The Evidentiary and Probative Value of Trade Union Records

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The integral connection between trade union records and the writing of labour history has been a theme constantly reiterated in both scholarly and archival journals. Most recent literature on this subject has stressed the inestimable value of these records for labour studies and underlined the importance of vibrant archival acquisition programmes to ensure that scholars are provided with the primary documentation so basic to the writing of labour history.[1] David Brody, the highly acclaimed American labour scholar, while insisting that authoritative history must rest firmly upon solid documentation, has in the same breath sadly bemoaned the dearth of many essential primary sources to the writing of the "new" labour history.[2] North of the border, similar concerns have been echoed by such highly prolific Canadian labour historians as Greg Kealey and Russell Hann who sternly warn that "unless a vital system of local archives can be established throughout the country, much of the important material relevant to working class history will not be collected at all."[3]

This historial approach, while undoubtedly important, tends to obscure the fact that beyond their secondary value as historical sources, union records also possess a more immediate and crucial value to the creating organization itself. The regularity with which unions resort to their records in the course of daily operations while defending membership concerns underlines their importance as invaluable informational sources on any number of union issues. Contract negotiation, contract interpretation, seniority grievances, and compensation benefits are but a few of the common instances where union officials rely on their past files for documentary evidence. Nevertheless, while it is obvious that union officers frequently cull through their files in search of past grievances, dues payments, or membership claims, this legal dimension underlying the value of trade union records has remained *terra incognita* to most participants in the legal process and archivists alike.

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1 For American literature see David Brody, "The Old Labour History and the New: In Search of an American Working Class," *Labour History* 20 (Winter 1979), pp. 111-26; and Walter Galenson, "Reflections on the Writing of Labour History," *Industrial and Labour Relations Review* 11 (October 1957), pp. 85-95. For Canadian sources, see the articles in *Archivaria* 4 (Summer 1977), the thematic issue on "The Working Class Record."

2 Brody, "The Old Labour History," p. 121.

3 Russell G. Hann and Gregory S. Kealey, "Documenting Working Class History: North American Traditions and New Approaches," *Archivaria* 4 (Summer 1977), p. 114.

Archivists schooled in the historical and administrative aspects of records keeping often forget the equally important legal considerations of their work regulated by the common law and other judicial restrictions on the admissibility of evidence before the courts. To this end, this article is offered as a preliminary endeavor to chart but a small portion of this territory by examining some of the general considerations affecting the admissibility and relative weight of documentary evidence in the field of labour law. But prior to embarking upon this discussion, one must first draw a careful distinction between the primary and secondary values inherent in union records, briefly review the relevant sections of the Canada Evidence Act and other provincial statutory provisions relating to documentary evidence made pursuant to a "business duty," examine the types of union records created in the course of daily operations, and only then probe the rationale underlying the evidentiary criteria adopted by provincial arbitrators before labour relations boards and arbitration hearings.

Simply put, the values inherent in union records are of two kinds: primary values which exist to serve the originating agency itself, and secondary values which benefit other agencies and private users. At the primary level, union records serve to accomplish the purposes for which the agency has been created, namely its administrative, fiscal, legal, and operating functions. Once these records have served this primary purpose, they acquire a secondary importance as invaluable sources for historical inquiry. If, for the purposes of analysis, the secondary values inherent in records can be roughly divided into two categories — evidence regarding the actual organization and functioning of creating individuals or institutions as well as information relating to various other persons, things, and phenomena — then a similar distinction can be drawn for primary values between the concepts of evidential and evidentiary value.

Any discussion of the primary values of records must differentiate between these two concepts. Evidential, as opposed to evidentiary, value does not in any way concern any special quality or merit which such records may possess as documentary evidence. Rather, evidential value relates to the substantive manner in which the records under consideration reflect the origin, development, and policies of any particular agency. As such, they contain a storehouse of administrative wisdom and experience to provide precedents in formulating policies, procedures, and the like in the interests of consistency and continuity. In essence then, when contemplating the evidential values of records, the quality of the evidence *per se* never falls under scrutiny, merely the character of the matter evidenced.[4]

Conversely, evidentiary value refers to the sanctity of documents as evidence, a quality derived from the circumstances surrounding their creation as well as their subsequent care in the hands of a custodian. Naturally enough, the manner in which records are regularly produced, employed, and stored are all considerations governing their admissibility before common law courts and other judicial bodies. But beyond this, their prior care and custody will greatly influence their value as documentary evidence. Of course, relevant documentary evidence must be authenticated before being admitted into evidence, but proper authentication alone does

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4 T.R. Schellenberg, *The Appraisal of Modern Public Records,* Bulletin of the National Archives, 8 (October 1956), p. 7.

not ensure admissibility.[5] For having lept the first hurdle, the evidence must satisfy a number of judicial requirements which will inevitably determine its admissibility in a court of law.

