

Pursuing the “Usual and Ordinary Course of Business”: An Exploratory Study of  
the Role of Recordkeeping Standards in the Use of Records as Evidence in  
Canada

by

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## **Abstract**

Recordkeeping standards are intended to offer guidance and recommendations for the requirements of a sound and effective records management program. One of the uses of recordkeeping standards may be to help organizations ensure the trustworthiness of records in the event that an organization must present records for consideration as evidence in court. No empirical study has previously been conducted, however, to determine if standards provide suitable guidance about the relationship between recordkeeping principles and legal compliance. Therefore, no assessment has yet been made of whether standards contain sufficient or appropriate guidance to help organizations meet their obligations for the creation and management of legally admissible records.

This dissertation addresses the nexus between recordkeeping standards and the admissibility of business records as evidence. The study uses case law from British Columbia and Ontario as a basis for comparing admissibility criteria in a selection of relevant cases against the content of a selection of relevant recordkeeping standards. The study aims to determine if the standards examined provide adequate recordkeeping guidance to help an organization support legal compliance with the criteria for admissibility identified. As an exploratory study, this research also presents an innovative model for considering the suitability and applicability of recordkeeping standards, particularly in relation to the legal obligations of an organization for records creation and management.

The findings of this research show that the act of sound and structured recordkeeping helps an organization increase the likelihood that its business records will be admitted as evidence, but that standards play a very small part in actual decisions about admissibility. Case law from British Columbia and Ontario reveals that, in order to convince a judge that a business record is trustworthy, counsel needs to be able to demonstrate the existence of, and consistent application

of, accurate and up-to-date recordkeeping documentation. The study offers recommendations on how recordkeeping standards could be strengthened so that they provide more robust and effective guidance about recordkeeping practices and the creation of records-related documentation, most notably in relation to legal issues associated with the admissibility of evidence.

## **Preface**

This study was conducted as a requirement for the degree of Doctor of Philosophy in Library, Archival and Information Studies at the University of British Columbia.

The objectives of the study were to investigate the requirements a business record must satisfy to be admitted as evidence in a Canadian court of law and determine if recordkeeping standards provide adequate guidance to help an organization support legal compliance with these criteria.

The author was responsible for the research design, data collection and analysis, and the writing of the research report under the guidance of his Supervisor, Professor Luciana Duranti, from the School of Library, Archival and Information Studies, and his committee members, Professor Edie Rasmussen, from the School of Library, Archival and Information Studies, Assistant Professor Victoria Lemieux, from the School of Library, Archival and Information Studies and Professor Anthony Sheppard, from the Faculty of Law. All committee members are from the University of British Columbia.

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## List of Abbreviations

ABPC	Alberta Provincial Court
AIIM	Association for Information and Image Management
AJ	Alberta Judgments
ALR	American Law Reports / Alberta Law Reports
Alta	Alberta
AC	Appeal Cases (Houses of Lords)
ACWS	All-Canada Weekly Summaries
AD	Appellate Division
Alta	Alberta
ANSI	American National Standards Institute
ARMA	Association of Records Managers and Administrators
B & Ad	Barnewall & Adolphus' Reports, King's Bench
BC	British Columbia
BCAC	British Columbia Appeal Cases
BCCA	British Columbia Court of Appeal
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCPC	British Columbia Provincial Court
BCSC	British Columbia Supreme Court
c	Chapter
CA	Court of Appeal
CanLII	Canadian Legal Information Institute
Co Ct	County Court
CCC	Canadian Criminal Cases
CGSB	Canadian General Standards Board
CPC	Carswell's Practice Cases
Crim Div	Criminal Division
CR	Criminal Reports
CRR	Canadian Rights Reporter
Ct J	Court of Justice
DLR	Dominion Law Reports
ER	English Reports
FC	Federal Court
FCJ	Federal Court Judgments
FTR	Federal Trial Reports
Gen Div	General Division
Gen Sess Ct	General Sessions Court
H Ct J	High Court of Justice
HL	House of Lords
InterPARES	International Research on Permanent Authentic Records in Electronic Systems
ISO	International Organization for Standardization
LR	Law Reports
Nfld & PEIR	Newfoundland & PEI Reports
NJ	Newfoundland Judgments
NSCA	Nova Scotia Court of Appeal

NSJ	Nova Scotia Judgments
OAC	Ontario Appeal Cases
OJ	Ontario Judgments
Ont Ct J	Ontario Court of Justice
OR	Ontario Reports
ON	Ontario
ONCA	Ontario Court of Appeal
ONCJ	Ontario Court of Justice
ONSC	Ontario Superior Court
Ont	Ontario
Ore	Oregon
QL	Quick Law Database (operated by LexisNexis)
para / paras	Paragraph / Paragraphs
Prov Ct	Provincial Court
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSO	Revised Statutes of Ontario
s / ss	Section / Sections
SAA	Society of American Archivists
Sask	Saskatchewan
SCC	Supreme Court of Canada
SCJ	Supreme Court Judgments
SCR	Canada Supreme Court Reports
SCTD	Supreme Court Trial Division
SJ	Saskatchewan Judgments
Sup Ct	Superior Court
TD	Trial Division
WCB	Weekly Criminal Bulletin
WWR	Western Weekly Reports

## Glossary

This glossary contains definitions of terms central to this dissertation. Definitions are drawn from the five sources listed below or a source provided at the end of the entry. Definitions with no citation are the author's.

*Black's Law Dictionary*, 9th ed., 2009 [Black's]

*A Glossary of Archival and Records Terminology*, Society of American Archivists (SAA), 2013, <http://www2.archivists.org/glossary> [SAA Glossary]

*InterPARES 3 Terminology Database*, International Research on Permanent Authentic Records in Electronic Systems (InterPARES), [http://www.interpares.org/ip3/ip3\\_terminology\\_db.cfm](http://www.interpares.org/ip3/ip3_terminology_db.cfm) [InterPARES]

*The People's Law Dictionary*, Law.com, <http://dictionary.law.com> [Law.com]

*West's Encyclopedia of American Law*, 2nd ed., 2005 [West's]

Working Group on Electronic Document Retention and Production, *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, 3rd edition (The Sedona Conference, 2010) [Sedona]

**Adjudicator:** A person whose job is to render binding decisions; one who makes judicial pronouncements. See also *Fact-Finder* [Black's].

**Admissibility:** The quality or state of being allowed to be entered into evidence in a hearing, trial, or other official proceeding [Black's].

**Admissible:** Capable or being legally admitted in a hearing, trial, or other official proceeding [Black's].

**Admissible Evidence:** Evidence that is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it [Black's].

**Administrative Law:** The law governing the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public [Black's].

**Affiant:** The person who signs an affidavit and swears to the affidavit's truth before a person authorized to administer oaths [Law.com].

**Affidavit:** A voluntary declaration of facts written down and sworn to by the affiant before an officer authorized to administer oaths [Black's].

**Analogue:** The representation of an object or physical process through the use of continuously variable electronic signals or mechanical patterns [InterPARES].

**Archival Science:** The body of knowledge about the nature and characteristics of archives and archival work systematically organized into theory, methodology, and practice [Luciana Duranti, "Archival Science," in *Encyclopedia of Library and Information Science*, vol. 59 (New York: Miriam Dekker, 1996), 1].

**Archivist:** An individual responsible for appraising, acquiring, arranging, describing, preserving, and providing access to records of enduring value, according to the principles of provenance, original order, and collective control to protect the materials' authenticity and context [SAA Glossary].

**At Issue:** Taking opposite sides; under dispute; in question [Black's].

**Authentic Record:** A record that is what it purports to be and that is free from tampering or corruption [InterPARES].

**Authentication:** The process of assuring the claimed identity of an entity, especially so that it may be admitted as evidence [InterPARES].

**Authenticity:** The trustworthiness of an entity as the entity; i.e., the quality of an entity that is what it purports to be and that is free from tampering or corruption. The quality of being authentic or entitled to acceptance [InterPARES].

**Best Evidence Rule:** The legal doctrine that an original piece of evidence, particularly a document, is superior to a copy. If the original is available, a copy will not be allowed as evidence in a trial [Law.com].

**Best Practice:** See *Guidelines*.

**Business:** Any profession, trade, calling, manufacture or undertaking of any kind carried on, regardless of location, whether for profit or otherwise, including any activity or operation carried on or performed, regardless of location, by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government [*Canada Evidence Act*, RSC 1985, c C-5, s 30(12)].

**Business Record:** A type of record created or received by a business in the course of operations and set aside for action or reference [SAA Glossary].

**Case:** A civil or criminal proceeding, action, suit, or controversy at law or in equity [Black's].

**Circumstantial Evidence:** Evidence based on inference and not on personal knowledge or observation. All evidence that is not given by eyewitness testimony. Also termed *indirect evidence* [Black's].

**Civil Law (System):** One of the two prominent legal systems in the Western world, originally administered in the Roman Empire and still influential in continental Europe, Latin America, Scotland, and Louisiana, among other parts of the world; Roman Law. The body of law imposed by the state, as opposed to moral law. The law of civil or private rights, as opposed to criminal law or administrative law [Black's].

**Civil Law (Branch):** The branch of law which concerns disputes between individuals and/or organizations, where a judgment can be the requirement of action, the cessation of action, and/or monetary payments from one party to another [Black's].

**Civil Liability:** (1) Liability imposed under the civil, as opposed to the criminal, law; (2) the state of being legally obligated for civil damages. See also *Liability* and *Personal Liability* [Black's].

**Claim:** The aggregate of operative facts giving rise to a right enforceable by a court. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. A demand for money, property, or a legal remedy to which one asserts a right; especially, the part of a complaint in a civil action specifying what relief the plaintiff asks for [Black's].

**Common Law:** The body of law derived from judicial decisions, rather than from statutes or constitutions [Black's].

**Counsel:** One or more lawyers who represent a client [Black's].

**Criminal Law:** The body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders [Black's].

**Declarant:** One who has made a statement [Black's].

**Demonstrative Evidence:** Physical evidence that one can see and inspect (i.e., an explanatory aid, such as a chart, map, and some computer simulations) and that does not play a direct part in the incident in question [Black's].

**Digital:** The representation of an object or physical process through discrete, binary values [InterPARES].

**Digital Record:** A digital document that is treated and managed as a record [InterPARES].

**Diplomatics:** The study of the creation, form, and transmission of documentation, and their relationship to the facts represented in them and to their creator, in order to identify, evaluate, and communicate their nature and authenticity [InterPARES].

**Direct Evidence:** Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption [Black's].

**Dissenting Opinion:** An opinion by one or more judges who disagree with the decision reached by the majority. See also *Majority Opinion* and *Opinion* [Black's].

**Discovery:** The process of identifying, locating, securing, and producing information and materials for the purpose of obtaining evidence for utilization in the legal process [Sedona].

**Dispute:** A conflict or controversy, especially one that has given rise to a particular lawsuit [Black's].

**Document:** An indivisible unit of information constituted by a message affixed to a medium (recorded) in a stable syntactic manner [InterPARES].

**Documentary Evidence:** Any document (paper or electronic) which is presented and allowed as evidence in a trial or hearing, as distinguished from oral testimony [Black's].

**Domestic Law:** The legal system governing individuals within a nation [Black's].

**Electronic:** Device or technology associated with or employing low voltage current and solid state integrated circuits or components, usually for transmission and/or processing of analogue or digital data [InterPARES].

**Electronic Record:** An analogue or digital record that is carried by an electrical conductor and requires the use of electronic equipment to be intelligible by a person [InterPARES].

**Electronically Stored Information (ESI):** Information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (i.e., on paper) [Sedona].

**Evidence:** Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked [John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada*, 2nd ed., vol. 1 (Boston: Little, Brown, 1923), 3]].

**Exclusionary Rule:** Any rule that excludes or suppresses evidence [Black's].

**Fact-Finder:** One or more persons—such as jurors in a trial or judges sitting without a jury—who hear testimony and review evidence to rule on a factual issue. See also *Adjudicator* [Black's].

**Fact-Finding:** The process of taking evidence to determine the truth about a disputed point of fact [Black's].

**Finding of Fact:** A determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, usually presented at the trial or hearing [Black's].

**Foundational Evidence:** Evidence that determines the admissibility of other evidence [Black's].

**Fraud:** A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his/her detriment [Black's].

**Genuine:** Authentic or real; having the quality of what a given thing purports to be or to have; free from forgery or counterfeiting [Black's].

**Guidelines:** A set of practices or procedures designed to accomplish a course of action.

**Hearsay:** An out of court statement (written or oral) offered in evidence and accepted for the truth of the contents of the statement to prove the truth of the matter asserted.

**Hearsay Exception:** Any of the several deviations from the hearsay rule, allowing the admission of otherwise inadmissible statements because the circumstances surrounding the statements provide a basis for considering the statements reliable [Black's].

**Hearsay Rule:** The rule that no assertion offered as testimony or in a document, can be received unless the person who made it is or has been open to test by cross-examination or an opportunity



for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute [Black's].

**Indicia of Reliability:** See *Threshold Reliability*.

**Indirect Evidence:** See *Circumstantial Evidence*.

**International Law:** The legal system governing the relationships between nations [Black's].

**International Standard:** A document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. See also *Recordkeeping Standard* [IEEE, "Standards Glossary," 2013, [http://www.ieee.org/education\\_careers/education/standards/standards\\_glossary.html](http://www.ieee.org/education_careers/education/standards/standards_glossary.html)].

**Judgment:** A court's final determination of the rights and obligations of the parties in a case. See also *Opinion* and *Ruling* [Black's].

**Judicial Discretion:** The power of the judge to make decisions on some matters without being bound by precedent or strict rules established by statute [Law.com].

**Jurisdiction:** (1) A government's general power to exercise authority over all persons and things within its territory; (2) a court's power to decide a case or issue, a decree [Black's].

**Jurisprudence:** (1) Originally (in the eighteenth century), the study of the first principles of the law of nature, the civil law, and the law of nations; (2) more modernly, the study of the general or fundamental elements of a particular legal system, as opposed to its practical and concrete details; (3) the study of legal systems in general [Black's].

**Law:** (1) The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system; (2) the aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them [Black's].

**Law of Evidence:** The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding [Black's].

**Laying a Foundation:** Introducing evidence of certain facts needed to render later evidence relevant, material, or competent [Black's].

**Legal Proceeding:** See *Proceeding*.

**Liability:** The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment. See also *Civil Liability* and *Personal Liability* [Black's].

**Lifecycle:** The different stages a record's existence. These phases typically include creation, maintenance, and preservation or disposition; they have also been considered as active, semi-active, and non-active phases [SAA Glossary].

**Majority Opinion:** An opinion joined in by more than half the judges considering a given case. See also *Dissenting Opinion* and *Opinion* [Black's].

**Mere Act:** An act in which the will is limited to the accomplishment of the act, without the intention of producing any other effect than the act itself: effect and act coincide [Luciana Duranti, *Diplomatics: New Uses for an Old Science* (Lanham, MD: Scarecrow Press, Inc.), 64]].

**Minority Opinion:** See *Dissenting Opinion*.

**Natural Law:** The unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed [West's].

**Opinion:** (1) a court's written statement explaining its decision in a given cause, usually including the statement of facts, points of law, rationale, and dicta; (2) a person's thought, belief or inference, especially a witness's view about a fact in dispute, as opposed to personal knowledge of the facts themselves. See also *Dissenting Opinion*, *Judgment*, and *Ruling* [Black's].

**Oral Testimony:** See *Testimony*.

**Personal Liability:** Liability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets. See also *Civil Liability* and *Liability* [Black's].

**Physical Evidence:** See *Real Evidence*.

**Policy:** A set of rules or principles that guide decision-making and actions in order to achieve desired outcomes of a particular topic or goal. Typically, these rules or principles are mandatory within an organization, as opposed to guidelines or best practices that may be voluntary.

**Positive Law:** A system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some non-political community. Positive law typically consists of enacted law—the codes, statutes, regulations, and case law that are applied and enforced in the courts [Black's].

**Precedent:** (1) The making of law by a court in recognizing and applying new rules while administering justice; (2) a decided case that furnishes a basis for determining later cases involving similar facts or issues [Black's].

**Prima Facie Evidence:** Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced [Black's].

**Private Law:** The body of law dealing with private persons and their property and relationships [Black's].

**Probative Evidence:** Evidence that tends to prove or disprove a point in issue [Black's].

**Proceeding:** The regular and orderly progression of litigation (civil or criminal), including all acts and events between the time of commencement and the entry of judgment [Black's].

**Public Law:** The body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together [Black's].

**Real Evidence:** Physical evidence (such as clothing or a knife wound) that itself plays a direct part in the incident in question [Black's].

**Record:** A document made or received in the course of a practical activity as an instrument or a by-product of such activity, and set aside for action or reference [InterPARES].

**Recordkeeping Standard:** A type of international standard that provides rules, guidelines, or principles for records professionals to assist in the management of organizational records throughout their lifecycles. See also *International Standard*.

**Records Lifecycle:** See *Lifecycle*.

**Records Management:** The systematic and administrative control of records throughout their life cycle to ensure efficiency and economy in their creation, use, handling, control, maintenance, and disposition [SAA Glossary].

**Records Management Program:** The activities, policies, and procedures within an organization to implement records management [SAA Glossary].

**Records Professional:** any individual who is qualified – as opposed to simply responsible – for managing records at any stage of their life-cycle and in any environment, regardless of the actual title of the position held [Luciana Duranti, “Educating the eXtreme Records Professional: A Proposal,” in *The 2010 S@P Yearbook: Dedicated to the Memory of Hans Scheurkogel*, ed. E. Hokke and T. Laeven (Harderwijk, NL: Harderwijk Press, 2010), 198].

**Reliability:** The trustworthiness of a record as a statement of fact. See also *Threshold Reliability* and *Ultimate Reliability* [InterPARES].

**Relevance:** The fact, quality, or state of being relevant; relation or pertinence to the issue at hand. See also *Probative Evidence* [Black's].

**Relevant:** Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact [Black's].

**Risk Management:** The systematic application of policies, procedures and practices to the tasks of identifying, analysing, evaluating, treating, and monitoring risk [National Archives of Australia, “Appendix 11: Risk Analysis in DIRKS,” in *DIRKS: A Strategic Approach to Managing Business Information* (Commonwealth of Australia, 2001), 3].

**Ruling:** The outcome of a court's decision either on some point of law or on the case as a whole. See also *Judgment* and *Opinion* [Black's].

**Rule Against Hearsay:** See *Hearsay*.

**Standard:** A model accepted as correct by custom, consent, or authority; 2. A criterion for measuring acceptability, quality, or accuracy [Black's].

**Substantive Law:** The part of the law that creates, defines, and regulates the rights, duties, and powers of parties. See also *Procedural Law* [Black's].

**Testimony:** The oral evidence of a witness in a judicial proceeding, such as a trial [Black's].

**Threshold Reliability:** A quality of evidence, determined by the judge, and based on whether the circumstances [of the evidence's creation] tend to negate inaccuracy and fabrication and whether the circumstances provide the trier of fact with a satisfactory basis for evaluating the truth about the facts to be proven. Also termed as *indicia of reliability*. See also *Reliability* and *Ultimate Reliability* [*R v Lemay*, 2004 BCCA 604, [2004] BCJ no 2494 (QL) at para 50].

**Trier of Fact:** See *Fact-Finder*.

**Trustworthiness:** The accuracy, reliability and authenticity of a record [InterPARES].

**Truth:** A fully accurate account of events; factuality [Black's].

**Ultimate Reliability:** To be determined by the trier of fact. Not to be confused with *threshold reliability*. See also *Reliability* and *Threshold Reliability* [*R v Lemay*, 2004 BCCA 604, [2004] BCJ no 2494 (QL) at para 50].

**Voir Dire:** A preliminary examination of a prospective juror by a judge or counsel to decide whether the prospect is qualified and suitable to serve on a jury; (2) A preliminary examination before a judge to test the competence of a witness or the admissibility of evidence [Black's].

**Weight:** The strength, value and believability of evidence presented on a factual issue by one side as compared to evidence introduced by the other side [Law.com].

**Witness:** (1) One who sees, knows, or vouches for something; (2) One who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit [Black's].

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## Dedication

*To Mom. So dearly missed; forever an inspiration.*

## Chapter 1: Introduction

### 1.1 Overview

This introductory chapter discusses the research problem that motivated the study, reviews the purpose of the study and its data sets, and outlines the research questions that have guided the research. The chapter also provides an overview of the methodologies used. The penultimate section describes the structure of this dissertation by providing a summary of its chapters. The final section reviews citation and formatting styles used throughout the remainder of the dissertation.

### 1.2 Research Problem

The lifeline of any business is its records.<sup>1</sup> Without them, the business simply cannot function. Though there are many different definitions of a record in use, one common definition is that a record is a “document made or received in the course of a practical activity as an instrument or a by-product of such activity, and set aside for action or reference.”<sup>2</sup> Thus, a business record may be a type of “document [or] other material created or received by a ... [business] ... in the course of operations and preserved for future use.”<sup>3</sup> This means that a business record contains evidence of decisions made by individuals within the business. Therefore, in the event of litigation, records become crucial pieces of evidence that assist the fact-finding process. However, simply because a business generates a record for litigation does not always mean that the record will be admitted as evidence in court, and therefore, be useable by either party.

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<sup>1</sup> A business is “any profession, trade, calling, manufacture or undertaking of any kind carried on, regardless of location, whether for profit or otherwise, including any activity or operation carried on or performed, regardless of location, by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government” (*Canada Evidence Act*, RSC 1985, c C-5, 30(12)).

<sup>2</sup> *InterPARES 3 Terminology Database*, s.v. “record.”

<sup>3</sup> *A Glossary of Archival and Records Terminology*, 2013, s.v. “business records” [Hereinafter referred to as *SAA Glossary*]. For readability purposes, this dissertation uses the singular form of the phrase, *business record*, with the understanding that it may encompass multiple *business records*.



As will be discussed in Chapter 2, business records have been used in legal actions since the seventeenth century, if not earlier. Despite their lengthy history in litigation, it is not clear how the Canadian judiciary has assessed business records that have been tendered as evidence.<sup>4</sup> It is understood that business records must satisfy certain conditions in order to be admitted as evidence, such as being made contemporaneously to the events they depict, created in the usual and ordinary course of business, and not created when legal proceedings are pending. The specific parameters for what constitutes the concept of “the usual and ordinary course of business” have important implications for organizational recordkeeping practices and standards.

An organization must manage its records “such that they are complete, true and accurate, accessible, legible, retained as required, and fully usable for any and all legal purposes should the need arise.”<sup>5</sup> An organization may systematically manage its records by establishing a records management program: a series of inter-related activities, policies and procedures for designing, classifying, appraising, maintaining, retrieving, using, protecting, and disposing of records.<sup>6</sup> To develop this program, a records professional, that is, “any individual who is qualified – as opposed to simply responsible – for managing records at any stage of their life-cycle and in any environment, regardless of the actual title of the position held,”<sup>7</sup> may draw on the guidance provided in recordkeeping standards, guidelines, and technical reports.<sup>8</sup> While numerous standards are

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<sup>4</sup> *R v Monkhouse* (1987), 56 Alta LR (2d) 97 (CA), [1987] AJ no 1031 (QL) at 3.

<sup>5</sup> David O. Stephens, “Legal Issues,” in *Managing Electronic Records*, ed. Julie McLeod and Catherine Hare (London: Facet Publishing, 2005), 102.

<sup>6</sup> *SAA Glossary*, s.v. “records management program.” *Records management* is the “process of establishing systematic and administrative controls on the creation, use, handling, maintenance, and disposition of records” (*SAA Glossary*, s.v. “records management.”).

<sup>7</sup> Luciana Duranti, “Educating the eXtreme Records Professional: A Proposal,” in *The 2010 S@P Yearbook: Dedicated to the Memory of Hans Scheurkogel*, ed. E. Hokke and T. Laeven (Harderwijk, NL: Harderwijk Press, 2010), 198.

<sup>8</sup> See Jackie Bettington, “Standardised Recordkeeping: Reality or illusion?,” *Archives & Manuscripts* 32, no. 2 (2004): 46-69; John Bolton, “Standards: Providing a Framework for RIM Success,” *Information Management Journal* 45, no. 3 (2011): 30-35; Eugenia K. Brumm and Diane K. Carlisle, “Standards: Building Blocks for a Strong RIM Program,” *Information Management Journal* 39, no. 6 (2005): 31-32, 34-37, 39; Mandeline

available to records professionals, it is unclear whether these standards are suitable for the issues they are designed to address, such as legal compliance. Simply put, standards “are not well understood.”<sup>9</sup> Moreover, recordkeeping standards do not appear to help Canadian records professionals define what the concept of “usual and ordinary course of business” means within their own organizations with respect to records creation and maintenance.

### **1.3 Research Purpose and Approach Taken**

The general goal of this research is to enhance records professionals’ understanding of the usability of recordkeeping standards as resources to assist them mitigate legal risks related to admissibility of documentary evidence. Specifically, this study examines legal risks associated with business records tendered as evidence in a Canadian court of law. To achieve this goal, an in-depth investigation of Canadian case law was identified as a major component of the research.

As indicated in the literature review in Chapter 3, no empirical study has reviewed Canadian case law to determine the criteria judges cite as reasons not to admit business records as evidence. Understanding these criteria is imperative for knowing whether recordkeeping standards suffice in mitigating legal risks. As organizations grapple with the challenges presented by the increasing amount of information they produce, records professionals need confidence in the tools they use to implement proper records management. Records professionals need to know which standards may help reduce legal risks within their organization, and, more importantly, that the standards provide recommendations pertinent to the particular context in which they are used.

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Henderson, “Standards: Developments & Impacts,” *Special Libraries* 72, no. 2 (1981): 142-148; Margaret Pember, “Sorting Out the Standards: What Every Records and Information Professional Should Know,” *Records Management Journal* 16, no. 1 (2006): 21-33; David O. Stephens, “International Standards and Best Practices in RIM,” *Information Management Journal* 34, no. 2 (2002): 68-71; and Victoria I. Walch, “The Role of Standards in the Archival Management of Electronic Records,” *American Archivist* 53, no. 1 (1990): 30-43.

<sup>9</sup> Peter Grindley, *Standards Strategy and Policy* (New York: Oxford University Press, 2005), 3. Though Grindley made this observation within the context of larger industrial and technological standards, Chapter 3 will demonstrate that his statement also applies to recordkeeping standards.

This dissertation aims to provide Canadian records professionals with a better understanding of how the implementation of certain recordkeeping standards, that is, rules, guidelines, or principles for records professionals to assist in the design of records systems and the management of organizational records throughout the records lifecycle, may contribute to the reduction of legal risks. Moreover, since most standards are not freely accessible and must be purchased, the information in this study may help records professionals better direct their resources while providing them with the confidence that their investment in these documents is not unsound. Finally, this investigation of the application of the concept of “usual and ordinary course of business” will provide records managers with a better understanding of the requirements a record must satisfy to be admitted as evidence in Canada under the business records exception to the hearsay rule.

#### **1.4 Research Questions**

The research discussed in this study explores the content of recordkeeping standards in the Canadian context and considers their relevance to the use of the business records exception to the hearsay rule. The objectives of the research are to determine:

- the criteria that judges use to assess business records as admissible evidence; and
- the capacity of existing recordkeeping standards to address those criteria and guide organizations in fulfilling them.

In order to achieve these objectives, two primary research questions are identified. Given the exploratory nature of the research, these research questions served as a guide but were not intended to constrain the scope of the analysis, allowing this author to “uncover the unexpected and to explore new avenues” as they arose.<sup>10</sup>

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<sup>10</sup> Kristy Williamson, “The Beginning Stages of Research,” in *Research methods for students, academics and professionals: Information Management and Systems*, ed. Kristy Williamson (Wagga Wagga, New South Wales: Centre for Information Studies, 2002), 53.

The first research question focuses on Canadian case law. The question aims to determine the criteria Canadian judges frequently cite to explain why a business record may or may not be admitted as evidence.

**Research Question 1:** On what grounds do the Canadian lawyers and judges base their assessment of documentary evidence as meeting the business records exception to the hearsay rule?

**Sub-Question 1.1:** What do the legal texts (i.e., case law, statutes, regulations, etc.) require?

**Sub-Question 1.2:** Is the adoption of a recordkeeping standard one of the grounds for admission as evidence? If yes, which standard(s)? If not, do the other criteria imply the adoption of a standard?

This author identified two groups of scholars who may share different views on the requirements for a record to be admitted as evidence under the business records exception to the hearsay rule: lawyers and judges. The first sub-question under Question 1 allows for their different opinions and the sources in which they are presented (i.e., the views of academics and practicing lawyers appear in articles and monographs and the views of judges appear in published case law). The second sub-question aims to determine what contribution, if any, recordkeeping standards may have in a judge's decision to admit a business record as evidence under the business records exception to the hearsay rule.

The second research question follows logically from the first research question. The purpose of this question is to determine whether the criteria cited in the legal texts are supported by recordkeeping standards. The sub-question aims to provide practical recommendations that either inform Canadian records professionals about the strengths of the standards or offers suggestions on how the standards may be improved.

**Research Question 2:** Does the content of recordkeeping standards, as they presently exist, provide sufficient legal protection to the business records of an organization?

**Sub-Question 2.1:** If yes, in what way? If not, how should these standards be modified to afford an organization better legal protection?

## 1.5 Research Methods

The research is guided by a constructivist “worldview,” that is, “a basic set of beliefs that guide action.”<sup>11</sup> Constructivists often rely on qualitative research methods, such as interviews, discourse analysis, or ethnography, to collect their data because context plays an integral role in knowledge synthesis as the researcher explores how the “social reality is an ongoing accomplishment of social actors.”<sup>12</sup>

According to Creswell, qualitative research is “an inquiry process of understanding a social or human problem, based on building a complex, holistic picture, formed with words, reporting detailed views of informants, and conducted in a natural setting.”<sup>13</sup> This type of research aims to better understand the relationships and meanings between the different variables that influence the phenomena being examined.<sup>14</sup> Typically, qualitative research is inductive in nature, whereby the researcher works toward developing theory. This is why this dissertation established research problems and questions and then examined them through the consideration of legal concepts, specifically, admissibility criteria of business records, rather than posing theories that it would test.

This is also an exploratory research project. In keeping with the strategies for such investigations proposed by social scientists such as Stebbins, this author aimed to produce “inductively derived generalizations about the group, process, activity, or situation under study,” in this instance, about recordkeeping standards based on a data set derived from Canadian case law.<sup>15</sup> Stebbins defines exploratory research as “a broad-ranging, purposive, systematic, prearranged undertaking designed to maximize the discovery of generalizations leading to description and

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<sup>11</sup> John W. Creswell, *Research Design: Qualitative & Quantitative Approaches* (Sage Publications, Inc.: London, 1994), 6.

<sup>12</sup> Andrew Bryman, *Social Research Methods*, 3rd ed. (New York: Oxford University Press, 2008), 20.

<sup>13</sup> Creswell, *Research Design*, 1.

<sup>14</sup> Bryman, *Social Research Methods*, 19-23.

<sup>15</sup> Robert A. Stebbins, “Exploratory Research,” in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa M. Given (Thousand Oaks, CA: Sage Publications, 2008), 327.

understanding of an area of social or psychological life.”<sup>16</sup> This form of research is typically used when there is “little or no scientific knowledge about the group, process, activity, or situation” that the researcher wants to examine but when the researcher believes the situation “contains elements worth discovering.”<sup>17</sup> Exploratory research equates to canvassing a broad topic to identify more specific areas that will require additional research.

To conduct this exploration, this author applied the social sciences methodology of content analysis to identify admissibility criteria from selected Canadian case law for the purpose of evaluating recordkeeping standards. Content analysis allows a researcher to interpret text in a logical and orderly manner, supporting and facilitating the development of theory about the issue being examined.<sup>18</sup> This author uses content analysis to identify criteria that judges from British Columbia and Ontario provide in their explanations for why business records should not be admitted as evidence. This study uses these reasons as a means to establish an objective and measurable basis for determining the role of records managers in creating and maintaining authentic and reliable business records. As will be discussed in Chapter 2, for a record to be admitted as evidence in a Canadian court of law, it must first be authenticated and then the judge must determine that the record is reliable. The following discussion focuses primarily on the reliability of records because it is the issue that appeared most frequently when reviewing the corpus of records in the data set. Authenticity and reliability work hand in hand, and therefore some of the issues addressed throughout the dissertation may also apply to the process of authentication.

The examination of the records management role focused on a critical analysis of five recordkeeping standards to determine whether they sufficiently or accurately describe the criteria

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<sup>16</sup> Robert A. Stebbins, *Exploratory Research in the Social Sciences* (Thousand Oaks, CA: Sage Publications, 2001), 3.

<sup>17</sup> Ibid, 6.

<sup>18</sup> Uwe Flick, *An Introduction to Qualitative Research*, 4th ed. (London: Sage, 2009), 305-32.

for the admissibility of business records in Canada. The exploration of the nexus between the legal admissibility of records and the guidance provided in key recordkeeping standards allowed the author to offer insights into issues that records professionals may wish to consider both in the development of recordkeeping standards and in the overall management of effective records management programs.

## **1.6 Organization**

This study includes seven chapters. This chapter has introduced the research problem, the objectives of the study, the research questions, and the research methods that are explored in detail in the subsequent chapters.

Chapter 2 reviews the history of the law of evidence as it concerns the admissibility of business records in Canada. The goal of Chapter 2 is to establish the necessary context for the material discussed in later chapters: the chapter introduces and defines key legal terminology and legal concepts to help the audience for this study, records professionals, to understand important elements of the law of evidence and the business records exception to the hearsay rule.

Chapter 3, the literature review, is divided into three sections. The first section explores how records and archives scholars have addressed legal issues pertaining to records management. The second section examines scholarly legal publications that address the admissibility of business records in Canada. The final section discusses the literature by records, archives, and legal scholars pertaining to recordkeeping standards.

Chapter 4 presents the methodology used to identify and collect the data set for the study. The data set consisted of legal rulings from British Columbia and Ontario that contained admissibility decisions concerning business records. The decision to focus on case law from these two provinces is explained in detail in Chapter 4, along with a review of the methodology used to identify and code

records that were offered as evidence under the business records exception but that ultimately were not admitted as evidence.

Chapter 5 explains the reasons judges of the British Columbia and Ontario courts did not admit certain business records as evidence. The chapter reviews six categories of codes that the author created from his review of the case law. The chapter also considers the relevance of these categories to records professionals and examines the ways in which records professionals may help their organizations increase the likelihood that records submitted as evidence will be admitted in a Canadian court of law.

Chapter 6 outlines the methodology used to identify six recordkeeping standards that were analyzed. The chapter then discusses the strengths and weaknesses of these recordkeeping standards in light of the findings of Chapter 5. This chapter also considers whether these standards possess the capacity to address issues relating to the admissibility of records under the business records exception in Canada.

Chapter 7 evaluates the outcomes of the research against its objectives. The chapter also presents the significance of the study to records managers, discusses the implications of the research findings, reviews the limitations of the study, and suggests future directions for this type of research.

## **1.7 Notes Regarding Citations and Formatting**

### **1.7.1 Citations**

This dissertation relies on two style manuals. The main text, bibliographic citations, and formatting are presented in accordance to the *Chicago Manual of Style*, 16th edition.<sup>19</sup> The cited legislation and jurisprudence (e.g., case law) follows the *Canadian Guide to Uniform Legal Citation*, 7th edition (also known as the *McGill Guide*).

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<sup>19</sup> *Chicago Manual of Style*, 16th edition (Chicago: University of Chicago Press, 2010).



A few variations of the *McGill Guide* have been implemented.<sup>20</sup> Only the ruling name and its judgment year are cited in the text body (e.g., “*R v Bob* (2010)” or “*Tim v Allen* (1980)”). The full citation of the ruling is listed as a footnote following the mention of its name. Though the *McGill Guide* says that the full citation should only appear at the first reference and that all subsequent references should refer back to the initial citation using *ibid* or *supra*, this dissertation repeats citations to improve readability. In some instances (and as permitted in the *McGill Guide*) a shorter title of the ruling appears in brackets at the end of the citation, e.g., “*Tim v Allen* (1980), 59 BCLR (2d) 215 (SC), [1980] BCJ no 456 (QL) [*Tim*].” At the first instance, the full citation is given but only the shorter title appears at subsequent citations. For rulings that are mentioned in multiple chapters, their complete citation is repeated at their first appearance in each chapter.

Cases cited in this dissertation are drawn from two sources: LexisNexis Legal, also known as QuickLaw (abbreviated as “QL”), and the database from the Canadian Legal Information Institute, known and abbreviated as CanLII. When available, citations are to the paragraph number (e.g., “at para 5”). In instances where the ruling does not contain paragraph numbers, this author converted the ruling to a PDF file (a feature available in both databases), formatting the pages to standard 8 ½” x 11” size, and cited the page number of the PDF file (e.g., “at 6”).

The *McGill Guide* recommends that the citation include the phrase “available at X” (where X represents the name of the database). Since all legal sources in this study come from QL or CanLII, the recommended phrase has been minimized to include only the relevant abbreviation from the database (e.g., *Tim v Allen* (1980), 59 BCLR (2d) 215 (SC), [1980] BCJ no 456 (QL) or *Bob v Smith*, 2000 CanLII 22806 (ONSC)).

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<sup>20</sup> *Canadian Guide to Uniform Legal Citation*, 7th edition (Toronto: Carswell, 2010) [hereinafter referred to as the *McGill Guide*].

The *McGill Guide* instructs authors to cite at least two reporters in which the ruling appears. (A “reporter” is a book or service that contains judicial opinions or case law.) Following this rule, the primary or secondary reporter or neutral citation<sup>21</sup> always appears first followed by the QuickLaw or CanLII citation. For example, if a text is quoted from paragraph 45 of the Supreme Court of Canada ruling *Tim v Allen* (1980), the footnote will appear as: *Tim v Allen* (1980), 59 BCLR (2d) 215 (SC), [1980] BCJ no 456 (QL) at para 45. This citation indicates that the passage pinpoints paragraph 45 from the QuickLaw database. In some rulings, QuickLaw and CanLII do not provide secondary reporters that contain the ruling at issue; in these situations, only the QL or CanLII citation has been provided, for example, *Mctavish v Boersma*, 1997 CanLII 4372 (BCSC).

### 1.7.2 Formatting

This thesis frequently references the *Canada Evidence Act*, the British Columbia *Evidence Act*, and the Ontario *Evidence Act*. To avoid repeating complete citations at each instance, the following citations are always implied when the statute name appears, unless the text indicates otherwise:

*Canada Evidence Act*, RSC 1985, c C-5  
*British Columbia Evidence Act*, RSBC 1996, c 124  
*Ontario Evidence Act*, RSO 1990, c E.23

In other words, when the text mentions the *Canada Evidence Act*, it is in reference to the current version: *Canada Evidence Act*, RSC 1985, c C-5. Therefore, when the text cites a different version of the Act, for example the 1893 version, its full citation is provided: *Canada Evidence Act*, 1893, 56 Vict, c 31.

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<sup>21</sup> According to Oxford LibGuides, in “1999, Canadian courts began assigning neutral citations to their judgments (the start date varies depending on the court). The neutral citation is only a case identifier and does not indicate where a case can be found. It consists of three parts: year of decision; abbreviation of the court; and an ordinal number” (“Unlocking Canadian Case Citations,” last updated February 25, 2013, <http://libguides.bodleian.ox.ac.uk/content.php?pid=186632&sid=1566944>). For example, *Edmonson v Payer* has the neutral citation 2011 BCSC 118, where 2011 is the year of the decision, BCSC represents the British Columbia Supreme Court, and 118 is the sequential ordinal number. This citation shows that this was the 118th case decided in 2011 in British Columbia by the Supreme Court.

Given the heavy use of abbreviations in case law citations, readers should consult the List of Abbreviations found on page xi for a list of abbreviations and their meaning.

The formatting and punctuation of quoted text are retained, except in instances where a ruling name or monograph title did not appear in italics. In these situations, converted the ruling name or monograph title was converted into italics.

All ellipses (e.g., "...") have been added by this author to indicate omitted text.

This dissertation defines a significant number of terms and concepts. All terms and concepts appear in italics, along with a definition, at their first mention.

## Chapter 2: History of the Law of Evidence in Canada

### 2.1 Introduction

One of the primary components of this dissertation is an analysis of Canadian case law. However, the audience for the dissertation—records professionals (i.e., archivists and records managers)—may be unfamiliar with many of the terms and concepts used throughout the following chapters. Thus, this chapter aims to acquaint the intended audience with legal terminology and, because language evolves and changes over time, the chapter also provides historical background to contextualize the terminology's current relevance and use.

In Canadian courts, the admissibility of business records is guided by the criteria set forth in four legal authorities: common law, federal statute, provincial statute, and the principled approach to hearsay.<sup>1</sup> Each of these authorities developed at different stages in Canadian legal history, but they all have strong connections to the origins of the common law system and its law of evidence. The current practice by which Canadian courts admit business records as evidence cannot be understood without some knowledge of the historical foundation on which these courts operate.

This chapter consists of five sections, including this introduction, section 2.1. Section 2.2 defines basic legal terminology used throughout this dissertation.<sup>2</sup> Section 2.3 discusses the history of the common law system and distinguishes it from other legal systems. This section also examines how the emergence of the jury system led to the creation of the rule against hearsay evidence, which contributed to the development of the law of evidence and the introduction of the business records exception to the rule against hearsay.<sup>3</sup> Section 2.4 discusses the history of the Canadian

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<sup>1</sup> The principled approach to hearsay is a development at common law, however, as will be discussed in more detail later in this chapter, this approach has been perceived and used by Canadian courts as a separate admissibility authority.

<sup>2</sup> Terminology can also be found in the glossary located in Appendix B.

<sup>3</sup> Throughout this chapter and subsequent chapters, the “rule against hearsay” is also referred to as “the hearsay rule.”

judicial system and explains the development of the *Canada Evidence Act* and the other three authorities concerned with admissibility. Section 2.5 provides a summary of the chapter. Overall, this chapter may help readers navigate and understand the analysis and discussion of Canadian case law that occurs in subsequent chapters.

## **2.2 Legal Framework and Core Definitions**

The law of evidence determines which evidence is admissible in a court of law to resolve a legal dispute. The rules that govern the law of evidence have several purposes. Foremost, they exist to facilitate the revealing of facts, or the search for the truth. As Ontario Superior Court Justice Strathy observed in *Pollack v Advanced Medical Optics, Inc* (2011), the rules “are designed to promote the determination of proceedings on their merits ... and to ensure that each party is given a fair hearing, all having regard to concerns of efficiency and economy.”<sup>4</sup> However, as the authors of *Evidence: Principles and Problems* (2001) write, a “major impediment to the search for truth is that the facts to be discovered by our courts are almost always past facts.... Facts as found by the court are really then only guesses about the actual facts.”<sup>5</sup> In other words, evidence which depicts a fact is not *the* fact; rather, it is a representation of the fact and allows for subjective interpretations about what actually occurred. Which evidence is used in court and how it is presented by counsel may influence how the court determines the truth and establishes innocence or guilt. As will be discussed in more detail in this chapter, over the centuries, the courts have guarded against allowing hearsay to be used in court because it may impede the jury from properly weighing the evidence. Moreover, the laws of evidence developed so that judges may have more consistent control over

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<sup>4</sup> *Pollack v Advanced Medical Optics, Inc*, 2012 ONSC 1850 (CanLII) at para 25.

