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Records and Archives in Court

by **A.F. SHEPPARD***

Some commentary might be made on the excellent papers by Mark Hopkins and Kenneth Chasse which appeared in *Archivaria* 18. The topic which both authors addressed, to cite the ACA 1983 programme, was as follows:

> In an increasingly litigious society, records and archives frequently become evidence in court. What are the criteria for admitting records in court as evidence, and how might records keepers be called upon to testify in court? These matters will be discussed in the context of federal and provincial law.

Therefore, my comments are directed towards these two central issues: the criteria for admitting records in court as evidence, and the status of records keepers called upon to testify in court.

I. The criteria for admitting records in court as evidence

Whenever a litigant proposes to use a record as evidence in court, three rules of evidence must be satisfied. As Mark Hopkins and Kenneth Chasse point out so lucidly, computer technology has created new forms of records which are often in machine language that must be read by an expert or converted to English before a court can use them as evidence. Computers can also dispense with written records entirely. As the use of computers becomes more widespread and the technology changes, the courts will face more evidentiary issues. The objections to the admissibility in court of computer printouts are the same ones that apply to any record. These three objections or criteria are exclusionary rules of law.

In a trial, with or without a jury, the judge must decide whether the rules of admissibility have been satisfied. These three rules of law are authentication, best evidence, and hearsay.

(A) *Authentication:* Whenever a record is used in court, the party offering it into evidence must introduce some evidence that it is genuine. When computer-generated records are offered, they must be authenticated.

* These remarks are adapted from my commentary on the two authors' papers which I presented at the Annual Meeting of the Association of Canadian Archivists in Vancouver in June 1983.

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Kenneth Chasse's paper is largely concerned with the authentication of computer records. The genuineness of a computer record is shown by proving the reliability of the particular computer used, and the dependability of the procedures to operate it and obtain the printout offered in court. An authenticating witness must also identify the printout as from the computer. If the printout is unintelligible to the judge and jury, an expert must explain it to them after it is introduced into evidence. In *R.* v. *McMullen*,[1] Morden, J.A., for the Ontario Court of Appeal, described the special concern about the authentication of computer printouts as reliability:

> I accept that the demonstration of reliability of computer evidence is a more complex process than proving the reliability of written records. I further accept that as a matter of principle a Court should carefully scrutinize the foundation put before it to support a finding of reliability, as a condition of admissibility. . . . The nature and quality of the evidence put before the Court has to reflect the facts of the complete record keeping process — in the case of computer records, the procedures and processes relating to the input of entries, storage of information, and its retrieval and presentation. . . .

As long as there is enough evidence of reliability that a reasonable jury properly instructed could find that the record is what it is purported to be, the judge should admit the printout as authenticated. A judge should not weigh contradictory evidence on the issue of authenticity. If the opponent has evidence that the printout is unreliable, the judge should not hear it on the issue of authenticity. The judge should assume that the evidence in favour of authenticity is uncontradicted. The opponent's contradictory evidence would go to the weight to be given to the printout by the jury (or the judge, in a trial by judge alone). The distinction between admissibility and weight is discussed at the end of this paper.

(B) *The Best Evidence Rule:* If the parties to the litigation dispute the contents of a record, the party offering it into evidence must introduce the original or a duplicate. Failing that, the party must satisfy the court that the original is unavailable. Then the party can prove contents of the record by secondary evidence such as a copy or oral testimony. Only if the party can account for the absence of the primary evidence will secondary evidence be admissible to prove its contents. A computer printout or microfilm seems readily admissible in evidence, over the objection that it violates the best evidence rule.

1. *Computer printout*

The Alberta[2] and Ontario Courts of Appeal[3] have held that a computer printout is an original record and not a copy of the information stored in the computer. Bill S-33, the proposed *Canada Evidence Act*, s. 130, provides that a printout is an original.

1 *R.* v. *McMullen* (1979) 47 C.C.C. (2d) 499, at p. 506.
2 *R.* v. *Cordell* (1982) 39 A.R. 281 (Alta.C.A.).
3 *R.* v. *Bell and Bruce* (1982) 35 O.R. (2d) 164 (C.A.).