At present, Section 30 of the *Canada Evidence Act* sets forth the criteria by which "business records" are admitted into evidence. Since this section defines "business records" as "all records made in the usual and ordinary course of virtually any activity, whether profit or non-profit and whether carried on in Canada or elsewhere," the section's basic approach is to provide an optional code of procedure which, if followed, permits the introduction of certain "business records" as proof of the facts contained therein, without substantiating oral evidence being required. In this sense then, Section 30 marks an important departure from the common law provisions respecting the admissibility of evidence, although it remains ancillary to, rather than a replacement of, common law and preexisting statutory exceptions to the hearsay rule. In other words, this section cannot operate to exclude records, if they are otherwise admissible under some other exception to the hearsay rule.[6]

Hearsay evidence is defined as "testimony in court or written evidence, such statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-of-court asserter." Of all evidentiary principles, the rule against hearsay evidence (the hearsay rule) has probably been given more attention than most. Briefly stated, the rationales for the hearsay rule rest on the basic inability to test evidence by cross-examination, absence of sanction of an oath when repeated declaration is made and where oral rather than documentary evidence is involved, and the natural tendency for the story to change in the telling. This rule, however, is subject to a number of complicated and often confusing exceptions.[7] But since all documents, if offered as proof of their contents, contain at the very least simple hearsay evidence — by virtue of the fact a document can only relate to the court a fact or occurrence someone else "told it" — therefore Section 30 actually operates as an exception to the hearsay rule of evidence. The general tendency on the part of counsel, moreover, to seek a panacea to "business records" problems in Section 30 of the *Canada Evidence Act* has firmly established it as a useful mechanism for expediting the admissibility of "business records" as evidence.[8]

Of course, in addition to the *Canada Evidence Act*, there also exist a number of provincial evidence acts which operate to regulate the admissibility of "business records" as evidence of their contents. Understandably, these various provincial

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5 Douglas J. Ewart, "Documentary Evidence: The Admissibility of Documents Under Section 30 of the Canada Evidence Act," *The Criminal Law Quarterly* 22 (1979-80), p. 190.

6 *Ibid.*

7 A fuller explanation of these exceptions can be found in Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (London, 1975); D.W. Elliott, *Phipson's Manual of the Law of Evidence* (London, 1972); and Edward W. Cleary, *McCormick's Handbook of the Law of Evidence* (St. Paul, 1972). For Canadian sources see J. Douglas Ewart, "Documentary Evidence: The Admissibility at Common Law of Records Made Pursuant to a Business Duty," *Canadian Bar Review* 59 (March 1981), pp. 52-75; J. Douglas Ewart, *Documentary Evidence in Canada* (Agincourt, 1983); S.N. Lederman, "The Admissibility of Business Records — A Partial Metamorphosis," *Osgoode Hall Law Journal* 11 (1973), pp. 373-96; and John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto, 1974).

8 Ewart, "Documentary Evidence," p. 190.

statutes are subject to degrees of similarities and differences but, considered as a whole, they all specify that in order for a writing or record to be admissible as evidence under the statutory exception to the hearsay rule, it must first meet certain criteria.

Section 36(2) of the *Ontario Evidence Act*, for instance, specifically stipulates that

> 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.[9]

In much the same fashion, Section 48(1) of the *British Columbia Evidence Act* also provides for the admissibility of "business records" before the courts. Like its Ontario counterpart, it states quite clearly that

> In proceedings where direct oral evidence of a fact would be admissible, a statement of the fact in a document is admissible as evidence of the fact if the document was made or kept in the usual and ordinary course of the business and if it was in the usual and ordinary course of the business to record in that document a statement of the fact that at the time it occurred or within a reasonable time after that.[10]

Once again, here as in Section 30 of the *Canada Evidence Act*, the meaning of the term "record" is sufficiently comprehensive to cover recorded information on most mediums,[11] and the term "business" broad enough to include the operations of trade unions as well as companies.[12] Obviously from the vantage point of unions, the implications embodied in these broad designations are self evident, which only serves to emphasize the evidentiary values inherent in their records.

