CITATION: *Peel (Reg. Mun., Dept. of Public Health) v. Con-Drain Co. (1983) Ltd.*, 2017 ONCJ 478
DATE: July 17, 2017

IN THE MATTER OF
Smoke-Free Ontario Act, S.O. 1994, c. 10

Between

The Region of Peel (Department of Public Health)

prosecutor

and

Con-Drain Co. (1983) Ltd.
and
Edmundo De Medeiros

defendants

Ontario Court of Justice
Brampton, Ontario
Quon J. P.

Reasons for Judgment

Trial held: **February 10, 2017**
Judgment rendered: **July 17, 2017**

Charges: **(1)** **Edmundo De Medeiros, did smoke tobacco in an enclosed work place, contrary to s. 9(1) of the *Smoke-Free Ontario Act*; and**

(2) **Con-Drain Co. (1983) Ltd., as an employer, failed to ensure compliance with s. 9 of the *Smoke-Free Ontario Act* in respect to an enclosed workplace, contrary to s. 9(3)(a) of the *Smoke-Free Ontario Act*;**

Counsel:

A. Krywoj, prosecutor for the Region of Peel (Department of Public Health)
B. Mcleod, legal representative for Con-Drain Co. (1983) Ltd. and Edmundo De Medeiros

Cases Considered or Referred To:

Cases in respect to the admissibility of hearsay evidence:

Ares v. Venner, [1970] S.C.R. 608 (S.C.C.).

R. v. Bradshaw, [2017] S.C.J. No. 35 (S.C.C.).

R. v. Fliss, 2002 SCC 16, [2002] 1 S.C.R. 535 (S.C.C.).

R. v. Khan (1988), 42 C.C.C. (3d) 197 (S.C.C.).

R. v Khelawon, 2006 SCC 57, [2006] 2 S.C.R. 787 (S.C.C.).

R. v. MacMullin, [2013] A.J. No. 1454 (Alta. Q.B.).

R. v. Mapara, [2005] 1 S.C.R. 358 (S.C.C.).

R. v. Monkhouse, [1987] A.J. No. 1031 (A.C.A.).

R. v. O'Neil, [2012] A.J. No. 516 (A.C.A.).

R. v. Starr, [2000] 2 SCR 144 (S.C.C.).

Cases in respect to admissions against penal interest as an exception to the hearsay rule:

Hanzelka v. Oshawa (City), [2011] O.J. No. 4054 (S.C.J.O.), per O'Connell J.

R. v. Colavita Construction Ltd., [1993] O.J. No. 4484 (Ont. Ct. (Prov. Div.)), per Atwood J.

R. v. Evans (1993), 85 C.C.C. (3d) 97 at 104 (S.C.C.).

R. v. Germanis, [2001] O.J. No. 2935 (O.C.J.), per Lampkin J.

R. v. Huntley, [1995] O.J. No. 2412 (O.C.J.), per Knazan J.

R. v. Kingston, [2005] O.J. No. 2147 (O.C.J.), per DeFilippis J.

R. v. Li, [2013] O.J. No. 564 (O.C.A.), per Doherty, Watt, and Pepall JJ.A.

R. v. Macatangay, [2003] O.J. No. 5643 (O.C.J.), per Hawke J.

R. v. McCullough, [2001] S.J. No. 599 (Sask. Q.B.), per Zarzeczny J.

R. v. Molyneaux, [2004] O.J. No. 3053 (O.C.J.), per Devlin J.

R. v. Navarro, [2002] O.J. No. 5864 (O.C.J.), per Khawly J.

R. v. Norat, [2009] O.J. No. 1083 (O.C.J.), per MacLean J.

R. v. Palmaria, [2005] O.J. No. 5276 (O.C.J.), per Shamai, J.

R. v. Sambhi, [2003] O.J. No. 3131 (O.C.J.), per Latimer J.

R. v. Young, [2005] O.J. No. 6232 (O.C.J.), per Fontana J.

R. v. Zilaie, [2002] O.J. No. 2144 (O.C.J.), per Krelove J.

Re Brown and the Queen, [1975] O.J. No. 2547, (1975), 11 O.R. (2d) 7, 64 D.L.R. (3d) 605, 30 C.C.C. (2d) 300 (O.H.C.), per Morden J. (in chambers).

Cases in respect to the best evidence rule:

Papalia v. The Queen (1979), 45 C.C.C. (2d) 1 (S.C.C.).

R. v. 2934752 Canada Inc. (c.o.b. Highland Transport), [1997] O.J. No. 6308 (O.C.J.), per Masse J.

R. v. Cotroni, [1961] S.C.R. 335 (S.C.C.).

R. v. Huxtable, 2012 ONCJ 611, [2012] O.J. No. 4583 (O.C.J.), per Ray J.

R. v. Ryckman, [1998] O.J. No. 6501 (Ont. Ct. (Prov. Div.)), per McGowan J.

R. v. Shayesteh, [1996] O.J. No. 3934, 111 C.C.C. (3d) 225, 1996 O.J. No. 3934 (O.C.A.), per Carthy, Austin and Charron JJ.A.

Cases in respect to admissions against penal interest made by an agent of the corporation:

R. v. 2934752 Canada Inc., [2000] O.J. No. 6064 (O.C.J.), per Regis J.

R. v. Laidlaw Environmental Services Ltd., [1998] O.J. No. 6426 (Ont. Ct. (Prov. Div.)), per Stone J.

R. v. Petro-Canada, 2007 ONCJ 669, [2007] O.J. No. 5351 (O.C.J.), per Andre J.

R. v. Ryckman, [1998] O.J. No. 6501 (Ont. Ct. (Prov. Div.)), per McGowan J.

R. v. Strand Electric Ltd., [1969] 2 C.C.C. 264 (O.C.A.), per MacKay, McLennan, and Laskin JJ.A.

R. v. Swish Maintenance Ltd., [2005] O.J. No. 3958 (O.C.J.), per Adams J.

R. v. Turner (1975), 61 Cr. App. R. 67 (C.A.).

Statutes, Regulations and Rules Cited:

Commercial Motor Vehicle Inspections Regulation (Highway Traffic Act), O. Reg. 199/07, s. 1(1)(g).

Commercial Motor Vehicle Operators' Information Regulation (Highway Traffic Act), O. Reg. 427/97, ss. 1.2(1)(a), 1.2(1)(b), and 1.2(2).

Evidence Act, R.S.O. 1990, c. E.23, ss. 34.1 and 35.

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1(1), 1(10), 7(5), 16, 16(3), 16(4), and 216.1(3).

Hours Of Service Regulation (Highway Traffic Act), O. Reg. 555/06, ss. 3(2) and 3(4).

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 48.1.

Smoke-Free Ontario Act, S.O. 1994, c. 10, ss. 1(1), 1(a)(ii), 1(2), 9, 9(1), 9(3), 9(3)(a), and 9.2(1).

General Regulation (Smoke-Free Ontario Act), O. Reg. 48/06.

Vehicle Permits Regulation (Highway Traffic Act), Reg. 628, R.R.O. 1990, s. 9(1), Sched. 4.

1. INTRODUCTION

[1] If you happen to be by yourself in your own personal-use motor vehicle while driving or while parked, then there is no law in Ontario that prohibits you from smoking a tobacco cigarette inside your own vehicle -- as long as your vehicle is not sitting in an enclosed public space or enclosed workplace, or located in a prescribed public space where smoking is not legally permitted.[1] But if you are not alone in your motor vehicle, then you are not legally permitted to smoke tobacco inside your motor vehicle if the other people in the vehicle are under the age of 16 years.[2]

[2] On the other hand, if you are not in a personal-use motor vehicle, but instead find yourself driving or parked in a commercial motor vehicle in Ontario, then it is against the law to smoke tobacco inside that commercial vehicle -- even when you are by yourself. This is because a commercial motor vehicle is considered to be an "enclosed workplace" under s. 1(1) of the Smoke-Free Ontario Act, S.O. 1994 ("SFOA") and no one in Ontario is permitted to smoke tobacco inside an enclosed workplace by virtue of s. 9(1) of the SFOA. This piece of provincial legislation had been enacted in Ontario to protect workers or members of the public from the effects of second-hand smoke while they are in an enclosed workplace. And, as such, employers are obligated under s. 9(3) of the SFOA to ensure that no one smokes tobacco cigarettes inside an enclosed workplace or other prescribed place over which the employer exercises control.

[3] In this present prosecution under the SFOA, it is alleged that Edmundo De Medeiros ("De Medeiros"), had contravened s. 9(1) of the SFOA by smoking a tobacco cigarette while driving a commercial motor vehicle on a highway, which under the SFOA would be an enclosed workplace. It would be an enclosed workplace since De Medeiros had been observed inside a pick-up truck, which the prosecution contends is a commercial motor vehicle because it is covered with a roof and a place where employees could or would work in or frequent during the course of their employment. In addition, the owner of that alleged commercial motor vehicle, which the prosecution claims is owned by a corporation named Con-Drain Co. (1983) Ltd. ("Con-Drain"), had also been charged for contravening s. 9(3)(a) of the SFOA by failing as an employer to ensure compliance with s. 9 of the SFOA because De Medeiros had been allegedly smoking tobacco in that pick-up truck, which is defined under the SFOA as an enclosed workplace and where such activity is not legally permitted.

[4] Moreover, the key issue that has to be decided in this matter involves considering the nature and weight of particular evidence, which had been adduced by the

[1] See ss. 9(1) and (2) of the Smoke-Free Ontario Act, S.O. 1994.

[2] See s. 9.2(1) of the Smoke-Free Ontario Act, S.O. 1994.

prosecution at trial, to prove the two defendants had committed their respective offences. That particular evidence is from the testimony of Peel Regional Police Officer Donald Malott, the only witness who had testified in the trial. Specifically, the defendants contend that the particular evidence from Officer Malott's testimony, which could prove that the pick-up truck driven by De Medeiros, is a commercial motor vehicle, as well as the particular evidence that could prove the pick-up truck is owned by Con-Drain, would be inadmissible hearsay evidence, since Officer Malott had only repeated in court for its truth, the information that he had observed on or in the ownership document for the pick-up truck that had been provided to him by De Medeiros. But more significant is that Officer Malott had also testified that the information that he had observed on the ownership document had also been confirmed by him to be accurate because he had said that he had checked and verified that information with the Ministry of Transportation and police databases that he had accessed.

[5] And, to support the defendants' contention that Officer Malott's evidence is inadmissible hearsay, the defendants rely on the case of R. v. Germanis, [2001] O.J. No. 2935 (O.C.J.), in which Lampkin J. had held that a police officer's testimony about the accused's driver's licence being a class G2 licence based on that particular information being observed by the officer on the accused's driver's licence or observed on the Ministry of Transportation database and then repeated at trial for its truth was hearsay evidence and not admissible. Lampkin J. had found that this hearsay evidence was inadmissible because it did not fall within any of the traditional exceptions to the hearsay rule, nor would it have been admissible under the case-by-case principled approach to that exclusionary rule, as it had not met the necessity requirement for admission. It had not met the necessity criterion because Lampkin J. had held that the prosecutors could have properly obtained and entered a certified document issued by the Ministry of Transportation as a business record exception to the hearsay rule, in order to prove or verify what the class of the accused's driver's licence had been on the date the accused had been charged.

[6] As such, the defendants submit that because the prosecution in the present case had omitted to provide a certified document from the Ministry of Transportation to prove that the pick-up truck is a commercial motor vehicle or to prove who the registered owner is of that pick-up truck, as had been required in the R. v. Germain case, but instead relies simply on that inadmissible hearsay evidence that had been given by Officer Malott at trial, then there would be no admissible evidence that would prove the pick-up truck is a commercial motor vehicle or that Con-Drain Co. (1983) Ltd. is the owner of the pick-up truck for which it would or could exercise control over. Accordingly, the defendants submit that the prosecution has failed to meet its burden in proving beyond a reasonable doubt all the necessary elements of the two charges laid respectively against De Medeiros and Con-Drain, and that acquittals should, therefore, be entered for the two defendants.

[7] Ergo, there are two key questions that have to be ultimately decided. First, it has to be resolved whether there is any admissible evidence that the pick-up truck is a commercial motor vehicle, since that answer will inform whether the pick-up truck is an "enclosed workplace" under the SFOA. And second, if it is determined that the pick-up truck is a commercial vehicle, then it has to be resolved whether there is any admissible evidence as to who the owner is of that pick-up truck, as the prosecution contends that Con-Drain Co. (1983) Ltd. had been the registered owner of the pick-up truck when De Medeiros had been observed smoking the tobacco cigarette and who would ultimately be the party that would be responsible for ensuring compliance with the SFOA in respect to that pick-up truck being an enclosed workplace.

[8] Therefore, in respect to whether Officer Malott's testimony, on what he had observed and read on the ownership document provided to him by De Medeiros and then repeated by Officer Malott at trial for its truth, should be excluded based on the holding in R. v. Germanis, which the defendants rely on to support their argument for exclusion, it should be pointed out that the Germanis holding is no longer completely persuasive or applicable. This is due to the Germanis holding being supplanted by jurisprudence that had been subsequently developed and decided using the principled and modern approach for determining the admissibility of hearsay evidence in which the admissibility of hearsay evidence is no longer determined by whether it falls within a categorical exception to the hearsay rule: see especially Watt J.A.'s holding in R. v. Li, [2013] O.J. No. 564 (O.C.A.). Hence, as a result of the development of the modern hearsay rule, reliable evidence is no longer excluded merely because it would be hearsay evidence that does not fall within a common law or traditional exception.

[9] Accordingly, in using and applying this principled and modern approach for determining the admissibility of hearsay evidence, Officer Malott's testimony that the pick-up truck is a commercial motor vehicle and owned by Con-Drain Co. (1983) Ltd., which had been based on what Malott had observed on the ownership document and then confirmed on the police and Ministry of Transportation databases, is admissible hearsay evidence. It is admissible because this hearsay evidence meets both the criteria of necessity and reliability for admission under the case-by-case principled exception to the hearsay rule and its probative value has not been outweighed by any prejudicial effect from its admission. Furthermore, the prosecution had adduced not only evidence of what Officer Malott had observed on the ownership document presented to him by De Medeiros that the pick-up truck was classified as a commercial motor vehicle, but had also adduced other admissible and corroborating evidence that proves the pick-up truck is a commercial motor vehicle. And, because the pick-up truck is a commercial motor vehicle and because there is no evidence that the pick-up truck was being used for personal-use at the time De Medeiros was observed smoking a tobacco cigarette, then it is by consequence an "enclosed workplace" as defined under the SFOA. Therefore, the prosecution has proven beyond a reasonable

doubt that Edmundo De Medeiros had been smoking tobacco in an enclosed workplace, contrary to s. 9(1) of the SFOA.

