

Admissibility: A Review and Update

by **MARK HOPKINS**

The articles by Ken Chasse, Mark Hopkins, and A.F. Sheppard in *Archivaria* 18 and 19 represent different approaches to the issue of admissibility of recorded information.¹ While Sheppard gives an excellent and concise summary of admissibility rules, he essentially is stating a traditional position and fails to acknowledge the problems facing large, complex organizations. The concerns, questions, and proposals identified in the three articles are still unresolved in the “real world.” However, an update is warranted within the context of a review of some of the problems and proposed solutions for admissibility of computer records.

The thrust of Sheppard’s position on admissibility of computer records is to suggest that we leave things alone as judges will adapt procedural law to meet current records-keeping practices. He quite rightly cites *Ares v. Venner* as an example.² Unfortunately, until senior provincial appeal courts and the Supreme Court of Canada determine admissibility for computer evidence, organizations or individuals relying on digitized information systems can have no certainty regarding admissibility. This lack of certainty will likely impede the implementation of office automation and integrated technologies.

Sheppard cites *R. v. McMullen* to explain the authentication rule.³ However, he should address the problem of costs and trial time needed to explain the working of a complex computer system, its programmes (with proprietary rights to be safeguarded), and data processing procedures. It would not be unreasonable to suggest that extensive foundation evidence could negate security measures for a computer system — measures put into place at great cost and with extensive planning. Therefore, the use of foundation evidence, while a reasonable suggestion, does not work adequately for some litigation.

Considerations of cost and security aside, *R. v. McMullen* only addresses the problem of admissibility for *banking records*, which are given special hearsay exemption status not

1 These articles originated in papers presented to the Annual Meeting of the Association of Canadian Archivists in Vancouver in June 1983 by Ken Chasse and Mark Hopkins. A.F. Sheppard was the commentator.

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

3 *R. v. McMullen* (1979), 47 C.C.C. (2d) 499.

accorded other *business records*. McMullen was reviewed and effectively overruled in *R. v. Bell & Bruce*.⁴ As J. Douglas Ewart says,

The demise of the McMullen approach is emphasized by the views expressed by the court in going on to consider the new on-line systems being brought into use by the banks, about which there was some information in the transcript. Noting that in those systems the information stored in the computer is not, or is not necessarily, erased when a monthly statement is produced, Weatherston, J.A. said: "*I do not consider that to be important. There is no reason why a bank may not have a 'record' in two or more different forms, just as it might have a duplicate set of books.*"

Thus, even on the facts in McMullen, the printout would be admissible without foundation evidence as long as the bank indicated that it treated the printout as one of its regular records.⁵

If this interpretation is correct, section 29 of the *Canada Evidence Act* guarantees admissibility of banking records "by the function of banking itself," regardless of its form or whether or not the record is a copy or that multiple copies exist in different media.⁶

It would be erroneous to suggest that *R. v. McMullen* and *R. v. Bell & Bruce* lay to rest the alleged problem of admissibility for computer records. These cases, if upheld in the Supreme Court of Canada, only deal with banking records. Any business not meeting the definition of a "financial institution" will find little help in these two cases. This is the core of Chasse's argument on this point,⁷ and Sheppard has failed to address it. The business world is unable to wait the incremental clarifications that the Supreme Court of Canada will ultimately render. It has been over two years since the Motion for Leave to Appeal *Bell & Bruce* was heard by the Supreme Court of Canada. Although the case was recently heard (5 March 1985), the Reasons will not be available for some time — perhaps a year. A business wishing to implement computer technology cannot afford to wait three years and even then perhaps be impeded by the decision.

The question essentially is how can computer records be guaranteed admissibility in courts while traditional safeguards of the rules of evidence are still maintained? The cases cited by Sheppard do not resolve the situation with certainty. If the Reasons given by the Ontario Court of Appeal in *Bell & Bruce* are sustained on the appeal, only banks will have some measure of assuredness. Nor does Sheppard address the cost and security problem, unless by not acknowledging the point, the position by default becomes: so be it; that is the cost of litigation.

Chasse offers the proposal that records managers become expert witnesses so that they may be the vehicle for admitting evidence.⁸ We should be wary of the proposal if we have any concerns that employees may be subject to pressure, manipulation, and conflicting

4 *R. v. Bell & Bruce* (1982), 35 O.R. (2d) 164 (C.A.)