It is hardly surprising to discover that, during the course of their daily operations, trade unions, just like businesses and other organizations, produce a wide variety of records. For in addition to a myriad of rank-and-file grievances which surface daily in the workplace, beleaguered trade union officials must also attend to a host of other membership concerns. Calculating pension payments, updating seniority lists, and recovering compensation benefits are but a few of the tasks that compete equally for the time of union officials along with other multifarious duties which collectively generate a sizable body of documentation.

Yet, aside from a certain select body of records which unions generally retain for their own administrative purposes, such as certification papers, contract files, financial records, and seniority lists, records-keeping seems to be afforded a higher priority by business than by labour. No doubt, the existence of various statutory

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9 *Ontario Evidence Act*, *RSO*, 1970, c. 151, s. 36.

10 *British Columbia Evidence Act*, *RSBC*, 1979, c. 116, s. 48.

11 The generally accepted definition of a record is found in Section 30(12) of the *Canada Evidence Act* as "the whole or any part of any book, document, paper, card, tape, or other thing on which information is written, recorded, stored or reproduced...." In respect to computer evidence, however, some variation exists between provinces.

12 M.R. Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (Don Mills, 1981), p. 184.

obligations which require businesses to retain certain types of records for fixed periods, coupled with the fact that these enterprises derive tax credits for money invested in proper records-keeping practices, in part accounts for the disparity between the state of business and union records.[13] Consequently, as Canadian labour archivist Nancy Stunden has commented, more often than not "union records are poorly organized and serviced; records management practices are virtually unknown; and filing is simplistic, uncontrolled, and unsystematic...." This sad state of affairs prompted Stunden to conclude that, for whatever reason, "there seems to be a more natural administrative concern with records keeping in business, perhaps because there is a clearer link between the daily activities of the present with those of the past in terms of reaching essential and fundamental objectives."[14]

This reasoning presumes, however, that a more logical connection exists between records-keeping in business than in trade unions. If anything, the current chaotic state of most union records is more a function of misunderstanding and disorganization than of any latent impediment militating against good records-keeping practices within the trade union movement as a whole. For while many union officials and legal counsels in the labour movement are fully aware of the invaluable storehouse of legal information contained in union records, the serious lack of records management programmes proves a major stumbling block to establishing efficiently organized records systems. This is especially evident at the local level, where the turnover of local union officials — and of organizations themselves — considerably complicates the task of locating important documents.[15] But while many union observers have acknowledged the value of records management programmes to labour unions in terms of cost savings and efficiency, the expense involved in providing such services, combined with the lack of properly trained personnel who can be trusted by labour, proves to be a serious deterrent.[16] This has usually meant that, although many unions may separate their current from non-current records, or may file carefully some specific types of records such as contract and personnel files separately from other documentation, records management programmes remain the exception rather than the rule in the labour movement.

The issue of extrinsic evidence has vexed labour relations and arbitration boards in Canada for many years. In general, the decision whether to admit extrinsic evidence (any evidence outside the collective agreement whether oral or documentary) has been regulated by common law rules of evidence and arbitral jurisprudence

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13 Because trade unions are non-profit organizations, unlike corporations, they cannot deduct from taxes money invested in proper records-keeping systems. Add to this the fact that there is currently little statutory regulation requiring Canadian trade unions to keep certain kinds of records and this helps explain the disparity.

14 Nancy Stunden, "Labour, Records, and Archives: The Struggle for a Heritage," *Archivaria* 4 (Summer 1977), p. 85.

15 For a description of this phenomenon at the local level, see Albert A. Blum, "Labour Union Archives in Michigan," *Labour History* 3 (Fall 1962), pp. 335-40; and William J. Stewart, "The Sources of Labour History: Problems and Promise," *American Archivist* 27 (January 1964), pp. 95-102.