[10] In addition, the prosecution has also proven beyond a reasonable doubt that Con-Drain Co. (1983) Ltd. is the owner of the pick-up truck being driven by De Medeiros, based on Officer Malott's uncontradicted testimony that Con-Drain Co. (1983) Ltd. is the name of the registered owner that he had observed on the ownership document provided to him by De Medeiros, which had also been confirmed by the information that Officer Malott had observed on the Ministry of Transportation database, which would be a reliable source for such information. As such, because De Mederios had been smoking in an enclosed workplace, which is the pick-up truck owned by Con-Drain and who meets the definition of "employer" under the SFOA, and because there is no evidence of due diligence by Con-Drain to prevent such prohibited activity, then the prosecution has also proven beyond a reasonable doubt that Con-Drain has contravened s. 9(3)(a) of the SFOA by failing as an employer to ensure compliance with s. 9 of the SFOA.

[11] Moreover, the trial of the these two charges had been held on February 10, 2017. After final submissions were made by the prosecution and the defendants, judgment was reserved and adjourned to July 14, 2017, for the judgment to be rendered. These, therefore, are the written reasons for judgment:

2. BACKGROUND

[12] At trial, Officer Malott had testified that at approximately 9:40 a.m. on February 1, 2016, he had observed the defendant, Edmundo De Medeiros, driving a white-coloured Ford F-150 pick-up truck on Bovaird Drive, just west of Bramalea Road, in the City of Brampton, and in the lane closest to the middle of the road. Malott also said he had observed De Medeiros holding a lit tobacco cigarette in his right hand and in front of his face, smoking that cigarette inside the cab of that pick-up truck. In addition, Malott said that his view had not been obstructed in any way. Officer Malott also said that after he had initiated a stop of the pick-up truck to investigate the driver for smoking a cigarette inside the pick-up truck, Malott said he had observed the driver toss the lit cigarette out the window and that when Malott had been at the window he said he could smell freshly burnt tobacco emanate from the cab of the vehicle. Moreover, Officer Malott testified that he had observed De Medeiros to be by himself inside that pick-up truck and driving in the lane closest to the centre of the roadway while Malott had been driving eastbound in the middle lane of three eastbound lanes on Bovaird Drive.

[13] Furthermore, Officer Malott said that he is familiar with the smell of burning tobacco and what a tobacco cigarette looks like, since both his parents and his wife are smokers.

[14] In addition, Officer Malott said that after the pick-up truck driven by De Medeiros had stopped, Malott said he had made a demand to De Medeiros for De Medeiros' driver's licence and for the permit or ownership document for the pick-up truck, and for proof of insurance for that vehicle. Officer Malott then said that De Medeiros had provided all three of the requested documents to him. However, Officer Malott said that De Medeiros was not the owner of that pick-up truck, but that the name of the owner of the pick-up truck was an Ontario company named Con-Drain Co. (1983) Ltd. with an address of 30 Floral Parkway in Concord Ontario, which Officer Malott said he had observed on that ownership document presented to him by De Medeiros. Officer Malott also said that the permit or ownership document that he had received from De Medeiros was a true document and not a photocopy. In addition, Officer Malott said that the licence plate on the vehicle, as well as the make and model of the vehicle, had matched the licence plate and the make and model of the vehicle stated on the permit or ownership document. Officer Malott had also testified that he had done further checks on the licence plate of the pick-up truck, on De Medeiros' driver's licence, and on the vehicle ownership and insurance documents that had been provided to him by De Medeiros, using the Ministry of Transportation databases and other police databases. Officer Malott then testified that the information contained in those three documents presented to him by De Medeiros were confirmed to be accurate and that he had been satisfied with the identity of the driver of the pick-up truck as Edmundo De Medeiros.

[15] Officer Malott had also testified that the numbering which he had observed on the licence plate for the pick-up truck was "AD61575", which he said would be a licence plate issued for a commercial motor vehicle as the plate numbering had comprised of 2 letters at the beginning of the sequence, which was then followed by 5 numbers. Officer Malott also said the pick-up truck was not owned by an individual for personal-use, since he did not see a green sticker on the front licence plate which would indicate to him that the pick-up truck had been designated primarily for transportation use. In addition, Officer Malott said that he had observed the word "COM" at the top of the ownership document presented to him by De Medeiros, which had indicated to Officer Malott that the pick-up truck being driven by the De Medeiros was registered as a commercial motor vehicle. Moreover, Officer Malott said that he had also observed the letters "CN" on the sides of the pick-up truck, which would have further indicated to Malott of the commercial nature of the pick-up truck. Officer Malott also said that the ownership document had been a true document with a company name on it, otherwise he would have had to lay the charge of utter forged document.

[16] Moreover, Officer Malott said that that he did not have a copy of the ownership document provided to him by De Medeiros to provide to the court because Officer Malott said that at the time he did not have any authority to seize the ownership document during that traffic stop. Officer Malott also said that since the true ownership document had listed the pick-up truck as a commercial motor vehicle, then Malott said that he is not required to ask the driver if the vehicle is being

used at that time for "personal use", nor is Malott required to find out if the driver is an employee, since no one in any event would be legally permitted to smoke in an enclosed workplace.

[17] Officer Malott also said that after using the Ministry of Transportation and police databases, which he had accessed for verifying and checking the information contained in the documents presented to him by De Medeiros, Malott said he had decided to charge De Medeiros for smoking in an enclosed workplace, which is contrary to s. 9(1) of the SFOA. In addition, Officer Malott also said that he had charged Con-Drain Co. (1983) Ltd., as the owner of the pick-up truck, for contravening s. 9(3)(a) of the SFOA, which is for the offence of failing as an employer to ensure compliance with s. 9 of the SFOA in respect to having observed De Medeiros smoking tobacco inside the pick-up truck, which is an enclosed workplace. Officer Malott also said he then issued both charges under Part I Certificates of Offence and then gave both of the Part I tickets to De Medeiros.

[18] During the trial, only one witness had provided testimony and evidence. That testimony was provided by Officer Malott. As such, there had been no evidence from the defendants that would contradict Officer's Malott's testimony, since neither the defendant, Edmundo De Medeiros, nor anyone from the corporate defendant, Con-Drain Co. (1983) Ltd., had appeared at the trial. However, both defendants had been represented at the trial by their legal representative, who had cross-examined Officer Malott.

[19] In their argument to exclude parts of Officer Malott's testimony, the defendants submit that in order for the prosecution to prove that the pick-up truck was an enclosed workplace within the meaning of the SFOA, it has to first prove that the pick-up truck is a commercial vehicle. However, the defendants submit that it had failed to do so, since Officer Malott's testimony that the pick-up truck is registered as a commercial vehicle would be hearsay evidence, as Officer Malott had testified to what he had observed written on the ownership document that had been provided to him by the driver of the pick-up truck, which would make that evidence inadmissible. And, since the prosecution had omitted to enter a certified document from the Ministry of Transportation as proof that the pick-up truck is registered as a commercial motor vehicle, then the defendants submit that there would be no legally admissible evidence that the pick-up truck being driven by Edmundo De Medeiros was in fact a commercial motor vehicle.

[20] Furthermore, the defendants contend that Officer Malott's testimony that the owner of the pick-up truck is Con-Drain Co. (1983) Ltd. would also be inadmissible hearsay evidence, since Malott had repeated in court for its truth what the name of the owner of the pick-up truck that Malott had observed written on the ownership document. And, because the prosecution had also omitted to enter a certified document from the Ministry of Transportation to prove who the owner is of that pick-up truck, then the defendants contend there is also no proof

or legally admissible evidence that Con-Drain Co. (1983) Ltd. is the registered owner of the pick-up truck being driven by De Medeiros when De Medeiros had been observed by Officer Malott allegedly smoking a tobacco cigarette while driving the pick-up truck.

[21] Accordingly, the defendants submit that the prosecution has not proven that the pick-up truck is a commercial motor vehicle nor that Con-Drain Co. (1983) Ltd. is the legal owner of that pick-up truck, and as such, the defendants contend that the prosecution has not proven beyond a reasonable doubt that the pick-up truck is an enclosed workplace or that the defendants, Edmundo De Medeiros and Con-Drain Co. (1983) Ltd. have committed their respective offences.

3. THE CHARGES

[22] As stated in the Certificate of Offence numbered 31605137421B that was issued on February 1, 2016, the defendant, Edmundo De Medeiros, has been charged with a Part I regulatory offence of smoking tobacco in an enclosed workplace, contrary to s. 9(1) of the Smoke-Free Ontario Act, S.O. 1994, c. 10:

> ***Edmundo De Medeiros***
>
> *At Bovaird Dr. West at Bramalea Rd.*
> *Brampton*
>
> *Did commit the offence of: Smoke Tobacco in enclosed work place contrary to s. 9(1) of S.F.O.A. (Smoke-Free Ontario Act)*
>
> *2016 – 02 – 01 9:40 AM*

[23] And, as stated on a separate Certificate of Offence numbered 31605137422B that was issued on February 1, 2016, the corporate defendant, Con-Drain Co. (1983) Ltd., has been charged with a Part I regulatory offence of failing to ensure compliance with s. 9 in respect to an enclosed workplace, contrary to s. 9(3)(a) of the Smoke-Free Ontario Act, S.O. 1994, c. 10:

> ***Con-Drain Co. (1983) Ltd.***
>
> *At Bovaird Dr. West at Bramalea Rd.*
> *Brampton*
>
> *Did commit the offence of: Failure of employer to ensure compliance contrary to s. 9(3)(a) of S.F.O.A. (Smoke-Free Ontario Act)*
>
> *2016 – 02 – 01 9:40 AM*

4. ANALYSIS AND DECISION

[24] To decide whether the prosecution has proven these two charges beyond a reasonable doubt, the first question that needs to be determined is whether the prosecution has proven that the Ford F-150 pick-up truck driven by De Medeiros is a commercial motor vehicle. If the prosecution fails to prove the pick-up truck is a commercial vehicle, then the charges against both defendants would have to be dismissed, as there would be no evidence then that could prove that the pick-up truck meets the definition of an "enclosed workplace" within the meaning of the Smoke-Free Ontario Act, S.O. 1994, c. 10 ("SFOA").

[25] Ergo, if there is admissible evidence that proves beyond a reasonable doubt that the pick-up truck being driven by De Medeiros is a commercial motor vehicle and that he had been smoking a tobacco cigarette while driving that pick-up truck, then the prosecution will have proven that De Medeiros had committed the offence of smoking tobacco in an enclosed workplace contrary to s. 9(1) of the SFOA beyond a reasonable doubt, since a commercial vehicle by its nature would be such a place where employees would work in or frequent during the course of their employment, and would therefore be an enclosed workplace within the meaning of s. 1(1) of the SFOA. And more important, the pick-up truck would still be an enclosed workplace if it is a commercial motor vehicle, regardless of whether there is an evidence of who the owner of that pick-up truck had been on February 1, 2016.

[26] As well, if the prosecution proves that the pick-up truck is a commercial motor vehicle where employees could work or be found in, and there is admissible evidence which would that prove beyond a reasonable doubt that the pick-up truck being driven by De Medeiros is owned by Con-Drain Co. (1983) Ltd., then under the SFOA, Con-Drain would meet the definition of an employer who would have been responsible for ensuring that everyone complies with s. 9 of the SFOA by not smoking a tobacco cigarette in an enclosed workplace. And, if it is determined that De Medeiros had been smoking a tobacco cigarette while driving the pick-up truck, then Con-Drain would be found guilty of contravening s. 9(3)(a) unless it can prove on a balance of probabilities that it had taken all reasonable care in the circumstances to prevent such event from occurring.

[27] To these questions, the prosecution submits that there is proof beyond a reasonable doubt that the pick-up truck is a commercial motor vehicle and it is owned by Con-Drain. Such evidence, the prosecution contends, is from the following: (1) Officer Malott's testimony that he had actually observed on the ownership document that had been provided to him by Edmundo De Medeiros, information that had denoted the Ford F-150 pick-up truck being driven by De

Medeiros was a commercial motor vehicle and that the registered owner was Con-Drain Co. (1983) Ltd.; (2) Officer Malott's testimony that the information on the ownership document and the other documents provided to him by De Medeiros were accurate based on verifying the information that he had garnered from the documents with what he had observed on the police and on the Ministry of Transportation databases; (3) Officer Malott's testimony that he had observed particular numbering on the licence plate attached to the Ford F-150 pick-up truck, which had informed Officer Malott that it was a licence plate for a commercial motor vehicle; (4) Officer Malott's testimony that he had observed the lettering "CN" on the doors of the pick-up truck, which Officer Malott believes is also an indication that the pick-up truck was being used as a commercial motor vehicle; and (5) Officer Malott's testimony that he did not observed a green sticker on the front licence plate attached to the Ford F-150 pick-up truck, which would have indicated to him that the pick-up truck was being only used primarily for transportation purposes.

[28] On the other hand, the defendants refute the prosecutions' argument that they have proven the elements of the two offences beyond a reasonable doubt and contend instead that there is no admissible evidence of who the owner of the pick-up truck is nor any evidence that the pick-up truck in question is a commercial motor vehicle, because Officer Malott's testimony on what he had observed on the ownership document and then repeated in court for its truth, amounts to inadmissible hearsay evidence. And, akin to how the prosecution proves who the owner is of a particular motor vehicle for the offence of "owner operate a motor vehicle on a highway without insurance", the defendants submit that the prosecution is also required to obtain and provide a certified document from the Ministry of Transportation to prove who is the legal owner of the motor vehicle and to prove the pick-up truck is classified as a commercial vehicle.

(A) WHY WOULD A PICK-UP TRUCK BE AN "ENCLOSED WORKPLACE"?

