modern techniques make objections to the first alternative less strong.

Lord Denning in *Garton v. Hunter* (1968), [1969] 2 Q.B. 37, [1969] 1 All E.R. 451, [1969] 2 W.L.R. 86, 67 L.G.R. 229, [1969] R.A. 11 (Eng. C.A.), stated at page 44 (my emphasis):

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It is plain that Scott L.J. had in mind the old rule that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded. That old rule has gone by the board long ago. The only remaining instance of it that I know is that, ***if an original document as available in your hands, you must produce it. You cannot give secondary evidence by producing a copy.*** Nowadays, we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

11 More recently, Justice Louise Charron in the case of *R. v. Shayesteh* (1996), 31 O.R. (3d) 161, 94 O.A.C. 81, 111 C.C.C. (3d) 225, [1996] O.J. No. 3934 (Ont. C.A.), had the following to say about the "best evidence rule" at page 252 [C.C.C.]:

When considering any proposed method of proof, the old principle known as the "best evidence rule", in my view, can still provide a useful starting-point. The rule may be used, not so much as a criterion for determining questions of admissibility and exclusion with respect to any item of evidence sought to be adduced, but as a general guide for choosing the appropriate method of proof. The parties (usually the Crown) should endeavour to put forth the best evidence "that the nature of the case will allow" (17 Hals., 4th ed., pp. 8-9, para. 8) for consideration by the triers of fact. Such evidence can then be supplemented by secondary evidence to the extent that such secondary evidence remains relevant. What particular use will be made of the evidence during the course of the trial then becomes essentially a matter of discretion for the trial judge depending on the particular circumstances of any given case.

12 The contents of a document and the truth thereof may, in certain circumstances, be proven by "secondary evidence". Such a situation would arise where the original has been destroyed or is otherwise unavailable. In such circumstances, the contents of the document may be proven by production of a copy or other secondary evidence. Justice Maule stated in *MacDonnell v. Evans* (1852), 11 C.B. 930, 3 Car. & K. 51, 21 L.J.C.P. 141, 18 L.T.O.S. 421, 16 Jur. 103, 138 E.R. 742 (Eng. C.P.), at page 942

If the document does not exist, or the party seeking to show its contents cannot get at it, he is at liberty to give secondary evidence because, in that case, no better is to be had.

13 The learned author, Peter K. McWilliams, in his excellent treatise on *Canadian Criminal Evidence*, 3rd ed. (Canada Law Book, loose-leaf service), summarized the usual grounds upon which secondary evidence may be adduced. He set these out at pages 6-3 and 6-4:

(1) *Failure of the accused to produce a document after being served with a notice to produce.* According to Cross, p. 599, footnote 8, "The accused should not be served with a *subpoena duces tecum* in a criminal case. The service of a notice to produce is unobjectionable because the accused need not comply with it." See Chapter 34 under "Privilege against Self-incrimination" and also 8 Wigmore, *Evidence*, §§2264, 2268 (McNaughton rev.1961).

...

(2) *Where someone other than the accused has possession.* In such a case, the prosecutor should serve him with a *subpoena duces tecum*. Then, if he establishes a claim to privilege or refuses to produce it, secondary evidence may be given: *Mills v. Oddy* (1834), 6 Car. & P. 728, 172 E.R. 1438. Similarly, secondary evidence is admissible when the person with the original is outside the jurisdiction. However, where a stranger who has been served wrongfully refuses to produce it, secondary evidence may not be given: *R. v. Inhabitants of Llanfaethly* (1853), 2 El. & Bl. 940, 118 E.R. 1018.

Kajela v. Noble (1982), 75 Cr. App. R. 149 (Div. Ct.), deferred to the BBC policy not to allow originals of their video films to leave their premises and upheld the admission of a video cassette recording which the court was satisfied was an authentic copy.

