

# The Admissibility of Business Records as Legal Evidence: A Review of the Business Records Exception to the Hearsay Rule in Canada<sup>1</sup>



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**RÉSUMÉ** Les spécialistes en gestion de l'information jouent un rôle important afin d'augmenter la probabilité que les documents d'archives des entreprises soient admis comme preuves. Cet article discute du cas des documents d'archives des entreprises comme exception à la règle et il examine les façons dont ils peuvent être mis en adjudication au Canada. En faisant l'étude de la jurisprudence canadienne, l'auteur examine plusieurs critères qui pourraient contribuer à la décision d'un juge d'admettre comme preuve un document d'archives d'entreprise et il identifie les façons dont les spécialistes en gestion de l'information peuvent venir en aide à leur organisation en satisfaisant à chacun de ces critères. L'auteur affirme qu'une gestion des documents solide et structurée permet à une institution d'augmenter la probabilité que ses documents d'archives d'entreprise soient admis comme preuve.

**ABSTRACT** Records professionals play an important role in increasing the likelihood that business records will be admitted as evidence. This article discusses the business records exception to the hearsay rule and the ways in which business records may be tendered as evidence in Canada. By reviewing Canadian case law, the author examines several criteria that could contribute to a judge's decision to admit a business record as evidence and identifies ways that records professionals can help their organization satisfy each of the criteria. It is argued that the act of sound and structured record-keeping helps an organization increase the likelihood that its business records will be admitted as evidence.

1 This article is an adaptation of the author's doctoral dissertation, "Pursuing the 'Usual and Ordinary Course of Business': An Exploratory Study of the Role of Recordkeeping Standards in the Use of Records as Evidence in Canada" (PhD diss., University of British Columbia, 2013).

## Introduction

All businesses face the risk of litigation. And when they encounter legal action – as a plaintiff or a defendant – businesses turn to their records as evidence.<sup>2</sup> Records professionals (i.e., archivists and records managers) recognize that business records may constitute evidence, but what is often overlooked is that not all records *tendered* as evidence are, in fact, *accepted* as evidence.<sup>3</sup> Business records must meet certain legal criteria before a judge will admit them as evidence. In Canada, these criteria, collectively known as the business records exception to the hearsay rule, are represented in four legal authorities: common law, federal statute (e.g., *Canada Evidence Act*), provincial statute (e.g., *British Columbia Evidence Act*), and the principled approach to hearsay. Each authority contains its own set of criteria that must be satisfied for business records to be admitted as evidence. There are, however, similarities among the criteria, and several of them have implications for how organizations create and maintain their records.

In order for counsel to convince a judge that a record satisfies several of these criteria, counsel needs to be able to demonstrate the existence of, and consistent application of, accurate and up-to-date recordkeeping documentation. This article recommends ways in which records professionals can help their organization ensure that business records will satisfy three of the necessary criteria, thereby increasing the likelihood that the records will be admitted as evidence in a Canadian court of law.

## Literature Review

Records professionals have long been aware of the legal ramifications of their day-to-day duties and obligations. In her 1945 Society of American Archivist (SAA) presidential address, Margaret Cross Norton remarked that one of the

- 2 This article defines a “business” according to the *Canada Evidence Act*: “any profession, trade, calling, manufacture or undertaking of any kind carried on, regardless of location, whether for profit or otherwise, including any activity or operation carried on or performed, regardless of location, by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government” (*Canada Evidence Act*, RSC 1985, c C-5, 30(12)).
- 3 In this article, a business record refers to a type of “document [or] other material created or received by a commercial enterprise in the course of operations and preserved for future use” (Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Chicago: Society of American Archivists), s.v. “business records,” <http://www2.archivists.org/glossary>).

primary duties of the archivist is to ensure the integrity of records so that they may be used as “acceptable legal evidence.”<sup>4</sup> More than fifty years later, Iacovino made a similar but broader argument, contending that organizations and individuals create and maintain records because of the need to have evidence of their “obligations and rights.”<sup>5</sup> Notwithstanding these statements, the literature exploring the relationship between archival science and the law is relatively sparse.

Peterson and Peterson’s *Archives & Manuscripts: Law*, published in 1945, and Behrnd-Klodt’s *Navigating Legal Issues in Archives*, published in 2008, introduce legal issues to records professionals, informing them of the relevance of legal knowledge to archival functions such as appraisal and reference service. Elizabeth Shepherd and Geoffrey Yeo recommend that records professionals follow legal developments because legislation dictates the type of records an organization must create, the form in which they should be maintained, and how long they must be retained.<sup>6</sup> Strickland stresses the role of records professionals in assisting an organization with legal challenges, lamenting the fact that, too often, organizations delegate “litigation to their attorneys and they fail to include information managers and information experts as key members of the litigation team.”<sup>7</sup> He argues that records professionals play an instrumental role in helping their organization protect copyrighted or proprietary information, prevent the leaking of trade secrets, address issues of privacy in the workplace, and identify, produce, and preserve relevant documents for the discovery process. Records and archives scholars have explored in greater detail several of these topics, including copyright,<sup>8</sup>

4 Margaret Cross Norton, “Some Legal Aspects of Archives,” *American Archivist* 8, no. 1 (January 1945): 5.

5 Livia Iacovino, “The Nature of the Nexus Between Recordkeeping and the Law,” *Archives and Manuscripts* 26, no. 2 (November 1998): 219.

6 Elizabeth Shepherd and Geoffrey Yeo, *Managing Records: A Handbook of Principles and Practice* (London: Facet Publishing, 2003).

7 Lee S. Strickland, “The Law of Electronic Information: Burgeoning Mandates and Issues,” in *Effective Approaches for Managing Electronic Records and Archives*, ed. Bruce W. Dearstyne (London: Scarecrow Press, 2002), 123.

8 See Jean Dryden, *Demystifying Copyright: A Researcher’s Guide to Copyright in Canadian Libraries and Archives* (Ottawa: Canadian Library Association, 2001); and Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* (Ithaca, NY: Cornell University Library, 2009).

archival legislation,<sup>9</sup> and discovery.<sup>10</sup> There remains one subject that they have not addressed in any considerable detail: business records as evidence in a court of law.

A lack of attention to admissibility requirements might be attributed to the difficulty that records and archives scholars have had in distinguishing between legal evidence and recordkeeping evidence, or the concept of “records as evidence.” Sir Hilary Jenkinson argued that archival documents represent “first-hand evidence” of administrative actions and “form an actual part of the *corpus*, of the facts of the case,” where a case is the situation or events that led to the creation of the documents.<sup>11</sup> According to him, one of the toughest challenges archivists face is the preservation of the evidentiary capacity of these documents. Jenkinson’s American counterpart, Theodore R. Schellenberg, asserted that records have evidential value, defined as the capacity to document “the organization and function of the creating agency.”<sup>12</sup>

The concept of records as evidence has also been debated in postmodern discussions of memory<sup>13</sup>; writers have argued that records are not evidence

