

Electronic Records as Documentary Evidence

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Abstract

The new electronic record provisions that are now part of almost all of the Evidence Acts in Canada are as important as any statutory law or common law concerning the use of records as evidence. They bring six important improvements to the evidentiary law of business records. It is argued, however, that their most serious defects are that they: (1) perpetuate the best evidence rule — a rule rendered redundant by electronic records and information management (RIM); (2) do not deal with hearsay issues; (3) do not cure the defects of the business record provisions in regard to electronic records; and (4) unnecessarily complicate the law. But these defects can be substantially lessened by judicial interpretation that accomplishes what the business records provisions should have accomplished. Although a topic left to a future article, this article should be read with the assumption that the electronic record provisions are interdependent with: (1) the new electronic commerce laws; (2) the new personal privacy protection laws; (3) the new electronic discovery guidelines; (4) the new National Standards of Canada concerning electronic RIM; and (5) the records requirements of government agencies such as the Canada Revenue Agency. This article is therefore a first step in justifying the emergence of the “RIM lawyer” as a new field of legal practice.

1. Introduction

This article is a review of the electronic record and business record provisions of the Evidence Acts.¹ To that end, it is intended to show that:

1. In the law of evidence concerning records and documents, the distinction between hearsay and best evidence rule issues is meaningless when applied to electronic records. The best evidence rule is not needed. The “system integrity test” of the electronic record provisions of the federal, provincial, and territorial Evidence Acts is the only test needed.
2. Therefore, there are three “procedural” reasons why satisfying the electronic record provisions with sufficient evidence should be held to satisfy the business record provisions as well: (1) the law reflects the reality that electronic technology needs no distinction between hearsay rule and best evidence rule issues; (2) it enables procedural simplicity, i.e., it is a one-step procedure; and (3) an effective burden of proof is cast where it should be — upon the party adducing the records in question.
3. There is also a substantive reason why evidence that satisfies the electronic record provisions also satisfies the business record provisions. The quality of paper records that have never been in

electronic form can be judged by their own history — creation, storage, and handling. Electronic records, however, must be judged by the quality of the electronic record system from which they come. The system integrity test of the electronic record provisions is an objective test in that it can be given both definition and application in accord with independent, authoritative standards such as the National Standards of Canada concerning electronic RIM. It sets a threshold of admissibility high enough to effectively judge the quality of the electronic records system from which the electronic records in question come. But the “usual and ordinary course of business” test of the business record provisions sets a low threshold of admissibility. It is a subjective test that accepts the quality of the record system from which the records come as being what must be accepted as the usual and ordinary course of business in regard to RIM. Therefore, it cannot be an effective test of RIM quality. (Only by chance might it be an effective test for judging the quality of paper record systems, but not for electronic record systems.) Evidence in satisfaction of the higher burden of proof should also satisfy the lower burden of proof. Therefore, evidence that satisfies the system integrity test of the electronic record provisions should also satisfy the usual

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and ordinary course of business test of the business record provisions.

4. Important hearsay issues concerning the business record provisions remain unanswered.
5. The vagueness and uncertainty of the business record provisions in the Evidence Acts causes these defects: (1) the uncertainty the litigant faces as to how they will be applied, meaning uncertainty as to what evidence to marshal for court; (2) inconsistent court decisions; and (3) court decisions that bring back the old common law requirements they were intended to replace.
6. The fact that the caselaw concerning business records shows no difficulty in regard to hearsay issues is not a valid reason for the failure of the *Uniform Electronic Evidence Act* (the UEEA),² and of the Evidence Acts that incorporated it as their electronic record provisions, to deal with hearsay issues concerning electronic records. That caselaw also shows no difficulty in dealing with best evidence rule issues. Nevertheless, the electronic record provisions were necessary and do provide important improvements to the law. If the courts are not given issues to decide, the courts and the caselaw will not decide them. The silence of caselaw does not justify the silence of legislation. The impact of electronic technology upon law and practice, and its rapid change, should lead to the conclusion that legislation is needed before the law is demonstrably inadequate. Otherwise, too much damage is done. That is why legislating the electronic record provisions was justified, albeit for the reasons argued herein, not in their present form.
7. The underlying theory of the usual and ordinary course of business test of the business record provisions of the Evidence Acts is losing its validity. It is a subjective test providing only a low threshold of admissibility. The theory is that good RIM is sufficiently guaranteed by the profit motive. There are now more reasons why good RIM might be seen to be contrary to the best interests of the record keepers. Preventing loss can be more important than maximizing profit. Therefore, the “circumstances of the making of the record” test of the business record provisions should be interpreted as though it were a record system, system integrity test comparable to the system integrity test of the electronic record provisions. The double usual and ordinary course of business tests of those provincial Evidence Acts that contain this phrase could be given a similar interpretation.

Therefore, this article reaches conclusions contrary to the following statement by John D. Gregory:

The rules on hearsay are generally accepted to present no special problems for the admission of electronic records. The medium on which indirect evidence is stored does not alter the characteristics of that evidence as hearsay. As a result, the law dealing with the hearsay aspect of documentary evidence has been able to handle electronic records without difficulty. Indeed, the leading common law case on documents, *Ares v. Venner*,³ sets out rules that could be applied as well to electronic as to paper records. Statutory rules on documents have tended to follow. For example, the *Ontario Evidence Act* has a codification of the business records rule that defines “record” this way: “includes any information that is recorded or stored by means of any device”. This kind of thinking led the Uniform Law Conference of Canada to omit rules on hearsay from the *Uniform Electronic Evidence Act*.⁴

2. UEEA Progeny — The Electronic Record Provisions of the Evidence Acts

Electronic records⁵ give rise to a “best evidence rule” issue — that is what the electronic record provisions declare.⁶ The best evidence rule states that where a fact or event is to be proved by means of a document or other recording, the “original” of such document or recording must be used.⁷ The electronic record provisions of the Evidence Acts state that electronic records satisfy the best evidence rule on proof of “the integrity of the electronic records system in which the electronic record was recorded or stored”, referred to as the electronic record “system integrity test”.⁸ Therefore, in regard to electronic records, these provisions substantially alter the best evidence rule.

Eight of Canada’s 14 jurisdictions have enacted electronic record provisions that copy the UEEA.⁹ New Brunswick added its own unique “electronic imaging” provisions to its *Evidence Act* in 1996,¹⁰ and Quebec had the necessary electronic evidentiary provisions in place in the *Civil Code of Quebec*¹¹ before the electronic record provisions of the *Canada Evidence Act* (CEA) became operative on May 1, 2000, being the first to do so as Part 3 of the federal *Personal Information Protection and Electronic Documents Act* (commonly referred to as PIPEDA).¹² Given that all 14 jurisdictions have enacted electronic commerce legislation (which, for the common law jurisdictions, closely copies the ULCC’s *Uniform Electronic Commerce Act* (the UECA)), and given that such UECA legislation needs UEEA legislation with which to enforce its legal rights and obligations — as all commerce needs appropriate laws of evidence that facilitate enforcing its laws of commerce — it is surprising that four jurisdictions have yet to enact UEEA legislation, namely, British Columbia, Newfoundland and Labrador, Nunavut, and the Northwest Territories. The answer from those four jurisdictions must be that the business record provisions of their Evidence Acts can continue to

serve electronic records adequately, just as they have until now.

Even if such an argument were valid, which it is not, it will lead to an unsatisfactory state of the law, which is described below under the heading, “9. Contradictory Caselaw — Civil Versus Criminal Proceedings”. Any argument that the business record provisions can adequately serve electronic records is defeated by the very existence of the electronic record provisions, which were enacted because of the serious doubts that the business record provisions could adequately serve that purpose.¹³ There are advantages brought to the law by those newer provisions — as analyzed below, which cannot be found in the older business record provisions.

Although there are few available decisions that have interpreted these new electronic record provisions — and none that have added significantly to what these provisions state themselves¹⁴ — there are many older decisions that deal with best evidence rule issues. In particular, the decisions in *R. v. McMullen*¹⁵ and *R. v. Bell and Bruce*,¹⁶ although banking record cases rather than business record cases, do deal with the best evidence rule issues within subsection 29(2) of the CEA. Therefore, until newer decisions displace them, they are very useful in dealing with issues arising from the electronic record provisions.

The argument that the second of these two decisions overrules the first is not valid, nor is the argument that the Ontario Court of Appeal has limited *McMullen* to its own peculiar facts.¹⁷ Firstly, until a court expressly states that one of its earlier decisions is overruled, an opinion that the earlier decision has “effectively been overruled” is of dubious value. Secondly, this argument is based on the statement in *Bell and Bruce* that, “The authenticity of the record as evidence is sufficiently guaranteed by compliance with subsection 2 of section 29”.¹⁸ The word “authenticity” is a reference to the authentication rule, not to the best evidence rule issues within subsection 29(2) of the CEA. Thirdly, the system integrity test of the new electronic record provisions requires what *McMullen* requires.¹⁹

3. The “System Integrity Test” in Comparison with Hearsay Rule Issues

All legal issues concerning the use of business records as evidence fall into three categories: hearsay issues, best evidence rule issues, and authentication issues. Hearsay issues concern the truth of the contents of a record. The best evidence rule concerns the reliability of copies, duplicates, and other substitutes for an original record — for example, is a particular printout a reliable reproduction of its electronic source? Authentication concerns the authorship of a record and the authority to

issue it as an official record. The electronic record provisions of the Evidence Acts,²⁰ provide the test for satisfying a challenge under the best evidence rule, i.e., is the paper printout or other display a reliable reproduction of its electronic source? They state that the best evidence rule in respect of an electronic record is satisfied by proof of the integrity of the electronic records system by or in which the record was recorded or stored. If a record is also challenged under the hearsay rule, its admissibility will be tested as well under the business record, banking record, microfilm record, government record, or other record or document provisions.²¹

Therefore, the law governing the use of records as evidence in legal proceedings is no longer dependent upon the preservation of “original” paper documents. In satisfaction of the best evidence rule, electronic records are now admissible as evidence dependent upon “the integrity of the electronic records system in which they are recorded or stored”.²²

However, that integrity is not defined by the Evidence Acts. It is left to the courts and tribunals to determine whether an electronic records system from which an electronic record comes has that necessary integrity and to devise their own tests for doing so. As a result, the amendments added to the Evidence Acts to accommodate electronic records are a compromise between the desire for certainty in the test to be applied and flexibility in applying it. The wording of the business record provisions reflects that same legislative drafting strategy.²³

Although there is no exact, mandatory definition of “integrity” provided to elucidate the system integrity test, the following “presumptions of integrity” are provided.²⁴ “In the absence of evidence to the contrary”, the integrity of an electronic records system by or in which an electronic record is recorded or stored is proved:

- (a) by evidence capable of supporting a finding that at all material times the computer system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record and there are no other reasonable grounds to doubt the integrity of the electronic records system;
- (b) by whether it is established that the electronic record was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
- (c) by whether it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce it.

The phrase “usual and ordinary course of business” in (c) is also undefined. This very same phrase provides the key test for admissible records in the “business record” provisions, wherein it is also undefined.²⁵

McMullen can be used to argue what standard of electronic RIM should be required by the system integrity test. It imposed the following necessary, but since

ignored, “*McMullen* standard”. Morden J.A., delivering the judgment of the Court, stated:

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 (see *McCormick's Handbook on the Law of Evidence*, 2nd ed. (1972), p. 734), and that the admission procedures in s. 30 [CEA] are more fine-tuned than that in s. 29 [CEA]. However, this does not mean that s. 29(2) is not adequate to the task. The four conditions precedent provided for therein, the last one being that the copy of the entry offered in evidence is a true copy of what is in the record, have to be proved to the satisfaction of the judge. *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: see Transport Indemnity Co. v. Seib* (1965), 132 N.W. 2d 871; *King v. State ex rel. Murdock Acceptance Corp.* (1969), 222 So. 2d 393, and “Note, Evidentiary Problems and Computer Records”, 5 Rut. J. Comp. L. 342 (1976), p. 355, *et seq.* If such evidence be beyond the ken of the manager, accountant or the officer responsible for the records (*R. v. McGrayne*, Ontario Court of Appeal, March 14, 1979 [since reported 46 C.C.C. (2d) 63]) than a failure to comply with s. 29(2) must result and the print-out evidence would be inadmissible.

Accordingly, I do not think that the difference in the procedures between ss. 30 and 29 is such as to compel the conclusion that s. 29 cannot be applicable to computer evidence, nor do I think that the potential difficulties of satisfying s. 29(2) should result in this conclusion. Further, it may be noted that, at least ostensibly, ss. 29 and 30 do not operate on the same plane. Section 29 makes the copy “*prima facie* proof” while s. 30 makes the record “admissible in evidence”.²⁶

The important conclusion to draw from this passage is that if electronically produced banking records require “proof of the entire record keeping process ... etc.”, in order to gain admissibility under section 29 of the CEA, then that at the least should be required of electronically produced business records under sections 30 and 31.1 to 31.8 of the CEA, given that, (1) banks operate under a much more demanding regulatory regime than does business in general, and (2) both subsections 29(2) and 30(1) of the CEA use the key phrase and test, “the usual and ordinary course of business”. *McMullen* is not binding on any court’s interpretation of the electronic record provisions because it predates them by 21 years (1979 to 2000). But it should be considered as being persuasive authority in regard to an electronic technology, having no more meaningful differences for the purposes of legal interpretation than its electronic counterparts at the time of *McMullen*.