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(3) *Where the original cannot be found after due search:* *Brewster v. Sewell* (1820), 3 B. & Ald. 296, 106 E.R. 672, and similarly where a person served with a *subpoena duces tecum* admits to having lost the original: *R. v. Haworth* (1829), 4 Car. & P. 253, 172 E.R. 693.

(4) *Where production of the original is impossible*, for example, an inscription on a wall or a tombstone: *Mortimer v. M'Callum* (1840), 6 M. & W. 58, 151 E. R. 320, or where the law requires a licence to remain on the wall in licensed premises: *Owner v. Bee Hive Spinning Co. Ltd.*, [1914] 1 K.B. 105; *R.v. Wisbey Enterprises Ltd. and Wisbey*, [1969] 3 C.C.C. 109 (B.C. Co. Ct.), or where the person is beyond the jurisdiction: *Alivon et al. v. Furnival* (1834), 1 C.M. & R. 277, 149 E.R. 1084.

(5) *Where there are statutory provisions for certified copies of government, banking and business records*, see ss. 25-30 of the *Canada Evidence Act*.

[This is the situation that governs the case at bar. The statutory provision for certified copies is subsection 210(7) of the *Highway Traffic Act*.]

(6) Where the document is a notice: *R. v. Turner*, [1910] 1 K.B. 346 (C.C.A.).

(7) Where the proceedings themselves notify the accused that he is required to produce the original regarding the theft of a document: *R. v. Aickles* (1784), 1 Leach 294 at 299, 168 E.R. 250: "If it had been in the prisoner's possession, the next best evidence . . . would have been admissible; for as a prisoner cannot be compelled, or even legally required, to produce any evidence which may operate against himself, the next best evidence which it is in the power of a prosecutor to produce, is always admitted . . .

...

It should be kept in mind that the foregoing requirement that the best evidence is the document itself applies whether the document is tendered to prove the truth of the contents or as original evidence.

(8) Where the original has been destroyed as in *R. v. Swartz et al.* (1977), 37 C.C.C. (2d) 409 (Ont. C.A.), varied at 45 C.C.C. (2d) 1 (S.C.C.), *sub nom*, *R. v. Cotroni*; *Papalia v. The Queen*, where original tapes were destroyed by the police.

Thus, it is seen that secondary evidence will readily be admitted where the original is not available for any number of reasons.

14 Secondary evidence of the contents of a document is most often proffered by means of photocopies of the originals. Usually, the person who made the photocopy has to testify as to the authenticity of the copy. Courts have had very little difficulty in accepting photocopies of documents. In *R. v. Wayte* (1982), 76 Cr. App. R. 110 (Eng. C.A.), Justice Alexander Bel-dam stated at pages 116-7 [emphasis added]:

First, there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible. Moreover, ***it is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not.***

15 A more recent example of the court's willingness to accept photocopies of documents where the original would have been admissible is the case of *R. v. Betterest Vinyl Manufacturing Ltd.* (1989), 42 B.C.L.R. (2d) 198, [1990] 2 W.W.R. 751, 52 C.C.C. (3d) 441, [1990] 2 C.T.C. 292 (B.C. C.A.). Appeals Justice John David Taggart, after a thorough review of the law, concluded that we are no longer bound to apply strictly the best evidence rule as it relates to copies of documents and

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especially to photocopies of them. In that case, the accused was charged with tax evasion. A large quantity of the accused's documents was seized as a result of the execution of a search warrant. These documents were copied and the investigator compared the original of the documents with the copies. The originals were then returned to the accused. In such a case, where the witness can attest as to the accuracy and authenticity of the copy after having compared it with the original, then the court need not slavishly adhere to the "best evidence" rule.

