Records and Records Keepers Judicially Considered: Credibility or Convenience?

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Although the judicial system is often considered to have many flaws, it is a system which accords considerable attention to the sources, uses, and relative value of information. It would be naive to assume that judges always set aside their personal values, attitudes, and prejudices to render decisions solely on weighing all available evidence. Judges are as susceptible to error as anyone else in society. However, judges do closely scrutinize vast amounts of information used in reaching their conclusions. The legal system's use of, and respect for, information stands in sharp contrast, for example, to the practices of politicians or journalists.

While most archivists, in their personal and professional activities, probably desire limited and infrequent contact with the legal system, it behooves them to examine the role of information in legal actions. Many information practices are questionable in all phases of the life cycle of records. Some accepted practices have serious ramifications which are most clearly seen in the court room setting.

Records managers, archivists, librarians, and EDP system managers all claim the information management world as their rightful domain. Before seeking exclusive domination of the information field, a clear understanding is required of acceptable and unacceptable information management principles and practices. Those striving to cast their professional mantles over the management of information should beware of ultimately being exposed as was the emperor in his new clothes.

This paper attempts to address the relationship between business practices and the admissibility of evidence in courts of law. Corporate information is admitted as evidence under both common law precedents and statute law. Information systems are often of questionable trustworthiness and they should be critically viewed rather than accepted as reliable. When records, records keepers, and record systems are generally viewed as trustworthy, obvious benefits accrue. Are they deserved? The veneer of "proper" or common records practices may in fact cover at best incomplete information or records, and at worst misleading or fraudulent information or records. Corporations or governments seeking to make their evidence admissible in

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law by virtue of having an information or records system, regardless of media types, should be willing to satisfy society and the courts of the propriety and extent of their information practices. Areas of potential concern include the following questions:

1. Are normal business records practices trustworthy and do they inspire or warrant public confidence?
2. Can one assume that private sector information, restricted from public view, is as accurate, complete, and trustworthy as public records which are open to scrutiny?
3. Should information systems be subject to an outside audit?
4. Should society place any confidence whatsoever in information systems which are not: a) properly funded? b) competently staffed? c) centrally controlled?
5. Do the admissibility sections of various evidence acts accommodate unacceptable public and private sector practices?

Hearsay: A Historical Summary

The rule against admissibility of hearsay evidence appears to date from the early 1700s and was more firmly entrenched in the common law by the end of that century.[1] The rule against hearsay evidence excludes third party evidence which cannot be cross-examined. It establishes that written or oral statements or assertions by way of non-verbal conduct made by persons not testifying are inadmissible if tendered as proof of their truth or implicit assertions.

This historic common law requirement that to be admissible, evidence must be given under oath and be subject to cross-examination, was dispensed with for particular instances where exclusion of such evidence would result in great injustice. Accordingly, certain exceptions to the hearsay rule developed as the courts attempted to strike a balance between proven truth established by reliable, tested evidence and the potential for injustice from strict adherence to the tradition of the common law hearsay rule.

Scholars of evidentiary jurisprudence have attempted to categorize the exceptions to the hearsay rule and to list their specific differences within the various categories. Perhaps the most exhaustive effort is the multi-volume *Wigmore on Evidence*[2] which is often quoted by judges and scholars. Even a cursory review of the case citations in *Wigmore* reveals the common law maze of admissibility which affected every type of oral and documentary evidence tendered to the courts. One commentator reviewing evidence and hearsay precedents described the results of attempting to fit the hearsay rule to particular cases as being

> Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents

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1 *Myers* v. *The Deputy Public Prosecutor* (*DPP*) (1965) A.C. 1031.

2 A definitive ten-volume work with extensive case citations provides a wide-ranging review of evidence: John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd edition (Boston, 1940). An excellent two-volume work on evidence by a Canadian scholar is Stanley A. Schiff, *Evidence in the Litigation Process* (Toronto, 1978).