- 9 See Thomas E. Brown, “The Freedom of Information Act in the Information Age: The Electronic Challenge to the People’s Right to Know,” *American Archivist* 58, no. 2 (Spring 1995): 202–11; Carol Couture and Jean-Yves Rousseau, *The Life of a Document: A Global Approach to Archives and Records Management*, trans. David Homel (Montreal: Véhicule Press, 1987); John M. Dirks, “Accountability, History, and Archives: Conflicting Priorities or Synthesized Strands?” *Archivaria* 57 (Spring 2004): 29–49; Jay Gilbert, “Access Denied: The Access to Information Act and Its Effect on Public Records Creators,” *Archivaria* 49 (Spring 2000): 84–123; Claire Johnson and Moira Rankin, “Records Professionals in a Multimedia Age: Turning Lead into Gold?” in *Record Keeping in a Hybrid Environment: Managing the Creation, Use, Preservation and Disposal of Unpublished Information Objects in Context*, ed. Alistair Tough and Michael Moss (Oxford: Chandos Publishing, 2006): 85–113; and Sue McKemmish and Frank Upward, *Archival Documents: Providing Accountability through Recordkeeping* (Melbourne: Ancora Press, 1993).
- 10 Discovery is one of the initial phases of litigation that involves identifying, retrieving, reviewing, and exchanging documentation relevant to the issues in dispute between the two parties. Recent publications include Christine Ardern, “Discovery and Records Management,” in *Managing Records in Global Financial Markets: Ensuring Compliance and Mitigating Risk*, ed. Lynn Coleman, Victoria L. Lemieux, Rod Stone, and Geoffrey Yeo (London: Facet Publishing, 2011), 165–78; Brian Dirking and Raghu R. Kodali, “Strategies for Preparing for E-Discovery,” *Information Management* 42, no. 3 (May–June 2008): 56–61; Donald Force, “From Peruvian Guano to Electronic Records: E-Discovery and Canadian Records Professionals,” *Archivaria* 69 (Spring 2010): 49–75; and Randolph A. Kahn and Diane J. Silverberg, “Eight Steps for Keeping Information Management and E-Discovery on Target,” *Information Management* 42, no. 3 (May–June 2008): 48–54.
- 11 Hilary Jenkinson, *A Manual of Archive Administration* (London: Percy Lund, Humphries & Co., 1922), 4.
- 12 Theodore R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1965), 23.
- 13 Terry Cook, “Archival Science and Postmodernism: New Formulations for Old Concepts,” *Archival Science* 1, no. 1 (March 2001): 3–24; Tom Nesmith, “Seeing Archives: Postmodernism and the Changing Intellectual Place of Archives,” *American Archivist* 65,

of memories themselves but touchstones, or triggers, of memories.<sup>14</sup> Brien Brothman disputes the notion that records are evidence. Rather, he believes that evidence “arises out of processes of social negotiation after the fact ... that what evidence a record serves up – what it is evidence for – is something that only becomes manifest through later use, not during the present-centred act of record creation.”<sup>15</sup> Jennifer Meehan contends that the phrase “records as evidence” has forced archivists to choose between serving the needs of users and those of the creators of archives. As a compromise, she advocates the concept of an “archival nexus,” which “sets out how ideas about the nature of records are the common grounds supporting different ideas about the value and use of records, and reframes debates about value and conflicts between types of use as different interactions with and interpretations of records.”<sup>16</sup> This approach integrates both sides of the meaning-making process, allowing archivists to better understand how their practices relate to and affect other disciplines, such as law.

According to Barbara Creed, legal evidence represents a legally recognized fact, whereas recordkeeping evidence represents how records have been managed within a specific context.<sup>17</sup> Robert Hartland, Sue McKemish, and Frank Upward explain that records may be used both for legal purposes and as recordkeeping evidence. They state that “many documents are consciously created on paper to provide evidence or conclusive information,” and how those documents are kept “is part of our ‘official’ record, its originality is important, and there is often a legal or official aspect present in what we choose to document.”<sup>18</sup> The authors contend that, while users access documents for their ability to provide evidence of an event, they rely less on how the legal process defines documents as evidence and more on how society

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no. 1 (Spring–Summer 2002): 24–41; and Mark A. Greene, “The Power of Meaning: The Archival Mission in the Postmodern Age,” *American Archivist* 65, no. 1 (Spring–Summer 2002): 42–55.

14 Laura Millar, “Touchstones: Considering the Relationship Between Memory and Archives,” *Archivaria* 61 (Spring 2006): 105–26.

15 Brien Brothman, “Afterglow: Conceptions of Record and Evidence in Archival Discourse,” *Archival Science* 2 (2002): 334–35.

16 Jennifer Meehan, “The Archival Nexus: Rethinking the Interplay of Archival Ideas about the Nature, Value, and Use of Records,” *Archival Science* 9, no. 3–4 (December 2009): 161.

17 Barbara Creed, “Records,” in *Archives: Recordkeeping in Society*, ed. Sue McKemish, Michael Piggott, Barbara Reed, and Frank Upward (Wagga Wagga, NSW: Centre for Information Studies, Charles Sturt University, 2005), 101–29.

18 Robert Hartland, Sue McKemish, and Frank Upward, “Documents,” in *Archives: Recordkeeping in Society*, ed. Sue McKemish, Michael Piggott, Barbara Reed, and Frank Upward (Wagga Wagga, NSW: Centre for Information Studies, Charles Sturt University, 2005), 89. The authors define a *document* “as any type of discrete object that has been recorded and can be retrieved” (p. 89). They contend that, for their purposes, this term suffices since it “incorporates the notion of evidence” (p. 91).

identifies the evidential value in documents.<sup>19</sup> Hartland, McKemmish, and Upward maintain that records professionals have a vested interest in maintaining the trustworthiness of documents,<sup>20</sup> not necessarily because the documents may be used as evidence in a court of law, but because of their relevance and importance to personal, cultural, and corporate identities.

Overall, these discussions strengthen the theoretical foundations of archival science and the way in which the discipline understands the concept of record as evidence. However, this article uses the concept of evidence in a more literal sense: legal evidence in Canadian courts of law. In this article, evidence is not to be understood as something that contributes to broader social or cultural values; rather, it is to be understood as “something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact.”<sup>21</sup>

Other records and archives scholars have focused less on the dichotomous nature of records as evidence and memory and more on the challenges of using business records as potential legal evidence. For example, several authors have argued that supporting documentation, such as accession records and audit logs, may serve to establish the authenticity and reliability of business records and strengthen the possibility that the records could be used as legal evidence.<sup>22</sup> Donald Skupsky and John Montaña contend that proper records management instills routine in an organization, helping define its “usual and ordinary course of business.”<sup>23</sup> Fern Phillips recommends that records professionals create policies and procedures to show how the technology adopted in their organization is being used as part of its usual and ordinary course of business, but she argues that the process of admissibility is influenced less by this type of documentation and more by judicial discretion. Writing from a Canadian perspective, she states that the

fundamental concept of admissibility in Canada appears to be that evidence must be material and relevant, part of the normal course of business, and part of a credible and

19 Ibid., 91.

20 Trustworthiness is the quality of being authentic and reliable. An authentic record is what it purports to be and is free from tampering or corruption. Reliability is the quality of being dependable and worthy of trust.

21 *Black's Law Dictionary*, 9th ed., s.v. “evidence.”

22 Meyer H. Fishbein, “The Evidential Value of Nontextual Records: An Early Precedent,” *American Archivist* 45, no. 2 (Spring 1982): 189–90; Cyrus B. King, “The Archivist and ‘Ancient Documents’ as Evidence,” *American Archivist* 26, no. 4 (October 1963): 487–91; and P. Fern Phillips, “Case Law and the Evidence Acts in Canada,” *Records Management Quarterly* 29, no. 2 (April 1995): 3–6, 8–11, 28.

23 Donald S. Skupsky and John C. Montaña, *Law, Records and Information Management: The Court Cases* (Denver: Information Requirements Clearinghouse, 1994). The concept of the “usual and ordinary course of business” is discussed in more detail later in this article.

reliable system to be admissible. Admissibility, like any court decision, will be dictated by common sense and experience, and rules need to be open and reasonable.<sup>24</sup>

Ian Freckelton maintains that good recordkeeping practices reduce risks associated with the potential consequences of litigation.<sup>25</sup> Considering medical malpractice issues, he says that health-care practitioners must make every effort to generate full and accurate records, and this entails ensuring that the records are complete, contemporaneous to the event they are about, and in the context of the “general practice” of the practitioner (i.e., the usual and ordinary course of business).<sup>26</sup> Likewise, Shepherd and Yeo state that the circumstances surrounding how records are created (i.e., made or received and set aside) and managed will have an impact on whether a “party may attempt to repudiate or discredit a record” by arguing that the record is not authentic or is unreliable.<sup>27</sup> Shepherd and Yeo believe that documentation pertaining to the creation and management of a record will affect its evidential weight, not its admissibility.<sup>28</sup> This contention implies that the threshold for the admissibility of business records as evidence is exceptionally low, perhaps non-existent, but the authors do not support this argument with any case law examples.