16 In the case at bar, the Ministry relies upon the decision of *R. v. Brown* (1975), 11 O.R. (2d) 7, 64 D.L.R. (3d) 605, 30 C.C.C. (2d) 300 (Ont. H.C.). In that case, the accused was charged with speeding and failing to produce a chauffeur's licence, contrary to the *Highway Traffic Act*. On being stopped by the police, the accused identified himself verbally and produced an ownership permit substantiating his identification. He was then served with two summonses to appear in court. On the day of the return of the summonses, no one appeared to defend the charges and so the accused was convicted *in absentia*. The accused appealed to a High Court judge in chambers. One of the grounds of appeal was that there was insufficient evidence of the identity of the driver to sustain a conviction. Justice John Morden, in rejecting this proposition, held at page 15 [O.R.]:

In my view, a reasonable inference can be drawn from the answer of the driver, coupled with the production of the ownership permit relating to the car being driven, that the applicant in this proceedings, Donald A. Brown of 40 High Park Ave., Toronto, Ontario, was the driver. The applicant submitted that the evidence should have gone further and included information from the records of the Registrar of Motor Vehicles to the effect that a Donald A. Brown lived at 40 High Park Ave., Toronto, Ontario. I do not see how this evidence would have met the objection now being raised by the applicant. If it is a relevant submission it indicates that the applicant's main concern is the weight of the evidence rather than whether there was any evidence to sustain the conviction.

And at page 16:

In the present case, I would add that it is more usual for persons in the position of the driver to state the true facts to a police officer rather than to relate a deliberate and detailed falsehood and, hence, the inference that it was the owner who was driving is more compelling than that it was some other person. (It is also relevant to note that the driver in such circumstances would be acting not only in accordance with the dictates of morality but also those of positive law: [citing subsection 17(2) of the *Highway Traffic Act*, which obliges every one who is unable to produce a licence to give reasonable identification of himself and that the correct name and address of such person shall be deemed to be reasonable identification.]

17 The decision in *Re Brown and the Queen* is distinguishable from the case at bar in several respects. First of all, the issue in *Re Brown and the Queen* was the identity of the person who was driving the vehicle. It was not important to establish who in fact was the registered owner. It was only important to prove who the driver was. In the case at bar, the identity of the driver of the transport truck is irrelevant. Proof that the corporate defendant was in fact the registered owner was the key issue. In *Re Brown and the Queen*, the driver made admissions against penal interest that were buttressed by documents found in the possession of the accused. It is trite law that documents in the possession of the accused are admissible against the accused: see *R. v. Treacy*, [1944] 2 All E.R. 229, 60 T.L.R. 544, 30 Cr. App. R. 93 (Eng. C.A.); *R. v. Watt*, [1966] 2 O.R. 726, [1967] 1 C.C.C. 188, 49 C.R. 261 (Ont. C.A.). In the case at bar, any documents found in the possession of the driver were not shown to be documents found in the possession of the accused and therefore are not admissible against the accused.

18 The case of *R. v. Colavita Construction Ltd.*, [1993] O.J. No. 4484 (Ont. Prov. Div.), per Provincial Judge Hugh K. Atwood, is on all fours with the case at bar. In *R. v. Colavita*, the defendant was convicted *in absentia* of the offence of operating a vehicle where the gross weight exceeded that for which the permit was issued, contrary to subsection 104(1) of the *Highway Traffic Act* of Ontario. At trial, the evidence disclosed that the officer in the employ of the Ministry of Transportation had stopped a commercial motor vehicle and caused it to be weighed with the result that the vehicle exceeded the permitted gross weight. The permitted gross weight and proof of ownership was taken from the registration permit of the tractor in the possession of the driver. The prosecution did not file any certified copies of Ministry documents to show what the permitted gross weight or ownership was according to Ministry records. On appeal to Provincial Judge Atwood sitting in Brampton, the appeal was allowed and a new trial was ordered. Judge Atwood held that it was incumbent upon the prosecution to prove

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the registered ownership by admissible evidence and this had to be done by means of certified copies of the registration from Ministry records. He stated in a brief endorsement:

There is no doubt, in my view, that Mr. Burd is correct. This is a matter in which the Ministry is obliged to provide admissible evidence. It would be my view that the proper, of course, method of providing registration of ownership is through a certified copy of the registration from the Ministry and, similarly of course, for the registered gross weight.