[29] According to s. 9(1) of the SFOA, no one is permitted to smoke tobacco or hold lighted tobacco in an "enclosed workplace":

> *9(1) No person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed workplace.*

[30] An "enclosed workplace" is defined under s. 1(1) of the SFOA and includes the "inside of any vehicle that is covered by a roof" that is "not primarily a private dwelling" and in which "employees work in or frequent during the course of their employment, whether or not they are acting in the course of their employment at the time" [*emphasis is mine below*]:

> *1.(1) In this Act,*

…

"enclosed workplace" means,

(a) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,

(i) that is covered by a roof,

(ii) that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and

(iii) that is not primarily a private dwelling, or

(b) a prescribed place;

[31] Also, under s. 1(2) of the SFOA, when referring to an enclosed workplace, a "private dwelling" does not specifically refer to a motor vehicle, but includes "Private self-contained living quarters in any multi-unit building or facility or "Any other prescribed place":

Private dwelling

1(2) For greater certainty, and without restricting the generality of the expression, the following are primarily private dwellings for the purposes of the definition of "enclosed workplace" in subsection (1):

1. Private self-contained living quarters in any multi-unit building or facility.

2. Any other prescribed place.

[32] Ergo, as specified in the definition of an "enclosed workplace" in s. 1(1) of the SFOA, a pick-up truck would be an enclosed workplace if it is a commercial motor vehicle with a roof and a location where employees could or would work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time.

[33] However, this definition does not specify that a person who is smoking or holding lit tobacco in an enclosed workplace, such as in a pick-up truck, has to be actually engaged or acting as an employee in respect to that vehicle for that vehicle to be classified as an enclosed workplace. Nor does s. 9(1) and s. 1(1) of the SFOA, specifically require the prosecution to prove De Medeiros was acting in the capacity of an employee or that he was employed by Con-Drain Co. (1983) Ltd., at the time that he had been driving the pick-up truck, since the no-smoking prohibition is not limited to only "employees", but applies to everyone, as the

provision states that “no person” shall smoke or hold tobacco in an enclosed workplace.

[34] On the other hand, evidence that De Medeiros is an employee of the owner of the pick-up truck would be a factor that could aid in establishing that the pick-up truck is a commercial motor vehicle, but it is not a required element of the offence that has to be proven by the prosecution.

[35] As such, the prosecution does not have to prove that the defendant, Edmundo De Medeiros, is an employee or an employee of Con-Drain Co. (1983) Ltd. to prove the pick-up truck is an enclosed workplace. However, the trier of fact must be satisfied that the inside of the motor vehicle at issue is a vehicle in which employees could or would work in or frequent during the course of their employment.

[36] Moreover, since a commercial motor vehicle by its very nature is a location where employees could or would work or frequent during the course of their employment, then the inside of a pick-up truck covered with a roof that is registered as a commercial motor vehicle would meet the definition of an enclosed workplace. In addition, evidence which shows that the motor vehicle where the alleged smoking had occurred had been owned by corporation would also be an indication that it is being used in or for a business, as opposed to a motor vehicle that it is owned by a human individual that is intended for their personal use.

[37] Furthermore, the prosecution is not required to prove that a commercial motor vehicle is not being used for personal purposes when someone is observed smoking tobacco in that commercial motor vehicle. Such evidence of what use was being made of the commercial motor vehicle at the time that the act of smoking tobacco had been observed would be within the knowledge of the person operating the commercial motor vehicle, so it would be up to the person observed smoking tobacco in a commercial motor vehicle that would meet the definition of an enclosed workplace to produce or introduce evidence to the contrary that the commercial motor vehicle was not being used as a commercial motor vehicle, but for a personal purpose at the time the smoking of tobacco had been observed.

[38] Consequently, unless there is evidence to the contrary, the inside of a motor vehicle covered with a roof that is registered as a commercial motor vehicle would be presumptively a location in which employees would work in or frequent during the course of their employment, since it would be reasonable to infer that a motor vehicle registered as a commercial vehicle is not being used for primarily for personal purposes or it would have been properly registered as a “personal-use” motor vehicle and not as a commercial motor vehicle.

[39] Therefore, even where there is no evidence that De Medeiros had been an employee or acting in the course of his employment at the time when he was supposedly observed to be smoking a tobacco cigarette, the inside of the pick-up

truck that was being driven by De Medeiros would still be considered an "enclosed workplace" under s. 1(a)(ii) of the SFOA, if it is proven to be a commercial motor vehicle and a location where employees could or would work in or frequent during the course of their employment -- as long as there is no evidence that the pick-up truck was being used as a "personal-use" motor vehicle at the time the smoking of tobacco inside the pick-up truck had been observed.

(B) IS THERE ANY LEGALLY ADMISSIBLE EVIDENCE THAT THE PICK-UP TRUCK THAT WAS BEING DRIVEN BY DE MEDEIROS IS A COMMERCIAL MOTOR VEHICLE AND THAT IT IS OWNED BY CON-DRAIN CO. (1983) LTD.?

[40] Officer Malott had testified that (1) he had observed an Ontario licence plate with the numbering of "AD61575" on the pick-up truck and further testified that the numbering on the licence plate had informed him that the licence plate was a commercial licence plate because the plate numbering comprising of 2 letters followed by 5 numbers, which is the sequence and numbering configuration for a commercial licence plate; (2) that Officer Malott had requested the ownership and insurance documents for the pick-up truck and when De Medeiros provided him with the pick-up truck's ownership document Malott had said that he had observed the word "COM" at the top of the ownership document, which informed Officer Malott that the pick-up truck is a commercial vehicle; (3) that Officer Malott had observed the lettering "CN" on the side doors of the pick-up truck, which Malott said had been further indication the pick-up truck was a commercial motor vehicle; and (4) that Officer Malott had not observed a green sticker on the front licence plate that would indicate the pick-up truck was primarily used for transportation, to make it a "personal-use" pick-up truck. Furthermore, Officer Malott said that he had observed on the ownership document provided to him by De Medeiros that the pick-up truck was registered to a company named Con-Drain Co. (1983) Ltd. and that after accessing his police databases and the Ministry of Transportation database and doing further checks on the ownership document he said that he was able to confirm the authenticity and accuracy of the contents of the ownership document provided to him by De Medeiros.

[41] In addition, Officer Malott said that he did not seize the ownership document for the pick-up truck as he was not lawfully permitted to do so in the circumstances.

[42] Hence, only Officer Malott's testimony on what he had observed on the ownership document provided to him by De Medeiros as to the name of the owner and as to the registered use of the pick-up truck and then confirmed by him on the Ministry of Transportation database, and then repeated in court for its truth, is hearsay evidence. On the other hand, Malott's testimony of observing the lettering "CN" on the doors of the pick-up truck, the numbering on the licence plate with particular sequencing, and the absence of a green sticker on the front licence

plate that would have indicated to him that the pick-up truck was only being used primarily for transportation, is not hearsay evidence.

(1) A Pick-Up Truck Is Legally Considered To Be Commercial Motor Vehicle Under Ontario's *Highway Traffic Act*

[43] In considering whether the pick-up truck being driven by De Medeiros is a commercial motor vehicle, it is important to note that a pick-up truck is legally considered in Ontario to be a commercial motor vehicle for the purpose of the Highway Traffic Act, R.S.O. 1990, c. H.8, unless it has been registered for "personal use" with the Ministry of Transportation.

[44] Pick-up trucks are specifically defined as commercial motor vehicles under s. 1(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8, where it states that a "commercial motor vehicle" is a motor vehicle that has permanently attached thereto a "truck or delivery body" [*emphasis is mine below*]:

> *1(1) In this Act,*
>
> …
>
> *"commercial motor vehicle" means a motor vehicle having permanently attached thereto a truck or delivery body and includes ambulances, hearses, casket wagons, fire apparatus, buses and tractors used for hauling purposes on the highways;*

[45] In addition, s. 1(10) of the Highway Traffic Act provides that the Lieutenant Governor in Council may make regulations defining "commercial motor vehicle" differently than from its definition in subsection 1(1) for the purposes of any Part or provision of the Highway Traffic Act:

> ***Definition of "commercial motor vehicle"***
>
> *1(10) The Lieutenant Governor in Council may make regulations defining "commercial motor vehicle" differently from its definition in subsection (1) for the purposes of any Part or provision of this Act, and those regulations may include or exclude any vehicle or class of vehicles for the purposes of that definition,* including *the inclusion or exclusion of vehicles or classes of vehicles based on a use or uses to which a vehicle may be put.*

[46] Ergo, under the s. 1(1) Highway Traffic Act definition, a pick-up truck, as a type of motor vehicle, would be a commercial vehicle since it is a motor vehicle that would have a truck body permanently attached.

(2) ***Vehicle Permits Regulation*, Reg. 628, R.R.O. 1990**

[47] Furthermore, under the heading, "Annual Validation Fees For Additional Classes Of Vehicles", in Schedule 4 of the *Vehicle Permits Regulation*, Reg. 628, R.R.O. 1990, a schedule of fees is set out for specific classes of commercial motor vehicles which includes types of commercial motor vehicles that are for "personal use".

[48] In particular, under item #11 in Schedule 4, there is a specific fee for a vehicle permit for the category of a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, that has a gross weight of not more than 3,000 kilograms. And, under item #12 there is a specific fee for a vehicle permit for the category of a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, that has a gross weight of not more than 3,000 kilograms, where the vehicle is "used primarily for personal transportation". And, under item #13 there is a specific fee for a vehicle permit for the category of a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, that has a gross weight of not more than 3,000 kilograms, where the permit holder is a resident of Northern Ontario who "uses the vehicle primarily for personal transportation":

SCHEDULE 4
ANNUAL VALIDATION FEES FOR ADDITIONAL CLASSES OF VEHICLES

Item	Class of Vehicle	Annual Fee in dollars From January 1, 2016 to August 31, 2016	Annual Fee in dollars On and after September 1, 2016
…			
11.	*For a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, with a gross weight of not more than 3,000 kilograms*	*108*	*120*
12.	*For a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, with a gross weight of not more than 3,000 kilograms, <u>if the vehicle is used primarily for personal transportation</u>*	*108*	*120*
13.	*For a commercial motor vehicle or a combination of a commercial motor vehicle and trailer or trailers, other than a bus, with a gross weight of not more than 3,000 kilograms, <u>if the permit holder is a resident of Northern Ontario</u>*	*54*	*60*

	who uses the vehicle primarily for personal transportation		

[49] In short, commercial motor vehicles can be registered as "personal-use" vehicles with the Ministry of Transportation.

(3) Validation Tags Are Required To Be Placed On The Front Licence Plate Of A Commercial Motor Vehicle

[50] Also, under s. 9(1) of the *Vehicle Permits Regulation*, Reg. 628, R.R.O. 1990, the validation sticker or tag for a commercial vehicle is required to be affixed to the front licence plate:

> ***NUMBER PLATES***
>
> ***9****(1) Evidence of validation issued for use on a number plate shall be affixed,*
>
> *(a) where the permit is for a commercial motor vehicle, in the upper right corner of the number plate exposed on the front of the motor vehicle; and*
>
> *(b) in all other cases, in the upper right corner of the number plate exposed on the rear of the motor vehicle.*

(4) When A Pick-Up Truck Is Only Used For "Personal Purposes", The Owner Of The Pick-Up Truck Will Not Be Obligated To Comply With Certain Requirements That Owners Of Commercial Motor Vehicles Have To Comply With

[51] Three regulations enacted under the Highway Traffic Act, R.S.O. 1990, c. H.8, also specifically refer to a pick-up truck as a commercial motor vehicle. These are the *Commercial Motor Vehicle Operators' Information Regulation*, O. Reg. 427/97; the *Commercial Motor Vehicle Inspections Regulation*, O. Reg. 199/07; and the *Hours Of Service Regulation* O. Reg. 555/06. On the other hand, these same regulations also provide for specific circumstances when a pick-up truck is a "personal-use" type of commercial motor vehicle that would exempt the owner or operator of the pick-up truck from complying with particular regulations that owners of commercial motor vehicles have to comply with.

(a) *Commercial Motor Vehicle Operators' Information Regulation*, O. Reg. 427/97

[52] In addition, under s. 1.2(2) of the *Commercial Motor Vehicle Operators' Information Regulation*, O. Reg. 427/97, which is a regulation that sets out the requirements for operators of commercial motor vehicles to have a Commercial Vehicle Operators Registration (CVOR) certificate for their commercial vehicles as required under s. 16 of the Highway Traffic Act, which is a provision that prohibits someone from driving or operating a commercial motor vehicle on a highway unless the operator of the vehicle is the holder of a valid CVOR certificate. Moreover, under s. 1.2(2), a pick-up truck is legally defined as a "commercial" motor vehicle where it has a manufacturer's gross vehicle weight rating of 6,000 kilograms or less and is fitted with either the unmodified original box installed by the manufacturer or an unmodified replacement box that duplicates the one that had been installed by the manufacturer:

> *1.2(2) In this section,*
>
> *"pick-up truck" means a commercial motor vehicle that,*
>
> *(a) has a manufacturer's gross vehicle weight rating of 6,000 kilograms or less, and*
>
> *(b) is fitted with either,*
>
> *(i) the original box that was installed by the manufacturer, which has not been modified, or*
>
> *(ii) a replacement box that duplicates the one that was installed by the manufacturer, which has not been modified.*

[53] However, if the pick-up truck is being only used for "personal purposes without compensation" and "it is not carrying, or towing a trailer that is carrying, commercial cargo or tools or equipment of a type normally used for commercial purposes", then under s. 1.2(1)(a) and (b) of the *Commercial Motor Vehicle Operators' Information Regulation*, O. Reg. 427/97, the owner of a pick-up truck is exempt from the requirement under s. 16 of the Highway Traffic Act to obtain a CVOR certificate for that pick-up truck [*emphasis is mine below*]:

> *1.2(1) A pick-up truck is exempt from the requirements of section 16 of the Act if,*
>
> *(a) it is being used for personal purposes without compensation; and*
>
> *(b) it is not carrying, or towing a trailer that is carrying, commercial cargo or tools or equipment of a type normally used for commercial purposes.*

(b) ***Commercial Motor Vehicle Inspections Regulation*, O. Reg. 199/07**

[54] And, under s. 1(1)(g) of the *Commercial Motor Vehicle Inspections Regulation*, O. Reg. 199/07, which is a regulation that requires the operators of commercial motor vehicles to conduct daily pre-trip inspections of their vehicles before driving on a highway in Ontario, a pick-up truck is not considered to be a commercial motor vehicle for the purposes of this Regulation where the pick-up truck is being used for personal purposes without compensation and is also not carrying, or towing a trailer that is carrying, commercial cargo or tools or equipment of a type normally used for commercial purposes [*emphasis is mine below*]:

> ***Definitions And Interpretation***
>
> *1(1) in section 107 of the act and in this regulation,*
>
> *"commercial motor vehicle" includes a school purposes vehicle but does not include,*
>
> *…*
>
> *(g) a pick-up truck that,*
>
> *(i) is being used for personal purposes without compensation, and*
>
> *(ii) is not carrying, or towing a trailer that is carrying, commercial cargo or tools or equipment of a type normally used for commercial purposes, or*
>
> *…*

(c) ***Hours Of Service Regulation*, O. Reg. 555/06**

[55] Furthermore, under s. 3(4) of the *Hours Of Service Regulation*, O. Reg. 555/06, a regulation which governs the number of hours that the driver of a commercial motor vehicle can legally operate or drive a commercial motor vehicle on a highway during a specific period, a pick-up truck is defined as a commercial motor vehicle, which is the same definition used to define a commercial motor vehicle under s. 1(1) of the Highway Traffic Act. However, s. 3(2) of the *Hours Of Service Regulation* provides that the regulation does not apply to the driver or operator driving a pick-up truck when the pick-up truck is being used for personal purposes without compensation and is not carrying, or towing a trailer that is carrying commercial cargo or tools or equipment of a type normally used for commercial purposes [*emphasis is mine below*]:

> ***Exemptions from Regulation***
>
> *…*

3(2) This Regulation does not apply to a driver, or the operator of such driver, while driving a pick-up truck that,

(a) is being used for personal purposes without compensation; and

(b) is not carrying, or towing a trailer that is carrying, commercial cargo or tools or equipment of a type normally used for commercial purposes.