Similarly, when such foundation evidence is adduced by way of an affidavit, as allowed under sections 29(2), 30(6), and 31.6 of the CEA, such affidavits should also be able to satisfy the above-mentioned *McMullen* standard. In fact, being printed forms, such

affidavits do not contain detail as to “the complete record keeping process”. The foundation evidence presented is never that thorough, and the witnesses who adduce such records are seldom cross-examined or otherwise challenged in argument or by opposing witnesses to that high a standard. And so it is that the caselaw that should by now have been well developed and refined, and that should exemplify this landmark decision, does not exist — not because the courts have chosen to ignore it, but more likely because counsel appearing before those courts have ignored it, in both civil and criminal proceedings. In civil cases the discovery process is used to make the rules of evidence less important. In criminal cases — being the much greater source of the rules of evidence because the greater frequency of jury trials makes necessary their development — possibly, insufficient knowledge of RIM and of electronic technology leaves counsel unable to effectively attack business records. Are civil counsel any more knowledgeable? The National Standards of Canada, written by experts in the records and information management industry and cited herein, can serve to educate and structure one’s cross-examination or examination-in-chief in relation to the admissibility and weight of business and electronic records, and in fact, all records used as evidence.²⁷

Therefore, the above *McMullen* standard requiring proof of “the facts of the complete record keeping process” can be said to be very similar to the words, “proof of the integrity of the electronic records system in or by which the data was recorded or stored” in subsection 31.2(1) of the CEA and subsection 34.1(5.1) of the *Ontario Evidence Act* (OEA). Both are tests of system integrity. If the *McMullen* standard had been developed and regularly applied to produce an ongoing body of caselaw, the electronic record provisions would not have been necessary. However, now that they are in existence, the evidence that their system integrity test should require should also be sufficient to satisfy the requirements of the business record provisions of section 30 of the CEA and section 35 of the OEA, as well. Can one possibly prove the system integrity of one’s electronic records system without also proving consequently, (1) its “usual and ordinary course of business”, as required by subsection 30(1) of the CEA and subsection 34.1(5) of the OEA; and (2) that the “circumstances of the making of its records” also satisfy subsection 30(6) of the CEA — and subsection 35(4) of the OEA, as well, albeit this subsection expressly limits the application of such “circumstances” to issues of “weight”?

A contrary argument would be that evidence of system integrity goes to the issue of whether the record in question has been altered, accidentally or intentionally, so as to cast doubt on its “integrity”, and does not go to the issue as to whether the record has been created “in the usual and ordinary course of business” rather than,

for example, “in contemplation of litigation”, or out of some other potentially corrupting bias or “oblique motive”?²⁸ That is, system integrity should be limited to the types of defects within the preview of the best evidence rule (for which the system integrity test was created), and not those that the hearsay rule and its exceptions guard against as well. This restricted, reduced integrity is used in the electronic commerce legislation pertaining to the “legal requirements re original documents”.²⁹

But like the above *McMullen* standard and accompanying text, words such as “integrity”, when applied to the whole of a record system, have to require foundation evidence for admissibility that provides a comprehensive description of the workings of that RIM system. Integrity has to be comprehensively applied, for it cannot have validity piecemeal, i.e., a RIM system cannot have selective system integrity, with only some of its parts and certifications required to satisfy that standard. An understanding of the National Standards of Canada³⁰ should therefore be necessary.

As to the effect of *Bell and Bruce*,³¹ it does not justify limiting the operation of the *McMullen* standard to situations wherein the printout is relied upon, independently from the reliability (or integrity) of the electronic record system in which it is recorded or stored. What *Bell and Bruce* did at most was to take away the possible argument, based upon *McMullen*, that where the printout remains after its electronic record (its electronic “parent”) has been erased, the printout should not be accepted as evidence because it can no longer be proved to be a “true copy” of that original electronic record. *Bell and Bruce* holds that the printout is nonetheless admissible, regardless the state of its electronic parent. However, that does not disturb the applicability of the *McMullen* standard in determining the admissibility of electronically produced records. In this regard, the analysis below under the heading “7. The ‘Relied Upon Printout’ Provisions” sets out the competing arguments in regard to those provisions and gives insight into the purpose of the electronic record provisions.

However, that purpose has been removed by the technology those provisions were enacted to serve — a technology that requires only the hearsay rule and its business record exception (and other record exceptions) and not the best evidence rule. *McMullen* and *Bell and Bruce* were decided almost 20 years before the first of these electronic record provisions came into effect.³² They and the best evidence rule should no longer be necessary, being based upon the faulty concept that computer software neatly and clearly separates its issues of fact and law into hearsay rule and best evidence rule varieties. In fact, electronic record systems irretrievably scramble them together. For example, if a software failure casts doubt upon the truth of the contents of a printout, does that create a hearsay rule issue or a best

evidence rule issue? “Truth of contents” issues have long been established as hearsay rule issues, and thereby provide the conceptual basis and justification for the rule against hearsay evidence. But the electronic record provisions expressly treat electronic record systems and their printouts as creating best evidence rule issues. Is the necessary answer that the hearsay rule applies to the declarations of human beings and not to those of electronic devices and the record systems that contain them? If it is not a hearsay rule issue, then what is it? Perhaps, therefore, is it more correct to consider such as being the declarations of humans because it is humans who set such electronic systems in motion to make such declarations? The answer should be, “why does it matter how such issues are categorized?” The software failure has cast doubt upon the credibility of the contents of its printout. Thus, the technology has blurred the distinction between hearsay rule and best evidence rule issues, if not completely removed it. Consequently, so should the law. Nevertheless, the electronic record provisions are now part of the Evidence Acts of Canada and must be coped with. However, the business record provisions were left untouched by such enactments, thus necessitating a “two-step analysis” of the admissibility issues for electronic records — one step for each set of provisions. The steps should have been combined into one. They would be, if judicial interpretation holds that satisfaction of the system integrity test also satisfies the tests of the business record provisions.

Nonetheless, the electronic record provisions can serve important purposes. The more capable electronic technology becomes, the more complex it becomes. Standard procedures become more complex and varied, far different in kind, and not merely in degree, than their pre-electronic counterparts — not merely in the speed and volume of intake and output as though electronic record systems mean nothing more than faster typewriters and adding machines. The *McMullen* standard is all the more necessary as that complexity increases, and the opponent of admissibility consequently becomes less capable of challenging electronic record systems and their records. Contrary to this reality, however, the business record provisions set a low threshold of admissibility by way of the weak, subjective test — “the usual and ordinary course of business” — which is not an effective burden of proof for RIM “quality assurance”. As a result, an unfair burden of disproving quality assurance is cast upon the opponent of admissibility. More compatible with the nature of electronic record systems, the system integrity test of the electronic record provisions casts an effective burden of proof upon the proponent of admissibility. Therefore, the “circumstances of the making of the record” test should equally be interpreted as imposing a similar burden of proving quality assurance upon the proponent as a necessary condition-precedent to admissibility for business records under sec-

tion 30 of the CEA. Although this “circumstances of the making” test is expressly barred in its provincial Evidence Act counterparts from similar application to issues of admissibility,³³ their double “usual and ordinary course of business” tests might be given such application in regard to electronic records. So far however, the caselaw has made no distinction between the section 30 (CEA) single “usual and ordinary course of business” test and the double variety of the provincial and territorial Evidence Acts.³⁴ Or, even though expressly barred from preventing admissibility, such “circumstances of the making” tests could be held to impose a similar burden of proving quality assurance as a condition-precendent to electronic records being given any “weight” as business records, even if ruled admissible.

There are, therefore, three important reasons why satisfying the electronic record provisions with sufficient evidence should be held to satisfy the business record provisions, as well: (1) the law reflects the reality that electronic technology needs no distinction between hearsay rule and best evidence rule issues; (2) it enables procedural simplicity, i.e., it is a one-step procedure; and (3) an effective burden of proof is cast where it should be — upon the party adducing the records in question.

Quite apart from such caselaw remedies, in comparison with the business record provisions, the electronic record provisions provide the following improvements to the evidentiary law of business records:

1. Substitute an evaluation of electronic record system integrity in place of evaluating paper-original documents as a test for determining the admissibility of, and “weight” (probative value; credibility) to be given business records (ss. 31.2 and 31.3 of the CEA; ss. 34.1(5)–(7) of the OEA) if they subsume the business record provisions, because satisfying the system integrity test will satisfy the tests of the business record provisions;
2. Expressly encourage the use of national and industry standards of record-keeping and information management in the determination of issues of admissibility and weight (section 31.5 of the CEA; subsection 34.1(8) of the OEA);
3. Abolish retention periods for paper-original records as a condition-precendent to the admissibility of their microfilm and imaged counterparts (the infamous “six-year rule”; e.g., subsections 34(3) and (4) of the OEA to be repealed — but such repeal not being necessary for section 31 of the CEA because it did not contain a retention period);
4. Give electronic records a legal status equal to that of paper-originals in regard to the authentication rule and the best evidence rule (ss. 31.1 and 31.2 of the CEA; ss. 34.1(4), (5), (5.1) of the OEA);

5. Make destruction of paper-originals optional without impairing the legal status of their electronic record counterparts in relation to admissibility and weight (destruction is assumed to be optional because the CEA and OEA provisions are silent on this issue); and
6. Allow recognition of trading partner agreements for electronic data interchange (EDI) that set up binding procedural protocols for transmitting all business records electronically, and for settling disputes arising from such data interchange (s. 31.5 of the CEA; s. 34.1(8) of the OEA).

Such improvements could have been built into a single set of provisions dealing with the admissibility and weight of electronic records.

As to the hearsay³⁵ rule issue concerning “the truth of the contents of records”, the Evidence Acts provide that business records, including government records, are admissible as evidence if made in the organization’s “usual and ordinary course of business” (s. 30(1) of the CEA; and s. 35(2) of the OEA). However, the phrase, “usual and ordinary course of business” is again undefined. The court or tribunal may have regard to “the circumstances of the making of the record” in determining what that usual and ordinary course of business is (s. 30(6) of the CEA and s. 35(4) of the OEA). But there is no guidance as to the required “circumstances of the making of the record” — these sections are silent. Nevertheless, these two undefined phrases provide the tests that determine whether any particular record is acceptable as evidence. Paper records that have never been kept in electronic form are subject to these “business record” provisions alone.³⁶ These tests, being undefined, make it important to use national and industry standards such as the National Standards of Canada, *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2005, and *Microfilm and Electronic Images as Documentary Evidence* CAN/CGSB-72.11-2000, to give them a RIM context for definition, policy, and procedure.

The lack of adequate caselaw for the business record provisions after 40 years in operation suggests a lack of awareness of the fundamental differences between electronic and traditional (paper) records management systems. Electronic and paper record systems make necessary a fundamental difference in the concepts upon which each is admitted into evidence — the difference between “electronic records system integrity”, and the traditional and much older “proof of the original record” made, “in the usual and ordinary course of business”. Is there too often a willingness by counsel to accept each other’s records into evidence on consent? Such practice does not warrant a presumption as to the high degree of accuracy, reliability, and trustworthiness of such records. If it is due to a failure of knowledge and investigation of

electronic records system management and practice, the result will become more potentially damaging to one's case as electronic technology increases in capability and complexity and all business activity becomes completely dependent upon it. Counsel is somewhat at risk when using the business record provisions without knowing something of RIM policy and procedure, and now even more so when having to cope with the electronic record provisions.

4. The Adequacy of the Business Record Provisions

(a) The hearsay and best evidence rules remain separate rules

The Evidence Acts that have incorporated the UEEA do not deal with hearsay rule issues because the UEEA is based upon the assumption that the distinction between paper and electronic records concerns form but not substance. This assumption means that distinctions among the media of storage — whether they be paper, electronic, or optical media — do not affect the truth of the contents of records. Therefore the hearsay rule, being a rule concerning “truth of contents”, is not dealt with by the UEEA because of the mistaken belief that the hearsay rule is “doing fine” in relation to records. Rules as to authentication and best evidence concern matters of authorship, form, and content, other than the truth of their contents. Therefore, they are the substance of the UEEA.

This distinction between form and substance and between form and truth of contents, can be challenged as being overly simplistic. The assumption that the distinction between paper and electronic records affects the form but not the substance (i.e., the truth of contents) of records is wrong. For example, imaged records involve matters that affect the truth of contents as well as the form of records.³⁷ Similar arguments can be made as to other forms of electronic records. The distinction between paper and electronic records concerns all matters of content as well as form. The distinction between form and content, between medium of storage and the truth of contents, was valid before there were electronically created and stored business records — that is to say, when all records were traditional paper-original records. But now electronic technology has blurred these distinctions such that trying to separate form from substance, and medium of storage from the truth of contents is illusory and serves no meaningful purpose in law. Similarly, the conceptual distinctions between the hearsay rule and the best evidence rule are obsolete. The UEEA perpetuates such conceptual “distinctions without a difference”.

The major shortcomings of the law of business records concern the hearsay rule — that is, the conditions under which a record will be accepted or not accepted in proof of the truth of its contents. Those conditions are the recording of acts and events in permanent records by means of original entries made close to the time when they happen, in the routine of business, and recorded by persons that have direct, personal knowledge of those acts and events, and who are under a “business duty” to make such records with no motive to misrepresent.³⁸ These requirements provide the foundation for the legal concept of the “original”. Proof of those business acts and events is to be made by means of that “original” permanent record. This traditional rule is therefore based upon the medium of storage, the original permanent paper record. Although it is being used now to admit electronic records into evidence, it is law based upon pre-computer concepts of record-keeping. Therefore, it is neither free from doubt, nor from important undecided issues.

In contrast, computer systems often use many storage media for each record. The final or permanent medium of storage is, more often than not, not the original medium upon which records were recorded. Nor are such permanent records made close to the time of the acts and events so recorded, nor made by the person having direct personal knowledge of the acts and events so recorded. Therefore, the integrity of electronically produced and stored business records should be made dependent upon proof of “record system integrity”, not proof of original paper records. The law has to reflect this same transition in concept that business RIM has made. That is why the UEEA should have dealt with the hearsay rule, so as to make that legal transformation.