Records and archives scholars have also been aware of how changing technologies create potential legal challenges that may affect professionals’ day-to-day activities. From the late 1970s until the late 1990s, the UNESCO Division General Information Programme managed the Records and Archives Management Programme (RAMP), which published research studies and guidelines on several archival and records management issues, such as archival infrastructure development, archival legislation, training and education, protection of the archival heritage, and research in archival theory and prac-

24 Phillips, “Case Law and the Evidence Acts in Canada,” 9.

25 Ian Freckelton, “Records as Reliable Evidence: Medico-Legal Litigation,” *Archives and Manuscripts* 26, no. 2 (1998): 270–93.

26 At the time of Freckelton’s publication, Regulation 13 of Australia’s Medical Practice Regulations 1998 (NSW) identified the required contents of medical records, which included the date of the treatment; the nature of the treatment; the name(s) of those who performed the treatment; the type of anaesthetic; the tissues sent to pathology; and the results or findings made in relation to the treatment. The 1998 version of this regulation has since been repealed, though the current version retains these requirements (Medical Practice Regulation 2008, no. 388, Schedule 1, “Records Relating to Patients”).

27 Shepherd and Yeo, *Managing Records*, 103.

28 The weight of evidence is “the strength, value and believability of evidence presented on a factual issue by one side as compared to evidence introduced by the other side” (*People’s Law Dictionary*, Law.com, s.v. “weight of evidence”). The weight of evidence is usually decided by the judge.

tice.<sup>29</sup> One RAMP project investigated the legal implications of the production and use of machine-readable records by public administrations.<sup>30</sup> The study concluded that archivists were aware of some of the legal challenges associated with the technology, such as preservation, privacy, access, disposal, and the evidential value of records, but in many countries relevant laws (e.g., archives acts, evidence acts, etc.) had yet to address these issues. Luciana Duranti, Corinne Rogers, and Anthony Sheppard argue that legislation may be limited in its ability to address admissibility issues because of the pace at which technology changes. In their article, they review the Canadian *Uniform Electronic Evidence Act* and contend that, while it is a step in the right direction for the Canadian judicial system, it is limited in its ability to address electronic evidence because it “presupposes a fixed technology.”<sup>31</sup> Therefore, the effectiveness of the Act is limited by the rate at which technology changes.

Duranti, Rogers, and Sheppard are not the only authors to discuss the effects of technological change on legal practices. Sara Piasecki remarks that the courts have “embraced the concept of ‘dependable systems,’” which emphasizes the processes and procedures that generated or maintained the record at issue.<sup>32</sup> This point has also been articulated by Heather MacNeil, who provides a historical analysis of how Canadian courts have assessed the trustworthiness of records, specifically electronic records, as legal evidence. Her research illustrates that records creators “face the responsibility to design systems that will provide a rebuttable presumption of integrity” despite the criteria for assessing trustworthiness over time.<sup>33</sup> Wendy Duff argues that records professionals must design their recordkeeping systems based on the criteria stipulated in legal authorities, such as the United States Federal Rules of Evidence. She contends that the statements in these authorities “provide clear instructions on how records should be kept and delineate elements need-

29 United Nations Educational, Scientific and Cultural Organization (UNESCO), “RAMP Studies,” accessed 11 July 2014, [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=4984&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=4984&URL_DO=DO_TOPIC&URL_SECTION=201.html).

30 Birgit Fredberg and Paulette Pieyns-Rigo, “Legal Implications of the Production of Machine-Readable Records by Public Administrations: A RAMP Study” (Paris: UNESCO, General Information Programme and UNISIST, 1988), accessed 13 July 2014, <http://unesdoc.unesco.org/images/0008/000809/080933eo.pdf>.

31 Luciana Duranti, Corinne Rogers, and Anthony Sheppard, “Electronic Records and the Law of Evidence in Canada: The *Uniform Electronic Evidence Act* Twelve Years Later,” *Archivaria* 70 (Fall 2010): 121.

32 Sara J. Piasecki, “Legal Admissibility of Electronic Records as Evidence and Implications for Records Management,” *American Archivist* 58, no. 1 (Winter 1995): 62. See also Livia Iacovino, *Recordkeeping, Ethics and Law: Regulatory Models, Participant Relationships and Rights and Responsibilities in the Online World* (Dordrecht, NL: Springer, 2006), 74–75.

33 Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives* (Dordrecht, NL: Kluwer Academic Publishers, 2000), 54.



ed for the records to be complete. These statements have authority or warrant for a lawyer ... because they emanate from an agency, the law, that lawyers trust and are legally bound to uphold.”<sup>34</sup> Duranti emphasizes that records professionals need to abide by a recordkeeping metadata scheme listing “all metadata required for uniquely identifying each record, and enabling the maintenance of its integrity and the presumption of its authenticity.”<sup>35</sup> She explains that this scheme will play an important role in establishing access privileges to the records, which is one of the “most important step[s] toward ensuring that the reliability and accuracy of records can be presumed.”<sup>36</sup>

Some records and archives scholars see a bigger role for records professionals in the admissibility process. John DiGilio remarks that email may be admitted once it is established that the system that produced the message was functioning properly at the time it was written and transmitted, which is often demonstrated by relying on the testimony of records professionals about “the technical soundness of an information system.”<sup>37</sup> Likewise, according to Stephen Mason, new technologies do not diminish the role of records professionals in helping an organization guard against legal risks. Mason asserts that records professionals’ biggest contribution may be their expertise in preserving digital information. He believes this skill will ensure that records retain their authenticity for the duration of any legal proceeding.<sup>38</sup>

Records and archives scholars are not the only ones advocating the role of records professionals in ensuring that a business’s records may be admitted as evidence in a court of law. In his book, Donald Skupsky, a U.S. lawyer and certified records manager, provides a comprehensive resource for records professionals as he presents American case law, a review of the Federal Rules of Evidence, and standards pertaining to the admissibility of microfilm and computer printouts.<sup>39</sup> Canadian lawyer Kenneth Chasse echoes the value of recordkeeping standards, such as the Canadian General Standards Board *Electronic Records as Documentary Evidence* (CAN/CGSB-72.34-2005), in ensuring the admission of electronic records as evidence. According to Chasse, this standard proves essential for a party to establish that the elec-

34 Wendy Duff, “Harnessing the Power of Warrant,” *American Archivist* 61, no. 1 (Spring 1998): 89.

35 Luciana Duranti, “From Digital Diplomats to Digital Records Forensics,” *Archivaria* 68 (Fall 2009): 55.

36 Ibid.

37 John J. DiGilio, “Electronic Mail: From Computer to Courtroom,” *Information Management* 35, no. 2 (April 2001): 40. DiGilio also refers to the importance that records professionals attribute to the chain of custody.

38 Stephen Mason, “Authentic Digital Records: Laying the Foundation for Evidence,” *Information Management* 41, no. 5 (September–October 2007): 32–33, 36, 38, 40.

39 Donald S. Skupsky, *Legal Requirements for Information Technology Systems: Evidence, Regulation, Government and International Requirements*, 3rd ed. (Denver: Information Requirements Clearinghouse, 1997).

tronic system from which a business record is extracted complies with a set of policy requirements accepted by the profession, thereby making the records generated trustworthy and admissible as evidence.<sup>40</sup>

In short, records and archives scholars' writings indicate that business records must meet legal standards of admissibility if they are to be used as evidence in a court of law. This point is echoed by Duff, who writes, "The mere existence of a record does not ensure that it will faithfully represent a transaction or an event; its credibility must be ensured through the establishment of reliable methods and procedures for its creation, maintenance, and use over time."<sup>41</sup> However, this literature is largely speculative in that some authors draw on anecdotal experiences, and most do not cite Canadian case law. Moreover, the authors offer little empirical research to help ascertain whether their assumptions about the role of recordkeeping practices satisfy the criteria used by the courts in determining what constitutes an admissible business record. The literature indicates that there is a need for research that bridges the gap between records and archives scholarship on the one hand and legal scholarship and court rulings on the other, specifically with regard to how each discipline can ensure that business records are admissible in a Canadian court of law. This article aims to start filling this void.