> are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders' debris.[3]

Common Law Admissibility

While scholars have attempted to classify and conceptualize the exceptions to the hearsay rule, the courts had trouble finding consistency and general guiding principles. Lord Reid described the situation as follows:

> By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognized. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no further. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind of judicial legislation, however, became less and less acceptable and when over a century ago the patchwork which then existed seems to have become stereotyped.[4]

He further decried the de-emphasis of trustworthiness in favour of deciding admissibility by category. Historically, the court sought the truth through admissibility by class not by credibility of the facts or actions tendered:

> The whole development of the exceptions to the hearsay rule is based on determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered.[5]

The example of admissibility of public records as being *prima facie* evidence of the facts contained therein sheds some light on how judges determine "apparent credibility." To be a public record in the common law tradition, a record must be "open to inspection by at least a section of the public."[6] Archivists would describe this as an access right to active records as opposed to dormant or archival records.[7] The test of "apparent credibility" is met when the public has a right to see information within the control of its creators and managers. The public record is, therefore, a "public document made for the purpose of the public making use of it."[8]

The *Canadian Human Rights Act*[9] provides the right to review and possibly amend information on oneself contained in federal government files and data banks. This important right is not widely utilized and applies only to one's own file or

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3 Sir Rupert Cross, *Evidence* (London, 1974) p. 2, citing C.P. Harvey, *The Advocates Devil* (1958), p. 79.

4 Sidney N. Lederman, "The Admissibility of Business Records: A Partial Metamorphosis," *Osgoode Hall Law Journal* 22, no. 3 (1973), p. 373, citing 1020 A.C., at 884 All E.R.

5 *Myers* v. *DPP* (1965) A.C. 1024.

6 *Ibid.*, A.C. 1023. An elaboration on the types and admissibility of public records can be found at section 25 of John Huxley Buzzard, Richard May, and M.N. Howard, *Phipson on Evidence*, 13th edition, (London, 1982).

7 Regarding admissibility of ancient documents, see G.D. Nokes, *An Introduction to Evidence* (London, 1967), pp. 339-41.

8 *Myers* v. *DPP* (1965) A.C. 1024.

9 Canada *Statutes* (1976-77) c. 33, s. 52, proclaimed 1 March 1978.

information. It does not accord access to a section of the public, only the concerned individual. Fortunately, under the act, *qui tacit consentire* does not apply to the credibility of federal government records.

The principle of general public access to active government information is of course a measure of the openness of the society. It could also have the potential, however, of establishing the trustworthiness or "apparent credibility" of the information in records which do not impinge privacy rights. Prior to the inclusion of admissibility provisions for business records[10] in the various evidence statutes, "apparent credibility" did not contribute to the admissibility of private sector records:

> I would agree that it is quite unreasonable to refuse to accept as prima facie evidence a record obviously well kept by public officers and proved never to have been discovered to contain a wrong entry though frequently consulted by officials, merely because it is not open to inspection. But that is settled law ... I must therefore regretfully decline to accept this reason as correct in law.[11]

Admissibility and Changing Information Systems

Over the centuries, from the inception of the hearsay rule, methods of recording, storing, creating, and copying information changed dramatically. By the time in the 1960s when various evidence acts were being amended to cover business records, society had moved from small business enterprises with few staff and quill pens in the 1700s to computers and multi-media information systems. One notable effort made by the courts to match evidentiary safeguards to modern business records was *Myers* v. *The Deputy Public Prosecutor (DPP)*. The minority opinion in this case was cited subsequently by the Supreme Court of Canada[12] to direct common law admissibility in Canada for certain types of business records.

In *Myers* v. *DPP*, it was alleged that various serial numbers were transferred from wrecked to stolen cars. As the cylinder block number was part of the casting, it could not correspond to the transferred engine and chassis serial numbers. All these numbers were entered on a card by workmen on the assembly line. The card was subsequently microfilmed. The question of admissibility in this case is "whether the card ... if produced by a responsible representative of the manufacturing concern (though not by anyone who made an entry), is proof of the truth of its contents."[13] The problem facing the court arose from methods typical of modern business — both mass production assembly lines as well as modern information systems with many people recording or doing things to individual documents. One of the identifying characteristics of post-World War II information systems in large corporations and government is the organization of office activities into a paper-processing factory. Office systems were patterned on the assembly line. From the mail room at the start of the assembly line, paper moves across a series of desks

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10 Except for Alberta and New Brunswick, all provinces and the federal government have sections of their evidence acts dealing with the admissibility of business records.

11 *Myers* v. *DPP* (1965) A.C. 1023-24.