…

3(4) In this section,

"pick-up truck" means a commercial motor vehicle that,

(a) has a manufacturer's gross vehicle weight rating of 6,000 kilograms or less, and

(b) is fitted with either,

(i) the original box that was installed by the manufacturer, which has not been modified, or

(ii) a replacement box that duplicates the one that was installed by the manufacturer, which has not been modified.

(5) How Would Anyone Know If A Pick-Up Truck Has Been Registered With The Ministry Of Transportation For "Personal Use" Only?

[56] As for evidence that the pick-up truck being driven by De Medeiros was not registered as a "personal-use" motor vehicle, Officer Malott had testified that he did not observe a green sticker on the front licence plate of the pick-up truck which would indicate to him that the pick-up truck was used primarily for transportation. Moreover, items #12 and #13 of Schedule 4 of the *Vehicle Permits Regulation*, Reg. 628, R.R.O. 1990, which establishes specific permit fees for commercial motor vehicles that are "used primarily for personal transportation" or where the permit holder is a resident of Northern Ontario who "uses the vehicle primarily for personal transportation", would support Officer Malott's testimony that a pick-up truck may be registered with the Ministry of Transportation for "personal use" and that such use can be indicated by a special sticker attached to the front licence plate of the pick-up truck.

[57] In addition, a pick-up truck that is not used for business or commercial purposes, nor to tow a trailer that is used for business or commercial purposes, but for personal purposes, then the owner of that pick-up truck would be exempt from complying with certain regulations enacted under the Highway Traffic Act that

owners or operators of commercial motor vehicles are obligated or required to follow.

[58] In sum, the Highway Traffic Act considers all pickup trucks to be classified legally as commercial motor vehicles, but the owner of a pickup truck can be exempted from complying with the requirements for obtaining a CVOR certificate, for conducting a daily pre-trip inspection, and for complying with the hours of service regulation, if the pick-up truck is being used for personal purposes without compensation and has a manufacturer's gross vehicle weight rating of 6,000 kg. (13,227 lb.) or less, and is fitted with either the original box that was installed by the manufacturer, which has not been modified, or a replacement box that duplicates the one that was installed by the manufacturer and has not been modified, and is not carrying or towing a trailer carrying commercial cargo or tools or equipment of a type normally used for commercial purposes.

[59] Therefore, either the permit or ownership document or a special sticker issued by the Ministry of Transportation to be attached to the front licence plate would have to specifically indicate that the pick-up truck had been registered as a "personal-use" pick-up truck in order that enforcement officials would know that this particular type of commercial motor vehicle would be exempt from particular regulations enacted under the Highway Traffic Act. And since it would be the owner of the pick-up truck that would have to declare and register the pick-up truck with the Ministry of Transportation as a commercial motor vehicle for "personal use", then the owner of the pick-up truck would have personal knowledge of its declared non-commercial purpose and the record of this declared non-commercial purpose for the pick-up truck would be part of the Ministry of Transportation's database that could be accessed by a police officer. On the other hand, even if the pick-up truck had not been registered as a "personal-use" commercial motor vehicle, the driver or operator of a pick-up truck could still inform and convince an enforcement official that the pick-up truck was being used by the operator or driver for only "personal purposes" at that particular moment.

(a) The driver or operator of a pick-up truck would have the obligation to prove that the pick-up truck had been used for "personal purposes" to establish that the pick-up truck is not an enclosed workplace for the purposes of the SFOA

[60] Considering that only De Medeiros would know whether the pick-up truck he was driving was being used for "personal purposes" at the time he had been observed smoking a tobacco cigarette inside the cab of the pick-up truck, then the obligation to adduce evidence that the pick-up truck was being used for "personal purposes" at the time rests with De Medeiros. The prosecution, on the other hand, is not required to prove that the pick-up truck was not being used by De Medeiros for "personal purposes" at the time, once the prosecution proves the pick-up truck is a

commercial motor vehicle, in order to establish the pick-up truck is an enclosed workplace under the SFOA.

(6) Is Officer Malott's Testimony That The Pick-Up Truck Is A Commercial Motor Vehicle And That It Is Owned By Con-Drain, Which Officer Malott Had Garnered From What He Had Observed On The Ownership Document Provided To Him By De Medeiros, Admissible For Its Truth?

[61] As required under s. 7(5) of the Highway Traffic Act, De Medeiros had been legally required to provide the ownership or vehicle permit document for the pick-up truck to Officer Malott upon the demand for that document from Officer Malott. After receiving the ownership document for the pick-up truck from De Medeiros, Malott then read the information contained in the ownership document, which he said had indicated that the pick-up truck was a "commercial" motor vehicle as it had the letters "COM" indicated on the top of the ownership document. Malott also said the registered owner stated on the ownership document was an Ontario company named Con-Drain Co. (1983) Ltd., with an address of 30 Floral Parkway in Concord, Ontario. Malott then testified that he had checked the information on the ownership document with the police and Ministry of Transportation databases and confirmed the information he observed on the document had been accurate.

[62] However, the defendants contend that this evidence would amount to inadmissible hearsay evidence and that since the prosecution had failed to enter a certified document issued by the Ministry of Transportation to prove the pick-up truck was a commercial motor vehicle and to prove who the registered owner of the pick-up truck had been on February 1, 2016, then the prosecution had failed to prove the necessary elements to establish that the defendants had committed their respective charges beyond a reasonable doubt.

(a) Hearsay Evidence Is Presumptively Inadmissible

[63] Putting aside that a pick-up truck is legally defined as a commercial motor vehicle under s. 1(1) of the Highway Traffic Act, the defendants' argument that Officer Malott's testimony on the information that he had observed on the ownership document for the pick-up truck and then repeated at trial for its truth would be inadmissible hearsay evidence, will be addressed first.

[64] In R. v Bradshaw, [2017] S.C.J. No. 35, at para. 1, Karakatsanis J., writing for the majority of the Supreme Court, has neatly summarized why hearsay evidence is presumptively inadmissible, but that it may be exceptionally admitted into evidence under the principled exception when the evidence meets the criteria of necessity and threshold reliability:

Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because — in the absence of the opportunity to cross-examine the declarant at the time the statement is made — it is often difficult for the trier of fact to assess its truth. Thus hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.

[65] Furthermore, in R. v Khelawon, [2006] 2 S.C.R. 787, at paras. 34 to 36, Charron J. for the Supreme Court, had acknowledged that the essential defining features of hearsay are that the statement is adduced to prove the truth of its contents and that there is the absence of a contemporaneous opportunity to cross-examine the declarant of that statement. In addition, Charron J. confirmed that hearsay includes statements and communications expressed by conduct. In addition, Charron J. noted that the basic rule of evidence is that all relevant evidence is admissible, but that there are exceptions to that basic rule, such as the rule against hearsay. Moreover, she also explained that hearsay evidence is not admissible absent an exception, and that it is the difficulty of testing hearsay evidence for its reliability that underlies the rule excluding hearsay statements generally. However, Charron J. then explained that the alleviation of this difficulty is what forms the basis of the exceptions to the hearsay rule [*emphasis is mine below*]:

The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is not admissible. Hearsay evidence is not excluded because it is irrelevant -- there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

…

At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see R. v. Abbey, [1982] 2 S.C.R. 24, at pp. 40-41, per Dickson J. It is sufficient to note, as this Court did in Starr, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, R. v. O'Brien, [1978] 1 S.C.R. 591, at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be

afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. …

The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

…

[66] Charron J. also reiterated at para. 42 in R. v. Khelawon, that it has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence, especially where the hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Charron J. then confirmed that in deciding whether hearsay evidence should be admitted into the trial, hearsay evidence is considered to be presumptively inadmissible unless it is shown on a balance of probabilities by the party wishing to have it admitted that the hearsay evidence falls within an exception to the hearsay rule, but that if it does not fall under a hearsay exception, then it may still be admitted if indicia of reliability and necessity are established on a *voir dire* [*emphasis is mine below*]:

It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (Wigmore on Evidence (2nd ed. 1923), vol. III, s. 1420, at p. 153). This Court first accepted this approach in Khan and later recognized its primacy in Starr. The governing framework, based on Starr, was recently summarized in R. v. Mapara, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

(7) The Ruling In R. v. Germanis

[67] To support their argument that Officer Malott's testimony on what he had read in the ownership document for the pick-up truck and then repeated in court for its truth is inadmissible hearsay evidence, and that there is no admissible evidence of who the registered owner is of the pick-up truck that was being driven by De Medeiros or that the pick-up truck is a commercial vehicle, the defendants rely on the case of R. v. Germanis, [2001] O.J. No. 2935 (O.C.J.), decided by Lampkin J. In that case, at paras. 19 to 22 of Germanis, Lampkin J. had held that the viva voce evidence of the constable who had repeated in court that the accused was a class G2 licence holder, which the constable had based on the information that the constable had observed on the accused's driver's licence, and then recorded in the constable's notes, was hearsay evidence. And, after considering the traditional categories for admitting hearsay, Lampkin J. had concluded that the hearsay evidence did not fit into any of the traditional exceptions to the hearsay rule, and as such, it could not be admitted for its truth. Then, in considering whether the hearsay evidence could still be admitted under the case-by-case principled approach, Lampkin J. had held that it did not meet the "necessity" requirement, since the *Highway Traffic Act* had permitted the prosecution to tender in court a certified copy of the accused's driver's licence and its restrictions, if any, as well as the class of that licence from the records of the Ministry of Transportation in order to prove the contents of those documents that had been provided by the accused to the police officer [*emphasis is mine below*]:

> *The rules of hearsay evidence have been somewhat relaxed in recent years and there is now a principled approach to its admissibility. Where original direct evidence is not available, hearsay evidence is admissible where it is necessary and reliable. The tendered evidence must meet a certain threshold of reliability for its admissibility. R. v. Khan, [1990] 2 S.C.R. 531, 113 N.R. 53, 41 O.A.C. 353, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, [1990] S.C.J. No. 81; R. v. K.G.B., [1993] 1*

S.C.R. 740, 148 N.R. 241, 61 O.A.C. 1, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, [1993] S.C.J. No. 22.

There is no doubt that the evidence of the constable pertaining to the contents of the licence is hearsay evidence. He testified from memory and the notes that he made.

His evidence does not fit into any of the pigeon-holes of the old common law exceptions to the hearsay rule:

(a) admissions and confessions;
(b) statements by deceased persons;
(c) reputation; and
(d) statements admitted as part of the res gestae.

Nor does his viva voce evidence satisfy the requirement of necessity in the sense contemplated by the new jurisprudence. It is common ground that the Ministry of Transportation and Communications is required by law to keep records of permits of persons licensed to drive in the Province of Ontario and of the restrictions and classes of drivers' licences. Subsection 210(7) of the Highway Traffic Act permits the proof of the contents of those documents in court by tendering certified copies thereof. While that is not the only method of proving the contents of the permit or licence, the viva voce evidence of the officer in proof thereof is hearsay and not admissible for its truth. It is not a question of challenging the accuracy of the officer's evidence given by consulting his notes. It is putting the prosecution to the strict proof of all elements of the offence. The necessity requirement is simply not fulfilled.

[68] Furthermore, Atwood J. in R. v. Colavita Construction Ltd., [1993] O.J. No. 4484 (Ont. Ct. (Prov. Div.)); Masse J. in R. v. 2934752 Canada Inc. (c.o.b. as Highland Transport), [1997] O.J. No. 6308 (Ont. Ct. (Prov. Div.)); Krelove J. in R. v. Zilaie, [2002] O.J. No. 2144 (O.C.J.); and Khawly J. in R. v. Navarro, [2002] O.J. No. 5864 (O.C.J.), had also held in their respective decisions that a police officer testifying as to what information had been observed on a document that had been given to the police officer, did not fall either within any traditional or common law exception to the hearsay rule or that it would be properly admissible under the principled exception to the hearsay rule.

(a) But Other Courts At The Same Level Have Disagreed With The Ruling In R. v. Germanis

[69] In regards to the applicability and persuasive value of R. v. Germanis to this proceeding, it should be emphasized that Lampkin J. in arriving at his decision on not admitting the hearsay evidence had considered and relied on R. v. Colavita Construction Ltd., [1993] O.J. No. 4484 (Ont. Ct. (Prov. Div.)) and R. v. 2934752 Canada Inc. (c.o.b. as Highland Transport), [1997] O.J. No. 6308 (Ont. Ct. (Prov.

Div.)), where it had been held that a police officer's testimony on what the officer had observed on a document and repeated in court for its truth had not been admissible because it had violated the hearsay rule. However, those particular cases had been decided before the Supreme Court of Canada had rendered its decisions in R. v. Starr, [2000] 2 SCR 144 on September 29, 2000, in R. v. Mapara, [2005] 1 S.C.R. 358 in 2005, and in R. v. Khelawon [2006] 2 S.C.R. 787 in 2006, where the Supreme Court had developed and adopted a more flexible and principled approach for the admission of hearsay evidence into a trial, so that hearsay evidence as indirect or secondary evidence could be admitted for its truth on a case-by-case principled exception to the rule against hearsay, where it met the criteria of necessity and reliability.