### The Law of Evidence

The admissibility of business records is a component of the law of evidence, which is one of the unique features that distinguishes the common law system from the civil law system.<sup>42</sup> The law of evidence determines which evidence is admissible in a court of law to resolve a legal dispute. The rules that govern the law of evidence have several purposes. Foremost, they facilitate the identification of facts, or the search for the truth. As Ontario Superior Court Justice Strathy observed in *Pollack v. Advanced Medical Optics Inc.* (2011), the rules "are designed to promote the determination of proceedings on their merits

40 Kenneth Chasse, "Electronic Discovery in the Criminal Court System," *Canadian Criminal Law Review* 14, no. 2 (2010): 111–80. See also three other articles by Kenneth Chasse that address similar issues: "The Legal Issues Concerning the Admissibility in Court of Computer Printouts and Microfilm," *Archivaria* 18 (Summer 1984): 166–201; "Electronic Records as Documentary Evidence," *Canadian Journal of Law and Technology* 6, no. 3 (2007): 141–62; and "Electronic Records for Evidence and Disclosure and Discovery," *Criminal Law Quarterly* 57, no. 2/3 (2011): 284–326.

41 Duff, "Harnessing the Power of Warrant," 88.

42 For more in-depth comparative analysis of the common law and civil law systems, see Gerald L. Gall, *The Canadian Legal System*, 3rd ed. (Vancouver: Carswell, 1990), 28–30; Livia Iacovino, "Recordkeeping and the Law: General Introduction," *Archives and Manuscripts* 26, no. 2 (November 1998): 194–215; Peter G. Stein, "Roman Law, Common Law, and Civil Law," *Tulane Law Review* 66, no. 6 (June 1992): 1591–1604; and C.G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 43–46.

... and to ensure that each party is given a fair hearing, all having regard to concerns of efficiency and economy.”<sup>43</sup> However, one of the major challenges is that evidence depicting a fact is not the fact. Rather, evidence is a representation of the fact and allows for subjective interpretations about what actually occurred.<sup>44</sup> Which evidence is used in court and how it is presented by counsel may influence how the court determines the truth and establishes innocence or guilt. The laws of evidence developed so that judges may have more consistent control over what evidence is admitted in court and, as a result, what evidence the jury may access and how counsel is allowed to present the evidence.<sup>45</sup> In particular, judges sought to guard against the use of hearsay evidence at trial.

### Hearsay Evidence and the Hearsay Rule

Most documentary evidence, which typically includes business records, is considered hearsay. Hearsay is a statement, oral or written, made outside of the courtroom, that is accepted for the truth of its contents. When hearsay evidence is submitted for the truth of its contents, the evidence is inadmissible unless it satisfies an exception to the rule against hearsay. For example, person A is suspected of killing person B with a knife. Person A states to person C that he killed person B. Person C is called to testify about the murder and states what person A told him. Person C’s testimony about what A said, if accepted as the truth, is hearsay.<sup>46</sup>

The exclusion of hearsay evidence, otherwise known as the “hearsay rule,” is intended to support a fair trial. In *Practical Treatise of the Law of Evidence*, Thomas Starkie explains that hearsay evidence is not admissible because it is “not a fact connected with the transaction, from which any *reasonable presumption* can be drawn as to the truth of the disputed fact....”<sup>47</sup> The hear-

43 *Pollack v. Advanced Medical Optics Inc.*, 2012 ONSC 1850 (CanLII) at para 25. A note on case citations in this article: Cases cited are drawn from the databases of the Canadian Legal Information Institute, known and abbreviated as CanLII, and from LexisNexis Legal, also known as QuickLaw (abbreviated as “QL”). When available, the paragraph number is cited (e.g., “at para 5”). In instances where the ruling does not contain paragraph numbers, this author converted the ruling to a PDF file (a feature available in both databases), formatted the pages to standard 8½” x 11” size, and cited the page number of the PDF file (e.g., “at 6”).

44 Ron Delisle and Don Stuart, *Evidence: Principles and Problems*, 6th ed. (Toronto: Carswell, 2001), 5.

45 John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), 3.

46 Hearsay evidence may also be admitted if the evidence is being tendered to establish that the statement was made, rather than to establish its truthfulness. Continuing with this example, C’s testimony about what A said would not be deemed hearsay if it is sought to be admitted simply to establish that A said the words, not whether the words were truthful.

47 Thomas Starkie, *Practical Treatise of the Law of Evidence: And Digest of Proofs in Civil and Criminal Proceedings* (London: J. & W.T. Clarke, 1824), 40–41 (emphasis in original).

say rule developed from the court's distrust of the jury's ability to assess the evidence properly in light of the facts of the case.<sup>48</sup> Judges were aware that hearsay evidence could be misleading or could prejudice a judgment because the person who made the statement was not under oath when he/she said or wrote it, or because the witness could not be cross-examined.<sup>49</sup> This meant the court could not observe the witness responding and thus gauge the reliability of the statement based upon the witness's behaviour.<sup>50</sup>

Once the hearsay rule became entrenched in the law of evidence in the common law system, the courts realized that exceptions needed to be made because the probative value of certain hearsay evidence exceeded its potential dangers. By the early nineteenth century, the courts had created several exceptions to the hearsay rule, one of which applied to entries made in the normal course of business.<sup>51</sup>

### **Business Records Exception to the Hearsay Rule**

Prior to the seventeenth century, business records were submitted under the "shop book" rule. Shop books, or books in which a business owner recorded financial transactions, were important pieces of evidence in legal disputes involving paid or unpaid debts. A business owner's shop books could be used "as evidence for himself, both in his lifetime and after his death."<sup>52</sup> This rule eventually became incorporated into the entries "made in the course of a particular routine of business" exception to the hearsay rule.<sup>53</sup> And by the

48 Ibid., 46.

49 John Henry Wigmore, one of the most influential legal writers of the twentieth century, considered the development of cross-examination to be "the most efficacious expedient ever invented for the extraction of the truth." See John Henry Wigmore, "A General Survey of the History of the Rules of Evidence," in *Select Essays in Anglo-American Legal History*, comp. and ed. Committee of the Association of American Law Schools, vol. 2 (Boston: Little, Brown, and Company, 1908), 694.

50 J. Douglas Ewart, *Documentary Evidence in Canada* (Agincourt, ON: Carswell Legal, 1984), 12–14.

51 This exception was one of seven that Starkie identified in the first volume of *Practical Treatise of the Law of Evidence and Digest of Proofs, in Civil and Criminal Proceedings* (1824). The other six exceptions are: (1) public documents made by the appropriate authority; (2) statements that were themselves an inherent part of the transaction (the *res gestae* exception); (3) statements to which the party was privy; (4) admissions made by the party himself; (5) evidence of reputation in cases involving questions of pedigree, prescription, custom, or boundary; and (6) declarations or entries made by a deceased person against his interest, or at least suggesting no interest in falsification.

52 James Bradley Thayer, *Select Cases on Evidence at the Common Law: With Notes* (Cambridge: Charles W. Sever, 1892), 471.

53 Unlike in England and Canada, the shop book rule continued to have some relevance as a unique exception in the United States until the early twentieth century. For discussions of how this rule evolved in the United States, see "The 'Shop Book' Rule," *Bench and Bar* 12, no. 1 (1908): 14–27; John Henry Wigmore, *A Treatise on the Anglo-American System of*

twentieth century, the “business records exception to the hearsay rule” (as it would come to be known) had seven criteria. To be admitted as evidence, the record needed to be:

(i) an original entry, (ii) made contemporaneously with the event recorded, (iii) in the routine, (iv) of business, (v) by a person since deceased, (vi) who was under a specific duty to another to do the very thing and record it, (vii) and who had no motive to misrepresent.<sup>54</sup>

Implicit in these criteria was the notion that the person who created or maintained the record would be the one to testify about the record. Only in situations where the person who created the record had died could the record be admitted, given that the record satisfied the other six criteria.