16 "A Proposal for a Conference on the Records of American Labour," presented by the George Meany Center for Labour Studies, 15 May 1980, p. 6.

balanced against the harmful consequences that could result from its admission.[17] While in theory, when interpreting a written contract, it is usually inappropriate for arbitrators to admit extrinsic evidence except in cases where the commonly accepted meaning of the contract is ambiguous, in practice this rule has been interpreted quite differently by provincial arbitration boards.

The admission of extrinsic evidence in common law is governed by something known as the "parole evidence rule." This rule, specifically designed to safeguard the sanctity of the covenant between the parties as recorded in a document, operates to exclude the admission of extrinsic evidence on the premise that, if admitted, it could result in unilateral variation or contradiction of the written contract. In most instances though, if rigidly applied, this rule would effectively shackle adjudicators and prevent them from discerning the actual bargain of the parties involved.[18] In order to avert this contradiction, the common law has conceded that when proving the oral component of a partly written and partly oral contract, proving unfulfilled precedent, construing words or phrases possessing special or customary meaning, or interpreting ambiguous wording, extrinsic evidence may be introduced as an aid to the adjudicator.

Nevertheless, despite these concessions, the courts have proved reluctant to admit extrinsic evidence as an aid to contract interpretation. This approach to admissibility, however, ignores the fundamental reality that the meanings vested in words alone will probably never uncover the mutual intentions of the parties. Despite this, the courts have chosen to ignore this reality and, consequently, the extent of such evidence admitted and its frequency of admission has been limited.[19]

Labour arbitration, although originally conceived as an inexpensive and informal manner of resolving industrial disputes, has in reality evolved into a complex and complicated structure.[20] This has usually meant that, in most provinces, arbitration and labour relations boards have chosen to adhere quite rigidly to the parole evidence rule and to follow closely the rules of evidence respecting "business records."

In Ontario, for instance, the interpretation given Section 37(7)(c) of the *Ontario Labour Relations Act* ensures that arbitrators will be guided by common law rules of evidence in reaching decisions. In other words, this means that even when a

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17 In practice, this has generally resulted in the courts weighing the value of extrinsic evidence in interpreting the words of the written contract against its potential for alteration of the bargain. After careful consideration, they have generally concluded that a proper balance between benefits and detriments is attained by first discovering an ambiguity before the evidence is admitted. Clearly, the rationale for this decision rests on the fact that unless an ambiguity is present, extrinsic evidence is not required for interpretative purposes but, conversely, once an ambiguity has been found, all types of extrinsic evidence are usually admissible. A more detailed explanation of this rationale can be found in Peter A. Gall and Donald Jordan, "The Admission and Use of Extrinsic Evidence in Labour Arbitrations," in M.A. Hickling, ed. *Current Problems in Labour Arbitration* (Vancouver, 1979); and M.R. Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (Don Mills, 1981).

18 Gall and Jordan, "The Admission and Use," p. 152.

19 *Ibid.*, p. 154.

20 A fuller explanation is provided in Gorsky, *Evidence and Procedure*, p. 145. See also Earl Edward Palmer, *Collective Agreement Arbitration in Canada* (Toronto, 1978); Stanley A. Schiff, *Evidence in the Litigation Process* (Toronto, 1978); and Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto, 1980).

document has been produced and identified as to its source, it remains hearsay unless it falls under some exception to the hearsay rule or proves admissible by virtue of statutory exception.[21]

But of course, the admissibility of evidence and the relative weight afforded such evidence are two entirely different matters. For as one astute American observer, David Bender, has pointed out, having "secured admissibility for his evidence only advances the proponent to first base; what then determines whether the run scores is the weight accorded the evidence by the trier of fact."[22] This means in essence that, before assigning evidence a relative or probative value, the courts must first carefully scrutinize it in order to determine the ultimate weight it will carry.