12 *Ares* v. *Venner* (1970) 14 D.L.R.(3d)4.

13 *Myers* v. *DPP* (1965) A.C. 1026.

where anonymous individuals carry out incremental processing activities. Responsibilities, activities, and knowledge tend to be compartmentalized often without audit trails or cross-check controls. A limited number of supervising employees know the full range of work activities.

This method of business organization collided with the hearsay rule in *Myers* v. *DPP*, when the prosecution attempted to

> enter as evidence the 'films and schedules' ... produced on oath by Legg who was employed in the Technical Investigation Department of the Austin Motor Company Ltd. and was in charge of all their records 'for police purposes.'[14]

This attempt to utilize the responsible record keeper was reviewed by Lord Morris as revealing only probable, not definitive trustworthiness, as the record keeper, not having personally made the entries, could merely state:

> Looking at our records I would *expect* that a motor car that we made which has this engine number and this chassis number *will be found* to have this cylinder block number.[15] (emphasis added)

A contrary view was expressed by Lord Pearce (part of the minority decision), who suggested that those making the entries had no knowledge of the trustworthiness of the records-keeping system:

> He [Legg, the record keeper] and not the workmen would know how efficient the system had been found in practice, and how often, if at all, it had been shown subsequently that mis-recordings must have occurred ... it is the best evidence, though it is, of course, subject, like every other man-made record, to the admitted universal human frailty of occasional clerical error.[16]

For Lord Pearce the central issue focused on whether the information system was good and whether it had been found prone to error. This shifts the reliability to the level of the overall system rather than the activities of an individual participant. It is worth asking where exactly the boundaries lie for occasional clerical error. Is the standard 5 per cent error rate in modern alphabetic filing systems acceptable? Given the complexities of the equipment and procedures of multi-media information systems, will a judge recognize when "records [are] so ill-kept as not to be worthy of credit?"[17] Is modern records management, in practice, merely a veneer covering inadequate and unreliable information systems that might easily be challenged in court?

Statutory Admissibility

Following *Myers* v. *DPP*, it became apparent that judge-made law should develop no further on admissibility of business records. The tyranny of precedents demanded

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14 *Ibid.*, A.C. 1035. In this quotation, "police purposes" refers to the statutory requirements to supply information for issuing of Log Books.
15 *Ibid.*, A.C. 1026.
16 *Ibid.*, 1036.
17 *Ibid.*, 1044.

legislative action. Following American developments, many Canadian jurisdictions amended their evidence statutes to try to close the gap between business practices and strict application of the hearsay rule. An example of this is section 35a(1) of the Ontario *Evidence Act* (*RSO*, 1960, c. 125, as amended by section 1 of 1966, c. 51 which took effect May 1966). In this section, the following definitions are advanced:

1. business was broadly defined to cover "every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise,"
2. record was broadly defined to include "any information that is recorded or stored by means of any devices,"
3. a writing or record was *prima facie* evidence of an act, transaction, occurrence or event if made in the usual course of business and made at the time or a reasonable time thereafter,
4. lack of personal knowledge by the maker might affect weight but not admissibility,
5. anything admissible under the common law remained admissible, and
6. any privileged record or writing was not made admissible.

Approximately one year after this amendment came into force, it was reviewed in an on-the-record ruling on a motion during trial in *Aynsley et al.* v. *Toronto General Hospital et al.*, 66 D.L.R. (2D) 575. This was a negligence case against the anaesthetists by the plaintiff Aynsley who suffered severe and permanent brain damage from an air embolism entering her nervous system and the resultant cardiac arrest. A trial motion raised the issue as to whether a report prepared by a doctor at the hospital was admissible under the 1960 *Evidence Act*, as amended, or whether it would have to be proved in a particular way. It also raised the question as to the scope and substance of the hospital's business records. These points involve the source of documents on a file and their usage in the course of business:

> ...I think the court is going to be faced with the production of documents which upon post-perusal might not stand the test; that is, that they are a record of any act, transaction, occurrence or event in that they were not made in the usual and ordinary course of business of the hospital ... such things as reports coming from elsewhere which are kept in the file and which would not be covered by this section, such as reports, perhaps x-rays, electro-encephalograph readings, which might have come to the hospital from some other source and which were not prepared in the usual and ordinary course of business.[18]