From the inception of the Canadian court system in the second half of the nineteenth century, Canadian judges used these seven criteria to determine whether a business record should be admitted as evidence. In 1970, the Supreme Court of Canada made a subtle but significant change to these criteria with its ruling in *Ares v. Venner*: the Supreme Court no longer required that the person who created the record testify about the record. Counsel could call a witness who was familiar with the process that created the record in question – the witness no longer had to have seen or experienced the events that led to its creation. Thus, the *Ares* decision eliminated the condition that the person who created the record could not testify because he/she was deceased. As a result of the *Ares* ruling, the original seven criteria are now typically cited by Canadian judges and legal scholars as the following five criteria.<sup>55</sup> For a business record to be admitted as evidence according to the common law authority, it must be made:

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*Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada*, 2nd ed., vol. 3 (Boston: Little, Brown, 1923), 258; and *Radtke v. Taylor* (1922), 105 Ore 559 (Sup Ct), 27 ALR 1423.

54 Ewart, *Documentary Evidence in Canada*, 46–47.

55 Since *Ares*, Canadian courts have also removed the criterion that the record needs to be an original entry. The “best evidence rule,” as it was originally intended, has been rendered mostly obsolete. See *Sierra Club of Canada v. Canada (Minister of Finance)* (1999), 163 FTR 109 (FC), 1999 CanLII 7756 at para 9. For additional information about the best evidence rule, see Luciana Duranti and Corinne Rogers, “Trust in Digital Records: An Increasingly Cloudy Legal Area,” *Computer Law & Security Review* 28 (2012): 522–31; Deborah R. Elgroth, “Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence,” *Fordham Law Review* 78, no. 1 (2009): 181–215; Colin Miller, “Even Better than the Real Thing: How Courts Have Been Anything but Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals under Rule 1003,” *Maryland Law Review* 68, no. 1 (2008): 160–220; Dale A. Nance, “The Best Evidence Principle,” *Iowa Law Review* 73, no. 2 (January 1988): 227–97; and Ann E. Tomeny, “Best Evidence and the Authentication of Documents,” *Loyola Law Review* 21 (1975): 450–75.

1. reasonably contemporaneously;
2. in the ordinary course of duty;
3. by a person who has personal knowledge of the record or events that led to the creation of the record;
4. by a person who is under a duty to make the record; and
5. when there is no motive to misrepresent the matters recorded.<sup>56</sup>

The business records exception to the hearsay rule also exists in federal, provincial, and territorial legislation. For example, the business records exception provision currently exists as section 30 of the *Canada Evidence Act*, section 35 of the Ontario *Evidence Act*, and section 42 of the British Columbia *Evidence Act*. As discussed below, the wording of the provision varies from act to act, but there are similarities because in all cases the provision is derived from the common law authority.

The business records exception to the hearsay rule has also been incorporated into Canada's most recently created admissibility authority, the principled approach to hearsay.<sup>57</sup> This authority developed in 1990 as a result of the Supreme Court of Canada's ruling for *R v. Khan*. It was subsequently applied and developed in later Supreme Court of Canada rulings: *R v. Smith* (1992),<sup>58</sup> *R v. B(KG)* (1993),<sup>59</sup> *R v. Starr* (2000),<sup>60</sup> and *R v. Khelawon* (2006).<sup>61</sup> The principled approach to hearsay affords Canadian judges more discretion when determining whether evidence satisfies the principles of necessity and the circumstantial guarantee of trustworthiness, or what Canadian courts often refer to as "the criterion of reliability."<sup>62</sup> The principle of necessity is often satisfied when the court determines that the benefit(s) of the evidence at issue would be lost if the court rejected its admissibility, even if the trustworthiness of the evidence cannot be assessed.<sup>63</sup> The criterion of reliability is satisfied when the courts recognize that "the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness."<sup>64</sup> This is often done when testimony and/or supporting documentation convinces a judge that there is minimal likelihood that the record has been tampered with or altered.<sup>65</sup>

56 David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Inc., 2008), 167.

57 The principled approach to hearsay is a development in common law. However, this approach has been perceived and used by Canadian courts as a separate admissibility authority.

58 *R v. Smith*, [1992] 2 SCR 915, [1992] SCJ no. 74 (QL).

59 *R v. B(KG)*, [1993] 1 SCR 740, [1993] SCJ no. 22 (QL).

60 *R v. Starr*, 2000 SCC 40, [2000] SCJ no. 40 (QL).

61 *R v. Khelawon*, 2006 SCC 57, [2006] SCJ no. 57 (QL).

62 *R v. Smith*, [1992] 2 SCR 915, [1992] SCJ no. 74 (QL) at para 33.

63 *Ibid.*

64 *R v. B(KG)*, [1993] 1 SCR 740, [1993] SCJ no. 22 (QL) at 104.

65 For example, see *R v. Bisson*, 2009 ONCJ 283, [2009] OJ no. 2764 (QL) at paras 35–41 and 110.

As previously mentioned, each authority has its own set of criteria that must be satisfied for a record to be admitted as evidence; however, the criteria overlap. The remainder of this article focuses on three admissibility criteria and how records professionals may be able to assist legal counsel to increase the likelihood that their records will be admitted as evidence in a Canadian court of law.

### **Analysis of Admissibility Authorities**

An examination of the business records exception to the hearsay rule, as it is presented in the four admissibility authorities, highlights three criteria that have implications for how an organization creates and maintains its records. The criteria are:

1. A witness who has personal knowledge of the record at issue or the events that led to the creation or management of the record.
2. Evidence that convinces a judge that the record was created in the usual and ordinary course of business.
3. Evidence that convinces a judge that the record was created at or near the time of the event that it depicts, a concept known as “contemporaneity.”

This section explains each of the criteria, reviews several Canadian rulings in which judges addressed each of the criteria when evaluating business records tendered as evidence, and discusses ways in which records professionals can help their organization satisfy each of the criteria.

### **Witness with Personal Knowledge of the Record or Event**

#### ***Explanation of the criterion***

For a business record to be admitted as evidence at common law, the record must be generated by a person with knowledge of the facts the record represents. The *Canada Evidence Act* and *British Columbia Evidence Act* both adopted this criterion for admission or exclusion. The beginning of subsection 30(1) of the *Canada Evidence Act* states, “Where oral evidence in respect of a matter would be admissible in a legal proceeding...” Likewise, the opening sentence of subsection 42(2) of the *British Columbia Evidence Act* reads, “In proceedings in which direct oral evidence of a fact would be admissible...” These statements serve two purposes when applied to business records. First, a witness must have sufficient knowledge about how the record was created and managed within the business and/or how the record was produced for court. Second, the court must not accept opinions because they are often speculations

or guesses and, therefore, are not based on personal knowledge.<sup>66</sup>

The Ontario *Evidence Act* approaches the concept of “direct oral evidence” slightly differently. Subsection 35(2) of the Act states that any “writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event...” Despite the difference in wording, Ontario judges have interpreted this section to mean that opinions should not be admitted as evidence.<sup>67</sup> Justice Hryn remarked that for a witness to satisfy subsection 35(1) of the Ontario *Evidence Act*, he/she needs first-hand knowledge about how the record was made or the process by which it was made; if a witness describes the creation of the record with phrases such as “It appears,” “I would think so,” or “I assume it would,” the testimony would not satisfy the criterion.<sup>68</sup>

There are several examples when witnesses demonstrated sufficient knowledge about records or recordkeeping processes and judges therefore admitted the records in question. In *Urbacon Building Groups Corp v. Guelph (City)* (2012), the defendant, the City of Guelph, objected to the admissibility of a photocopy of a time sheet allegedly recording hours for one of the employees of Swan and Associates Inc., a subcontractor that had filed a claim for a lien. The City of Guelph contended that the evidence should not be admitted because it was hearsay. Justice Corbett disagreed, however. The time sheet was admitted after an employee of Swan Associates and the manager, Ms. Swan, both testified to the process used to record such sheets. Ms. Swan explained to the court the recordkeeping practices at Swan Associates (i.e., how the time sheet was made and maintained), and she was also able to confirm the meaning of several annotations made on the time sheet in her handwriting.<sup>69</sup> This witness testimony about recordkeeping procedures served to confirm the reliability of the record.