<sup>5</sup> Ron Delisle and Don Stuart, *Evidence: Principles and Problems* (Ontario: Carswell, 2001), 5.

what evidence is admitted in court and “the method by which admissible facts are placed before it.”<sup>6</sup>

At the core of the law of evidence is the concept of *evidence*. According to *Black’s Law Dictionary*, *evidence* is “something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact.”<sup>7</sup> John Henry Wigmore, one of the most influential legal writers of the twentieth century, defined *evidence* as “any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.”<sup>8</sup> Evidence may be either direct or circumstantial. The former is evidence which, “if believed, proves the existence of a fact without inference or presumption,” while the latter is “proof of a fact from which the existence of a material fact is inferred.”<sup>9</sup> For example, person A is suspected of killing person B with a knife, and person C saw the event. The testimony from person C would be direct evidence of the cause of death of person B. The knife, if forensically proven to match the wounds of the victim, and offered as an exhibit, would be circumstantial evidence (the knife would also be physical evidence if offered as an exhibit). Circumstantial evidence may also be a receipt in person A’s wallet showing that he/she purchased the knife that killed B. The inference that may be made is that person A killed person B because person A owned the knife at one time.

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<sup>6</sup> John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), 3.

<sup>7</sup> *Black’s Law Dictionary*, 9th ed., s.v. “evidence.”

<sup>8</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada*, 2nd ed., vol. 1 (Boston: Little, Brown, 1923): 3 [Hereinafter referred to as Wigmore, *On Evidence*].

<sup>9</sup> Michael R. Arkfeld, *Electronic Discovery and Evidence* (Phoenix, AZ.: Law Partner Publishing, LLC, 2006), §8.3[B].

Most evidence is circumstantial; this includes documentary evidence, a document (paper or electronic) that is allowed as evidence in a trial or hearing. (Documentary evidence is distinguished from oral testimony of an eyewitness who observed the matter in dispute.) Documentary evidence typically includes business records, that is, those records created and maintained by a business for the purposes of the business.<sup>10</sup>

When counsel seeks to introduce a record as evidence in a Canadian court of law, the evidence must clear two hurdles. First, the record must first be authenticated, that is, a witness must make a declaration that the record is what it purports to be.<sup>11</sup> Second, the record must be deemed to be reliable, that is, it must be found to be dependable or trustworthy.<sup>12</sup> An agreement by the parties to the authenticity of the record, however, “does not assure its admission into evidence as other bars, such as the hearsay rule, may remain.”<sup>13</sup> When the parties agree to the authenticity of a document, it “does not mean agreement as to the truth of the contents of the document. Specific agreement as to the truth of the contents is required” though similar steps will be taken but “with the addition of questions to established that the witness wrote the letter, sent the letter, and confirms that the contents of the letter are true.”<sup>14</sup> In other words, Canadian judges require

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<sup>10</sup> This dissertation uses the term *record* rather than *document*, because in archival science this term incorporates the concept of document. According to the InterPARES 3 terminology database, a *record* is a “document made or received in the course of a practical activity as an instrument or a by-product of such activity, and set aside for action or reference” (*InterPARES 3 Terminology Database*, s.v. “record”). The database defines a *document* as an “indivisible unit of information constituted by a message affixed to a medium (recorded) in a stable syntactic manner” (*InterPARES 3 Terminology Database*, s.v. “document”). Therefore, while all records are also documents, only some documents are records, depending on the circumstances of their creation and use.

<sup>11</sup> *InterPARES 3 Terminology Database*, s.v. “authenticate.”

<sup>12</sup> Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford Scholarship Online, 2010), 117-118.

<sup>13</sup> Ann E. Tomeny, “Best Evidence and the Authentication of Documents,” *Loyola Law Review* 21 (1975): 462.

<sup>14</sup> *Introducing Evidence at Trial: A British Columbia Handbook* (Vancouver, BC: Continuing Legal Education, 2007), 161 and 164. Lederman, cautioned the courts against admitting business records without first questioning their contents: “Unless there is some guarantee of reliability in the particular circumstances,” we writes, “the general practice of allowing in business records based on hearsay is inherently dangerous” (Sidney Lederman, “The Admissibility of Business Records:--A Partial Metamorphosis,” *Osgoode Hall Law Journal* 11, no. 3 [1973]: 389). Justice Addy of the Canadian Federal Court (Trial Division) echoed this position, stating that

assurance that a record is authentic and reliable before the record can be admitted. (As previously mentioned, this study focuses on the reliability of business records, more than authenticity or the process of authentication because reliability is the issue that appeared most frequently when reviewing the records at issue in the data set.) The reason judges scrutinize records to this extent is because most documentary evidence constitutes hearsay.

When a statement, oral or written, is made outside of the courtroom and is admitted for the truth of its contents, it is considered hearsay.<sup>15</sup> When hearsay evidence is submitted for the truth of its contents the evidence is inadmissible unless it satisfies an exception to the rule against hearsay. Hearsay evidence may also be admitted if the evidence is being tendered to establish that the statement was made, rather than its truthfulness.<sup>16</sup> As will be discussed in more detail later in this chapter, since the development of the law of evidence in the eighteenth century, courts operating in the common law system have created a number of exceptions to the rule against admitting hearsay evidence. Among the first of these exceptions was the business records exception that permits the admittance of a business record, given that the business record satisfies certain criteria, even though that record contains hearsay. To understand the significance of this rule, it is important to first explain the legal system in which the rule functions—the common law system.

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“each document submitted must still be considered to see whether, either on its face or, having regard to all the evidence relating to it, it still meets the tests of sufficient reliability and disinterest to allow it to be admitted” *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1987), 10 FTR 122 (TD), [1987] FCJ no 285 (QL) at 6).

<sup>15</sup> For example, say event X happens. Person A states to person B that he did X. B is called to testify about X and tells the court what A told him. B’s testimony about what A said, if accepted as the truth, is hearsay. Tregarthen, author of *The Law of Hearsay Evidence*, summarized the concept in another way: A “statement is hearsay when only a fact dependent on its truth or honesty is relevant to the issue. Every statement has a dual nature ... the respectable Dr. Jekyll is received with a becoming respect, but the disreputable Mr. Hyde is kicked ignominiously out of court” (John B.C. Tregarthen, *The Law of Hearsay* [London: Stevens and Sons, Ltd., 1915], 10-11).

<sup>16</sup> Referring to the example in the previous note, B’s testimony about what A said would not be deemed hearsay if it is sought to be admitted simply to establish that A said the words, not that the words were truthful.



## 2.3 The Common Law System

Legal systems – the systems established to enact, interpret, and enforce rules of conduct – are complex entities that form and fluctuate based on the interrelationships of groups (i.e., collections of individuals) within them and their interaction with external groups.<sup>17</sup> Common law and civil law are the two prevalent systems among the many found around the world. Common law is the predominant system in most English-speaking countries, such as England, Australia, New Zealand, the United States (with the exception of the state of Louisiana), and Canada (with the exception of the province of Quebec). This system originated in England soon after the Norman Conquest in 1066,<sup>18</sup> and over the course of six hundred years it came to be based on the principle of *stare decisis et quia non movere* (hereinafter referred to as *stare decisis*), which means “to abide by precedent and to not disturb the undisturbed.” In a common law system, judicial precedent develops as judges follow each other’s decisions to determine the outcome of a legal dispute between two parties: the judge’s ruling applies as a binding authority on subsequent legal decisions.<sup>19</sup>

Whereas the common law system relies on *stare decisis*, civil law is based on a set of principles or civil code.<sup>20</sup> Translated from the Latin term *ius civile*, meaning “a body of law exclusively available to citizens,”<sup>21</sup> civil law prevails in Europe, Asia, Africa, and Latin America, and it

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<sup>17</sup> C. G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 5.

<sup>18</sup> The term *common law* has been credited to Henry II (r. 1155-1189) who ordered his royal justices, whose authority could not be questioned, to bring “the King’s justice to every man.” This process eventually led to a law common “to the whole realm as opposed to local custom which might vary from one district to another” (Ibid, 44).

<sup>19</sup> See Arthur L. Goodhart, “Precedent in English and Continental Law,” *Law Quarterly Review* 50, no. 1 (1934): 40-65; William S. Holdsworth, “Case Law,” *Law Quarterly Review* 50, no. 2 (1934): 180-95; and Ezra R. Thayer, “Judicial Legislation: Its Legitimate Function in the Development of the Common Law,” *Harvard Law Review* 5, no. 4 (November, 1891): 172-201. See also *R v Saskatchewan Federation of Labour*, 2013 SKCA 43 (CanLII) at paras 29-32.

<sup>20</sup> Gall, *Canadian Legal System*, 30.

<sup>21</sup> Paul J. du Plessis, “Civil Law,” in *Encyclopedia of Political Theory*, ed. Mark Bevir (Thousand Oaks, CA: SAGE, 2010), 204-206.

continues to be applied in the U.S. state of Louisiana and to civil disputes in the Canadian province of Quebec. This system has strong roots in Roman law and started to appear on the European continent as early as the fifth and sixth centuries, but it did not take hold until the late fourteenth century.<sup>22</sup> While Roman and civil law played some role in the development of common law, these two systems developed, for the most part, independently of each other.<sup>23</sup> As the common law system developed in England, two features emerged that distinguished it from its civil law counterpart: trial by jury and the law of evidence.

### 2.3.1 The Jury System

The exact origins of the jury system are unknown. Some scholars find the roots of the jury system in ancient Greece, where Greeks held jury courts to conduct special trials and determine both the trials' outcomes and the appropriate penalties.<sup>24</sup> Jurors, or *dicasts*, could only be men thirty years of age or older, and the number that appeared per case ranged from 501 to 1501 in criminal cases and up to 201 in civil cases.<sup>25</sup> Romans adopted and modified the Greek system but later dismissed it because "it was too democratic for the tastes of the increasingly despotic emperors."<sup>26</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> There are several theories about why and how the two systems diverged. One legal scholar argues that common law developed in England as a result of intellectual thinkers and reformers perceiving civil law as "both archaic in substance and cumbersome to administer" (William S. Holdsworth, *A History of English Law*, 3rd ed., vol. 4. [London: Methuen & Co. Ltd., 1945], 217). Another legal scholar contends that the *Domesday Book*, the great survey ordered by King William, Duke of Normandy, functioned as one of the initial building blocks for common law despite its fiscal intentions (Theodore Frank Thomas Plucknett, *A Concise History of the Common Law*, 2nd ed. [New York: The Lawyers Co-operative Publishing, Co., 1936], 12-13). In other words, where Holdsworth saw the common law system materialize in spite of the civil law system, Plucknett saw common law naturally develop from custom.

For more in-depth comparative analysis of these two systems see: Gall, 28-30; Livia Iacovino, "Recordkeeping and the Law: General Introduction," *Archives and Manuscripts* 26, no. 2 (November, 1998): 194-215; Peter G. Stein, "Roman Law, Common Law, and Civil Law," *Tulane Law Review* 66, no. 6 (June, 1992): 1591-1604; and Weeramantry, *Invitation to the Law*, 43-46.

<sup>24</sup> Stephen Adler, *The Jury: Trial and Error in the American Courtroom* (New York: Times Books, 1994), 244.

<sup>25</sup> John Guinther, *The Jury in America* (New York: Facts on File Publications, 1988), 2.

<sup>26</sup> Adler, *Jury*, 244.

From the Romans to the Anglo-Saxons, only scant traces of jury-like systems appear throughout Europe—barbarian tribes had little use for them.<sup>27</sup> Nearly five hundred years after the fall of Rome, signs of the jury system reappeared. A trial-like process occurred in France during the reign of Louis I (r. 778-840)<sup>28</sup> and, among the Anglo-Saxons, kings used groups of men to find resolution to disputes involving confiscated land.<sup>29</sup>

The Normans brought the “use of the inquisition in public administration.”<sup>30</sup> In these instances, juries consisted of men familiar with the disputed events and it was expected that they would conduct their own interviews and acquire their own evidence, on which they would base their verdict. The jury system became more popular during the reign of Henry II, who introduced ordinances called assizes, which ordered certain disputes to be resolved by groups of jurors.<sup>31</sup> Once again, jurors were expected to gather their own information about the dispute; legal counsel rarely, if ever, submitted evidence for the jury to consider.

Prior to the fourteenth century there had been little need for counsel to present evidence to the court, since jurors were responsible for gathering their own information, and what evidence counsel did have was simply given to the jury without debate.<sup>32</sup> Only by the late fourteenth century did counsel start to present evidence, which consisted of records such as charters, writs, and land titles. Still, the jurors were allowed to rely on their own knowledge to determine the truth. In the early part of the fifteenth century, however, the courts began to limit the power of the jury. The first step occurred when judges prevented the jury from being able to draw inferences about the

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<sup>27</sup> Guinther, *Jury in America*, 2.

<sup>28</sup> James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little Brown & Company, 1898), 48 [Hereinafter referred to as Thayer, *On Evidence*].

<sup>29</sup> Thomas Starkie, *On the Trial by Jury* (Boston: Little, Brown, and Company, 1880), 7.

<sup>30</sup> Thayer, *On Evidence*, 7.

<sup>31</sup> According to *West's Encyclopedia of American Law*, the “word *assize* comes from the Latin *assideo*, which describes the fact that the men taking action sat together” (2nd ed., s.v. “assize”).

<sup>32</sup> Thayer, *On Evidence*, 1046.

existence of records referenced in other evidence. For example, if document A mentioned document B, but document B could not be produced, then the jury was no longer allowed to infer that document B existed or that it stated what was claimed.<sup>33</sup> Such jury instructions did not result in the exclusion of evidence, however. It would be a hundred years before judges would start limiting the evidence a jury could access.

The limitation of evidence that a jury could review and use was a consequence of the increased use of witness testimony between the fifteenth and seventeenth centuries. The appearance of witnesses led to the rise of admissibility issues. Judges became cognizant of the negative influence that witness testimony and certain evidence could have on the jury's ability to properly evaluate evidence.<sup>34</sup> This problem developed for other types of evidence and, by the eighteenth century, judges became aware that certain evidence could impede the jury from properly weighing it.<sup>35</sup> To reduce miscarriages of justice – instances where the jury's verdict contradicted the evidence – judges increasingly excluded potentially misleading evidence. The foundation of the common law of evidence had been laid.<sup>36</sup>

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<sup>33</sup> Ibid, 109.

<sup>34</sup> Lord William Ellis Gloag Kincairney, "The History of the Law of Evidence," *Juridical Review* 11, no. 1 (1899): 1-25. By the end of the 18<sup>th</sup> century, the courts remedied this situation by instituting counsel's right to cross-examine witnesses. Wigmore considered the development of cross-examination to be "the most efficacious expedient ever invented for the extraction of the truth" (John Henry Wigmore, "A General Survey of the History of the Rules of Evidence," in *Select Essays in Anglo-American Legal History*, compiled and edited by a Committee of the Association of American Law Schools, vol. 2 [Boston: Little, Brown, and Company, 1908]: 694).

<sup>35</sup> Thayer, *On Evidence*, 116.

<sup>36</sup> Thayer writes that "the greatest and most remarkable offshoot of the jury was the body of excluding rules which chiefly constitute the English "Law of Evidence" (*On Evidence*, 180). Thayer's view echoes Starkie's position, who wrote that the "great and leading principle on which its numerous rules depend, is the exclusion of all such evidence from the jury as is likely to mislead or prejudice their judgment: they are, indeed, the rules on which the Courts act in exercising a control in respect of the kind of knowledge which a jury ought to possess to warrant their verdict, and which was originally exercised by examining the jurors themselves" (*On the Trial by Jury*, 39-40).

The exclusion of evidence also altered the dynamic of trials. Prior to the development of the exclusion principles, "a trial was a very quiet and comparatively dull and uninteresting proceeding" because counsel were primarily responsible for handling mere formalities, such as "debates on venues, discontinuances, disseisins, color, *cum plurimis similibus*, now seldom heard of" (Starkie, *On the Trial by Jury*, 40). Once the

Theories about the historical origins of the law of evidence continue to evolve. Contrary to Wigmore, the rise of the rule against hearsay did not necessarily usher in the modern era's law of evidence; for example, some legal scholars point to the rise of criminal law<sup>37</sup> at the end of the eighteenth century as the dawn of the modern law of evidence.<sup>38</sup> These scholars contend that the development of the adversary system of trial coincided with counsel taking a more active role in legal proceedings and judges being more passive.

### 2.3.2 The Law of Evidence

The law of evidence did not garner a significant amount of attention from legal scholars until the end of the eighteenth century. Prior to the printing of the *Nisi Prius* Reports by Thomas Peake in 1790, laws of evidence "rested largely in the memory of the experienced leaders of the trial bar and into the momentary discretion of judges."<sup>39</sup> Seminal publications appearing in the mid-eighteenth century—Sir Geoffrey Gilbert's *Law of Evidence* (published posthumously in 1754), Henry Bathurst's *The Theory of Evidence* in 1761, and William Blackstone's four volume *Commentaries on the Laws of England* published from 1765-1769—paid little attention to rules of evidence.

The *Nisi Prius* Reports shifted this perspective. These reports, written by Thomas Peake, Isaac Espinasse, and John Campbell, and published between 1790 and 1815, devoted significant attention to rulings on evidence and cited more case law regarding evidence than had been referenced to that time.<sup>40</sup> Moreover, because the reports appeared in print, case law became "fixed," resulting in a more consistent form of judicial precedent because the rules governing

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courts started to prevent evidence from reaching the jury, the role of counsel shifted, becoming more of an advocate who sought, by power of persuasion, to convince the jury of a particular argument.

<sup>37</sup> A criminal proceeding occurs when a party is accused of "an offense against the state, against the people and against the public interest" (Gall, *Canadian Legal System*, 25).

<sup>38</sup> See Thomas P Gallanis "The Rise of Modern Evidence Law," *Iowa Law Review* 84 (1999): 499-560 and John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96, no. 5 (June 1996): 1168-1202.

<sup>39</sup> Wigmore, *On Evidence*, vol. 1, 111.

<sup>40</sup> *Ibid.*

evidence were no longer only in the minds of legal experts and judges. In the early nineteenth century, a new wave of legal treatises appeared that addressed more issues than just the authentication of evidence and the best evidence rule.<sup>41</sup> Thomas Starkie's *Practical Treatise of the Law of Evidence* (1824) was the first to outline issues involving the rule against admitting hearsay evidence.

### 2.3.3 Hearsay

According to the Oxford English Dictionary, the word *hearsay* first appeared in print around 1533 in Giles Dewes' *Introductorie for to Lerne Frenche*.<sup>42</sup> The concept, however, did not start appearing in legal publications with any consistency until the early eighteenth century (around the time the courts started to exclude evidence with increasing regularity). As previously mentioned, hearsay is a statement, oral or written, made outside of the courtroom, that is offered to prove the truth of the contents of the statement. When hearsay evidence is submitted for the truth of the content of the statement, the evidence is inadmissible unless the statement satisfies an exception to the rule against hearsay.

The courts guard against the admissibility of hearsay evidence because they want to prevent the jury from seeing or hearing potentially misleading evidence. A judge may deem evidence misleading because the person who made the statement was not under oath when he/she said or wrote it, or because the witness could not be cross-examined, which would allow the court to observe him/her responding and thus gauge the reliability of the statement based on witness's

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<sup>41</sup> *Authentication* is the "declaration of a record's authenticity at a specific point in time by a juridical person entrusted with the authority to make such a declaration" (*InterPARES 3 Terminology Database*, s.v. "authentication"). The *best evidence rule* is "the legal doctrine that an original piece of evidence, particularly a document, is superior to a copy. If the original is available, a copy will not be allowed as evidence in a trial" (*The People's Law Dictionary*, Law.com, s.v. "best evidence rule"). As will be discussed in more detail in Chapters 5 and 6, the Canadian courts have applied the best evidence rule in situations where the party that tendered evidence had the original record but did not produce it.

<sup>42</sup> OED Online, s.v. "hearsay, n.," accessed 23 October 2012, <http://www.oed.com/view/Entry/85059?rskey=lohZyW&result=2&isAdvanced=false>.

behaviour.<sup>43</sup> Nearly three hundred years after the hearsay rule first appeared, the fundamental idea underpinning it remains unchanged. In 2006, Justice Charron, writing for the majority in the Supreme Court of Canada decision of *R v Khelawon* (2006), states:

While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function.<sup>44</sup>

The adoption of the rule against admitting hearsay evidence was of such significance that Wigmore considered it the “most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to the jury trial, the greatest contribution of that eminently practical legal system to the world’s methods of procedure.”<sup>45</sup>

Once the hearsay rule became entrenched in the law of evidence in the common law system, the courts realized that exceptions needed to be made because the probative value of certain hearsay evidence exceeded its potential dangers. By the early nineteenth century, the courts had created several exceptions to the hearsay rule. In the first volume of his treatise, Starkie identified seven exceptions:

1. public documents made by the appropriate authority;
2. statements that were themselves an inherent part of the transaction (the *res gestae* exception);
3. statements to which the party was privy;
4. admissions made by the party himself;
5. evidence of reputation in cases involving questions of pedigree, prescription, custom, or boundary;

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<sup>43</sup> Ron Delisle and Don Stuart, *Evidence: Principles and Problems* (Ontario: Carswell Legal, 2001) and J. Douglas Ewart, *Documentary Evidence in Canada* (Ontario: Carswell Legal, 1984).

<sup>44</sup> *R v Khelawon*, 2006 SCC 57, [2006] SCJ no 57 (QL) at para 2 [*R v Khelawon*, 2006].

<sup>45</sup> Wigmore, *On Evidence*, vol. 3, 25.

6. declarations or entries made by a deceased person against his interest, or at least suggesting no interest in falsification; and
7. entries made in the normal course of business.<sup>46</sup>

All exceptions to the hearsay rule are related to two principles: 1) circumstantial guarantee of trustworthiness and 2) necessity.<sup>47</sup> The principle of circumstantial guarantee of trustworthiness, or what Canadian courts often refer to as “the criterion of reliability,”<sup>48</sup> is satisfied when the courts recognize that, if the witness appears in court, his/her testimony would do little to change the court’s opinion about the authenticity and reliability of the evidence, even when the declarant was cross-examined.<sup>49</sup> The principle of necessity is satisfied when the court determines that the benefit(s) of the evidence at issue would be lost if the court rejected its admissibility, even if the trustworthiness of the evidence cannot be assessed.<sup>50</sup> The initial rationale for applying the necessity principle was the death of the person whose statement is introduced as evidence; however, in recent years, other circumstances have been considered appropriate, such as the inability of the witness to testify, or counsel’s inability to present “evidence of the same value from the same or other sources.”<sup>51</sup> As will be discussed below, these principles prevail with regard to the “entries made in the normal course of business” exception to the hearsay rule.

#### **2.3.4 Business Records Exception**

Written evidence has not always been accepted with open arms by judges. When Lord Chief Baron Gilbert suggested that written records were more trustworthy than oral evidence, Jeremy

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<sup>46</sup> Thomas Starkie, *Practical Treatise of the Law of Evidence and Digest of Proofs, in Civil and Criminal Proceedings* (London: V. and R. Stevens and G.S. Norton, 1824).

<sup>47</sup> Wigmore, *On Evidence*, vol. 3, 153-157 and 160-77.

<sup>48</sup> *R v Smith*, [1992] 2 SCR 915, [1992] SCJ no 74 (QL) at para 33 [*R v Smith*].

<sup>49</sup> Wigmore, *On Evidence*, vol. 3, 155.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*



Bentham lashed out and argued to the contrary.<sup>52</sup> As recently as the early twentieth century, one legal scholar wrote that he had “become convinced that documentary evidence of today is one of the greatest dangers in the administration of justice, because it so frequently enables suitors to defeat the very ends of justice.”<sup>53</sup> Despite this skepticism toward documentary evidence, the use of business records as evidence in common law jurisdictions predates the formal development of the rule against hearsay. Prior to the seventeenth century, these records were submitted under the “shop book” rule. Shop books, or books that recorded the financial transactions of a business owner, were important pieces of evidence in legal disputes involving paid or unpaid debts. A business owner could use his own shop books “as evidence for himself, both in his lifetime and after his death.”<sup>54</sup> This position changed when the courts became more protective of the evidence introduced to the jury.

In 1609, the English parliament passed legislation designed to protect individuals from business owners who tried to collect debts multiple times. The *Act to Avoid the Double Payments of Debts*, St 7 Jac I, c 12, prohibited shop books from being used in court by the business owner because doing so violated the principle that “a man cannot make evidence for himself.”<sup>55</sup> The statute did not completely preclude shop books from being admitted, after all, the books were often the only evidence the shop owner had to make his argument.<sup>56</sup> Clarity over the admissibility of shop books came with the case of *Doe d. Patteshall v Turford* (1832),<sup>57</sup> where the court established that

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<sup>52</sup> Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives* (Dordrecht: Kluwer Academic Publishers, 2000), 24-25.

<sup>53</sup> Webster A. Melcher, “Dangers of Documentary Evidence, and Methods of Protection Against Them,” *Lawyer and Banker and Bench and Bar Review*, 5, no. 5 (October 1912): 330.

<sup>54</sup> James Bradley Thayer, *Select Cases on Evidence at the Common Law: With Notes* (Cambridge, Charles W. Sever, 1892), 471.

<sup>55</sup> Thayer, *Select Cases on Evidence at the Common Law*, 476.

<sup>56</sup> Bill Blair, “Business Records as Evidence in Colorado,” *University of Colorado Law Review* 35, no. 2 (Winter 1963): 221-31.

<sup>57</sup> *Doe d. Patteshall v Turford* (1832), 3 B & Ad 890, 110 ER 327.

the exception covered “all entries made ‘by a person, since deceased, in the ordinary course of his business,’ whether a person wholly unconnected with the parties, or the clerk of a party, or the party himself....”<sup>58</sup> This rule eventually became incorporated into the “entries made in the normal course of business” exception to the hearsay rule.<sup>59</sup>

By the twentieth century the “business records exception to the hearsay rule” (as it would come to be known) had seven criteria:

(i) an original entry, (ii) made contemporaneously with the event recorded, (iii) in the routine, (iv) of business, (v) by a person since deceased, (vi) who was under a specific duty to another to do the very thing and record it, (vii) and who had no motive to misrepresent.<sup>60</sup>

These principles dominated common law in England (and subsequently in Canada) until the second-half of the twentieth century.

In Canada, changes to the common law approach to admitting business records as evidence would not become firmly grasped by Canadian courts until the Supreme Court of Canada ruling of *Ares v Venner* in 1970.<sup>61</sup> The significance of this ruling and its impact on how Canadian courts would interpret the business records exception to the hearsay rule cannot be properly understood without first considering the history of the legal system in Canada.

## 2.4 Canadian Judicial System

When the first colonists in what are now the provinces of Quebec and Nova Scotia—French explorers and fur traders—established permanent settlements in what they called “New France,” they adopted the French civil law system. In 1763, after England defeated France in the Seven Years’

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<sup>58</sup> Wigmore, *On Evidence*, vol. 3, 260.

<sup>59</sup> Unlike in England and Canada, the shop book rule continued to have some relevance as a unique exception in the United States until the early 20<sup>th</sup> century. For discussions of how this rule evolved in the United States see: “The ‘Shop Book’ Rule,” *Bench and Bar* 12, no. 1 (1908): 14-27; Wigmore, *On Evidence*, vol. 3, 258-262; and *Radtke v Taylor* (1922), 105 Ore 559 (Sup Ct), 27 ALR 1423.

<sup>60</sup> Ewart, *Documentary Evidence in Canada*, 46-47.

<sup>61</sup> *Ares v Venner*, [1970] SCR 608 (QL) [*Ares*, 1970].

War, King George III issued a Royal Proclamation that established English criminal law and civil law (both based on the common law system) as the governing legal systems in New France, which was renamed “Quebec.” This Proclamation created civil tension with the French colonists who clung to the traditional laws governing property and civil rights.<sup>62</sup> To calm the growing dissatisfaction, the British Parliament passed the *Quebec Act* in 1774 which “re-introduced” French civil law for civil matters but maintained the use of English common law for criminal matters.<sup>63</sup> Seventeen years later, partially as a result of friction between the French and British colonists, Parliament passed the *Constitution Act*, which contributed to the division of Quebec into Upper and Lower Canada. Upper Canada (Ontario) retained English law in civil and criminal matters, while Lower Canada (Quebec) shifted its legal system to the French civil law system for civil matters while continuing to follow the English system for criminal matters.

In 1867, the Act of Confederation unified Upper and Lower Canada, New Brunswick, and Nova Scotia into the new nation of Canada. Soon after, Parliament passed the *British North America Act* of 1867, which created the federal and provincial governments of Canada. This Act allowed the provinces to create and pass their own laws (with some restrictions). The formation of the Canadian federal government paved the way to the codification of criminal law and, thus, to the creation of the *Canada Evidence Act*, twenty-five years later.

#### **2.4.1 The Canada Evidence Act**

The codification of criminal law—legislation that stipulates the procedures and penalties of crimes against the state—had been discussed in England since the early 1870s. Jurist Sir James Fitzjames Stephen believed that criminal law would be strengthened by legislation that consolidated

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<sup>62</sup> George Crouse, “A Critique of Canadian Criminal Legislation: Part One,” *Canadian Bar Review* 12, no. 9 (November 1934): 549-50.

<sup>63</sup> Robert S. Mackay, “Criminal Law in Canada,” in *Canadian Jurisprudence: The Civil Law and Common Law in Canada*, ed. Edward McWhinney (Toronto: Carswell Company Ltd., 1958), 285.

the main criminal legal practices and procedures of the courts.<sup>64</sup> The English Parliament thought otherwise. A draft of the code, written by Sir John Holker and presented to Parliament in 1878, was not well received and was ultimately rejected by Parliament.<sup>65</sup> Stephen's and Holker's efforts did not go to waste, however. Across the Atlantic, the Canadian federal government, which closely followed developments in the English Parliament and courts, picked up on the work of the English commissions and, in 1892, passed its own Criminal Code.<sup>66</sup> This code only addressed substantive law and legal procedures, not rules of evidence. In the same session, however, Parliament also passed the *Canada Evidence Act*, 1893, 56 Vict, c 31, which defined the scope and nature of admissible evidence. The relative ease with which the Code and the *Canada Evidence Act* passed was a direct result of the fact that all the provinces followed the English criminal law system.

Assented on 1 April 1893, the "Act representing Witnesses and Evidence," also known as the *Canada Evidence Act*, 56 Vict, c 31, s 1, "applied to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf." The original Act consisted of 29 sections and one schedule.<sup>67</sup> Sections 3-6 applied to witnesses, sections 7-21 pertained to documentary evidence, sections 22-25 addressed oaths and affirmations, and sections 26-29 dealt with statutory declarations.

Even though the majority of the Act pertained to documentary evidence, sections 7-21 did not deal with business records; rather, they dealt with government records.<sup>68</sup> Although Canadian

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<sup>64</sup> A.J. MacLeod and J.C. Martin, "The Revision of the Criminal Code," *Canadian Bar Review* 33, no. 1 (January 1955): 4.

<sup>65</sup> Crouse, "Critique of Canadian Criminal Legislation," 547.

<sup>66</sup> Ibid, n. 11. The Code went into effect on 1 July 1893. In England, Parliament would pass its own *Criminal Evidence Act* in 1898.

<sup>67</sup> To minimize confusion, section and subsection references will be to the year in which the statute was assented. When appropriate, the current corresponding section or subsection will be mentioned for reference purposes.

<sup>68</sup> These sections included: Imperial Acts (s 7); Proof of proclamations (ss 8 & 9); Proof of judicial proceedings (s 10); Imperial proclamations (s 11); Official documents (s 12); Copies of public books (s 13); Proof of handwriting not required (s 14); Order signed by secretary of state (s 15); Copies of documents in Canada

legislators would revise the Act in subsequent years, business records would not be addressed again by legislators until 1926, when amendments added section 28A and its subsections, which concerned financial records, specifically bank records.<sup>69</sup> The business records provision would not be added to the Act for almost fifty years. Despite the late appearance of the business records provision, the drafters of the Act were keenly aware of the importance that business routines played in creating reliable records. Section 17 of the Act, “copies of entries in government books,” reads:

A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such book and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy of itself.<sup>70</sup>

The penultimate clause of this section, the phrase “usual and ordinary course of business,” would become a permanent fixture in later amendments of the Act, as well as in provincial legislation. Despite its importance, a clear definition of the “usual and ordinary course of business” has remained largely elusive, though Justice I.V.B. Nordheimer, in his ruling of *R v Dunn* (2011), provides one of the best explanations the phrase. He states that the phrase implies that employees of a business create records “under circumstances where there is no motivation to misrepresent the facts being recorded ... the terms ‘usual and ordinary’ carry with them the connotation of something done commonly and routinely in the course of the normal operations of a business where there is no reason to record otherwise than accurately and objectively.”<sup>71</sup> As will be discussed in later

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Gazette (s 16); Copies of entries in government books (s 17); Notarial acts in Quebec (s 18); Notice to adverse party (s 19); Construction of this act (s 20); and Application of provincial laws (s 21).

<sup>69</sup> *Canada Evidence Act*, 17 Geo V, c 11 was assented on 31 March 1927.

<sup>70</sup> *The Canada Evidence Act 1893*, 56 Vict, c 31, s 17.

<sup>71</sup> *R v Dunn*, 2011 ONSC 2752, [2011] OJ no 2221 (QL) at para 15. Additional analysis and discussion of this phrase may be found in Chapter 5 of this dissertation.

chapters, this phrase has become a major point of contention within the Canadian judiciary when considering whether certain business records should be admitted as evidence.

#### **2.4.2 The Development of Admissibility at Common Law in Canada**

As the Canadian Parliament enacted the *Canada Evidence Act*, Canadian courts started to establish their own criteria for admitting business records according to common law. From the second half of the eighteenth century, Canadian courts that followed the common law system also closely followed the *stare decisis* set forth by English courts. By the late nineteenth and early twentieth centuries, however, the courts began to search for a more flexible approach to assessing the admissibility of documentary evidence, specifically business records. This trend became apparent with four different rulings: *Canada Atlantic Railway Co v Moxley* (1889),<sup>72</sup> *Omand v Alberta Milling Co* (1922),<sup>73</sup> *Ashdown Hardware Co v Singer* (1951),<sup>74</sup> and *Ares v Venner* (1970).<sup>75</sup>

At issue in *Canada Atlantic Railway Co v Moxley* was whether there was sufficient evidence to determine that a fire on the plaintiff's property (a lumber yard) resulted from the passing of the defendant's No. 4 locomotive, which was the first to pass the business before the fire was noticed. (A second train passed a short time later.) The contested evidence consisted of entries from a logbook maintained by the driver of the locomotive. During the course of the trial, it was discovered that the driver did not actually make each entry in the logbook (as he was supposed to do) because he could not write. Rather than creating the written entries himself, he dictated the entries to another employee who wrote the entries in the logbook.

At trial, a mechanical foreman "testified that the entries were all seen by him at the respective times of their being made, and were attended to."<sup>76</sup> For these reasons, the Divisional

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<sup>72</sup> *Canada Atlantic Railway Co v Moxley* (1889), 15 SCR 145, [1889] SCJ no 7 (QL) [*Canada Atlantic Railway Co*].

<sup>73</sup> *Omand v Alberta Milling Co* (1922), 69 DLR 6 (Alta SC (AD)), [1922] AJ no 63 (QL) [*Omand*].

<sup>74</sup> *Ashdown Hardware Co. v Singer*, [1952] 1 DLR 33 (Alta SC (AD)), [1951] AJ no 60 (QL) [*Ashdown*].

<sup>75</sup> *Ares*, 1970.

<sup>76</sup> *Canada Atlantic Railway Co*, at 10

Court admitted the logbook. The logbook was a crucial piece of evidence that contributed to the jury's decision that the fire resulted from Canada Atlantic Railway Co not properly maintaining one of its locomotive engines. On appeal, the Court of Appeal upheld the decision of the lower court to admit the evidence, a decision which the Supreme Court of Canada also upheld. Thus, the decisions made by these courts departed from the established common law criterion that the witness needed to be the author of the entry at issue and also needed to be deceased.

A similar type of record was at issue in *Omand v Alberta Milling Co*, where the Alberta Supreme Court (Appellate Division) ruled that the trial judge should have admitted an inspection report. The report pertained to a shipment of flour that the plaintiff argued was below established standards; the plaintiff sought compensation from the defendants for the low-grade materials. A unanimous Supreme Court ruled that the inspection report met the twin conditions of circumstantial guarantee of trustworthiness and necessity. The report was considered trustworthy because the court determined that the method by which the government created the report resulted in the inspectors having: a disinterest in either of the needs of the parties, a duty to test the materials as part of the inspection, and a duty to record the test at the time. (Had the inspector not done so, he most likely would have been reprimanded by his superiors). The necessity criterion was met because the inspector could not specifically recall the cargo container at issue and needed the report to refresh his memory.<sup>77</sup> Once again, this Canadian court admitted the evidence despite the fact that the witness was not deceased and was, therefore, capable of testifying about the evidence.

*Ashdown Hardware Co v Singer* involved a dispute over the receipt of payment of goods that were sold to the plaintiff and delivered by the defendant. The evidence of the transaction was the plaintiff's ledger accounts; no receipts or other documentation existed but other corroborative

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<sup>77</sup> As the court remarked, it would be unlikely that the report itself would "revive" the witness's memory per se, and the purpose of this action "enables him to assert his belief that its contents are true" (*Omand*, at para 38).

evidence, such as witness testimony, could be used. According to the established common law criteria, the ledger accounts could not be admitted because the person who created the entries must be the one to testify to their trustworthiness.<sup>78</sup> The court ruled that even though the credit manager was not the author, his testimony sufficed to allow the entry of the books. Writing for the unanimous court, Justice Ford stated:

[i]t is true that there was no direct proof of actual delivery to or receipt by the firm of the goods in question, nor evidence by any clerk or servant of the plaintiff who personally sent out the goods, in fulfilment of any specific order; but, in my opinion, proof in this way cannot be reasonably required in present-day business in a large commercial concern where clerks and servants are changed from time to time, whose evidence may be difficult, and often impossible to obtain; and who, even if brought before the Court, would have forgotten most of the particular transactions. Of course, the Court must, as always, having in mind the circumstances, decide what is the best evidence available, and the kind or degree of proof required.<sup>79</sup>

Once again, the court concurred with Wigmore's principles of circumstantial guarantee of trustworthiness.<sup>80</sup> This case, along with the rulings in *Moxley* and *Omand*, indicated that Canadian courts preferred a more flexible approach to determining the admissibility of documentary evidence and did not base admissibility on the strict set of criteria set forth in the common law. Moreover, these three cases served as the foundation for the seminal Supreme Court of Canada decision in *Ares v Venner* in 1970.

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<sup>78</sup> In this case, the court referred to *Lischinsky v Auld*, [1932] 3 WWR 691 (Sask CA), [1932] SJ no 83 (QL), where the court ruled that "entries in tradesmen's books are not evidence of the transaction recorded. To be of any value, an entry must be made at the time by the person by whom that transaction was carried out" (at para 9). But the court also mentioned that if the defendants had only relied on the ledgers then its case would not have succeeded.

<sup>79</sup> *Ashdown*, at para 9.

<sup>80</sup> Wigmore argues that the person called to testify must be the one with knowledge of the process by which the record was created. He concludes that "where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, verified by the testimony of the former person only, provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case outweigh the probable utility of doing so" (vol. 3, p. 278). However, Wigmore emphasizes that the entrant or the original observer needs to be deceased; he does not account for situations where the entrant or the original observer was still alive and could testify.



On 21 February 1965, while skiing in Jasper Park in Alberta, George Ares suffered a major skiing accident which resulted in “a severe comminuted fracture of both the tibia and fibula of his right leg.”<sup>81</sup> At Seton hospital, Dr. Venner evaluated Ares and fitted his broken leg with a cast. While in the hospital, Ares experienced complications. Dr. Venner and other consulting physicians identified the cause of the problem to be a lack of circulation in the leg, which proceeded to worsen. Just over a month after the accident, the doctors had to amputate Ares’ right leg below the knee. Following his recovery, Ares filed suit against Dr. Venner for negligence.<sup>82</sup>

The trial judge found Dr. Venner guilty of negligence because the doctor was “concerned more with maintaining the good fracture reduction he had obtained than with the maintenance of good circulation. This led to irreparable damage.”<sup>83</sup> On appeal, Dr. Venner argued that the trial judge erroneously admitted nurse’s notes submitted by Ares. Dr. Venner objected to this evidence because the notes were considered “an expression of opinion by the nurse on what she observed the time she was there....”<sup>84</sup> Although the nurse in question was never called to testify about the trustworthiness of her records, the trial judge admitted the notes because the nurse had been summoned to the court and her appearance in the courtroom led him to consider that the notes were “generally trustworthy.”<sup>85</sup> The Court of Appeal overturned the trial judge’s decision, explaining that the nurse needed to be called to establish the trustworthiness of the records.<sup>86</sup> As a result, the Court of Appeal ordered a new trial. Ares appealed this decision and the case went before the Supreme Court of Canada.

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<sup>81</sup> *Ares v Venner* (1969), 70 WWR 96 (SC (AD)), [1969] AJ no 53 (QL) at para 2 [*Ares*, 1969].

<sup>82</sup> Ares also filed suit against two other hospitals but he later dropped these suits.

<sup>83</sup> *Ares*, 1969, at para 6.

<sup>84</sup> *Ares*, 1970, at 8.

<sup>85</sup> *Ibid* at 5.

<sup>86</sup> *Ares*, 1969, at para 6.

The Supreme Court of Canada agreed with the lower court, finding that Dr. Venner was negligent in his medical duties. The Supreme Court of Canada, however, overturned the Court of Appeal's ruling that the trial judge should not have admitted the nurse's notes. The Supreme Court of Canada ruled that:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters 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.<sup>87</sup>

The Supreme Court of Canada believed that courts were better served by basing the admissibility of hearsay evidence on the twin principles of the circumstantial guarantee of trustworthiness and necessity. Overall, this decision effectively shaped the Canadian common law system in three ways: it removed the requirement that the witness needed to be deceased; it allowed certain opinion evidence to be admitted; and it expanded "the exception to cover records of knowledge and observations, provided the latter are based on personal knowledge."<sup>88</sup>

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<sup>87</sup> *Ares*, 1970, at 11. In making its decision, the Supreme Court of Canada sided with the minority opinion in the British House of Lords' case of *Myers v Director of Public Prosecutions (DPP)*, [1965] AC 1001 (HL). In this case, the appellant owned a legitimate business selling wrecked cars. However, the respondent accused him of illegally selling stolen cars that had been disguised as wrecked cars. The evidence at issue was a microfilm reproduction of records which showed that the serial numbers stamped on the engine blocks of the disguised cars matched those of stolen cars. These records had been created by men working for the business but none of these men was called to testify to the trustworthiness of the records. The trial judge admitted the evidence (without explanation) and the court of criminal appeal agreed with this decision. Upon further appeal, the House of Lords overturned the judgment made by the court of criminal appeal. According to the majority opinion, the microfilm records could only be admitted if they met the conditions of any of the existing exceptions to the hearsay rule, which they did not because it could not be determined if any of the witnesses were deceased. Moreover, the majority opinion stated that the judiciary could not create new exceptions to the hearsay rule; only Parliament had this authority by enacting new legislation.