(b) The weaknesses and inadequately answered issues of the business record provisions

As a result, the most serious failings of the present business record provisions in the Evidence Acts remain unchanged. They are:

- (1) they fail to inform adequately as to what evidence is needed for proof of the truth of business records sufficient to render them admissible in evidence and
- (2) they allow court decisions to ride off in all directions because the tests they provide are undefined and too vague to command consistency in judicial interpretation.³⁹

In short, the current law as to the admissibility and weight of business records is based upon three concepts, two of which are without fixed definition and the third of which needs to be revised for electronic records. The

two undefined concepts are, “the usual and ordinary course of business”, and “the circumstances of the making of the record”. They appear in most of the evidence legislation in Canada.⁴⁰ The third is the concept of the “original” record.⁴¹

The absence of fixed definitions of the key phrases “usual and ordinary course of business” and “the circumstances of the making of the record” gives the courts complete flexibility in applying them. But that same flexibility leaves litigants and the business community uncertain as to what is required to prove business records as admissible and credible evidence. To aggravate this unsatisfactory situation, several important hearsay rule questions about business records as evidence remain unanswered, even with the combined assistance of statutory business record provisions and court decisions interpreting them. Consider the following examples of important questions needing answers, or new answers, and the conflicting answers given by the court decisions cited in their accompanying notes:

Whether the present statutory language requires that admissible records need only be made by a person under a “business duty” to make such records, or whether the supplier of the information recorded, as well as the maker of the record must have been acting pursuant to such “business duties”.⁴² For example, a customer using an ATM is not under a business duty to the bank but bank records are thus made by that customer and relied upon by the bank.

Whether s. 30(1) CEA allows for double hearsay and not just single hearsay. Such limitation would arise from the opening words, “Where oral evidence in respect of a matter would be admissible . . .”.⁴³

Whether it is sufficient if the making of the record was part of the ordinary routine of the business, or whether not only the making of the record but also the events being recorded must be part of the business routine.⁴⁴ For example, making an accident report is business routine, but the accident is not, unless one’s business is accidents.

Whether contemporaneity (co-incidence in time) between the making of a record and the events recorded as part of the “usual and ordinary course of business” must always be required, or at least considered.⁴⁵

Whether records are inadmissible because of the interest or bias of the maker of the records, or whether such a requirement is not to be read into the business record provisions of our Evidence Acts, and is merely to be considered as going to the “weight” of the record if admitted into evidence.⁴⁶

Whether admissibility requires detailed evidence of the RIM system, or merely an examination of the system by an expert witness of the proponent of the records in question.⁴⁷

Whether business records may contain statements of opinion.⁴⁸

The Supreme Court of Canada has held that a computer printout can be treated as an “original” business record even if its electronic source has been deleted. Previously, the hard copy printout was held to be merely a copy dependent upon the continued existence of its electronic counterpart for purposes of an authenticating

comparison if called for.⁴⁹ Should electronic records have the same legal status as their paper originals if those originals are no longer available to verify the accuracy of those electronic descendants, and should printouts have the legal status of their electronic ancestors or parents after they have been deleted from their hard drives? (Subsection 4(2) of the UEEA deals with this issue, but in relation to the best evidence rule, not the hearsay rule. Software now affects all three rules of admissibility “seamlessly” (the hearsay, best evidence, and authentication rules) and therefore so should the legal rule determining the admissibility of the products of the application of such software in making and storing electronic records.)

Such unanswered “hearsay” questions could be resolved by statute to allow the business record provisions to be compatible with electronic business records.⁵⁰ Instead, the UEEA perpetuates the best evidence rule where it is no longer needed.

(c) The future of the concept of the “original” record

The third unsatisfactory concept in the present law is that of “the original”, i.e., proof of a record requires proof of the original record. It is not unsatisfactory because it remains vague and undefined, but rather because it is incompatible with electronic RIM which has no such “original”. An acceptable original in its pre-computer form, is one made at or near the time of the events it records — such is the “contemporaneity” requirement. This concept of the “original” concerns the best evidence rule rather than the hearsay rule, as did the previous two concepts of “the usual and ordinary course of business” and “the circumstances of the making of the record”. The relative simplicity and clarity of the “original” provides some compensation for the vagueness of the other two concepts. The best evidence rule states that the absence or alteration of the original must be adequately explained or proof of its admissibility will fail.⁵¹

An important consequence of moving the law from “original” to “system integrity”, that is, from a dependence upon proof of the integrity of the original business document, to a dependence upon proof of the integrity of the RIM system, means that the best evidence rule loses most or all of its meaning and purpose. That is so because the same factors that are relevant to applying the hearsay rule exception for business records will also affect the use of the evidence as equivalent to an original, which is a best evidence rule issue. Because the UEEA directs an analysis of such system integrity for purposes of the best evidence rule, and electronically produced records are system-dependent for their integrity in regard to the hearsay rule as well, the UEEA should have so dealt with the hearsay rule instead of leaving the existing inadequate statutory law in place. Electronic technology

blurs the distinction between form and content and, therefore, between the hearsay rule and the best evidence rule. The UEEA attempts to preserve pre-computer concepts for the mere sake of legal continuity from past to present even though those concepts, as separate concepts, are now obsolete. They need unification into one principle of system integrity because electronic RIM systems and electronic technology as a whole, in fact, deal with the form and substance of business records as a seamless whole. The alternative choices for such reform have been reviewed in the consultation papers of the ULCC.⁵² The result of those papers and their subsequent consultation process has been the UEEA and its incorporation into a majority of the Evidence Acts in Canada, (beginning with the amendments to the CEA, sections 31.1–31.8, operative from May 1, 2000).

As to the hearsay issue concerning the truth of the contents of records, the Evidence Acts provide that “business records”, which includes government records, are admissible as evidence if made in the organization’s “usual and ordinary course of business”.⁵³ However, the phrase “usual and ordinary course of business” is again undefined. But under subsection 30(6) of the CEA, the court or tribunal may have regard to “the circumstances of the making of the record” in determining whether to accept any record as evidence. And to that end, under subsection 30(9) of the CEA:

Any person, who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.⁵⁴

However, in contrast to subsection 30(6) of the CEA, subsection 35(4) of the OEA and subsection 42(3) of the BCEA limit the use of such “circumstances” to issues of “weight”:

The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.⁵⁵

(d) The two hearsay admissibility tests in section 30 of the CEA — which is predominant?

Of great importance to the nature of the foundation evidence adduced to gain or oppose admissibility of both electronic and traditional paper-original records, is the strong argument that subsection 30(6) of the CEA is the predominant test of section 30, rather than the “usual and ordinary course of business” test of subsection 30(1) of the CEA. Subsection 30(6) makes “the circumstances of the making of a record” applicable to both the admissibility of and “weight” given any business record. Such interpretation means that subsection 30(6) is not only an exclusionary rule, but is also superior to the admissibility test in subsection 30(1) provided by the words, “a record made in the usual and

ordinary course of business”. If so, any “circumstances of the making of a record” could be used alone or with others to determine whether any business record should be excluded, whether or not it was made within “the usual and ordinary course of business” of the organization from which the record was produced and is being adduced. A very detailed cross-examination of the chief records officer, or other proponent witness of admissibility, as to such “circumstances of the making” should therefore be imperative. Note that this interpretation views subsection 30(6) as an exclusionary rule only, and not as a rule for admitting as well as excluding records from evidence.

Support for this “predominance view” of subsection 30(6) over subsection 30(1) of the CEA can be found in J. Douglas Ewart, *Documentary Evidence in Canada*.⁵⁶ At page 85, footnote 57, the author states:

Subs. 30(6), *Canada Evidence Act, supra*, note 7. The argument that this subsection creates an exclusionary power, rather than just a power to assess the weight of any particular record, is grounded on the opening words. It seems clear that the words: “For the purpose of determining whether any provision of this section applies” include subs. (1), which is the foundation of admissibility. The court should, therefore, be able to use the subs. (6) powers to determine whether to apply subs. (1), or in other words, to determine whether or not to admit the record. This interpretation is buttressed by the next following phrase in subs. (6): “or for the purpose of determining the probative value, if any . . .”. The use of the disjunctive implies that the opening phrase relates to admissibility, rather than just weight. Although it could be argued that the subs. (6) examination is limited to determining whether the document is authentic and was made in the usual and ordinary course of business, it would appear to be open to the courts to take the broader view that the subsection permits them to decide whether subs. (1)’s admissibility power ought to be used. If this expanded view does not prevail and all documents which are found, on a subs. (1) examination, to have been made in the usual and ordinary course of business and to concern matters respecting which oral evidence would be admissible, *must* be admitted, then it is clear that the court can give them no weight at all. See note 58, *infra*. [emphasis in original]

The body of the text containing the references to footnotes 57 and 58 appears under the heading, “Changes from the Common Law Admissibility Tests: An Overview [of s. 30 CEA]”. It states:⁵⁷

Also gone is any rigid standard of contemporaneousness. However, departure from this common law standard, and indeed all others, forms a valid basis for an argument that the court should use its apparent power to exclude the record [fn. 57] or at least, pursuant to its undisputed authority to do so, should give the document little weight. [fn. 58]

Footnote 58 itself states:

This approach was adopted by Callaghan Co. Ct. J. (as he then was) in *R. v. Grimba* (1977), 38 C.C.C. (2d) 469 (Ont. Co. Ct.) at 472: “These are matters which, of course, would go the weight of the documents and matters which should be drawn to the attention of the jury”. The continuing applicability of the common law where matters of

weight are in issue was forcefully stated by Morand J. in *Aynsley v. Toronto Gen. Hospital*, *supra*, note 8.⁵⁸

And as well, at page 99:

Then there is the general power in section 30(6) to consider the record and the circumstances of its making in deciding its admissibility and weight.

Whereas “the usual and ordinary course of business” is a subjective test, being determined by the nature of the course of business of the business organization itself,⁵⁹ “the circumstances of the making of the record” invites the application of objective and authoritative standards of RIM. Thus National Standards of Canada approved by the Standards Council of Canada⁶⁰ concerning RIM become applicable in determining the admissibility and weight of business records, under both the business records hearsay rule exceptions in the Evidence Acts, and the common law exception as well. The latter uses a comparable phrase, “in the routine of business”, which equally invites the application of objective and authoritative standards.⁶¹

(e) The business records exception to the hearsay rule at common law compared with its Evidence Act counterparts

Both a statutory and common law business records exception to the hearsay rule are available in 12 of Canada’s 14 jurisdictions. They have different constituent elements, which gives a reason for using them together in any legal proceeding wherein there is a statutory business records exception available. All provincial and territorial Evidence Acts contain such a provision except the Evidence Acts of Alberta and Newfoundland and Labrador. Therefore, in proceedings governed by the provincially enacted laws of Alberta and Newfoundland and Labrador, only the business records exception at common law would be available. However, in proceedings based upon federal statutes, the business records exception within section 30 of the CEA would apply and could be relied upon, along with the exception at common law. The common law business records exception was redefined and updated by the Supreme Court of Canada in *Ares v. Venner*.⁶² Although a full understanding of the operation of the common law exception requires a thorough examination of the “*Ares v. Venner* progeny” (all of the subsequent court decisions that have applied this ruling), the following key passage from *Ares v. Venner* itself is sufficient for purposes of this description of the applicable rules of evidence:⁶³

Hospital records, including nurses’ notes, made contemporaneously by someone having a personal knowledge of the matter then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses’ notes, the nurses were present in Court and were available to be called as witnesses.

The Supreme Court of Canada decided that hospital records were admissible in a medical malpractice case, the Court stating that judges could restate common law hearsay exceptions to meet modern conditions — a proposition rejected by the House of Lords in England a few years earlier in a decision also turning upon the business records exception at common law: *Myers v. D.P.P.*⁶⁴ The result of the decision in *Ares*, as shown by subsequent decisions, has been to expand the scope of admissibility of the business records exception to the rule against hearsay evidence at common law, for all business records.⁶⁵

Ewart concludes his analysis of the effect of *Ares* upon the common law exception by listing its resulting constituent elements as they stand now, as follows:⁶⁶

In the result, the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who has a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after *Ares* does reflect a more modern, realistic approach for the common law to take towards business duty records.

As Ewart states, the most dramatic change made by section 30 of the CEA is that it has only two requirements of admissibility, but the common law exception still has as many as seven elements.⁶⁷ Subject to what is set out above as to the “predominance view” of subsection 30(6) over subsection 30(1) of the CEA, “[u]nder section 30, a record *prima facie* qualifies for admission if: (i) it was made in the usual and ordinary course of business; and (ii) it refers to a matter in respect of which oral evidence would be admissible”.⁶⁸ This second requirement arises from the opening words of subsection 30(1) of the CEA: “Where oral evidence in respect of a matter would be admissible in a legal proceeding”, which words are immediately followed by the first requirement, “a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record”.⁶⁹

Paper records that have never been kept in electronic form are subject to the statutory and common law hearsay exceptions alone. The electronic record provisions of the Evidence Acts would not apply to such records. But electronic records would have to be shown to be in compliance with them if a best evidence rule objection were raised.

(f) Divergence of theory and practice under the business record provisions

The theory of the law’s reliance upon tests of admissibility and weight, such as “the usual and ordinary course of business” and “the circumstances of the making of the record”, is that it is always within a busi-

ness's self-interest to maintain complete and accurate records. The need to maximize profit is assumed to be an unfailing and constant guarantee of complete and accurate records and record-keeping systems. But in many situations now, incomplete and inaccurate records are necessary to maximize profits, or at least to minimize losses. For example, there are many more demands for production of records by private litigants and government departments and regulatory agencies than was the case when the theory, and the present law it supports, were created. Often it is more conducive to profit and to the avoidance of loss to destroy or "lose" embarrassing and damaging records than to comply with demands for their production. Official agencies such as environmental, taxing, consumer, labour, and securities authorities have much greater and more frequently used powers to force production of records and disclosure of information, and to conduct their own searches and seizures under expanded legal powers.

Similarly, private plaintiffs can use the civil courts to force production, disclosure, injunctions restraining competitive activities, and to obtain an "Anton Pillar order", the civil search warrant. That is, a court order is obtained that requires the defendant to allow a search of its various premises including searches of its computers without prior notice and to allow removal of relevant materials for deposit with the court. The Anton Pillar order can authorize searches of any premises including homes, automobiles, and warehouses, and can require the target persons to disclose the whereabouts of relevant objects, documents, access procedures, keys, combinations, to allow the taking of photographs and the making of copies. As well, interlocutory injunctions can be obtained to restrain further activity in relation to various products, computers programs, and records facilitating the business activities being attacked. There now exists in the civil courts the power to force a business person to assist in his or her own financial demise by being forced to disclose one's very own confidential business information and produce one's own business records, and to suffer such at the beginning of such litigation and not merely as a result of its unfavourable conclusion. As a result, the increasing benefits of failing to keep such records and to destroy them if they exist puts self-interest increasingly in conflict with the legal theory as to what are legislated and, therefore, officially represented to be adequate legal tests of the integrity of business records.