Although labour relations and arbitration boards in Ontario have adopted a traditional approach to weighing the probative value of evidence before their consideration,[23] the British Columbia Labour Relations Board has struck its own balance between the potential benefits and detriments of extrinsic evidence in arbitration hearings. This approach, which it feels best responds to the aims of the industrial relations system, has instructed arbitrators to freely admit extrinsic evidence in arbitration hearings involving interpretation of a collective agreement, but then to exercise caution as to the actual use made of this evidence.[24]

In a recent landmark decision, *The University of British Columbia* v. *Canadian Union of Public Employees, Local 116* (1976), the Board has outlined what it feels is the proper approach for arbitrators in that province to take with respect to the admission of extrinsic evidence. In overturning the previous decision of an arbitrator to exclude arbitrarily evidence concerning past negotiation history, the Board insisted that "because of the inherent ambiguity of words, no artifiical barriers to the admission of extrinsic evidence should be erected.[25] In reaching this decision, the Board relied heavily on the results of a previous case, *Simon Fraser University* v. *AUCE Local 2* (1976). Here the Board maintained that certain inherent features of the industrial relations system coupled with the very nature of collective agreements clearly warranted this approach:

> Collective agreements deal with the entire range of employment terms and working conditions often in large diverse bargaining units. The agreement lays down standards which will govern that industrial establishment for lengthy periods — one, two, even three years. The negotiators are often under heavy pressure to reach agreement at the eleventh hour to avoid a work stoppage and their focus of attention is primarily on the economic content of the proposed settlement, not the precise contract language in which it will be expressed. Finally the collective agreement, though a product of negotiations over many years,

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21 Gorsky, *Evidence and Procedure*, p. 183.

22 David Bender, *Computer Law: Evidence and Procedure* (New York, 1979), section 8:01, p. 8-2.

23 Section 36(4) of the *Ontario Evidence Act* permits the admission of a record based on hearsay. However, where the maker of the record has no personal knowledge of the facts recorded, this may affect its weight.

24 Gall and Jordan, "Extrinsic Evidence," p. 151.

25 *University of British Columbia* v. *Canadian Union of Public Employees, Local 116* [1976] BCLRB Decision 42/76.

> must remain a relatively concise and intelligible document to the members of the bargaining unit and the lower echelon of management whose actions are governed by it.[26]

Obviously, this approach marks a significant departure from that adopted in Ontario by effectively overriding the parole evidence rule and permitting British Columbia labour relations and arbitration boards substantial freedom with regard to the admission of such evidence. As a result, union records such as negotiating minutes, memoranda of agreement, and letters of intent assume a greater importance in British Columbia as documentary evidence before provincial labour boards.

While most trade union officials have long recognized the value of such documents as collective agreements, master bargaining records, and letters of intent, and have taken measures to safeguard these records, this should not obscure the importance of other sorts of documentation to these organizations. The highly legalistic structure of the industrial relations system, in conjunction with the growing urgency and complexity of members' concerns, underlines the value of other types of records that unions produce. As a result, trade unions have both a duty to themselves and an obligation to their members to ensure that these records are properly preserved and maintained.

Through the process of adapting to rapid social change, unions find themselves more and more embroiled in issues concerning occupational health and safety, technological change, occupational reclassification, and bargaining unit determination, in which evidence contained in union records may prove crucial in the final analysis. Although the importance of union records for contract negotiation and interpretation is readily acknowledged, unions also use their records in other instances as well. In the process of seeking entitlement benefits for members in pension, seniority, or compensation cases, when redressing unfair labour practices of employers, or alternatively when defending the integrity of the organization itself — the duty of fair representation — unions have often turned to their past files to provide information on any number of these issues.

When attempting to recover pension and compensation benefits or when proving evidence of employment seniority, a variety of records are examined before rendering a final decision. A review of a number of such cases reveals that during the arbitration process various pieces of documentary evidence such as correspondence, seniority lists, medical and compensation records, union newsletters, and time records were introduced into the proceedings as evidence.[27]

In much a similar vein, when contesting unfair labour practices of employers such as unjust termination, downgrading job descriptions, or denial of promotion, a wide

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26 *Simon Fraser University* v. *AUCE, Local 2* [1976] BCLRB Decision 16/76.