2. *Microfilm*

Many federal and provincial statutory provisions affect the application of the best evidence rule to microfilms.[4] Bill S-33, the proposed *Canada Evidence Act*, ss. 130 and 132, would make microfilm admissible as duplicates. Where a statute provides that a microfilm is admissible "for all purposes," the courts apply the words literally. In *Kushner Breen & Gordon* v. *Merrill Lynch*,[5] it was held that a microfilm copy of a person's handwriting could be used as a standard of comparison to determine whether that person also wrote the document in issue. The handwriting expert testified that he would not have taken the job if he had known that a microfilm was the standard. The judge admitted the expert's opinion as to the identity of the disputed handwriting, but gave it no weight.

Even in the absence of specific legislation, the courts admit microfilm as original evidence. For example, in *Barker* v. *Wilson*,[6] the English High Court, Queen's Bench Division, held that if microfilm is the method used by a business in keeping permanent records, then it is admissible as an original record. Bridge, L.J., said:

> The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'banker's books' and the phrase 'an entry in a banker's book,' it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm.[7]

(C) *The Hearsay Rule*

Hearsay in the law of evidence means any oral or written statement "offered in evidence to prove the truth of the matter asserted but made otherwise than in testimony at the proceeding in which it is offered."[8] The elements of hearsay are, first, a *statement* which was not made under oath and subject to cross-examination in this proceeding, and secondly, the statement is offered as evidence to prove the truth of what it asserts. If the statement does not violate the hearsay rule, it is called non-hearsay. But if the statement violates the definition of hearsay, the judge can receive it in evidence only if it falls within an exception to the hearsay rule.

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4 See for example *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 31; *Evidence Act*, R.S.B.C. 1979 c. 116 s. 40.

5 [1974] 3 W.W.R. 158 (Man.Q.B.).

6 [1980] 2 All E.R. 81 (Eng.Q.B.Div.); *R.* v. *Biasi et al.* (1981) 62 C.C.C. (2d) 304 (B.C.S.C., photostats used as originals held admissible).

7 *Ibid.*, at p. 83.

8 Bill S-33, the *Canada Evidence Act*, 1982, s. 2.

Computer-generated and microfilm evidence seem, once again, to be readily admissible over a hearsay objection on the ground either that it is not hearsay or that it is hearsay but saved by an exception.

1. *Computer printout*

(a) *Non-hearsay*

A computer printout may be admissible as non-hearsay. In *R.* v. *Wood*,[9] the accused was charged with possession of stolen metal. The Crown experts used a computer to calculate the chemical composition of the metal. They testified as to the chemical analysis and the computer programme. The English Court of Appeal held that the printout was not hearsay. The printout contained a calculation by a machine and it was not a statement. The court drew a distinction between information and calculations resulting from data fed into a computer. While a printout of the information would be hearsay, electronic calculations were not hearsay. The same result could be reached by treating the printout as the basis of expert testimony. In Canada, using an out-of-court statement as the basis of expert testimony is a well-established non-hearsay use.

(b) *Exceptions to the hearsay rule*

The courts appear willing to modify the traditional common law exceptions to the hearsay rule so as to admit computer printouts. In *Ares* v. *Venner*,[10] in a unanimous judgment of Canada's highest court, Hall, J. quoted with approval the following passage to the effect that the common law rules of evidence must change to accommodate modern business practices:

> The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. Particularly is this so in the field of procedural law. Here the question posed is — 'Shall the courts admit as evidence of a particular fact authentic and reliable records by which alone the fact may be satisfactorily proved?' I think the courts themselves are able to give an affirmative answer to that question.[11]

Similarly, the courts admit computer-generated evidence of banking,[12] business,[13] and public records[14] under the statutory exceptions to the hearsay rule in federal and provincial legislation. The definitions of "record" and "document" could be improved, but, as presently

9 *R.* v. *Wood* (1982) 76 Cr. App. R. 23 (C.A.).
10 (1970) 14 D.L.R. (3d) 4 (S.C.C.).
11 *Ibid.*, at p. 15.
12 *Supra*, footnotes 2, 3, and 6.
13 *R.* v. *Vanlerberghe* (1978) 6 C.R. (3d 222 (B.C.C.A.).
14 *R.* v. *Sanghi* (1971) 6 C.C.C. (2d) 123 (N.S.S.C.-A.D.).

worded, they seem to cover computer printouts. In addition to the provisions in Ken Chasse's paper, the *Interpretation Act* (British Columbia)[15] defines a "record" as including

> books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise.