The trial judge admitted the report prepared by the doctor, but reserved on the propriety of the doctor proving the contents of the file. The doctor's knowledge of hospital procedures might not be sufficient to testify that a document was made in

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18 *Aynsley et al.* v. *Toronto General Hospital et al.* 66 D.L.R.(2d)583.

the ordinary course of business or that it was made within a reasonable time of the the act, transaction, occurrence or event. His Lordship's preference in this case was to admit the file through the custodian of the records:

> It would be, it appears to me, more satisfactory if *the custodian of the records* were to be called to testify as to these records and *as to the fact that they were made in the course of the business* of the hospital. However, it is true that while this person is probably the best person to do it, the documents may be proven by persons other than the people who actually have them in their custody...[19] (emphasis added)

By 1966-67, the section of the Ontario *Evidence Act* dealing with admissibility of business records held the potential for a litigant entering records which might be difficult to rebut or to cross-examine in order to challenge the evidence as *prima facie* proof of the facts contained therein. An effort was made to balance the scales by requiring seven days advance notice prior to tendering a writing or record which could then be produced for inspection within five days of notice to produce.[20]

Business records, although now more readily admissible, did not become proof of everything contained in the file. They merely proved acts, transactions, and occurrences in the business routine which were routinely recorded. In another case of medical negligence, the hospital record was held not to be admissible as proof of diagnosis, opinion, or impression routinely recorded at the time as "diagnosis is a professional opinion ... it is not an act, occurrence or event within the meaning of the words of this section."[21] According to Judge Griffiths,[22] even in the broadest interpretation of the act that, when the admissibility criteria were met, the judge lacked the discretion to exclude business records, they could be given no weight:

> ...if the writings or records offered in evidence fall within the broad wording of s. 36 and satisfy the criteria of that section, then they should be admitted, even though they do not fall into the category of what are commonly considered to be business records, such as ledger accounts, time cards, payroll records and other routine commercial records at which the legislation was primarily, but obviously, not exclusively aimed.[23]

A Matter of Confidence

If a wide interpretation is placed on admissibility of business records meeting the criteria (act, transaction, occurrence, event, usual course of business, contemporanity) and notice is given, and if the court lacks discretion to exclude such evidence, a danger exists that evidence may be self-serving, misleading, or otherwise unreliable. The court must weigh the evidence in its context to arrive at its proper weight, ranging from a great deal to nothing. The intent of this positive effort to meet the

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19 *Ibid.*, 584.
20 Ontario, *Statutes* (1968) c. 36, s. 1.
21 *Adderly* v. *Bremner* 67 D.L.R.(2d)277.
22 *Setak Computer Services Corporation Ltd.* v. *Burroughs Business Machines Ltd. et al.* 15 O.R.(2d)758.
23 *Ibid.*, 757-58.

court's needs for full and frank disclosure shifts the emphasis from technical admissibility to judicial discretion in weighing evidence. It is an attempt to balance business records keeping with legal safeguards.

> It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples....[24]

The level of confidence society and the courts should have in information systems is an important question for archivists and records managers. Evidently the courts and legislatures are willing to place some confidence in the records keeper entering written or other records for evidentiary purposes, as long as the criteria for business records are met. When Judge Morand suggests in *Aynsley* that it would be "more satisfactory if the custodian of the records were to be called to testify as to these records"[25] he gives considerable responsibility to the records keeper. Is that confidence and responsibility warranted? How much, if any, confidence should be placed in government or corporate information systems and their keepers? Are the "expedients which the entire commercial world recognizes as safe," so described by Wigmore, really trustworthy? If not, how great are the dangers to society and particularly to the administration of justice?

Confidence Questioned

A penetrating indictment of the activities of records managers and archivists was rendered by Judge Greene of the District of Columbia when asked to review the records-scheduling practices of the Federal Bureau of Investigation and the National Archives and Records Service. He found the relationship between the two agencies a bit too cooperative for the archivists to pursue their professional responsibilities with requisite integrity:

> The thrust of the actions of the F.B.I., perhaps naturally so, has been to preserve what is necessary or useful for its operations. The Archives, which should have safeguarded the interests of both the F.B.I. and the public, in practice considered only the former.[26]

This case explored the FBI records system and FBI scheduling activities in response to issues raised by various research groups and individuals (plaintiffs). Probably few judges or lawyers have reviewed records-keeping activities to the extent of Mr. Justice Greene. His findings clearly suggest that large records-keeping systems warrant close scrutiny. The problems with records-keeping practices and systems

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24 *Re Watson Properties Limited* C.B.R. (Volume 23) 191-92, citing *Wigmore on Evidence*, 3rd edition, volume 5, p. 452.