In his dissenting opinion, Lord Pearce stated that the microfilm records should have been admitted *prima facie* because they bore indicia of reliability, that is, "whether the circumstances [of the creation of the record] tend to negate inaccuracy and fabrication and whether the circumstances provide the trier of fact with a satisfactory basis for evaluating the truth about the facts to be proven" (*R v Lemay*, 2004 BCCA 604, [2004] BCJ no 2494 (QL) at para 50). Lord Pearce stated that the courts should not be bound to a strict interpretation of the common law criteria and that the courts must be more flexible and adaptive in the ways in which they apply the "principles on which the court sets out to discover the truth" (*Myers v DPP*, at 1042).

<sup>88</sup> Ewart, *Documentary Evidence in Canada*, 52. See also *R v Graham* (1980), 55 CCC (2d) 266 (Prov Ct (Crim Div)), [1980] OJ no 3928 (QL) at para 19.

Some judges later questioned whether the *Ares* ruling only applied to nurses' notes or also applied to other types of documentary evidence. The Ontario ruling of *Setak Computer Services Corporation v Burroughs Business Machines Ltd* (1977)<sup>89</sup> answered this question. At issue in *Setak* was the admissibility of numerous sets of minutes documenting internal meetings of Setak employees. The plaintiff attempted to admit the minutes under section 36 of the Ontario *Evidence Act*, RSO 1990, c E.23 or the common law exception to the hearsay rule. The defence argued that the minutes should not be admitted because, among other issues, the author of the minutes was still alive and the ruling in *Ares* did not apply since the minutes were not specifically nurse's notes.

Justice Griffiths of the Ontario High Court of Justice agreed that the minutes should not be admitted, but for different reasons. The learned judge ruled that the *Ares* decision "settles the law applicable to records of other businesses made in similar circumstances."<sup>90</sup> He did not admit the minutes because they did not meet one of the common law criteria as the "authors of the minutes did not have personal knowledge of all the facts recorded."<sup>91</sup> Moreover, he said the minutes could not be received "to prove the validity of any opinion expressed at a meeting" in accordance to the Ontario *Evidence Act* because of the delay in the time between when the meeting occurred and when the minutes were written.<sup>92</sup>

Not every judge agreed with the Supreme Court decision in *Ares* or the Ontario High Court of Justice ruling in *Setak*. In *Woods v Elias* (1978), Justice Smith ruled a police accident report inadmissible because the report did not satisfy the Ontario *Evidence Act* definition of a business record. Justice Smith focused on the definition of "business" and surmised that "[w]hile the term

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<sup>89</sup> *Setak Computer Services Corporation v Burroughs Business Machines Ltd* (1977), 15 OR (2d) 750 (H Ct J) (QL) [*Setak*].

<sup>90</sup> *Ibid* at 5.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* at 9.

'business' as defined in s 36(1)(a) [now s 35(1)] seems broad enough to include every type of activity including a police investigation, the *ejusdem generis* rule must come to our aid lest we do away almost entirely with the hearsay rule. The floodgates would be open."<sup>93</sup> Justice Smith disagreed with the rulings in *Ares* and *Setak* because they changed the requirement that death was no longer one of the criteria for satisfying the necessity principle:

I feel no attraction to the view that the Court in *Ares v Venner* ... meant to mark a new beginning without any regard for the forces that led to the development of that exception. Doing away with the criterion of necessity brought on by death while maintaining the same kind of liberal treatment afforded the other criteria, constitutes a departure from existing law so drastic that it ought not to be inferred that such was the Court's intent in the absence of clear language admitting of no doubt as to the existence of that intent.<sup>94</sup>

Justice Smith's opinion has fallen into the minority voice among the Canadian judiciary; the ruling in *Ares* continues to be cited regularly by Canadian courts when addressing issues of admissibility of business records.<sup>95</sup> The common law approach, however, has not been the only authority for judges to consider when determining whether business records should be admitted as evidence. As *Ares* made its way through the Canadian court system, the *Canada Evidence Act* was

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<sup>93</sup> *Woods v Elias* (1978), 21 OR (2d) 840 (Co Ct), [1978] OJ no 3606 (QL) at para 4.

<sup>94</sup> *Ibid* at para 18.

<sup>95</sup> As of November 2012, the ruling had been mentioned in 430 rulings, followed in sixty-two rulings, cited in thirty-three rulings, and questioned in one ruling (results based on QuickLaw's QuickCite Case Citator which provides, case history, instances of where a case has been cited by another case, the judicial treatment of the case, and instances "where a case has been considered in either Halsbury's Law of Canada or a Canadian legal journal" ("Source Information" available via LexisNexis Academic).

In *Exhibitors Inc v Allen* (1989), 70 OR (2d) 103 (H Ct J), [1989] OJ no 1221 (QL), Justice Arbour of the Ontario High Court questioned the applicability of *Ares* to the Ontario courts. She reasoned that since *Ares* originated in Alberta and that province, at the time, lacked a provision in its *Evidence Act* regarding business records, the decision about the admissibility of the nurse's notes needed to be made at common law. Ontario, however, had a business records provision in its *Evidence Act*, therefore, according to Justice Arbour, "admissibility is governed by statute and statute supersedes the common law" (at para 33). Since this ruling, Justice Arbour's observation has not been followed by any other justices and has been explicitly opposed by at least one other justice (see *Mastrangelo (Litigation guardian of) v Kitney* (1992), 16 CPC (3d) 262 (Ont Ct J (Gen Div)), [1992] OJ no 2932 (QL)).

undergoing revisions to include a section specifically addressing the admissibility of business records.

### **2.4.3 Canada Evidence Acts and the Business Records Provisions**

As previously mentioned, none of the original twenty-nine sections of the 1893 *Canada Evidence Act* specifically addressed business records. This changed when the Parliament session of 1968-69 added section 29A and its subsections (29A(1)-29(12)).<sup>96</sup> By adding this section, legislators determined that business records possess a “circumstantial guarantee of accuracy” because organizations rely on them for their day-to-day operations. This provision meant that the courts should not be precluded from considering business records for admission simply because they contain hearsay.<sup>97</sup> (See Appendix A for the precise wording of the business records exception provisions of the *Canada Evidence Act*, *British Columbia Evidence Act*, and the *Ontario Evidence Act*; the sections reflect the wording in place at the time of the writing of this dissertation.) Since the incorporation of this provision into the *Canada Evidence Act*, Canadian courts have made it quite clear that a record created in the course of business does not equate to the record being inherently trustworthy. Therefore, judges should not admit business records as evidence *carte blanche*.<sup>98</sup>

Provincial legislation often follows closely on the heels of federal legislation, as exemplified by the development of the *British Columbia Evidence Act* and *Ontario Evidence Act*. British Columbia had its own law of evidence prior to the federal *Canada Evidence Act*. In 1884, the British Columbia Legislative Assembly passed the “Act relating to the Law of Evidence.” This Act consisted of one section that addressed competent witnesses (s 1, 47 Vict, c 8). Ten years later, a more robust

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<sup>96</sup> This section is currently section 30 of the *Canada Evidence Act*, RSC 1985, c C-5. Also, section 29A did not replace the sections pertaining to government or financial records; rather, it expanded the scope of record types that the court could admit under the Act.

<sup>97</sup> *R v Grimba and Wilder* (1977), 38 CCC (2d) 469 (Ont Co Ct), [1977] OJ no 2606 (QL) at para 8.

<sup>98</sup> *R v Monkhouse* (1987), 56 Alta LR (2d) 97 (CA), [1987] AJ no 1031 (QL) at 6 [*R v Monkhouse*]; *R v Gager*, 2012 ONSC 388 (CanLII) at para 255; and *Children’s Aid Society of Toronto v L(L)*, 2010 ONCJ 48 (CanLII) at para 7.

version of this legislation appeared with the British Columbia *Evidence Act*, passed in 1894; however, this version only addressed government and court records. Amendments in 1927 (17 Geo 5, c 21) addressed financial records, while amendments in 1968 (16-17 Eliz II, c 16) added the business records provision.

The Ontario *Evidence Act* predates the British Columbia *Evidence Act*. As early as 1843, a version of the *Law of Evidence* appeared in Upper Canada (7 Vict, c 4); however, this Act applied only to the admissibility of “any note memorandum, or certificate, made or to be made by one or more Notaries Public....”<sup>99</sup> In 1852, the Upper Canada legislature added several sections to the Act (16 Vict, c 19), including section 9, which addressed the admissibility of government and court documents, and section 11 which made it a felony to “forge any seal, stamp or signature of any document in this Act or mentioned or referred to....”<sup>100</sup> Despite the earlier developments of the *Evidence Act* in Ontario, the Act would eventually follow a path similar to that of the British Columbia *Evidence Act*: financial records would be added as an amendment in 1929 (19 Geo V, c 33) and a business records section would appear in 1966 (14-15 Eliz II, c 51). Although not exactly identical, the wording of the different provincial acts is strikingly similar as well as to that of the federal legislation and common law authority.

Revisions to the provincial and federal statutes expanding the scope of the different types of documentary evidence did not replace the common law authority, though the revisions to the statutes “have generally been more restrictive in their interpretation of admissibility.”<sup>101</sup> As a result, from the late 1970s until the early 1990s, Canadian lawyers relied on the “tripartite authority” (i.e.,

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<sup>99</sup> *The Statutes of Practical Utility in the Civil Administration of Justice, in Upper Canada, from the First Act Passed in Upper Canada to the Common Law Procedures Acts, 1856*, edited by Robert A. Harrison (Toronto: Maclear & Co., 1857), 66.

<sup>100</sup> *Ibid*, 230.

<sup>101</sup> *Mctavish v Boersma* (1997), 38 BCLR (3d) 306 (SC), [1997] BCJ no 1719 (QL) at para 6.

common law, federal statute, and provincial statute) when introducing business records as evidence.<sup>102</sup> In the early 1990s, however, Canadian courts returned to a more flexible approach to evaluating and admitting hearsay evidence.

#### **2.4.4 Principled Approach to Hearsay**

In *R v Khan* (1990),<sup>103</sup> a three-and-half-year-old girl was allegedly sexually assaulted by her dentist. The evidence at issue was constituted of statements the girl made to her mother after the dentist visit, which led to the dentist's arrest. However, the trial judge did not allow the statements to be admitted as evidence because they were not made contemporaneously with the event and the child was not competent to give unsworn testimony. Upon appeal, the Court of Appeal ruled that the trial judge should have admitted the statements; and the court ordered a new trial. The dentist appealed the ruling and the case went before the Supreme Court of Canada.

In her ruling on the case, Justice McLachlin (as she was then), writing for a unanimous court, remarked that Canadian courts have traditionally understood the hearsay rule to be "an absolute rule," meaning that unless the evidence satisfies the conditions of one of the exceptions to the rule, the evidence would not be admitted. She commented that while this perception offered some "certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law." Justice McLachlin recommended Canadian courts adopt "a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions."<sup>104</sup> Specifically, she encouraged the application of the principled approach to hearsay, which is based on the two core principles of necessity and circumstantial guarantee of trustworthiness. The Canadian courts have identified the latter principle

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<sup>102</sup> Sidney Lederman, "The Admissibility of Business Records: A Partial Metamorphosis," *Osgoode Hall Law Journal* 11, no. 3 (1973): 396.

<sup>103</sup> *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77 at 12 [*R v Khan*, 1990].

<sup>104</sup> *Ibid.*

as the “principle of reliability.”<sup>105</sup> Based on the principled approach, the Supreme Court of Canada ruled that the child’s statements satisfied both of these conditions and the statements should have been received by the trial court. The Supreme Court of Canada ordered a new trial.

The principled approach to hearsay quickly became entrenched in the Canadian legal system, being applied and further developed in the Supreme Court of Canada rulings of *R v Smith* (1992),<sup>106</sup> *R v B(KG)* (1993),<sup>107</sup> *R v Starr* (2000),<sup>108</sup> and *R v Khelawon* (2006).<sup>109</sup> The Canadian lower courts soon followed suit and applied the approach to civil law cases as well as to types of evidence other than oral statements, such as documentary evidence.<sup>110</sup> *Khan*, however, has ended “the old categorical approach to the admission of evidence.”<sup>111</sup> On the contrary, the principled approach has become the fourth admissibility authority by which counsel and the courts may introduce evidence.

#### **2.4.5 Court Rules**

It may also be argued that there is a fifth method by which evidence may be admitted, that is, in accordance with some other court rule or process that addresses the admissibility of evidence. This authority specifies the procedural obligations that counsel must meet in order for a judge to consider a record as evidence. For example, in *Slough Estates Canada v Federal Pioneer Ltd* (1994), the defendant tendered numerous items of correspondence and reports as evidence. Justice

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<sup>105</sup> See also *R v Starr*, 2000 SCC 40, [2000] SCJ no 40 (QL) [*R v Starr*, 2000], where the majority opinion reads: “Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness” (at para 215).

<sup>106</sup> *R v Smith*, [1992] 2 SCR 915, [1992] SCJ no 74 (QL) [*R v Smith*].

<sup>107</sup> *R v B(KG)*, [1993] 1 SCR 740, [1993] SCJ no 22 (QL).

<sup>108</sup> *R v Starr*, 2000.

<sup>109</sup> *R v Khelawon*, 2006.

<sup>110</sup> The aforementioned Supreme Court cases were criminal cases and only addressed oral statements. For discussions on the applicability of the principled approach to civil cases see *Etienne v McKellar General Hospital* (1994), CPC (3d) 342 (Ont Ct J (Gen Div)), [1994] OJ no 2869 and for the authorities application to other types of evidence see *Canada (Minister of Citizenship and Immigration) v Seifert*, 2006 FC 270, [2006] FCJ no 344 (QL) at paras 18-19.

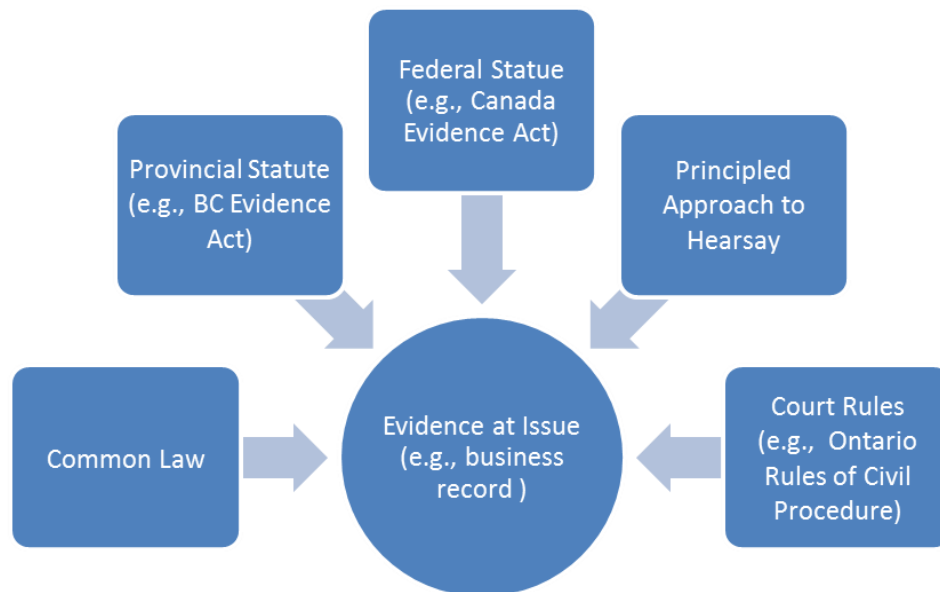
<sup>111</sup> *R v Smith*, at para 32.



Rosenberg did not admit these records because counsel had not authenticated them in accordance to Rule 20.02 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, which stipulates that the “admission of hearsay evidence by affidavit is allowable where the source of the information and the fact of belief are specified in the affidavit.”<sup>112</sup> Because this authority specifies the obligations counsel must meet in order for the court to consider a record as evidence and does not relate to the circumstances that result in the creation or maintenance of a business record, the “court rules” authority is not a point of focus in this study.

#### 2.4.6 Illustration of Admissibility Authorities

Figure 2-1 illustrates admissibility authorities in the Canadian legal system; the figure is followed by an example of the process a court used to assess a business record in relation to the different authorities.



**Figure 2.1: Canadian Admissibility Authorities**

<sup>112</sup> *Slough Estates Canada v Federal Pioneer Ltd* (1994), 20 OR (3d) 429 (Ont Ct J (Gen Div)), [1994] OJ no 2147 (QL) at para 56.

In *R v Wilcox* (2001), a fisherman and Glace Bay Fisheries, a wholesaler, were accused of exceeding the legal limit on the amount of snow crab they could sell. In its investigation, the Crown seized a number of financial records from Glace Bay Fisheries, including a “crab book.”<sup>113</sup> This book was the lynchpin for Crown counsel’s case because it contained a record of the shipments received from fishermen and the payments made to them by Glace Bay Fisheries. The court determined that Mr. Kimm, an employee of Glace Bay Fisheries, created the book without the authorization of the employee’s superiors, who had specifically instructed against keeping such a book. At the provincial court, the judge did not allow the crab book to be admitted as evidence because it was not a business record. The Crown appealed the decision. In its review of the case, the Court of Appeal applied the four central authorities to determine whether to admit the crab book.<sup>114</sup>

First, the court ruled that the crab book did not satisfy the common law authority because Mr. Kimm had no duty to create the book as a business record.<sup>115</sup> Next, the court questioned whether the crab book satisfied section 30 of the *Canada Evidence Act*. The court concluded that “admissibility under s. 30 is seriously debatable” and reached no definitive conclusion on whether the book satisfied this authority. Next, the court turned to the principled approach to hearsay. The court determined that the crab book satisfied the twin conditions of necessity and reliability. The book was deemed to be necessary because Mr. Kimm could not recall the specific entries in the book, thus he needed the book to “give meaningful material evidence” at trial.<sup>116</sup> The court found that the book satisfied the principle of reliability. Direct testimony from Mr. Kimm established that he created and maintained the book in the normal routine of his daily activities and that the

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<sup>113</sup> *R v Wilcox*, 2001 NSCA 45, [2001] NSJ no 85 (QL).

<sup>114</sup> The court did not assess the admissibility of the crab book according to the fifth authority, that is, court rules or procedures.

<sup>115</sup> *Ibid* at para 50.

<sup>116</sup> *Ibid* at para 75.

contents of the book were accurate. (Mr. Kimm stated that none of the fisherman disputed the payments they received from the company.)<sup>117</sup> Based on its finding that the crab book satisfied the principled approach to hearsay, the Court of Appeal unanimously ruled that the decision of the lower court to exclude the crab book as evidence should be set aside; the case was returned to the Provincial Court.

As the Court of Appeal made apparent in its ruling of *R v Wilcox*, the fact that evidence does not satisfy the criteria of one admissibility authority does not preclude it from being admitted under a different authority. Counsel and the courts have several options for admitting evidence, regardless of how complex the application of these options may seem.

## **2.5 Summary**

The current manner in which the Canadian legal system determines the admissibility of business records as evidence has been shaped by the historical developments of the common law system. Canadian courts have followed in the footsteps of the *stare decisis* set forth by the English courts, the system from which the common law authority grew. Until the 1970s, the common law authority primarily governed the admissibility of business records as evidence in Canadian courts. Since the inclusion of the business records provision in the *Canada Evidence Act*, followed by the incorporation of similar provisions in provincial evidence Acts and the adoption of the principled approach to hearsay in the early 1990s, the process of admitting business records has become a complex endeavor within Canadian courts. A clear understanding of the business records exception to the hearsay rule remains elusive.

As shown in the next chapter, the business records exception to the hearsay rule is a complex and debatable topic. J. Douglas Ewart went so far as to say that the rules governing the

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<sup>117</sup> Ibid at paras 68-69.

admissibility of records “remain very much a foreign language to most participants in the legal process.”<sup>118</sup> As Chief Justice Laycraft observed, when writing for a unanimous court in *R v Monkhouse* (1987), it “is one of the curiosities of court procedure that, centuries after the adoption of an adversarial trial process in which documentary evidence is tendered and received every day, so much uncertainty and ambiguity remains in the rules relating to the admission of documents.”<sup>119</sup> By exploring the criteria used by the courts to rule business records as inadmissible, it is possible to shed light on the uncertainty expressed by Justice Laycraft. This analysis is then used to determine whether the recordkeeping standards, rules, or guidelines used by records professionals to assist in the management of organizational records throughout their lifecycle satisfy the criteria set forth by the different authorities for the admission of business records as evidence in a Canadian court of law.

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<sup>118</sup> J. Douglas Ewart, “Documentary Evidence: The Admissibility of Documents under Section 30 of the Canada Evidence Act,” *Criminal Law Quarterly* 22, no. 2 (March 1980): 189.

<sup>119</sup> *R v Monkhouse*, at 3.

## Chapter 3: Literature Review

### 3.1 Introduction

This literature review shows the need for an examination of the content of recordkeeping standards in light of the criteria Canadian judges use to determine whether a business record should be admitted as evidence in a court of law. The chapter is divided into five sections, including this introduction, section 3.1. Section 3.2 explores archival science<sup>1</sup> literature to determine the extent to which records and archives scholars have addressed certain legal issues, such as the concepts of “records as evidence” and “business records as admissible evidence.” Section 3.3 focuses on how Canadian legal scholars have addressed these same concepts.<sup>2</sup> Section 3.4 examines the literature pertaining to recordkeeping standards as written by records professionals.<sup>3</sup> Section 3.5 provides a summary of the chapter.

### 3.2 Records and Archives Scholars

Litigation is a risk that all organizations face, though some are more susceptible to it than others. In the event that an organization is sued and the parties go to trial, the organization must be able to use its records to support its case or refute the opponent’s position. Organizations may also need to produce their records for a legal proceeding in which they are not a party to the lawsuit. A

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<sup>1</sup> The archival field comprises the bodies of knowledge of archives and records management. Duranti defines *archival science* as “the body of knowledge about the nature and characteristics of archives and archival work systematically organized into theory, methodology, and practice” (Luciana Duranti, “Archival Science,” in *Encyclopedia of Library and Information Science*, vol. 59 [New York: Miriam Dekker, 1996], 1). The Society of American Archivist Glossary defines *records management* as the “systematic and administrative control of records throughout their life cycle to ensure efficiency and economy in their creation, use, handling, control, maintenance, and disposition” (*A Glossary of Archival and Records Terminology*, Society of American Archivists (SAA), 2013, s.v. “records management”). Thus, combining elements of both these definitions, *archival science* is concerned with the nature and characteristics of records, archives, and the methodologies of records management and archival work, which strive to systematically and administratively control records throughout their life cycle, that is, from the moment of their creation through their permanent retention or disposition.

<sup>2</sup> A *legal scholar* is a person learned in legal matters and who has been licensed to practice his/her profession, including lawyers, attorneys, professors of law, and judges or justices.

<sup>3</sup> A *recordkeeping standard* is a type of international standard that provides guidance through principles, rules, or guidelines for the management of organizational records throughout their lifecycles.

litigant may rely upon the records of an organization to support his/her case. The use of these records in legal actions results in the organization functioning as a witness rather than as a litigant, but the risks remain the same: the organization needs to be able to ensure that its records can be admitted as evidence, because failing to do so could compromise the legal proceeding and result in adverse consequences for the organization, including new litigation, fines, or bad public relations.

Records professionals have long been aware of the legal ramifications of their day-to-day duties and obligations. In her 1945 Society of American Archivist (SAA) presidential address, Margaret Cross Norton remarked that one of the primary duties of the archivist was to ensure the integrity of records so they may be used as “acceptable legal evidence.”<sup>4</sup> Over fifty years later, Iacovino made a similar but broader argument contending that organizations and individuals create and maintain records because of the need to have evidence of their “obligations and rights.”<sup>5</sup> Notwithstanding these statements, the literature exploring the relationship between archival science and the law is relatively sparse.

Peterson and Peterson’s *Archives & Manuscripts: Law*, published in 1945, and Behrnd-Klodt’s *Navigating Legal Issues in Archives*, published in 2008, introduce legal issues to records professionals, informing their readers of the relevance of legal knowledge to archival functions such as appraisal and reference service. Shepherd and Yeo recommend records professionals follow legal developments because legislation may dictate the type of records an organization must create, the form in which they should be maintained, and how long the records must be retained.<sup>6</sup> Strickland stresses the role that records professionals have in assisting an organization with legal challenges,

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

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

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

lamenting the fact that, too often, organizations delegate “litigation to their attorneys and they fail to include information managers and information experts as key members of the litigation team.”<sup>7</sup>

He argues that records professionals play an instrumental part in helping their organizations protect copyrighted or proprietary information, prevent the leaking of trade secrets, address privacy in the workplace issues, and identify, produce, and preserve relevant documents for the discovery process. Records and archival scholars have explored in greater detail several of these topics, including copyright,<sup>8</sup> archival legislation,<sup>9</sup> and discovery.<sup>10</sup> There remains one subject that they have not addressed in any considerable detail: business records as evidence in a court of law.

The notion of business records as legal evidence should not be confused with the concept of “records as evidence” explored by archival science scholars. Sir Hilary Jenkinson argued that archival

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

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

<sup>9</sup> Thomas E. Brown, “The Freedom of Information Act in The Information Age: The Electronic Challenge to the People’s Right to Know,” *American Archivist* 58, no. 2 (1995): 202-11; Couture, Carol and Jean-Yves Rousseau, *The Life of a Document: A Global Approach to Archives and Records Management*, trans. David Homel (Montréal: Véhicule Press, 1987); John M. Dirks, “Accountability, History, and Archives: Conflicting Priorities or Synthesized Strands?,” *Archivaria* no. 57 (2004): 29-49; Jay Gilbert, “Access Denied: The Access to Information Act and its Effect on Public Records Creators,” *Archivaria* no. 49 (2000), 84-123; Claire Johnson and Moira Rankin, “Records Professionals in a Multimedia Age: Turning Lead into Gold?,” in *Record Keeping in a Hybrid Environment: Managing the Creation, Use, Preservation and Disposal of Unpublished Information Objects in Context*, eds. Alistair Tough and Michael Moss (Oxford: Chandos Publishing, 2006): 85-113; and Sue McKemmish and Frank Upward, *Archival Documents: Providing Accountability through Recordkeeping* (Melbourne: Ancora Press, 1993).

<sup>10</sup> Discovery is one of the initial phases of litigation that involves identifying, retrieving, reviewing, and exchanging documentation relevant to the issues in dispute between the two parties. Recent publications include Christine Ardern, “Discovery and Records Management,” in *Managing Records in Global Financial Markets: Ensuring Compliance and Mitigating Risk*, eds. Lynn Coleman, Victoria L. Lemieux, Rod Stone, and Geoffrey Yeo (London: Facet Publishing, 2011), 165-78; Brian Dirking and Raghu R. Kodali, “Strategies for Preparing for E-Discovery,” *Information Management Journal* 42, no. 3 (2008): 56-61; Donald Force, “From Peruvian Guano to Electronic Records: E-Discovery and Canadian Records Professionals,” *Archivaria* no. 69 (2010): 49-75; and Randolph A. Kahn and Diane J. Silverberg, “Eight Steps for Keeping Information Management and E-Discovery on Target,” *Information Management Journal* 42, no. 3 (2008): 48-54.

documents represent “first hand evidence” of administrative actions and “form an actual part of the corpus, of the facts of the case,” where a case is the situation or events that led to the creation of the documents.<sup>11</sup> According to him, one of the toughest challenges archivists face is the preservation of the evidentiary capacity of these documents. Jenkinson’s American counterpart, Theodore R. Schellenberg, asserted that records have evidential value, defined as the capacity to document “the organization and function of the creating agency.”<sup>12</sup>

The concept of record as evidence has also been debated in postmodern discussions of memory,<sup>13</sup> in the context of which writers have argued that records are not evidence of memories themselves but touchstones, or triggers, of memories.<sup>14</sup> Brothman disputes the notion that records are evidence. Rather, he believes that evidence “arises out of processes of social negotiation after the fact ... that what evidence a record serves up—what it is evidence for—is something that only becomes manifest through later use, not during the present-centred act of record creation.”<sup>15</sup> Meehan contends that the phrase “records as evidence” has forced archivists to choose between serving the needs of users and those of the creators of archives. As a compromise, she advocates the concept of “archival nexus,” which “sets out how ideas about the nature of records are the common grounds supporting different ideas about the value and use of records, and reframes debates about value and conflicts between types of use as different interactions with and

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<sup>11</sup> Hilary Jenkinson, *A Manual of Archive Administration* (London: Percy Lund, Humphries & Co. Ltd., 1922), 4.

<sup>12</sup> Theodore R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1965), 23.

<sup>13</sup> Terry Cook, “Archival Science and Postmodernism: New Formulations for Old Concepts,” *Archival Science* 1, no. 1 (2001): 3-24; Thomas Nesmith, “Seeing Archives: Postmodernism and the Changing Intellectual Place of Archives,” *American Archivist* 65, no. 1 (2002): 24-41; and Mark A. Greene, “The Power of Meaning: The Archival Mission in the Postmodern Age,” *American Archivist* 65, no. 1 (2002): 42-55.

<sup>14</sup> Laura Millar, “Touchstones: Considering the Relationship Between Memory and Archives,” *Archivaria* no. 61 (2006): 105-126.

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



interpretations of records.”<sup>16</sup> This approach integrates both sides of the meaning-making process, allowing archivists to better understand how their practices relate to and affect other disciplines, such as law.

Overall, these discussions strengthen the theoretical foundations of archival science and the way in which the discipline understands the concept of record as evidence. However, this dissertation uses the concept of evidence in a more literal sense. Specifically, this study explores the reasons why, in some cases, business records have not been admitted as evidence in Canadian courts of law in the provinces of British Columbia and Ontario.

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

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<sup>16</sup> Jennifer Meehan, “The Archival Nexus: Rethinking the Interplay of Archival Ideas about the Nature, Value, and the Use of Records,” *Archival Science* 9 (2009): 161.

<sup>17</sup> Barbara Creed, “Records,” in *Archives: Recordkeeping in Society*, edited by Sue McKemmish, Michael Piggott, Barbara Reed, and Frank Upward (Wagga Wagga, N.S.W.: Centre for Information Studies, Charles Sturt University, 2005), 101-29.

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

evidence and more on how society identifies the evidential value in documents.<sup>19</sup> Hartland, McKemmish, and Upward maintain that records professionals have a vested interest in maintaining the trustworthiness of documents,<sup>20</sup> not necessarily because the documents may be used as evidence in a court of law, but because of their relevance and importance to personal, cultural, and corporate identities. The authors express skepticism about the capability of a document to satisfy admissibility tests for evidence.

Other records and archives scholars have focused less on the dichotomous nature of records as evidence and memory and more on the challenges to business records as potential legal evidence. For example, several authors have argued that supporting documentation, such as accession records and audit logs, may be used to establish the authenticity and reliability of business records and strengthen the possibility that the records could be used as legal evidence.<sup>21</sup> Skupsky and Montaña contend that proper records management instills routine within an organization, helping define its “usual and ordinary course of business.”<sup>22</sup> Phillips recommends that records professionals create policies and procedures that show that the technology adopted in their organization is being used as part of its usual and ordinary course of business, but he argues that the process of admissibility is influenced less by this type of documentation and more by judicial discretion. Writing from a Canadian perspective, he states that:

The fundamental concept of admissibility in Canada appears to be that evidence must be material and relevant, part of the normal course of business, and part of a credible and reliable system to be admissible. Admissibility, like any court decision, will be

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<sup>19</sup> Ibid, 91.

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

<sup>21</sup> Meyer H. Fishbein, “The Evidential Value of Nontextual Records: An Early Precedent,” *American Archivist* 45, no. 2 (1982): 189-90; Cyrus B. King, “The Archivist and ‘Ancient Documents’ as Evidence,” *American Archivist* 26, no. 4 (1963): 487-91; and P. Fern Phillips, “Case Law and the Evidence Acts in Canada,” *Information Management Journal* 29, no. 2 (1995): 3-6, 8-11, 28.

<sup>22</sup> Donald S. Skupsky and John C. Montaña, *Law, Records and Information Management: The Court Cases* (Denver: Information Requirements Clearinghouse, 1994).

dictated by common sense and experience, and rules need to be open and reasonable.<sup>23</sup>

Freckleton maintains that good recordkeeping practices reduce risks associated with the potential consequences of litigation.<sup>24</sup> Considering medical malpractice issues, he says that healthcare practitioners must make every effort to generate full and accurate records, and this entails that the records be made complete, contemporaneously to the event they are about, and in the context of the “general practice” of the practitioner (i.e., the usual and ordinary course of business).<sup>25</sup> Likewise, Shepherd and Yeo state that the circumstances of how records are created (i.e., made or received and set aside) and managed will impact how a “party may attempt to repudiate or discredit a record,” arguing that the record is not authentic or is unreliable.<sup>26</sup> Shepherd and Yeo believe that documentation pertaining to the creation and management of a record will affect its evidential weight, not its admissibility. *Weight of evidence* is “the strength, value and believability of evidence presented on a factual issue by one side as compared to evidence introduced by the other side.”<sup>27</sup> This contention implies that the threshold for the admissibility of business records as evidence is exceptionally low, if not non-existent, but the authors do not support this argument with any examples.

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<sup>23</sup> Phillips, 9.

<sup>24</sup> Ian Freckleton, “Records as Reliable Evidence: Medico-legal Litigation,” *Archives and Manuscripts* 26, no. 2 (1998): 270-93.

<sup>25</sup> At the time of Freckleton’s publication, Regulation 13 of Australia’s Medical Practice Regulations 1998 (N.S.W.) identified the required contents of medical records, which included: the date of the treatment; nature of the treatment; name(s) of those who performed the treatment; type of anaesthetic; tissues sent to pathology; results or findings made in relation to the treatment. The 1998 version of this regulation has since been repealed, though the current version retains these requirements (Medical Practice Regulation 2008 (No. 388), Schedule 1, “Records Relating to Patients”).

<sup>26</sup> Shepherd and Yeo, 103.

<sup>27</sup> The *weight of evidence* is “the strength, value and believability of evidence presented on a factual issue by one side as compared to evidence introduced by the other side” (*People’s Law Dictionary*, Law.com, s.v. “weight of evidence”). The weight of evidence is usually decided by the judge.

Records and archives scholars have also been aware of how changing technologies create potential legal challenges that may affect professionals' day-to-day operations. From the late 1970s until the late 1990s, the UNESCO Division General Information Programme managed the Records and Archives Management Programme (RAMP) that published research studies and guidelines on several archival and records management issues, such as archival infrastructure development, archival legislation, training and education, protection of the archival heritage, and research in archival theory and practice.<sup>28</sup> One of the projects of the Programme investigated the legal implications of the production and use of machine-readable records by public administrations.<sup>29</sup> The study concluded that archivists were aware of some of the legal challenges associated with this technology, such as preservation, privacy, access, disposal, and the evidential value of the records, but in many countries relevant laws (e.g., archives acts, evidence acts, etc.) had yet to address these issues. Duranti, Rogers, and Sheppard argue that legislation may be limited in its ability to address admissibility issues due to the pace at which technology changes. In their article, they review the Canadian *Uniform Electronic Evidence Act* and argue that this Act, while a step in the right direction for the Canadian judicial system, is limited in its ability to address electronic evidence because it "presupposes a fixed technology."<sup>30</sup> Therefore, the effectiveness of the Act is limited by the rate at which technology changes.

Duranti, Rogers, and Sheppard are not the only authors to discuss the effects of technological change on legal practices. Piasecki remarks that the courts have "embraced the

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<sup>28</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), "RAMP Studies," available online at [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=4984&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=4984&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>29</sup> Birgit Fredberg and Paulette Pieyns-Rigo, "Legal Implications of the Production of Machine-Readable Records by Public Administrations: A RAMP Study," Paris: UNESCO, General Information Programme and UNISIST, 1988.

<sup>30</sup> Luciana Duranti, Corinne Rogers, and Anthony Sheppard, "Electronic Records and the Law of Evidence in Canada: The Uniform Evidence Act Twelve Years Later," *Archivaria* no. 70 (2010): 121.

concept of ‘dependable systems,’” which emphasizes the processes and procedures that generated or maintained the record at issue.<sup>31</sup> This point has also been articulated by MacNeil, who provides a historical analysis of how Canadian courts have assessed the trustworthiness of records, specifically electronic records, as legal evidence. Her research illustrates records creators “face the responsibility to design systems that will provide a rebuttable presumption of integrity...” despite the criteria for assessing trustworthiness changing over time.<sup>32</sup> Duff argues that records professionals must design their recordkeeping systems based on the criteria stipulated in legal authorities, such as the United States Federal Rules of Evidence. She contends that the statements in these authorities “provide clear instructions on how records should be kept and delineate elements needed for the records to be complete. These statements have authority or warrant for a lawyer ... because they emanate from an agency, the law, that lawyers trust and are legally bound to uphold.”<sup>33</sup> Duranti emphasizes that records professionals need to abide by a recordkeeping metadata scheme that lists “all metadata required for uniquely identifying each record, and enabling the maintenance of its integrity and the presumption of its authenticity.”<sup>34</sup> She explains that this scheme will play an important role in establishing access privileges to the records, which is one of the “most important step[s] toward ensuring that the reliability and accuracy of records can be presumed.”<sup>35</sup>

Some records and archives scholars see a bigger role for records professionals in the admissibility process. DiGilio remarks that e-mail may be admitted once it is established that the

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<sup>31</sup> Sara J. Piasecki, “Legal Admissibility of Electronic Records as Evidence and Implications for Records Management,” *American Archivist* 58, no. 1 (1995): 62. See also Livia Iacovino, *Recordkeeping, Ethics and Law: Regulatory Models, Participant Relationships and Rights and Responsibilities in the Online World* (Dordrecht: Springer, 2006), 74-75.

<sup>32</sup> MacNeil, *Trusting Records*, 54.

<sup>33</sup> Wendy Duff, “Harnessing the Power of Warrant,” *American Archivist* 61, no. 1 (1998): 89.

<sup>34</sup> Luciana Duranti, “From Digital Diplomats to Digital Records Forensics,” *Archivaria* no. 68 (2009): 55.

<sup>35</sup> *Ibid.*

system that produced the message was functioning properly at the time the message was written and transmitted, which is often demonstrated by relying on the testimony of records professionals about “the technical soundness of an information system.”<sup>36</sup> Likewise, according to Mason, new technologies do not diminish the role of the records professionals in helping an organization guard against legal risks. Mason asserts that records professionals’ biggest contribution may be their expertise in preserving digital information. He believes this skill will ensure that records retain their authenticity for the duration of any legal proceeding.<sup>37</sup>

Records and archives scholars are not the only ones advocating the important role that records professionals play in helping a business ensure that its records may be admitted as evidence in a court of law. In his book, Skupsky, a U.S. lawyer and certified records manager, provides a comprehensive resource for records professionals, as he presents American case law, a review of the Federal Rules of Evidence, and standards pertaining to the admissibility of microfilm and computer printouts.<sup>38</sup> Chasse, a Canadian lawyer, has also echoed the value that recordkeeping standards, such as the Canadian General Standards Board *Electronic Records as Documentary Evidence* (CAN/CGSB-72.34-2005), have in ensuring that electronic records may be admitted as evidence. According to Chasse, this standard proves essential for a party to establish that the electronic system from which a business record is extracted complies with a set of policy requirements accepted by the profession, thereby making the records generated from it trustworthy and admissible as evidence.<sup>39</sup>

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<sup>36</sup> John J. DiGilio, “Electronic Mail: From Computer to Courtroom,” *Information Management Journal* 35, no. 2 (2001): 40. He also refers to the importance that records professionals attest to the chain of custody.

<sup>37</sup> Stephen Mason, “Authentic Digital Records: Laying the Foundation for Evidence,” *Information Management Journal* 41, no. 5 (2007): 32-33, 36, 38, 40.

<sup>38</sup> Donald S. Skupsky, *Legal Requirements for Information Technology Systems: Evidence, Regulation, Government and International Requirements*, 3rd ed. (Denver: Information Requirements Clearinghouse, 1997).

<sup>39</sup> Kenneth Chasse, “Electronic Discovery in the Criminal Court System,” *Canadian Criminal Law Review* 14, no. 2 (2010): 111-180. See also three other articles by Kenneth Chasse that address similar issues: “The Legal

In short, the records and archival scholars' writings indicate that business records must meet legal standards of admissibility if they are to be used as evidence in a court of law. This point is echoed by Duff who writes that the "mere existence of a record does not ensure that it will faithfully represent a transaction or an event; its credibility must be ensured through the establishment of reliable methods and procedures for its creation, maintenance, and use over time."<sup>40</sup> However, this literature is largely speculative, in that some authors draw on their anecdotal experiences. Moreover, the authors offer little empirical research to ascertain whether their assumptions about the role of recordkeeping practices satisfy the criteria used by the courts to determine what constitutes an admissible business record.

### 3.3 Canadian Legal Scholars

Typically, the admissibility of business records is addressed by legal scholars as a section or chapter in a legal textbook or casebook<sup>41</sup> covering the law of evidence.<sup>42</sup> Two resources that specifically address the issue of the admissibility of business records are Douglas J. Ewart's *Documentary Evidence in Canada* (1984) and Bryant, Lederman, and Fuerst's *The Law of Evidence in Canada* (2009).

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Issues Concerning the Admissibility in Court of Computer Printouts and Microfilm," *Archivaria* no. 18 (1984): 166-201; "Electronic Records as Documentary Evidence," *Canadian Journal of Law and Technology* 6, no. 3 (2007): 141-62; and "Electronic Records for Evidence and Disclosure and Discovery," *Criminal Law Quarterly* 57, no. 2/3 (2011): 284-326.

<sup>40</sup> Duff, "Harnessing the Power of Warrant," 88.

<sup>41</sup> A casebook is a type of legal textbook that consists of a "compilation of judicial decisions illustrating the application of particular principles of a specific field of law" (*West's Encyclopedia of American Law*, 2nd ed., 2008).

<sup>42</sup> See Ronald J. Delisle and Lisa Dufrainmont, *Canadian Evidence Law in a Nutshell*, 3rd ed. (Toronto: Carswell, 2009); Beverly M. McLachlin and Anthony F. Sheppard, *A Selection of Cases on the Law of Evidence*. 10th rev. (Vancouver: Faculty of Law, University of British Columbia, 2003); David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011); and Hamish Stewart, Ronald Murphy, Steven Penney, Marilyn Pilkington, and James Stribopoulos, *Evidence: A Canadian Casebook*, 2nd ed. (Toronto: Emond Montgomery Publications, 2006).