5 J. Douglas Ewart, *Documentary Evidence in Canada* (Toronto, 1984), p. 134.

6 *Ibid.*

7 Ken Chasse, "The Legal Issues Concerning the Admissibility in Court of Computer Printouts and Microfilm," *Archivaria* 18 (Summer 1984), pp. 177-78.

8 *Ibid.*, pp. 180-83.

loyalties.⁹ This will not be a case of a neutral third party called as expert,¹⁰ but the use of an employee of the organization to grease the axle of admissibility — albeit subject to challenge on cross-examination during a *voir dire* or trial.

These differences were aired by interveners appearing before the Senate Committee on Legal and Constitutional Affairs on Bill S-33, *The Uniform Canada Evidence Act*. This Senate bill died on the order paper in December 1983. The needed evidence provisions are still unavailable and new legislation has not yet been tabled by the Conservative government. One of the interveners on Bill S-33 was the Canadian Legislative and Regulatory Affairs Committee of the Association of Records Managers and Administrators (ARMA). With respect to computer records, the ARMA brief differed from the industry and specialist briefs as ARMA did not have a particular system to protect or a desire for special industry status (as a hearsay exemption). Essentially ARMA wanted predictable admissibility for whichever system was used in any organization.

The suggestion was made by ARMA that information systems could be audited to verify their accuracy and reliability.¹¹ This would be similar to the auditing of financial systems for tax and other purposes. Just as an organization floating debentures, selling bonds, or launching a new stock issue enhances public confidence by preparing audited financial reports, it could have an audited information system to ensure admissibility. Thus the organization can make a business decision as to whether it is more cost effective to have an audit or whether it wishes to use extensive foundation evidence and expert witnesses. One might hope that good “corporate citizens” would see other advantages in having trustworthy information systems for general corporate use, let alone for admissibility. By proposing development of a core of professional knowledge and expertise, Chasse identifies the foundation of future auditing of information systems.¹² The auditing proposal also is reflected in embryonic form in the *Microfilm as Documentary Evidence* standard (Can2-72. 11-79).

While the basic issue of admissibility of computer information is still unresolved, ARMA and the federal Department of Justice co-sponsored a National Consultation on the Admissibility of Recorded Evidence (NCARE), Ottawa, 28-29 March 1985. This national consultation brought together informed parties representing many organizations to attempt to seek a workable solution that is in harmony with traditional evidentiary rules for protecting legal rights. As one participant remarked,

There is no question that the rules of evidence regarding the admissibility of computer-produced records need to be revised. The present law, if strictly applied, would impose impractical and in some respects, unnecessary burdens on the users of computers. However ... law reform does not just

9 Mark Hopkins, “Records and Records Keepers Judicially Considered: Credibility or Convenience,” *Archivaria* 18 (Summer 1984), pp. 162-63.

10 J. Morgan Kousser, “Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing,” *The Public Historian* 6 (Winter 1984), pp. 12-17. Kousser’s article raises interesting questions on the role of the historian as expert witness which, to some extent, can be generalized to other professionals as expert witnesses.

11 Hopkins, “Records and Records Keepers,” pp. 164-65. The suggestion to use an audit system to establish trustworthiness was made during discussions with the members of the Senate Committee, not as a formal part of the ARMA brief. Representing ARMA were Dr. Jake V. Knoppers, Mark Hopkins, and Ron C. Taylor.

12 Chasse, “Legal Issues,” pp. 191-92.

concern itself with accommodating modern business realities. It also must examine how best to protect the rights of litigants. Our system of justice requires that a person against whom evidence is tendered should have a reasonable opportunity to test its reliability: this is the primary reason for the Hearsay Rule. As a general proposition it can be asserted that the more difficult it is for a person to test the reliability of evidence tendered against him, the more reluctant the courts are to receive the evidence in the case. Applying the generalization to computer-produced records it would seem that the threshold for their admissibility should be higher where the system is not susceptible of being readily checked, either due to its complexity or the limitations imposed in the name of system security.¹³

A new evidence bill should be tabled in the near future. NCARE will speed-up, it is hoped, resolution of the differing views. This should assist its passage through committee hearings and ultimately into legislation that is satisfactory to all.

13 E.A. Tollefson, "The Admissibility of Computer-Produced Records: Principles and Problems," unpublished paper prepared for the National Consultation on the Admissibility of Recorded Evidence, Ottawa, 28-29 March 1985.