25 *Aynsley et al.* v. *Toronto General Hospital et al.* 66 D.L.R.(2d)584.

26 *American Friends Service Committee et al.* v. *William H. Webster et al.*, "Opinion" of Judge Harold H. Greene, District of Columbia, filed 10 January 1980.

extend far beyond the accepting statement of Lord Pearce that "it is the best evidence, though it is, of course, subject, like every other man-made error, to the admitted universal human frailty of occasional clerical error."[27] When does acceptable clerical error give way to unacceptable errors and inadequacies of information practices and systems?

It may very well be possible for the courts and society in general to live with the small clerical errors of normal business activities. No doubt these smaller problems can be overcome with other corroborative documents, files, or other types of evidence. However, at what point should the court question its own assumptions about the trustworthiness of records-keeping systems? If the system lacks credibility what confidence can be placed in its keeper?

Credibility Lacking?

Recently in Toronto, the sale of apartment complexes drew attention to the business activities at Greymac Trust Co. and Seaway Trust Co. Appraisers and investigators reviewing the activities of these large financial institutions have uncovered a variety of questionable activities. A *Globe and Mail* editorial quoted J. David Taylor, a business consultant running Greymac Trust after the government takeover, as being unable, "to recall looking at a file that hasn't got something missing."[28]

The question of information integrity in textual data bases or electronic filing systems is potentially more problematic than in manual systems. A few computer commands can delete or modify digitized information while countless hours would be required to similarly alter textual information in a manual system. A case in point was recently reported during an investigation of the United States Environmental Protection Agency. A senior agency official stated that "he deleted the memorandum [central to Congressional investigation of the agency's toxic dump cleanup program] ... in the same way EPA computers are routinely purged."[29] A dispute also existed regarding the Congressional committee's access to EPA toxic waste enforcement files. One representative expressed concern that subpoenaed material "was altered or destroyed in agency paper shredders or computers."[30]

These two accounts do not inspire confidence in those information systems or their keepers — one a traditional financial filing system in the private sector and the other an operational filing system in the public sector. Is there a possibility that corroborating or related documents or files in other systems and other agencies would be correspondingly altered or destroyed? Are information systems worthy of the confidence which evidence acts and the courts ascribe to them?

A 1980 study by Irwin Ross, published in *Fortune*, revealed that corporate illegalities are very widespread.[31] A ten-year period of review of 1,073 major

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27 *Myers* v. *DPP* (1965) A.C. 1036.

28 *The Globe and Mail*, Toronto, 23 February 1983.

29 *The Citizen*, Ottawa, 21 February 1983, p. 25.

30 *Ibid.*

31 Irwin Ross, "How Lawless Are Big Companies?" *Fortune*, 1 December 1980, p. 56. A reply to this article, "How Justice Loads the Scales Against Big Corporations," by William L. Lurie, executive vice president and general counsel of International Paper Co., was published in the 29 December 1980 issue of *Fortune*, p. 86. The reply does not negate assertions of illegal corporate activities.

corporations revealed that 117 or 11 per cent were involved in at least one major delinquency: bribery, including kickbacks and illegal rebates; criminal fraud; illegal political contributions; tax evasion; and criminal antitrust violations such as price-fixing and bid-rigging. The list of offenders would be even longer if foreign bribes and kickbacks were included. Post-Watergate morality is no doubt quite jaded. The "whys" are probably deeply imbedded in the ethics of the free market. Ross observed that

> No single answer accounts for the variety of corporate misbehaviour. One generalization often invoked plays on the distinction between *malum in se* — a crime in itself, like the immemorial offenses of the common law — and *malum prohibitum* — purely statutory crimes that vary with society.[32]

One can only hope that those trained for and responsible for society's information resources will explore ways to rectify the situation when records are concerned.