*Documentary Evidence in Canada* is the only monograph devoted entirely to Canadian legal issues associated with documentary evidence. The book is not intended to be a critical examination of Canadian law; rather, Ewart provides a “research tool and a courtroom resource by amalgamating analytical thoroughness with frequent quotations and extensive indexing.”<sup>43</sup> While broader in scope than Ewart’s book, *The Law of Evidence in Canada* by Bryant, Lederman, and Fuerst presents a more current examination of admissibility issues involving business records. As explained in the previous chapter, there are several authorities on the basis of which business records may be admitted as evidence: common law, statutory (federal and provincial), the principled approach to the hearsay rule, and others. Bryant, Lederman, and Fuerst caution their readers against taking the admissibility of business records for granted because “a close examination of the various provisions reveals serious limitations on the scope of admissibility.”<sup>44</sup> The authors contend that the existence of different authorities dictate that the courts carefully scrutinize the authenticity and reliability of each record being tendered as evidence because, in most situations, both conditions must be satisfied for the judge to admit a record as evidence.

As textbooks and casebooks indicate, counsel must navigate a complex maze when tendering a business record as evidence. There has been some debate among Canadian legal scholars about whether the overlapping nature of the various authorities is a positive or negative

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<sup>43</sup> Ewart, *Documentary Evidence in Canada*, 1.

<sup>44</sup> Justice Alan W. Bryant, Justice Sidney N. Lederman, and Justice Michelle K. Fuerst. *Sopinka, Lederman, & Bryant: The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis, 2009), 292. This book is not the first instance of a text containing this argument. Thirty-six years prior to the publication of *The Law of Evidence in Canada*, Lederman, in his article, “The Admissibility of Business Records: A Partial Metamorphosis” observed that nuances of each admissibility authority pose considerable challenges for counsel because he/she must “consider the validity of each segment of the tripartite authority permitting the introduction of business records” (*Osgoode Hall Law Journal* 11, no. 3 (1973): 396). Since the publication of the article, a fourth authority, the principled approach to hearsay, has been adopted by the Canadian judiciary. There is a fifth authority for admitting records as evidence: rules of court or rules of procedure, such as the British Columbia *Supreme Court Civil Rules* or the Ontario *Rules of Civil Procedure*. This authority specifies the obligations counsel must meet in order for a judge to consider a record as evidence.



attribute of the Canadian judicial system. Hill, Tanovich, and Strezos feared the erosion of the common law system with the introduction of the statutory authorities. They found some solace in the fact that “the statutory rules supplement the law, rather than replace the rule. The classes of documents caught by the two regimes do not completely overlap and so the common law exception continues to have a role to play.”<sup>45</sup> In other words, the authors believe it is important that at least two different authorities exist, which allow for greater flexibility when submitting a record as evidence.

When the Supreme Court of Canada adopted the principled approach to hearsay in 1990,<sup>46</sup> it made clear that this approach does not render moot the traditional common law or statutory exceptions to hearsay: the principled approach may be used in conjunction with the others.<sup>47</sup> Paciocco and Stuesser believe that the Canadian courts would benefit from this new approach and that “the law of evidence [in Canada] is coming to appreciate that its rules should not be rigidly formalized to allow only for those conditions that operate in a minority of cases where juries are involved.”<sup>48</sup> However, some legal scholars contend that the principled approach has done little more

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<sup>45</sup> S. Casey Hill, David M. Tanovich, and Louis P. Strezos, *McWilliams’ Canadian Criminal Evidence*, 4th ed. (Aurora, ON: Canada Law Book, 2003), §7-91.

<sup>46</sup> As discussed in Chapter 2, the principled approach materialized from the Supreme Court of Canada ruling in *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77, which advocated a two-pronged test for the admissibility of hearsay evidence. This test, drawing from Wigmore’s *On Evidence* and the 1970 Supreme Court of Canada ruling in *Ares v Venner*, suggested that hearsay evidence be gauged against the principles of necessity and reliability.

<sup>47</sup> Writing for the majority opinion in the Supreme Court of Canada case of *R v Starr*, 2000 SCC 40, SCR 144 (QL), Justice Iacobucci remarked that it “is true that there is guidance inherent in the principled approach itself, which directs a court to gauge whether a particular hearsay statement is reliable and whether its admission is necessary in the circumstances. However, the exceptions are more fact-specific and contextually sensitive. Properly modified to conform to the principled approach, the exceptions are practical manifestations of the principled approach in concrete and meaningful form.” Justice Iacobucci also states that some “commentators have suggested that the Court’s recent hearsay jurisprudence may accordingly be seen as creating new hearsay exceptions to supplement the traditional exceptions ... Perhaps a more accurate characterization is to say that all of the hearsay ‘exceptions’ should be seen simply as concrete examples of the practical application of the purpose and principles of the hearsay rule in a particular context” (at para 205).

<sup>48</sup> Paciocco and Stuesser, *The Law of Evidence*, 8.

than add another layer of complexity to an already complicated process.<sup>49</sup> As Currie explains, the various authorities and their exceptions have reached the point where the rules have been rendered “ossified, overly formalistic, and unwieldy.”<sup>50</sup>

The discussion by Canadian legal scholars of the criteria Canadian courts use to assess the admissibility of business records may prove insightful to records professionals, but it may also be limited in its applicability for records professionals. Legal scholarship is not written from the viewpoint of records professionals, however, recordkeeping standards may serve as a potential nexus between these two professions. As will be discussed in the next section, records professionals have written quite a bit about recordkeeping standards, but they have not investigated them from a legal perspective.

### **3.4 Recordkeeping Standards**

According to the International Organization for Standardization (ISO), the “standardization of records management policies and procedures ensures that appropriate attention and protection [are] given to all records, and that the evidence and information they contain can be retrieved more efficiently and effectively, using standard practices and procedures.”<sup>51</sup> In short, recordkeeping standards are tools records professionals use to improve how their organization operates. The implementation and use of these standards may contribute to reducing certain organizational risks, such as legal risks associated with not having trustworthy records.<sup>52</sup>

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<sup>49</sup> Bruce P. Archibald, “The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?,” *Queen’s Law Journal* 25, no. 1 (1999): 1-64; Robert J. Currie, “The Evolution of the Law of Evidence: Plus ça change...?,” *Canadian Criminal Law Review* 15, no. 2 (2011): 213-27; and Colin Tapper, “The Law of Evidence and the Rule of Law,” *Cambridge Law Journal* 68, no. 1 (2009): 67-89.

<sup>50</sup> Currie, “The Evolution of the Law of Evidence,” 213.

<sup>51</sup> International Organization for Standardization (ISO), *ISO 15489-1: Information and Documentation—Records Management. Part 1: General* (Geneva: ISO, 2002), vi.

<sup>52</sup> Mathieu Gouanou and Mike Marsh, “Imploding Technologies: Driven by Records Management Requirements?,” *Records Management Journal* 14, no. 2 (2004): 62-64.

Recordkeeping standards serve as a nexus between recordkeeping practices and legal issues such as the admissibility of business records. Skupsky makes this connection in his *Legal Requirements for Information Technology Systems* when he briefly reviews *Performance Guideline for Legal Acceptance of Records Produced by Information Technology Systems* by the Association for Information and Image Management (AIIM). He states that this “performance guideline” was designed by an AIIM Task Force to “examine the performance requirements of a records and information management system to ensure the admissibility of records in evidence or the acceptability of records by regulatory agencies.”<sup>53</sup> Chasse and Gurushanta make the relationship between recordkeeping standards and recordkeeping practices more apparent. They argue that recordkeeping standards play an important role in how an organization accounts for its routine operations:

The use of national and international standards of record-keeping and information management becomes increasingly necessary as organizations become national and then international in scope, and such standards are incorporated within the law of evidence. Use of recognized standards reinforces trust in the internal workings of an organization and most importantly, insures the trust of those who deal with the organization.<sup>54</sup>

In a different article, Chasse acknowledges that, while recordkeeping standards “cannot affect admissibility under ss. 30 [of the *Canada Evidence Act*] and 35 [of the *Ontario Evidence Act*] because they contain a subjective admissibility test ... tactically, the standards should be used when arguing any admissibility issues concerning records.”<sup>55</sup> The fact that these authors have been the only ones to directly connect recordkeeping standards to legal issues such as the admissibility of business

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<sup>53</sup> Skupsky, *Legal Requirements for Information Technology Systems*, 144.

<sup>54</sup> Kenneth Chasse and Vigi Gurushanta, “The Electronic Evidence National Standard: Proving the ‘Record System Integrity’ of Electronic Records,” eVIDA Group, (2002): n.p., <http://radio-weblogs.com/0117653/gems/ITONTARIOarticle2002.pdf>.

<sup>55</sup> Chasse, “Electronic Discovery in the Criminal Court System,” 133.

records should not come as a huge surprise because records and archives scholars have devoted only a minimal amount of attention to recordkeeping standards.

The lack of professional discourse involving recordkeeping standards may be attributed to their relatively recent development. One of the first standards, AS 4390, *Records Management*, was published in 1996 by the Australian Standards Office.<sup>56</sup> Despite its importance, Stephens contends this standard could not be accepted on the global market because it was based on the Australian legal framework and, therefore, could not be generalized.<sup>57</sup> Less than five years later, ISO developed modified versions of AS 4390, publishing ISO 15489-1, *Information and Documentation—Records Management—Part 1: General* and ISO 15489-2, *Information and Documentation—Records Management—Part 2: Guidelines* in 2001. These international standards have become two of the most popular recordkeeping standards among records professionals.

Upon its release in 2001, records professionals quickly praised ISO 15489, with one records professional calling it a “milestone.”<sup>58</sup> Healy believed that the standard enhanced the identity of the profession and that most records professionals would find it useful.<sup>59</sup> Yeo argued that the standard might serve as the ideal starting point for any organization intending to establish a records management programme, an argument echoed by Bradley.<sup>60</sup> White-Dollmann stated that the standard was “a viable model ... [that] provides validity to proposed recommendations ... [and]

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<sup>56</sup> Kathryn Swan, Adrian Cunningham, and Anne Robertson, “Establishing a High Standard for Electronic Records Management within the Australian Public Sector,” *Records Management Journal* 12, no. 3 (2002): 79-86.

<sup>57</sup> David O. Stephens, “International Standards and Best Practices in RIM,” *Information Management Journal* 34, no. 2 (2002): 68-71.

<sup>58</sup> Bob McLean, “The ISO 15489 Imperative,” *Information Management Journal* 36, no. 6 (2002): 25-31.

<sup>59</sup> Susan Healy, “ISO 15489 Records Management: Its Development and Significance,” *Records Management Journal* 11, no. 3 (2001): 140.

<sup>60</sup> Geoffrey Yeo, “Establishing a Records Management Programme: The ISO 15489 Methodology,” *Records Management Bulletin* no. 117 (2003): 3-6, 44 and Alexandra Bradley, “Back to the Future: Time-tested Fundamentals Meet Challenges of Technology,” *Information Management Journal* 45, no. 2 (2011): 32-38.

provides a business process classification approach for retention management.”<sup>61</sup> According to McLeod, Childs, and Heaford, the standard could work as an “authoritative source” to help convince senior management and staff of the importance of proper records management.<sup>62</sup> The standard could also have increased the transparency of recordkeeping practices because it aimed to ensure “that appropriate records exist in the form of policy documents, procedures, guidelines, and directives as well as transactional records, which enable enterprises to clearly demonstrate that they conduct their business in an orderly, accountable, consistent, and equitable manner,” and this may help protect an organization against litigation.<sup>63</sup>

Despite the beneficial effects of the standard, there are some indications that it has not been widely adopted. Julie McLeod has conducted several studies aimed at assessing the impact of ISO 15489. In 2004, she found that legislative developments in the United Kingdom, such as the Freedom of Information and Data Protection Acts, as well as the Sarbanes-Oxley Act in the United States, served as both drivers and inhibitors for the adoption of the standard.<sup>64</sup> While most participants in her study welcomed the standard to the profession, there was much uncertainty about its value. In particular, the participants in McLeod’s research questioned how useful the standard would be as a means of informing senior management about recordkeeping practices and how difficult its implementation would be, since the standard lacked clear examples. In another study, McLeod and Childs learned that views about the benefits of the standard to the profession varied widely. The participants agreed that the standard “provides a high-level framework which

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<sup>61</sup> Mary M. White-Dollmann, “ISO 15489: A Tool for Records Management in Mergers,” *Information Management Journal* 38, no. 5 (2004): 44.

<sup>62</sup> Julie McLeod, Sue Childs, and Susan Heaford, “Records Management Capacity and Compliance Toolkits: A Critical Assessment,” *Records Management Journal* 17, no. 3 (2007): 217.

<sup>63</sup> McLean, “The ISO 15489 Imperative,” 26-27.

<sup>64</sup> Julie McLeod, “ISO 15489: Helpful, Hype or Just Not Hot?,” *Archives & Manuscripts* 32, no. 2 (2004): 101.

should be used to 'elevate the standing' of the records profession," but the lack of attention the standard received and the lack of publicity about its usefulness threatened its future.<sup>65</sup>

Bettington examined the use of ISO 15489 in the Queensland Government.<sup>66</sup> In her article, she states there are four factors that contribute to proper records management: policy, design, implementation, and standards. These factors help ensure legal compliance, fulfillment of accountability requirements, and preservation of corporate and social memory. Of the four identified factors, she contends that the application of standards is the one least used by the Queensland Government to support its records management program. Bettington argues that, although ISO 15489 provides a good framework for recordkeeping, it is too "passive and reactive."<sup>67</sup> Moreover, the standard fails to "provide recordkeepers with sufficient guidance for achieving business performance outcomes."<sup>68</sup> She concludes that this standard should not be used in isolation and warns that full adoption of any given standard is extremely difficult because of the "contingent nature of recordkeeping" and because standards should not be accepted *prima facie*.<sup>69</sup>

ISO 15489 has also functioned as an audit tool. Crockett and Foster applied the standard to a small European pharmaceutical company where a records management system had not been implemented. In this situation, the standard was used to establish the "policies, procedures, and operating framework" of the business, not to assess the quality and control over its electronic records.<sup>70</sup> Alexander-Gooding and Black discuss the initial steps in using ISO 15489 to establish proper records and information management practices in Jamaica. The authors illustrate some of

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<sup>65</sup> Julie McLeod and Sue Childs, "Consulting Records Management Oracles: A Delphi in Practice," *Archival Science* 7 (2007): 163.

<sup>66</sup> Jackie Bettington, "Standardised Recordkeeping: Reality or Illusion?," *Archives & Manuscripts* 32, no. 2 (2004): 46-69.

<sup>67</sup> *Ibid*, 59.

<sup>68</sup> *Ibid*, 61.

<sup>69</sup> *Ibid*, 65.

<sup>70</sup> Margaret Crockett and Janet Foster, "Using ISO 15489 as an Audit Tool," *Information Management Journal* 38, no. 4 (2004): 53.

the strengths and weaknesses of the standard within the context of the Caribbean island. For example, on the positive side, the standard establishes “world-class best practices” and “clearly speaks to responsibilities for records and the importance of appropriate policies and procedures.”<sup>71</sup> On the negative side, the authors contend that the standard does not adequately address electronic or vital records and is completely voluntary, which means that organizations may take significant liberties when relying on the standard for guidance.

Iacovino and Reed used ISO 15489 to design HealthConnect, a “nationally coordinated and distributed network of electronic health records (EHRs)” in Australia.<sup>72</sup> They relied on the standard as a general-level benchmark for the project, using it alongside the InterPARES benchmark requirements for system design and ISO 23081, “Records Management Processes: Metadata for Records.” Likewise, ISO 15489 has been used in China as a means to identify gaps in records management policies, programs, and processes,<sup>73</sup> and in France to assist with the classification of administrative and technical documents at the National Library.<sup>74</sup> In addition to being used by records professionals within organizations, Anderson argues that ISO 15489 may work as a resource for teaching system design to students in archival studies programs as a means to help them understand macroappraisal.<sup>75</sup>

Despite its popularity, there are some indications that ISO 15489 may become obsolete in the face of new technologies.<sup>76</sup> In addition to the experiences of Alexander-Gooding and Black in

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<sup>71</sup> Sharon Alexander-Gooding and Sonia Black, “A National Response to ISO 15489: A Case Study of the Jamaican Experience,” *Information Management Journal* 39, no. 2 (2005): 63.

<sup>72</sup> Livia Iacovino and Barbara Reed, “Recordkeeping Research Tools in a Multi-disciplinary Context for Cross-Jurisdictional Health Records Systems,” *Archival Science*, 8 (2008): 37-68.

<sup>73</sup> Xiaomi An and Hongyan Jiao, “Assessing Records Management in China Against ISO 15489 and the Implications,” *Records Management Journal* 14, no. 1 (2004): 33-39.

<sup>74</sup> Catherine Dhérent, “Document Management at the French National Library,” *Records Management Journal* 16, no. 2 (2006): 97-101.

<sup>75</sup> Karen Anderson, “Teaching about Electronic Records in an Online Learning Environment,” *Archival Science* 5 (2005): 379-389.

<sup>76</sup> At the time of the writing of this dissertation in July 2013, ISO is in the process of updating this standard.

Jamaica, Joseph, Debowski, and Goldschmidt argue that new technologies such as social media, have placed a strain on some of the guiding principles of the standard.<sup>77</sup> They state that the concepts of metadata, retention and disposition schedules, classification, and security of records were based on the management of paper and electronic records and may not be adaptable to the social media era.

ISO 15489 is not the only recordkeeping standard records and archives scholars have discussed. Some attention has been given to standards that prescribe guidelines and requirements for electronic preservation or recordkeeping systems. For example, Caplan and Spence offer different opinions about the value of ISO 14721, *Space Data and Information Transfer Systems—Open Archival Information System—Reference Model* (also known as the OAIS model). Caplan argues that the model “has much to offer” organizations intending to design a long-term preservation storage system.<sup>78</sup> However, Spence contends that the model may be difficult for smaller archives to adopt because of its complexity and because it demands considerable resources to interpret and implement.<sup>79</sup> In *Preservation of the Integrity of Electronic Records*, Duranti, Eastwood, and MacNeil discuss how the collaborative efforts of the Preservation of the Integrity of Electronic Records project at the University of British Columbia (also known as the UBC Project) contributed to the development of the U.S. Department of Defense’s *Design Criteria Standard for Electronic Records Management Software Applications* (DoD 5015.2-STD).<sup>80</sup> Wendy Duff writes that the “University of

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<sup>77</sup> Pauline Joseph, Shelda Debowski, and Peter Goldschmidt, “Paradigm Shifts in Recordkeeping Responsibilities: Implications for ISO 15489’s Implementation,” *Records Management Journal* 22, no. 1 (2012): 57-75.

<sup>78</sup> Patricia Caplan, “The Florida Digital Archive and DAITSS: A Model for Digital Preservation,” *Library Hi Tech* 28, no. 2 (2010): 224-234.

<sup>79</sup> Jaqueline Spence, “Preserving the Culture Heritage: An Investigation into the Feasibility of the OAIS Model for Application in Small Organisations,” *Aslib Proceedings: New Information Perspectives* 58, no. 6 (2006): 513-524.

<sup>80</sup> Luciana Duranti, Terry Eastwood, and Heather MacNeil, *Preservation of the Integrity of Electronic Records* (Dordrecht: Kluwer Academic Publishers, 2002).



Pittsburgh Electronic Records Project,” devised a list of nineteen functional requirements that an electronic recordkeeping system should contain to ensure that records are “readable, understandable, and trustworthy.”<sup>81</sup> Also in the 1990s, a third project that investigated electronic recordkeeping was carried out at Indiana University. The “Indiana University Electronic Records Project” explored the methods “and techniques analysts employ in reviewing system processes.”<sup>82</sup> Unlike the UBC project, however, the Pittsburgh and Indiana projects did not directly lead to the creation of a national or international standard, though the research significantly contributed to a better understanding of electronic recordkeeping practices.

Finally, Kenneth Chasse considers one of the only standards designed specifically for Canadian records professionals: *Electronic Records as Documentary Evidence* (CAN/CGSB-72.24-2005). He does not provide an in-depth analysis of the standard; rather, he argues that the standard “is particularly useful in providing rules and procedures for records and information management with which to satisfy the *Evidence Act* tests ... Record systems should therefore be designed, initiated, and maintained in accordance with” the standard.<sup>83</sup>

The aforementioned standards are only a small number of the standards available to records professionals. There are numerous others designed to assist records professionals in handling variety of recordkeeping issues. For example, in 2004 ARMA International published *Requirements for Managing Electronic Messages as Records*. Less than eight years later, the organization updated the standard, releasing the new version under the title *Policy Design for*

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<sup>81</sup> Wendy Duff, “Ensuring the Preservation of Reliable Evidence: A Research Project Funded by the NHPRC,” *Archivaria* 42 (Fall 1996): 29. For an overview and comparison of the UBC and Pittsburgh projects see Philip Bantin, “Strategies for Managing Electronic Records: A New Archival Paradigm? An Affirmation of Our Archival Traditions?” *Archival Issues* 23, no. 1 (1998): 17-34.

<sup>82</sup> Phillip Bantin, “The Indiana University Electronic Records Project Revisited,” *American Archivist* 62, no. 1 (1999): 154. See also Phillip Bantin, “Developing a Strategy for Managing Electronic Records: The Findings of the Indiana University Electronic Records Project,” *American Archivist* 61, no. 2 (1998): 328-364.

<sup>83</sup> Kenneth Chasse, “Electronic Discovery in the Criminal Court System,” *Canadian Criminal Law Review* 14, no. 2 (2010): 130-131.

*Managing Electronic Messages* (ANSI/ARMA 19-2012). In 2004, ARMA International also released *Records Management Responsibility in Litigation Support*, a standard specifically designed for assisting records managers in the United States to become more familiar with their roles and obligations when organizations encountered litigation. ISO has published numerous standards that address issues related to the maintenance and preservation of electronic records, such as *Electronic Document File format for Long-term Preservation – Part 1: Use of PDF 1.4 (PDF/A-1)* (ISO 19005-1:2005)<sup>84</sup>; *Metadata for Records – Part 1: Records* (ISO 23081-1:2006), *Managing Metadata for Records – Part 2: Conceptual and Implementation Issues* (ISO 23081-2:2009); *Recommendations for Trustworthiness and Reliability* (ISO/TR 15801:2009); and *Trusted Third Party Repository for Digital Records* (ISO/TR 17068:2012).

Despite the emergence of the aforementioned standards, records, archives, and legal scholars have not determined whether their content is suitable to the objectives they are expected to achieve. Chapter 6 provides such an analysis. Specifically, it reviews several of the standards mentioned in this chapter to determine whether their contents satisfies what constitutes a reliable business record within the Canadian legal context. However, it is first necessary to assess the criteria Canadian courts use to determine what constitutes a reliable, and therefore, admissible business record. Once these criteria are understood, recordkeeping standards may be properly reviewed and critiqued.

### **3.5 Summary**

Records and archives scholars have not developed a substantial body of research pertaining to the concept of reliability. Moreover, they have paid little attention to the issue of business records as legal evidence. As a consequence, records professionals have not determined whether

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<sup>84</sup> This standard consists of two other parts: *Electronic Document File Format for Long-term Preservation – Part 2: Use of ISO 32000-1 (PDF/A-2)* (ISO 19005-2:2011) and *Electronic Document File Format for Long-term Preservation – Part 3: Use of ISO 32000-1 with support for embedded files (PDF/A-3)* (ISO 19005-3:2012).

recordkeeping standards satisfy certain legal obligations, such as admissibility requirements. The literature indicates that there is a need for research that bridges the gap between records and archives scholarship, on the one hand, and legal scholarship and court rulings, on the other hand, specifically with regard to how each discipline can ensure that business records are admissible in a Canadian court of law. Recordkeeping standards represent a potential nexus between recordkeeping and legal requirements. These standards are partly designed to satisfy certain legal requirements, such as how to ensure the trustworthiness of a business record. To date, no scholar has questioned whether existing standards sufficiently satisfy the conditions of reliability set forth by Canadian courts. The research described in the following chapters addresses this issue and aims to start filling this void.

## Chapter 4: Methodology

### 4.1 Introduction

This chapter outlines the methodology and procedures used to collect the data set and determine the six categories this author used to analyze five recordkeeping standards. This chapter is divided into nine sections, including this introduction, section 4.1. Section 4.2 discusses content analysis, the methodology used to review the case law and recordkeeping standards. Section 4.3 explains legal terminology used throughout the chapter, particularly to clarify the distinction between the concept of *ruling* and the concept of *case*. Section 4.4 reviews how the data set—which consists of business records from British Columbia and Ontario rulings—was identified. Section 4.5 explains the admissibility rate of the records in the data set: that is, how often a judge did or did not admit each business record as evidence. Section 4.6 clarifies how this author determined the codes that were used when reviewing the rulings. Section 4.7 describes how the rulings and associated documentation were coded, specifically focusing on how this author arrived at the six categories he used to analyze five recordkeeping standards. Section 4.8 explains the process followed to select the five recordkeeping standards analyzed, identifies the standards in question, and describes how these standards were critically examined in light of the six categories. Section 4.9 provides a summary of the chapter.

### 4.2 Content Analysis

This study uses the social science methodology of content analysis to review both Canadian case law and recordkeeping standards in relation to the research questions posed. According to Bryman, content analysis is “an approach to the analysis of documents and texts (which may be printed or visual) that seeks to quantify content in terms of predetermined codes and in a systematic and replicable manner.”<sup>1</sup> Krippendorff writes that content analysis “seeks to understand

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<sup>1</sup> Bryman, *Social Research Methods*, 274.

data not as a collection of physical events but as symbolic phenomena....”<sup>2</sup> In other words, content analysis aims to uncover themes and trends in the data.<sup>3</sup>

Content analysis has been used to analyze judicial behavior in numerous studies conducted by political scientists and legal scholars.<sup>4</sup> This author, however, uses the methodology for a different purpose: the intention is to review case law from a broader, more holistic perspective in order to identify categories of inadmissible criteria. By using content analysis, this author identifies criteria that judges from British Columbia and Ontario provide in their reasons for judgment for why a business record should not be admitted as evidence. These findings are then used to analyze the guidance provided in recordkeeping standards, in order to develop theory about the role of records professionals in helping to ensure that business records will be admitted as evidence in a Canadian court of law. Thus, this study does not use content analysis to develop theory about the law of evidence, the business records exception to the hearsay rule, or the processes by which records have been tendered as evidence and subsequently assessed by Canadian judges. Its focus is on studying the nexus between the law and recordkeeping, in order to support improvements in the methods used by records professionals to ensure the records of their organizations are admissible in a court of law.

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<sup>2</sup> Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Beverly Hills, CA: Sage Publications, 1980), 7.

<sup>3</sup> Joseph A. Maxwell and Barbara A. Miller, “Categorizing and Connecting Strategies in Qualitative Data Analysis,” in *Handbook of Emergent Methods*, ed. Sharlene Nagy Hesse-Biber and Patricia Leavy (New York: The Guilford Press, 2008), 465.

<sup>4</sup> See Fred Kort, “Predicting Supreme Court Decisions Mathematically: Quantitative Analysis of the Right to Counsel Cases,” *American Political Science Review* 51, no. 1 (1957): 1-12; Werner F. Grunbaum, “A Quantitative Analysis of the ‘Presidential Ballot’ Case,” *The Journal of Politics* 34, no. 1 (1972): 223-243; C. Neal Tate, “The Methodology of Judicial Behavior Research: A Review and Critique,” *Political Behavior* 5, no. 1 (1983): 51-82; Charles A. Johnson, “Content-Analytic Techniques and Judicial Research,” *American Politics Research* 15, no. 1 (1987): 169-197; and Mark A. Hall and Ronald F. Wright, “Systematic Content Analysis of Judicial Opinions,” *California Law Review* 96, no. 1 (2008): 63-122.

Content analysis involves the process of coding text, with each code representing a concept that exists in the data set. The coding process allows a researcher to interpret text in a logical and orderly manner, supporting and facilitating the development of theory about the issue being examined.<sup>5</sup> The strength of content analysis is its ability to explain “complex phenomena and relationships that have previously gone unobserved or been misunderstood....”<sup>6</sup>

In this study, each code reflects a specific criterion a judge cited as a reason not to admit a business record as evidence. The author began by creating codes for each reason a judge cited. An initial list of fifty-five codes was created. After reviewing these codes, this author refined them into nine categories to consolidate the reasons into larger but still cohesive groupings. This process facilitated the analysis of the recordkeeping standards by eliminating redundant discussions that would have occurred had this author compared the standards to each code.

Because content analysis is not without its limitations, the author reviewed each ruling within the data set at least four times in order to confirm the precise nature of the ruling and determine the most appropriate codes.<sup>7</sup> Thus, the first reading of each ruling determined if the ruling should be included in the data set at all. If, during this first review, the ruling was deemed suitable for inclusion, this author also identified those portions of the ruling most applicable to the study.<sup>8</sup> The second review recorded specific contextual information about each ruling, including: the name of the ruling, the jurisdiction, the court, the presiding judge(s), the year of the judgment, and the citation of the ruling. Additionally, this second review identified the record at issue and noted if it was or was not admitted.

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<sup>5</sup> Flick, *An Introduction to Qualitative Research*, 305-32.

<sup>6</sup> Randy Hodson, *Analyzing Documentary Accounts* (Thousand Oaks, CA: Sage Publications, 1999), 9.

<sup>7</sup> Hsieh and Shannon, 1280.

<sup>8</sup> This process is known as “unitizing” or “segmenting” (Maxwell and Miller, 465.)

The third review of the ruling focused on coding. Since the primary focus of the research was on records not admitted as evidence, the third reading involved identifying and recording the criteria by which each record in question was not admitted. The goal was to seek out and understand those criteria that led to the rejection of a record as evidence, in order to correlate those findings with recordkeeping standards and determine if there were elements where recordkeeping standards could be improved so that records professionals may be able to increase the likelihood that business records would be admitted as evidence in a court of law.

Several months after the third reading, a fourth review of all the rulings occurred. The purpose of this reading was to verify consistency in the codes, and the time lapse was intentional to facilitate as objective and “fresh” a review as possible. It is acknowledged that the ideal application of content analysis would include a review and testing of the original researcher’s coding by other researchers, in order to determine the reliability of the codes. This approach was deemed to be unrealistic in this instance, because of the complexity of the research, which necessitated that reviewers have familiarity with the legal literature and process as well as records management concepts, and the exploratory nature of the study.<sup>9</sup> As a result of this fourth review, changes to the coding scheme were made where necessary.

Figure 4.1 illustrates the workflow of this study.

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<sup>9</sup> Charles A. Johnson, “Content-Analytic Techniques and Judicial Research,” *American Politics Research* 15, no. 1 (1987): 196.

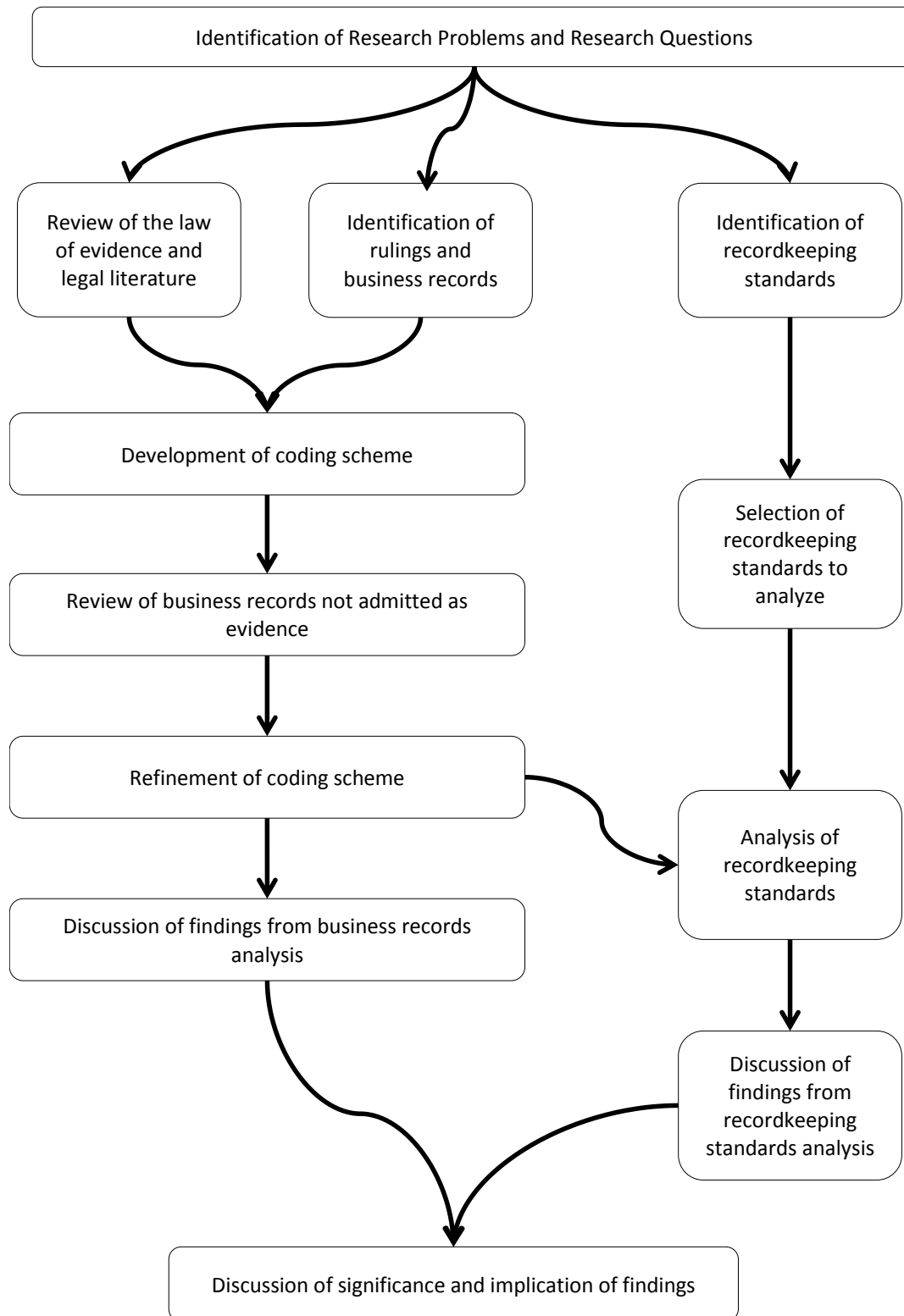


Figure 4.1: Workflow of this Study



The remainder of this chapter reviews how this author determined the data set, that is, the rulings this author reviewed and business records this author examined, and how he used content analysis to determine the categories by which he analyzed the recordkeeping standards.

### **4.3 Legal Terminology: *Cases and Rulings***

Prior to discussing the rulings this author collected and reviewed, readers should be made aware of the distinction between the concept of *ruling* and the concept of *case*. The terms are not synonyms. A *ruling* is a published decision made by a judge. A *case* (also known as a “legal dispute”) is a term used to refer to the events and legal issues that have brought the two parties to trial. A *ruling* may include a judge’s discussion of the case, either in its entirety or in relation to a specific component of the case.<sup>10</sup> Depending on the case and on the legal issues in question, a judge may decide to address one or more of these issues in a *voir dire*. A *voir dire*, commonly referred to as a trial within a trial, is an examination of the evidence (or witness) held during the court proceedings. Admissibility issues are often handled in a *voir dire*, which may nor may not result in a distinct ruling. Thus, any case may have one or more rulings on admissibility. For example, a case that involves a child as a witness may have one *voir dire* to determine if the child is competent to testify. A second *voir dire* that determines if one or more business records are admissible may also occur.

Further, a *voir dire* may contain contextual information about the record at issue and legal counsel’s positions for why the record should or should not be admitted as evidence. This means that a ruling may contain all the issues associated with the legal dispute, including: the situation and issues that brought the parties into legal conflict, the parties’ arguments, the relevant legal issues (including any admissibility objections made by counsel), and the judge’s final decision. A ruling,

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<sup>10</sup> Rulings may also be rendered by a panel of judges, which typically occurs during appeal cases. For readability purposes, this chapter uses the term *judge* with the understanding that it encompasses both individual judges and panels of judges.

however, may only address a single legal issue, such as the admissibility of one or more pieces of evidence.<sup>11</sup>

A few of examples may help clarify the distinction between the concepts of *case* and *ruling*. In the case of *R v Lardner* (2007), the ruling includes all the legal issues of the case. In this case, Mr. Lardner, the defendant, crashed his motorcycle, which resulted in the death of his passenger, Ms. Paulson.<sup>12</sup> Crown counsel charged Mr. Lardner with several offences arising from this incident, including “criminal negligence causing death.”<sup>13</sup> The ruling contains a background of the events leading to Ms. Paulson’s death, the arguments of both counsel, a brief discussion regarding the admissibility of hospital records, and the judge’s decision to convict Mr. Lardner. Though this study refers to *R v Lardner* as a *ruling*, this ruling addresses all legal issues associated with Mr. Lardner’s arrest, arguments at trial, and the judge’s final decision.

*R v Losani Homes* (1998), on the other hand, only addresses the admissibility of evidence.<sup>14</sup> In this case, the accused was charged with making election campaign contributions that exceeded the legal limit set forth in the *Municipal Elections Act*, 1996, SO 1996, c 32, Sch. In a *voir dire*, the judge heard arguments from counsel about whether two tax returns should be admitted as evidence. In the *voir dire*, Justice Dechert explains his decision not to admit the tax returns as evidence. This ruling only reflects information about the tax returns; it does not include information about any of the other legal issues associated with the charges against the accused, nor does it provide a decision regarding guilt.

Both *R v Lardner* and *R v Losani Homes* serve as examples of rulings cited and reviewed throughout this dissertation. This study limits its discussion of each ruling only to the details relevant

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<sup>11</sup> A ruling may have one or more business records at issue.

<sup>12</sup> *R v Lardner*, 2007 BCSC 986 (CanLII).

<sup>13</sup> *Ibid* at para 1.

<sup>14</sup> *R v Losani Homes (1998) Ltd*, 2007 ONCJ 634, [2007] OJ no 5236 (QL).

to the discussion of the admissibility of business records as evidence. In most examples, the decision is not discussed because it is not known or, as is more often the situation, it is irrelevant to the overall objective of this study.

Before discussing the methodology for this study, one other point of terminology needs to be addressed. As discussed in Chapter 2, counsel commonly use four primary authorities to tender business records as evidence:

1. the business records exception to the hearsay rule at common law;
2. the business records exception provisions of the provincial *Evidence Act*;
3. the business records exception provisions of the *Canada Evidence Act*; and/or
4. the principled approach to hearsay.

These four authorities are hereinafter referred to as “the authorities.”

As mentioned in Chapter 2, this study also recognizes a fifth admissibility category: “Court Rules.” This category denotes evidence that is tendered according to some other court rule or procedure, such as the British Columbia *Supreme Court Civil Rules*. This fifth authority specifies the obligations counsel must meet in order for a judge to consider a record as evidence. As previously mentioned, this authority, however, is not discussed further because it does not focus on the circumstances that result in the creation or maintenance of the record; instead, it specifies the obligations counsel must meet in order for the court to consider a record as evidence.

#### **4.4 Identifying the Rulings and Records**

This dissertation uses case law from British Columbia and Ontario as a basis for comparing the admissibility criteria in those cases with the content of recordkeeping standards. Among these cases, this author identified situations where one party submitted a business record as evidence, but the other party contested the submission. This author examined those records and the grounds

upon which their admissibility was determined by the judge.<sup>15</sup> This chapter explains the methodology used to identify the rulings and records.

The majority of the research for this study relies on published legal rulings accessible in two databases: LexisNexis Legal (hereinafter referred to as QuickLaw) and the case law database from the Canadian Legal Information Institute (hereinafter referred to as CanLII). QuickLaw is one of the most comprehensive legal databases. It indexes case law, laws, regulations, literature, and other legal documentation from the United States, Canada, and other countries.<sup>16</sup> CanLII is similar to QuickLaw but covers case law, legislation, and regulations from Canadian provinces and territories only.<sup>17</sup> While CanLII is a non-profit organization that aims to make case law and other legal information freely available on the Internet, QuickLaw is a proprietary system owned and operated by LexisNexis, and users can only access the information in QuickLaw through a subscription.<sup>18</sup>

Using these two databases, searches were restricted to rulings in the provinces of British Columbia and Ontario between the years 1970 and 2012. As discussed in Chapter 2, 1970 is a milestone year for the development of common law in Canada with the decision by the Supreme Court of Canada in *Ares v Venner* (1970).<sup>19</sup> This ruling changed how Canadian courts interpreted the business records exception to the hearsay rule at common law by removing the requirement that the witness had to be deceased. Moreover, *Ares* allowed certain opinion evidence to be admitted as evidence, and the ruling expanded the exception “to cover records of knowledge and observations, provided the latter are based on personal knowledge.”<sup>20</sup> The year 2012 was selected as the closing

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<sup>15</sup> A business record whose admissibility is contested by opposing counsel is also known as a *record at issue*.

<sup>16</sup> For more information about QuickLaw, visit: <http://www.lexisnexis.ca/en-ca/products/quicklaw-full-service.page>.

<sup>17</sup> For more information about CanLII, visit: <http://www.canlii.org/en/>.

<sup>18</sup> As a student at the University of British Columbia, this author accessed QuickLaw via the Koerner Library at the University of British Columbia. For information about the database, access, and permitted uses, see <http://resources.library.ubc.ca/page.php?details=lexisnexis-academic--legal&id=752>.

<sup>19</sup> *Ares v Venner*, [1970] SCR 608 (QL).

<sup>20</sup> Ewart, *Documentary Evidence in Canada*, 52. See also *R v Graham* (1980), 55 CCC (2d) 266 (Prov Ct (Crim Div)), [1980] OJ no 3928 (QL) at para 19.

date for the searches for rulings because it was the most recent date for which complete information about rulings was available during the course of this research.

Preliminary searches for rulings in all provinces and territories revealed that over half of the results came from British Columbia and Ontario. Though the legal decisions from British Columbia and Ontario are not binding on other provincial or territorial courts, the volume of case law emanating from these two provinces suggests that their rulings may serve as guideposts in this preliminary study of the reasons that contribute to the admissibility of records as evidence in Canada. They may also be a basis on which this exploratory study can establish how well recordkeeping standards address these factors.

Identifying a search strategy capable of retrieving a reasonable number of relevant rulings from the databases proved challenging. Searches using phrases such as “business records exception to the hearsay rule” and “usual and ordinary course of business” produced a limited number of rulings, but searches for the phrase “business record” produced unwieldy results. The study eventually settled on a search string that looked for a combination of terms within close proximity to each other, as shown here:

((record OR document) w/10 (admissible OR admissibility)) AND “business record”

The first component of this search strategy, ((record OR document) w/10 (admissible OR admissibility)), identifies all rulings that contain the word *record* or the word *document* that appear within ten words of the term *admissible* or *admissibility*. QuickLaw and CanLII did not limit results to just these four terms, however. Both databases offer search capacities identifying slight variations of the terms and returning rulings that included the original four terms as well as the words *records*, *documents*, *inadmissible*, and *inadmissibility*. CanLII also retrieved derivations of the terms, such as *recording*, *admitting*, or *admissions*.

The final component of the search strategy, the phrase “business record,” limited the results to rulings that contained this phrase only if the ruling also satisfied the first part of the search. The phrase “business record” served as a key element of the search strategy, allowing for the return of more precise results, because that particular phrase appears in the wording of three of the four authorities (the principled approach being the lone exception). Conducting the searches without the phrase “business record” resulted in an unmanageable ten-fold increase of the number of rulings per database.