And Bill S-33, the proposed *Canada Evidence Act*, expressly includes a computer printout as a "record" under sections 2 and 130.

2. *Microfilm*

(a) *Non-hearsay*

In British Columbia, *R.* v. *Degelman*[16] shows the courts' eagerness to admit microfilm as non-hearsay. Mr. Degelman was charged with possession of stolen parts from a Chevrolet Corvette. The prosecutor called a witness from the provincial Motor Vehicles Branch who testified that he had searched the microfilm records and according to them the parts belonged to a Mr. Huffman. The witness also testified that there was a discrepancy in the record. The British Columbia Court of Appeal held the testimony admissible for the non-hearsay purpose of showing the state of the records. Also it held that the jury could draw the inference that Mr. Huffman owned the parts. The jury drew that inference and convicted Mr. Degelman. In my opinion, the Court of Appeal was too accommodating: the prosecution should have been required to introduce the microfilm record or an authenticated copy, not merely a government official who testified as to what it said. In the interests of a fair trial, Mr. Degelman should have been allowed to challenge the accuracy of the record more effectively. The case graphically illustrates the dangers of shortcutting the rules of admissibility and leaving the admissibility of computer records to the so-called experts in computer technology and records management. In this case, both the hearsay rule and the best evidence rule were trampled. The hearsay and best evidence rules are crucial to a fair trial. Kenneth Chasse's suggestion that the admissibility of computer records should be a matter for professional records managers and is beyond the capacity of the hearsay rule would be a step in the wrong direction. If it were the law, many more cases like *Degelman* would be the result.

(b) *Hearsay*

The courts presently admit microfilmed banking, business, and public records under the statutory exceptions to the hearsay rule. In *R.* v. *Biasi*, Paris, J., of the British Columbia Supreme Court, admitted photostat copies within the definition of business *record*:

> Some of the business line cards, it is pointed out, are in fact photostat copies of some other records, and it is said there-

15 *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29.
16 (1977) 2 C.R. (3d) 1 (B.C.C.A.).

> fore that our affidavit pursuant to s. 30(3) of the *Canada Evidence Act*, explaining the absence of the original, should have accompanied the documents. However, Mr. Funk testified that those cards tendered were in fact used by B.C. Telephone Company as their original records, the actual originals having for some reason been disposed of. In my view, the definition of 'record' in s. 30 is broad enough to encompass such documents as it is defined as including any document in which information is 'written, recorded, *stored* or *reproduced*.' Therefore, the documents tendered are B.C. Tel's 'original' (as distinct from copies under s.s. (3)) for the purposes of this section. I further have no doubt that the records whenever made were made in the usual and ordinary course of business of the company.[17]

Therefore, as long as a witness can account to the court for the absence of the original document — by establishing that it was made and destroyed in the ordinary course of business, that the microfilm or photostat was made in the ordinary course of business according to an accurate and reliable system, and that the microfilm or photostat is used in the business — it is admissible as an original business record.

(3) *Archives*

(a) *Authentication and the best evidence rule*

Federal and provincial statutes greatly facilitate the admissibility of archival records. They provide that a certified copy of any original document satisfies the requirements of authentication and the best evidence rule. For example, section 7 of the *Archives Act* of Ontario[18] provides as follows:

> A copy of any original document in the custody of the Archivist, certified under his hand and seal to be a true copy, is *prima facie* evidence of authority and correctness of such document.

The courts presume that the purported signature and seal of a public official is authentic. They also take a very liberal approach to the proper form of attestation required. If the document is not attested by the Archivist personally, but by someone on his behalf, the courts will rely on other applicable statutory provisions to uphold the formal validity of the certification.[19]

(b) *Hearsay*

As Mark Hopkins points out, federal and provincial archives are public records and can qualify for admissibility under common law and statutory exceptions to the hearsay rule.

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17 *Supra*, footnote 6, at p. 306 (C.C.C.).
18 R.S.O. 1970 c. 27; *Public Archives Act*, R.S.C. 1970 c. P-27 s. 9.
19 *R.* v. *John & Murray Motors Ltd.* (1979) 8 C.R. (3d) 80 (B.C.C.A.).