There is a lack of data on the extent and growth of corporate crime over the last twenty-five years. It is quite probable that when illegalities occur, the official record is incomplete, inaccurate, or false. Often corporate crime is rationalized as being committed in the interest of the corporation rather than the individual. The competitive nature of business and the survival instincts of managers, revealed by corporate crime activities, suggest that one must query the integrity and trustworthiness of corporate information systems. Given business pressures and corporate loyalty, is the records keeper, who is often lacking authority and rank, likely to be the trustworthy vehicle for entering or adducing evidence?

The principle on which admissibility of business records is based is trustworthiness: the honesty of those creating, amending, deleting, and organizing information while pursuing their normal activities. Minor inadvertent clerical errors do not contravene the principle. Honestly compiled records, in a comprehensive, effective, efficient information system, properly managed, warrant complete confidence as *prima facie* evidence. The problem is to sort the wheat of good systems from the chaff of bad.

Public records receive their vote of confidence because their entries are made by the proper official, in the course of duty, and are open to public use and inspection. In what circumstances do private records warrant confidence? Corporate records are private property created by various people, often modified by many at a whim and without much accountability or review, often maintained under direct control of the user and not centrally controlled by a knowledgeable individual with the resources and the authority to develop a credible, comprehensive information system.

If information was recorded on twenty dollar bills (which probably approximates the real, total cost of the average letter, memorandum, or short report), it might be maintained in a more reliable system. Perhaps an alternative model for credibility in information systems and records keepers can be found in the financial community. Corporate accounts are maintained by corporate employees whose work is periodically reviewed by outside auditors. Information warrants the same scrutiny before courts can rely on it!

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32 Ross, "How Lawless Are Big Companies?" p. 58.

Both public and private sector records are open to potential abuse by their creators and managers. The United States Environmental Protection Agency case as well as the Greymac Trust Co. and Seaway Trust Co. cases, call into question the *presumption of trustworthiness* which records creators and managers wish to establish and promote. This presumption of trustworthiness is also being claimed by the major corporate computer-based systems. Quite possibly most of them are trustworthy, but should that assumption not be questioned? If society accepts that public and private sector information systems are basically trustworthy, with few exceptions, records from these systems are automatically accorded substantial legal status.

Surely this legal status at least should be earned if not established as strictly proven fact. If major information systems are assumed trustworthy, the burden of proof shifts to the individual challenging its veracity. Imagine yourself taking on the Royal Bank of Canada or the Canada Employment and Immigration Commission/ Department where your information, as an individual, must be strictly proven, while theirs is deemed trustworthy. Furthermore, if large complex information systems are accorded the status of being accepted as by their very nature trustworthy, an interesting contradiction arises when two such systems are in disagreement to the point of litigating the dispute.

Information systems, in both public and private sectors, lack the integrity, I believe, to justify general, let alone judicial confidence. It is doubtful that professionalization of the records management or information management communities will lead to trustworthy systems. Training is certainly a prerequisite for professional status, as are a code of ethics and disciplinary review; these all contribute to confidence in the professional's activities and responsibilities. However, lacking proper authority, these ascribed responsibilities are nominal rather than real. Professional competence will not always offset the record keepers' identification with the employers' perceived interests and thus complicity in illegal activities may ensue. Any corporate or government information system not closely and centrally controlled and with insufficient resources does not warrant any confidence, particularly by a court. Records and information keepers or managers must be subject to outside review and audit.

Confidence and trustworthiness should be proven, not assumed. Cross-examination of a records keeper as to his practices is not likely to be sufficiently penetrating to establish existing inadequacies. The information systems of lawyers and the courts are themselves not particularly confidence-inspiring, and *they* are covered by a multiplicity of rules and statutory requirements.

Motions for the production of documents, examinations for discovery and notice as a strict prerequisite are all useful mechanisms for revealing facts and truth. But they do not satisfy the courts' requirement for complete, accurate, admissible evidence. They are a utilitarian compromise of the court bending to the prevailing wind of business practices.

As long as information, like money, is a privately controlled resource, the onus should be on business and government to establish the integrity of their information and their information systems by a regular, periodic audit conducted by outside auditors. Independent archivists, promoting more access to information and having a detached outsider's interest in information as a societal resource, could contribute

much to filling the credibility gap. They should become more cognizant of information practices, technology, and systems. They should promote and represent society's interest in a complete, credible record.