#### **4.4.1 Search Results**

As shown in Table 4.1, this author identified a total of 419 rulings for this study.<sup>21</sup> The search strategy retrieved 141 rulings from QuickLaw and 250 rulings from CanLII, for a total of 391 rulings. An additional 28 rulings were identified from other sources, such as legal texts and references within rulings. These rulings were identified as “Others.” Neither QuickLaw nor CanLII retrieved any of these “Others” rulings with the original search strategy, but this author was able to locate them through separate searches in one or the other of the two databases.

Due to the exploratory nature of this study, this author aimed for a general understanding of the nature of the data set. To achieve the sample necessary to consider the research questions fully, the study did not require the identification of every ruling from British Columbia and Ontario nor the analysis of every business record mentioned in these rulings. The rulings and records identified for the purposes of this study provide a viable basis from which to gain a preliminary understanding of the criteria by which Canadian judges assess business records as evidence.

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<sup>21</sup> The number of rulings considered for the data set is not representative of all Canadian case law, nationally or provincially. As Swift remarks, “[t]here simply is no record of most day-to-day rulings on evidence questions. Those rulings that are recorded in pre-trial orders and in trial transcripts are not easily accessible. Hotly contested evidence rulings can be questioned on appeal, but many rulings are not contested and many cases are not appealed. Thus, published judicial opinions present only a small sample of what is happening to hearsay” (Eleanor Swift, “The Hearsay Rule at Work: Has it Been Abolished De Facto by Judicial Decision?,” *Minnesota Law Review* 72, no. 3 [1992]: 473).

**Table 4.1: Total Number of Retrieved Rulings**

Source	# of Retrieved Rulings
QuickLaw	141
CanLII	250
Others	28
<b>Total</b>	<b>419</b>

**4.4.2 Excluded Rulings**

This study did not review every retrieved ruling or every business record within each ruling.

As indicated in Table 4.2, the study excluded 274 rulings. A preliminary review of several retrieved rulings revealed that they contained a number of “false positives.” That is, the rulings satisfied all the search strategy criteria but did not, in fact, contain at least one business record at issue. To eliminate all the false positives, each ruling was reviewed individually to determine whether it contained at least one business record at issue. As Table 4.2 shows, this study excluded rulings for one of seven reasons. Each reason is discussed in more detail following the table.

**Table 4.2: Criteria for Excluding Rulings and the Number of Rulings Excluded Per Criteria**

Ruling Exclusion Reasons	# of Times Exclusion Applied
1. There was no business record at issue in the ruling	148
2. The judge assessed the business record at issue for reasons other than one of the authorities	68
3. The judge did not discuss which admissibility criteria the record did or did not satisfy	24
4. The judge did not rule on the admissibility of the business record at issue	17
5. The ruling centers around an affidavit to which a business record was attached	11
6. The record at issue was not identified	5
7. The judge did not identify the admissibility authority by which he/she assessed the business record at issue	1
<b>Total</b>	<b>274</b>

**4.4.2.1 There was No Business Record at Issue in the Ruling**

The study excluded 148 rulings because they did not contain at least one business record at issue. Some of these rulings were identified because CanLII retrieved derivations of the search

terms, such as *recording* and *admitting*. In most situations, terms were used in contexts other than the admissibility of a business record.

Rulings were also identified when a judge summarized or quoted another ruling and the search terms appeared in the summary or in a quotation. For example, in the British Columbia Court of Appeal ruling of *Mazur v Lucas* (2010), Justice Garson summarized the ruling of the British Columbia Supreme Court case of *Cunningham v Slubowski* (2003), writing that the lower court “described the proper use of clinical records, not otherwise in evidence, in the context of a ruling on the admissibility of those records. Although her ruling pertained to the admissibility of clinical records, part of her ruling is nevertheless apt to this case.”<sup>22</sup> Thus, the search terms *records* and *admissibility* appeared in *Mazur* but they were not in the proper context. Therefore the ruling was not included in the study.

This exclusion criterion also covered rulings where counsel objected to the admissibility of at least one business record but the judge did not decide whether the record should or should not be admitted because there were other more significant legal issues to address. For example, in *United Furniture Warehouse LP v 551148 BC Ltd* (2006), the defence counsel contested the admissibility of several business records presented by the plaintiff. Justice Boyd did not rule on the admissibility of the record because she determined that, for other reasons, the plaintiff’s submission could not succeed. Thus, the question of admissibility was rendered moot and the ruling was not included in the analysis.<sup>23</sup>

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<sup>22</sup> *Mazur v Lucas*, 2010 BCCA 473 (CanLII) at para 38.

<sup>23</sup> *United Furniture Warehouse LP v 551148 BC Ltd*, 2006 BCSC 204 (CanLII) at para 27. See also *Westshore Terminals Ltd v Sandwell Inc*, 1999 CanLII 5748 (BCSC), where counsel disputed the admissibility of a computer listing of the work orders on the grounds that it was hearsay. The judge, however, found “it unnecessary to decide whether the disputed evidence is admissible for its truth, because, if so admitted, it does not assist Westshore in proving its claim” (at para 17).



One other circumstance in which this study excluded retrieved rulings was when the parties did not contest the business records that counsel tendered as evidence. The search retrieved this type of ruling because the judge made an observation about a business record tendered as evidence. For example, in *Woodward v Grant* (2007), the defendant wanted to admit clinical records as evidence. These records were admitted because counsel for the plaintiff “did not argue that the documents failed to satisfy s. 42 [of the British Columbia *Evidence Act*], and as a result,” Justice Gray “considered them as business records.”<sup>24</sup> This study excluded this ruling and others like it because there was no business record at issue.

#### **4.4.2.2 The Judge Assessed the Business Record at Issue for Reasons Other than One of the Authorities**

This study excluded sixty-eight rulings that contained a business record submitted as evidence for a reason other than one of the five authorities. A few examples will help clarify the reasons for excluding these rulings. In *R v Pearce* (1999), a vehicle ownership certificate was not admitted as evidence because the judge ruled it did not satisfy subsections 82.1 and 83.2 of the *Motor Vehicle Act*, RSBC 1996, c 318. In *R v Bell* (2006), the Ontario Court of Justice overturned the decision of the lower court to admit a record listing power equipment because the record did not satisfy subsection 225(4) of the *Highway Traffic Act*, RSO 1990, c H.8.<sup>25</sup> And in *R v Fitzpatrick* (1994), the court ruled that a government report and several fishing logs could, in fact, be admitted because they did not violate the defendant’s section 7 *Charter* rights.<sup>26</sup>

If the ruling contained multiple business records, and if at least one of the records was tendered according to one of the authorities, then the ruling was *not* excluded. In these

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<sup>24</sup> *Woodward v Grant*, 2007 BCSC 1192 (CanLII) at para 12.

<sup>25</sup> *R v Bell*, [2006] OJ no 222 (QL) (Ct J (Gen Div)).

<sup>26</sup> *R v Fitzpatrick* (1994), 90 CCC (3d) 161 (BCCA), [1994] BCJ no 1271 (QL) at para 48. Section 7 of the *Canadian Charter of Rights and Freedoms* Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982 c 11, states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

circumstances, the study included the ruling but discounted the particular record that was admitted for a reason other than one of the authorities. For example, in *Ontario v Rothmans* (2011), this author identified seventy-five business records at issue. Of these seventy-five records, the judge admitted ten records according to the admissions of a party exception to the hearsay rule. Therefore, this study included the *Ontario v Rothmans* ruling but only considered sixty-five of the seventy-five business records.<sup>27</sup>

Rulings also satisfied this exclusion criterion when a judge did not assess the business record at issue. A court of appeal does not always examine or evaluate the evidence; rather, this court determines whether the lower court correctly applied the law. Therefore, the court of appeal may not consider the business record at all, and so this study excluded rulings when the higher court did not assess the business record at issue according to one of the authorities. For example, in *R v Hape* (2005), the accused, an investment banker, was convicted of two counts of money laundering. The accused appealed the decision of the lower court for several reasons, one of which was that he believed the lower court should not have admitted copies of banking records “on the basis that they did not fall under the ‘business records’ exception to the hearsay rule.”<sup>28</sup> On review, the Court of Appeal ruled:

[W]e would not describe the trial judge’s decision to admit the copies as a variation of the common law. Rather, his reasons reflect an application of the well-established threshold reliability criterion to the admissibility of hearsay evidence in the form of copies of banking documents. We regard his approach as an application of the accepted common law principles governing the admissibility of hearsay to the documents placed before the court. As there is nothing in the record to cast doubt on the integrity of the copies or the records from which the copies were made, we conclude that the trial judge’s ruling was correct.<sup>29</sup>

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<sup>27</sup> *Ontario v Rothmans Inc*, 2011 ONSC 5356, [2011] OJ no 4163 (QL) [Ontario, 2011].

<sup>28</sup> *R v Hape* (2005), 201 OAC 126 (CA), 2005 CanLII 26591 at para 11.

<sup>29</sup> *Ibid* at para 15.

In this ruling, the court determined whether the lower court correctly applied the law or, in this situation, correctly applied the common law approach to the hearsay rule. Because the court of appeal did not assess the banking records, this study excluded the ruling.

#### **4.4.2.3 The Judge Did Not Discuss Which Admissibility Criteria the Record Did or Did Not Satisfy**

In twenty-four rulings, judges did or did not admit a business record according to one of the authorities, but did not explain why the business record did nor did not satisfy the criteria in the admissibility authority.<sup>30</sup> Since this study examines specific reasons for the admission or rejection of evidence, the lack of information about the business record negated the usefulness of the ruling.

#### **4.4.2.4 The Judge Did Not Rule on the Admissibility of the Business Record at Issue**

This study excluded seventeen rulings because the judge did not rule on the admissibility of a record. In these rulings, there was a business record at issue, but instead of determining whether the record should or should not be admitted as evidence, the judge deferred his/her decision.<sup>31</sup> In one ruling, the delay was prompted because counsel was unprepared.<sup>32</sup>

#### **4.4.2.5 The Ruling Centers Around an Affidavit to Which a Business Record was Attached**

This study excluded eleven rulings because they involved issues associated with the use and application of affidavits, not specifically with the admissibility of a business record. An *affidavit* is a written document in which the signer declares under oath that the statements in the document are true.<sup>33</sup> Counsel must follow certain procedures when using affidavits, as outlined in legislation, regulations, and rules of court. For example, subsections 12-5(59)-(65) of the *Supreme Court Civil Rules*, BC Reg 168/2009, outline the procedures for using affidavits in the British Columbia Supreme Court. Similarly, Rule 4.06 on the *Ontario Rules of Civil Procedure*, PRO 1990, Reg 194, addresses

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<sup>30</sup> *Birkett v Astris Energi Inc*, 2002 CanLII 29939 (Ont SC).

<sup>31</sup> *After Six Inc v Black & Lee Formal Wear Rentals Ltd*, 2003 BCSC 567 (CanLII).

<sup>32</sup> *Ganger (Guardian of) v St Paul's Hospital*, 1997 CanLII 2707 (BCSC).

<sup>33</sup> *People's Law Dictionary*, Law.com, s.v. "affidavit."

how counsel should prepare an affidavit, and subsection 53.02 advises how counsel may use an affidavit to introduce evidence. The use of affidavits is also detailed in some provincial and federal statutes.<sup>34</sup>

Counsel must navigate a combination of rules of court and legislation when using affidavits. As a result, judges often address the procedural issues associated with the use of affidavits rather than any admissibility issues that apply to the attached business record.<sup>35</sup> For example, in *Airia Brands Inc v Air Canada* (2011), e-mails were attached to affidavits by one of the plaintiff's witnesses. Justice Leitch did not rule on the admissibility of the e-mails because the affidavits in question were inadequate. In this ruling, Justice Leitch remarks that:

[a]lthough hearsay in an affidavit is admissible under Rule 39.01(4), neither [witness] depose that they believe the information in the e-mail attachments to be true. There is no discussion of the contents of the e-mails. There is no reference to the authors or recipients of the e-mails. They offer no statement of opinion respecting the veracity of the e-mail[s].<sup>36</sup>

This study excluded this ruling because the judge made no specific ruling regarding the admissibility of the records that were attached to the affidavit, rendering the ruling unusable.

#### **4.4.2.6 The Record at Issue was Not Identified**

In five rulings, the judge discussed the authority by which the record at issue was or was not admitted as evidence, but the judge did not provide any descriptive information about the record at issue.<sup>37</sup> As a result, this author could not identify a sufficient amount of contextual information about the record for the purposes of this study.

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<sup>34</sup> See, for example, subsections 30(3)(a)-(b) and 30(7) of the *Canada Evidence Act*.

<sup>35</sup> See *Slough Estates Canada v Federal Pioneer Ltd* (1994), 20 OR (3d) 429 (Gen Div), [1994] OJ no 2147 (QL) at paras 58-59.

<sup>36</sup> *Airia Brands Inc v Air Canada*, 2011 ONSC 4003 (CanLII) at para 23.

<sup>37</sup> *R v Anthes Business Forms*, 1975 CanLII 54 (Ont CA); *R v Biasi (No. 2)* (1981), 66 CCC (2d) 563 (BCSC), [1981] BCJ no 2215 (QL); *R v Schiel*, 2005 BCPC 581 (CanLII); and *Soan Mechanical Ltd v Terra Infrastructure Inc*, 2011 ONCA 371 (CanLII).

#### 4.4.2.7 The Judge Did Not Identify the Admissibility Authority by Which He/She Assessed the Business Record at Issue

In one ruling, *Clark v Clark* (2012), counsel for the defendant tendered as evidence records of the Department of Fisheries and Oceans Canada but, while Justice Baker admitted these records as evidence, she did not identify the authority she used to make her decision. She ruled: “I am satisfied that the records are admissible for the truth of their contents as ‘business records’. I am also satisfied that they are government documents prepared in circumstances that provide assurances of reliability.”<sup>38</sup> This is the only explanation Justice Baker provided about her decision; the lack of more precise information rendered the ruling unusable for this study.

#### 4.4.3 Recording Information about the Rulings

Once the data set (i.e., relevant rulings and business records) was identified, contextual information about each ruling was recorded into multiple Microsoft Excel spreadsheets. As illustrated in Figure 4.2, one spreadsheet contained information about each ruling, including the ruling name (e.g., *Smith v Bob*) (column A), judgment year (column B), jurisdiction (i.e., British Columbia or Ontario) (column E), court of judgment (e.g., Supreme Court) (column F), and whether the ruling was from a civil or criminal case (column G).

A	B	E	F	G
Ruling Name	Year (Judgement)	Jurisdiction	Court	Civil / Criminal
Butler v Latter	1994	British Columbia	Supreme Court	Civil
Canadian Imperial Bank of Commerce v McKinnon	1981	British Columbia	Supreme Court	Civil
Can-Dive Services Ltd v Laurentian Pacific Insurance Co	1994	British Columbia	Supreme Court	Civil
Catholic Children's Aid Society of Metropolitan Toronto v P	1984	Ontario	Provincial Court (Family Division)	Civil
R v Bisson	2009	Ontario	Court of Justice	Criminal
R v CL	1999	Ontario	Court of Appeal	Criminal

**Figure 4.2: Contextual Information Collected from Each Ruling**

<sup>38</sup> *Clark v Clark*, 2012 BCSC 1220 (CanLII) at para 22.

The ruling name, judgment year, jurisdiction, and court of judgment appear in the heading of each ruling. To identify whether the ruling was a civil or criminal case, it was noted whether or not the Crown was listed as a party (e.g., *R v Bisson*). According to the *Canadian Guide to Uniform Legal Citation*, “R” is always referred to as the prosecution used in place of the Crown in criminal cases.<sup>39</sup>

#### **4.4.4 Recording Information about the Records**

To record information about each record at issue, a second Excel spreadsheet was used. This document repeated the aforementioned set of data, but added several columns to capture specific information about each identified record.

Any ruling may contain one or more business records at issue. For each ruling, each record was identified according to the description the judge provided. For example, in the British Columbia ruling of *R v Malik* (2004), the first paragraph reads: “Mr. Malik and Mr. Bagri seek to have a report prepared by physiotherapist Paul Deschryver admitted at trial....”<sup>40</sup> In the Excel spreadsheet, in the column titled “Record at Issue,” this author listed “physiotherapy report” (as shown in Figure 4.3, column M, highlighted row). Figure 4.3 shows examples of two rulings that contained multiple records at issue: *Ontario v Rothmans Inc* (above the highlighted row) and *R v Marini* (below the highlighted row). With regard to these two rulings, this author recorded the different business records of each ruling in column M. Repeating the contextual information for each ruling (columns A and B, E-G) was necessary in order to prevent the data from becoming misaligned when this author sorted columns during the analysis phase of the study.

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<sup>39</sup> “The Crown—Criminal Cases,” *Canadian Guide to Uniform Legal Citation*, 7th ed. (Toronto: Carswell, 2010), §3.3.8.

<sup>40</sup> *R v Malik*, 2004 BCSC 819, [2004] BCJ no 1253 (QL).

A	B	E	F	G	M
Ruling Name	Year (Judgement)	Jurisdiction	Court	Civil / Criminal	Record at Issue
Alferez v Wong	1994	British Columbia	Supreme Court	Civil	Medical records
Ontario v Rothmans Inc	2011	Ontario	Superior Court of Justice	Civil	Visit Report--USA & Canada (Sept. 7-25, 1975)
R v Grant	1988	British Columbia	Court of Appeal	Criminal	Telephone Record
R v ML	2002	Ontario	Court of Appeal	Criminal	Escort service records
R v Malik	2004	British Columbia	Supreme Court	Criminal	Physiotherapy report
R v Marini	2006	Ontario	Superior Court of Justice	Criminal	Billing records
R v Marini	2006	Ontario	Superior Court of Justice	Criminal	Dial tolls
R v Mendez-Romero	2008	Ontario	Superior Court of Justice	Criminal	Payroll records

**Figure 4.3: Example of a Documented Record**

In some rulings, the judge grouped business records together. *R v Marini* (2006), in Figure 4.3, is an example. In this ruling, the Crown tendered into evidence business records from Rogers Wireless. Justice Clark stated that these records fell into two separate categories: “The first category consists of the billing records” and the “second category contains what are referred to as dial tolls. These consist of raw data kept by the engineering department of Cantel respecting telephone calls placed over their system generally.”<sup>41</sup> Based on this example, in rulings where a judge grouped business records together and issued a single ruling on their admissibility, the grouped records were counted as a single business record. In *R v Marini* the judge made two rulings, one pertaining to the billing records and another pertaining to the dial tolls; therefore, this study listed billing records and dial tolls as two separate records.

#### 4.4.5 Summary of Records

Identifying relevant rulings was the first step in establishing a data set for this research project. The second step involved identifying business records the admissibility of which was contested by counsel for one of the parties. This study did not include a business record if a judge did or did not admit it for reasons other than one of the five authorities. Additionally, this study did

<sup>41</sup> *R v Marini* (2006), 71 WCB (2d) (Ont Sup Ct J), [2006] OJ no 4057 (QL) at paras 4-5.

not include any records tendered as evidence by a private person,<sup>42</sup> such as a diary or personal letter, because these records were not records created, maintained, or used by a business for its day-to-day operations.

From the 145 rulings, this study identified 477 business records at issue. As Table 4.3 shows, eighty-one rulings had only one record at issue, which accounted for sixty percent of the total number of rulings in the data set. Four rulings had twenty-one or more records at issue which accounted for three percent of the total number of rulings in the data set. Of these four rulings, *Ontario v Rothmans, Inc* (2011), had sixty-five business records at issue: the greatest number of records identified in any of the rulings.<sup>43</sup> On average, each ruling had slightly over three business records at issue.

**Table 4.3: Number of Records at Issue per the Number of Rulings in the Data Set**

# Records at Issue	# of Rulings	% of Total Number of Rulings
1	81	0.60
2	26	0.19
3	13	0.10
4	5	0.04
5	5	0.04
6-10	7	0.05
11-15	3	0.02
16-20	1	0.01
21+	4	0.03
<b>Total</b>	<b>145</b>	

#### 4.5 Determining Admissibility Decisions

The final component for determining the data set was to identify the rulings that contained inadmissible records: this section explains the process followed to carry out that identification. The analysis of these data contributes to answering the primary research question of this study: on which grounds do the legal and judiciary professionals base their assessment of documentary

<sup>42</sup> A *private person* is a person who does not hold public office or serve in the military.

<sup>43</sup> *Ontario*, 2011.



evidence as meeting the business records exception to the hearsay rule? Further, this analysis supports the identification of linkages between admissibility issues and recordkeeping standards, which may provide findings that help records professionals reduce risks associated with records that need to be tendered as evidence in a Canadian court of law.

This author chose to focus on only the rulings chosen because they specifically addressed admissibility issues. As discussed in Chapter 2, it is agreed that recordkeeping standards should take into account all the criteria relevant to ensuring records are authentic, reliable, and accurate evidence of actions and transactions. Moreover, recordkeeping standards have a particular role in supporting the admissibility of records in court, to ensure records meet the highest standards of evidence. Thus understanding the specific reasons that judges do not admit business records will help highlight particular issues that recordkeeping standards should emphasize.

#### **4.5.1 Recording the Authorities**

As discussed earlier in this chapter, a business record tendered as evidence may be assessed for as many as five different reasons:

1. the business records exception to the hearsay rule at common law;
2. the business records exception provisions of the provincial evidence acts;
3. the business records exception provision of the federal statute;
4. the principled approach to hearsay; and
5. any other common law exception or provision in a statute, regulation, or rules of court.

To account for the possibility that any record may be assessed for one or more of these reasons, this author added columns to the end of the Excel spreadsheet previously mentioned. As Figure 4.4 shows, columns U-Y represent the five admissibility authorities, and column Z provides space for this author to identify the specific court rule reason. A seventh column (column AA) documents the judge's final decision.

A	M	U	V	W	X	Y	Z	AA
Ruling Name	Record at Issue	Common Law	Provincial Statute	Federal Statute	Principled Approach	Court Rules	Court Rules Reason	Final Decision

**Figure 4.4: Recording Admissibility Decisions**

Depending on the authorities applied to the business record, a judge could make one of seven rulings per record per authority. The judge may:

1. Admit the record.
2. Not admit the record.
3. Admit the record but only a part of it.
4. Uphold the decision by the lower court to admit the record.
5. Overturn the decision by the lower court to admit the record.
6. Uphold the decision by the lower court not to admit the record.
7. Overturn the decision by the lower court not to admit the record.

To facilitate entering the decisions into the Excel spreadsheet, this author abridged the seven scenarios into the following words or phrases:

1. Admissible.
2. Inadmissible.
3. Admissible (in part).
4. Admissibility Upheld.
5. Admissibility Overturned.
6. Inadmissibility Upheld.
7. Inadmissibility Overturned.

The section of the spreadsheet showing the judge's final decision could only contain one of three options:

1. Admissible.
2. Inadmissible.
3. Admissible (in part).

The final decision was limited to these three options because options #4 and #7 from the abridged list equate to a record being admitted as evidence. Similarly, options #5 and #6 from the abridged list equate to a record not being admitted as evidence. Figure 4.5 illustrates a part of the completed Excel spreadsheet. In this figure, the ruling of *British Columbia (Public Guardian and Trustee of) v Egli* (the highlighted row) shows one record at issue (column M), which the judge assessed and ruled could not be admitted as evidence according to the common law authority (column U) and according to a “Court Rules” reason (column Y), which was the British Columbia *Supreme Court Rules* (column Z). The judge’s final decision was that that the evidence could not be admitted; therefore, this author inserted “Inadmissible” in the final decision column (column AA).

A	M	U	V	W	X	Y	Z	AA
Ruling Name	Record at Issue	Common Law	Provincial Statute	Federal Statute	Principled Approach	Court Rules	Court Rule Reason	Final Decision
Bassett v The Maritime Life Assurance Co	Clinical records		Inadmissible					Inadmissible
British Columbia (Public Guardian and Trustee of) v Egli	Certificate of incompetence	Inadmissible				Inadmissible	Rule 40(A) of the BC Supreme Court Rules	Inadmissible
Butler v Latter	Clinical records		Admissible					Admissible
Gill v A&P Fruit Growers Ltd	Cell phone records		Admissible		Admissible			Admissible
R v Metalore Resources Ltd	Certificate of Analysis		Admissible					Admissible
Ontario v Rothmans Inc	Communique (February 1, 2000)				Inadmissible			Inadmissible
Ontario v Rothmans Inc	Letter from DA Crawford to A Wallace Hayes (March 30, 1988)				Inadmissible			Inadmissible
Ontario v Rothmans Inc	Letter from DA Crawford to Frank Colby				Inadmissible			Inadmissible

**Figure 4.5: Excel Worksheet with Identified Admissibility Rulings**

As shown in Figure 4.6, *R v Wilder* is an example of a case in which the judge determined that two records at issue could be admitted according to the *Canada Evidence Act*. The judge also determined, however, that the records did not satisfy the twin conditions of necessity and reliability; therefore, they could not be admitted according to the principled approach to hearsay. The judge’s final conclusion was that the two records could be admitted as evidence.

A	M	U	V	W	X	Y	Z	AA
Ruling Name	Record at Issue	Common Law	Provincial Statute	Federal Statute	Principled Approach	Court Rules	Court Rule Reason	Final Decision
R v Vanlerberghe	Bookkeeping records			Admissibility Upheld				Admissible
R v West	Forensic report				Admissible			Admissible
R v Wilder	T2020s				Admissible			Admissible
R v Wilder	telex dated September 17, 1985			Admissible	Inadmissible			Admissible
R v Wilder	1990 memo			Admissible	Inadmissible			Admissible
R v Wilder (No 2110)	Diary of Mr. Rus	Admissible		Admissible	Admissible			Admissible
R v Ziegler	Ambulance crew report	Inadmissible			Inadmissible			Inadmissible

**Figure 4.6: Example of Differing Admissibility Rulings**

In some rulings, a business record is partially admitted, meaning that the judge allows certain sections or pages of the record to be admitted as evidence while rejecting other sections or pages. An example of this situation occurred in the British Columbia ruling of *Schray v Jim Pattison Industries Ltd (cob Save-On-Foods)* (2006). In this case, the plaintiff sued the defendant for damages after she slipped and fell in a grocery store owned and operated by the defendant.<sup>44</sup> The defendant tendered the grocery store sweep log as evidence to establish that the floor was clean at the time of the accident. Justice Holmes assessed the sweep log according to the common law authority and determined that there was a reasonable doubt that the sweep log had been properly updated. Justice Holmes ruled that the entries *prior* to the time of the event could be admitted as evidence, but the entries made *after* the event could not be admitted as evidence. Based on Justice Holmes' decision, this study identified the sweep log as "Admissible (in part)" according to the common law authority and recorded "Admissible (in part)" as the final decision (see Figure 4.7, highlighted row).

<sup>44</sup> *Schray v Jim Pattison Industries Ltd (cob Save-On-Foods)*, 2006 BCSC 1120, [2006] BCJ no 1696 (QL) at para 1.

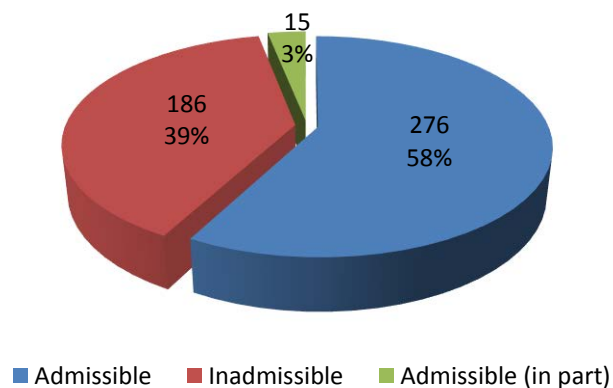
A	M	U	V	W	X	Y	Z	AA
Ruling Name	Record at Issue	Common Law	Provincial Statute	Federal Statute	Principled Approach	Court Rules	Court Rule Reason	Final Decision
Samra v Guru Nanak Gurdwara Society	Deposit slips		Admissibility Upheld					Admissible
Schray v Jim Pattison Industries Ltd (c.o.b. Save-On-Foods)	Sweep Log	Admissible (in part)						Admissible (in part)
Seaman v Crook	Clinical records		Admissible					Admissible
White v Stonestreet	Clinical notes		Admissible					Admissible
White v Stonestreet	Clinical notes		Admissible					Admissible
Woods v Elias	Accident report		Inadmissible					Inadmissible

**Figure 4.7: Example of an "Admissible (in part)" Ruling**

#### 4.5.2 Admissibility Rate of Business Records Examined

Once the study recorded all the rulings, records, and admissibility decisions identified, this author used Excel to calculate the admissibility rate of the records. This calculation was done by totaling the number of each type of response—Admissible, Inadmissible, and Admissible [in part]—and then dividing each number by 477 (the total number of records at issue identified for the study).

As Figure 4.8 indicates, judges admitted as evidence 276 of the 477 business records identified for this study, for an admissibility rate of 59%. Judges did not admit 186 of the 477 business records identified for this study, for an inadmissibility rate of 39%. The remaining fifteen business records, or 3%, represented instances where judges admitted as evidence only a portion of the records at issue.



**Figure 4.8: Number and Percentage of Admissible and Inadmissible Records from British Columbia and Ontario Rulings**

To determine the criteria by which to analyze the recordkeeping standards, this author considered only the 186 records that were not admitted as evidence. As previously mentioned, a fundamental premise of this study is that the reasons judges do not admit records can provide the greatest insights into the relationship between recordkeeping and admissibility because they can illustrate problems in how the records are managed. This information can then be used to evaluate the guidance given to records professionals in the use of recordkeeping standards and the development of appropriate procedures, with the goal of providing insights that may help them improve the likelihood that a business record will be admitted as evidence in a court of law.

The next two sections discuss the method by which this author coded the rulings and refined these codes into six categories used to analyze the recordkeeping standards.

#### **4.6 Establishing the Data Set Codes**

Prior to examining the rulings that contained records not admitted as evidence, this author developed codes in order to standardize the process of recording the criteria cited by judges in the rulings that contained records not admitted as evidence. In this study, each code reflects a particular criterion cited by a judge as a reason not to admit a business record as evidence. These codes were derived from this author's review of the law of evidence literature and Canadian case law. Separate sets of codes were made for each admissibility authority: one set for the common law, one set for the British Columbia *Evidence Act*, one set for the Ontario *Evidence Act*, and one set for the *Canada Evidence Act*.<sup>45</sup> An inductive approach was required to develop codes for the principled approach to hearsay, so the author developed those codes after examining each ruling.

The process of determining the codes required considerable analysis and adjustment. In order to establish the initial set of codes particularly for the common law authority, for example,

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<sup>45</sup> See Appendix B for the complete list of codes used in this study.

this author began by including six of the seven criteria identified by Ewart, who observed that for a record to be admitted as evidence according to the common law authority it must:

1. be an original entry;
2. have been made contemporaneously to the event it represents;
3. made in the routine of a business activity;
4. made by a business;
5. made by a person since deceased;<sup>46</sup>
6. made by a person with knowledge of the facts that the record represents; and
7. the person who made the record should not have any motive to misrepresent the facts the record represents.

This list was then revised to represent more accurately a judge's decision *not* to admit a business record as evidence, because this study focuses on why records were not admitted as evidence in a Canadian court of law. Table 4.4 shows the initial set of codes chosen to assess reasons why judges did not admit business records according to the common law authority.

**Table 4.4: Initial Common Law Codes**

Common Law Codes (British Columbia & Ontario)	
1.	The record is not an original entry
2.	The record was not made contemporaneously to the event it represents
3.	The record was not made in the routine of a business activity
4.	The record was not made by a business
5.	The record was made by a person who did not have knowledge of the facts that the record represents
6.	The person who made the record had motive to misrepresent the facts the record represents

The initial intention was to use these six codes to analyze each ruling that applied the common law authority. Upon reviewing the rulings, however, it was clear that the six codes did not accurately capture all the different reasons that judges cited when ruling that a business record

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<sup>46</sup> Ewart, *Documentary Evidence in Canada*. As discussed in Chapter 2, the decision of the Supreme Court of Canada in its ruling *Ares v Venner*, [1970] SCR 608 removed this criterion, which is why it is included here but crossed out. Also, the *Ares* decision allowed counsel to call a witness who was familiar with the process that created the record at issue: the witness no longer needed to see or experience the events that led to the creation of the record.

could not be admitted as evidence according to the common law authority. In fact, judges frequently apply their own interpretations of that authority, sometimes citing Ewart's principles verbatim and sometimes providing their own explanation. Considering that judges are often very precise in the way they articulate a decision, this author decided to retain the judge's language for each ruling.

Therefore, instead of using the six codes for the common law authority identified above, this author identified eighteen codes, as shown in Table 4.5.

**Table 4.5: Final Set of Common Law Codes**

Common Law Codes (British Columbia & Ontario Rulings)	
1.	Witness did not have personal knowledge of the facts
2.	Business routine unclear or unknown
3.	Not purported to be a business record
4.	Witness not under a duty to record the particular act
5.	Maker of the record had motive to misrepresent (opinion)
6.	No evidence record kept in the usual and ordinary course of business
7.	No evidence record made contemporaneously
8.	Unclear where the record came from
9.	Unclear how the record was prepared
10.	Unclear who made the record
11.	Failure to satisfy best evidence rule (no explanation why original record could not be produced)
12.	Maker of the record had motive to misrepresent (litigation)
13.	Not required to keep the record
14.	Not made in the routine of business
15.	Unclear if record was properly made
16.	No witness to cross-examine
17.	Other evidence available
18.	Witness's qualifications unclear

The same methodology was used for establishing the codes for the federal and two provincial evidence acts. This author began by assuming there would be one code for each subsection of the acts, but after reviewing the rulings, it appeared to be more appropriate to divide certain subsections into multiple codes. To illustrate, subsection 30(1) of the *Canada Evidence Act* reads:



Where oral evidence in respect of a matter would be admissible in a legal proceeding, 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.

An analysis of the rulings revealed that judges addressed this subsection as if it contained two distinct elements: 1) “oral evidence in respect of a matter would be admissible in a legal proceeding,” and 2) “a record made in the usual and ordinary course of business.”<sup>47</sup> Therefore, this study had two codes for this subsection, revised to represent more accurately a judge’s decision *not* to admit a business record as evidence:

1. Oral evidence would not be admitted in a legal proceeding.
2. The record was not made in the usual and ordinary course of business.

The codes for the principled approach to hearsay authority were developed while reviewing each ruling because, even though the literature stipulates only two principles for this particular authority—necessity and reliability<sup>48</sup>—in practice judges must articulate specific reasons for determining whether or not a record satisfies either of these principles. These reasons are not addressed in the literature; therefore, this author reviewed each ruling involving the principled approach to hearsay and then developed appropriate codes.

#### **4.7 Coding the Rulings**

Microsoft Excel was used to facilitate coding of each ruling that contained a business record that a judge did not admit as evidence.<sup>49</sup> Each authority from each province was coded separately. In other words, British Columbia rulings that applied the common law authority were coded at a

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<sup>47</sup> Both of these provisions are defined and discussed in more detail later in this chapter.

<sup>48</sup> See Chapter 2 for more information about the development of the principled approach to hearsay within the Canadian judiciary.

<sup>49</sup> This author initially attempted to use QSR International’s NVivo 9, software specifically designed for organizing and analyzing unstructured data such as documents, surveys, audio, and images. Unfortunately, after some testing, it was determined that this software would not work for this study because the software could not easily capture the complex relationship between the records that needed to be coded, the admissibility authorities, and the judges’ decisions to admit or not admit a business record as evidence.

different time and using a different Excel document than rulings from Ontario that applied the common law authority. The coding process allowed the author to identify the most frequently cited reasons why judges did not admit business records as evidence. Coding the rulings and therefore examining the trends resulted in a refining of the coding scheme. This process allowed this author to determine the dominant issues for why business records were not admitted as evidence, which then could be examined to consider the extent to which records professionals may help their organizations meet their legal obligations for the creation and management of legally admissible records.

Each Excel document presents a similar layout and contains a series of worksheets, as shown in Figure 4.9. In the worksheet, the rows represent the codes from the authority and the columns represent the record(s) at issue from each ruling. Each ruling was coded by placing an “X” next to the specific criteria. Figure 4.9 illustrates how this author coded each ruling.

A	B	C	D
Ruling Name (Revised)	British Columbia v Harries	British Columbia v Harries	British Columbia v Harries
Record at Issue (Revised)	ICBC file notes	Medical legal report	Clinical records
s42–ss(1)—not a business			
s42–ss(1)—not a document			
s42–ss(1)—not a statement			
s42–ss(2)—direct oral evidence would not be admissible			
s42–ss(2)(a)—record was not made in the usual and ordinary course of business	x	x	x
s42–ss(2)(a2)—document was not kept in the usual and ordinary course of business			
s42–ss(2)(b)—not the usual and ordinary course of business to create the record			
s42–ss(2)(b2)—record not created in a timely manner after the fact			
s42–ss(3)—lack of personal knowledge of the making of the statement			
s42–ss(3)—unclear circumstances of the making of the statement			
s42–ss(4)—legal proceedings pending			

**Figure 4.9: Example of Codes for British Columbia *Evidence Act***

Once each inadmissible record from each authority was coded, all the records and codes for a specific authority were merged into another spreadsheet (as per the “All Rulings” tab at the bottom left of Figure 4.9).

Figure 4.10 illustrates an example of the merged spreadsheet for the rulings and records of the British Columbia *Evidence Act*. In this spreadsheet, the rows represent the records at issue and the columns represent the criteria (codes) by which a judge ruled that the record could not be admitted as evidence. The “Xs” represent the number of times that a specific criterion for a specific authority was coded. From this spreadsheet it was possible to tally the number of “Xs” in each column automatically, calculating precisely how many times judges in that province applied that specific code.

A	B	D	E	G
Ruling Name	Record at Issue	s42--ss(1)--not a business record	s42--ss(2)(a)--document was not made in the usual and ordinary course of business	s42--ss(2)(b)--not the usual and ordinary course of business to create the record
British Columbia v Harris	ICBC file notes		X	
British Columbia v Harris	Medical legal report		X	
British Columbia v Harris	Clinical records		X	
Luu v Wang	Sinovac share distribution plan	X		
Matheson (Guardian ad litem of) v Barnes	Adjustment statement (Exhibit A)			X

**Figure 4.10: Example of Merged Records and Codes**

Once the coding process was completed, the results for three of the four authorities were merged. (The results from the two provincial evidence acts were not combined because there were too many variations in the language between the acts. As a result, the findings related to each Act were reviewed separately.) As indicated in Table 4.6, the analysis of the 186 records resulted in the identification of fifty-five codes: the common law authority was assigned eighteen codes between the two provinces; the *Canada Evidence Act* was assigned eight codes between the two provinces; the British Columbia *Evidence Act* was assigned six codes, the Ontario *Evidence Act* was assigned five codes, and the principled approach to hearsay was assigned eighteen codes between the two

provinces. (See Appendix B for the original codebook that lists the fifty-five codes. See also Appendix C for the original coding results, including details about the number of records coded per criterion and the number of rulings each code represents.)

**Table 4.6: Number of Codes According to Each Admissibility Authority**

Admissibility Authority	# of Codes
Common Law	18
Canada Evidence Act	8
British Columbia Evidence Act	6
Ontario Evidence Act	5
Principled Approach to Hearsay	18
<b>Total</b>	<b>55</b>

A review of these codes revealed a substantial amount of overlap. As discussed in Chapter 2, since the authorities share a common history, it is natural and inevitable that judges regularly cite similar criteria for not admitting records as evidence, even when they assess records according to different authorities. The similarities among the codes allowed the fifty-five codes to be refined into nine broader categories, as shown in Table 4.7.

**Table 4.7: Revised List of Categories**

Categories
1. Lack of personal knowledge of the fact that resulted in the creation of the record
2. Record not created in the usual and ordinary course of business
3. Insufficient information about the record at issue
4. Not the usual and ordinary course of business to create the record
5. Record was created when legal proceedings were pending
6. Record not created contemporaneously
7. Record not purported to be a business record
8. No explanation why the original could not be produced
9. Insufficient notification provided to opposing counsel

This author then analyzed these nine categories for their recordkeeping implications. This analysis revealed that six of the nine categories represented admissibility issues where records professionals may be able to assist legal counsel to increase the likelihood that their records would

be admitted as evidence in a Canadian court of law. Table 4.8 highlights these six categories, which are discussed in more detail in Chapter 5.

**Table 4.8: Categories Pertinent to Records Professionals**

Category
1. Lack of personal knowledge of the fact that resulted in the creation of the record
2. Record not created in the usual and ordinary course of business
3. Not the usual and ordinary course of business to create the record
4. Insufficient information about the record at issue
5. No explanation why original could not be produced
6. Record not created contemporaneously

This author determined that three of the nine categories represented issues beyond the control of records professionals, as shown in Table 4.9.

**Table 4.9: Codes Not Applicable to Records Professionals**

Category
1. Record was created when legal proceedings were pending
2. Record not purported to be a business record
3. Insufficient notification provided to opposing counsel

For example, several records were not admitted as evidence because counsel failed to satisfy the requirement that opposing counsel receive sufficient notification that the records were to be submitted as evidence. Notification periods vary per statute or rules of court. Though records professionals may help expedite the identification, retrieval, and production of records, ensuring that the records are sent to opposing counsel in a timely manner is solely the obligation and responsibility of counsel.

Several records were not admitted as evidence because judges determined that these records were created when legal proceedings were pending or expected. Judges avoid admitting records in these circumstances, because the author of the record in question was likely to be biased and the record could no longer be considered reliable since it was not generated in a systematic or

routine manner. A records professional may serve as a conduit for informing employees when *not* to create certain records, but legal counsel must inform the organization when such action is required.

Finally, as shown in *Fanshawe College v LG Philips* (2010) and *R v Nardi* (2012) judges stated that the records at issue could not be admitted as evidence because they were not business records.<sup>50</sup> However, the judges did not provide any specific reasoning for why or how they determined that the records at issue did not satisfy the statutory definition of a business record. These situations illustrate that there are some cases where, regardless of the actions an organization takes to create and manage its records properly, the admission of a record into evidence may be a matter of judicial discretion.

#### **4.8 Recordkeeping Standards**

The final component of the methodology involved the identification and critical analysis of five recordkeeping standards in light of the six categories identified. In order to determine these standards, the author conducted extensive research into all the possible standards that might be relevant to the objectives of this study, including Canadian, American, and international standards. The following five standards were chosen because the author determined that they were most closely associated with the question of admitting a business record in a court of law:

1. *Electronic Records as Documentary Evidence* (CAN/CGSB-72.34-2005)
2. *Legal Acceptance of Records Produced by Information Technology Systems* (ANSI/AIIM TR-31)
3. *Records Management Responsibility in Litigation Support* (ARMA:2007)
4. *Information and Documentation—Records Management—Part 1: Guidelines* (ISO 15489-1)
5. *Information and Documentation—Records Management—Part 2: Procedures* (ISO 15489-2)

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<sup>50</sup> *Fanshawe College of Applied Arts and Technology v LG Philips LCD Co*, 2010 ONSC 1314, [2010] OJ no 2687 (QL) and *R v Nardi*, 2012 BCPC 318, [2012] BCJ no 1900 (QL) [*R v Nardi*].

Chapter 6 will explain, in detail, the reasons this author selected these five standards and excluded others from consideration.