The exercise of such powers under the law (such as the granting of interlocutory injunctions and Anton Pillar orders) requires proof, and often the source of that proof is within the records of the defendant who thus finds his own records used against him. The inducement to destroy records that might operate against one's interests grows — profit is no longer the sole dictator of RIM practice. Destroying or otherwise disposing of one's damaging records in bad faith ("spoliation") is then more in

accord with self-interest than maintaining complete and accurate records.⁷⁰

Therefore, the test of admissibility should judge not the record alone, but the record system it comes from. The business record provisions require that the record be judged. The electronic record provisions require that the record system be judged. It follows that they should be combined to create one test that judges the record system. That can be accomplished by judicial interpretation that holds that evidence that satisfies the system integrity test of the electronic record provisions, satisfies the business record provisions, as well. Conversely, evidence that cannot satisfy the system integrity test should be held to be insufficient to satisfy the business record provisions. The "circumstances of the making of the record" test in section 30 of the CEA could be given that interpretation on the issue of admissibility and on the issue of weight in the business record provisions of the provincial and territorial Evidence Acts. Similarly, the double "usual and ordinary course of business" test of the latter,⁷¹ could also be given that interpretation on the issue of admissibility.⁷² For both issues, there is no effective way of judging the quality of an electronic record system, or of any electronic record, except by means of the system integrity test. The electronic record provisions confirm and declare that to be so.

5. The Tests Applicable to Electronic Records as Evidence

The tests applicable to the use of electronic records as evidence in legal proceedings depend upon three key legal phrases;

- (1) "the integrity of the electronic records system" (the "system integrity test");
- (2) "the usual and ordinary course of business"; and
- (3) "the circumstances of the making of the record".

The first phrase is found in the "electronic record" provisions of the Evidence Acts.⁷³ The second and third are found in the "business record" provisions.⁷⁴ All three must be satisfied for records that are: (1) recorded or stored in an electronic record system; and (2) business records.⁷⁵ For records that are "relied upon printouts" within the meaning of subsection 31.2(2) of the CEA, and subsection 34.1(6) of the OEA,⁷⁶ they too will have to satisfy the business record provisions of the Evidence Acts. These special subsections might be thought of as providing a fourth key legal phrase.

For admissibility of a business record that is electronically recorded or stored, one recent decision implies that the applicable business record provisions are satisfied first, followed by the applicable electronic record provisions, as well.⁷⁷ Quite likely, proof of the "integrity of the electronic records system" will satisfy the other

two key phrases as well, because it appears to be a higher and objective standard, and the “usual and ordinary course of business” is a lower and subjective standard and therefore creates a lower “threshold of admissibility”.⁷⁸ However, the phrase is too new to the Evidence Acts to tell whether the courts will give it that interpretation. Whereas “the usual and ordinary course of business” is a subjective test, being determined by the nature of the course of business of the business organization itself,⁷⁹ “the circumstances of the making of the record” test invites the application of objective and authoritative standards of RIM. Thus, the National Standards of Canada cited herein⁸⁰ should be used when determining the admissibility and weight of business records, under both the statutory business records hearsay rule exceptions in the Evidence Acts, and the common law exception, as well. The latter uses a comparable phrase, “in the routine of business”, which equally invites the application of objective and authoritative standards.⁸¹ Given the all-encompassing definition of “business” used in the Evidence Acts⁸² and the pervasiveness now of electronic RIM, it is best to consider all records as being subject to the above three legal tests. Being qualitative rather than quantitative, these tests are not yet capable of an exact definition or measure. Caselaw applying them has added little so far.⁸³

To add further to the distinction between the objective “system integrity test” and the subjective “usual and ordinary course of business” test, note that the latter phrase appears in the presumptions created by paragraph 31.3(c) of the CEA and paragraph 34.1(7)(c) of the OEA, which presumptions are part of the electronic record provisions of those two Evidence Acts. However, it does not follow that such appearance in both the electronic record provisions and in the business record provisions thereby equates these two sets of provisions as being equally subjective or objective and having equal “thresholds of admissibility”. First, only a rebuttable presumption is created, not an absolute one, as is indicated by the words “in the absence of evidence to the contrary”, which apply to all three presumptions created by section 31.3 of the CEA and subsection 34.1(7) of the OEA. In comparison, the definition of “electronic record system” in subsection 31.2(2) of the CEA and subsection 34.1(5.1) of the OEA, which creates the system integrity test, is not a mere presumption. Second, the “usual and ordinary course of business” test operates in only one of three presumptions created by section 31.3 of the CEA and subsection 34.1(7) of the OEA, and not in all circumstances involving the application of the electronic records provisions.

6. National Standards of Records and Information Management in Aid of Admissibility

Because the Evidence Acts purposely leave undefined the above key phrases in the tests they make applicable to records, they therefore provide that for the purpose of determining under any rule of law whether an electronic record is admissible as evidence in legal proceedings, evidence may be presented in respect of any standard, procedure, usage, or practice concerning the manner in which electronic records are to be recorded or stored.⁸⁴ This “standards as evidence” provision states (using the OEA version):

34.1. (8) For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record.⁸⁵

Therefore, the National Standard of Canada, *Electronic Records As Documentary Evidence*, CAN/CGSB 72.34-2005,⁸⁶ is particularly useful in providing rules and procedures for RIM, with which to satisfy the *Evidence Act* tests. Those tests, and the national standards created to facilitate their application, are meant to be applied as much in business and government activities as in legal proceedings. RIM systems should therefore be designed, initiated, and maintained in accordance with that law and those standards.

7. The “Relied Upon Printout” Provisions

In addition to the above methods by which electronic records can satisfy the best evidence rule, there is the “relied upon printout”. It is a printout that “has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout”.⁸⁷ The commentary to the UEEA provision, subsection 4(2), states:

The purpose of this Act is to provide for rules for electronic records, those produced or stored in a computer or readable at the time of their use only with the help of a computer. Many records today are produced using a computer with word-processing software and then printed. The electronic file is never used again. Business correspondence is an example. The record “lives its life” on paper, and the paper is presented in evidence. The reliability of the computer system is not at issue. This subsection allows such a

record to be treated as a paper record. The paper printout would be the original for the purposes of the best evidence rule.

It is suggested that there are two interpretations of the resulting Evidence Act “relied upon printout” provisions:

1. The printout is not an electronic record because it is not used as evidence of what is in the computer and therefore the reliability of the computer that generated it is not in issue; and
2. The printout is an electronic record, and proof of “reliance” upon such printout satisfies the best evidence rule; however, “evidence to the contrary” concerning the reliability of the computer would displace the presumption flowing from such “business reliance”.⁸⁸

Analysis here gives insight into the essential purpose of the electronic record provisions as a whole. Note that subsection 31.2(2) of the CEA contains the phrase, “in the absence of evidence to the contrary”, whereas subsection 34.1(6) of the OEA and subsection 4(2) of the UEEA do not.⁸⁹ The theory of the first interpretation is that because the record lives the whole of its meaningful life on paper, the necessary reliability that satisfies the best evidence rule is to be found in the proof of “business reliance” upon that printout. But there are several arguments in support of the second interpretation.

Advocates of the first interpretation would point to the opening words of subsection 31.2(2) of the CEA, “Despite subsection (1)”, as meaning that the printout is excepted from the rule in subsection (1), and therefore is not to be considered an electronic record. The OEA counterpart is in the opening words of subsection 34.1(5), “Subject to subsection (6)”, which subsection provides for the “relied upon printout”. But the definition of “electronic record” in subsection 34.1(1) of the OEA ends with the words, “other than a printout referred to in subsection (6)”. Its CEA counterpart, which is the definition of “electronic document” in section 31.8, does not contain a comparable qualification.

Also, subsection 4(2) of the UEEA and subsection 34.1(6) of the OEA do not say that the “relied upon” printout satisfies the best evidence rule, but rather that such printout “is the record for the purposes of the best evidence rule”. In contrast, subsection 31.2(2) of the CEA states that such “relied upon” printout “satisfies the best evidence rule”. For subsection 4(2) of the UEEA and subsection 34.1(6) of the OEA, the relationship between printouts and electronic data is not relevant, as it is for subsection 31.2(2) of the CEA. This distinction could therefore support an argument that subsection 31.2(2) of the CEA creates an electronic record that can be attacked by adducing evidence of the unreliability of the electronic record system it came from, whereas subsection 34.1(6) of the OEA does not create an electronic record that can be so attacked. The CEA provision falls within the second of the two possible interpretations

suggested above, but the OEA provision comes within the first interpretation. It would follow that subsection 34.1(6) of the OEA creates a paper document (as though it came from a typewriter) and not an electronic record, but subsection 31.2(2) of the CEA creates an electronic record. If the OEA paper document is an original, it satisfies the best evidence rule. If it is a copy, its proponent will have to show why a copy should be allowed to be used as evidence in place of its absent original. In contrast, subsection 31.2(2) of the CEA printout will have to be defended against any attack upon its electronic source.⁹⁰

The second interpretation of the electronic record provisions as an homogeneous whole has the attractions of consistency, unity, and simplicity, which makes it more likely to be accepted, even if “mistaken”, according to the intended interpretation of their drafters. It is the first interpretation that was intended by those who prepared the UEEA for adoption by the Uniform Law Conference of Canada, and its CEA and OEA progeny.⁹¹

There is one case in particular that deals with this subsection, *R. v. Morgan*.⁹² Those who favour the first interpretation would argue that the Court in *Morgan* did not recognize that subsection 31.2(2) CEA describes a case wherein the printout is not an electronic record because it is not used as evidence of what is in the computer, and therefore does not bring the reliability of the computer into issue. That analysis of *Morgan* may mean (to those who favour the second interpretation) that the subsection will not be widely understood as being necessary to an age wherein most documents are generated from a word-processing program to live their effective lives on paper only, and not as proof of what was in the computer during such generation — i.e., if *Morgan* is wrong in its treatment of subsection 31.1(2) of the CEA, many courts will make the same “mistake”. Although legislative history can be used in aid of the interpretation of statutes, Parliamentary history, including the intention of those who drafted the statute in question, cannot.⁹³ Courts are in no way bound to find that the Parliament or legislature that enacted the legislation in question, had the same intention as its drafters.⁹⁴

Those favouring the first interpretation would argue that the printout reliance exceptions to the electronic record provisions, taken as a whole, were meant to provide for situations wherein the interpretation of records and settlement of disputes depends entirely upon the printout containing such records, as in the case of a printed contract. In such situations, electronic record system integrity is not involved. In turn, there is no need to look for originals or copies and duplicates of such originals, as the traditional form of the best evidence rule requires. The best evidence rule is thus entirely dispensed with in regard to such relied upon printouts.

Similarly, it would be argued that the best evidence rule does not fit electronically produced records, for there is no true original. The so-called “copy” produced from its electronic parent is just as good as that original. Therefore, the best evidence rule has no appropriate application between them. But it has a meaningful application between any one record and the record system that produced it. Therefore the UEEA and the electronic record provisions of the Evidence Acts that incorporated the UEEA establish a system integrity test. The best evidence rule is satisfied on proof of the integrity of the electronic record system in which the data was recorded or stored.⁹⁵ This is a substantial alteration of the best evidence rule in order to make it applicable to electronic records.

The contrary argument would be that there is in fact a need for a test linking each printout with its electronic parent.⁹⁶ Software and hardware do fail, casting doubt on the integrity of the resulting printout or other output from its electronic data or parent. Therefore, all of the electronic record provisions should be interpreted with regard to that critical link — the “lifeline of record integrity”.

Does whichever interpretation is adopted make a difference? — only in so far as it makes the reliability of the electronic record system that generated the printout a relevant issue, and thus provides a way of countering the “relied upon printout” method of satisfying objections based upon the best evidence rule. Even the electronic records of small businesses should have to live with that.

Ironically, Ewart,⁹⁷ writing in 1984 — and therefore long before the electronic record provisions began to be added to the Evidence Acts, beginning May 1, 2000 — used the same distinction between the “relied upon printout” and the printout that is looked upon as a copy of a record kept within the computer system, to distinguish the two most important decisions of the Ontario Court of Appeal as to the test for the admissibility of computer printouts under the business records provisions of the Evidence Acts.⁹⁸

8. Electronic Signatures

Government agencies may soon adopt electronic signature technology allowing for electronic records and documents to be transmitted with secure electronic signatures. Therefore, in addition to all the above parts of the “electronic record” provisions, section 31.4 of the CEA provides for the making of regulations establishing presumptions of evidence in relation to electronic documents signed with secure electronic signatures, “including regulations respecting (a) the association of secure electronic signatures with persons; and (b) the integrity of information contained in electronic docu-

ments signed with secure electronic signatures”. Secure electronic signature regulations⁹⁹ were published in Part II of the *Canada Gazette* for February 23, 2005.¹⁰⁰ These regulations define the technology and the necessary technical terms. They create a presumption as to authenticating an electronic document, which states:

5. When the technology or process set out in section 2 is used in respect of data contained in an electronic document, that data is presumed, in the absence of evidence to the contrary, to have been signed by the person who is identified in, or can be identified through, the digital signature certificate.

As allowed by section 31.4 of the CEA, future regulations could also establish evidentiary presumptions as to the integrity of information contained in electronic documents and not only as to their authentication. The OEA, however, does not yet deal with electronic signatures. But Ontario’s *Electronic Commerce Act, 2000*, contains provisions for the use of electronic signatures in facilitating electronic commerce, (1) section 11 — in place of signatures, endorsements, and seals; and (2) section 17 — in place of signatures, “to be provided to a public body”.¹⁰¹

9. Contradictory Caselaw — Civil Versus Criminal Proceedings

An unsatisfactory state of the law now exists because not all jurisdictions in Canada have enacted electronic record provisions.¹⁰² Caselaw conflicts seem inevitable. In criminal proceedings in all jurisdictions of Canada, electronic records will be treated as giving rise to a best evidence rule issue that defines printouts as copies of their electronic parents, and a hearsay issue as to the accuracy of what is stated in the printout, because both the electronic record and business record provisions of the CEA must be satisfied to gain admissibility. But in civil proceedings in those four jurisdictions that do not yet have electronic record provisions in their Evidence Acts, they will be treated as giving rise to a hearsay issue alone. Before the electronic record provisions were enacted both issues were treated as giving rise to a single hearsay issue to be determined under the business record provisions of the applicable Evidence Act or under the common law business record exception to the hearsay rule.¹⁰³ That will be the first source of conflicting caselaw — the categorizing of the issues of admissibility.