[70] Moreover, in R. v. Khelawon, Charron J. had noted at para. 42, that the Supreme Court had long recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. As well, Charron J. had noted that a rigid application of the traditional exceptions to the hearsay rule had also proven to be problematic, since it led to the needless exclusion of evidence in some cases, or its unwarranted admission in others. In addition, Charron J. had reaffirmed that because of the problems that had arisen in the application of the hearsay rule that it had been necessary to adopt a more flexible approach based on the two guiding principles of necessity and reliability [*emphasis is mine below*]:

> *It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (Wigmore on Evidence (2nd ed. 1923), vol. III, s. 1420, at p. 153). This Court first accepted this approach in Khan and later recognized its primacy in Starr. …*

[71] In addition, Charron J., at paras. 49 and 78 of R. v. Khelawon, pointed out that the "necessity" requirement for the admission of hearsay evidence had been founded on society's interest in getting at the truth. And, because it is not always possible to meet the optimal test of contemporaneous cross-examination, Charron J. noted that it is crucial in the interests of justice to consider whether the evidence should nonetheless be admitted in its hearsay form rather than simply losing the value of that evidence,. Moreover, Charron J. clarified that "necessity" should not be equated with the unavailability of the witness, since the necessity criterion should be given a flexible definition where "necessity" would be based on the unavailability of the testimony and not simply on the unavailability of the witness. As for the criterion of "reliability" for admitting hearsay evidence, Charron J. held that it is about ensuring the

integrity of the trial process which requires that the hearsay evidence not be admitted unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. However, Charron J. explained that even if the two criteria are met, the trial judge still has the discretion to exclude that hearsay evidence to ensure a fair trial where its probative value is outweighed by its prejudicial effect [*emphasis is mine below*]:

> *The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.*
>
> *…*
>
> *As we know, the Court ultimately ruled in B. (K.G.), and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in B. (K.G.) where a witness recants an earlier statement, necessity is based on the unavailability of the testimony, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the degree of reliability required to justify its admission. …*

[72] Ergo, even though it would be this more flexible and principled approach that is required to be used for determining whether the hearsay evidence from Officer Malott should be admitted for its truth, it should still be emphasized that other courts at the same level in Ontario had subsequently disregarded or disagreed with Lampkin J.'s holding in R. v. Germanis.

[73] In particular, in R. v. Macatangay, [2003] O.J. No. 5643 (O.C.J.), at para. 79, Hawke J. had disagreed with Lampkin J.'s reasoning in Germanis and held that in her particular case, the police officer's testimony on what he had observed on the

accused's driver's licence provided to him and then recorded in his notes was an "admission against penal interest" made by the accused driver, which would then be a traditional exception to the hearsay rule that can be used as evidence of the truth of the contents of that document and that it had been available to consider along with all the other evidence:

> *I do not disagree with Justice Lampkin's analysis of why that is hearsay, but where I differ is I view this as an admission. And an admission is an exception to the hearsay rule and as such, admissions may be used as evidence of the truth of the contents. And this admission was available to the justice to consider along with all the other evidence at trial. So the appeal is dismissed.*

[74] Also, in R. v. Norat, [2009] O.J. No. 1083 (O.C.J.), MacLean J., sitting as a Provincial Offences Appeal Court, had to consider the issue of whether the hearsay evidence from the police officer, who had obtained and recorded the name of the defendant and the Class G2 license status of the accused from the information the officer had actually observed on the accused's driver's licence, should be excluded or admitted for its truth. In concluding that the production of the documents by the accused in the case before her was an "admission by the accused", Maclean J., at paras. 12-14, and 18 of Norat, had disagreed with Lampkin J's finding in Germanis that the police officer's testimony did not fall into a traditional exception, and instead found the hearsay evidence of the police officer in the case before her to be an "admission" by the accused driver and admissible as a traditional or common law exception to the hearsay rule [*emphasis is mine below*]

> *In facts similar to the ones before this Court, Justice Krelove sitting on a Provincial Offences Appeal in R. v. Zilaie [2002] O.J. No. 2144 (O.C.J.), found that the Crown could have proven ownership by filing a certificate of the Registrar of Motor Vehicles pursuant to s. 210 of the Highway Traffic Act. At paragraph 4 the Court states:*
>
> > *4* Constable Light's testimony that she was given an ownership document by the owner which she reviewed and determined to be in the name of the owner is hearsay evidence (see R. v. Germanis, [2001] O.J. No. 3225 (O.C.J., Lampkin, J.). In order for such evidence to be admissible for the truth of its contents, it must fall within one of the exceptions to the hearsay exclusion rule. No such exception has been established in this case. Alternatively such hearsay evidence may be admitted for the truth of its contents based upon the principled approach to admissibility established by the Supreme Court of Canada in R. v. Khan (1990), 59 C.C.C. (3d) 92 and other cases. Both reliability and necessity must be established as part of the principled approach. However, necessity can not be established in this case as the prosecution could have proved ownership by obtaining and filing a certificate of the Registrar of Motor Vehicles pursuant to Section 210 of the Highway Traffic Act.
>
> *As quoted, Justice Krelove, relying on Germanis, infra, concluded that the testimony of the police officer that the name on the permit was that of the*

Defendant, did not meet the test of reliability and necessity based upon the principled approach to the hearsay rule but went on to add at paragraph 6 that:

> *6* I hasten to add that the result in this case may have been different if there was admissible admission by the respondent that he was the owner of the vehicle.

I respectfully disagree with the result reached by Justice Krelove, because it is my view that the production of the documents did in fact amount to an "admissible admission that he was the owner of the vehicle" for reasons that will be expanded upon below.

…

With the greatest of respect to Justice Lampkin, I disagree that this type of evidence does not fit within any of the common law exceptions to the hearsay rule. It is my view that the production of the driver's own documents to an officer amounts to an admission by that driver. Admissions and confessions by an accused person have long been recognized as an exception to the hearsay rule. The caselaw that supports this view will be referred to in greater detail below.

…

(8) For A Regulatory Trial In Ontario, Hearsay Evidence May Be Admitted For Its Truth Through Different Routes

[75] For this particular regulatory proceeding, there are several routes by which hearsay evidence could be admitted for its truth. They are the following:

(1) if the hearsay evidence is admissible under an exception provided for under the SFOA;

(2) if the hearsay evidence is admissible under an exception provided for under the Evidence Act, R.S.O. 1990, E.23;

(3) if the hearsay evidence is admissible under an exception provided for under Provincial Offences Act, R.S.O. 1990, c. P.33.

(4) if the hearsay evidence falls within a traditional or common law exception; and

(5) if the hearsay evidence meets the criteria of necessity and reliability under the case-by-case principled approach.

(a) Is The Hearsay Evidence Admissible By An Exception Under The SFOA?

[76] The SFOA does provide for the admission of business records seized by an inspector as an exception to the hearsay rule under s. 15, but this provision does not provide the prosecution with the statutory exception for the admission of the specific hearsay evidence from Officer Malott's testimony in this trial:

> ***Copy admissible in evidence***
>
> *(15) A copy of a record that purports to be certified by an inspector as being a true copy of the original is admissible in evidence to the same extent as the original, and has the same evidentiary value.*

(b) Admissibility Of Business Or Electronic Records Under The Evidence Act, R.S.O. 1990, c. E.23

[77] If a certified document from the Ministry of Transportation had been tendered by the prosecution, then it would have been admissible as a statutory exception to the hearsay rule. It would have been admissible under ss. 34.1 or 35 of the Evidence Act, R.S.O. 1990, c. E.23, which have modified the common law rules on the admissibility of records relating to prove of the record's authenticity or that it is the best evidence. In addition, where the best evidence rule is applicable in respect of an electronic record, s. 34.1(5) provides that it would satisfied on proof of the integrity of the electronic record. Furthermore, these statutory provisions indicate that the authenticity and integrity of a business or electronic record may be proven by affidavit evidence, and that the record may be regarded for its truth unless there is evidence to the contrary [*emphasis is mine below*]:

> ***Electronic records***
>
> ***Definitions***
>
> ***34.1(1)*** *In this section,*
> *…*
>
> *"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6);*
>
> *"electronic records system" includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records.*
>
> ***Application***

(2) This section does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

Power of court

(3) A court may have regard to evidence adduced under this section in applying any common law or statutory rule relating to the admissibility of records.

…

Application of best evidence rule

(5) Subject to subsection (6), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record.

…

What constitutes record

(6) An electronic record in the form of a printout that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule.

…

Proof by affidavit

(9) The matters referred to in subsections (6), (7) and (8) may be established by an affidavit given to the best of the deponent's knowledge and belief.

…

Business records

Definitions

35*(1) In this section,*

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; ("entreprise")

"record" includes any information that is recorded or stored by means of any device. ("document")

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

…

[78] Although the Evidence Act, R.S.O. 1990, c. E.23, provides for the admission of certified business or electronic records as an exception to the hearsay rule, the prosecution did not obtain and provide any certified document from the Ministry of Transportation, nor did they rely on any provision in the Ontario Evidence Act for the admission of the hearsay evidence in this trial.

(c) Is The Hearsay Evidence Admissible By An Exception Under The Provincial Offences Act, R.S.O. 1990, c. P.33?

[79] The Provincial Offences Act, R.S.O. 1990, c. P.33, the procedural statute that governs the trials of regulatory offences in Ontario, does provide for the admission of certified evidence under s. 48.1 as an exception to the hearsay rule, but this provision does not provide the prosecution with the statutory exception for the admission of the specific hearsay evidence from Officer Malott's testimony in this trial:

Certified evidence

Application

48.1*(1) This section applies to a hearing, including a hearing in the absence of a defendant under section 54, where,*

(a) the proceeding for the offence was commenced by certificate under Part I or II; and

(b) the offence is specified by the regulations.

Admissibility of certified evidence

(2) The following are admissible in evidence as proof of the facts certified in it, in the absence of evidence to the contrary:

1. *A certified statement in a certificate of offence.*

2. *A certified statement in a certificate of parking infraction.*

3. *Other types of certified evidence specified by the regulations.*

Other provisions on admissibility

(3) For greater certainty, subsection (2) does not affect or interfere with the operation of a provision of this Act or any other Act that permits or specifies that a document or type of document be admitted into evidence as proof of the facts certified in it.

Onus

(4) For greater certainty, this section does not remove the onus on the prosecution to prove its case beyond a reasonable doubt.

No oral evidence

(5) A provincial offences officer who provides certified evidence referred to in subsection (2) in respect of a proceeding shall not be required to attend to give evidence at trial, except as provided under subsection 49(4).

Regulations

(6) The Lieutenant Governor in Council may make regulations,

(a) specifying offences for the purposes of clause (1)(b);

(b) respecting other types of certified evidence for the purposes of paragraph 3 of subsection (2);

(c) respecting restrictions or conditions on the admissibility of evidence under subsection (2).

(d) Is The Hearsay Evidence Admissible Under A Traditional Exception?

[80] As a licenced driver, De Medeiros had been legally obligated under s. 7(5) of the Highway Traffic Act, R.S.O. 1990, c. H.8, upon a demand made by Officer Malott to surrender the ownership document or permit for the pick-up truck that he had been driving for inspection:

Permit to be carried

7(5) Subject to subsection (6), every driver of a motor vehicle on a highway shall carry,

(a) the permit for it or a true copy thereof; and

(b) where the motor vehicle is drawing a trailer, the permit for the trailer or a true copy thereof,

and shall surrender the permits or copies for inspection upon the demand of a police officer.

[81] As well, if the pick-up truck is a commercial vehicle, then under ss. 16(4) and 216.1(3) of the Highway Traffic Act, De Medeiros would have also been required upon the demand of Officer Malott to surrender to Officer Malott for inspection the documents that are required under s. 16(3) to be carried, such as the CVOR certificate and the ownership document for the pick-up truck:

Documents to be surrendered

16(4) Every driver of a commercial motor vehicle shall, upon the demand of a police officer, surrender for inspection the documents that are required under subsection (3) to be carried.

…

Surrender of documents

216.1(3) Where a commercial vehicle and its contents and equipment are examined under this section, the officer conducting the examination may require the driver, operator or other person in control of the vehicle to surrender all documents relating to the ownership and operation of the vehicle and to the carriage of the goods, and to furnish all information within that person's knowledge relating to the details of the current trip.

(i) Would De Medeiros producing the ownership document for the pick-up truck be an "admission against interest" that can be used to prove the pick-up truck is a commercial motor vehicle and that it is owned by Con-Drain Co. (1983) Ltd.?