27 For specific cases, see *Pope and Talbot Limited* v. *Industrial Woodworkers of America, Local 1-423 (Popoff Grievance)* [1976] 1 WLAC; *MacMillan Bloedel Industries Limited, Eve River Division* v. *IWA, Local 1-363* [1977] 1 WLAC; *Brenda Mines Limited* v. *USWA, Local 7618* [1977] 1 WLAC; *Spear and Jackson (B.C.) Limited* v. *USWA, Local 3376* [1977] 1 WLAC; *Northwood Pulp and Timber Limited* v. *Canadian Paperworkers Union, Local 603* [1982] 2 CAN LRBR; and *Cominco Limited* v. *Canadian Association of Industrial, Mechanical, and Allied Workers, Locals 23, 24, and 27 and USWA Locals 480, 651, 8320, 9672, and 9705* [1982] 1 CAN LRBR.

variety of records can prove useful before arbitration and labour relations boards. Although it is difficult to generalize regarding the various types of records used in such instances, as individual grievances understandably involve different forms of evidence, a selective overview of numerous cases in this area again and again illustrates the importance of key types of documentation. When contesting such grievances, unions frequently introduced a variety of records designed to support their case. In the case of unjust dismissal, unions have generally introduced correspondence between the grievor and the company as well as the union and the company on matters relating to the termination of employees. When defending occupational status or challenging promotion denials, such documentation as job descriptions, work record, and letters of commendation has usually played a role in the proceedings.[28]

Occasionally, some unions have been challenged by their own members to faithfully demonstrate that they are honouring their contractual obligation to the membership. In these instances, union officials have been forced to produce evidence of their "good faith" from their past files in the form of correspondence and other reports to demonstrate that their actions have not violated the trust placed in them by the members.[29] This so-called "duty of fair representation,"[30] a fundamental obligation of all unions, is a recurring issue for trade unions and only serves to further reinforce the importance of proper records-keeping practices to the labour movement as a whole.

Some unions, in recognition of this reality, have already established their own records-keeping systems to better service the needs of their members. The British Columbia Government Employees' Union, for one, has developed a relatively sophisticated centralized records system which not only facilitates the task of

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28 For further details, see *British Columbia Assessment Authority* v. *Joint Union Representatives BCGEU, CUPE, and Vancouver Municipal and Regional Employees Union (Casement et al. Grievance)* [1976] 2 WLAC; *G.T.E. Automatic Electric (Canada Limited)* v. *Federation of Telephone Workers of British Columbia (Clerical Division)* [1977] 2 WLAC; *Government of British Columbia* v. *BCGEU* [1979] 20 LAC 2d; *Goodyear Canada Inc.* v. *Misc. Workers, Wholesale, and Retail Delivery Drivers and Helpers Union, Local 351* [1979] 19 LAC (2d); *B.C. Ferry Corporation* v. *B.C. Ferry and Marine Workers Union* [1980] 1 CAN LRBR; and *Delta Optomist* v. *Ernest Bexley and Vancouver-New Westminister Newspaper Guild, Local 115* [1980] 2 CAN LRBR.

29 For numerous examples, see *British Columbia Hydro and Power Authority* v. *Office and Technical Employees Union, Local 378 and Christopher R. Tottle* [1978] 2 CAN LRBR; *British Columbia Distillery Company Limited and Group of Seagrams Employees* v. *Distillery, Brewery, Winery, Soft Drink, and Allied Workers Union, Local 604* [1978] 1 CAN LRBR; *Eurocan Pulp and Paper Company Limited* v. *Canadian Paperworkers Union, Local 298* [1979] 2 CAN LRBR; *Robert Joyce, Diane Harvey, and Diana Halverson* v. *Vancouver Municipal and Regional Employees' Union* [1980] 1 CAN LRBR; *Ruby Chow and Overwaitea Foods, A Division of Jim Pattison* v. *International Limited and Retail Clerks Union, Local 1518* [1981] 3 CAN LRBR; *Margaret Cameron and Teamsters Local Union 213* v. *Shuswap Okanagan Dairy Industries Co-op Association* [1981] BCLRB Decision 46/81; and *Charles F. Deane and OTEU, Local 378* v. *Insurance Corporation of British Columbia* [1982] 1 CAN LRBR.