In *R v. Bisson* (2009), the accused was charged with driving a water vehicle while intoxicated. Crown counsel tendered as evidence a lab specimen report and an internal inquiry report, both pertaining to toxicology screen tests. To establish the reliability of the records, Crown counsel called as witnesses the two medical laboratory technologists who created the reports. Though neither could recall the specific analysis, they both described the procedures followed to produce such reports.<sup>70</sup> Therefore, because witnesses could and did provide

66 See *R v. Ross* (1991), 92 Nfld & PEIR 51 (SC (TD)), [1991] NJ no. 240 (QL) at 7. Furthermore, subjective opinions should not be confused with opinions made by expert witnesses who draw their conclusions from facts. Expert witness testimony is admissible.

67 *Slough Estates Canada v. Federal Pioneer Ltd.* (1994), 20 OR (3d) 429 (Gen Div), [1994] OJ no. 2147 (QL) at para 65.

68 *R v. Felderhof*, 2005 ONCJ 406, [2005] OJ no. 4151 (QL) at para 110.

69 *Urbacon Building Groups Corp v. Guelph (City)*, 2012 ONSC 81, [2012] OJ no. 56 (QL) at para 37.

70 *R v. Bisson*, 2009 at paras 35–41.



direct knowledge about the procedures and practices that led to the creation of the records, Justice Lambert deemed the records to be reliable.<sup>71</sup>

In cases where a judge applies the principled approach to hearsay, a witness who can testify as to how, when, and why a record was created and/or managed will affect a judge's decision about the criterion of reliability. For example, in *R v. Wilcox* (2001), the Nova Scotia Court of Appeal overturned the lower court's decision not to admit a "crab book" that contained a record of the shipments received from fishermen and the payments made to them by Glace Bay Fisheries.<sup>72</sup> The Court of Appeal determined that the book satisfied the criterion of reliability because direct testimony from Mr. Kimm, an employee of Glace Bay Fisheries who was responsible for creating the book, established that he maintained it in the normal routine of his daily activities and that its contents were accurate. Mr. Kimm stated that none of the fishermen disputed the payments received from the company.<sup>73</sup>

Canadian case law also contains a number of examples when business records were *not* admitted as evidence because the witness could not provide appropriate information about how the record was created, managed, or produced. For example, in *Canadian Imperial Bank of Commerce v. McKinnon* (1981), the defendants tendered banking account cards as evidence. The defendants called on the bank branch manager to testify, but the manager "had no knowledge of the transactions recorded."<sup>74</sup> Justice Taylor ruled that these records did not satisfy subsection 42(1) of the British Columbia *Evidence Act* because "the defendants know no more about the banking transactions than the manager. I do not accept the contention that the Court can place any reliance in such circumstances on the mute record of the account."<sup>75</sup>

### ***Relevance to recordkeeping practices***

The value of good witness testimony in a legal dispute cannot be underestimated. The challenge may lie in the identification of the appropriate witness. Testimony provided may strengthen counsel's case by helping the judge understand the circumstances of the creation of the record. The judge will use this information to determine whether the record is reliable and should be admitted as evidence.

Records professionals may serve as witnesses because they are familiar with the processes of records creation and maintenance in the system. In the event that records professionals are not needed as witnesses, recordkeeping

71 Ibid., at para 110.

72 *R v. Wilcox*, 2001 NSCA 45, [2001] NSJ no. 85 (QL).

73 Ibid., at paras 68–69.

74 *Canadian Imperial Bank of Commerce v. McKinnon*, [1981] BCI no. 188 (QL) (SC) at para 3.

75 Ibid., at para 9.

documentation, such as policies and procedures, may assist counsel to identify the appropriate employee to testify. Recordkeeping policies may specifically indicate job responsibilities and designate which records some employees are responsible for creating and/or managing.

Records professionals may also be responsible for other information that could facilitate the identification of key witnesses. Sign-off documents, access logs, data maps, and metadata could facilitate the process of determining who created or maintained the record and thus who may or may not be able to testify about its trustworthiness.<sup>76</sup> For example, the properties assigned by word-processing software may document who created or edited a record. And the use of names or initials found in marginal notes might confirm who reviewed or annotated the record, illustrating a chain of custody.

The existence of clear, precise, and up-to-date policies, procedures, and other recordkeeping documentation may provide counsel with useful information when identifying the appropriate employee to testify about a record. Records professionals need to understand the importance of establishing and maintaining these documentation processes so that personnel can demonstrate organizational compliance and accuracy when identifying the appropriate employee to testify about a record or the work process whereby it was created or maintained.

## Usual and Ordinary Course of Business

### *Explanation of criterion*

The common law authority, the *Canada Evidence Act*, the *British Columbia Evidence Act*, and the *Ontario Evidence Act* all contain the phrase “usual and ordinary course of business.” In cases where a judge applies the principled approach to hearsay, knowing whether a record was created in the usual and ordinary course of business will contribute to the judge’s decision about the criterion of reliability. From a judicial perspective, demonstrating the usual and ordinary course of business in the organization helps a judge determine if the record is trustworthy. The fact that a record is created in a systematic and routine manner limits the likelihood that it may have been altered.<sup>77</sup> In

76 A data map is “a comprehensive and defensible inventory of an organization’s IT systems ... a repository for data and information mapped to business units, data stewards, and custodians,” which can help an organization understand the relationship of its records to its employees, business processes, and business functions (Bobby Balachandran, “Tech Trends: 5 Steps to Compliance: Building an Automated Data Map,” *Information Management* 43, no. 6 (November–December 2009): 40. See also David Wetmore and Scott Clay, “To Map or Not to Map: Strategies for Classifying Sources of ESI,” *Information Management* 43, no. 5 (September–October 2009): 33–40.

77 *R v. Dunn*, 2011 ONSC 2752, OJ no. 2221 (QL) at para 15.

the British Columbia Court of Appeal ruling for *Olynyk v. Yeo* (1988), Justice Southin explained the concept of “usual and ordinary course of business” as follows:

For instance, if a meteorologist records in the usual documents of his office that it was raining at such and such a time, whether he saw the rain or a fellow meteorologist did, the document is admissible to prove that it was raining. But if he writes down that his fellow meteorologist saw an accident on his way to work, that is not a fact being recorded in the usual and ordinary course of his business and is not admissible as such in proof of the occurrence of the accident.<sup>78</sup>

Business records have been admitted in cases when a witness convinced the judge that a record was created in the usual and ordinary course of business. For example, in an Ontario case, *Children’s Aid Society of Simcoe County v. TW* (2012), the applicant sought to introduce as evidence three separate records: a service plan recording, a family risk reassessment, and a family and child strengths and needs assessment. Justice Healey ruled that these records could be admitted because counsel for the applicants satisfied the conditions for admissibility, specifically that the record was made in the usual and ordinary course of business because in “this case the documents are all pre-printed forms bearing the logo of the Children’s Aid Society of Toronto, and are all documents commonly seen by those familiar with the field of child protection.”<sup>79</sup>

Canadian case law is also rife with instances when a judge ruled that a business record or set of records did not satisfy the criterion of usual and ordinary course of business. For example, in *R v. Dunn* (2011) the defendants faced multiple charges of fraud. Crown counsel tendered several memoranda as evidence of interviews made by the law firm of Wilmer, Cutler, and Pickering during an audit of Nortel Networks Corporation (of which Mr. Dunn was the chief executive officer). Justice Nordheimer of the Ontario Superior Court of Justice ruled that an interview memorandum could not be admitted as evidence because the audit process

strains any reasonable interpretation of the words “usual and ordinary” to attempt to embrace what [Wilmer, Cutler, and Pickering] was engaged in within the ambit of those terms. There was nothing usual about the situation in which Nortel found itself. To the contrary, the situation was completely unusual and that is the very reason why the Audit Committee acted as it did. At the same time, there was nothing ordinary about the role of [Wilmer, Cutler, and Pickering] or the task that it undertook.<sup>80</sup>

78 *Olynyk v. Yeo* (1988), 33 BCLR (2d) 247 (CA), [1988] BCJ no. 2289 (QL) at 7.