[82] In R. v. Kingston, [2005] O.J. No. 2147 (O.C.J.), DeFilippis J. on appeal had to consider whether it was necessary for the Crown to produce certified records from the Ministry of Transportation in order to prove the motor vehicle owned and driven by the accused was a commercial vehicle. In deciding to admit the hearsay evidence provided to the court during the police officer's testimony, DeFilippis J., at paras. 7 to 9 in R. v. Kingston, had differentiated between the

situation where a driver had produced documents showing that a corporation had been the owner of the vehicle that was being driven from the situation where the driver is the actual owner of the vehicle being driven. As such, DeFilippis J. had concluded that certified documents from the Ministry of Transportation were not required to be adduced by the prosecution to prove that the motor vehicle owned and actually being driven by the accused was a commercial motor vehicle, that documents found in the accused's possession were admissible against him, and that it was sufficient for the officer to describe what was in the documents [*emphasis is mine below*]

> *The Appellant relies heavily on the decision of my colleague, Justice Masse, in Her Majesty the Queen (Ministry of Transportation) v. 2934752 Canada Inc. (c.o.b. as Highland Transport), [1997] O.J. No. 6308, 20 May 1997, Ontario Court of Justice, Provincial Division. In that case, the prosecution sought to prove the guilt of the corporate defendant, to offences under the Highway Traffic Act, by reference to documents in the possession of the driver of a certain transport truck. Justice Masse concluded that any documents found in the possession of the driver were not shown to be documents in the possession of the corporate defendant and, therefore, were not admissible. The documents in question merely established the identity of the driver. They did not prove the fact in issue, namely, that the corporate defendant was the registered owner of the vehicle. Justice Masse held that the "best evidence" of this fact was the certified Ministry record.*
>
> *Highland Transport does not apply to the case under consideration. In this case, the Appellant is the person who produced the documents relied upon by the prosecution to prove his guilt. It is trite law that documents found in the possession of a defendant are admissible against that person. In Re Brown and the Queen (1975), 11 O.R. (2d) 7 (Ont. H.C.), it was held that it was open to the trial judge to convict the driver of a motor vehicle on the basis of admissions against penal interest which were buttressed by documents found in the possession of the accused. Moreover, there is no need to produce the actual document. It is sufficient for an officer to describe it in testimony.*
>
> *In this case, Cst. Hominsky described the vehicle driven by the Appellant as a commercial vehicle. He testified that the Appellant produced a "commercial vehicle registration" and a logbook for that vehicle. In addition, the Appellant confirmed at trial that he not properly maintained the logbook. I agree that it was open to the trial judge to rely on this evidence in coming to the conclusion that the Appellant was guilty. In these circumstances, it was not necessary for the prosecution to adduce certified Ministry records.*

[83] However, in R. v. Huxtable, [2012] O.J. No. 4583 (O.C.J.), at paras. 9 and 10, Ray J. held that where the driver of the motor vehicle is not the registered owner of the vehicle, then the police officer's testimony about the contents of a document, without producing the document, is generally inadmissible hearsay unless it can be admitted as an exception to the hearsay rule. In that particular case, Ray J. concluded that the driver's production of the ownership document would not be an

admission against penal interest in respect to the actual owner of the motor vehicle [*emphasis is mine below*]

> *When a witness purports to describe the contents of a document without producing the document, this is generally regarded as hearsay and inadmissible. The situation is different, if the viva voce evidence can be found to be an exception to the hearsay rule. In Re Brown and the Queen (1975), 11 O.R.(2d) 7 (H.C.) the issue was the identity of the driver. The driver was charged with speeding and failing to produce a chauffeur's licence, contrary to the Highway Traffic Act. The driver identified himself verbally and produced an ownership permit confirming his identification. Morden J. decided that the identity of the driver could reasonably be inferred from his statement coupled with the production of the ownership permit relating to the car being driven. MacLean J. applied the same approach in R. v. Norat, [2009] O.J. No. 1083 (C.J.) to a situation in which the driver identified himself and produced a valid permit as well as photo licence. The officer compared the photo to the driver and could definitely see that it was the same person. MacLean J. concluded that the production of the driver's own documents amounted to an admission following the approach of Hawke J. in R. v. Macatangay [2003] O.J. No. 5643 (C.J.). Hawke J. accepted that the production of a driver's licence is an admission which is an exception to the hearsay rule and as such can be used as evidence of the truth of its contents, as long as there are no problems with admissibility such as voluntariness.*
>
> *The issue in the case before me is not the identity of the driver, who was not the registered owner. The prosecution in this case must establish the identity of the registered owner. It cannot be said here that, "the driver made admissions against penal interest that were buttressed by documents found in [his] possession:" R. v. Highland Transport, [1997] O.J. No. 6308 (C.J.), para. 17. MacLean J. accepts this distinction between the two cases in Norat at para. 19. I am persuaded by the submissions of the appellant that the learned Justice of the Peace misapplied the Norat case, when he extended it to the facts in this case. The investigating officer's evidence in this case is hearsay, and there is no exception to the hearsay rule pursuant to which it can be admissible. It is not the best evidence. The prosecution had the option at trial of producing certified copies of documents establishing ownership of the vehicle for the truth of their contents pursuant to s. 210(7) of the Highway Traffic Act, and declined to do so. This would have been the "best evidence."*

[84] And, as to whether an admission against penal interest made by the driver or operator of a motor vehicle owned by a corporate accused can be received against the corporate accused, Mackay J.A., writing for the majority of the Court of Appeal for Ontario, in R. v. Strand Electric Ltd., [1969] 2 C.C.C. 264 (O.C.A.), had adopted the principle that statements made by an agent within the scope of his authority to third persons during the continuance of the agency may be received as admissions against the agent's principal in litigation to which the latter is a party [*emphasis is mine below*]:

I am of the view that the Court below was right in holding that a supervisor on the location of the work was a person with authority as agent and employee of the appellant to make the admissions he did and that such statements were admissible as evidence as against the appellant company.

I adopt the statement of the author of Cross on Evidence, 2nd ed., pp. 441-2, as being a correct statement of the law on this point. The statement in part is:

> Statements made by an agent within the scope of his authority to third persons during the continuance of the agency may be received as admissions against his principal in litigation to which the latter is a party. So far as the reception of admissions is concerned, the scope of authority is a strictly limited conception. It is sometimes said that the agent must be authorised to make the admission, but that is a confusing statement for no one expressly or impliedly authorises others to make informal admissions on his behalf which may be proved against him in subsequent litigation. A better way of putting the matter is to say that the admission must have been made by the agent as part of a conversation or other communication which he was authorised to have with a third party.
> …

In the present case, ss. 13 [am. 1965, c. 19, s. 5] and 15 [am. 1962-63, c. 22, s. 7] of the Construction Safety Act, 1961-62 are relevant. They are as follows: 13(1) An inspector for the purpose of carrying out his duties under this Act may require the production of the drawings and specifications of a project or any part thereof, and may inspect the same and may require information from any person concerning any matter related to a project.

> (2) No person shall neglect or refuse to produce drawings and specifications as required by an inspector under subsection 1, and no person shall furnish an inspector with false information or neglect or refuse to furnish information required by an inspector in the exercise of his duties under this Act.
>
> 15. Every person shall furnish all necessary means in his power to facilitate any entry, inspection, examination or inquiry by an inspector in the exercise of his powers and duties under this Act.

These sections not only authorized but compelled Richards to give the information he did to the inspector McMurray. To put it another way, by reason of these sections any employer, including a limited company, is compelled by statute to authorize its agents or employees to give information such as was given by Richards to McMurray in this case.

In Marshall v. The Queen, [1961] S.C.R. 123, 129 C.C.C. 232, 26 D.L.R. (2d) 459, a case involving the admission, on a charge under the Criminal Code, of statements made by a motorist to a police officer, that he was obliged to make by reason of the then s. 110(5) of the Highway Traffic Act, Cartwright, J., now C.J.C., said at p. 129 S.C.R., p. 237 C.C.C.:

> It has long been settled that statements made under compulsion of a statute are not by reason of that fact alone rendered inadmissible in criminal proceedings against the person making them; it is sufficient on this point to refer to Walker v. The King [1939] S.C.R. 214 at 217 [71 C.C.C. 305 at p. 307, [1939] 2 D.L.R.

353]; Regina v. Scott (1856), Dears & B. 47, 25 L.J.M.C. 128; and Regina v. Coote (1873), L.R. 4 P.C. 599 at 607.

And at p. 131 S.C.R., p. 238 C.C.C.:

> . . . on the other hand it is his duty under s. 110, to furnish the officer with such information concerning the accident as the officer may require, and the information which he gives in fulfilment of this duty can be used against him if he is tried for criminal negligence. If it is thought undesirable that such anomalies should exist, they can be removed only by legislative action.

[85] Furthermore, in R. v. Laidlaw Environmental Services Ltd., [1998] O.J. No. 6426 (Ont. Ct. (Prov. Div.)), Stone J. had held at paras. 15 and 16 that a document in the possession of the owner of a motor vehicle is *prima facie* evidence as to its contents with respect to dangerous goods dealt with by the Dangerous Goods Transportation Act, but that such *prima facie* evidence could always be expanded or read down by other evidence, or contradicted by other evidence called by the Crown or defendants. Moreover, Stone J. held that it is a question of fact whether the driver or operator of a commercial vehicle, who is in a position to produce the registration and manifest, is an agent of the truck owner. Normally, without more, Stone J. held that the trier of fact is entitled to infer such agency [emphasis is mine below]:

> *In terms of further points it was one of the issues being raised in the lower court, and in this court, as to whether a document in possession such as this manifest would be admissible against the truck's owner and operator. It is my understanding of the law on this subject that prima facia, a document in the possession of the owner of a motor vehicle is evidence as to its contents with respect to dangerous goods dealt with by the Dangerous Goods Transportation Act. However, that prima facia evidence can always be expanded or read down by other evidence or, in fact, contradicted by other evidence called by the Crown or defence.*
>
> *It is further to be noted that it is a question of fact, in any case, whether the operator of a commercial vehicle who is in a position to produce the registration and manifest, is an agent of the truck owner. Normally, without more, the trier of fact is entitled to infer such agency. Mr. Crocker argued that there was no evidence in this case, that the driver was asked if he was the operator's agent, but, of course, the inspector was never given a chance to finish testifying. In any event, the absence of such a question would not have been fatal to the Crown's prima facia case in and of itself given the evidence already before the court. Again, that is an issue that could have been explored if the witness had been permitted to finish giving his evidence, both by the Crown and the defence. It may well have been that the driver was not an agent of the owner, or he may have been the agent. But, again, there is far too little on the record to make the definitive determination, and that is something that would have to be addressed by the trial court. In fairness that is really not the key issue that was raised before the court on this appeal. The key issue was whether the witness would have been entitled to refer to notes made, essentially contemporaneously, and then to*

give oral evidence as to the contents of a written manifest which, in turn, was as to the contents of the motor vehicle.

[86] On the other hand, in R. v. Swish Maintenance Ltd., [2005] O.J. No. 3958 (O.C.J.), at paras. 11 to 19, Adams J. had considered that the driver and the owner of the motor vehicle were two separate parties, and the driver had not been proven to be an agent for the corporate accused, and as such, the prosecution did not prove the owner of the motor vehicle was the corporate accused [*emphasis is mine below*]:

> *There is a difference between the accused who makes an admission at the time of the offence, whether hearsay or not, and the observation of a document by the investigating officer in the absence of the accused and which observation was entered at trial without either the documentation or further proof of the documentation.*
>
> *Proof of ownership is an essential element of this offence. Here, officer Smith has reviewed a document presented to him by the driver, Michael Baltrami, who is a third party in this proceeding and one who is not proved to be an agent for Swish Maintenance Ltd. The only evidence of ownership is that of Officer Smith who based his belief on the information that he obtained and recorded in his notebook.*
>
> *Various cases have considered evidence of ownership provided by drivers as admissible for a number of reasons. In Huntley [1995] O.J. No. 2412, an objection to accepting an accused's identification through a license amounting to hearsay was rejected. The court held that a voluntary statement by the accused was always admitted as an exception to the hearsay rule and the licensing information was not required to be certified by the evidence of the officer. In Sambhi [2003] O.J. No. 3131, the accused presented a G2 license to the investigating officer at the scene. The admission was not hearsay and admitted as sufficient and proof of the offence. In a similar situation, in Macatangay [2003] O.J. No. 5643, the presentation of a G2 license when he was pulled over was an admission that was admissible as an exception to the hearsay rule. In Molyneaux [2004] O.J. No. 3053, Justice Devlin admitted the license as both prima facie hearsay and an admission by the accused admissible as an exception to the hearsay rule. Finally, in a recent decision in Kingston [2005] O.J. No. 2147, Justice De Filippis distinguished between the driver who produces the information and the reliance upon documents themselves as the identification of the operator.*
>
> *All of these cases speak of what happens when the accused produces the license to the investigating officer and when the accused is present at the time of the offence.*
>
> *However, where there is a driver who is a third party in the absence of the owner, then the courts have given different consideration to the use of the documentation as evidence at trial.*

In 2934752 Canada Inc. (c.o.b. Highland Transport) [1997] O.J. No. 6308, an appeal against the decision of Justice of the Peace Gemmell was dismissed when the proof of identification of the owner of the vehicle by the evidence of the officer who took notes of the ownership at the time of the offence and which notes were provided to the officer from a third party, namely, the driver. In respect to the documentation provided to the officer, Her Worship said the following:

> (a) 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.

In an extensive review of the law, Justice Masse dismissed the appeal. He noted that the copy of drivers' documents "are not certified by anybody" and only the certification of Ministry Records was sufficient to provide the proof necessary to complete the element of identification of a third party. Where the driver produces records of ownership in the absence of the owner and in the absence of proof of agency of the driver on behalf of the owner, then the crown must establish proof of the certification of the documentation relied upon: also see Zilaie [2002] O.J. No. 2144; Germanis [2001] O.J. No. 3255; Ryckman [1998] O.J. No. 6501.

Swish Maintenance Ltd. is a case where the owner and driver were two separate and distinct entities. Unlike the cases where G2 licensees admitted their own identification, this is a case where the only identification was the document itself presented by the driver, Michael Baltrami. The owner was not present at the time of the offence. After observation, the document was left with the third party and the investigation of the offence was completed. There was no certification of the ownership in evidence at the trial. And there was no evidence that the driver, Michael Baltrami, was an agent acting on behalf of the owner.

In view of the decisions and reasoning relating to third parties which differentiates between hearsay admissions by the accused, I conclude that the prosecution has not met its' onus of proof beyond reasonable doubt relating to the ownership of the vehicle.

(A) Is Edmundo De Medeiros an agent of the corporate defendant, Con-Drain Co. (1983) Ltd.?

[87] In the situation where the driver of the motor vehicle is not the owner, it has been held by the Court of Appeal for Ontario in R. v. Strand Electric Ltd., [1969] 2 C.C.C. 264, that vicarious admissions made by a third party driver are not admitted for its truth against the owner of the motor vehicle unless there is evidence that the third party is an agent or employee of the owner of the vehicle.

[88] Although Stone J. had reasoned in R. v. Laidlaw Environmental Services Ltd. that a trier of fact is entitled to infer that the driver of a commercial vehicle, who is in a position to produce the registration and manifest of goods being carried for that commercial motor vehicle for the purposes of the *Dangerous Goods*

Transportation Act, is an agent of the truck owner, where there is no evidence to the contrary, there is however no evidence adduced in the case at bar, such as the production of a manifest of the goods being carried to vehicle or an admission made by De Medeiros that he was an employee of the owner of the pick-up truck, which could show De Medeiros was an agent acting on behalf of the owner of the pick-up truck or that he had been authorized to make an admission on behalf of the owner of the pick-up truck.

[89] Hence, De Medeiros has not been proven beyond a reasonable doubt to be an agent or employee of the owner of the pick-up truck.

(B) Is the hearsay evidence admitted under the traditional exception of "an admission against penal interest"?

[90] Although it has been held that information contained in a document provided by the driver of a motor vehicle, who is the owner of that motor vehicle, when those documents are legally required to be provided to the officer on demand, is an "admission against penal interest" made by the driver, which is a traditional exception to the hearsay rule, it does not apply when the driver is not the owner of the motor vehicle, or when the owner of the vehicle is not present in the vehicle with the driver, or when the owner is a corporate entity where it has not been proven that the driver is an agent or employee of the corporate owner.