After identifying these standards, this author examined each of them in light of the six categories that represented the six legal issues. To facilitate referencing each issue, this author abridged the six issues into the key words or phrases. The issues, and the key phrases, are listed below in Table 4.10:

**Table 4.10: Abridged Wording of the Legal Issues Examined in the Recordkeeping Standards**

Original Wording	Abridged Wording
A person with knowledge of the record could testify about the record or procedures that created the record.	Witness testimony.
Sufficient information exists about how the record was created and maintained.	Supporting documentation.
The record was created in the usual and ordinary course of business.	Record created in the usual and ordinary course of business.
The record was made contemporaneously to the events it depicts.	Contemporaneity.
It was the usual and ordinary course of business to make the record.	Was the usual and ordinary course of business to make the record.
The business can account for why an original record may not be generated for court.	Best evidence rule.

Next, this author determined which sections of the five standards were relevant to the six legal issues. As Table 4.11 indicates, one standard provides support information on all six issues, three standards supported five of the issues, and one standard includes information about only one of the issues.

**Table 4.11: Sections of the Standards that Address the Six Legal Issues**

Legal Issue \ Standard	CAN/CGSB-72.34-2005*	ANSI/AIIM TR-31: 2004†	ARMA: 2007‡	ISO 15489-1: 2001§	ISO 15489-2: 2001**
1. Witness testimony	5.5	1.1.6; 1.2.1.3	11.1; 11.2	No	No
2. Supporting documentation	5.4.1; 6.1	2.5	5.1	6.2	2.2
3. Record created in the usual and ordinary course of business	5.3; 5.5	2.4.1	No	7.2.3	No
4. Contemporaneity	5.5	2.4.1	11.2	7.2.2	No
5. Was the usual and ordinary course of business to make the record	5.4.3; 5.5; 6.1; 6.4.1	No	11.4	2.3.1	No
6. Best evidence rule	5.1; 6.6.1	1.2.1.2; 1.2.1.3; 1.2.1.4; 3.8.1; 3.8.3; 3.8.10	9.10.1	No	No
<p>* <i>Electronic Records as Documentary Evidence</i> (CAN/CGSB-72.34-2005)</p> <p>† <i>Legal Acceptance of Records Produced by Information Technology Systems</i> (ANSI/AIIM TR-31)</p> <p>‡ <i>Records Management Responsibility in Litigation Support</i> (ARMA:2007)</p> <p>§ <i>Information and Documentation—Records Management—Part 1: Guidelines</i> (ISO 15489-1)</p> <p>** <i>Information and Documentation—Records Management—Part 2: Procedures</i> (ISO 15489-2)</p>					

Chapter 6 discusses how each standard addresses each of the six legal issues identified. The chapter reviews the strengths and weaknesses of the texts and recommends changes that should be made to enhance their ability to address the legal issues in question.

## 4.9 Summary

The chapter discussed the methodology of content analysis and its use in this study. This chapter also outlined how this study identified its data sets: the rulings and business records. Overall, the study identified 145 rulings and 477 business records on which counsel contested admissibility as evidence. Of the 477 business records identified, 186 were ruled inadmissible. After



a review of the rulings, the 186 records were coded with each code representing a criterion that judges from British Columbia and Ontario cited when not admitting a business record as evidence.

Following an analysis of the codes, this author identified similarities among the codes and was able to refine the original list from fifty-five codes to nine. A review of these nine codes revealed that six of them had recordkeeping implications and that analysis of these findings would support the identification of issues that may benefit records professionals, as they strive to provide assistance to counsel to ensure that the records may be admitted as evidence. The final section of the chapter reviewed the final component of this study: the identification of recordkeeping standards. The section identified the five standards selected by this author for a critical examination, and reviewed how the standards address the six legal categories. Chapter 5 discusses these six categories in more detail and their relevance to records professionals.

## **Chapter 5: Discussion of Categories**

### **5.1 Introduction**

This chapter discusses the six categories of inadmissible criteria and considers their relevance to records professionals. The chapter functions as a bridge between the review of the case law and the analysis of recordkeeping standards. The chapter is divided into four sections, including this introduction, section 5.1. Section 5.2 discusses the coding results, focusing on six groups of codes for instances where judges did not admit business records as evidence; these codes were deemed most relevant to the day-to-day operations of records professionals. As a point of comparison, Section 5.3 reviews examples of rulings where judges did admit business records as evidence, demonstrating further the relationship between recordkeeping and the admission of business records. Section 5.4 provides a summary of the chapter.

### **5.2 Discussion of Categories**

The following sections discuss the six categories of codes in detail, presenting the information as follows: an explanation of the category and a discussion of rulings applicable to that category. Each section concludes with a discussion of the implications for records professionals of the findings within that category, followed by suggestions for improving records creation and maintenance in order to avoid the rejection of business records as evidence. The categories are arranged in descending order by the number of records coded in each category. (See Appendix D for a breakdown of the number of records coded per each category.)

As discussed in Chapter 2, for a record to be admitted as evidence in a Canadian court of law, it must first be authenticated and then the judge must determine that the record is reliable. The two processes, however, are not mutually exclusive. The following discussion, based on this author's data set, focuses on how judges assessed the reliability of the records at issue.

### **5.2.1 Lack of Personal Knowledge of the Fact that Resulted in the Creation of the Record**

This category captured all instances where a business record was not considered admissible because the judge ruled that the witness could not testify to the trustworthiness of the record. One of the most frequently cited reasons that judges use to preclude business records from being admitted as evidence is that the witness did not have sufficient knowledge about how the record was created and managed within the business and/or about how the record was produced for court.

This category also includes situations where judges do not admit business records as evidence because the records at issue contain opinions. Judges are careful to exclude opinions because they are often speculations or guesses; therefore, are not based on personal knowledge.<sup>1</sup>

#### **5.2.1.1 Explanation of the Category**

At common law, according to Ewart, for a business record to be admitted as evidence, it must be generated by a person with knowledge of the facts that the record represents.<sup>2</sup> The *Canada Evidence Act* and British Columbia *Evidence Act* both adopted this criterion for admission or exclusion. The first part of subsection 30(1) of the *Canada Evidence Act* reads: “Where oral evidence in respect of a matter would be admissible in a legal proceeding....” and the opening statement of subsection 42(2) of the British Columbia *Evidence Act* reads: “In proceedings in which direct oral evidence of a fact would be admissible....” The rationale is effectively outlined by Justice Puddester of the Newfoundland Supreme Court (Trial Division) in his ruling of *R v Ross* (1991), where he explained subsection 30(1) of the *Canada Evidence Act* by stating:

Under the literal wording of the section, the contents of the information in the business record are not required to be exactly the same as the oral evidence on the point. But beyond this, in my view, the intention of the section is clear. If oral evidence from one person, or a chain of persons, within the business could be called to provide the information, then the business record itself can be so produced... I see no

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<sup>1</sup> Subjective opinions should not be confused with opinions made by expert witnesses who draw their conclusions from facts. Expert witness testimony is admissible.

<sup>2</sup> See Section 5.2.2 of this chapter for Ewart’s list of the seven criteria that a record needs to satisfy in order to be admitted according to the common law authority.

requirement in s. 30(1) itself limiting the qualifying condition to oral evidence from only the person who prepared the document in question.”<sup>3</sup>

The Ontario *Evidence Act* approaches the concept of “direct oral evidence” slightly differently. Subsection 35(2) of the Act states that any “writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event....” Despite the difference in wording, Ontario judges have interpreted this section to mean that opinions should not be admitted as evidence. As Justice Rosenberg explained in his ruling of *Slough Estates Canada Ltd v Federal Pioneer Ltd* (1994), “the business records exception under s. 35 of the Ontario *Evidence Act* does not contemplate the admissibility of records containing opinions of their makers, as these opinions would not be records of ‘an act, transaction, occurrence or event’ as required by the Act.”<sup>4</sup> Justice Hryn of the Ontario Court of Justice remarked that for a witness to satisfy subsection 35(1) of the Ontario *Evidence Act*, he/she needs first-hand knowledge about how the record was made or the process by which it was made. According to Justice Hryn, witnesses who describe the creation of the record with phrases such as “it appears,” “I would think so,” and “I assume it would” are insufficient to satisfy the criterion.<sup>5</sup>

#### **5.2.1.2 Discussion of Rulings**

Several rulings illustrate why judges decided that records could not be admitted as evidence either because the witness lacked sufficient knowledge about the events or because the record contained an opinion. For example, in *Canadian Imperial Bank of Commerce v McKinnon* (1981), the defendants tendered banking account cards as evidence. The defendants called the bank branch manager to testify to the records, but the branch manager “had no knowledge of the transactions

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<sup>3</sup> *R v Ross* (1991), 92 Nfld & PEIR 51 (SC (TD)), [1991] NJ no 240 (QL) at 7.

<sup>4</sup> *Slough Estates Canada v Federal Pioneer Ltd* (1994), 20 OR (3d) 429 (Gen Div), [1994] OJ no 2147 (QL) at para 65.

<sup>5</sup> *R v Felderhof*, 2005 ONCJ 406, [2005] OJ no 4151 (QL) at para 110 [*R v Felderhof*].

recorded.”<sup>6</sup> Justice Taylor ruled that these records did not satisfy subsection 42(1) of the British Columbia *Evidence Act* because “the defendants know no more about the banking transactions than the manager. I do not accept the contention that the Court can place any reliance in such circumstances on the mute record of the account.”<sup>7</sup>

*Olynyk v Yeo* (1988) exemplifies a ruling where the British Columbia Court of Appeal overturned the decision of the lower court to admit as evidence four medical records. The medical records formed the crux of the case for the defendant Yeo. The case resulted from an automobile accident between the two parties, Olynyk and Yeo, in October 1983. About six months after the accident, Olynyk fell down a flight of stairs at his home and suffered a serious leg injury that rendered him unable to work at his construction job. Olynyk argued that his fall was the result of his leg being compromised from the car accident. Yeo, the defendant, contended that Olynyk was at fault for his fall because he descended the staircase in the dark. Yeo argued this position by submitting medical records as evidence. The medical records were from visits Olynyk made to medical institutions after his fall in his home. The medical records contained notes about the incident, but none of the records identified Olynyk “as the source of the description of the fall” and the tending doctor did not remember Olynyk.<sup>8</sup> The trial judge admitted the records as evidence and the defendant was found liable for only a reduced amount of damages for personal injury. The Court of Appeal did not agree with the decision made by the lower court. Justice Southin, writing for a unanimous court, stated:

It is part of the usual and ordinary course of the business of a hospital and its staff to record “history” for the purpose of treating the patient but the “facts” in the history are not facts which occurred within the observation of the maker of the statement or within the observation of any other person whose observation it is part of the usual

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<sup>6</sup> *Canadian Imperial Bank of Commerce v McKinnon*, [1981] BCJ no 188 (QL) (SC) at para 3.

<sup>7</sup> *Ibid* at para 9.

<sup>8</sup> *Olynyk v Yeo* (1988), 33 BCLR (2d) 247 (CA), [1988] BCJ no 2289 (QL) at 3 [*Olynyk*].

and ordinary course of business of the maker to record. There was no one on the staff of the hospital who could have given “direct oral evidence” of the cause of the fall.<sup>9</sup>

In other words, though the medical records contained information about the plaintiff’s fall, because no medical personnel witnessed the actual event, no one could know whether the plaintiff’s fall was in fact related to the car accident. As a result of its decision that the records were inadmissible, the Court of Appeal ordered a new trial.

In *Catholic Children's Aid Society of Toronto v JL* (2003), the plaintiff, the Catholic Children’s Aid Society of Toronto, tendered several records to be admitted as evidence, including risk assessment reports. Justice Jones did not admit the risk assessment reports because she believed they contained opinions:

Although risk assessment reports may be of great assistance to the society in formulating its future plans for the family, I did not view these reports as capable of being admitted under section 35. They did not record an “act, occurrence, transaction or event.” They purported to express an “expert” opinion on future risk. Such opinion could only be admitted after compliance with the expert evidence rules.<sup>10</sup>

In *Strata Plan LMS 3851 v Homer Street Development Limited Partnership* (2007), the plaintiff tendered a number of memoranda consisting of meeting minutes, to be admitted as evidence. These records were made by employees of the defendant. Mr. Douglas, one of the employees responsible for drafting the meeting minutes, was called to testify about the records. During his testimony it was revealed that “the authors did not follow any established systematic routine when preparing the memoranda.”<sup>11</sup> More importantly, Justice Truscott ruled that the memoranda dated February 5, 1999 could not be admitted as evidence because this author of the record “was not even an attendee at the meeting of February 5, 1999.”<sup>12</sup>

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<sup>9</sup> Ibid at 7.

<sup>10</sup> *Catholic Children's Aid Society of Toronto v JL* (2003), 122 ACWS (3d) 877 (Ont Ct J), [2003] OJ no 1722 (QL) at para 24.

<sup>11</sup> *Strata Plan LMS 3851 v Homer Street Development Limited Partnership*, 2007 BCSC 1265, [2007] BCJ no 1866 (QL) at para 22.

<sup>12</sup> Ibid at para 46.

### **5.2.1.3 Discussion of Recordkeeping Implications**

The rulings demonstrate the difficulty in identifying the appropriate person within an organization who could testify to the creation, management, and/or production of a record submitted as evidence. Recordkeeping documentation, such as policies and data maps, may assist counsel to identify the appropriate employee to testify about a record. Recordkeeping policies may specifically indicate job responsibilities and designate which records some employees may be responsible for creating and/or managing records. A data map is “a comprehensive and defensible inventory of an organization’s IT systems ... a repository for data and information mapped to business units, data stewards, and custodians,” which can assist an organization to understand the relationship of its records to its employees, business processes, and business functions.<sup>13</sup> Therefore, the policies and data map would provide counsel with useful information when needing to identify the appropriate employee to testify about a record. Moreover, with this documentation, counsel may be better able to identify opinion evidence and better prepared when tendering a record as evidence or challenging a submission from the opposing counsel.

### **5.2.2 Insufficient Information about the Record at Issue**

This category captured all instances where a business record was not considered admissible because the judge did not have enough information about the origins of the record and its chain of custody to be able to consider the record reliable. Judges require knowledge of an organization recordkeeping practices to ensure that a record at issue contains a circumstantial guarantee of trustworthiness.

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<sup>13</sup> Bobby Balachandran, “5 Steps to Compliance: Building an Automated Data Map,” *Information Management Journal* 43, no. 6 (2009): 40. See also David Wetmore and Scott Clay, “To Map or Not to Map: Strategies for Classifying Sources of ESI,” *Information Management Journal* 43, no. 5 (2009): 33-40.

#### **5.2.2.1 Explanation of the Category**

The rulings in this section illustrate that when a judge assesses a record according to the principled approach to hearsay, he/she is sometimes quite specific about the information required to determine whether the record should be admitted as evidence. A judge needs to have contextual information about the record such as who made the record, when and how the record was generated, how the record was used, and when it was issued.

#### **5.2.2.2 Discussion of Rulings**

Several rulings illustrate why judges decided that records could not be admitted as evidence because counsel did not provide enough information about the origins and/or creation of the record at issue. In *Ontario v Rothmans Inc* (2011), the Crown sought \$50 billion for health care costs arising from tobacco-related disease. The defendants were fourteen different tobacco companies, including Rothmans Inc, Philip Morris, R.J. Reynolds Tobacco Company, and British American Tobacco. The ruling cited for this study involved Justice Conway's admissibility decisions regarding over 150 records, many of which consisted of correspondence and reports produced by the defendants. Justice Conway ruled forty-two of these records could not be admitted as evidence according to the principled approach to hearsay because counsel did not provide any evidence for how the records were created. Therefore, the records did not satisfy the reliability principle of the admissibility authority.<sup>14</sup>

Justice Holmes provided a similar explanation for why she did not admit ten records in the case of *R v Bath* (2010). These records consisted of photocopies of bank statements from four different financial institutions: HSBC Bank Canada, Khalsa Credit Union (KCU), Canadian Imperial Bank of Commerce (CIBC), and the Mt. Lehman Credit Union. All the account statements had been stamped "Certified True Copy." According to Justice Holmes, presenting the records as certified true

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<sup>14</sup> *Ontario v Rothmans, Inc*, 2011 ONSC 5356, [2011] OJ no 4163 (QL) at para 88.



copies was insufficient evidence to allow them to be admitted according to the principled approach to hearsay, because counsel could not explain: 1) the source of the records and 2) how the records were used by the business.<sup>15</sup> Justice Holmes also ruled the account statements from the Khalsa Credit Union did not satisfy the reliability principle because “of the absence of evidence concerning when and how they were produced, and for what purpose.”<sup>16</sup> She explained that a record may only be admitted according to the principled approach to hearsay when counsel provides the court with “an understanding of the circumstances in which the documents were created or copied....”<sup>17</sup>

In the case of *R v Nardi* (2012), Judge Challenger did not admit as evidence several records from the plaintiff, because the records did not satisfy section 30 of the *Canada Evidence Act*. These records included screen shots the complainant made of his Orbicule software account using the Safari web browser. She also ruled that the records could not be admitted as evidence according to the principled approach to hearsay because they did not satisfy the reliability principle. In this case, Crown counsel did not call as a witness an employee of Orbicule to discuss the routines that led to the creation of the records. Moreover, counsel did not establish that the screen shots from the Safari web browser were in fact taken from the complainant’s Orbicule account.<sup>18</sup> Judge Challenger explained that “reliability of the information in the marketing material is generally supported by the software apparently functioning as was described therein ... There is nothing on the screenshots or photographs to establish that the computer being used was that belonging to the complainant. This is assumed, but not proven in any way.”<sup>19</sup>

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<sup>15</sup> *R v Bath*, 2010 BCSC 307, [2010] BCJ no 2842 (QL) at paras 72-73 [*R v Bath*, 2010 BCSC 307].

<sup>16</sup> *Ibid* at para 78.

<sup>17</sup> *Ibid* at para 50.

<sup>18</sup> *Ibid* at para 18.

<sup>19</sup> *R v Nardi*, at para 17.

### **5.2.2.3 Discussion of Recordkeeping Implications**

The analysis of the codes for this category indicates a close similarity to the codes categorized identified in sections 5.2.3 and 5.2.5 of this chapter. The codes in this section show how important it is that counsel provides sufficient evidence about the recordkeeping practices of the organization to demonstrate the trustworthiness of the record. As argued with respect to the codes discussed in section 5.2.1, records professionals may assist counsel in creating this foundation by providing documentation about the record at issue. Policies, procedures, metadata, and data maps may contribute to understanding the origins of the record and the functions that led to its creation and maintenance. Further, in situations where the maker of the record is no longer with the organization, the records manager of the organization may need to be able and ready to take the stand to testify about the processes that created a record. These duties should be outlined in recordkeeping policies.

### **5.2.3 Record Not Created in the Usual and Ordinary Course of Business**

This category captures all instances where a business record was not considered admissible because the judge ruled either that the record was not created in the usual and ordinary course of business or that counsel provided insufficient evidence to establish that the record was created in the usual and ordinary course of business. As discussed in Chapter 2, the business records exception to the hearsay rule was developed because the courts recognized that business records have a circumstantial guarantee of trustworthiness: that is, they are created in a systematic and routine manner that limits the likelihood that they may be altered.

Explaining the concept of “usual and ordinary course of business,” Judge Nordheimer of the Ontario Superior Court of Justice, in his ruling of *R v Dunn* (2011), stated that “the terms ‘usual and ordinary’ carry with them the connotation of something done commonly and routinely in the course of the normal operations of a business where there is no reason to record otherwise than accurately

and objectively.”<sup>20</sup> And in the British Columbia Court of Appeal ruling of *Olynyk v Yeo* (1988), Justice Southin explained the concept of “usual and ordinary course of business” as follows:

For instance, if a meteorologist records in the usual documents of his office that it was raining at such and such a time, whether he saw the rain or a fellow meteorologist did, the document is admissible to prove that it was raining. But if he writes down that his fellow meteorologist saw an accident on his way to work, that is not a fact being recorded in the usual and ordinary course of his business and is not admissible as such in proof of the occurrence of the accident.<sup>21</sup>

#### **5.2.3.1 Explanation of the Category**

The analysis reveals that Canadian courts do not assume that business records are inherently trustworthy. Judges require that counsel present evidence to establish that the record submitted in evidence is authentic and reliable. As Justice Hryn explained in *R v Felderhof* (2005):

Most businesses have a culture of communicating and reporting in writing. That does not mean each document is made in the usual and ordinary course of business and meets the test in s. 35 [of the Ontario *Evidence Act*]. To satisfy the 2nd prong requires evidence that it was in the usual and ordinary course of such business to make such writing of such acts, transactions, occurrences or events contemporaneously. And it requires evidence that the writing was made on a regular basis, routinely, systematically.”<sup>22</sup>

#### **5.2.3.2 Discussion of Rulings**

Several rulings illustrate why judges decided that records could not be admitted as evidence on the grounds that the record at issue was not created in the usual and ordinary course of business. In *R v Dunn* (2011) the defendants faced multiple charges of fraud. Crown counsel tendered several interview memoranda as evidence of interviews made by the law firm of Wilmer, Cutler, and Pickering during an audit of Nortel Networks Corporation (of which Mr. Dunn was the Chief Executive Officer). Justice Nordheimer of the Ontario Superior Court of Justice ruled that an interview memorandum could not be admitted as evidence because the audit process

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<sup>20</sup> *R v Dunn*, 2011 ONSC 2752, OJ no 2221 (QL) at para 15 [*R v Dunn*].

<sup>21</sup> *Olynyk*, at 7.

<sup>22</sup> *R v Felderhof*, at para 220.

strains any reasonable interpretation of the words “usual and ordinary” to attempt to embrace what [Wilmer, Cutler, and Pickering] was engaged in within the ambit of those terms. There was nothing usual about the situation in which Nortel found itself. To the contrary, the situation was completely unusual and that is the very reason why the Audit Committee acted as it did. At the same time, there was nothing ordinary about the role of [Wilmer, Cutler, and Pickering] or the task that it undertook.<sup>23</sup>

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

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

to indicate that signatures in apparent endorsement of redeemed cheques are ‘information’ that CRCD or the Government records in the usual and ordinary course of its business. Moreover, the affidavits do not even confirm that the cheques bore such signatures when CRCD took custody of the cheques, or that the cheques remained in the state in which they were received, while they were in CRCD custody.<sup>24</sup>

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

Police records are also not immune from the scrutiny of the courts. In British Columbia Supreme Court ruling *United States v Graham* (2004), the plaintiff sought to extradite the defendant from Canada to South Dakota for the alleged murder of Anna M. Aquash. The United States of America tendered as evidence a booking sheet produced by the Vancouver Police Department.<sup>25</sup> To

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<sup>23</sup> *R v Dunn*, at para 16. Justice Nordenheimer also ruled that the interview memorandum did not satisfy the reliability principle of the principled approach to hearsay for this same reason (see para 35).

<sup>24</sup> *R v Bath*, 2010 BCSC 1137, [2010] BCJ no 2851 (QL) at para 45.

<sup>25</sup> *United States v Graham*, 2004 BCSC 1768, [2004] BCJ no 2834 (QL).

establish the trustworthiness of the record, the plaintiff brought forth as a witness a corrections officer responsible for booking, fingerprinting, and photographing inmates as they arrived at the jail in Vancouver. Though the corrections officer described the process by which she would have fingerprinted and photographed the defendant as part of her normal duties, the corrections officer did not in fact book the defendant. Since the correction officer could not speak to the procedures that led to the creation of that particular booking sheet, Justice Bennett ruled that the evidence could not be admitted because of a lack of compliance with subsection 30(1) which requires sufficient evidence to “establish that the booking sheet was made in the usual and ordinary course of business. The evidence of how the booking sheet was made was confusing and only clarified in cross-examination.”<sup>26</sup> The judge conceded that it was likely that the booking sheet had been created in the usual and ordinary course of business but such an assumption could not warrant the admissibility of the sheet because the court needed “to rely on evidence, not speculation.”<sup>27</sup>

In *Hunt v Westbank Irrigation (District of)* (1991), Justice Oliver ruled that “grower summary sheets” that indicated grape production from various commercial grape growers could not be admitted as evidence. The defendant had received the records from the British Columbia Grape Marketing Board and tendered them as evidence, but Justice Oliver learned that the Grape Marketing Board was not responsible for their creation. In fact, it was not known who authored the sheets. As a result, Justice Oliver ruled that:

the “facts” recorded were within the observation of the maker of the statement or within the observation of any person whose observation it is part of the usual and ordinary course of business of the maker to record. In the circumstances, to admit these records for the truth of their contents would be to admit unreliable hearsay ... Accordingly, I am of the view that these records do not fall within the ambit of s. 48 of the Evidence Act and are therefore inadmissible.<sup>28</sup>

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<sup>26</sup> Ibid at para 86.

<sup>27</sup> Ibid.

<sup>28</sup> *Hunt v Westbank Irrigation (District of)* (1991), 59 BCLR (2d) 215 (SC), 1991 CanLII 544 at 14-15.

### **5.2.3.3 Discussion of Recordkeeping Implications**

The findings related to this category demonstrate that records professionals may assist counsel to define the usual and ordinary course of business that created the record. For many records at issue, counsel must provide evidence about the business routine or process that led to the creation of the record and/or controlled the record. In situations where the author of the record is still alive and is employed by the business, it should be sufficient to require the author of the record to testify in court or provide an affidavit about the record. However, in situations where the author of the record cannot testify because he/she has is deceased or cannot be located, counsel may need to rely on a person familiar with the process that led to the creation of the record. This person may be the records manager or the employee currently performing similar tasks. Additionally, recordkeeping documentation, such as policies and procedures, may help counsel articulate to the court the usual and ordinary course of business that created the record. Without a reliable witness or recordkeeping documentation, Canadian courts have shown that simply because a record comes from a business does not automatically mean that it will be admitted as evidence. Business records may have a circumstantial guarantee of trustworthiness about them, but they are not inherently trustworthy.

### **5.2.4 Record Not Made Contemporaneously**

This category captured all instances where a business record was not considered admissible because the judge ruled that the record was not created at the time of the event or soon after the event that record depicts. The concept of the contemporaneous creation of evidence has been presented by legal theorists stretching back to John Locke in the seventeenth century. The concept,

known as the “ground-zero” theory, argues that the “truth” is best obtained and more accurate the closer in time it is captured to the event it represents.<sup>29</sup>

#### **5.2.4.1 Explanation of the Category**

Judges have not provided a precise definition of what constitutes a record made “contemporaneously” or “within a reasonable time thereafter.” A judge uses his/her discretion to determine whether a record satisfies this criterion. Unfortunately, no judge has explained how soon a record would need to be made after the event in order for the record to satisfy the criterion.

#### **5.2.4.2 Discussion of Rulings**

Several rulings illustrate why judges did not admit records as evidence because the judges determined that the records at issue were not made contemporaneously with the events they depicted. In *R v Palma* (2000), Justice Watt remarked that arrest records and a supplementary police report could not be admitted as evidence because there “was no completion of the statement contemporaneously with the act.”<sup>30</sup> In *R v Graham* (1980), the defendant was accused of failure to pay his taxes from 1974-1976. Crown counsel tendered a 1977 audit report as evidence, but Justice Sharpe did not admit the report as evidence because it did not satisfy the criterion of being made contemporaneously to the event.<sup>31</sup> In *Sandhu v Gill* (1999), the plaintiff was unsuccessful in his attempt to enter as evidence the clinical records of a massage therapist. Justice Burnyeat did not admit the records because there was no evidence that the entries in the records were “recorded contemporaneously or within a reasonable time thereafter.”<sup>32</sup>

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<sup>29</sup> See MacNeil, *Trusting Records* and John Locke, *Essay Concerning Human Understanding* (London, 1690), 244. For a counterpoint to this position see Kim Lane Scheppele, “The Ground-Zero Theory of Evidence,” *Hastings Law Journal* 49 (1997): 321-34.

<sup>30</sup> *R v Palma*, 2000 ONSC 22806 (CanLII) at para 79.

<sup>31</sup> *R v Graham* (1980), 55 CCC (2d) 266 (Prov Ct (Crim Div)), [1980] OJ no 3928 (QL) at paras 17-18.

<sup>32</sup> *Sandhu v Gill* (1999), 93 ACWS (3d) 670 (BCSC), [1999] BCJ no 2870 (QL) at para 13.

#### **5.2.4.3 Discussion of Recordkeeping Implications**

The analysis of this category revealed that records professionals need to understand that judges often deem it important to consider how closely a record was created in relation to the event it depicts. Recordkeeping policies may help clarify records creation practices to support admissibility. For example, a policy should require that certain records, such as meeting minutes or reports, be drafted as soon as possible after the event that they depict. Requiring timely record making, and ensuring employees are aware of the legal importance of generating records as close as possible to the time of the event in question, may reduce the possibility that the record will be not be admitted as evidence in a Canadian court of law. With electronic records, metadata will increasingly play a vital role in establishing who authored a record and when. Therefore, electronic recordkeeping systems should be regularly audited to verify that their clocks are correct. Metadata, however, may function as a double-edged sword. Metadata may provide precise evidence that exonerates the party that creates the records in a timely fashion but damages the party that is proven to have lied about when the record was made or by whom.

#### **5.2.5 Not the Usual and Ordinary Course of Business to Create the Record**

This category captured all instances where a judge determined that it was not the usual and ordinary course of business to create the record. The courts differentiate between 1) whether a record was created in the usual and ordinary course of business and 2) whether it was part of the usual and ordinary course of business to create the record. This is a subtle but important distinction. Where the former focuses on *how* the record was created, the latter addresses *whether* an employee had a duty to create the record in the first place. For example, the British Columbia Court of Appeal in *Olynyk v Yeo* (1988), observed that:

The words “to record in that document a statement of the fact” mean, in our opinion, that the fact occurred within the observation of someone who has a duty himself to



record it or to communicate it to someone else to record as part of the usual and ordinary course of business.<sup>33</sup>

#### **5.2.5.1 Explanation of the Category**

The requirement that an employee make a record as part of his/her business duty is stipulated in British Columbia *Evidence Act* and the Ontario *Evidence Act*. Subsection 42(2)(b) of the British Columbia *Evidence Act* states that a document is admissible as evidence if “it was in the usual and ordinary course of business of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.” Subsection 35(2) of the Ontario *Evidence Act* contains similar language, stating “any writing or record ... is admissible ... if it was in the usual and ordinary course of business of such business to make such a writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.”

Judges have also used the concept of duty to create a record when applying the common law and principled approach to hearsay authorities. The theory behind this criterion is that “because of that duty, there is an element of disinterestedness on the part of the person keeping the record.”<sup>34</sup> The duty also implies the role of supervision within the organization. Supervision increases the likelihood that the records are accurately created and maintained because the record maker wants to avoid discipline or dismissal that may result from creating or maintaining erroneous records.<sup>35</sup>

#### **5.2.5.2 Discussion of Rulings**

Several rulings illustrate why judges decided that records could not be admitted as evidence because the record at issue was not created pursuant to a business duty. In *LeBlanc v Ford Credit Canada Ltd* (2003), Justice Meztger ruled that four sets of clinical notes tendered by the plaintiff as

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<sup>33</sup> *Olynyk v Yeo*, at 7.

<sup>34</sup> *McLennon v York-Finch General Hospital*, [1997] OJ no 5862 (QL) (Ct J (Gen Div)) at para 39 [McLennon].

<sup>35</sup> *R v Dunn*, at para 18.

evidence could not be admitted because the plaintiff failed to establish that the records were “made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.”<sup>36</sup>

In *O'Rourke v Claire* (1997) the plaintiff, O'Rourke, sought damages for a car accident involving him and the defendant. In 1992, the plaintiff was stopped at a pedestrian crosswalk when his vehicle was struck from behind by a truck driven by the defendant. To support his claim for damages, the plaintiff tendered several records from O.T. Consulting/Treatment Services Ltd, the business where the plaintiff received physiotherapy. One of these records contained a handwritten note by Mr. Trainor, a supervisory employee of O.T. Consulting. In his testimony, Mr. Trainor describes the records “as ‘standard’ documents and said they were kept in the ordinary course of business” but he did not say if the employees had a duty to record the information.<sup>37</sup> As a result, Justice Smith ruled the handwritten note could not be admitted as evidence because:

[m]uch of the note records what Mr. Trainor was told by Ms. Slosel [a physiotherapist at O.T. Consulting]. Those facts did not occur within the observation of Mr. Trainor nor has it been proven that all of them occurred within the observation Ms. Slosel. Neither has it been proven that she had a duty to record those facts, or to communicate them to Mr. Trainor to record as part of the usual and ordinary course of business.<sup>38</sup>

*Algoma-Davis Timber Ltd v Ontario* (1991) involved a contractual dispute between the plaintiff and defendant. The plaintiff sought damages from the Crown. The plaintiff argued that the Crown had agreed to cut timber on land the Crown had sold to the company. One of the issues in the case involved the admissibility of a letter dated August 21, 1968. This letter, an important component of the plaintiff's case, was written by Mr. Peter Betts, of the law firm Carrothers, Robarts, Betts, and McLennan, to John Gravely, the president of Algoma-Davis Timber. Justice Gray

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<sup>36</sup> *LeBlanc v Ford Credit Canada Ltd*, 2003 BCSC 1267, [2003] BCI no 2217 (QL) at para 8.

<sup>37</sup> *O'Rourke v Claire* (1997), 32 BCLR (3d) 104 (SC), BCI no 630 (QL) at para 22.

<sup>38</sup> *Ibid* at para 29.

ruled that the record could not be admitted as evidence because “any duty Betts owed to his client was not a duty to record in the sense that duty ensued in connection with business records in s. 35. In my opinion, paragraph 2 of the letter is clearly hearsay and falls within no exception to the hearsay rule.”<sup>39</sup>

In *McLennon v York-Finch General Hospital* (1997), the plaintiff claimed the defendant, York-Finch General Hospital, held him against his will. The defendant tendered hospital records to demonstrate the unusually high number of times the plaintiff had been admitted to the hospital. None of the records contained any documentation that indicated wrongdoing by the doctors, nurses, or staff. The hospital also wanted to have the records admitted as evidence to prove that no harm had been done to the plaintiff. However, Justice Misener ruled that the records could not be admitted as evidence because there “is no duty, no duty on anybody in business to keep a record of their civil or criminal wrongdoings, intentional wrongdoings in any event, and indeed it is not in the ordinary course of anybody’s business to commit civil and criminal wrongs.”<sup>40</sup> According to Justice Misener, simply because an event is not described in a record does not mean that the record can be used to argue that the event did not occur.<sup>41</sup>

#### **5.2.5.3 Discussion of Recordkeeping Implications**

The findings related to this category reveal several important implications for records professionals. Establishing that a business record possesses a circumstantial guarantee of trustworthiness not only requires counsel to demonstrate that the record was created in the usual and ordinary course of business, but also to provide evidence that the employee who made the

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<sup>39</sup> *Algoma-Davis Timber Ltd v Ontario*, [1991] OJ no 541 (QL) (Ct J (Gen Div)) at 12.

<sup>40</sup> *McLennon*, at paras 37 and 44.

<sup>41</sup> According to *R v Gould* (1990), 78 CR (3d) 151 (BCCA), 1990 CanLII 734, a record may be used to argue that an event did not occur in situations when the record does not contain evidence of the event. However, in these circumstances the record only needs to be produced for the court and not admitted as evidence according to an exception to the hearsay rule. See also the *Canada Evidence Act*, s 30(2).

record at issue had a business duty to make the record. To prove to the court that a record was created pursuant to duty, counsel may need to rely either on the maker of the record, a person within the organization familiar with the process that generated the record, or on recordkeeping documentation indicating that the record was made pursuant to a formally identified business duty.

Recordkeeping policies should stipulate that employees should only make records that they are under a business duty to make; and that doing otherwise may have adverse legal effects for the organization. According to the Association of Records Managers and Administrators (ARMA) and its “Generally Accepted Recordkeeping Principles<sup>42</sup>,” compliance with recordkeeping policies and procedures is a vital component for any records management program. The Principle of Integrity states: “Adherence to formal information governance policies and procedures that have been approved by senior management is essential to an organization’s ability to achieve legal and regulatory compliance. If formal support has not been obtained, records may be at risk of not being accepted as having evidentiary value.”<sup>42</sup> Legal and regulatory compliance is increasingly recognized as a critical component of records management programs. This study contributes to this body of knowledge by identifying specific actions records professionals may take to help ensure organizational records may be admitted as evidence in a Canadian court of law.

#### **5.2.6 No Explanation Why the Original Could not be Produced**

This category captured all instances where a business record was not considered admissible because the judge ruled that the tendering party could not provide a sufficient explanation for why the original could not be produced. When counsel submits a copy of a record as evidence, a judge often requires counsel to explain why the original version of the record could not be produced: the requirement to submit the original is known as the “best evidence rule.” In situations where counsel

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<sup>42</sup> Association of Records Managers and Administrators (ARMA), “Generally Accepted Recordkeeping Principles<sup>©</sup>” (2013). Available online at <http://www.arma.org/r2/generally-accepted-br-recordkeeping-principles>.

cannot clarify why the original is not presented in court, a judge may rule that the copy is either inadmissible as evidence or carries little if any weight.

#### **5.2.6.1 Explanation of the Category**

The best evidence rule has garnered a significant amount of attention from legal and records professionals.<sup>43</sup> The idea at the core of this principle is that the truth of an event would best be obtained when counsel tenders the “best evidence” in existence, which would facilitate the “central task of accurately resolving disputed issues of fact.”<sup>44</sup> Prior to the invention of copying machines, judges did not admit as evidence copies of documentary evidence in order to safeguard the court from receiving fraudulent records or records incorrectly transcribed.<sup>45</sup> With the development of the typewriter, computer printers, and other copying devices, the best evidence rule has evolved from a focus on the exclusion of evidence to a concern for the determination of the weight of evidence. The rule, as it was originally intended, has been rendered mostly obsolete.<sup>46</sup> Since the 1970s, if not earlier, Canadian courts have applied the best evidence rule in situations where the party that tendered evidence had the original record but did not produce it.<sup>47</sup>

#### **5.2.6.2 Discussion of Rulings**

In 2005, Alexander Boros was convicted of three offenses involving the illegal construction of a house in Toronto. Boros appealed his conviction, in part on the position that the conviction was unreasonable and not supported by the evidence. In *Tarion Warranty Corp v Boros* (2012), Justice

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<sup>43</sup> Luciana Duranti and Corinne Rogers, “Trust in Digital Records: An Increasingly Cloudy Legal Area,” *Computer Law & Security Review* 28 (2012): 522-31; Deborah R. Elgroth, “Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence,” *Fordham Law Review* 78, no. 1 (2009): 181-215; Colin Miller, “Even Better than the Real Thing: How Courts have been Anything but Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003,” *Maryland Law Review* 68, no. 1 (2008): 160-220; Dale A. Nance, “The Best Evidence Principle,” *Iowa Law Review* 73, no. 2 (January, 1988): 227-97; and Ann E. Tomeny, “Best Evidence and the Authentication of Documents,” *Loyola Law Review* 21 (1975): 450-75.

<sup>44</sup> Nance, “The Best Evidence Principle,” 233.

<sup>45</sup> Tomeny, “Best Evidence and the Authentication of Documents,” 451.

<sup>46</sup> *Sierra Club of Canada v Canada (Minister of Finance)* (1999), 163 FTR 109 (FC), 1999 CanLII 7756 at para 9.

<sup>47</sup> *R v Pires*, 2012 ONCJ 713, [2012] OJ no 5421 (QL) at para 56.

Fairgrieve agreed with Boros and overturned the trial judge's decision because the judge erred in admitting four records as evidence. Justice Fairgrieve ruled that the records at issue should not have been admitted as evidence because Crown counsel, the tendering party for the evidence, did not satisfy the best evidence rule. As Justice Fairgrieve explained:

... there was no attempt made by the prosecutor to account for the failure to produce the original documents.... There was no evidence that there would have been any difficulty in obtaining the originals; to the contrary, the reasonable inference would seem to be that Mr. Attwood [an investigator and witness for the plaintiff] could have easily obtained them simply by asking for them. There was no reason to think that the original documents were in any way unavailable. Similarly, no evidence was called with respect to authenticating the copies that were filed.<sup>48</sup>

As previously discussed, in *R v Bath* Justice Holmes did not admit as evidence numerous bank records from four different financial institutions. Not only did Justice Holmes reject the records as evidence because of a lack of information about the origins of the records—how they were made, who made them, and when they were made—but she also stated they could not be admitted as evidence because of counsel's failure to satisfy the best evidence rule: "there isn't any evidence to indicate the form of the original record (from which the certified copy is made), whether that original is available for review, or why it was not sought or provided."<sup>49</sup>

#### **5.2.6.3 Discussion of Recordkeeping Implications**

The best evidence rule continues to have major implications for records professionals. Though the rule typically applies more to the weight of evidence than its exclusion, the two examples cited in this section demonstrate that judges sometimes base their decision about the admissibility of a record on whether counsel can explain why an original record cannot be produced. This is information that a records manager should be able to provide. Records professionals should know when an original has been destroyed and when the original is available. A records manager

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<sup>48</sup> *Tarion*, at para 38.

<sup>49</sup> *R v Bath*, 2010 BCSC 307, at para 123.

should be able to facilitate the location of the original and/or copy of the record. A retention and disposition schedule may provide the necessary information about the destruction of records, and on that basis counsel should be able to explain to the judge why certain records, or versions of the records, could not be produced. Additionally, the metadata from an electronic recordkeeping system may account for who destroyed which record, or which version of the record, and when this action occurred. Recordkeeping policies and procedures should instruct employees on how best to manage both their original records and the copies of these records; improper handling of the records may open the organization to litigation risks.

### **5.3 Examples of Admissible Records**

The previous discussion considers rulings where business records were not admitted as evidence, since a primary goal of this study is to highlight for records professionals challenges with admissibility that might be mitigated by improved recordkeeping. It is instructive, however, also to review rulings in which business records were admitted as evidence to illuminate the relationship between recordkeeping and the admission of business records. A review of several such rulings supports the findings articulated earlier, particularly about the need for witnesses to be directly familiar with the record being tendered as evidence and/or with the recordkeeping processes behind the creation or management of the record or its production for court. However, one ruling discussed shows that a judge does not always require witness testimony to determine the admissibility of a record.

In *R v Bisson* (2009), the accused was charged with driving a water vessel while intoxicated. Crown counsel tendered as evidence a lab specimen report and an internal inquiry report, both pertaining to toxicology screen tests. To establish the reliability of the records, Crown counsel called as witnesses the two medical laboratory technologists who created the reports. Though neither witness could recalled the specific analysis, they both described the procedures they followed to

produce such reports.<sup>50</sup> Therefore, Justice Lambert deemed the records to be reliable and admitted them, because witnesses could and did provide direct knowledge about the procedures and practices that led to the creation of the records.<sup>51</sup>

In *Urbacón Building Groups Corp v Guelph (City)* (2012), the defendant, the City of Guelph, objected to the admissibility of a photocopy of a timesheet allegedly recording hours for one of the employees of Swan and Associates, Inc, a subcontractor that had filed a claim for a lien. The City of Guelph contended that the evidence should not be admitted because it was hearsay. Justice Corbett disagreed, however. The timesheet was admitted as evidence after an employee of Swan Associates and the manager for Swan Associates, Ms. Swan, both testified to the process used to record such sheets. In particular, Ms. Swan explained to the court the recordkeeping practices at Swan Associates (i.e., how the timesheet was made and maintained), and she was also able to confirm her own handwriting the meaning of several annotations made on the timesheet.<sup>52</sup> This witness testimony about recordkeeping procedures served to confirm the reliability of the record.