The second source is the difference in the legal tests applicable to determine admissibility. The business record provisions use the key phrases, “the usual and ordinary course of business” and “the circumstances of the making of the record”. The electronic record provisions use a “system integrity test”, as stated in the key phrase, “the integrity of the electronic record system in

which the record is recorded or stored". Thus, the electronic record provisions set a much more demanding standard than do the business record provisions. As described above, it is an objective standard whose interpretation is guided by National Standards of Canada, particularly *Electronic Records as Documentary Evidence*. It requires an assessment of the worth ("integrity") of the whole record system from which the electronic record in question comes. In contrast, the business record provisions set a much lower threshold of admissibility in that they require merely proof that the record in question was made in accordance with whatever is the authenticating organization's "usual and ordinary course of business". This is a very subjective test that does not require an assessment of the whole record system. As a result, cases wherein an electronic record provision is applicable should be much more demanding of the record system involved than cases wherein a business record provision alone is applicable. A caselaw conflict as to the threshold of admissibility is to be expected.

There are, however, two legal arguments that may diminish these conflicts. Firstly, in criminal proceedings, subsection 30(6) of the CEA can be argued to require an examination of the record system from which the record comes, for it allows "the circumstances of the making of the record to be examined". It connects such words to its opening phrase, "For the purpose of determining whether any provision of this section applies". This supports an argument that subsection 30(6) not only creates an exclusionary power, but also that it is superior to subsection 30(1) which contains the admissibility test, "a record made in the usual and ordinary course of business". This construction would allow any particular "circumstance of the making of a record" to be grounds for excluding a record, even though it was proved to have been made "in the usual and ordinary course of business". This argument was well put by J. Douglas Ewart more than 20 years ago.¹⁰⁴

The argument that this subsection creates an exclusionary power, rather than just a power to assess the weight of any particular record, is grounded on the opening words. It seems clear that the words, "For the purpose of determining whether any provision of this section applies" include subsection (1), which is the foundation of admissibility. The court should, therefore, be able to use the subsection (6) powers to determine whether to apply subsection (1), or in other words, to determine whether to admit the record. This interpretation is buttressed by the next following phrase in subsection (6), "or for the purpose of determining the probative value, if any...". The use of the disjunctive implies that the opening phrase relates to admissibility, rather than just to weight. Although it could be argued that the subsection (6) examination is limited to determining whether the document is authentic and was made in the usual and ordinary course of business, it would appear to

be open to the courts to take the broader view that the subsection permits them to decide whether subsection (1)'s admissibility power ought to be used. If this expanded view does not prevail and all documents which are found, on a subsection (1) examination, to have been made in the usual and ordinary course of business and to concern matters respecting which oral evidence would be admissible *must* be admitted, then it is clear that the court can give them no weight at all.

Secondly, the Supreme Court of Canada in *R. v. Starr*¹⁰⁵ has held that hearsay evidence that cannot meet the "necessity" and "reliability" tests of the "principled approach to the admissibility of hearsay evidence" must be excluded, even though such hearsay comes within an established exception to the hearsay rule. And conversely, it can be admitted if it satisfies those tests, even though it does not come within an established exception. The "reliability" test can be argued to require an examination of the record system that generated the record. Although the analysis in *Starr* concerned the "traditional exceptions" to the hearsay rule and not statutory exceptions such as the business record provisions of the Evidence Acts, it can be argued that *Starr* is equally applicable to statutory exceptions as well. The majority judgment of Iacobucci J. contains the following paragraphs that link the "principled approach" to the *Canadian Charter of Rights and Freedoms*.¹⁰⁶

Why the Exceptions Must be Rationalized

[199] As I have already discussed, a fundamental concern with reliability lies at the heart of the hearsay rule. By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

[200] In *Khan, Smith*, and subsequent cases, this Court allowed the admission of hearsay not fitting within an established exception where it was sufficiently reliable and necessary to address the traditional hearsay dangers. However, this concern for reliability and necessity should be no less present when the hearsay is sought to be introduced under an established exception. This is particularly true in the criminal context given the "fundamental principle of justice, protected by the Charter, that the innocent must not be convicted": *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 24, 112 C.C.C. (3d) 385, 143 D.L.R. (4th) 38 quoted in *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 71, 139 C.C.C. (3d) 321, 180 D.L.R. (4th) 1. It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.

[201] In addition to improving trial fairness, bringing the hearsay exceptions into line with the principled approach will also improve the intellectual coherence of the law of hearsay. It would seem anomalous to label an approach "principled" that applies only to the admission of evidence, not its exclusion. Rationalizing the hearsay exceptions into the principled approach shows that the former are simply specific manifestations of general principles, rather than the isolated "pigeon-holes" referred to in *U. (F.J.)*, *supra*, at para. 20.

The “principled approach” to the hearsay exceptions has thus been made a constitutional principle of trial fairness. Therefore it is superior to any statutory provision such as the record and document provisions of the CEA — being a *Charter* argument it would be applicable only in criminal proceedings.¹⁰⁷ It can therefore be used to request an examination of the reliability of a record, and therefore of the record system it came from, whether or not the application of section 30 CEA results in a finding of that record’s admissibility or inadmissibility.

10. Answering John Gregory’s Attack

In his very helpful article, “Canadian Electronic Commerce Legislation”,¹⁰⁸ John Gregory states under the heading, “Electronic Evidence”, and its subheadings, “(a) Principles of Documentary Evidence and Their Reform (i) Hearsay” (at 329):

... However, documentary evidence has at common law been admitted on the ground that the manner in which it is created gives a “circumstantial guarantee of trustworthiness”.¹⁰⁹

Electronic documents may tend to reopen the debate, however. The impermanence and the malleability of information in electronic form make some electronic records unreliable. Others are, of course, thoroughly trustworthy, and technology offer many ways to give different degrees of assurance to them. It has been argued in Canada that the combination of electronic records and the restatement of the law of hearsay makes it necessary to develop new rules for the admission of such records in their character as hearsay. If these records are unreliable in different ways, then their reliability is a hearsay issue in a way it was not when that law was more bound in categories.

The main proponent of this point of view is Ken Chasse, who is much published on electronic evidence issues.¹¹⁰ He would prefer that the courts examine in detail the circumstances of the creation and retention of electronic records. The recommendations of his 1994 paper echo the procedures of the Ontario Court of Appeal in *R. v. McMullen*.¹¹¹ This case has, however, been little followed since then.

The argument on the other side is twofold. First, the law does not investigate the actual abilities of the human beings that keep records, in order to apply the business records rule. Why should it investigate the inner workings of a computer? Second, “[t]he required circumstantial guarantee of trustworthiness flows from the presumption that businesses will create systems which ensure the reliability of their records. The nature of those systems, whether they involve computers or human beings, does not affect the reliability of that presumption”.¹¹² (We are not talking here of records created with the prospect of litigation.)

As noted, the *Uniform Electronic Evidence Act* tends to the latter argument, at least in respect of hearsay, rather than Ken Chasse’s more demanding recommendations. The debate is a reminder of the difficulty caused by using the same word “reliability” in several different contexts. It does not mean the same thing, or involve the same tests, when we are talking about authentication or best evidence. The quotation from Douglas Ewart’s book in the preceding para-

graph introduces yet another concept, of the reliability of a presumption (in effect, of reliability)! The *Uniform Act* tried to stay away from the word, if not the concept.

In defence, the necessary answers are as follows: First, it is not entirely correct to say of *McMullen* that “This case has, however, been little followed since then”. In fact, it has received almost no “judicial treatment” at all (except in *Bell*, as described above¹¹³). *McMullen* has neither been rejected nor ignored. It has not been cited because the issue that it deals with has not been submitted for decision. That issue asks: what should the foundation evidence be for admitting electronic records into evidence? John Gregory’s statement that *McMullen* “has, however, been little followed” implies that *McMullen* has been rejected. The Ontario Court of Appeal did not expressly do so, and the Supreme Court of Canada has neither overruled nor distinguished it. *McMullen* is still good authority for the *McMullen* standard that it promulgates, as elucidated above.

Second, Mr. Gregory asks, “Why should it [the law] investigate the inner workings of a computer?” The answer is, because it has to. The type of record system analysis required for judging the accuracy and reliability of a record from an electronic record system cannot be the same as that required for a traditional (pre-computer) paper record system. The concepts of RIM are very different and therefore the conditions-precedent for admissibility must be different. The law must reflect the change in technology. Technological changes do not always require changes in the law, but in this case such is necessary. For example, traditional paper record systems gave rise to, and therefore can satisfy, the legal concept of “an original record”. But in electronic record systems there is no such “original”. The printout taken to court is produced at the end of the record system’s functions and activities, not at the beginning — not at the time of the acts or events it records, and not by a person having “direct personal knowledge”. And the other conditions-precedent of the traditional admissibility rule have no electronic counterpart, either. Therefore, a new rule of admissibility is necessary.

That is why the law should investigate the inner workings of electronic record systems. Their technology is completely incompatible with the traditional form of legal analysis which looks for “an original record” and demands proof in the continuity of its handling until it arrives in court as a proposed piece of evidence. This traditional form of legal analysis reflected a traditional paper record technology that made no distinction between “a record” and the medium upon which it is stored, which was invariably paper or microfilm. To use “a record” meant to use its paper or microfilm manifestation. But for electronic record systems, the distinction between “a record” and its medium of storage is the foundational concept of their existence and fundamental to their methods of operation. So, if there is no “original

record” to examine, what should the necessary rule of admissibility require examination of? — the electronic record system itself, and as a unified whole, because that is the RIM concept upon which it is based. The *McMullen* standard declares it to be so, and so do the National Standards of Canada concerning electronic RIM, being standards created by experts in the RIM industry.

Third, John Gregory’s argument assumes the correctness of the presumption that the profit motive is a sufficient guarantee of accurate and reliable records. As argued above, the presumption itself should be questioned.

Fourth, John Gregory’s arguments are based upon the perpetuation of the best evidence rule into the realm of electronic record systems, and maintaining the distinction between hearsay rule and best evidence rule issues.

Notes:

¹ The electronic record provisions referred to are sections 31.1 to 31.8 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the “CEA”), and section 34.1 of the *Evidence Act*, R.S.O. 1990, c. E.23 (the “OEA”). The business record provisions are section 30 of the CEA, and section 35 of the OEA. The *Evidence Act* of Ontario is used herein to exemplify similar provisions in the Evidence Acts of the other common law jurisdictions in Canada, only because it is not practical to cite comparable provisions in all of the other provincial and territorial Evidence Acts, as well as the Articles of Book 7, “Evidence”, of the *Civil Code of Quebec*.

² The electronic record provisions of the Evidence Acts are close copies of the *Uniform Electronic Evidence Act* (the “UEEA”), which was adopted by the Uniform Law Conference of Canada (the “ULCC”) in 1998. The UEEA, along with its helpful section-by-section commentary, can be downloaded from the ULCC Web site at: <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u2>>.

The ULCC is made up of representatives of the federal and provincial governments. Many of these representatives have responsibility for preparing amendments such as incorporating the UEEA into the federal, provincial, and territorial Evidence Acts and Ordinances. The purpose of the ULCC is to bring about common legislation on subjects of mutual federal and provincial interest. The main mechanism used is drafting model pieces of legislation. Therefore, the UEEA, being such an intended model Act of draft legislation, has become part of the Evidence Acts and Ordinances across Canada with little alteration from its present form. Bill C-6, the *Personal Information and Protection of Electronic Documents Act*, S.C. 2000, c. 5, and Ontario Bill 11, *Red Tape Reduction Act*, S.O. 1999, c. 12, Sched. B, both good examples of this process, became the electronic record provisions of their respective Evidence Acts. The ULCC is almost 100 years old. As a result of its work, the Evidence Acts are very similar from one province or territory to the next.

³ [1970] S.C.R. 608, 14 D.L.R. (3d) 4, 12 C.R.N.S. 349 [*Ares v. Venner*, cited to C.R.N.S.].

⁴ “Canadian Electronic Commerce Legislation” (2002) 17 *Banking & Finance Law Review* 277, online: <<http://pages.ca.inter.net/~euclid1/bflr2002.pdf>> at 328.

⁵ Subsection 34.1(1) of the OEA, *supra* note 1, states: “electronic record” means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6)”. [A record within subsection 34.1(6) is intended to be a record relied upon apart from its electronic source — see *supra* note 81.] An “electronic records system” is defined by subsection 34.1(1) of the OEA as including “the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records”. Section 31.8 of the CEA, *supra* note 1, contains very similar definitions, except the CEA uses “document” whereas the OEA uses “record”. The electronic record provisions of the CEA

The technology of electronic record systems does not need it, and in fact, stands in contradiction of it. As argued above, the best evidence rule should be abolished. There is not only no benefit in the form of “legal continuity” gained from perpetuating its existence, but also it is damaging to both the substantive and procedural aspects of the law of evidence, as argued above.

In short, these arguments do not address the fundamental difference between electronic record systems and traditional paper record systems. As a result, the UEEA perpetuates old legal concepts into a realm of new RIM technology. They do not fit and they will not work. The law has been made unnecessarily complicated, and the pre-existing problems produced by the business record provisions of the Evidence Acts have not been fixed. An opportunity for much-needed law reform has been, if not completely missed, at the least, inadequately used.

and OEA are very similar because both copy the UEEA, *ibid*. Note that there are two parts to these definitions of “system”: (1) the computer system in which data is recorded and stored; and (2) any procedures relating to recording and storage.