[91] Ergo, since De Medeiros is not the registered owner of the pick-up truck then the production of the ownership document for the pick-up truck by De Medeiros cannot be admitted for its truth using the traditional exception of an "admission against penal interest" to prove the pick-up truck is a commercial motor vehicle or to prove the owner of the pick-up truck is Con-Drain Co. (1983) Ltd.

(e) Is The Hearsay Evidence Admissible Under Case-By-Case The Principled Approach?

[92] On the other hand, even if the hearsay evidence is not admissible under a traditional or common law exception, it still may be admitted for its truth if it satisfies the criteria of necessity and reliability and the probative value of the hearsay evidence is not outweighed by its prejudicial effect.

(i) Is Officer Malott's Testimony Based On What He Had Garnered From The Ownership Document And From What He Had Viewed On The Ministry Of Transportation Database Admissible For Its Truth?

[93] In R. v. Fliss, [2002] 1 S.C.R. 535 (S.C.C.), at para. 45, the Supreme Court held that a police officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence [*emphasis is mine below*]:

> *There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.*

(A) Information obtained from the Ministry of Transportation database is inherently reliable

[94] In R. v. MacMullin, [2013] A.J. No. 1454 (Alta. Q. B.), Germain J. at paras. 70 to 76, had to consider the reliability of hearsay records or records from a database offered as evidence at trial and after reviewing the Alberta Court of Appeal's decisions in R. v. O'Neil, [2012] A.J. No. 516 and in R. v. Monkhouse, [1987] A.J. No. 1031, confirmed that such records can be admitted as prime facie evidence only if they have come into existence under circumstances which make them inherently trustworthy [*emphasis is mine below*]:

> *The modern approach to the admission of necessary and reliable documentary hearsay evidence is reviewed by the Alberta Court of Appeal in* R. v. O'Neil*, 2012 ABCA 162, 524 AR 351, leave denied [2012] SCCA No. 317 at paras 40-46. In this case the question was whether the contents of a database could be relied upon for the truth of their contents. The court considered these to be "business records". The Court cites* R. v. Monkhouse *(1987), 83 AR 62, 56 Alta LR (2d) 97 (Alta CA).*
>
> *Chief Justice Laycock in* R. v. Monkhouse *concludes:*
>
> > [hearsay records] can be admitted only if they have come into existence under circumstances which make them inherently trustworthy. Where an established system in a business or other organization produces records which are regarded as reliable and customarily accepted by those affected by them, they should be admitted as prima facie evidence.
>
> *The database evidence was admissible in* R. v. O'Neil *because it met that general criteria.*
>
> *My conclusion is that the modern context the* Ares v. Venner *rule on the admission of reliable and necessary documentary evidence should be cast broadly, to better reflect the modern nature of documentary evidence. Current technology and business methods mean that an unprecedented degree of data is*

recorded and tracked, much of it by automated processes. This means that the Ares v. Venner *rule has become more and more relevant, particularly in legal actions, such as this one, where much of the evidence is necessarily captured primarily in the documentary record. It is simply a fact of modern life that in situations such as this that witnesses, after they review financial, logistic, scientific, medical, engineering, information technology and many other kinds of records, can say little more than they have no personal knowledge or memory of these materials, but at best these documents do not appear incongruous when evaluated for the truth of their contents, and their materials arise from a generally trusted (i.e. reliable) data source.*

This is a functional test, in my view, supported by R. v. O'Neil*.*

This version of the Ares v. Venner *criteria is not revolutionary, but rather a simple and pragmatic description of a process that was recognized over sixty years ago in* Myers v. Director of Public Prosecutions *by Lord Pearce:*

> ... The necessity created by mass production and modern business they could not then foresee. They did not provide for the anonymity of modern industrial records and the difficulty of tracing those who made them. The individuality of persons in a large factory or business may be difficult or impossible to discover. They do many repetitive and almost automatic tasks concerning which no memory exists. Yet their composite efforts make machines and records whose complexity, efficiency, and accuracy are beyond anything imaginable in 1886. In my view the anonymity of the recorder or the impossibility of tracing him create as valid a necessity as does his death for allowing his business records to be admitted. ...

Today government and private bodies collect, record, and administer an unprecedented volume of information. That information relates to almost any aspect of daily life. Unlike a century ago, that information may be retained in an accessible form for decades. Information is typically secured by complex procedures to ensure that data is not lost, corrupted, or manipulated. Often that information is acquired without the participation of the human hand. In this context much documentary evidence will be prima facie *reliable, and should be admitted on that basis. Fanciful "what if's?" or a demand that the courts prefer to rely on tenuous personal knowledge should not be used to frustrate the acquisition of evidence that is 'more helpful than harmful'.*

[95] Moreover, in R. v. Monkhouse, [1987] A.J. No. 1031, the Alberta Court of Appeal held that hearsay records are not to be accepted in evidence merely to avoid the inconvenience of identifying a witness or because many witnesses would be involved, or even because otherwise no evidence would be available. Rather, they can be admitted only if they have come into existence under circumstances which makes them inherently trustworthy:

> *These hearsay records are not to be accepted in evidence merely to avoid the inconvenience of identifying a witness or because many witnesses would be involved, or even because otherwise no evidence would be available. Rather, they can be admitted only if they have come into existence under circumstances which makes them inherently trustworthy. Where an established system in a*

business or other organization produces records which are regarded as reliable and customarily accepted by those affected by them, they should be admitted as prima facie evidence.

[96] In addition, the Alberta Court of Appeal in R. v. O'Neil, [2012] A.J. No. 516, held at paras. 45 and 46, that the information garnered from a particular database was inherently reliable and properly admitted for the truth of its contents under the common law business records exception to the hearsay evidence rule:

The Monkhouse preconditions are met in this case for the following reasons:

(a) the entries in the database were original entries according to the testimony of Penny Steinkey, Liesel MacPhee, Joyce Dixon and Mina Forsyth, all former employees of ITRS;

(b) the entries were made contemporaneously;

(c) the entries were made in the routine of business;

(d) the persons recording this information have personal knowledge of the thing required as they had received the application form or the refund cheque that was being entered. Beyond that, the status changed and the claims were made automatically by the computer program in the database;

(e) the data-entry clerks (who were employees of ITRS) had a duty to make the entry as that was their job and they were in fact paid by the entry. They had no motive to misrepresent as creation and submissions of claims and processing of refund cheques was the only way both the clerks and ITRS were paid; and

(f) in his statement to Constable Roussel, the appellant acknowledged that the database was the key tool used to operate ITRS.

Exhibits 36 and 37 were properly admitted pursuant to the common law business records exception. Accordingly, this ground of appeal is dismissed.

[97] But more importantly, the Court of Appeal for Ontario in R. v. Li, [2013] O.J. No. 564, had to also consider on appeal of the accused's conviction, whether the evidence admitted at trial that an accused was the owner of a pick-up truck that had been based on the police officer's observations of that particular information on the Ministry of Transportation database and then repeated at trial for its truth should have been excluded as inadmissible hearsay. In addition, at trial the Crown did not obtain and tender any certified documents from the Ministry of Transportation to prove the accused had been the owner of the pick-up truck, but had relied on the observations of the police officer that the pick-up truck had been at the property under surveillance and on the police officer's viva voce evidence

that the pick-up truck had been owned by the accused based on information the police officer had observed and obtained from a Ministry of Transportation database. Although the trial judge had concluded that the information was hearsay, it had been held that the hearsay evidence had been sufficiently reliable and necessary to warrant its admission.

[98] After hearing the appeal of the accused's conviction, Watt J.A., writing for the Court of Appeal, held at paras. 30 to 44 in R. v. Li, that it is permissible for any witness to refresh his memory about a subject, such as the ownership of a motor vehicle, by any means that would rekindle the witness' recollection of the subject, and that the stimulus used by the witness to refresh his or her recollection need not itself constitute admissible evidence. In addition, in allowing the admission of the police's testimony on what he had observed on the Ministry of Transportation database, Watt J.A. concluded that the reliability requirement had been satisfied because of the way in which the records had come into existence. Watt J.A. further acknowledged that because driving a motor vehicle on Ontario's highways is a privilege, then drivers require a licence to operate a motor vehicle and that motor vehicles require a permit to operate on Ontario's highways, and that drivers and owners of motor vehicles have to apply for licences and permits and fill out forms and submit them to a licensing agency, and that false statements on the forms would attract a penalty, and that some of the information provided on the form by the owner of the vehicle is replicated on the permit. Therefore, because of these requirements of drivers and owners to provide accurate information to the Ministry of Transportation, Watt J.A. held that common sense dictates that sufficient trust can be placed in the truth and accuracy of the statements that appear on the face of the licence and permit. Watt J.A. also concluded that the necessity requirement for the admission of the police officer's evidence had also been met, as the availability of other means of introducing hearsay, for example, a listed exception or statutory provision, does not mean that the means chosen does not satisfy the necessity requirement under the principled approach. He then concluded that in this particular case, relevant direct evidence of vehicle ownership or that the appellant was the holder of the driver's licence viewed by the police officer was not available since its source, the accused, was not a competent witness for the Crown [*emphasis is mine below*]:

> *This ground of appeal challenges the admissibility of those parts of D/C Henderson's evidence that tended to link the appellant to the grow operation at 61 Jessup Road: the appellant's ownership of the pick-up truck and his operation of the pick-up truck during a trip from Jessup Road to Ng's home in Richmond Hill. The complaint involves D/C Henderson's use of an MOT database to access a photograph of the appellant as a basis for his identification and motor vehicle registration information to prove the appellant's ownership of the pick-up truck seen at Jessup Road.*
>
> *The principal complaint the appellant makes is that D/C Henderson's testimony that the appellant owned the pick-up truck seen at the Jessup Road grow*

operation is based upon MOT database entries which, when repeated to prove their truth, are inadmissible hearsay.

The hearsay rule has four essential elements:

i. a declarant;
ii. a recipient;
iii. a statement; and
iv. a purpose.

> *The defining characteristics of hearsay are the purpose for which the evidence is introduced -- to prove the truth of the contents of the statement -- and the absence of a contemporaneous opportunity to cross-examine the declarant to test the reliability of the out-of-court statement: R. v Khelawon, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35.*

Where the hearsay rule is engaged, the evidence is prima facie inadmissible. The hearsay rule, like other rules of admissibility, is by nature exclusionary, but not unqualifiedly so. Hearsay evidence may be admitted under an established categorical exception or under the principled approach that had its genesis in R. v. Khan, [1990] 2 S.C.R. 531, over two decades ago.

The common law made exceptions for public and business records. These exceptions retain their vitality today despite the enactment of statutory provisions that govern the same subject matter. The special trustworthiness of public records rests in the duty to maintain the records and the high probability that the duty to make an accurate report has been performed. It is all the more so where a party is required to provide accurate information to the record-keeper, and subject to penalty for failing to do so or lying about it. The common law exceptions contain no notice requirements.

Government and business records may also be admissible under the Canada Evidence Act ("CEA"). Government records may be received under s. 24(a), provided notice is given under s. 28. Business records are governed by s. 30 and are also subject to a notice requirement in s. 30(7) unless the court orders otherwise. Section 40 of the CEA incorporates provincial rules of evidence subject to the provisions of the CEA and other federal legislation.

It is also permissible for any witness to refresh his memory about a subject, such as the ownership of a motor vehicle, by any means that would rekindle the witness' recollection of the subject. The stimulus used by the witness to refresh his or her recollection need not itself constitute admissible evidence: R. v. Fliss, 2002 SCC 16, [2002] 1 S.C.R. 535, at para. 45.

The Principles Applied

I would not give effect to this ground of appeal. My reasons are several.

First, the photograph viewed by D/C Henderson on the MOT database, considered apart from the contents of the licence and ownership of the

plate/vehicle, was not rendered inadmissible by the hearsay rule. The photograph was not a "statement", an essential feature of the exclusionary rule, nor was it tendered to prove the truth of its contents.

D/C Henderson was entitled to examine the photograph and compare the appearance of the person depicted there with the person he saw driving the vehicle seen at the grow operation away from that area to 18 Damian Drive. He was entitled further to compare the person in the photograph with the man he saw at 18 Damian Drive unloading the same vehicle that he had under surveillance for eight and one-half hours, and taking several things into the garage of Ng's house. In essence, he was refreshing his memory.

Second, the Crown did not tender any MOT documents, driver's licence, or ownership permit, as part of its case-in-chief nor rely upon these documents to prove the truth of their contents. Ownership of the pick-up truck was not an essential element of the case for the Crown. In a way, it was somewhat beside the point. What the Crown needed to prove was the appellant's participation in the grow operations described in the indictment. It sought to do so by circumstantial evidence. The pick-up truck was at the Jessup Road grow operation. The appellant drove the vehicle away from the grow operation. He helped unload the vehicle at 18 Damian Drive where a subsequent search of the area where the unloaded items were taken revealed things commonly used in grow operations. Documents found in the residence linked the appellant or a person by the same name, to Ng and another grow operation with characteristics similar to those at Jessup Road. The link was from photo to driver to unloader to appellant, a chain of reasoning not dependent on ownership of the pick-up.

Third, assuming the appellant's objection properly invokes the hearsay rule, rather than the requirement that a witness have first-hand knowledge of the observations of which she or he gives evidence, it was open to the trial judge to conclude that the records relied upon satisfied the reliability and necessity requirements of the principled exception to the hearsay rule.

The reliability requirement is satisfied because of the way in which the records came into existence. Driving a motor vehicle on this province's highways is a privilege. Drivers require a licence to operate a motor vehicle. And motor vehicles require a permit to operate on the province's highways. Drivers and owners of motor vehicles apply for licences and permits. They fill out forms and submit them to a licensing agency. False statements on the forms attract a penalty. Information provided on the form, some of it at least, is replicated on the permit. Common sense dictates that we can put sufficient trust in the truth and accuracy of the statements that appear on the face of the licence and permit. This is sufficient to satisfy the reliability requirement.

The necessity requirement is also met.

The necessity requirement has its genesis in society's interest in getting at the truth. It is not always possible to meet the optimal test of contemporaneous cross-examination. Rather than simply losing entirely the value of the evidence, it becomes necessary in the interests of justice to consider whether the evidence

should be admitted nonetheless in a second-hand form, as hearsay: Khelawon, at para. 49.

The necessity requirement refers to the necessity of proving a fact in issue through the introduction of hearsay evidence, rather than other direct evidence that does not attract the operation of the exclusionary rule: R. v. Smith, [1992] 2 S.C.R. 915, at pp. 929 and 933. Thus, the availability of other means of introducing hearsay, for example, a listed exception or statutory provision, does not mean that the means chosen does not satisfy the necessity requirement under the principled approach. In this case, relevant direct evidence of vehicle ownership or that the appellant was the holder of the driver's licence viewed by D/C Henderson was not available. Its source, the appellant, was not a competent witness for the Crown.