79 *Children’s Aid Society of Simcoe County v. TW*, 2012 ONSC 3604, [2012] OJ no. 2872 (QL) at para 9.

80 *R v. Dunn*, 2011 at para 16. Justice Nordheimer also ruled that the interview memorandum

In other words, the memorandum resulted from an event that was an anomaly at Nortel. These records were not created in a systematic or routine process that ensured they possessed a circumstantial guarantee of trustworthiness.

In *R v. Bath* (2010), Crown counsel tendered cheques from the Cheque Redemption Control Directorate (CRCDD) of Canada. Justice Holmes did not admit the cheques because the affidavits used to admit the records failed

to indicate that signatures in apparent endorsement of redeemed cheques are “information” that CRCDD or the Government records in the usual and ordinary course of its business. Moreover, the affidavits do not even confirm that the cheques bore such signatures when CRCDD took custody of the cheques, or that the cheques remained in the state in which they were received, while they were in CRCDD custody.<sup>81</sup>

This ruling demonstrates that lack of evidence regarding the recordkeeping practices of an organization is sufficient reason for a judge not to admit a business record as evidence. The cheques tendered as evidence might, in fact, have been trustworthy, but counsel did not offer enough evidence about the process in which they were created and managed to convince the judge that the cheques had not been altered.

### ***Relevance to recordkeeping practices***

Records professionals may assist counsel to define the usual and ordinary course of business that created the record, that is, the fact that a record was a by-product of a routine or systematic process. For many records at issue, counsel must provide evidence about the business routine or process that led to the creation of the record and/or controlled the record. In situations where the author of the record is still alive and is employed by the business, it should be sufficient to require that individual to testify in court or provide an affidavit about the record. However, in situations where the author of the record cannot testify because he/she is deceased or cannot be located, counsel may need to rely on a person familiar with the process that led to the creation of the record. That person may be the records manager.

The importance of recordkeeping policies and procedures also contributes to a judge’s understanding of the context in which a record was created. These documents may help counsel articulate to the court the usual and ordinary course of business that created the record. According to the Canadian General Standards Board’s (CGSB) *Electronic Records as Documentary Evidence*, records policies and procedures may provide evidence of the usual and ordi-

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did not satisfy the reliability principle of the principled approach to hearsay for this same reason (see para 35).

81 *R v. Bath*, 2010 BCSC 1137, [2010] BCJ no. 2851 (QL) at para 45.

nary course of business,<sup>82</sup> but only when documents are regularly maintained and updated. In the absence of a reliable witness or accurate and up-to-date recordkeeping documentation, Canadian courts are quick to exclude business records as evidence.

## Contemporaneity

### *Explanation of criterion*

The concept of the contemporaneous creation of evidence, known as the “ground-zero” theory, argues that the “truth” is best obtained and more accurate the closer in time it is captured to the event it represents.<sup>83</sup> The common law authority, the British Columbia *Evidence Act*, and the Ontario *Evidence Act* explicitly require counsel to demonstrate that a business record was created at or near the time of the event that it depicts. Subsection 35(2) of the Ontario *Evidence Act* states that “any writing or record made of any act, transaction, occurrence or event is admissible as evidence 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.” The British Columbia *Evidence Act* contains similar language: subsection 41(2) states that “a statement of a fact in a document is admissible as evidence of the fact if it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.” Moreover, when applying the principled approach to hearsay, judges have applied the concept of contemporaneity to determine whether a record satisfies the criterion of reliability.<sup>84</sup>

Though the criterion of contemporaneity has an important role in the admissibility process, Canadian judges use their discretion to determine whether a record was made “contemporaneously” or “within a reasonable time thereafter.” For example, in *R v. Palma* (2000), Justice Watt remarked that arrest records and a supplementary police report could not be admitted as evidence because there “was no completion of the statement contemporaneously with the act.”<sup>85</sup> In *R v. Graham* (1980), the defendant was accused of failure to pay his taxes from 1974 to 1976. Crown counsel tendered a 1977 audit report as evidence, but Justice Sharpe did not admit the report as evidence because it did not satisfy the criterion of being made contemporane-

82 *Electronic Records as Documentary Evidence*, CAN/CGSB-72.34-2005 (Gatineau, QC: Canadian General Standards Board, 2005), 17–18.

83 MacNeil, *Trusting Records*, 44–46.

84 For example, see *R v. Losani Homes (1998) Ltd.*, 2007 ONCJ 634, [2007] OJ no. 5236 (QL) at para 77 and *R v. Bath*, 2010 at paras 72 and 78.

85 *R v. Palma*, 2000 ONSC 22806 (CanLII) at para 79.

ously to the event.<sup>86</sup> In *Sandhu v. Gill* (1999), the plaintiff was unsuccessful in his attempt to enter as evidence the clinical records of a massage therapist. Justice Burnyeat did not admit the records because there was no evidence that the entries in them were “recorded contemporaneously or within a reasonable time thereafter.”<sup>87</sup>

*R v. Ballantyne* (2008) is an example in which the accused opposed a record on the grounds that it was not made contemporaneously and, therefore, not made in the usual and ordinary course of business. Crown counsel tendered three printouts of screenshots from the computer of an administrative security officer with the Headingley Correctional Centre. This security officer, one of Crown counsel’s witnesses, also testified about the process followed to create the records shown in the screenshots. The admissions officer “described the inputting of information into the [computer] system ... where information is entered to keep track of inmate movement.”<sup>88</sup> Another witness, a unit staff correctional officer, testified about the operations of the computer system and about the process of tracking the movement of inmates. The testimony from these two witnesses was enough to establish the reliability of the records and satisfy the business records exception to the hearsay rule at common law and section 30 of the *Canada Evidence Act*, because the witnesses confirmed that the records were made within a reasonable time after the event and in the usual and ordinary course of business.<sup>89</sup>

### ***Relevance to recordkeeping practices***

The courts do not provide a definitive rule about how long after an event a record can be created and still be admitted as evidence. In none of the previous cases does a judge explain how soon a record would need to be made after the event in order for it to satisfy the criterion. Still, records professionals cannot overlook the importance of ensuring that records are created in a timely fashion. Though this responsibility will ultimately rest with the employee responsible for creating, receiving, and/or managing the record as a part of his/her work, recordkeeping policies may help clarify records creation practices to support this component of admissibility. For example, policies should require that certain records, such as meeting minutes or reports, be drafted as soon as possible after the event that they depict. Requiring timely record making, and ensuring that employees are aware of the legal importance of generating records as close as possible to the time of the event in question, may reduce

86 *R v. Graham* (1980), 55 CCC (2d) 266 (Prov Ct (Crim Div)), [1980] OJ no. 3928 (QL) at paras 17–18.

87 *Sandhu v. Gill* (1999), 93 ACWS (3d) 670 (BCSC), [1999] BCJ no. 2870 (QL) at para 13.

88 *R v. Ballantyne*, 2008 BCSC 1566, [2008] BCJ no. 2691 (QL) at para 7.

89 *Ibid.*, at paras 5–16.

the possibility that the record will not be admitted as evidence. With electronic records, metadata will increasingly play a vital role in establishing who authored a record and when, as well as when the record was last modified. Therefore, electronic recordkeeping systems should be regularly audited to verify that their clocks are correct. Metadata may provide evidence that exonerates a party that creates records in a timely fashion or it may damage a party that is proven to have lied about when a record was made or by whom.