⁶ Subsection 34.1(5) of the OEA, *supra* note 1, states: “Subject to subsection (6), [the “relied upon printout provision”] where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record”. Subsection 31.1(1) of the CEA, *supra* note 1, states: “The best evidence rule in respect of an electronic document is satisfied (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored, or (b) if an evidentiary presumption establish under section 31.4 applies”. Section 31.4 of the CEA provides for the making of regulations to establish evidentiary presumptions in relation to electronic documents signed with secure electronic signatures. See below, the heading, “7. Electronic Signatures”.

⁷ *R. v. Cotroni; Papalia v. R.*, [1979] 2 S.C.R. 256, 45 C.C.C. (2d) 1 [*Cotroni and Papalia*].

⁸ See subsection 31.2(1) of the CEA, *supra* note 1, and subsection 34.1(5.1) of the OEA, *supra* note 1.

⁹ *Supra* note 2.

¹⁰ S.N.B. 1996, c. 52, ss. 47.1, 47.2.

¹¹ See Articles 2831, 2837–2841, 2870, and 2874 of the *Civil Code of Quebec*, L.Q. 1991, c. 64; and *An Act to establish a legal framework for information technology*, R.S.Q., c. C-1.1.

¹² *Supra* note 2.

¹³ The UEEA, *supra* note 2, and its commentary describe the workings of each of its sections. But they provide no statement of foundation principle as to the purpose or need for the UEEA other than to state that: (1) an electronic record should be judged by judging the electronic record system in which it is recorded or stored; and (2) the law should be neutral as to the media of storage so that storage may be dictated by business needs and purposes. There is no commentary as to the interaction of the UEEA with the business record exceptions to the hearsay rule in the Evidence Acts and at common law. Many commentators have pointed out the serious deficiencies of the business record provisions in general, and quite apart from their application to electronic records. The most detailed of these commentaries is provided by J. Douglas Ewart, *Documentary Evidence in Canada* (Toronto: Carswell: 1984) [Ewart], at 80–110, which, in spite of its age, still provides the best treatment of evidentiary issues concerning records and documents.

¹⁴ See *R. v. Gratton*, [2003] A.J. No. 1078 (Alta. Q.B.); *R. v. Bellingham*, [2002] A.J. No. 476 (Alta. P.C.).

¹⁵ (1979), 100 D.L.R. (3d) 671, 47 C.C.C. (2d) 499 at 506 (Ont. C.A.) [*McMullen*, cited to C.C.C.].

- ¹⁶ (1982), 35 O.R. (2d) 164, 65 C.C.C. (2d) 377 (Ont. C.A.) [*Bell and Bruce*, cited to C.C.C.], aff'd, [1985] 2 S.C.R. 287.
- ¹⁷ Both arguments are made by Ewart, *supra* note 13, at 134 and 120.
- ¹⁸ *Supra* note 16, at 380.
- ¹⁹ This comparison is further developed under the next heading — “3. The ‘System Integrity Test’ in Comparison with Hearsay Rule Issues”.
- ²⁰ *Supra* note 1.
- ²¹ For example, there are at least 20 document provisions in the CEA. Therefore, a notice stating that it is intended to use documentary evidence should not be acceptable if it does not specify which provision(s) is/are to be used. Each has its own constituent elements and specified ways of satisfying the hearsay, best evidence, and authentication issues raised by such intended evidence. A contained statement that it is intended to adduce documentary evidence pursuant to the *Canada Evidence Act* is therefore not adequate, even if copies of the documents accompany the notice.
- ²² See subsection 31.2(1) of the CEA, *supra* note 1, and subsection 34.1(5.1) of the OEA, *supra* note 1.
- ²³ Given the history of the business record provisions, it is now a strategy of dubious worth. Many important issues remain to be decided in relation to these provisions, even though they have been in the Evidence Acts for more than 40 years — see below, “4. The Adequacy of the Business Record Provisions”.
- ²⁴ See section 31.3 of the CEA, *supra* note 1, and subsection 34.1(7) of the OEA, *supra* note 1.
- ²⁵ See subsection 30(1) of the CEA, *supra* note 1, and subsection 35(2) of the OEA, *supra* note 1.
- ²⁶ [Emphasis added] *McMullen*, *supra*, note 15, at 506.
- ²⁷ National Standards of Canada are written by standards-development agencies accredited by the Standards Council of Canada (SCC). Draft standards are submitted to the SCC for its approval, and then published by the development agency. The function of the SCC is to ensure that the formal, established process for developing standards has been followed. The national standards cited herein are those of the Canadian General Standards Board (CGSB), particularly, its newest electronic records standard, *Electronic Records as Documentary Evidence* — CAN/CGSB-72.34-2005, and its narrower predecessor, *Microfilm and Electronic Images as Documentary Evidence* — CAN/CGSB-72.11-1993 (amended to Apr., 2000). See also *infra* note 86. These standards were written by committees composed of experts from the records and information management field, including legal advisers. They may be purchased from the CGSB’s Web site: <<http://www.ongc-cgsb.gc.ca>>.
- ²⁸ This contrary argument was put to me by John Gregory, General Counsel, Policy Division, Ministry of the Attorney General (Ontario), and see also his further contributions *infra* notes 50, 52, 91, and 108. Given that the key phrases of the electronic record provisions await judicial interpretation, just as the key phrases of the business record provisions still await definitive judicial interpretation, the whole field of possible interactions between both sets of provisions remains open.
- ²⁹ The electronic commerce legislation includes section 11 of the UECA, “Provision of Originals”, which states (in relevant part):
11. (1) A requirement under [enacting jurisdiction] law that requires a person to present or retain a document in original form is satisfied by the provision or retention of an electronic document if
 - (a) there exists a reliable assurance as to the integrity of the information contained in the electronic document from the time the document to be presented or retained was first made in its final form, whether as a paper document or as an electronic document;
 - (2) For the purpose of paragraph 1(a),
 - (a) the criterion for assessing integrity is whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display;
 - (b) the standard of reliability required shall be assessed in the light of the purpose for which the document was made and in the light of all the circumstances.
- ³⁰ *Supra* note 27.
- ³¹ *Supra* note 16.
- ³² On May 1, 2000, for sections 31.1–31.8 CEA, *supra* note 1.
- ³³ For example, subsection 35(4) of the OEA, *supra* note 1, states: “The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility”. To similar effect is subsection 42(3) of the *Evidence Act*, R.S.B.C. 1996, c. 124 [BCEA], and most of the other provincial and territorial Evidence Acts use this same form for their business record provisions.
- ³⁴ For example, subsection 35(2) of the OEA, *supra* note 1, states: “Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter”. The underlying purpose is to require not only the making of the record, but also the event so recorded to be within “the usual and ordinary course of business” of the business in question. For example, an accident report of a train wreck made by a railway employee would satisfy the first but not the second requirement because the railway is not in the business of railway accidents: *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477 (1943), being a case found in most Canadian evidence textbooks to exemplify the purpose of the double phrase, which was copied from comparable U.S. legislation. However, such limitation upon the compass of the double phrase in subsection 35(2) of the OEA was expressly rejected in *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.* (1977), 15 O.R. (2d) 750, 76 D.L.R. (3d) 641 (Ont. H.C.J.) [*Setak*, cited to D.L.R.], wherein Griffiths J. stated (at 650): “With respect, I believe that *Palmer* imposes an unreasonable and unnecessary limitation on the wording of the enactment. To draw a distinction between records relating to the principal business and those relating only to an auxiliary feature of the business, is not justified by the plain wording of the section. So long as the records are made in the usual and ordinary course of some phase of the business, whether principal or auxiliary, they should be admitted, in my view, according to the plain meaning of s. 36 [now s. 35]”. However, *Setak* did not involve a “record made in contemplation of litigation” as in *Palmer v. Hoffman*.
- ³⁵ “Hearsay” means a statement offered in evidence to prove the truth of the matter asserted within it, but made otherwise than in testimony in the proceeding in which it is offered: *R. v. O’Brien*, [1978] 1 S.C.R. 591, (1977), 35 C.C.C. (2d) 209 [O’Brien, cited to S.C.R.] at 593-94.
- ³⁶ In addition to the “electronic record” and “business record” provisions in the Evidence Acts, there are also provisions applicable to government records, to banking records, and to microfilm records. But all are subject to the provisions concerning electronic records if the records in question are in electronic form (ss. 31.1 to 31.8 of the CEA, *supra* note 1; s. 34.1 of the OEA, *supra* note 1).
- ³⁷ Imaging includes microfilmed and scanned records. It includes RIM procedures such as the use of erasable and non-erasable disks; indexing and retrieval software quality; preparation of documents for scanning; scanning resolution; image compression; image enhancement; encrypting; quality assurance; scanner testing; verification of index data; backup and recovery procedures; the care, handling, and storage of disks; hardware and software dependence; security measures; and generally all of the biographical and bibliographical data (now a variety of “meta data”) which is essential to the use of all business records, both paper and electronic. Imaging procedures should be guided by the National Standard of Canada, *Microfilm and Electronic Images as Documentary Evidence* CAN/CGSB-72.11-1993 (amended to Apr., 2000).
- ³⁸ For an analysis and more exacting statement of the conditions-precedent to admissibility of business records, both under the business record provisions of the Evidence Acts and at common law, see: Ewart, *supra* note 13, at 44–69, and 80–110; *Ares v. Venner*, *supra* note 3, and the cases that have applied it.
- ³⁹ For example, compare the decisions in such cases as: *McMullen*, *supra* note 15; *Bell and Bruce* *supra* note 16; *R. v. Vanlerberghe* (1976), 6 C.R. (3d) 222 (B.C.C.A.); *Setak*, *supra* note 34; *Re Watson Properties Ltd.* (1977), 17 O.R. (2d) 328 (Ont. Sup. Ct. (Bank. & Ins. Div.)) [*Watson*]; *Tecoglas Inc. v. Domglas Inc.* (1985), 51 O.R. (2d) 196 at 205 (Ont. H.C.). Also compare the decisions that have applied to business records the Supreme Court of Canada’s rewriting of the hearsay rule in *Ares v. Venner*, *supra* note 3, and even more dramatically the Court’s “principled exception” to the hearsay rule as developed in its celebrated trioka of: *R. v. Khan*, [1990] 2 S.C.R. 531, (1990), 59 C.C.C. (3d) 92; *R. v. Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257; and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257. In 2000, this “principled approach to the admissibility of hearsay evidence”, was made the predominant exception for documentary and record evidence by the S.C.C.’s decision in *R. v. Starr*, [2000]