*R v Ballantyne* (2008) is an example where the accused opposed a record on the grounds that it was not made contemporaneously and, therefore, not made in the usual and ordinary course of business. In a *voir dire*, Crown counsel tendered three printouts of screenshots from the computer of an administrative security officer with the Headingley Correctional Centre. This officer, one of Crown counsel's witnesses, also testified about the process followed to create the records shown on the screenshots. The admissions officer "described the inputting of information into the [computer] system ... where information is entered to keep track of inmate movement."<sup>53</sup> Another witness, a unit staff correctional officer, testified about the operations of the computer system and

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<sup>50</sup> *R v Bisson*, 2009 ONCJ 283, [2009] OJ no 2764 at paras 35-41.

<sup>51</sup> *Ibid* at para 110.

<sup>52</sup> *Urbacón Building Groups Corp v Guelph (City)*, 2012 ONSC 81, [2012] OJ no 56 (QL) at para 37.

<sup>53</sup> *R v Ballantyne*, 2008 BCSC 1566, [2008] BCI no 2691 (QL) at para 7.



about the process of tracking the movement of inmates in the correctional facility. The testimony from these two witnesses was enough to establish the reliability of the records and satisfy the business records exception to the hearsay rule at common law and section 30 of the *Canada Evidence Act*, because the witnesses confirmed that the records were made within a reasonable time after the event and, therefore, in the usual and ordinary course of business.<sup>54</sup>

Since *Ares v Venner* (1970), Canadian courts have ruled that direct knowledge of the business record is not a precondition for admissibility. Judges in British Columbia and Ontario have regularly admitted records where witnesses are only familiar with the processes or recordkeeping practices that created and/or managed the records. For example, in *Alferez v Wong* (1994) the plaintiff, Alferez, suffered injuries when the motorcycle he was driving collided with a vehicle driven by the defendant, Mrs. Wong. This case involved who was liable for the accident. Mrs. Wong sought to introduce hospital records “relating to the taking of blood tests from the plaintiff” that would indicate that Mr. Alferez was impaired at the time of the accident. Mrs. Wong did not call any witnesses who could testify to the accuracy, propriety, or the method of taking tests that led to the hospital records. Instead, the defence relied on Ms. Carolyn Kirkwood, “an analyst who is well-known to [the] Courts,” who interpreted the test results for the court. While she was able to testify as to the usual method for taking such tests, she was unable to comment on these specific tests.<sup>55</sup> The testimony of Ms. Kirkwood was sufficient as Justice Oppal ruled that the “taking of blood tests falls clearly within the duty of attending nurses. To find that these records are inadmissible would render both s. 43 of the Hospital Act and s. 48 of the Evidence Act meaningless.”<sup>56</sup>

There is at least one instance where a judge admitted business records without the testimony of a witness. In *Children's Aid Society of Simcoe County v TW* (2012), the applicant,

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<sup>54</sup> Ibid at paras 5-16.

<sup>55</sup> *Alferez v Wong*, [1994] BCJ no 3319 (SC) at para 18.

<sup>56</sup> Ibid at para 22.

Children's Aid Society of Simcoe County, sought to introduce as evidence three separate records: a service plan recording, a family risk re-assessment, and a family and child strengths and needs assessment. Justice Healey ruled that these records could be admitted because counsel for the applicants satisfied the conditions for admissibility as established in *Setak Computer Services Corp v Burroughs Business Machines Ltd* (1977), specifically, that:

- (1) the record was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a writing or record. In this case the documents are all pre-printed forms bearing the logo of the Children's Aid Society of Toronto, and are all documents commonly seen by those familiar with the field of child protection;
- (2) the record must have been made contemporaneously with the transaction recorded, or within a reasonable time thereafter. The documents appear to record observations and assessments of events as they existed on the date of document's creation;
- (3) the documents contain only records of facts. The documents in question record only facts and observations made by the assigned caseworker; and
- (4) the maker of the record must be acting under business duty and the informant must be acting under business duty or the informant's statement must be otherwise admissible under the hearsay rule of exceptions. In this case the documents on their face indicate that they have been completed by the caseworker assigned to the file, whose signature also clearly appears on each of the documents. This court did not hear evidence that the caseworker was under a duty as part of her job to complete such forms; such an obligation can be inferred from the nature of the documents.<sup>57</sup>

This ruling indicates the importance to an organization of ensuring that it creates and maintains complete records. In this example, the records submitted contained logos, signatures, and other unique information that allowed Justice Healy to infer that they had been created in the usual and ordinary course of business and, therefore, were reliable.

The rulings summarized in this section highlight the importance of witness testimony, as well as the significance of ensuring the completeness of records, in order to confirm the reliability of

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<sup>57</sup> *Children's Aid Society of Simcoe County v TW*, 2012 ONSC 3604, [2012] OJ no 2872 (QL) at para 9.

a business record. In the ideal situation, the witness would be the person responsible for creating the particular record in question, but the examples show that other witnesses can also help verify recordkeeping processes. Further, the last example demonstrates that clear and precise recordkeeping practices, which ensure the completeness and trustworthiness of records, can also support their admission as evidence in court.

There is an important role for records professionals here. Not only can they serve as possible candidates to testify to the recordkeeping practices of the organization, but they may also be able to assist counsel to identify employees who could testify about a record or the processes that made or managed the record. Further, the records professional is responsible not only for managing records but also for supporting the efficient and effective creation of trustworthy records. The establishment and documentation of formal recordkeeping procedures will not only help an organization operate effectively but will also provide an objective account of records processes, further supporting witness testimony and allowing the admission of records as evidence.

## 5.4 Summary

The analysis in this chapter reveals that records professionals may play a role in helping their organizations ensure that their business records will be admitted as evidence in the event of litigation. To convince a judge that the business records being tendered as evidence are reliable, counsel requires testimony of a person familiar with the record itself or the recordkeeping practices that made the record and/or documentation about the recordkeeping practices of the business.<sup>58</sup> In other words, courts require businesses to be transparent about how they create and maintain their records. As Justice Holmes in *R v Bath* noted:

... I will say that weaknesses in the state of the KCU records and record-keeping practices regarding the documents in issue, as described in the evidence in the *voir dire*, does not allow me to draw the usual inferences that apply to records of a financial institution, particularly in relation to documents pertaining to the accounts

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<sup>58</sup> *R v Rowbotham (No 4)* (1977), 33 CCC (2d) 411 (Ont Gen Sess Ct), [1977] OJ no 1686 at para 55.

under scrutiny in this case. The evidence indicated that numerous documents, and it seems transactions, associated with these accounts fell short of compliance with industry standards....<sup>59</sup>

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

Chapter 6 will analyze the nature of recordkeeping documentation in light of the findings derived from the Canadian case law reviewed in this chapter. Chapter 6 considers whether or not recordkeeping standards provide sufficient information for records professionals to address certain legal matters adequately, particularly the need to ensure that business records can be tendered successfully as evidence in a Canadian court of law.

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<sup>59</sup> *R v Bath*, 2010 BCSC 307, at para 78.

## Chapter 6: Recordkeeping Standards

### 6.1 Introduction

The world of standardization is a vast universe of documentation. By some estimates, there were, in 1984, over 400 voluntary standards organizations in the United States alone.<sup>1</sup> No exact count exists of the actual number of individual standards, but the SAI Global Standards Information Database (Infobase) identifies over 200,000 separate standards on all matters from banking to dentistry to engineering.<sup>2</sup> The Canadian General Standards Board (CGSB) lists about 900 standards<sup>3</sup> and, since its inception in 1947, the International Organization for Standardization (ISO) has developed over 18,000 standards.<sup>4</sup> Recordkeeping standards occupy only a very small corner of this tremendous array of documentation. In fact, one records professional has identified no more than thirty-six separate records-related standards commonly used by records professionals.<sup>5</sup>

As stated in Chapter 1, a recordkeeping standard provides rules, guidelines, or principles for records professionals to assist in the design of records systems and the management of organizational records throughout the records lifecycle. Recordkeeping standards also serve as a nexus between recordkeeping practices and legal issues, such as the question of the admissibility of business records. As argued by Chasse and Gurushanta, the use “of recognized standards reinforces trust in the internal workings of an organization and most importantly, insures the trust of those who deal with the organization.”<sup>6</sup> Recordkeeping standards can play an important role in

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<sup>1</sup> Dorothy M. Cerni, *Standards in Process: Foundations and Profiles of ISDN and OSI Studies*. NTIA Report 84-170 (Washington, DC: US Department of Commerce, 1984).

<sup>2</sup> SAI Global, Infobase: [http://www.ili.co.uk/cgi-bin/info/en/whatis\\_standards](http://www.ili.co.uk/cgi-bin/info/en/whatis_standards).

<sup>3</sup> Canadian General Standards Board: <http://www.tpsgc-pwgsc.gc.ca/cgsb/prgsrv/stdsdev/process-e.html>.

<sup>4</sup> ISO Catalogue: [http://www.iso.org/iso/iso\\_catalogue.htm](http://www.iso.org/iso/iso_catalogue.htm).

<sup>5</sup> Virginia A. Jones, “Standards for Establishing Records and Information Management Programs,” *Information Management Journal* 46, no. 4 (2012): 38-43.

<sup>6</sup> Kenneth Chasse and Vigi Gurushanta, “The Electronic Evidence National Standard: Proving the ‘Record System Integrity’ of Electronic Records,” eVIDA Group, (2002): n.p., <http://radio-weblogs.com/0117653/gems/ITONTARIOarticle2002.pdf>.

establishing the trustworthiness of records tendered as evidence in a court of law. This is especially true in Canada. Subsection 31(5) of the *Canada Evidence Act* states:

For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

Despite the importance of recordkeeping standards, though, records professionals have not yet critically analyzed them to determine whether the guidance they provide offers the necessary support for legal compliance. This chapter takes a first step towards understanding whether recordkeeping standards can help Canadian records professionals understand the legal process by which business records are assessed when tendered as evidence in Canadian courts. The chapter also considers whether the guidance contained in the standards will increase the likelihood that organizational records will be admitted as evidence in Canadian courts.

This chapter is divided into four sections, including this introduction, section 6.1. Section 6.2 reviews the methodology by which this author identified the five recordkeeping standards analyzed in the chapter. Section 6.3 is an analysis of these five recordkeeping standards, which are examined in light of the six categories identified in Chapter 5 that address admissibility issues; these are the issues that records professionals may be able to help legal counsel address in the event of litigation. The final section, 6.4, provides further recommendations for how recordkeeping standards may be improved with regards to addressing admissibility issues.

## **6.2 Analysis of Recordkeeping Standards**

This section reviews how this author identified the five recordkeeping standards most relevant to the focus of this study. The section also addresses the decision-making process followed to exclude other standards from consideration. Lastly, the section outlines the relevant sections of standard associated with the six categories analyzed.

### 6.2.1 Determining the Recordkeeping Standards to Examine

As explained in Chapter 4, this author identified five recordkeeping standards to critically analyze in light of the six legal categories identified following the content analysis of the case law.

The standards chosen for examination are:

1. *Electronic Records as Documentary Evidence* (CAN/CGSB-72.34-2005)
2. *Legal Acceptance of Records Produced by Information Technology Systems* (ANSI/AIIM TR-31)
3. *Records Management Responsibility in Litigation Support* (ARMA:2007)
4. *Information and Documentation—Records Management—Part 1: Guidelines* (ISO 15489-1)
5. *Information and Documentation—Records Management—Part 2: Procedures* (ISO 15489-2)

Below is a brief summary of the nature and scope of these five standards, which are discussed in detail in section 6.3 of this chapter.

1. *Electronic Records as Documentary Evidence*, published in 2005 by the Canadian General Standards Board (CGSB), is one of two standards written specifically for Canadian records professionals.<sup>7</sup> This standard aims to assist Canadian records professionals in the development of “policies, procedures, practices and documentation for the integrity and authenticity of electronically stored information to ... enhance the admissibility and the weight of electronic records in a court of law, a tribunal or an inquiry....”<sup>8</sup> This standard consists of eight sections that review and outline matters such as the legal requirements that electronic records must satisfy to be used as documentary evidence in a Canadian court of law and the requirements that a records management system

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<sup>7</sup> *Microfilm and Electronic Images as Documentary Evidence* (CAN/CGSB-72.11-93) (1993) is the second standard published for Canadian records professionals. While this author reviewed this standard as part of his preliminary assessment of potentially relevant standards, he did not include this standard in the final analysis because sections of it, specifically its discussions about evidentiary requirements, have been superseded by *Electronic Records as Documentary Evidence*.

<sup>8</sup> *Electronic Records as Documentary Evidence*, CAN/CGSB-72.34-2005 (Gatineau: Canadian General Standards Board, 2005), 1 [Hereinafter referred to as *Electronic Records as Documentary Evidence*].

(RMS) program should meet in order to ensure that the records it controls retain their trustworthiness.

2. *Legal Acceptance of Records Produced by Information Technology Systems* (hereinafter referred to as *Legal Acceptance of Records*) focuses on legal developments in the United States. The standard is a compilation of three technical reports co-written by the American National Standards Institute (ANSI) and the Association for Information and Image Management (AIIM) in the 1990s. This report consists of three major sections. Section 1 provides an overview of the law of evidence in the United States; section 2 reviews requirements that an information technology system should meet to ensure records coming from the system can be admitted as evidence in a court of law; and section 3 is a self-assessment to help users of the standard determine “whether good recordkeeping practices are being followed that will avoid problems regarding acceptance of records ... as evidence in the event of litigation.”<sup>9</sup> Overall, this document aims to “set forth rules concerning the legal acceptance of records produced by information technology systems.”<sup>10</sup>
3. *Records Management Responsibility in Litigation Support* (hereinafter referred to as *Records Management Responsibility*), published in 2007 by the Association of Records Managers and Administrators (ARMA), consists of eleven sections that address matters such as the legal process, records and information management (RIM) practices in law firms, and the requirements for the admissibility of business records as outlined in the

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<sup>9</sup> *Legal Acceptance of Records Produced by Information Technology Systems*, ANSI/AIIM TR-34-2004 (Silver Spring, MD: AIIM International, 2004), 20 [Hereinafter referred to as *Legal Acceptance of Records*].

<sup>10</sup> *Ibid*, 2.



U.S. Federal Rules of Evidence.<sup>11</sup> The standard is designed to “assist records and information managers in identifying their role in the typical litigation process.”<sup>12</sup>

4. *Information and Documentation—Records Management—Part 1: Guidelines* (hereinafter referred to as ISO 15489-1), published in 2006 by the International Organization for Standardization (ISO), consists of eleven sections that review the necessary elements that a records management program should contain to ensure that organizational records are properly and adequately created, captured, and managed.<sup>13</sup>
5. *Information and Documentation—Records Management—Part 2: Procedures* (hereinafter referred to as ISO 15489-2), published in 2006 by the ISO, consists of six sections that outline procedures that records professionals may use to implement the recommendations made in ISO 15489-1.<sup>14</sup> The standard also includes two appendices that cross-reference its sections to the relevant sections in ISO 15489-1.

This author chose to examine the first three standards because they were written specifically to assist records professionals navigate legal issues. The first standard, *Electronic Records as Documentary Evidence*, was chosen because of its unique focus on Canadian recordkeeping practices; the standard has also become a fundamental component of many Canadian records management programs. *Legal Acceptance of Records* and *Records Management Responsibility* were chosen because they also focus on legal issues and are relevant to recordkeeping practices. Although these two standards were written from a U.S. perspective to provide guidance for

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<sup>11</sup> The U.S. Federal Rules of Evidence is the code by which guide U.S. courts determine what evidence is admissible at trial (“Evidence: An Overview,” Legal Information Institute [LII], last modified August 19, 2010, <http://www.law.cornell.edu/wex/evidence>).

<sup>12</sup> *Records Management Responsibility in Litigation Support*, ARMA International (Lenexa, KS: ARMA International, 2007), ix [Hereinafter referred to as *Records Management Responsibility*].

<sup>13</sup> *ISO 15489-1 – Information and documentation — Records Management – Part 1: General* (Geneva: ISO, 2006) [Hereinafter referred to as ISO 15489-1].

<sup>14</sup> *ISO 15489-2 – Information and documentation — Records Management – Part 2: Procedures* (Geneva: ISO, 2008) [Hereinafter referred to as ISO 15489-2].

American records professionals, this fact was not a detriment to their inclusion in this study. As mentioned in Chapter 2, Canada and the United States both adhere to the common law legal system.<sup>15</sup> Furthermore, both jurisdictions share a legal history established on similar legal principles.<sup>16</sup> As discussed in more detail in section 6.2.4 of this chapter, this author examined the five standards in light of six legal issues that address the fundamental criteria of the business records exception to the hearsay rule. These issues are applicable to both the Canadian and American legal systems. Therefore, even though the author reviewed and rejected a number of other American standards as not relevant to this study (as well as assessing a range of other international standards as part of his research), he did include *Legal Acceptance of Records* and *Records Management Responsibility* given their direct relevance to the issues in question.

This author chose the two inter-related ISO records management standards because they are two of the earliest international standards created for records professionals. Since their publication, ISO 15489-1 and ISO 15489-2 have received significant attention by records professionals around the world, many of whom have argued that they function as the foundation for any sound and accountable records management program.<sup>17</sup> This author would be remiss not to consider them in this study.

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<sup>15</sup> As discussed in Chapter 2, common law is the predominant system in most English-speaking countries, such as England, Australia, and New Zealand, the United States (with the exception of the state of Louisiana), and Canada (with the exception of the province of Quebec). In a common law system, judicial precedent develops as judges determine the outcome of a legal dispute between two parties: the judge's ruling applies a binding authority on subsequent legal decisions.

<sup>16</sup> For example, John Henry Wigmore's famous legal treatise focused on legal developments in the United States and Canada: *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada*, 2nd ed., vol. 1 (Boston: Little, Brown, 1923).

<sup>17</sup> Jones, 38; Alexandra Bradley, "Back to the Future: Time-tested Fundamentals Meet Challenges of Technology," *Information Management Journal* 45, no. 2 (2011): 32-38; and Geoffrey Yeo, "Establishing a Records Management Programme: The ISO 15489 Methodology," *Records Management Bulletin* no. 117 (2003): 3-6, 44.

### 6.2.2 Standards Excluded from this Study

An argument may be made that nearly every recordkeeping standard has legal implications. For example, section 5.2 of *Policy Design for Managing Electronic Messages* (ANSI/ARMA 19:2012) addresses the authenticity and authentication of e-mail. Section 5 of *Evaluating and Mitigating Records and Information Risks* (ARMA 2009) addresses legal risks that highlight “the keys to legal and regulatory compliance.”<sup>18</sup> These considerations, however, are only one small component of each standard, and legal issues are not intended as the primary focus in either case. After conducting a preliminary content analysis of these and similar standards, and researching the literature to assess their potential impact on legal issues such as admissibility, this author chose to exclude them as not applicable to the questions examined in this study.

This author also excluded standards that focused exclusively on electronic recordkeeping systems. This group includes standards such as *Design Criteria Standard for Electronic Records Management Software Applications* (DoD 5015.2-STD, 2007) by the United States Department of Defense, *Model Requirements for the Management of Electronic Records* (MoReq2010) by the European Commission; and *Document Management—Information Stored Electronically—Recommendations for Trustworthiness and Reliability* (ISO/TR 15801:2009), and *Information and Documentation – Principles and Functional Requirements for Records in Electronic Office Environments* (ISO 16175: 2011) by the ISO. Although these standards may have legal implications – because they direct an organization to keep digital records according to prescribed procedures – their primary purpose is to provide requirements for the development of electronic recordkeeping systems. For this author to have considered these standards, they would need to explicitly identify the criteria necessary for a business record (paper or electronic) to be admitted as evidence in a common law system, a discussion not found in any of these standards.

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<sup>18</sup> *Evaluating and Mitigating Records and Information Risks* (Overland Park, KS: ARMA International, 2009), 15.

This author also excluded standards from the ISO 30300 series. In 2011, ISO released the first two standards of its 30300 series, which also applies to records and information management.<sup>19</sup>

This series:

offers the methodology for a systematic approach to the creation and management of records, aligned with organizational objectives and strategies. Managing records using a management system for records (MSR) supports cost-effective operational processes, such as storage, information retrieval, information re-use. It prepares an organization for the possibility of litigation or inquiry arising in the future, and ensures that a thorough preparation for due diligence can be carried out.<sup>20</sup>

According to Joseph, Debowski, and Goldschmidt this series of standards

is aimed at senior management to position RIM practices at the management systems level so that it is strategically aligned with similar quality management, security management and environmental management systems. The 30300 suite of standards also provide pathways for organisations to seek certification for compliance with a management system for records (MSR).<sup>21</sup>

Despite the close relationship this series of standards has to ISO 15489,<sup>22</sup> this author excluded from this study the ISO 30300 standards because they do not explicitly address issues pertaining to the admissibility of business records as evidence in a common law system.

This study also does not consider ARMA's "Generally Accepted Recordkeeping Principles©," ("The Principles") which address compliance with recordkeeping policies and procedures.<sup>23</sup> Records

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<sup>19</sup> Though intending to be a four-part series, at the time of the writing of this dissertation, only two of the four standards have been released: ISO 30300:2011: *Information and Documentation – Management Systems for Records – Fundamentals and Vocabulary* and ISO 30301:2011: *Information and Documentation – Management Systems for Records – Requirements*. The remaining two standards are: ISO 30303: *Information and Documentation – Management Systems for Records – Guidelines for Implementation* and ISO 30304: *Information and Documentation – Management Systems for Records – Assessment Guide*.

<sup>20</sup> Judith Ellis and Carlota Bustelo, "Management Systems for Records," (10 January 2012). Available online at [http://www.iso.org/iso/home/news\\_index/news\\_archive/news.htm?refid=Ref1524](http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1524).

<sup>21</sup> Joseph, Debowski, and Goldschmidt, "Paradigm Shifts in Recordkeeping Responsibilities," 60. See also Peter Goldschmidt, Pauline Joseph, and Shelda Debowski, "Designing an Effective EDRMS Based on Alter's Service Work System Model," *Records Management Journal* 22, no. 3 (2012): 152-169.

<sup>22</sup> Ibid.

<sup>23</sup> Association of Records Managers and Administrators (ARMA), "Generally Accepted Recordkeeping Principles©" (2013). Available online at <http://www.arma.org/r2/generally-accepted-br-recordkeeping-principles>.

professionals have accepted as The Principles as a *de facto* standard because the guidance they provide assists records professionals strengthen the records management programs of their organizations and, therefore, help these organizations mitigate against various business risks.<sup>24</sup> This author, however, has excluded The Principles from this study because they do not explicitly address requirements pertaining to the admissibility of business records as evidence in a common law system.

### **6.3 Analysis of the Standards**

The following sections critically analyze the five standards in light of the six categories identified, following the content analysis approach. The section reviews the strengths and weaknesses of the texts and recommends changes that should be made to the standards to enhance their ability to address the legal issues in question. Each section includes: a summary of the category, a content analysis of the section(s) from each standard that provide content about the category, and an overall assessment of how each standard addresses the legal issues in question, including recommendations for improvements as appropriate. This author recognizes that revisions to standards occur very infrequently. This author's suggestions for revisions to the standards must, therefore, be considered hypothetical in one sense. However, the findings presented here could be used by records professionals to address gaps in their recordkeeping practices.

#### **6.3.1 Witness Testimony**

##### **6.3.1.1 Summary of the Category**

Witness testimony refers to the legal issue that a person with knowledge of the record could testify about the record or the procedures that created the record. For a business record to be

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<sup>24</sup> For example, see Julie J. Colgan, "Stay out of the Spotlight: Retention and Disposition According to GARP," *Information Management Journal* 45, no. 5 (September/October 2011): 38-41; Gordon E. J. Hoke, "Shoring Up Information Governance with GARP," *Information Management Journal* 45, no. 1 (January/February 2011): 27-31; William "Bill" Manago, "Protect, Maintain Information Integrity to Reduce Business Risk," *Information Management Journal* (May/June 2011): 36-41; and John Montană, "GARP: A Lens for Clarifying Legal Requirements," *Information Management Journal* 45, no. 2 (March/April 2011): 32-34, 36-37.

admitted as evidence, one requirement is that a person with knowledge of the facts concerning the creation of the record at issue testifies about the record in court, either in person or deposes the same information by affidavit. The witness/deponent must provide evidence about how the record was created and managed within the business and/or how the record was produced for use in court.

#### **6.3.1.2 Content Analysis of the Standards**

The content analysis of the standards reveals that three of the five standards contain guidance about the importance of witness testimony in relation to the creation and maintenance of records. Two of the five standards, *Electronic Records as Documentary Evidence* and *Legal Acceptance of Records*, contain the greatest insight about the importance of considering employees as potential witnesses in litigation. *Electronic Records as Documentary Evidence* addresses the topic in section 5.5, which lists nine “factors,” as the standard calls them, that an organization may use to prove the “usual and ordinary course of business, the integrity of its electronic records system, and therefore, the integrity of any record recorded or stored in that system.”<sup>25</sup> These nine factors are:

1. sources of data;
2. contemporaneous recording;
3. routine business data;
4. data entry;
5. industry and national standards;
6. business reliance;
7. software reliability;
8. recording of system changes; and
9. security.<sup>26</sup>

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<sup>25</sup> *Electronic Records as Documentary Evidence*, 18.

<sup>26</sup> *Ibid*, 18-19.

The standard stipulates that witness testimony is required to verify the status of a recordkeeping system in relation to these nine factors. The final paragraph of section 5.5 states that the most ideal person to serve as a witness would be the

supervising officer of the organization who is accountable for the records system. An additional witness may be required for software unique to the system unless the supervisor can prove its history of reliability ... in choosing suppliers and programmers, consideration should be given to their ability and experience to prove the reliability of their products.<sup>27</sup>

Of all five standards, this paragraph in *Electronic Records as Documentary Evidence* offers the most precise guidance available for records professionals on the issue of witness testimony, providing specific examples of who may serve as the ideal employee or representative of the organization to testify to the trustworthiness of a business record. Further, the section also makes the important observation that more than one witness may be required to testify about the record to prove its trustworthiness.

In *Legal Acceptance of Records*, section 1.1.6, “Laying a proper foundation,” addresses witness’ testimony. This section states that records may be admitted as evidence only after the proper foundation for the evidence has been established by a competent person who does not contradict the evidence.<sup>28</sup> Witnesses may also be used to admit copies of records as evidence by convincing the court that the records “accurately reflect the information in the computer files.”<sup>29</sup>

*Records Management Responsibility* provides several suggestions for how an organization may be better prepared to identify persons required to testify about a record. For example, Section 11.1 states the important point that the custodian of the record (who may be also its creator, either

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<sup>27</sup> Ibid, 19.

<sup>28</sup> *Legal Acceptance of Records*, 6.

<sup>29</sup> Ibid, 9. A copy of a record may be admitted as evidence in lieu of the original according to the best evidence rule. This rule is discussed in more detail in section 6.3.6 of this chapter.

as the maker or the original recipient) does not always need to be the person who testifies about the record:

The custodian of the records does not need to be in control of or have individual knowledge of the particular corporate records; the records custodian needs to be familiar with only the company's recordkeeping practices. As stated earlier, that role frequently rests with the company's records manager, the legal department, the IT department, the CIO, or some combination.<sup>30</sup>

As discussed in Chapter 2, in the Supreme Court of Canada decision of *Ares v Venner* (1970) the court ruled that a person familiar with the process that led to the creation of the record could testify to the trustworthiness of that record. Therefore, as *Records Management Responsibility* correctly indicates, the records manager of the organization may be called to testify about a record if the person who created the record is unavailable.

Section 11.2, offers further insight about witness testimony by saying that the

records collection should be set up with appropriate procedures, forms, logs, and sign-off documents that clearly reveal the identity of employees who may no longer be available ... A printed name plus initials or a signature should suffice. Tracking logs are also used to establish a chain of custody....<sup>31</sup>

This is one of the few standards that mentions the possibility that counsel may use a record that was made by an employee no longer working at the organization and who may be unavailable to testify. In place of the witness, counsel may draw on recordkeeping procedures to confirm the process of records creation, receipt, and management.

The other two standards – ISO 15489-1 and ISO 15489-2 – do not address this category of witness testimony at all.

### **6.3.1.3 Assessment and Recommendations**

Three of the five standards contain statements about the importance of ensuring that a record is created by a person with knowledge of the facts that the record depicts. Three of the five

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<sup>30</sup> *Records Management Responsibility in Litigation Support*, 37.

<sup>31</sup> *Ibid.*



standards also recommend that an organization identify potential witnesses who could testify about the trustworthiness of records or the electronic systems from which they were produced. This is sound advice, but the standards could provide additional guidance.

For paper records, the standards should encourage the use of sign-off documentation that establishes a chain of custody, as discussed in *Records Management Responsibility*. These procedural documents will also assist counsel to identify potential witnesses and/or determine when the maker of the record is unavailable to testify. This knowledge could enable counsel to identify and seek out other potential witnesses in a timelier manner.

Standards should also recommend that records professionals create data maps that document the flow of records through their organization. For electronic records, the standards should acknowledge the importance of metadata in electronic recordkeeping systems. *Electronic Records as Documentary Evidence* touches on the role of metadata in section 6.4.5, where it states:

A complete set of metadata including all evidentiary relevant information on the source of the data, the business rules associated with its capture (creation), its logical structure, and complete entity and attribute definitions shall be captured or created.<sup>32</sup>

The standard does not, however, explicitly establish the relationship between the use of metadata and the notion that metadata may facilitate the identification of potential witnesses. In recordkeeping standards, the role of metadata to support the admissibility of a record by helping identify potential witnesses needs to be made more apparent: the value of metadata to an organization reaches well beyond its traditional purpose to support records storage and retrieval.

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<sup>32</sup> *Electronic Records as Documentary Evidence*, 23.

## **6.3.2 Supporting Documentation**

### **6.3.2.1 Summary of the Category**

Judges require knowledge of the recordkeeping practices of the organization in order to determine whether a record is trustworthy. One way these practices may be demonstrated is in the policies and procedures or other supporting documentation that an organization creates to guide and manage its recordkeeping practices.

### **6.3.2.2 Content Analysis of the Standards**

The content analysis of the standards reveals that all five standards discuss the importance of creating recordkeeping policies and procedures. Section 5.4 of *Electronic Records as Documentary Evidence* reviews how a procedures manual may assist an organization in using its records as documentary evidence. Section 5.4.1 states that in “the event of legal proceedings ... the procedures manual can be the most important support to satisfy the legal requirements (admissibility and weight) for electronic records in the evidence acts.”<sup>33</sup> The manual may “be used by a witness as evidence to prove that a) an authorized RMS program is followed; b) the RMS program provides proof of the system’s integrity ... [and] c) the electronic records are authentic and have integrity....”<sup>34</sup> Section 6 also states that policies and procedures contribute to the infrastructure of the records management system and “provide the most persuasive evidence of the usual and ordinary course of business.”<sup>35</sup>

This standard should be lauded for emphasizing the importance of recordkeeping documentation in the legal process, particularly because the standard states that the procedures manual may “be used by a witness.” In other words, a witness who takes the stand to testify about a record may need to or choose to rely on policies and procedures from the organization to refresh

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<sup>33</sup> *Electronic Records as Documentary Evidence*, 16.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 22.

his/her memory about how the record was made or maintained. Implicit in the standard, therefore, is the critically important requirement that procedures be up to date, so that they are useful when referenced in court. Records professionals must regularly verify that their recordkeeping policies and procedures accurately reflect the current functions and operations of the business. One way to carry out this verification is to conduct internal audits of recordkeeping documentation to ensure they remain current and complete; a preferable option is to have an independent external auditor review the documents against current practice to ensure consistency. If records management policies and procedures are not up to date, a witness may present contradictory testimony, which could lead the judge to rule that the record cannot be admitted as evidence. The inadmissible ruling would not be because of any fault in the record itself but because the usual and ordinary course of business was not made sufficiently clear in the procedural documents created by the organization to demonstrate the trustworthiness of that record.

The other four standards do not explicitly establish the relationship between recordkeeping policies and procedures and the concept of “usual and ordinary course of business,” but both *Legal Acceptance of Records* and *Records Management Responsibility* stress the importance of records management documentation for legal purposes. Section 2.5 of *Legal Acceptance of Records* remarks that such documentation “preserves the information about the process or system independent of the individuals involved and can be used to prepare exhibits to guide witness testimony. The documentation, along with the exhibits, can be introduced into evidence for the jury to scrutinize during their deliberations.”<sup>36</sup>

Unlike the other standards, *Legal Acceptance of Records* provides examples of what the court may expect to see when a party uses records management documentation to tender a business record:

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<sup>36</sup> *Legal Acceptance of Records*, 17.

No particular form or level of detail is required for describing the process or system to the court, although visual aids outlining the documentation can be helpful. Typically, documentation should be sufficient to demonstrate the steps required to get from the beginning to the end of the process. In some proceedings, only a general, non-technical description of the process or system will be sufficient. In others, more detailed documentation will be required, including verification that any equipment or software involved operated properly at the time the records were produced....<sup>37</sup>

As indicated by this statement, in order to establish that a record was made at or near the time of the event, the submitting party may need to provide evidence about the recordkeeping practices and systems that led to the creation of the record. The section also indicates that there is no universal standard for creating recordkeeping policies and procedures. The amount of detail needed about the recordkeeping practices of the organization will vary depending on the circumstances of the case and the evidence being tendered. But as implied in *Legal Acceptance of Records*, policies and procedures should be written in plain language so they can stand up for themselves in a legal proceeding when no witness can be called to explain them.

*Records Management Responsibility* echoes the guidance in *Legal Acceptance of Records*, stating, for instance, that “[s]ound policies and procedures are a corporation’s best defence against litigation, protecting the corporation’s records, and mitigating risk....”<sup>38</sup> The standard cautions, however, that these documents are not a panacea for admitting records as evidence:

Established and documented policies and procedures alone mean nothing in a court of law. What counts are policies and procedures that have been documented, implemented, communicated, updated, and followed on a regular and consistent basis. If corporations have policies and procedures as described above, they are defensible in a court of law.<sup>39</sup>

This statement is similar to the wording in *Electronic Records as Documentary Evidence*, indicating that a witness may still be required to explain the creation, maintenance, implementation, and adoption of the documentation by the organization.

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<sup>37</sup> Ibid, 18.

<sup>38</sup> *Records Management Responsibility*, 13.

<sup>39</sup> Ibid, 13-14.

ISO 15489-1 and ISO 15489-2 contain broad discussions about the importance of recordkeeping documentation. Section 6.2 of ISO 15489-1 states that the

objective of the policy should be the creation and management of authentic, reliable and useable records, capable of supporting business functions and activities for as long as they are required. Organizations should ensure that the policy is communicated and implemented at all levels in the organization. The policy should be adopted and endorsed at the highest decision-making level and promulgated throughout the organization. Responsibility for compliance should be assigned.<sup>40</sup>

ISO 15489-2 provides some guidance about the implementation of policies and procedures within a records management program, primarily by focusing on the identification of the appropriate person to endorse the documentation. Section 2 also cautions readers that a policy that advocates good records management practices does not necessarily result in good records management; the policy needs to be endorsed by senior management and the organization needs to ensure “the allocation of the resources necessary for implementation.”<sup>41</sup>

### **6.3.2.3 Assessment and Recommendations**

The discussions about the documentation of recordkeeping practices, such as policies and procedures, are among the most helpful features of the five standards for supporting strong and effective records management. Four of the five standards discuss how procedural documents may contribute to establishing the trustworthiness of records tendered as evidence. The fifth standard, ISO 15489-1, indicates that a records management program should contain specific policies and procedures, the standard, however, it does not address how these documents may contribute to ensuring the trustworthiness of records.

Documentary evidence such as recordkeeping policies and procedures may contribute to a judge’s understanding of how a record was created or maintained. For example, in *R v Bath* (2010)

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<sup>40</sup> ISO 15489-1, 5.

<sup>41</sup> ISO 15489-2, 1.

counsel relied in part on “affidavits sworn by managers or senior officials of four financial institutions” to tender various financial records as evidence.<sup>42</sup> These affidavits were not the only evidence that counsel used, however; documentation about recordkeeping was also presented. Justice Holmes cited the weak supporting documentation from one of the financial institutions as a reason not to admit some of the records as evidence:

... I will say that weaknesses in the state of the KCU records and record-keeping practices regarding the documents in issue, as described in the evidence in the *voir dire*, does not allow me to draw the usual inferences that apply to records of a financial institution, particularly in relation to documents pertaining to the accounts under scrutiny in this case....<sup>43</sup>

This ruling highlights two characteristics that recordkeeping standards should address. First, standards should explain that judges may rely on more than one source to verify the trustworthiness of a record. Second, as demonstrated in *R v Bath*, simply because counsel provides supporting documentation, such as recordkeeping policies and procedures, the admission of the record as evidence is not inevitable. Standards should emphasize the importance of ensuring that policies and procedures clearly articulate and accurately represent the actual and current recordkeeping practices of the organization. Policies and procedures that are out of date, incomplete, or poorly constructed may not convince a judge that a record is trustworthy.

### **6.3.3 Record Created in the Usual and Ordinary Course of Business**

#### **6.3.3.1 Summary of the Category**

The business records exception to the hearsay rule was developed because the courts recognized that business records have a circumstantial guarantee of trustworthiness: that is, they are created in a systematic and routine manner that limits the likelihood that they may be altered. A record made in the usual and ordinary course of business is a by-product of an action routinely

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<sup>42</sup> *R v Bath*, 2010 BCSC 1137, [2010] BCJ no 2851 (QL) at para 1 [*R v Bath*, 2010 BCSC 1137].

<sup>43</sup> *R v Bath*, 2010 BCSC 307, [2010] BCJ no 2842 (QL) at para 78 [*R v Bath*, 2010 BCSC 307].

conducted by an organization. From a judicial perspective, demonstrating the usual and ordinary course of business in the organization helps a judge determine if the record is trustworthy. The fact that a record is created in a systematic and routine manner limits the likelihood that it may have been altered.

#### **6.3.3.2 Content Analysis of the Standards**

The content analysis of the standards reveals that three of the five standards address the concept of “usual and ordinary course of business.” The concept of “usual and ordinary course of business” is most prevalent in *Electronic Records as Documentary Evidence*: it appears eighteen times in the body of the standard. Section 5 offers the most insight into the concept. For example, section 5.3 states that a procedures manual should contain policies and procedures outlining how an electronic recordkeeping system should be used. These procedures documents have legal implications because they “provide evidence to satisfy the requirements for the admissibility of electronic records in legal proceedings,” such as confirming that a record was made in the usual and ordinary course of business. Moreover, this documentation offers insight about “the circumstances surrounding the creation of the record,”<sup>44</sup> which a judge typically considers when determining if a record should be admitted as evidence.

The standard also provides guidance with regard to this legal concept in relation to the nine factors outlined in section 6.3.1.2 of this chapter. By providing documentation that illustrates, for example, that a record at issue was made contemporaneously to the event it depicts or that the system that stored the record “conforms to all appropriate standards,” a judge is more likely to conclude that the record possesses a circumstantial guarantee of trustworthiness and therefore may be admitted as evidence.

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<sup>44</sup> *Electronic Records as Documentary Evidence*, 16.

*Legal Acceptance of Records* and ISO 15489-1 both address the concept of “usual and ordinary course of business,” but not with nearly the same rigor as *Electronic Records as Documentary Evidence*. Section 2.4.1 of *Legal Acceptance of Records*, “Characteristics [of a records management process or system],” states that records “produced as part of a regularly conducted activity such as those produced in the regular course of business are admissible subject to a showing that the process or system used to produce them is reliable and accurate.”<sup>45</sup> The section then attempts to define the phrase “regularly conducted activity” but only does so with the curious phrase “may include a regular pattern of activity.” This definition is of little assistance to readers seeking a non-circular definition or who need to draw on practical examples.<sup>46</sup>

ISO 15489-1 incorporates the concept of “usual and ordinary course of business” into section 7.2.3, “Reliability.” This section states that a reliable business record is one that “should be created ... by instruments routinely used within the business to conduct the transaction.”<sup>47</sup> Unfortunately, the standard does not provide any further discussion on the matter. As a consequence, a reader unfamiliar with judicial practice will most likely be unaware of the legal implications of the section and thus overlook its importance.

The other two standards – *Records Management Responsibility* and ISO 15489-2 – do not address the concept of a record created in the usual and ordinary course of business.

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<sup>45</sup> *Legal Acceptance of Records*, 16.

<sup>46</sup> *Ibid*, 16. Even Canadian judges have struggled to provide a lucid definition for the concept of “usual and ordinary course of business.” For example, Judge Nordheimer of the Ontario Superior Court of Justice attempted to provide such a definition in *R v Dunn* (2011). He stated that the “terms ‘usual and ordinary’ carry with them the connotation of something done commonly and routinely in the course of the normal operations of a business where there is no reason to record otherwise than accurately and objectively” (*R v Dunn*, 2011 ONSC 2752, [2011] OJ no 2221 (QL) at para 15). Unfortunately, his argument is circular: the terms *commonly* and *routinely* are synonymous with the terms *usual* and *ordinary*, therefore they do not provide any useful examples of how counsel may demonstrate that a record was made in the usual and ordinary course of business.

<sup>47</sup> ISO 15489-1, 7.



### 6.3.3.3 Assessment and Recommendations

Establishing that a record was made in the usual and ordinary course of business is vital for having the record admitted as evidence. With the exception of *Electronic Records as Documentary Evidence*, the lack of attention to this legal concept in recordkeeping standards is alarming. Legal standards need to incorporate more robust guidance about the concept of “usual and ordinary course of business.” Specifically, standards should provide a succinct definition of the concept, while making recommendations that will assist records professionals to satisfy the criteria for meeting the business records exception to the hearsay rule.

One of the first challenges is to provide a succinct definition for the concept of “usual and ordinary course of business.” *Electronic Records as Documentary Evidence* comes the closest to defining the concept when it states that policies and procedures must articulate the “circumstances surrounding the creation of the record.”<sup>48</sup> But it is unlikely that a reader unfamiliar with Canadian legal developments would be able to make a connection between documenting the “circumstances of the creation of the record” and the concept of “usual and ordinary course of business” when, in fact, the two phrases are inextricably linked.

The Canadian case law reviewed in Chapter 5 reveals that the concept of “usual and ordinary course of business” cannot be articulated in one simple statement. It is a collective concept encompassing several ideas, principles, and processes. To understand the notion of a record-making routine *per se*, one must be able to describe the circumstances that led to the creation, maintenance, and use of the record. Therefore, standards should recommend that organizations develop policies and procedures that demonstrate who made the record, when it was made, who maintained it, how it was used, and how it was produced for legal action.<sup>49</sup>

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<sup>48</sup> *Electronic Records as Documentary Evidence*, 16.

<sup>49</sup> *R v Nardi*, 2012 BCPC 318, [2012] BCI no 1900 (QL) and *R v Bath*, 2010 BCSC 307.