(ii) Supporting Or Corroborating Evidence Is A Factor In Determining Whether Hearsay Evidence Is Sufficiently Reliable To Warrant Its Admission

[99] Furthermore, Charron J. in R. v Khelawon, [2006] 2 S.C.R. 787 (S.C.C.), at paras. 97 to 100, emphasized that corroborating evidence would be a factor to consider in determining whether hearsay evidence is sufficiently reliable to warrant its admission:

Idaho v. Wright, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in Starr. He said the following:

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best

> ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

…

In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in Idaho v. Wright as follows (at p. 36):

> The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement [Ratten v. R., [1972] A.C. 378 (P.C.)]. Or, a party claims it can rely on the truth of the contents of a statement because it was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see R. v. Evans, [1991] 1 S.C.R. 869. Looking to other evidence to confirm the reliability of evidence, the thing Idaho v. Wright purports to prevent, is the very antithesis of "bootstrapping".

[100] Also, recently Karakatsanis J., writing for the majority of the Supreme Court in R. v. Bradshaw, [2017] S.C.J. No. 35, held at para. 4 that corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement [*emphasis is mine below*]:

> *In my view, corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.*

(iii) Other Evidence That The Pick-Up Truck Is A Commercial Motor Vehicle

[101] Besides the testimony of Officer Malott that the pick-up truck is a commercial motor vehicle, which had been based on the information he had observed on the ownership document provided to him and from the information he had observed on the Ministry of Transportation database used to confirm the veracity and accuracy of the information contained in the ownership document, there is additional evidence that had been adduced at trial to sufficiently corroborate and prove that the pick-up truck was a commercial motor vehicle.

(a) a pick-up truck is considered to be a commercial motor vehicle under the HTA

[102] A pick-up truck is legally defined under s. 1(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8. to be a commercial motor vehicle for the purposes of the Highway Traffic Act. However, the owner of the pick-up truck may register the pick-up truck with the Ministry of Transportation as a "personal use" commercial motor vehicle in order not to have to comply with the regulations requiring the owner have a CVOR certificate, to conduct daily pre-trip inspections, or in respect to the number of hours that a driver is permitted to drive the commercial motor vehicle on a highway over a specific period. However, there is no evidence adduced at trial that the owner of the vehicle had registered the pick-up truck for only "personal use", nor is there any evidence that the pick-up truck was only being operated by De Medeiros for "personal purposes" at the time he had been observed smoking a tobacco cigarette by Officer Malott.

(b) the number sequencing of the licence plate on the pick-up truck indicates that the pick-up truck is a commercial motor vehicle

[103] Furthermore, Officer Malott had observed the licence plate with the numbering of **"AD61575"** attached to the pick-up truck and testified that because the numbering on the licence plate had 2 letters followed by 5 numbers it had been an indication to him that the pick-up truck is a commercial motor vehicle, since that particular arrangement and combination of numbering of 2 letters followed by 5 numbers is the sequence and arrangement of letters and numbers for a licence plate that is issued for a commercial motor vehicle.

(c) there is no personal-use sticker on the front licence plate to indicate that the pick-up truck is not being used as a commercial motor vehicle

[104] In addition, Officer Malott testified that he did not observe a green sticker on the front licence plate on the pick-up truck, which would inform him that the pick-up truck was being used primarily for transportation.

(d) there is the lettering "CN" on the doors of the pick-up truck

[105] Officer Malott had also testified that he had observed lettering on the side doors of the pick-up truck that had contained the letters "CN", which Officer Malott believes further corroborates what Officer Malott had observed on the ownership document provided to him that the pick-up truck is a commercial motor vehicle. It is, as such, a reasonable inference that lettering or logos painted or displayed on the side of motor vehicles do indicate a business or commercial use for the vehicle, especially when there is no evidence to the contrary.

(e) the pick-up truck is owned by a corporation

[106] Although Officer Malott testified that from his observation of the ownership document provided to him by De Medeiros that the pick-up truck is owned by an Ontario company, that evidence does not automatically make the pick-up truck a commercial motor vehicle, but it does support the notion that the pick-up truck is likely used by the pick-up truck's owner for business purposes.

(f) there is no evidence that the pick-up truck had been used for "personal purposes" when Officer Malott had observed De Medeiros smoking tobacco inside the pick-up truck

[107] In addition, there is no evidence that the pick-up truck was being used by De Medeiros for "personal purposes" when Officer Malott had observed him smoking tobacco inside the cab of the pick-up truck.

(iv) The Hearsay Evidence Is Admitted For Its Truth Under The Principled Approach

[108] Accordingly, based on the similar circumstances in R. v. Li, [2013] O.J. No. 564 (O.C.A.), to the present case, and based on the reasoning of Watt J.A. in R. v. Li that information in the Ministry of Transportation database is reliable, then the hearsay evidence from Officer Malott that had been based on what he had observed on the Ministry of Transportation database, when Officer Malott had been verifying the accuracy of the information contained in the ownership document for the pick-up truck, would be admissible for its truth, since the hearsay evidence would meet the criteria of necessity and reliability under the principled approach, and its probative value is not outweighed by its prejudicial effect.

(9) Is The Prosecution Required To Obtain and Produce A Certified Document From The Ministry Of Transportation To Prove The

Pick-up Truck Is A Commercial Motor Vehicle Or To Prove Con-Drain Co. (1983) Ltd. Is The Owner Of The Pick-Up Truck?

[109] The defendants' contention that the prosecution had been required to enter a certified document from the Ministry of Transportation to prove that the pick-up truck driven by De Medeiros had been a commercial motor vehicle and that its owner was Con-Drain, is in essence, an argument that the failure of the prosecution to produce a certified document from the Ministry of Transportation would contravene the "best evidence rule".

[110] However, in R. v. MacMullin, [2013] A.J. No. 1454 (Alta. Q. B.), Germain J. at paras. 57 to 59, confirmed that hearsay evidence is not inadmissible simply because there may be alternatively other available evidence, but that what is crucial is that the hearsay evidence meets the common standard for admission: the hearsay evidence is relevant, reliable, and more probative than prejudicial [*emphasis is mine below*]:

> *Nor is hearsay evidence inadmissible simply because it is not the only available alternative. In the majority decision in R. v. B(KG); R. v. KGB, [1993] 1 SCR 740 at para 107, 148 NR 241, Chief Justice Lamer observed:*
>
> > ... in shaping the law of hearsay in Canada, this Court has not treated necessity in the sense of unavailability as the sine qua non of admissibility. ... While the decisions in Khan and Smith established that Canadian courts will no longer carve out categorical "exceptions", the new approach shares the same principled basis as the existing exceptions.

[111] And, to reiterate that just because there may be other means for admitting hearsay evidence does not mean that the "necessity" criterion has not been met to admit the hearsay evidence of Officer Malott, Watt J.A. for the Court of Appeal for Ontario in R. v. Li, [2013] O.J. No. 564, held at para. 44 that the availability of other means of introducing hearsay, for example, a listed exception or statutory provision, does not mean that the means chosen does not satisfy the necessity requirement under the principled approach:

> *The necessity requirement refers to the necessity of proving a fact in issue through the introduction of hearsay evidence, rather than other direct evidence that does not attract the operation of the exclusionary rule: R. v. Smith, [1992] 2 S.C.R. 915, at pp. 929 and 933. Thus, the availability of other means of introducing hearsay, for example, a listed exception or statutory provision, does not mean that the means chosen does not satisfy the necessity requirement under the principled approach. In this case, relevant direct evidence of vehicle ownership or that the appellant was the holder of the driver's licence viewed by D/C Henderson was not available. Its source, the appellant, was not a competent witness for the Crown.*

[112] Therefore, a certified document from the Ministry of Transportation is not required to be obtained and tendered in order prove that the pick-up truck is a commercial motor vehicle or that the pick-up truck is owned by Con-Drain Co. (1983) Ltd. Such proof can be made by other admissible evidence, including hearsay evidence, such as provided in Officer Malott's testimony.

(C) CONCLUSION

(1) Has The Prosecution Proven That The Pick-Up Truck Is A Commercial Vehicle Beyond A Reasonable Doubt?

[113] Since Officer Malott's testimony about what he had observed on the ownership document that the pick-up truck driven by De Medeiros is a commercial motor vehicle, which had been noted from the ownership document provided to him by De Medeiros, had been confirmed for its accuracy and veracity by Officer Malott using the Ministry of Transportation database as a reliable source, it is admissible as hearsay evidence under the principled exception to the hearsay rule because the criteria of necessity and reliability have been satisfied and its probative value is not outweighed by its prejudicial effect.

[114] Moreover, Officer Malott's testimony that the ownership document indicated that the pick-up truck driven by De Medeiros is a commercial motor vehicle is also corroborated by other admissible evidence, such as the configuration of the numbering on the licence plate that had indicated to Officer Malott that the pick-up truck was a commercial motor vehicle; that pick-up trucks are legally considered to be commercial vehicles under the Highway Traffic Act; that the pick-up truck is owned by a corporation which would indicate that the vehicle is likely used in a business; that Officer Malott had not observed a green sticker on the front licence plate that would indicate that the pick-up truck had been registered with the Ministry of Transportation by the truck's owner for only personal use; and that Officer Malott had observed the lettering "CN" on the doors of the pick-up truck, which would suggest that the pick-up truck was being used for a commercial purpose.

[115] In addition, there is no evidence that the pick-up truck was being used for "personal purposes" by De Medeiros at the time he had been observed driving the pick-up truck and smoking a tobacco cigarette.

[116] Ergo, the prosecution has proven beyond a reasonable doubt that the pick-up truck being driven by De Medeiros was a commercial motor vehicle.

(2) Has The Prosecution Proven That The Pick-Up Truck Is Owned By Con-Drain Co. (1983) Ltd. Beyond A Reasonable Doubt?

[117] Likewise, Officer Malott's testimony about what he had observed on the ownership document that the pick-up truck driven is owned by Con-Drain Co. (1983) Ltd. and then subsequently confirmed for its accuracy and veracity by Officer Malott using the Ministry of Transportation database, which is recognized as a reliable source by the Court of Appeal for Ontario in R. v. Li, [2013] O.J. No. 564 (O.C.A.), at para. 41, is also admissible as hearsay evidence under the principled exception to the hearsay rule because the criteria of necessity and reliability have been satisfied and its probative value is not outweighed by its prejudicial effect.

[118] Therefore, the prosecution has also proven beyond a reasonable doubt that the pick-up truck being driven by De Medeiros at the time he had been observed smoking a tobacco cigarette was owned by Con-Drain Co. (1983) Ltd.

(3) Has The Prosecution Proven That That The Defendants Have Committed Their Respective Charges Beyond A Reasonable Doubt?

[119] As Officer Malott's testimony is uncontradicted, the prosecution has proven beyond a reasonable doubt that the defendant, Edmundo De Medeiros, had been smoking a tobacco cigarette in the Ford F-150 pick-up truck while it was being driven on Bovaird Drive on February 1, 2016, at 9:40 a.m. Furthermore, based on Officer Malott's admissible and uncontradicted testimony, the prosecution has also proven the pick-up truck is a commercial motor vehicle, which would make the pick-up truck an "enclosed workplace" under the SFOA. As such, the prosecution has proven that Edmundo De Medeiros has committed the offence of smoking tobacco in an enclosed workplace, contrary to s. 9(1) of the SFOA.

[120] Moreover, based on Officer Malott's admissible and uncontradicted testimony, the prosecution has also proven beyond a reasonable doubt that the corporate defendant, Con-Drain Co. (1983) Ltd., is the owner of the pick-up truck that De Medeiros had been driving and smoking a tobacco cigarette in.

[121] In addition, Con-Drain Co. (1983) Ltd., meets the definition of "employer" for the purposes of s. 9(3) of the SFOA, since Con-Drain is the owner of the pick-up truck for which it would have control or direction of, or who is directly or indirectly responsible for the employment of a person in that pick-up truck. "Employer" is defined under s. 1(1) of the SFOA and includes an owner of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it [*emphasis is mine below*]:

> *"employer" includes an owner, operator, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation,*

profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it;

(a) Has Con-Drain Taken All Reasonable Care To Avoid Committing The Offence

[122] No evidence has been adduced that Con-Drain Co. (1983) Ltd. had taken all reasonable care to prevent anyone from smoking tobacco in the cab of the pick-up truck that it owns, while it was being driven on Bovaird Drive on February 1, 2016, at 9:40 a.m.

[123] Therefore, the prosecution has proven beyond a reasonable doubt that the pick-up truck is owned by Con-Drain Co. (1983) Ltd., and as such, Con-Drain is responsible as an employer under the SFOA to ensure compliance with s. 9 of the SFOA. And, because De Medeiros had been smoking a tobacco cigarette in the pick-up truck that is defined as an enclosed workplace under the SFOA, and because there is no evidence of any due diligence by Con-Drain to prevent such prohibited activity, then the prosecution has proven beyond a reasonable doubt that Con-Drain Co. (1983) Ltd. had failed to ensure compliance with s. 9 of the SFOA, and therefore, has committed an offence under s. 9(3) of the SFOA.

5. DISPOSITION

(A) For the defendant, Edmundo De Medeiros

[124] In respect to Certificate of Offence numbered 31605137421B, for the charge of smoking tobacco in an enclosed workplace, contrary to s. 9(1) of the Smoke-Free Ontario Act, S.O. 1994, c. 10, the prosecution has met their burden of proving beyond a reasonable doubt that the defendant, Edmundo De Medeiros, has committed that offence based on the totality of the evidence. Therefore, a conviction will be entered against Edmundo De Medeiros.

(B) For the defendant, Con-Drain Co. (1983) Ltd.

[125] In respect to Certificate of Offence numbered 31605137422B, for the charge of employer failed to ensure compliance with s. 9 of the Smoke-Free Ontario Act, in respect to an enclosed workplace, contrary to s. 9(3)(a) of Smoke-Free Ontario Act, S.O. 1994, c. 10, the prosecution has proven beyond a reasonable doubt that the corporate defendant, Con-Drain Co. (1983) Ltd. has committed that offence. As such, a conviction will be entered against the corporate defendant, Con-Drain Co. (1983) Ltd.

Dated at the City of Brampton on July 17, 2017
QUON J.P. ***Ontario Court of Justice***