- 2 S.C.R. 144, 147 C.C.C. (3d) 449, 190 D.L.R. (4th) 591 [Starr]. See *infra* note 83, for a more detailed explanation of this point.
- ⁴⁰ See, for example, subsections 30(1) and (6) of the CEA, *supra* note 1, and subsections 35(2) and (4) of the OEA, *supra* note 1. While these OEA provisions contain a double “usual and ordinary course of business” test, the CEA provisions contain a single test, and whereas the CEA makes the “circumstances of the making of the record” relevant to both admissibility and weight, the OEA counterpart in subsection 35(4) expressly restricts the relevance of such “circumstances” by the words, “may be shown to affect its weight, but such circumstances do not affect its admissibility”.
- ⁴¹ Before computers were used to create and store business records, the words “record” and “document” could be used interchangeably because all records were in the form of paper documents. Separating the concepts of the content of a record from the medium upon which it was stored made necessary the use of a different word for each, that is, “record” for the content of the record and “document” for the medium upon which it was stored or written. Similarly, “data” makes a “record” which, when stored on paper, becomes a “document”. Then, to ruin this neat taxonomy, the CEA uses “document” in its electronic record provisions, while most of the other Evidence Acts use “record”. The CEA, however, uses “record” in its business, banking, and microfilm record provisions.
- ⁴² See, for example, the following decisions: *R. v. Felderhof* (2005), C.C.C. (3d) 34, [2005] O.J. No. 4151 (Ont. S.C.) [Felderhof]; *Setak*, *supra* note 34; *Walton*, *supra* note 39; *Matheson v. Barnes & I.C.B.C.*, [1981] 1 W.W.R. 435 (B.C.S.C.); *Adderley v. Breamer*, [1968] 1 O.R. 621 (Ont. H.C.) [Adderley]; *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, [2003] F.C.J. no. 370 (F.C.A.); *R. v. Monkhouse*, [1987] A.J. 1031 (Alta. C.A.); *Catholic Children's Aid Society of Toronto v. J.L.* (2003) 39 R.F.L. (5th) 54, [2003] O.J. 1722 (Ont. S.C.) [Catholic Children's Aid].
- ⁴³ *R. v. Gregoire* (1998), 130 C.C.C. (3d) 65 (Man. C.A.); *R. v. Grimba and Wilder* (1977), 38 C.C.C. (2d) 469 (Ont. Co.Ct.); *R. v. Martin* (1977), 8 C.R. (5th) 246 (Sask. C.A.); *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157 (N.S.C.A.) [Wilcox]; *Canada (Minister of Citizenship and Immigration) v. Oberlander*, [1999] 1 F.C. 88, [1998] F.C.J. No.1380 (T.D.); *Canada (Minister of Citizenship and Immigration) v. Skomatchuk*, [2006] F.C.J. No. 926 (T.D.); *Sunila* (1986), 26 C.C.C. (3d) 331 (N.S.S.C.) [Sunila]; *R. v. Marini*, [2006] O.J. No. 4057 (S.C.J.); *R. v. Baker* (1977), 35 C.C.C. (2d) 314 (B.C.C.A.); *R. v. Scheel* (1978), 42 C.C.C. (2d) 31 (Ont. C.A.) [Scheel].
- ⁴⁴ *Setak*, *supra* note 34; *Aynsley v. Toronto General Hospital*, [1968] 1 O.R. 425 (Ont. H.C.) affirmed [1969] 2 O.R. 829, affirmed [1972] S.C.R. 435 (*sub nom. Toronto Gen. Hospital Trustees v. Matthews*) [Aynsley]; *Adderley*, *supra* note 42; *Palter Cap Co. Ltd. v. Great West Life Assurance Co.*, [1936] O.R. 341, [1936] 2 D.L.R. 304 (Ont. C.A.); *Conley v. Conley*, [1968] 2 O.R. 677, 70 D.L.R. (2d) 352 (Ont. C.A.); *B.C. v. Harris*, [2003] B.C.J. No. 1897 (B.C.S.C.); *Newmarket (Town) v. Halton Recycling Ltd.*, [2006] O.J. No. 2233 (Ont. S.C.); *Robb v. St. Joseph's Health Care Centre*, [1999] O.J. 523 (Ont. Ct. G.D.) [Robb]; *Catholic Children's Aid*, *supra* note 42; *Johnson v. Lutz et al.* (1930), 253 N.Y. 124, 170 N.E. 517 (C.A. of New York); *Palmer v. Hoffman*, *supra* note 34.
- ⁴⁵ *Felderhof*, *supra* note 42; *Setak*, *supra* note 34; *Vanlerberghe*, *supra* note 39; *R. v. West*, [2001] O.J. 3413 (Ont. S.C.) [West]; *Robb*, *ibid.*; *Re: S.V.*, [2002] S.J. No. 714 (Sask. Q.B.) [Re: S.V.].
- ⁴⁶ *Northern Wood Preserves Ltd. v. Hall Corp. Shipping*, [1972] 3 O.R. 751, aff'd. 2 O.R. (2d) 335 (Ont. C.A.); *Setak*, *supra* note 34; *R. v. Biasi (No. 2)* (1981), 66 C.C.C. (2d) 563 (B.C.S.C.); *R. v. McLarty (No. 3)* (1978), 45 C.C.C. (2d) 184 (Ont. Co. Ct.); *West*, *ibid.*
- ⁴⁷ Compare *McMullen*, *supra* note 15, with *Vanlerberghe*, *supra* note 39; note the difference when expert testimony is used as in *Vanlerberghe*.
- ⁴⁸ *Felderhof*, *supra* note 42; *R. v. Laverty (No. 2)* (1979), 47 C.C.C. (2d) 60 (Ont. C.A.); *Robb v. St. Joseph's Health Care Centre*, [1999] O.J. 2003 (Ont. S.C.); *Catholic Children's Aid*, *supra* note 42; *Re: S.V.*, *supra* note 45.
- ⁴⁹ Compare *McMullen*, *supra* note 15, with *Bell and Bruce*, *supra* note 16.
- ⁵⁰ A contrary opinion as to the state of hearsay issues attendant to electronic records is given by John D. Gregory, in, “Canadian Electronic Commerce Legislation” *supra* note 4 at 328 *et seq.*, whereat the author states: “The rules on hearsay are generally accepted to present no special problems for the admission of electronic records”. For further quotation from and analysis of this article, see *infra* note 108 in part 10, “Answering John Gregory's Attack”. And in regard to John Gregory himself, see also notes 28, 52, and 91.
- ⁵¹ The Supreme Court of Canada's most recent formulation of the best evidence rule is now more than 25 years old: see *Cotroni and Papalia*, *supra* note 7.
- ⁵² In a paper, as part of the 1995 proceedings of the Uniform Law Conference of Canada (the ULCC), entitled: “Proposals for Uniform Electronic Evidence Act”, by John D. Gregory of the Ministry of the Attorney General of Ontario and Ed Tollefson, Q.C., of the federal Department of Justice, online: <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1995&sub=1995ad>>, under the heading “Problems With Computer-Produced Evidence” (paras. 89 to 99), the authors conclude:
- [99] The conclusion that one can reach is that the provisions of the *Canada Evidence Act* do not provide a particularly comfortable fit for computer-produced evidence. They were not prepared with the computer in mind, so their terminology is inappropriate or ill-defined. Having been prepared with the objective of resolving particular problems, the relevant sections of the Act reveal inconsistencies of approach and unwarranted overlapping which affects all forms of documentary evidence, not just computer-produced evidence.
- Similarly, in a paper written for the 1994 proceedings of the ULCC, “Computer-Produced Records In Court Proceedings”, (Ken Chasse, online: <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1994&sub=1994ac>>), I concluded (at para. 82):
- The current rule has several areas of uncertainty that the case-by-case development of the law will not resolve for years.
 - Many solicitors have difficulty advising their clients about the proper conduct of their businesses because of uncertainty about the use of electronic records in litigation.
 - A very liberal use of electronic evidence may be unfair to someone wishing to attack the reliability of the evidence; the onus of proof of reliability should be on the proponent of evidence and not on its opponent.
 - Current rules are based on inconsistent statutes and thus create a diversity of law across Canada. Caselaw is not capable of resolving this in the short run.
 - National and industry standards for the proper use of computer technology are widely accepted and do not inspire fear of unduly limiting the technology or systems to which they apply.
- ⁵³ For example, subsection 30(1) of the CEA, *supra* note 1, subsection 35(2) of the OEA, *supra* note 1, and subsection 42(2) of the BCEA, *supra* note 33.
- ⁵⁴ CEA, *supra* note 1.
- ⁵⁵ Subsection 35(4) of the OEA, *supra* note 1.
- ⁵⁶ *Supra* note 11. In spite of its age, this book still contains the best available treatment of the hearsay rule and best evidence rule issues arising from electronic and pre-electronic records — see generally chapters 2 and 3, pp. 44–119). The chapter titles and subheadings are, chapters 2, “The Admissibility of Records Made Pursuant to a Business Duty”, having three major subdivisions, which are, “1. The Common Law Business Exceptions to the Hearsay Rule”, (pp. 44–69); and “2. The Business Duty Rule under the Uniform Evidence Act”, (pp. 69–74), which is a reference to the Uniform Evidence Act in Appendix 4, pp. 541–603, that concludes the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, (Toronto: Carswell; 1982) [Federal/Provincial Task Force], being a report of the Uniform Law Conference of Canada, and “(3) The Continuing Availability of the Common Law Exception” (pp. 74–75). And for chapter 3, “Statutory Provisions Governing Business Records”, which chapter provides a detailed analysis of the “American Origins of the Canadian Statutory Business Records Provisions”, and therefore of the constituent elements of section 30 CEA, and of the “provincial enactments”, and lastly of, “The Provisions of the Uniform Evidence Act”. As these headings should imply, in these chapters substantial support can be found for the above opinion that there are an unacceptably large number of important, unanswered questions as to the interpretation and operation of section 30 of the CEA and its provincial and territorial counterparts (see notes 38 to 45 and accompanying text). See also, *supra* note 59.
- ⁵⁷ *Ibid.*, p. 85.
- ⁵⁸ Note 8 accompanies the text (at p. 77) which states: “Although some may see the various statutory provisions as pre-emptive codes, it is important to be aware that courts have frequently been willing to impose interpretations, particularly limiting interpretations, based on the earlier common law rules”. The content of note 8 itself states: “*Palmer v. Hoffman*, 318 U.S. 109 (1943) is an excellent example of this approach. In *Aynsley v. Toronto Gen. Hospital*, [1968] 1 O.R. 425, affirmed [1969] 2 O.R. 829, affirmed [1972] S.C.R. 435 (*sub nom. Toronto Gen. Hospital Trustees v. Matthews*), Morand J. took a somewhat different approach, accepting

admissibility under the statute but stating, “in dealing with the question of weight the Judge will apply all of the old rules of evidence which have stood the test of centuries”.

⁵⁹ Ewart, *supra* note 11, and accompanying text, discusses the subjective nature of the “course of business” test as an aspect of the “dramatic change from the common law position” (at 84) made by section 30 of the CEA. He states of this dramatic change (at 85): “Gone is the requirement that there be a strict duty to a third person; instead, a record made by anyone conducting a business or undertaking, employer or sole proprietor as well as employee or casual assistant, is *prima facie* admissible if made in the usual and ordinary course of that business or undertaking. The standard is subjective to the business; admissibility is measured in relation to the usual and ordinary course of the in question”.

⁶⁰ *Supra* note 22.

⁶¹ Ewart, *supra* note 13, at 53, whereat the author provides a comparative list of the constituent elements of the common law rule, and the “Impact of Ares” [*Ares v. Venner*, *supra* note 3] upon each of the constituent elements of the common law rule by way of a comparative listing of the “Traditional Rules” that made up the common law hearsay exception before *Ares* (in left hand column) with the “Impact of Ares” upon each of them (in the right hand column). A useful discussion of these points can also be found in *Federal/Provincial Task Force*, *supra* note 56 at 390–401 (being ss. 29.11 & 29.12 of the Report), and elsewhere whereat the decision in *Ares v. Venner*, *supra* note 3, is discussed. In the context of criminal proceedings and generally in relation to the *Canada Evidence Act*, see: É.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd ed. (Toronto: Canada Law Book, 2006), at para. 16:15110, “Business records”.

⁶² *Supra* note 3.

⁶³ *Ibid.*, at 363.

⁶⁴ [1965] A.C. 1001, [1964] 2 All E.R. 881, 48 Cr. App. R. 348 (H.L.).

⁶⁵ See, for example, *Davie Shipbuilding Ltd. v. Cargill Grain Ltd.* (1975), 10 N.R. 347 (S.C.C.) at 358; *C.P.R. v. City of Calgary*, [1971] 4 W.W.R. 241 (Alta. C.A.) at 257–58; and *Setak*, *supra* note 34 at 755.

⁶⁶ Ewart, *supra*, note 13, at the top of page 54, and the same list appears at 84, note 55, under the heading, “Changes from the Common Law Admissibility Tests: An Overview”. For the detailed analysis of how *Ares v. Venner* redefined and updated the common law business records exception to the hearsay rule, see: Ewart at 48–54; and for a detailed analysis of the differences between this redefined common law exception and the business records exception provided by s. 30 of the CEA, see 82–105.

⁶⁷ Ewart, *supra* note 13, at 84–85.

⁶⁸ *Ibid.*

⁶⁹ CEA, *supra* note 1.

⁷⁰ For a helpful analysis of the spoliation doctrine in Canada, along with a review of the caselaw to 1998, see: Craig Jones, “The Spoliation Doctrine and Expert Evidence in Civil Trials” (1998) 32 U.B.C. L. Rev. 293–325.

⁷¹ Of the 10 Evidence Acts that use the “usual and ordinary course of business” phrase in their business record provisions, five use the double phrase, namely the Evidence Acts of British Columbia, Manitoba, Nova Scotia, Ontario, and Saskatchewan.

⁷² In regard to electronic records, no cases could be found that would prevent these interpretations of the business record provisions. And more importantly, these suggested interpretations are not overly venturesome, but rather both necessary and modest when compared to the great modernization the Supreme Court of Canada has brought to the hearsay rule and its exceptions; see the Court’s decisions cited *supra* note 35, and *infra* note 76.

⁷³ Section 31.2 of the CEA, *supra* note 1, and subsections 34.1(5), (5.1) of the OEA, *supra* note 1.

⁷⁴ Section 30 of the CEA, *ibid.*, and section 35 of the OEA, *ibid.* Note that “business” includes all types of commercial and institutional activity including that of governments.

⁷⁵ In Quebec, instead of appearing within an Evidence Act, comparable provisions can be found in the Articles of the *Civil Code of Quebec*, (Book Seven, “Evidence”), L.Q., 1991, c. 64, and in *An Act to Establish a Legal Framework for Information Technology*, R.S.Q., c. C-1.1.

⁷⁶ Both *supra* note 1.

⁷⁷ See *R. v. Morgan* [2002] N.J. No. 15 (Nfld. Prov. Ct.), at paras. 6 and 20 to 27. Morgan was charged with violating a fishing licence condition. A Crown witness tendered a computer generated copy of the fishing

licence and its conditions, and produced two affidavits attested to by the Acting Licensing Administration. Flynn, Prov’l. Ct. J., held that the electronic record provisions of the *Canada Evidence Act* cannot by themselves admit a document into evidence. Admissibility must be found by way of some other rule such as the business record provisions of section 30 of the CEA. The electronic record provisions merely answer any objection based upon the best evidence rule. Note that subsections 31.2(1) and (2) of the CEA were accepted as being alternative means of answering such objections — see paras. 23 and 26.

In addition, there is the authentication rule. Subsection 34.1(4) of the OEA states: “The person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be”. Section 31.1 of the CEA uses a similar wording.

⁷⁸ As to the “usual and ordinary course of business” being a subjective test, subjective to the business from which the record in question comes, see Ewart, *supra* note 13, at 85; and *supra* note 38; see *supra* note 56 for comments on Ewart.

⁷⁹ Ewart, *supra* note 13, discusses the subjective nature of the “course of business” test as an aspect of the “dramatic change from the common law position” (at 84) made by section 30 of the CEA. He states of this dramatic change (at 85): “Gone is the requirement that there be a strict duty to a third person; instead, a record made by anyone conducting a business or undertaking, employer or sole proprietor as well as employee or casual assistant, is *prima facie* admissible if made in the usual and ordinary course of that business or undertaking. The standard is subjective to the business; admissibility is measured in relation to the usual and ordinary course of the business in question”.

⁸⁰ *Supra* note 27.

⁸¹ *Supra* note 13, at 53; see *supra* note 61.

⁸² See the definitions of “business” in the business record provisions: subsection 30(12) of the CEA, *supra* note 1; and subsection 35(1) of the OEA, *supra* note 1.

⁸³ The “electronic record” provisions of the federal and provincial Evidence Acts date from May 1, 2000, when sections 31.1–31.8 CEA became operative, and are therefore too new to have accumulated defining court decisions. Other than *Morgan*, *supra* note 77, the two other available decisions that refer to the electronic record provisions provide no analysis; see: *Gratton*, *supra* note 14, at paras. 108 to 125; *Bellingham*, *supra* note 14 at paras. 26 to 28.