### Summary of Criteria

The review of the three criteria above demonstrates that Canadian courts require businesses to be transparent about how they create and maintain their records. As Justice Holmes noted in *R v. Bath*, “I will say that weaknesses in the state of the KCU records and record-keeping practices regarding the documents in issue ... does not allow me to draw the usual inferences that apply to records of a financial institution, particularly in relation to documents pertaining to the accounts under scrutiny in this case.”<sup>90</sup> To convince a judge that a tendered business record is reliable, counsel requires testimony from a person familiar with the record itself, or proof of the accuracy and timeliness of the business’s recordkeeping practices. Records professionals are responsible for understanding these matters. Thus, records professionals can help legal counsel identify witnesses to testify about the trustworthiness of records, and may themselves provide important testimony or documentation, such as policies and procedures that contribute to how an organization defines its “usual and ordinary course of business,” demonstrating that a record in question was made at or near the time of the event it depicts.

Records professionals should ensure that employees are aware of legal issues associated with recordkeeping practices. Employees should understand that they have a legal obligation to create records in the usual and ordinary course of business and that records need to be made contemporaneously with the events they depict. Employees can be made aware of these matters through in-house training seminars, recordkeeping policies and procedures orientation, frequent updates from legal counsel regarding any legal actions the business faces, and regular guidance about how to manage records appropriately. Employers are responsible and should be held accountable to ensure that employees adhere to the policies and procedures and that they know the risks of not creating records in the usual and ordinary course of business.

Finally, readers will have observed that the discussion of the three criteria focused primarily on paper-based records. The vast majority of business records tendered as evidence in Canadian courts up to the present time are

90 *R v. Bath*, 2010 at para 78.

presented in their paper format, despite the fact that many may have originated as born-digital records. As the next section discusses, counsel continues to rely on the traditional criteria of the business records exception to the hearsay rule when tendering records as evidence.

### Admissibility of Electronic Records

Legal scholars have argued that “digital technology has fundamentally changed the world of real evidence, particularly regarding authentication of informational records,”<sup>91</sup> and that the judicial system needs to create new foundations to ensure the information’s authenticity.<sup>92</sup> Some Canadian legislation has been created and amended specifically to address the admissibility of electronic records. For example, in 1988 the province of Prince Edward Island assented its *Electronic Evidence Act*, RSPEI 1988, c E-4.3, and two years later the legislator of the Yukon Territories assented its version of the same statute: *Electronic Evidence Act*, RSY 2002, c 67. In 2000, Canadian federal legislators added subsections 31.2–31.8 of the *Canada Evidence Act*, while Ontario legislators amended the Ontario *Evidence Act* to include subsections 34.1(1)–34.1(11); both amendments specifically address the admissibility of electronic evidence.<sup>93</sup>

As explained by Justice Greene of the Ontario Court of Justice, these amendments have not created a new exception to the hearsay rule; rather, they provide

an authentication process and route to admissibility of computer generated documents where normally original documents would be required. In order to admit computer generated documents for the truth of their contents, in the absence of the author of the documents, either section 30 of the [*Canada Evidence Act*] must be complied with, or some other exception to the hearsay rule must be applied.<sup>94</sup>

Justice Flynn of the Newfoundland and Labrador Provincial Court echoed Justice Greene, saying that subsections 31.1 and 31.2 of the *Canada Evidence Act*

91 George L. Paul, “The ‘Authenticity Crisis’ in Real Evidence,” *The Practical Litigator* 15, no. 6 (November 2004): 46. See also Rudolph J. Peritz, “Computer Data and Reliability: A Call for Authentication of Business Records under the Federal Rules of Evidence,” *Northwestern University Law Review* 80, no. 4 (1986): 956–1002; and Stanley A. Kurzban, “Authentication of Computer-Generated Evidence in the United States Federal Courts,” *IDEA: The Journal of Law and Technology* 35, no. 4 (1995): 437–60.

92 George L. Paul, *Foundations of Digital Evidence* (Chicago: American Bar Association, 2008).

93 At the time of writing, the British Columbia *Evidence Act* does not contain an electronic record provision or legislation that specifically addresses electronic records.

94 *R v. Mondor*, 2014 ONCJ 135, [2014] OJ no. 1392 (QL) at para 38.



must work in conjunction with either some common law general rule of admissibility of documents or some other statutory provision. These sections themselves do not authorize the admissibility of the documentary evidence it describes. Rather, what the sections do is to clothe electronically stored and produced documents with the status of “best evidence” provided they meet certain criteria for their admissibility.<sup>95</sup>

In other words, traditional rules of evidence still apply with regard to tendering business records as evidence regardless of their format.

Though issues associated with the admissibility of electronic records have the potential to alter traditional admissibility rules of evidence, this development has not yet occurred because the Canadian courts still rely heavily on paper-based records regardless of whether the records were born digital – an observation this author made in his dissertation research, which analyzed 477 business records tendered as evidence in British Columbia and Ontario courts.<sup>96</sup> Of these records, only two were declared electronic business records by the presiding judges. Thus, while the digital era may be causing an increase in the number of business records that counsel contests as evidence, it does not appear to be having a similar impact on how business records are presented in court.<sup>97</sup> The traditional rules of evidence and criteria of the business records exception to the hearsay rule continue to be applied by Canadian judges.

## Conclusion

Records professionals play an important role in increasing the likelihood that business records will be admitted as evidence. For a business record to be admitted as evidence, counsel must convince a judge that the record is authentic and reliable. Therefore, the challenge for records professionals is not, in most circumstances, to ensure that business records are trustworthy. Instead, the challenge is to demonstrate that trustworthiness in a court of law. By reviewing Canadian case law and criteria that a business record must satisfy to be admitted as evidence, this article has presented several ways in which records professionals can contribute to this important legal process.

While the legal admissibility of business records is an issue of significance to the work of recordkeeping, the topic has not yet received much attention by the records management profession. The reasons are not clear. It could be that records professionals are not concerned with legal risks associated with admis-

95 *R v. Morgan*, [2002] NJ no. 15 (Prov Ct) (QL) at para 20.

96 Donald C. Force, “Pursuing the ‘Usual and Ordinary Course of Business’: An Exploratory Study of the Role of Recordkeeping Standards in the Use of Records as Evidence in Canada” (PhD diss., University of British Columbia, 2013). See especially chapters 4 and 5.

97 Force, “Pursuing the ‘Usual and Ordinary Course of Business,’” 185.

sibility issues. Or it could be that their myriad other daily duties prevent them from devoting their time and energy to these issues. Still, the issue of records as legal evidence cannot be overlooked.

Additional research into the admissibility of business records could perhaps address the relationship between recordkeeping and the law; it is possible that the findings might help strengthen archival and records management theory and practice. Records professionals might also benefit from a study of how the courts have assessed the admissibility of specific types of records. For example, are medical records assessed differently from police records, and police records differently from government records? Though the legal literature indicates that all records should be treated equally, it would be useful to examine whether judges emphasize different sets of criteria when reviewing different types of records. Such research could influence how records professionals manage different types of records in their particular work environments.

Moreover, little systematic, empirical research has been done on how Canadian courts have treated electronic business records as evidence, despite provincial and territorial legislation that specifically addresses the admissibility of electronic business records. What are the salient criteria that judges consider when determining the trustworthiness of electronic records? Will the traditional business records exception to the hearsay rule be superseded by legislation (or provisions in legislation) that specifically address the admissibility of electronic records? Answers to these questions could contribute to how an organization allocates its resources for the management of electronic records.

The intention of this article is to generate discussion about the ways records professionals can help their organizations achieve effective, accountable, and legally compliant records management practices. The failure to admit business records as legal evidence can cost an organizations time and money, damage its reputation, and lead to serious penalties. Losing a civil or criminal case as a result of weak evidence is a negative outcome that can be mitigated, if not eliminated, through better recordkeeping.

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