30 On the duty of fair representation, see B.L. Adell, "The Duty of Fair Representation — Effective Protection for Individual Rights in Collective Agreements?" *Industrial Relations Industrielles* 25 (August 1970), pp. 602-16. For the specific case of Ontario, see L.P. Carr, "Development of Fair Representation in Ontario," *Osgoode Hall Law Journal* 6 (October 1968), pp. 281-93. More recent attitudes can be found in David C. McPhillips, "Duty of Fair Representation: Recent Attitudes in British Columbia and Ontario," *Industrial Relations Industrielles* 36 (October 1981), pp. 803-25.

retrieving documents, but also attempts to preserve the legal quality of these documents as evidence. To this end, files are arranged according to an alpha-numeric filing system and in turn divided into sixteen different divisions, which reflect the multifarious activities of the union itself. But, in addition to its role as a valuable tool for retrieving documents essential to union operations, this system also exists to safeguard the evidentiary value of these records. Under the watchful eye of a records custodian, every effort is made to ensure that this organization's records are funnelled through this centralized system. In so doing, this assures that if certain records are required as legal evidence before labour boards their authenticity and continuous custody can be demonstrated and their "business nature" quickly verified. If necessary, a custodian can be produced to testify as to their validity. Unfortunately, as previously noted, such records systems remain the exception rather than the rule in trade unions and this considerably complicates legal considerations respecting the admissibility of such evidence.

From their perspective as documentary evidence, union records (as extrinsic evidence) have frequently formed the backbone of presentations before arbitration and labour relations boards. Although it is beyond the scope of this article to systematically detail the numerous occasions when unions have summoned their records into evidence, it is possible to briefly outline several leading cases as illustrative examples where documentary evidence has proved crucial in the final analysis.

In this connection, the previously cited *University of British Columbia* v. *Canadian Union of Public Employees, Local 116* (1976) continues to provide a precedent in this area. This case involved a dispute over the meaning of a notation inserted at the end of the wage rates set out in a schedule to the collective agreement. This insertion that "Trades pay is 90% of the Building Trades Pay" proved ambiguous and clearly required some additional background information before this sentence could be satisfactorily interpreted. To clarify its intent and meaning, the Board admitted a copy of the 1972 arbitration award between the parties and the union's initial 1975 proposal that tradesmen be paid at 100 per cent of downtown rates, as well as a signed memorandum of settlement of April 6th on this wage issue. As a result of this collective documentary evidence, the union won 100 per cent of downtown wage rates for its trades employees.

In much the same manner, by resorting to their past negotiation minutes, another union was successful in winning a retroactive wage settlement for its members. This case, *Vernon Fruit Union, British Columbia Fruit and Vegetable Workers' Union, Local 1572* v. *Okanagan Federated Shippers' Association* (1976), involved the application by the union under Section 96 of the Labour Code for a retroactive wage premium settlement for seven grieving employees.[31] To discern properly the parties' intentions, it proved necessary to trace the fate of the wage premium as reflected in the excerpts of the negotiation minutes kept by both sides. Here, as elsewhere, the existence of this documentary evidence proved essential to the eventual outcome of the case and resulted in a favourable decision for the union.

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31 *Vernon Fruit Union, British Columbia Fruit and Vegetable Workers' Union, Local 1572* v. *Okanagan Federated Shippers' Association* [1976] BCLRB Decision 55/76.

Once documentary evidence is admitted, however, the Board has insisted that caution be exercised in order to minimize its "detrimental" features. It has therefore drawn a distinction between various types of evidence and attached a value to each of these categories. In assessing the relative probative weight to assign each category, the Board has ruled that objective evidence — negotiating minutes signed by both parties reflecting a mutuality of intent measurable by objective standards — will carry a greater weight than subjective evidence which consists of intentions or impressions of what was achieved at the bargaining table and that both will assume a greater or lesser significance according to the degree of ambiguity in the text.[32]

But often in these circumstances, the existence of documentary evidence alone will not prove sufficient when assigning these records a probative value. More often than not, the arbitrator must look beyond the profferred evidence and investigate the circumstances underlying its creation as well as its subsequent care and custody. Therefore, although "business records" may be authenticated through the testimony of one familiar with the books of the concern, such as a custodian or supervisor (who has not made the record or seen it made), the probative value of such evidence must ultimately rest on the thoroughness, intelligence, and personality of the expert presenting this evidence.