I'm not quite sure in this case why the matter was proceeded with in this form, other than, I suppose, because the trial was *ex parte*. But much as, of course, evidence of prohibition of driving must be properly adduced through certified copies, and not merely from reading from a form, so similarly in this case.

It is true that Mr. Angi testifies that he sees these things on a piece of paper, but the piece of paper is not able to be cross-examined. This is the heart of the hearsay, and not admissible evidence.

For these reasons, the appeal will be granted. Conviction will be set aside.

Thus, Judge Atwood held that proof of registration had to be proven by production of certified copies of Ministry records.

19 What we must keep in mind in the case at bar is that the Ministry has to prove who was the registered owner-operator of the transport truck in question. In other words, the Ministry has to prove the status of its own records regarding the vehicle. The best evidence to prove this would be the production of the original registration documents in the possession of the Ministry. The authenticity of these documents is beyond dispute. However, to remove the original registration documents from their repository with the Ministry is impracticable, inconvenient and puts these documents at risk of damage or loss. Consequently, statutory provisions such as subsection 210(7) of the *Highway Traffic Act*, providing for proof by secondary means, are designed to obviate the necessity of removing documents from the Ministry. Any concerns that a party may have as to the authenticity of the copies is removed by the fact that the copies that are produced must be certified by the Registrar of Motor Vehicles. Any documents in the possession of the driver do not necessarily reflect the status of the Ministry records. They only tell us what was in the possession of the driver at that particular time. In the case at bar, the Ministry officer was able to tell us the information contained in the documents in the possession of the driver but he was not able to tell us what information was contained in the documents of the Ministry. The requirement of certification by the Registrar contained in subsection 210(7) of the *Highway Traffic Act* was neither an accident nor the result of legislative capriciousness on the part of the legislature. Certification ensures that the information contained in the document produced to the court is the same as the information contained in the original Ministry records. The driver's documents are not certified by anybody, let alone the Registrar, to contain the same information as the Ministry records.

20 The Ontario *Highway Traffic Act* provides a very easy method of proving the status of its own records. Section 210 provides in part as follows:

(7) A copy of any writing, paper or document filed in the Ministry under this Act, or any statement containing information from the records required to be kept under this Act, purporting to be certified by the Registrar under the seal of the Ministry, shall be received in evidence in all courts without proof of the seal or signature and is proof, in the absence of evidence to the contrary, of the facts contained therein.

(8) An engraved, lithographed, printed or otherwise mechanically or electronically reproduced signature or facsimile signature of the Registrar is sufficient authentication of any such copy or statement.

(9) A copy may be made by electronic means in an electronic format and may be filed in the Ministry by direct electronic transmission if the making and filing is in accordance with the regulations.

(10) A statement may be made by electronic means in an electronic format if the making is in accordance with the regu-

lations.

(11) A copy or statement may be certified by the Registrar under the seal of the Ministry by electronic means in an electronic format and the certification, together with the copy or statement, may be filed in a court by direct electronic transmission if the certification, sealing and filing are in accordance with the regulations.

(12) A printed copy of a document filed under subsection (11) shall be deemed to have been filed as the original document if it is printed in accordance with the regulations.

(13) The Lieutenant Governor in Council may make regulations respecting,

(a) the making of copies and statements and their certification and sealing by electronic means in an electronic format;

(b) the filing of copies, statements and certifications by direct electronic transmission;

(c) the printing of documents filed by direct electronic transmission.

Thus, it is seen that not only can the Ministry prove its records by physically producing and filing with the court a certified copy of the pertinent record, it may also do so by direct electronic transmission. In this "high-tech" age of advanced electronic communications, what could be easier?

21 Ontario Regulation 499/94 establishes the technical requirements for the making, copying, certifying and filing of electronic documents. This regulation reads as follows:

1. — In this Regulation,

"electronic document" means any statement, document or record filed in the Ministry that is maintained in an electronic format and includes any such statement, document or record that,

(a) is a copy of another electronic document, or

(b) has been transferred into an electronic format from any paper or written format.