At common law,[20] the exception to the hearsay rule for public records required that the contents be relevant to a public matter, that the record be made by a public officer acting under a public duty to make the record, that the record must have been made to be retained and kept as a record, and that the record must be open to public inspection. Live testimony would be necessary to establish these elements.

Since the common law requirements are extremely onerous, the more practical course is to use one of the statutory exceptions to the hearsay rule for the admissibility of public records. Under such provisions as section 26 of the *Canada Evidence Act* and section 36 of the British Columbia *Evidence Act*, the foundation for admissibility can be established by the archivist's affidavit.

Authentication, best evidence, and hearsay can all be disposed of by certificate and affidavit. The archivist's testimony should not ordinarily be necessary to establish the admissibility of archives.

II. Records keepers testifying in court

A records keeper may be called upon to testify in court on two issues: admissibility and weight. Admissibility is a question for the judge to decide. Therefore, the records keeper may testify to the judge concerning admissibility. Secondly, if the record is ruled admissible, a records keeper may also testify as to its weight. In a trial by jury, weight is a question of fact for the jury to determine. In a trial by judge without a jury, the same judge decides admissibility and weight, but is expected to do so as if he or she were exercising two independent and separate roles. Even in a trial by judge alone, admissibility and weight are kept separate.

However, there is in practice a considerable overlap between authentication, which is an aspect of admissibility, and weight. For instance, evidence of a record keeper as to the reliability of the computer and the system which produced the printout is crucial to its admissibility and to its weight. Kenneth Chasse's proposal that the legislatures enact checklists of factors for the judge to consider in determining authenticity creates a risk to the efficient administration of justice, particularly in jury trials. The same evidence will be given twice: once to the judge in the absence of the jury and then to the jury. The judge's inquiry into authenticity could become a prolonged inquiry into such complex issues as whether a particular computer system measured up to industry standards. Canadian judges, with an eye to the protracted and chaotic trial administration so prevalent in the United States, would oppose such a change. The Supreme Court of Canada has spoken out against the elaborate authentication of wiretaps.[21] The following quotation from the Chief Justice of Ontario seems apt:

20 *Sturla* v. *Freccia* (1880), 5 A.C. 623 (H.L.).
21 *Charette* v. *R.* (1980) 14 C.R. (3d) 191 (S.C.C.).

> By adopting such a procedure the trial is unduly prolonged, the jury is absent from the court-room too long, and the continuity of the trial which is so desirable is unduly disturbed. . . .[22]

I would be concerned about the impact of the proposal on efficient trial administration.

Furthermore, the uses to which computers may be put and the technology are changing all the time. Kenneth Chasse points out inconsistencies in the reasons for judgment in different cases. The reason for these inconsistencies is that no two cases are the same; each case has unique factual issues. The enactment of generalized criteria for admissibility will not solve this problem because specific facts will lead to inconsistencies in the application of the criteria.

Finally, Kenneth Chasse's proposal to establish standards for the qualification of records managers as expert witnesses goes far beyond the present requirements of the law of evidence. The qualification of a witness as an expert is much less demanding. In *R.* v. *Bunniss*,[23] His Honour Judge Tyrwhitt-Drake of the British Columbia County Court, said:

> The test of expertness, so far as the law of evidence is concerned, is skill, and skill alone, in the field in which it is sought to have the witness's opinion. If the court is satisfied that the witness is sufficiently skilled in this respect for his opinion to be received, then his opinion is admissible.

He defined an expert as:

> . . .one who has, by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought, and the practical ability to use his judgment in that science.[24]

This is the standard presently used by the courts to decide whether a witness qualifies as an expert. The proposal to raise this standard for records managers would have the effect of excluding many highly qualified individuals from testifying as experts, even though their testimony would be useful and all that the courts would require. The proposal seems objectionable on the grounds that it would deprive the courts of useful testimony and would be expensive for litigants.

In conclusion, I would contend that Kenneth Chasse presents too bleak a picture of the present state of the law of evidence. In doing so, he invites Macaulay's famous retort: "Reform? Sir, do not speak to me of reform; things are bad enough as they are."

22 *R.* v. *Dietrich* (1970), 1 C.C.C. (2d) 49, at p. 62.
23 *R.* v. *Bunniss* (1964), 50 W.W.R. (N.S.) 422, at p. 424.
24 *Ibid.*, p. 425.