This has usually meant that, in practice, evidence introduced at an arbitration hearing has been formally supported by the testimony of a witness intimately familiar with union affairs and operations. In *Prince Rupert Fishermen's Cooperative Association* v. *Clerks' Union, Local 1674* (1963) for example, union evidence of past practice and negotiating history was given by Linda Long, the union's business agent and "certainly a person who had a thorough and interested part in the drafting and negotiation of the collective agreement."[33] Her testimony was pitted against that of Mr. Gunther Elfert for the Fishermen's Association, whose long experience in negotiations eminently qualified him for this task. The Board carefully weighed the credibility and knowledge of each witness in conjunction with the particular circumstances of the case before rendering its judgement. In a slightly different vein, in the case of *British Columbia Hydro and Power Authority* v. *Divisions 101, 134, and 139 of the Amalgamated Transit Union (Robertson Grievance)* (1978), the arbitration board displayed its contempt for unsubstantiated documentary evidence.[34] For when a union witness — not of the original negotiating team — attempted to produce what he described as incomplete minutes of negotiations, the Board instructed the union that, because of the passage of time and lack of notes, such evidence would carry little probative value unless substantiated by a member of the original negotiating team. It is obvious, therefore, that without proper testimonial evidence of a "qualified witness" in support of documentary evidence, such documentary evidence may win admissibility but its probative value will be negligible.

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32 *Board of School Trustees of School District No. 68 (Nanaimo)* v. *Canadian Union of Public Employees No. 606 (Mid-Island School Employees)* [1976] BCLRB Decision 68/76.

33 *Prince Rupert Fishermen's Cooperative Association* v. *Amalgamated Shoreworkers and Clerks' Union, Local 1674* [1963] 13 LAC (2d).

34 *British Columbia Hydro and Power Authority* v. *Divisions 101, 134, and 139 of the Amalgamated Transit Union (Robertson Grievance)* [1978] 2 WLAC.

Undoubtedly, the legal dimension underlying records-keeping harbours important ramifications for both the labour movement and labour archivists alike. From labour's perspective, these legal considerations governing the admissibility of documentary evidence should alert many union officials to the value of viable records management programmes within their organizations, and almost certainly promises to reshape their attitudes towards all records of their organizations. For once aware of the importance of records management in the legal process, especially in smaller unions, the union hierarchy may cease to regard such programmes as frills and instead begin to elevate them as a part of the organization's vital lifeblood. At the same time, from the archivist's perspective, these developments promise to greatly expand his power as legal custodian of documentary evidence. They promise, too, a fuller, richer, and better organized body of union records for eventual archival preservation.

Armed with this knowledge and these concerns, labour archivists have an obvious obligation to proselytize the trade union community as a whole to ensure that the legal considerations underlying records-keeping are being met. For through this process, both archives and archivists stand to benefit greatly: by establishing earlier control over such records and in turn by facilitating their systematic transfer to an archives. To this end, the Committee of Canadian Labour Archivists recently formed in the Association of Canadian Archivists has outlined this as one of its long-term objectives.

This change may come slowly, but if as Gerald Ham has argued we are now living in the "post-custodial" age with regard to archival development,[35] then we may witness the establishment of archives and the decentralization of holdings within the labour movement itself.[36] This trend is certainly evident throughout the Canadian archival community as a whole and has been supported wholeheartedly in the recommendations of the Wilson Report on Canadian archives. Furthermore, if this drift towards decentralization becomes prevalent within unions themselves, then we may witness the steady decline of large labour collections at the national level. Whatever the eventual outcome, however, it is almost certain that many archivists and union officials will cease to view archives as something "old" and come to regard many more records as valuable documentary evidence.

In conclusion then, labour archivists should be involved in the care and custody of union records at the earliest possible stage, with a full awareness of the legal aspects of archival appraisal. Union records are an invaluable aid for any number of labour related concerns; without recourse to such documentation, unions are jeopardizing their members' interests. Unfortunately, the purging of too many union records in the interests of expediency has not only threatened labour's historical heritage but, equally importantly, has left large gaps in their documentary evidence.

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35 F. Gerald Ham, "Archival Strategies for the Post-Custodial Era," *American Archivist* 44 (Summer 1981), p. 207.

36 For an encouraging sign, see "A Proposal for a Conference on the Records of American Labour," presented by the George Meany Center for Labour Studies, 15 May 1980.