2. — An electronic document is properly made if the information set out in the document can be examined or retrieved in an intelligible form by electronic means.

3. — (1) An electronic document that is a copy is properly made if the copy accurately reproduces the information set out in the document even if the copy displays the information differently from the way the information is displayed in the document.

(2) An electronic document that is a copy may encrypt, summarize, reformat or compress the information set out in the document if the copy displays the information accurately when the copy is examined or retrieved by electronic means.

4. — An electronic document is properly certified and sealed if the document, or the electronic transmission of which it forms a part,

(a) originates in the Ministry;

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(b) states that the information set out in the document has been obtained from Ministry records; and

(c) bears the signature of the Registrar under the seal of the Ministry.

5. — (1) An electronic document is properly filed in the Ministry if the transmission of which the document forms a part is completely and accurately received and recorded in an electronic format.

(2) An electronic document is properly filed in a court if,

(a) the document is made, certified and sealed in accordance with this Regulation; and

(b) the information required by Form 1 of Ontario Regulation 500/94 is completely and accurately received and recorded such that it can be examined or retrieved in an intelligible form by electronic means.

6. — (1) An electronic document may be printed by any means that produces the document on paper.

(2) In an electronic document or a printed copy of an electronic document, the seal of the Ministry may be represented by an asterisk.

(3) A printed copy of an electronic document filed in a court shall be deemed to have been filed as the original document if it has been printed in accordance with Ontario Regulation 497/94.

(4) This regulation comes into force on the day the *Provincial Offences Statute Law Amendment Act, 1993* comes into force.

I was not advised if the *Provincial Offences Statute Law Amendment Act, 1993*, S.O. 1993, c. 31, has been proclaimed in force but, if it has been, then electronic filing would not only guarantee the authenticity of the document filed in court but also eliminate time-consuming "paper shuffling" with its attendant risks of loss or misplacement of documents.

22 The Ministry also relies on section 25 of the *Truck Transportation Act*, R.S.O. 1990, c. T-22. This Act provides in part [emphasis added]:

22. — (1) Any officer may, at any time, examine any commercial vehicle, its contents and equipment for the purpose of ascertaining whether this Act, the *Highway Traffic Act* and the regulations under either Act are being complied with and the person in control of the vehicle shall assist in the examination of it, its contents and equipment.

(2) Where a commercial vehicle examined under this section contains goods, the officer conducting the examination may require the person in charge of the vehicle to surrender all documents in the possession of that person or in the vehicle **relating to the operation of the vehicle and to the carriage and ownership of the goods** and to furnish all information within that person's knowledge relating to the details of the current trip and the ownership of the goods.

...

23. — An officer of the Ministry may examine all books, records and documents of,

(a) a licensee or a holder of a trip permit relating to the business of operating public trucks;

(b) a holder of a certificate of intercorporate exemption or of an affiliated corporation named in the certificate relating to the transportation of goods for compensation; or

(c) a holder of a load brokerage certificate relating to the transportation of goods for compensation,

for the purpose of ensuring that the provisions of this Act and the regulations are being complied with and the officer may, for the purpose of the examination, upon producing his or her designation as an officer of the Ministry, enter at any reasonable time the business premises of the licensee, holder or affiliated corporation, as the case may be.

24. — (1) Where the Minister believes, on reasonable and probable grounds, that any person has contravened a provision of this Act or the regulations, the Minister may appoint one or more persons to investigate whether the contravention has occurred and the person appointed shall report the results of the investigation to the Minister.

(2) For purposes relevant to an investigation under this section, the investigator may inquire into and inspect the business affairs of the person in respect of whom the investigation is being made and may,

(a) upon production of his or her appointment, enter, at any reasonable time, the business premises of the person and inspect books, papers, documents and things relevant to the investigation; and

(b) inquire into negotiations and transactions made by or on behalf of or in relation to the person relating to the transportation of goods or the use of public trucks or that are otherwise relevant to the investigation,

and for the purpose of the inquiry, the investigator has the powers of a commission under Part II of the Public Inquiries Act, which Part applies to the inquiry as if it were an inquiry under that Act.

