

Book Reviews



Electronic Evidence in Canada. GRAHAM UNDERWOOD and JONATHAN PENNER. Toronto: Carswell, 2010. 340 p. ISBN 978-0-7798-2263-8.

Electronic Evidence in Canada (EEC) lives up to its title as a comprehensive review of the nature and rules governing the use of electronic evidence in Canadian jurisprudence. Archivists and records managers will be interested to know that it specifically addresses the concepts of record, document, authenticity, and reliability. It also addresses the role and function of records management, and digital systems for the management of records. It is surprisingly readable with relatively few specialized legal terms. The book has extensive references to Canadian case law as well as rules of practice and statutory requirements. It is surprising (to this reviewer) how much case law exists on the topic. The book's content is not limited to Canadian law, however. There are occasional references to the American and British environments, usually to highlight commonalities or differences in practice.

The concept of record is not as central to the business of identifying and preparing evidence as we in the recordkeeping community might think it is or should be, or at least it is not central in the same way. The authors assert that the "records management policies and practices of an organization can have a profound impact upon the admissibility of the organization's records at trial" (p. 3–2) but, tellingly, the inclusive term for electronic evidence is Electronically Stored Information (ESI), not electronic records. ESI is an inclusive term containing documents, records, metadata, and the informational content, whether analogue or digital. As evidence, ESI must be authentic, reliable, and material to the matter under trial. The text suggests that the archival perspective on the concept of record is important to the electronic information a lawyer wishes to have admitted in court, only insofar as it helps establish adequate certainty of authenticity and sufficient reliability to allow the information to be admitted.

The term "authenticity" is introduced early on although its meaning – "whether or not ESI that is proffered is what it is claimed to be" (p. 11–12) – is not explicitly set out until chapter 11. ESI is tested in relation to whether it is

what it is claimed to be. As such, it is very similar to authenticity as understood by recordkeepers. The authors state that from an evidence standpoint it is a binary condition: ESI is deemed to be authentic or it is not, and ESI that is not authentic is not admissible. But this “does not mean that the standard of proof for authenticity is certainty. ESI has to be shown to be authentic on a balance of probabilities” (p. 11–12). The same goes for reliability, which is the degree to which the “ESI conveys accurate information about a material fact” (p. 11–13). The authenticity and reliability of ESI is assessed before a trial (*voir dire*) to determine whether, on a balance of probability, the ESI is authentic and reliable. But acceptance of the authenticity and reliability of ESI, while a crucial first threshold to cross, is not the only test to which ESI is submitted before it will be admitted as evidence.

Establishing the authenticity of ESI is dependent on the type of evidence the ESI is intended to provide. ESI can be introduced as documentary evidence, real evidence, or demonstrative evidence. This is perhaps one of the most interesting aspects of the publication. The text traces development of the understanding of what constitutes a “document” in common law to the current inclusive understanding of a document as virtually “any medium that contains ESI” (p. 13–6). Documentary evidence has two essential characteristics:

- i) it is “a recording (in some fashion) of an out-of-court statement of fact made by a person who is not called as a witness”;
- ii) it is “tendered for the truth of the statement contained in the recording” (p. 13–13).

By contrast, real evidence permits a judge or members of a jury “to observe first-hand, to acquire knowledge of material facts directly, and to draw his or her own conclusions without the filter of a witness” (p. 12–2). An example of ESI that can be admitted as real evidence is the metadata that is automatically generated and associated with digital records when registered in a recordkeeping system. The authors express concern that Canadian courts have not been uniformly sensitive to the distinction between real and documentary evidence, and “have treated records containing computer-generated information [real evidence] in the same fashion as documentary evidence and admitted them under an exception to the hearsay rule, even though the content of the records is not hearsay” (p. 12–8). The authors reveal that the distinction in treatment is more sophisticated in American and British courts (p. 12–1).

Demonstrative evidence, may, at first consideration, be of least interest to recordkeepers. Advising that the definition of demonstrative evidence is vague, the authors advance two characteristics that distinguish this type of evidence:

- i) it is not “directly material (or relevant) to a material fact in the case”;
- ii) it “will assist the trier of fact in understanding other evidence that is material” (p. 14–1).

Examples of demonstrative evidence cited in the book range widely from the generic, such as an illustration of the operation of a system (generic because

it does not speak specifically to the facts at issue), to the specific, such as a computer-generated recreation of the events being examined. Things such as manuals or training videos that might normally be considered publications and, as such, fall outside the scope of records management or archival activities, may need to be considered for their contribution to understanding of more conventional documentary records.

Another very interesting aspect of the book for recordkeepers is the logistics of managing ESI in the context of preparing it for potential use in court. The chain of custody of ESI as evidence is comparable to the more familiar record life cycle. Chain of custody traces ESI from its creation or transactional origin through its collection, review, normalization, and use or presentation at trial. The authors observe that there “is often no issue as to the authenticity of the ESI at the earliest stage” (p. 11–19) and that “the mere possibility that an electronic document might have been altered will never be sufficient grounds to refuse its entry into evidence on the basis that the content is not reliable” (p. 13–13). The book states that the greatest threat to the authenticity and reliability of ESI occurs when it is copied from its source, and subsequently manipulated for review and presentation at trial.

The courts are encouraging – and in some provinces even requiring – that contending parties consult on the rules for identifying and preparing ESI for use. On the basis of the *Sedona Principles* (Canadian Edition),¹ and practice directions developed and adopted in British Columbia and Alberta, a National Model Practice Direction was approved by the Canadian Judicial Council in 2007, which is available online and also included as an appendix to this book.² These practice directions help all parties (including courtroom services) to address needed hardware, software, and related equipment; set out the arrangements among the parties, the Court, and third party service providers; determine the formats for the electronic common book of documents, expert reports, and discovery transcripts; and determine procedures for complying with orders regarding the trial cost sharing (p. 15–2). However, the motives for pre-trial consultation regarding ESI between the parties are primarily to prevent technological issues from dominating the litigation, thereby adding inappropriate delay and expense (p. 15–4).

The section on records management, in the “Electronic Records” chapter, is brief and focuses primarily on records management systems, record classifica-

1 *The Sedona Conference, Working Group 7 “Sedona Canada”, The Sedona Canada Principles Addressing Electronic Discovery* (Sedona, AZ: Sedona Conference, 2008), available at http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf (accessed on 2 April 2011).

2 Available as a publication at the website of the Canadian Judicial Council, [http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic\(1\).pdf](http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic(1).pdf) (accessed on 2 April 2011).

tion, and disposition. There are comments on the management of records scattered throughout, such as

... records managers should be aware that sophisticated protocols for producing records or documents internally may cause the opponent to cry foul, or to apply to the court for an order that they be permitted to enjoy the same tools to assist in document production (p. 6–14).

This advice is provided in the context of the production of documents where the resources available to the two parties to search for, and organize, information vary widely. The section is helpful in understanding the differing purposes behind managing records and producing ESI as evidence.

Electronic Evidence in Canada can be read cover to cover but it also has a good table of contents and an adequate index, and is intended more, I suspect, as a manual and reference text than a monograph. The latter sections become somewhat repetitive when reading the book cover to cover, in particular the sections in Part IV, “Use and Presentation of ESI at Trial.” This book provides recordkeepers in Canada with an invaluable perspective on our own perceptions of the nature, use, and value of records as evidence.

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