The “business record” provisions date from the late 1960s, but still have not produced judicial decisions that clearly define or exemplify their two key tests sufficiently so that one knows exactly what foundation evidence to marshal in preparation for legal proceedings. However, the following decisions provide a representation of the available caselaw that elucidates the issues; see: *McMullen*, *supra* note 15; *Bell and Bruce*, *supra* note 16; *Wilcox*, *supra* note 43; *R. v. Penno* (1977), 35 C.C.C. (2d) 266, 76 D.L.R. (3d) 529, 37 C.R.N.S. 391 (B.C.C.A.); *Scheel*, *supra* note 43; *R. v. Bicknell* (1988), 41 C.C.C. (3d) 545 (B.C.C.A.); *R. v. Sanghi* (1972), 6 C.C.C. (2d) 123, at 128–132 (N.S.C.A.). Pre-existing the business record provisions of the Evidence Acts is the business record exception to the rule against hearsay evidence at common law, which may still be used together with its Evidence Act counterpart; see: *Ares v. Venner*, *supra* note 3; *Monkhouse*, *supra* note 42; *Sunila*, *supra* note 43. A third route to admissibility as evidence is by way of the “principled exception to the rule against hearsay evidence”, which exception is explained in *Starr*, *supra* note 39, (particularly paragraphs 199–201, reproduced *infra*, in part 9 “Contradictory caselaw — civil versus criminal proceedings), and modified by *R. v. Khelawon*, [2006] S.C.J. No. 57, 2006 SCC 57, and exemplified for records as admissible hearsay evidence by, *Wilcox*, *supra* note 43, at paras. 59 to 76.

That many of the uncertainties of section 30 of the CEA have yet to be resolved was also the conclusion of Ewart, *supra*, note 13, in 1984. He states (at 83): “Finally, perhaps because of the breadth of its intended impact, section 30 contains a number of significant ambiguities, many of which have yet to find definitive resolutions. The section is not an easy one to interpret; there remains a considerable degree of understatement in the sentiments expressed by Pennell J. of the Ontario Supreme Court early on in the life of section 30: ‘I have engaged in infrequent safaris into [section 30’s] various subsections and I have found an exploration of the whole sweep of the section is one not altogether free of difficulty.’ [Re *Martin and R.* (1973), 11 C.C.C. (2d) 224 (Ont. H.C.) at p. 230]”. It is suggested that not only has this state of caselaw affairs not changed since 1984, but also that this same uncertainty and lack of resolution of

important issues can still be said of the business record provisions of the provincial and territorial Evidence Acts, as well.

⁸⁴ See: section 31.5 of the CEA, *supra* note 1, and subsection 34.1(8) of the OEA, *supra* note 1.

⁸⁵ Note the words, “under any rule of law”, which mean that subsection 34.1(8) of the OEA, *supra* note 1, and section 31.5 of the CEA, *supra* note 1, apply not only to the electronic record provisions, but also to issues of the admissibility of electronic records under the business record and banking record provisions, and other document provisions of the Evidence Acts, and also to their common law counterparts. Also, subsection 34.1(3) of the OEA states that, “a court may have regard to evidence adduced under this section in applying any common law or statutory rule relating to the admissibility of records”. Even though this provision is a copy of subsection 2(2) of the UEEA, *supra* note 2, it has not a counterpart in the CEA.

⁸⁶ “CAN/CGSB-72.34-2005” is its designation in Canada’s National Standards System, which states that it is standard “72.34”, developed by the Canadian General Standards Board (the CGSB) and approved in 2005 by the Standards Council of Canada, the coordinating body of the System. The CGSB, a government agency within Public Works and Government Services Canada, has been accredited by the Standards Council of Canada as a national standards development organization. The process by which such national standards are created and maintained in Canada is described within the Standard itself. See also *supra* note 27.

⁸⁷ See: subsection 31.2(2) of the CEA, *supra* note 1; and subsection 34.1(6) of the OEA, *supra* note 1.

⁸⁸ Consider whether evidentiary inferences are created by subsection 4(2) of the UEEA. It appears to create an evidentiary inference by way of the words, “is the record for the purposes of the best evidence rule”. And more definitely so do the words in subsection 4(1), stating that “the best evidence rule . . . is satisfied in respect of the electronic record on proof of . . .”. *The Interpretation Act*, R.S.C. 1985, c. I-21, s. 25(1) states: “Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary”. (There does not appear to be a comparable provision in the Ontario *Interpretation Act*, R.S.O. 1990, c. I11.) For such purposes, is there a distinction between the wording of subsections 4(2) and (1) — between “for the purposes of the best evidence rule” and “the best evidence rule is satisfied”? The enacted counterparts in section 31.2 of the CEA, *supra* note 1, and subsections 34.1(5), (6) of the OEA, *supra* note 1, use the same two phrases, but subsection 31.2(2) of the CEA also contains the words, “in the absence of evidence to the contrary”, while subsection 34.1(6) of the OEA does not.

⁸⁹ *Supra* note 2.

⁹⁰ This distinction between printout and its electronic source was actually recognized by the courts almost 20 years before the electronic record provisions were enacted; see *McMullen*, *supra* note 15, affirming 42 C.C.C. (2d) 67 (Ont. H.C.); *Bell and Bruce*, *supra* note 16. Specifically, in *Bell and Bruce*, Weatherston J.A., delivering the judgment of the Ontario Court of Appeal stated (at 380): “*McMullen* is authority for the proposition that information stored in a computer is capable of being a ‘record kept in a financial institution’, and that the computer print-out is capable of being a copy of that record, notwithstanding its change in form. It is not authority for the proposition that the stored information is the only record, or that a computer print-out is only a copy of that record”. [emphasis in the original] And at 381: “There was some suggestion that one of the banks had the new ‘on-line’ system, under which the information stored in the computer is not, or is not necessarily, erased when a monthly statement is produced. I do not consider that to be important. There is no reason why a bank may not have a ‘record’ in two or more different forms, just as it might have a duplicate set of books”.

⁹¹ The first interpretation is that favoured by John D. Gregory, General Counsel, Policy Division, Ministry of the Attorney General (Ontario) (And see: www.euclid.ca). He acted as Chair of the committee that prepared the *Uniform Electronic Evidence Act* (the UEEA) for the Uniform Law Conference of Canada (the ULCC), and therefore later had comparable responsibility for bringing to life the electronic record provisions of the OEA. The other two participants in drafting the UEEA were federal Department of Justice lawyers, who also aided in preparing the electronic document provisions of the CEA, being Part 3 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [“PIPEDA”], Parts 2 (“Electronic Documents”) and Part 3 (“Amendments to the *Canada Evidence Act*”) came into force on May 1, 2000, *supra* note 2. John Gregory also added to his many years of work in this area of the law

by providing substantial critical analysis and helpful comment upon the more “legal content” parts (particularly section 5, “Legal requirements for electronic records as documentary evidence”) of the new National Standard of Canada, *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2005, (*supra* notes 27 and 86), during the dozens of our meetings of the Canadian General Standards Board’s Committee on Micrographics and Image Management that drafted the standard. See further notes, 25, 46, 48, and 102.

⁹² *Supra* note 77.

⁹³ In *Maxwell on the Interpretation of Statutes*, 11th ed. (London: Sweet & Maxwell; 1962), at p. 25: “Lord Halsbury states however, that he has, on more than one occasion, said that the worst person to construe a statute is the person who is responsible for its drafting, for he is much disposed to confuse what he intended to do with the effect of the language which in fact he has employed”. Cited in support are: *Hilder v. Dexter*, [1902] A.C. 474; *Herron v. Rathmines, etc.*, [1892] A.C. 498, 501. The passage continues on page 26: “But it is unquestionably a rule that what may be called the parliamentary history of an enactment is not admissible to explain its meaning. Its language can be regarded only as the language of the three Estates of the realm, and the meaning attached to it by its framers or by individual members of one of those Estates cannot control the construction of it. Indeed, the inference to be drawn from comparing the language of the Act with the declared intention of its framers would be that the difference between the two was not accidental but intentional”.

⁹⁴ It is the intention of Parliament (in regard to the CEA amendments), or of the enacting legislature (in the case of a provincial or territorial Evidence Act or other legislative amendment) that should guide judicial interpretation, not that of legislative draftspersons or those who aided in the preparation of the Bill before it became a legislated Act: *R. v. Hasselwander*, [1993] 2 S.C.R. 389, 81 C.C.C. (3d) 471, at 478; *United Nurses of Alberta v. Alberta (A.G.)*, [1992] 1 S.C.R. 901, 71 C.C.C. (3d) 225 at 258, 89 D.L.R. (4th) 609. More recently in, *R. v. W.(R.E.)* (2006), 79 O.R. (3d) 1 (Ont. C.A.) Rosenberg J.A., in delivering the judgment of the Court, in interpreting paragraph 39(1)(d) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, referred (at p. 12) to the statement of the Minister of Justice on introducing the Act on second reading, and (at p. 13) to the testimony of Professor Nicholas Bala before the House of Commons’ Standing Committee on Justice and Human Rights (February 16, 2000, at 1545) in determining the intention of Parliament. But there is no resort to the views of lawyers who drafted or otherwise prepared the Bills that become Acts, except in the form of testimony before a Parliamentary committee.

One of the most important examples of differences between drafters’ intentions and the courts’ interpretation of federal legislation applicable to criminal proceedings is the “*Milgaard* procedure” under subsection 9(2) of the CEA (“previous statement of witness not proved adverse”), which was held to result in leave to cross-examine one’s own witness on an inconsistent statement before the jury, instead of such cross-examination being only a *voir dire* procedure in aid of seeking a declaration of adversity under subsection 9(1) of the CEA: *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, at 221 (Sask. C.A.), leave to appeal to the S.C.C. refused (1972) 4 C.C.C. (2d) 566n. This *Milgaard* procedure for subsection 9(2) of the CEA, was quoted with implied approval in *R. v. McInroy and Rouse*, [1979] 1 S.C.R. 588, 42 C.C.C. (2d) 481, at 485-86, and 496 (concluding paragraph of the decision of Martland J. approving of the cross-examination allowed under subsection 9(2)). See also, Professor Ron Delisle’s earlier article (Judge Delisle as he then was), “Witnesses — Competence and Credibility” (1978) 16 Osgoode Hall L.J. 337, at 345-47, whereat he reproduces portions of the testimony of the Minister of Justice, John Turner, and of the Director of the Criminal Law Section, John Scollin (later Mr. Justice Scollin of the Manitoba Court of Queen’s Bench), before the Standing Committee for Justice and Legal Affairs on January 28, 1969 (at 109-12), being testimony in support of the Bill that added subsection 9(2) to the CEA. This testimony is cited in support of the author’s view that (at 345), “despite *R. v. Milgaard*, *supra*, the cross-examination mentioned in subsection 9(2) ought to take place on a *voir dire*”. The same view is put forward by Professor Delisle in an earlier article, “Witnesses — Now and Later” (1976) 34 C.R.N.S. 1, at 7-8, which view was adopted by Langdon J. in *R. v. Cronshaw and Dupon* (1976), 33 C.C.C. (2d) 183 at 201 (Ont. Prov’l. Ct.), quoting from the article.

⁹⁵ Subsection 4(1) of the UEEA; subsection 31.2(1) of the CEA, *supra* note 1; subsection 34.1(5.1) of the OEA, *supra* note 1.

⁹⁶ However, the hearsay rule may provide a more appropriate test than the best evidence rule.

⁹⁷ *Supra* note 11.

- ⁹⁸ See: *McMullen*, *supra* note 15; *Bell and Bruce*, *supra* note 16. Ewart makes the distinction (*supra*, note 13 at 134) that in the case of the “relied upon printout”, *Bell and Bruce* “effectively overrules” the *McMullen* standard, (which distinction is not agreed with). Specifically, in *Bell and Bruce*, Weatherston J.A., delivering the judgment of the Ontario Court of Appeal, stated (at 380): “*McMullen* is authority for the proposition that information stored in a computer is *capable* of being a ‘record kept in a financial institution’, and that the computer print-out is *capable* of being a copy of that record, notwithstanding its change in form. It is not authority for the proposition that the stored information is the only record, or that a computer print-out is only a copy of that record”. [emphasis in the original] And at 381: “There was some suggestion that one of the banks had the new ‘on-line’ system, under which the information stored in the computer is not, or is not necessarily, erased when a monthly statement is produced. I do not consider that to be important. There is no reason why a bank may not have a ‘record’ in two or more different forms, just as it might have a duplicate set of books”.
- ⁹⁹ SOR/2005-30, registered February 1, 2005.
- ¹⁰⁰ Vol. 139, no. 4; pages 207–211. Note that section 57 of PIPEDA, *supra* note 2, added subsection 32(2) to the CEA, *supra* note 1, which states that copies of documents published in the *Canada Gazette* are admissible in evidence as proof, in the absence of evidence to the contrary, of the originals and of their contents.
- ¹⁰¹ S.O. 2000, c. 17.
- ¹⁰² See notes 9 and 10 *supra*, and accompanying text.
- ¹⁰³ See *Ares v. Venner*, *supra* note 3, and the cases that have applied it to issues concerning business records as evidence.
- ¹⁰⁴ *Supra* note 13, at 85, note 57 of Ewart’s text.
- ¹⁰⁵ *Supra* note 39.
- ¹⁰⁶ Being Part I, *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c. 11 R.S.C. 1985, Appendix II, No. 44, proclaimed in force April 17, 1982 (hereinafter, “the Charter”).
- ¹⁰⁷ The “fair trial” provision of the Charter, paragraph 11(d), applies only to, “Any person charged with an offence”.
- ¹⁰⁸ *Supra* note 4. For other references to its author, see notes 28, 50, and 91.
- ¹⁰⁹ Note 279 in the original text: “In the words of *Wigmore on Evidence*, cited in J.D. Ewart, *Documentary Evidence in Canada*, *supra* note 270, at 13. Compare the language of the *Civil Code of Quebec*, [citing articles 2837 and 2838]. The Code is online at: <<http://www.lexum.umontreal.ca/ccq/en/index.html>>”.
- ¹¹⁰ Note 280 in the original text: “See for example his opening contribution to the Uniform Law process, ‘Computer-produced Records in Court Proceedings’, [1994] Proceedings of the Uniform Law Conference, online at: <<http://www.ulcc.ca/en/poam2/index.cfm?secW1994&subW1994ac>>”.
- ¹¹¹ Note 281 in the original text: (1978), 42 C.C.C. (2d) 67, affirmed (1979), 47 C.C.C. (2d) 499, 25 O.R. (2d) 301, 100 D.L.R. (3d) 671 (Ont. C.A.).
- ¹¹² Note 282 in the original text: “Ewart, *Documentary Evidence in Canada*, *supra*, n. 270, at 67”.
- ¹¹³ *Supra* note 84.