(3) No person shall obstruct an investigator in the course of an investigation under this section or withhold from an investigator or conceal or destroy any books, papers, documents or things relevant to the investigation.

(4) Where a justice of the peace is satisfied, upon an application without notice by an investigator acting under this section,

(a) that the investigation has been ordered and that the applicant has been appointed to conduct it; and

(b) that there are reasonable grounds for believing there are in a specified building, dwelling, receptacle or place, books, papers, documents or things relating to the investigation,

the justice of the peace may, whether or not an inspection has been made or attempted under clause (2)(a), issue an order authorizing the investigator, together with such police officers as the investigator calls upon to assist, to enter and search, if necessary by reasonable force, the building, dwelling, receptacle or place for the books, papers, documents or things and to examine them.

(5) Every entry and search authorized under subsection (4) shall be made between sunrise and sunset unless the order authorizes the investigator to make the search at night.

(6) The Minister may appoint an expert to assist in examining books, papers, documents or things examined under clause (2)(a) or subsection (4).

25. — (1) Any person,

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(a) obtaining a document under section 22, may take the document for the purpose of making a copy of it; or

(b) in the course of an investigation under section 23 or 24, upon giving a receipt therefor, may take anything that may be examined under that section for the purpose of making copies thereof,

but the copying shall be done as quickly as reasonably possible and the thing copied shall be promptly returned thereafter.

(2) Any copy made as provided in subsection (1) and certified to be a true copy by the person making the copy is admissible in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the original document and that the facts set out therein are true.

23 Section 25 of the *Truck Transportation Act* provides for the filing of photocopies of documents made by an officer and certified by him or her to be true copies. The appellant has not provided me with a transcript of the proceedings relating to the charge dated 24 October 1995. Therefore, this court has no idea what photocopies of what documents purporting to prove what facts were in dispute. Without so deciding, it may be that section 25 of the *Truck Transportation Act* may not apply to the particulars of the registration of a vehicle and may only apply to the operation of the vehicle and the carriage and ownership of the goods being transported. There is no record before me that would permit me to decide whether the learned justice of the peace was correct in refusing to admit photocopies of such documents to be received into evidence. It could very well be that the documents tendered by the Ministry were not the kind of documents contemplated by section 25 of the *Truck Transportation Act*. On the other hand, it could very well be that the documents were exactly what was contemplated by the Act and the learned justice of the peace may have erred in not admitting them for the truth of their contents. In the absence of a record, it is impossible for me to tell. It is up to the appellant to make sure that the appeal has been perfected and that there is before the appellate tribunal an adequate record to permit review. This has not been done.

CONCLUSION

(1) With Respect to the First Ground of Appeal

24 It was incumbent on the Ministry to prove the existence and the contents of documents that are in its own possession. The best evidence is the original documents in the Ministry records. It is impractical to produce these documents; therefore, the next best evidence is copies certified to be accurate by the Registrar. Documents found in the possession of a person, the driver, who is not the accused and who has not been shown to be an agent of the accused, are not admissible against the accused. In addition, such documents, not having been certified to be true copies of the Ministry records, are not the best evidence that the nature of the case will allow. This is even more so when the documents are not even produced and we are left with the oral testimony of the Ministry officer as to the contents of the documents. I am of the view that the learned justice of the peace committed no error. This first ground of appeal is dismissed.

(2) With Respect to the Second Ground of Appeal

25 The record before this court as to what happened at trial is insufficient to permit this court to conduct a review of the decision of the learned justice of the peace. The learned justice of the peace may or may not have been in error. This court has no way of knowing. It is up to the appellant to provide an adequate record. The appellant has not done so. Consequently, this ground of appeal is also dismissed.

Appeal dismissed.

END OF DOCUMENT