### **6.3.4 Contemporaneity**

#### **6.3.4.1 Summary of the Category**

For a business record to be admitted as evidence, the record must have been made at or near the time of the event that it depicts. The concept of contemporaneity argues that the “truth” is best obtained and is more accurate the closer in time it is captured to the event it represents.

#### **6.3.4.2 Content Analysis of the Standards**

The content analysis of the standards reveals that four of the five standards address the issue of contemporaneous creation. *Electronic Records as Documentary Evidence* contains one section that addresses the concept of contemporaneity. As previously discussed, section 5.5 reviews ways by which an organization may prove its “usual and ordinary course of business, the integrity of its electronic records system and, therefore, the integrity of any record recorded in that system.”<sup>50</sup> The standard indicates that organizations may demonstrate to a judge that the records in question were “captured and recorded contemporaneously with, or within a reasonable time after, the events to which they related....”<sup>51</sup> The standard, however, does not explain why contemporaneity is an important component of the creation of a record. Nor does the standard provide any guidance for how an organization may improve the likelihood that its records will actually be created contemporaneously to the events they reflect.

*Legal Acceptance of Records* sheds some light on why it is important for a record to be made at or near the time of the event it depicts. As section 2.4.1 states, records “produced within a short period after the event or activity occurs tend to be more readily acceptable as accurate than records produced long after the event or activity.”<sup>52</sup> The same section also explains that even if a record is not made contemporaneously to the event in question, it is not automatically disqualified as

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<sup>50</sup> *Electronic Records as Documentary Evidence*, 17.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Legal Acceptance of Records*, 16.

admissible evidence. According to the standard, a record known to be “later-produced” may still be admitted if it can be shown that “the time lapse had no effect on the record’s contents.”<sup>53</sup> Like *Electronic Records as Documentary Evidence, Legal Acceptance of Records* lacks recommendations for how an organization may prove that a record has been made contemporaneously or that a delay in the creation of the record did not affect its contents.

*Records Management Responsibility* addresses the concept of contemporaneity in section 11.2, under the section “Record Made at or Near the Time of the Occurrence.” This section states that, for a business record to be admitted according to the Federal Rules of Evidence, it “must be made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.”<sup>54</sup> The remainder of the section, however, focuses on the importance of witness testimony and the chain of custody, and the relationship of these issues to the concept of contemporaneity is not made clear. The standard does not discuss why a record needs to be made contemporaneously to the event that it depicts, nor does the standard offer recommendations for how an organization may demonstrate that a record was, in fact, created at or near the time of the event.

ISO 15489-1 contains only a slight mention of contemporaneity. Section 7.2.2 defines an authentic record as a record that that can be proven “a) to be what it purports to be, b) to have been created or sent by the person purported to have created or sent it, and c) to have been created or sent at the time purported.” ISO 15489-1 also mentions that the “creation, receipt, transmission, maintenance and disposition of records” should be controlled by the implementation of policies and procedures,<sup>55</sup> but the standard does not include any guidance about the specific contents of these procedural documents. The broad and generalized nature of this recommendation

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<sup>53</sup> Ibid, 16.

<sup>54</sup> *Records Management Responsibility*, 37.

<sup>55</sup> ISO 15489-1, 7.

drastically limits the usefulness of the standard to help records professionals ensure that the records of their organizations are made contemporaneously to the event they depict.

The last standard – ISO 15489-2 – does not address the concept of contemporaneity at all.

#### **6.3.4.3 Assessment and Recommendations**

Four of the five standards reviewed for this study discuss the importance of records being created at or near the time of the event they depict, but only one standard, *Records Management Responsibility*, mentions the importance of this legal concept. Aside from the extremely broad recommendations in ISO 15489-1, the other four standards lack guidance for how an organization may ensure that its records are created according to the principle of contemporaneity.

Recordkeeping standards may strengthen the guidance on the principle of contemporaneity in several ways. First, records professionals must understand that creating records at or near the time of the event they depict is a vital criterion that most records must satisfy to be admitted as evidence. Additionally, the standards should explain that Canadian courts rely on this criterion of contemporaneity to determine whether a record is trustworthy.

ISO 15489-1 is correct when it suggests that organizations should create policies and procedures that “control the creation of records,” but more specific guidance is necessary. For example, a policy should require that certain records, such as meeting minutes, be drafted and approved as soon as possible after the meeting. Organizations that use electronic records management systems should be cognizant that metadata will also play a vital role in establishing when a record was created and by whom.<sup>56</sup> But metadata alone does not suffice; the organization should also be able to provide a witness that explains the purpose of metadata and its role in the

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<sup>56</sup> For example, subsection 9.2.1 of *Metadata for Records — Part 1: Records* (ISO 23081-1:2006) states that, in order “define the content of the record or any aggregation, its logical and physical structure and its technical attributes ... metadata about the record should ... include the date and time when the record was created...” (p. 12). And subsection 9.5.1 of this standard suggests that “[b]usiness process metadata at the point of record capture should ... capture the date and time of a transaction when a record was created” (p. 17).

recordkeeping process. In situations where an organization relies on metadata to provide essential contextual information about electronic records, a person from the organization may be required to testify before a judge, explaining how the organization defines and uses metadata in its recordkeeping practices.

The reliability of automatically generated metadata must also be guaranteed in order to demonstrate contemporaneity. If a standard recommends the use of metadata, the standard should stipulate that electronic recordkeeping systems should be regularly audited to verify, for instance, that their system clocks represent the correct date and time.<sup>57</sup> As discussed in section 6.3.1 of this chapter, witness testimony may also be required to explain to the court why the original record was not produced or to verify the procedures by which the organization created the copy.

### **6.3.5 Was the Usual and Ordinary Course of Business to Make the Record**

#### **6.3.5.1 Summary of the Category**

The courts differentiate between 1) whether a record was created in the usual and ordinary course of business and 2) whether it was part of the usual and ordinary course of business to create the record. This is a subtle but important distinction. Where the former focuses on *how* the record was created, the latter addresses *whether* an employee had a duty to create the record. The courts need to know whether a record was made pursuant to a duty; if so, there is a greater likelihood that the record is accurate and objective and, therefore, trustworthy.

#### **6.3.5.2 Content Analysis of the Standards**

The content analysis of the standards reveals that three of the five standards address the issue that a business record must be created as a result of a business duty. As previously mentioned, section 5.5 of *Electronic Records as Documentary Evidence* lists nine factors an organization may

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<sup>57</sup> For discussions on the auditing of electronic recordkeeping systems, see *Electronic Records as Documentary Evidence*, section 8.

address to ensure that a record can be assessed as made in the usual and ordinary course of business. One of these factors is to ensure the data entry process is established in such a way that the “data-base capture and entry procedures are part of the usual and ordinary course of business of the organization and are carried out in accordance with the procedures manual.”<sup>58</sup> Regrettably, the standard leaves it to the reader to interpret the significance of this statement; the only guidance provided is to capture necessary actions in a procedures manual, but the nature of those actions is not defined. The phrase “are part of,” however, implies that the organization should somehow formalize the business duty to create a record.

Section 6 of the standard re-emphasizes the importance of making a record pursuant to a business duty. In this section, the standard lists the requirements an organization should fulfill when implementing a records management system. Section 6.1 stipulates that an electronic recordkeeping system must become a “part of the organization’s usual and ordinary course of business.”<sup>59</sup> In other words, any record created as a result of the use of the system must be the by-product of business functions, not the result of a “mere act” conducted by an employee.<sup>60</sup> According to the standard, the organization’s chief records officer and/or senior management play an integral part in ensuring that the system is integrated into the usual and ordinary course of business.<sup>61</sup>

In its review of Rule 902(11) of the U.S. Federal Rules of Evidence, *Records Management Responsibility* addresses the distinction between a record made in the usual and ordinary course of business and one made pursuant to a business duty. The standard states that “the fourth element of Rule 902(11) requires that the record must have been [a result of] a regular practice of a regularly

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<sup>58</sup> *Electronic Records as Documentary Evidence*, 17.

<sup>59</sup> *Ibid*, 19.

<sup>60</sup> A *mere act* is “an act in which the will is limited to the accomplishment of the act, without the intention of producing any other effect than the act itself: effect and act coincide” (Luciana Duranti, *Diplomatics: New Uses for an Old Science* [Lanham, MD: Scarecrow Press, Inc., 1998], 64).

<sup>61</sup> See subsections 5.4.3, 6.3.1 and 6.4.1 of the standard.

conducted activity to make and keep the record at issue ... The phrase ‘regular practice’ is a necessary further assurance of a record’s trustworthiness.”<sup>62</sup> But the standard does not provide any guidance for how an organization may demonstrate that a record was created pursuant to a business duty.

In ISO 15489-2, section 2.3 states that the policies and procedures of an organization should require the creation of “records according to the business needs and business processes that adequately document the business activities in which they take part.”<sup>63</sup> But the standard does not elaborate on the statement; the reader must ascertain its legal implications without further guidance.

#### **6.3.5.3 Assessment and Recommendations**

Canadian courts require evidence that the normal routine of a business resulted in the creation of the record tendered as evidence. Only two of the five standards address the issue that a record must be made pursuant to a business duty. To enhance their guidance on this matter, these standards may be improved in two ways. First and foremost, they could articulate the difference between a record that was made in the usual and ordinary course of business and a record that was a necessary by-product of carrying out the usual and ordinary course of business. As previously discussed, the former implies that the record was created according to a routine or systematic process, whereas the latter implies a business duty to create the record. Second, the standards should also emphasize that the recordkeeping policies of an organization should contain clauses stipulating that employees must only make records as part of their assigned functions and responsibilities, as doing otherwise may have legal ramifications for the business.

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<sup>62</sup> *Records Management Responsibility*, 37-38.

<sup>63</sup> ISO 15489-2, 2.

### 6.3.6 Best Evidence Rule

#### 6.3.6.1 Summary of the Category

When counsel tenders a copy of a business record as evidence, judges often require counsel to explain why the original record could not be produced. The requirement to render the original record is known as the “best evidence rule.” This rule was developed to prevent the admission of forgeries, but since the emergence of the typewriter and other copying devices, the rule has been modified to allow courts to accept copies of records.<sup>64</sup> In cases where counsel cannot explain why the original record has not been produced, a judge may rule that the copy cannot be admitted as evidence, or the judge may admit the copy but state that it carries little, if any, weight.<sup>65</sup>

#### 6.3.6.2 Content Analysis of the Standards

The content analysis of the standards reveals that three of the five standards discuss the best evidence rule. Section 5.1 of *Electronic Records as Documentary Evidence* states that “[o]riginal paper source records can be disposed of once their electronic form is stored in a secure records management environment. Copies produced from these electronic records will have a legal authority equal to the original source records.”<sup>66</sup> While this statement indicates that the standard addresses the best evidence rule, the statement is incomplete. A copy of a record is unlikely to be admitted as evidence in situations where counsel does not provide sufficient explanation for why the original record cannot be produced. In order for counsel to be able to explain to a judge why a copy is being tendered in place of an original, the organization must provide counsel with an

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<sup>64</sup> Some legal scholars have argued that, in the digital age, the concept of an original document has been lost, replaced with the notion of a “reference” document (e.g., George Paul, *Foundations of Digital Evidence* [Chicago: American Bar Association, 2008], 15), while others contend that a duplicate is more important now than the original (e.g., Colin Miller, “Even Better than the Real Thing: How Courts have been Anything but Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003,” *Maryland Law Review* 68, no. 1 [2008]: 160-220).

<sup>65</sup> See *Tarion Warranty Corp v Boros*, 2012 ONCJ 156, [2012] OJ no 1297 (QL) and *R v Bath*, 2010 BCSC 307.

<sup>66</sup> *Electronic Records as Documentary Evidence*, 14. This standard implies incorrectly that disposing of records is synonymous with the destruction of records. According to the *SAA Glossary*, *disposal* means the “transfer of records, especially noncurrent records, to their final state, either destruction or transfer to an archives” (*SAA Glossary*, s.v. “disposal”).



explanation from senior management for why the organization chose to destroy the original record but maintain the copy and/or documentation demonstrating that the original has been destroyed in the usual and ordinary course of business.

*Electronic Records as Documentary Evidence* also addresses the admissibility of paper copies. Section 6.6.1 states:

Whenever paper copies need to be produced from an RMS, those copies need to be authenticated as true copies of the originals to enhance their admissibility and weight in legal proceedings ... Where a paper document is produced as part of the output, the procedures shall include the use of an authorized Person signature or other authorized procedure to authenticate this document.<sup>67</sup>

According to this section of the standard, the organization must have a set of procedures in place that ensure the copy is authenticated. As discussed in Chapter 5, the British Columbia ruling of *R v Bath* (2010) Justice Holmes did not admit as evidence several financial records stamped “certified true copy.” The witnesses counsel called to testify about the records had no knowledge of the process that stamped the records. *R v Bath* demonstrated that a record stamped “certified true copy” is insufficient by itself for a judge to deem the record to be trustworthy. A judge requires evidence of the origins of the stamp: who stamped the record, when the record was stamped, and why the record was stamped.<sup>68</sup>

*Legal Acceptance of Records* addresses the best evidence rule in section 1, sections 1.2.1.2 and 1.2.1.3, and again in section 3. Section 1 states that a duplicate of a record may be used as evidence.<sup>69</sup> Unlike the other standards that use the term *copy* when referring to the best evidence rule, *Legal Acceptance of Records* uses the term *duplicate*, which it defines as a “record that is produced by the same impression as the original, or from the same matrix, or by any other

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<sup>67</sup> Ibid, 24.

<sup>68</sup> *R v Bath*, 2010 BCSC 307, at para 123.

<sup>69</sup> *Legal Acceptance of Records*, 8-9.

technique that accurately reproduces the original.”<sup>70</sup> The standard does not articulate why it uses the term *duplicate* instead of the term *copy*. Some legal scholars question whether or not it is correct to call a duplicate a *copy*, because the former may have a higher legal status than the latter.<sup>71</sup> Without addressing this distinction between these two terms, a records professional may understand the term *duplicate* as being synonymous with the term *copy*, especially since the term *copy* is used in other standards.

Section 3 of *Legal Acceptance of Records* consists of a self-assessment that a records professional may use to determine “whether good recordkeeping practices are being followed....”<sup>72</sup> Section 3.8.1 states that while the modern “rules of evidence equate records ... as originals or reproductions of originals....” it is still important for the organization to be able to “identify original records as opposed to copies or duplicates.”<sup>73</sup> Section 3.8.3 reiterates the statement that duplicate records may be treated as originals when they have been “accurately produced by an information technology system....”<sup>74</sup> The standard emphasizes that the organization must be able to differentiate an original record from a duplicate of it, a task that is considerably more difficult with electronic records.<sup>75</sup>

The last reference to the best evidence rule in *Legal Acceptance of Records* occurs in section 3.8.10. This section states that the “legal status of records offered as evidence in litigation or for acceptance by a government agency is not affected by their form or format, or by the fact that they

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<sup>70</sup> Ibid, 3.

<sup>71</sup> Joanne Wharton, “Duplicate Originals and the Best Evidence Rule,” *Ohio State Law Journal* 19, no. 3 (1958): 520-22. It should also be noted that archival science recognizes different forms of copies, such as *copy in form of original*, *authentic copy*, *conformed copy*, *intimate copy*, *pseudo-copy*, and *simple copy*. A *copy in form of original* is defined as a “copy identical to the original and having the same effects, but generated subsequently” (*InterPARES 3 Terminology Database*, s.v. “copy in form of original”).

<sup>72</sup> *Legal Acceptance of Records*, 20.

<sup>73</sup> Ibid, 23.

<sup>74</sup> Ibid, 23.

<sup>75</sup> Ibid, 24

are duplicates rather than originals.”<sup>76</sup> The section goes on to say that “the routine destruction of original records after reproduction in the ordinary course of business will not affect the legal status of duplicate records regarding their admissibility. If the process or system is deemed to be trustworthy, the records will ordinarily be deemed admissible, but their contents will continue to be subject to challenge.”<sup>77</sup> The key part of this section is the phrase “if the process or system is deemed to be trustworthy.” This statement implies that a witness must be able to explain how the organization created the duplicate record – a discussion that may lead to questions about why the organization chose to retain a copy of the record rather than the original.

*Records Management Responsibility* is the weakest of the three standards in addressing the best evidence rule. The issue is addressed only in section 9.10.1, “Authenticity,” which states:

Preserving and protecting the original document from loss or damage, whether it exists in paper or electronic form, is critical for two reasons. First, the original document is required to make the strongest showing that the evidence is authentic, rather than a manufactured forgery. Claiming that the original was lost or destroyed is liable to weaken the evidence in the eyes of the fact finder (the jury or, in a nonjury trial, a judge). Second, although a duplicate can usually be admitted into evidence, a court has the authority under appropriate circumstances to deem a duplicate inadmissible as unreliable, thus denying a party the benefit of having the evidence presented in court.<sup>78</sup>

Though the section acknowledges that copies of records may be used as evidence, it incorrectly implies that the courts prefer the original record, a notion disputed by *Electronic Records as Documentary Evidence* and *Legal Acceptance of Records*. Once again, a copy of a record may be held to the same standard and weight as the original if it is reasonably explained why the original cannot be produced. As the standard indicates, if there is no supporting documentation proving a considered and formal destruction process, it is unlikely that the record will be admitted as evidence.

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<sup>76</sup> Ibid, 28.

<sup>77</sup> Ibid.

<sup>78</sup> *Records Management Responsibility*, 29.

The other two standards – ISO 15489-1 and ISO 15489-2 – do not address the best evidence rule at all.

#### **6.3.6.3 Assessment and Recommendations**

Of the three standards that address the best evidence rule, only *Legal Acceptance of Records* clarifies that the courts often require an explanation for why the original record has not been rendered before the judge will admit a copy of that record as evidence. The fact that the standards address the best evidence rule is positive, but their analysis of this legal issue is incomplete.

When a recordkeeping standard addresses the best evidence rule, it should stress that a copy of a record may be deemed to be of equal weight to its original counterpart, but only when counsel is able to provide sufficient explanation for the reason why the original record cannot be rendered. Therefore, these standards should encourage organizations to document situations where the original record has been destroyed in favor of a copy. More importantly, the decisions for these actions should be clearly articulated in policies and procedures. The case law indicates that a judge may require evidence of the procedure that resulted in the creation of the copy in order to determine if the copy is trustworthy.<sup>79</sup> Finally, the destruction of the original records should also be documented in the disposition schedules and records disposal authorities of the organization. Should opposing counsel question why the tendering party destroyed the original record, the disposition schedules and authorities should be able to demonstrate that the elimination of the original was done in the usual and ordinary course of business.

#### **6.4 Further Recommendations**

This chapter reviewed five recordkeeping standards to determine the extent to which they addressed six legal issues:

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<sup>79</sup> See *R v Bath*, 2010 BCSC 307, at para 123.

1. A person with knowledge of the record could testify about the record or procedures that created the record.
2. Sufficient information exists about how the record was created and maintained.
3. The record was created in the usual and ordinary course of business.
4. The record was made contemporaneously to the events it depicts.
5. It was the usual and ordinary course of business to make the record.
6. The business can account for why an original record may not be generated for court.

By addressing these legal issues as part of their recordkeeping practices, records professionals can increase the likelihood that business records may be admitted as evidence in a court of law.

The analysis in this chapter reveals that the standards vary in their coverage of the six legal issues. In fact, *Electronic Records as Documentary Evidence* was the only standard to address all six. The two issues that received the most attention in the standards were: issue #1, that a person with knowledge of the record could testify about the record or procedures that created the record; and issue #6, that the business can account for why an original record may not be generated for court (i.e., the best evidence rule). The issue that received the least attention in the standards was issue #5, that it has to be the usual and ordinary course of business of an organization to make the record for to be admissible under the business records exception to the hearsay rule.

This chapter proposed several specific recommendations to enhance recordkeeping standards. In addition to the specific recommendations highlighted above, some more general proposals are offered here, to strengthen the effectiveness of these recordkeeping standards in relation to several key legal issues. These issues include: the explanation of legal issues; identification of witnesses; the creation and implementation of policies and procedures; and the application of metadata.

**Issue #1: Explanation of Legal Issues:** The research outlined above clearly indicates that standards need to do a better job of explaining the pertinence of each legal issue they address, so that records professionals may understand the significance of the issue in relation to recordkeeping

practices. For example, standards should emphasize the importance of the legal concept of “usual and ordinary course of business.” To define the concept, standards should explain that the concept of “usual and ordinary course of business” means that records are made according to a routine or systematic process. Moreover, the standards should also caution that records cannot be the result of a “mere act,” that is, made by an employee outside the usual and ordinary course of business. Ungoverned records creation puts the organization at risk because the record may not be considered trustworthy: a judge is unlikely to admit a business record as evidence if he/she determines that the record was not made in the usual and ordinary course of business.

**Issue #2: Identification of Witnesses.** The value of good witness testimony in a legal dispute cannot be underestimated. The testimony that a witness provides may strengthen counsel’s case by helping the judge understand the circumstances that resulted in the creation of the record. This information will enable him/her to determine if the record is reliable and, therefore, whether it should be admitted as evidence.

The challenge may lie in the identification of the appropriate witness. Standards should inform records professionals that any record creator in the organization may be called to testify or required to complete an affidavit that vouches for the record at issue. Records professionals may also serve as witnesses because they should be familiar with the processes that created the record and the methods used to maintain the record in the recordkeeping system. Sign-off documents, logs, and metadata may all facilitate the process of determining who created or maintained the record and, thus, who may or may not be able to testify about the trustworthiness of the record. Records professionals need to understand the importance of establishing and maintaining these documentation processes so that the appropriate personnel can demonstrate organizational compliance.

**Issue 3: Creation and Implementation of Policies and Procedures.** The importance of recordkeeping policies and procedures also contribute to a judge's understanding of the context in which a record at issue was created. These documents help to demonstrate the usual and ordinary course of business: that is, the fact that a record was a by-product of a routine or systematic process. As mentioned in *Electronic Records as Documentary Evidence*, records policies and procedures may provide evidence of the usual and ordinary course of business, but only when these documents are regularly maintained and updated.

Policies and procedures also contribute to the application of the best evidence rule. The standards correctly observe that the best evidence rule pertains to copies of records. However, the standards omit the important observation that counsel often needs to justify why the original record cannot be rendered for court. Therefore, the standards should require that organizations document and articulate any decisions to retain copies of records rather than the originals. The destruction of original records should be clearly identified in retention and disposition schedules and records disposal authorities, in the event that these schedules or authorities are needed to demonstrate the routine and systematic manner by which the organization destroys records. The process by which an organization makes these choices should also be articulated in policies and procedures so that this documentation may be used in court to establish the trustworthiness of the records.

**Issue #4: Application of Metadata.** For organizations that rely on electronic recordkeeping systems, metadata will support the admissibility of business records as evidence in several ways. First, metadata may play a significant role in identifying a potential witness who could testify about the trustworthiness of a record. For example, the record properties assigned by word processing software may document who created or edited a record. And the use of names or initials found in marginal notes may confirm who reviewed or annotated the record, illustrating a chain of custody. Second, automatically generated metadata such as date and time may help the organization

determine when the record was created or last modified. The accuracy of this metadata is critical to help the organization prove the contemporaneity of the record.

The standards should emphasize that the organization needs to provide clear guidance for records professionals about the importance of managing metadata, both manually and automatically generated. The standards should also mention that the metadata be properly used by employees, monitored by appropriate senior officers, and kept up-to-date if the metadata are to be used as a viable resource when demonstrating that a record is trustworthy. For example, the organization need to control against intentional or accidental misuse of metadata, such as when employees change their user name or user's initials in Microsoft Word or other programs to obscure their identity. Once again, it would be up to the organization to identify the appropriate employee who could testify about the role of metadata in the organization and demonstrate to a judge that the metadata are reliable.

In light of the analysis of five recordkeeping standards in this chapter, along with the analysis of Canadian case law in Chapter 5, the next chapter will discuss the implications of the research carried out for this study. Chapter 7 will also examine avenues for future research, drawn from the author's findings.



## **Chapter 7: Discussion, Analysis, and Conclusion**

### **7.1 Introduction**

This chapter discusses the findings of this study in relation to the research questions posed in the first chapter. It contains four sections, including this introduction, section 7.1. Section 7.2 offers an interpretation of the findings in relation to the two research questions and their secondary questions. Section 7.3 discusses the implications of this study and considers how the findings benefit records professionals. Section 7.4 discusses future research that may be conducted as a result of the findings of this study. Section 7.5 outlines the limitations of the study. The final section, 7.6, presents some final thoughts on this study.

### **7.2 Interpretation of Findings**

Two issues were explored: 1) the lack of clarity on how the Canadian judiciary has assessed business records that have been tendered as evidence; and 2) the lack of discussion on whether the content of recordkeeping standards is accurate and sufficient to provide records professionals with appropriate guidance to increase the likelihood that business records will be admitted as evidence. To address these issues, this author identified two primary research questions and related sub-questions:

**Research Question 1:** On what grounds do the Canadian lawyers and judges base their assessment of documentary evidence as meeting the business records exception to the hearsay rule?

**Sub-Question 1.1:** What do the legal texts (i.e., case law, statutes, regulations, etc.) require?

**Sub-Question 1.2:** Is the adoption of a recordkeeping standard one of the grounds for admission as evidence? If yes, which standard(s)? If not, do the other criteria imply the adoption of a standard?

**Research Question 2:** Does the content of recordkeeping standards, as they presently exist, provide sufficient legal protection to an organization's business records?

**Sub-Question 2.1:** If yes, in what way? If not, how should these standards be modified to afford an organization better legal protection?

The next section summarizes the findings of this study in relation to each of these research questions.

### **7.2.1 Research Question #1**

**Research Question 1:** On which grounds do the Canadian lawyers and judges base their assessment of documentary evidence as meeting the business records exception to the hearsay rule?

**Sub-Question 1.1:** What do the legal texts (i.e., case law, statutes, regulations, etc.) require?

**Sub-Question 1.2:** Is the adoption of a recordkeeping standard one of the grounds for admission as evidence? If yes, which standard(s)? If not, do the other criteria imply the adoption of a standard?

To answer the first research question, this author reviewed Canadian legal literature and Canadian case law, specifically relevant rulings in the provinces of British Columbia and Ontario, to determine what criteria business records must satisfy to be admitted as evidence and whether recordkeeping standards contribute to a judge's assessment of the trustworthiness of the records. The case study analysis revealed that the Canadian judiciary based their review of documentary evidence (i.e., business records) on four specific legal authorities: common law, provincial statute (e.g., British Columbia *Evidence Act* and Ontario *Evidence Act*), federal statute (e.g., *Canada Evidence Act*), and the principled approach to hearsay.<sup>1</sup> As detailed below, it was found that, though each of these authorities has its own set of criteria, many of these criteria occur in one or more of the authorities. This author also found that recordkeeping standards were not used as grounds for admission of evidence.

Business records are considered not inherently trustworthy. For a record to be admitted as evidence, a judge must determine that the record has a circumstantial guarantee of trustworthiness,

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<sup>1</sup> As discussed in Chapter 2, there is a fifth authority for admitting records as evidence: rules of court or rules of procedure, such as the British Columbia *Supreme Court Civil Rules* or the Ontario *Rules of Civil Procedure*. This authority has not been discussed because it does not focus on the circumstances that result in the creation or maintenance of the record; instead, it specifies the obligations counsel must meet in order for the court to consider a record as evidence.

which the Canadian courts often refer to as “the criterion of reliability.”<sup>2</sup> The courts must test the trustworthiness of individual records before admitting them as evidence. In Canada, the judges draw on four admissibility authorities listed above to determine whether a business record has a circumstantial guarantee of trustworthiness and so may be admitted as evidence. As already pointed out, each authority has its own set of criteria but the criteria overlap among the authorities. For example, the following criteria are used at common law to admit a business record according to the business records exception to the hearsay rule. To be admitted, the record must be made:

1. at or near the time of the event of which it depicts;
2. in the ordinary course of duty;
3. by a person having personal knowledge of the matters;
4. by a person who is under a duty to make the record or report; and
5. by a person who has no motive to misrepresent the matters recorded.<sup>3</sup>

The authorities, in particular the provincial and federal *Evidence Acts*, draw heavily from the common law criteria. The principled approach also applies these criteria but the judges use them to determine if a record satisfies the criterion of reliability. Overall, the criteria established in the authorities work together to help a judge review the circumstances in which the record was created, maintained, and used by the organization.

This study sought to assess these legal texts qualitatively. It explored the reasons judges did not admit business records as evidence in British Columbia and Ontario. Based on the analysis of 477 business records—identified from 198 rulings—this author found that several of the most common reasons cited by British Columbia and Ontario judges for not admitting business records relate to issues that records professionals may address as part of their daily operations. Records professionals

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

<sup>3</sup> Paciocco and Stuesser, *The Law of Evidence*, 167.

play an important role to ensure that the records of an organization are trustworthy and therefore may be admitted as evidence.

A judge can only ascertain whether a record is reliable based on the information presented by the party that tenders the record. Counsel may use several methods to demonstrate to a judge that a record is reliable. The two salient methods are: 1) witness testimony, either in person or by affidavit, by a person familiar with the record at issue or the process that created the record; and 2) the use of recordkeeping documentation such as policies, procedures, and standards that help counsel to illustrate the circumstantial guarantee of trustworthiness of the record. The two methods are not mutually exclusive. For example, an employee who testifies about the trustworthiness of a record may also use a policy or procedural document to refresh his/her memory about how the record was created, maintained, or used by the business.

In order to answer Sub-question 1.2 (Is the adoption of a recordkeeping standard one of the grounds for admission as evidence? If yes, which standard(s)? If not, do the other criteria imply the adoption of a standard?), this study investigated whether judges cited recordkeeping standards with any regularity when ruling that a record could or could not be admitted as evidence. This author reviewed the rulings from his initial data set and then expanded the scope of the analysis by using QuickLaw to search the case law from all Canadian provinces and territories for references to the five recordkeeping standards identified as foundational for the purposes of this study.

The searches and the detailed case law analysis revealed that witness testimony was the prevailing method for introducing business records as evidence. Though rulings such as *R v Bath* (2010) refer to supporting recordkeeping documentation,<sup>4</sup> none of the rulings reviewed for this study specifically mentions recordkeeping standards, either by name or as a means to support tendered evidence. The lack of reference to recordkeeping standards was surprising, especially with

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<sup>4</sup> *R v Bath*, 2010 BCSC 307, [2010] BCJ no 2842 (QL) at para 79.

regard to ISO 15489-1 standard on records management, which is, arguably, one of the most popular and widely used recordkeeping standards.<sup>5</sup>

Based on the review, the absence of any mention of recordkeeping standards in the case law may be attributed to the limited information standards provide about how a record was created or maintained. As remarked below, a recordkeeping standard may help an organization construct a sound records management program, but it cannot accurately portray the recordkeeping practices of the organization because organizations apply standards voluntarily. There is no external requirement, such as an audit process, for any organization to adopt a recordkeeping standard. Further, a judge requires specific information about the record at issue, not generalizations about the overall recordkeeping operations of the organization creating the record in question. Therefore, witness testimony, a review of the recordkeeping policies and procedures of an organization, or both, offer more precise information about the circumstances that led to the creation and use of a particular record, whereas a standard may only be able to justify why the organization created particular recordkeeping policies or adhered to specific records management practices.

Even though recordkeeping standards do not appear in legal rulings about the admissibility of records, standards may still, in theory, prove beneficial when a party decides to tender a business record as evidence. As Chasse writes, recordkeeping standards “should be used when arguing any admissibility issues concerning records.”<sup>6</sup> Recordkeeping standards may also prove instrumental in helping an organization demonstrate that it follows a well-structured and formal records management program that consists of records created and maintained in the “the usual and ordinary course of business.”

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<sup>5</sup> In *R v CM*, 2012 ABPC 139, [2012] AJ no 586 (QL) at para 52, Justice Franklin refers to two articles written by Canadian lawyer Kenneth Chasse in which he discusses the standard *Electronic Records as Documentary Evidence*.

<sup>6</sup> Kenneth Chasse, “Electronic Discovery in the Criminal Court System,” 133.

The adoption of a standardized records management process may, therefore, help ensure that a record is trustworthy, which increases the chance it can be admitted as evidence in a court of law. On the other hand, non-compliance of a recordkeeping standard may be grounds from which opposing counsel may object to the admissibility of a business record. Thus, recordkeeping standards can support the creation of admissible evidence, but a subsequent question must then be considered. Do existing recordkeeping standards provide the necessary measure of guidance to address admissibility issues and, if not, how could they be improved?

### **7.2.2 Research Question #2**

**Research Question 2:** Does the content of recordkeeping standards, as they presently exist, provide sufficient legal protection to an organization's business records?

**Sub-Question 2.1:** If yes, in what way? If not, how should these standards be modified to afford an organization better legal protection?

Even though the research revealed that recordkeeping standards do not play a prominent role in legal decisions about admissibility, the author felt it was important to consider whether, and how, current recordkeeping standards provide guidance that supports the management of records to increase the likelihood of their admissibility as evidence. In general, it was found that while some recordkeeping standards do address legal issues associated with the admissibility of evidence, their guidance could be much more specific and commanding.

Recordkeeping standards have many purposes in an organization. According to Pember, they "ensure efficiency, effectiveness, and accountability, reduce costs, and mitigate risk in the management of corporate records and information."<sup>7</sup> Legal risks may include the inability of a business to produce records for court that would be admissible as evidence. As this study revealed, recordkeeping standards can help an organization be prepared in the event that it encounters legal action.

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<sup>7</sup> Pember, "Sorting Out the Standards," 26

The three recordkeeping standards that focus specifically on legal issues—*Electronic Records as Documentary Evidence*, *Legal Acceptance of Records*, and *Records Management Responsibility*—are limited in their capacity to help Canadian organizations prepare for legal risks associated with the admissibility of business records. By examining these standards against the criteria most frequently cited as reasons not to admit business records as evidence, it was possible to assess their legal value. Their analysis revealed that the standards lack the necessary completeness to make them effective tools to help records professionals mitigate legal risks. For example, the standards lack terminology that distinguishes important concepts, such as the phrase “the usual and ordinary course of business.” Moreover, two of the standards lack adequate guidance about the best evidence rule, because they do not indicate that to satisfy this legal principle when presenting copies of records as evidence, counsel must explain to a judge why and how the original record was destroyed. And all of the standards overlook the role of metadata in defending the trustworthiness of a record.

The research found that the standards investigated are not, as presently constructed, strong enough to help Canadian records professionals prepare their organizations for the legal risks considered in this study. The challenge, then, as posed in sub-question 2.2, is to determine how these standards can be modified to afford an organization better legal protection. Of course, revising recordkeeping standards to address legal issues more accurately and robustly may also have a broader positive impact on recordkeeping practices. For example, if standards were to articulate more clearly the meaning of, and the importance of, the concept of “usual and ordinary course of business,” records professionals may be able to improve the recordkeeping practices in their organizations, ideally resulting in increased recordkeeping accuracy and improved efficiency.

For instance, if a strict set of procedures is developed for the creation of meeting minutes, based on guidance provided in recordkeeping standards that link legal admissibility with the legal

concept of contemporaneity, employees will allocate adequate time to write up the minutes and have them authorized so that they are created at or near the time of the event they depict. Similarly, if a standard articulates the significance of maintaining clear, accurate, and up-to-date disposition schedules and authorities in order to address questions linked to the best evidence rule, records staff may find it easier to secure senior management approval for the consistent application of those authorities. Moreover, if standards emphasize the importance of a duty to record information in the “usual and ordinary course of business,” this requirement may be incorporated in organizational policies, helping to reduce the number of employees who use their personal phones or e-mail accounts to conduct core business activities. If recordkeeping standards were more closely linked to legal issues, and if organizational policies and procedures were developed and maintained to reflect the requirements of those standards, records professionals would be in a much stronger position when required to provide evidence of the recordkeeping practices of the organization and to support the admission of business records as evidence.

By themselves, recordkeeping standards may not be able to demonstrate that a record is trustworthy. And the standards as they exist today do not address legal issues in a sufficiently robust manner. Still, the consistent application of recordkeeping standards may help an organization justify its recordkeeping actions and decisions, providing support when the organization faces legal challenges. Further, the application of standards can also help records professionals demonstrate that the processes involved with creating and managing records are carried out in a systematic, routine, and timely manner, thereby increasing the likelihood that the organization will be well prepared in the event of litigation.

### **7.3 Significance of the Study**

This exploratory study has identified and articulated baseline findings about the nexus between recordkeeping standards and the law, in relation to the admissibility of business records as



evidence. As a result, this study makes several contributions to the literature of the field of records management.

Records professionals acknowledge that recordkeeping standards are an important resource for an organization that wants to implement a successful records management program.<sup>8</sup> For the most part, the mere existence of these standards has been praised; their application has been considered essential to the development of robust and accountable information frameworks. But this assumption of the inherent value of standards has not been subject to critical examination. This is the first study to analyze several principal recordkeeping standards in a systematic fashion, to determine whether the guidance they provide offers the necessary support for legal compliance.

Further, this study also revealed that existing recordkeeping standards do not provide comprehensive guidance to support effective recordkeeping particularly with regard to the question of the admissibility of evidence. The literature about recordkeeping standards assumes that the content of recordkeeping standards is complete and authoritative, and that the standards have been created to address truly critical recordkeeping issues. The findings of this study indicate that only two recordkeeping standards have been designed specifically to address Canadian records issues,<sup>9</sup> but that neither of these standards comprehensively addresses the admissibility of business records.

Another significant contribution of this study, therefore, is its discovery that the recordkeeping standards examined do not address and provide guidance to help mitigate serious records risks, particularly the legal risks associated with the exclusion of the admissibility of business

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<sup>8</sup> John Bolton, "Standards: Providing a Framework for RIM Success," *Information Management Journal* 45, no. 3 (2011): 30-35.

<sup>9</sup> *Electronic Records as Documentary Evidence*, CAN/CGSB-72.34-2005 (Gatineau: Canadian General Standards Board, 2005) and *Microfilm and Electronic Images as Documentary Evidence* (CAN/CGSB-72.11-93) (1993). The latter, however, has been superseded by the former.

records.<sup>10</sup> Accountable and reliable recordkeeping systems are crucial to ensuring the trustworthiness of business records, and therefore, to supporting the admission of those records as evidence in a Canadian court of law. Thus, this study identifies specific actions that records professionals could undertake to create best practice records management programs that mitigate legal risks.

This study has examined Canadian evidence law from a recordkeeping perspective. The methodology developed for this study is as valuable as the actual findings. This research provides a baseline framework for more robust studies of legal rulings and the admissibility of evidence.

This study also reviews how Canadian courts have dealt with business records as evidence from the traditional common law to the principled approach to hearsay. This study contributes to Canadian recordkeeping literature by discussing the historical development of the business records exception to the hearsay rule. This analysis will benefit recordkeeping professionals by acquainting them with legal issues specific to the admissibility of business records.

Finally, this study indicates that the process of tendering a business record as evidence cannot be taken for granted. Canadian judges do not simply admit as evidence a business record without first assessing its trustworthiness. The findings of this study present insight about how British Columbia and Ontario judges have defined the concept of “the usual and ordinary course of business,” in order to determine if a record is admissible. The study reveals that, for a disputed business record to be admitted as evidence, judges must have access to a clear and precise explanation of the recordkeeping practices of the organization. Judges pay close attention to who made the record, when was it made, what purpose the record served, and how the record was

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<sup>10</sup> Victoria L. Lemieux, “The Records-Risk Nexus: Exploring the Relationship between Records and Risk,” *Records Management Journal* 20, no. 2 (2010): 199-216 and Victoria L. Lemieux, *Managing Risks for Records and Information* (Lenexa, KS: ARMA International, 2004).

maintained. These questions strike at the very core of the duties and obligations of records professionals.

The costs of litigation are significant. And those costs are not just monetary. An organization risks its reputation, its future operations, and its credibility whenever it encounters litigation. This study has provided a framework to assist records professionals identify and prioritize recordkeeping duties that may help organizations save time and money in the event their records are needed as evidence. These actions can only contribute to the development and perseverance of the organization.

#### **7.4 Implications of the Study**

This study provides records professionals with an approach to understanding the criteria that Canadian judges require a business record to meet before that record can be admitted as evidence in court. The research indicates that the simple fact that a record was created in the usual and ordinary course of business does not mean that the record will be admitted without first being scrutinized by a judge. Thus, a lawyer needs to be rigorous when preparing a business record to be tendered as evidence. This means that a lawyer must ensure he/she can prove to the judge the circumstances that led to the creation, use, and maintenance of the record at issue. The lawyer can benefit from working closely with records management professionals within the organization to achieve this objective, and records professionals can improve the likelihood that a record is admitted by taking a more active role in the creation and management of business records and, in some cases, by providing expert testimony on the processes of records creation and recordkeeping within an organization.

The findings of this study, then, show that records professionals play an important role in increasing the likelihood that business records will be admitted as evidence. They create policies and procedures that contribute to how an organization defines its “usual and ordinary course of

business.” Moreover, records professionals may help legal counsel identify witnesses who can testify about the trustworthiness of records, and may provide important testimony or documentation that, for example, justifies the decision to use copies of records instead of originals or confirms that a record was made contemporaneously to the event it depicts. Given this necessarily close relationship between legal counsel and records professionals, this study demonstrated the importance for organizations to have qualified records professionals on staff who implement and maintain a robust records management program. This records program should be provided with the resources necessary to ensure it can offer recordkeeping services that protect the organization from legal risk.

Finally, this study has implications for the future development of recordkeeping standards. The research demonstrates that recordkeeping standards might be more useful to records professionals as tools to mitigate legal risks if the standards were to contain more specific legal guidance. That guidance could then be used to support real and concrete changes in recordkeeping practices, reducing the chance that the organization is exposed to legal risks while increasing the quality and consistency of records practices.

## **7.5 Future Research**

The exploratory nature of this dissertation research and its findings have led this author to consider a series of potential research projects, involving both additional analysis of recordkeeping standards and technology and more detailed examination of legal issues. Some ideas for research studies are suggested below.

### **7.5.1 Recordkeeping Standards and Technology Research**

There is a need for more extensive investigation into recordkeeping standards. First and foremost, it is important to analyze the perception and use of recordkeeping standards among records professionals. The literature clearly indicates that standards are perceived as useful, but are

records professionals actually using them? If so, which ones? If not, why not? Answers to these questions may influence the development of standards by identifying weaknesses in existing standards or gaps in the coverage of standards. Such research may also shed light on what legal risks, if any, records professionals focus on most often, and whether the risks they address are, in fact, the risks they should be most concerned about. Research could also consider whether records professionals require additional resources to confront those risks adequately.

Records professionals would also benefit from research that investigates the relationship among recordkeeping standards. For example, this study has highlighted a range of criteria that business records must satisfy in order to be admitted in a Canadian court of law and examines how those criteria are addressed in a select number of standards. A valuable study would examine whether those same criteria are articulated in other recordkeeping standards that focus exclusively on electronic recordkeeping systems, such as DoD 5015.12, MoReq2010, and *Requirements for Records in Electronic Office Environments* (ISO/TR 15801:2009). Such research might also illustrate how records professionals could make better use of various standards, including understanding their commonalities and differences, in order to design records management programs that are less susceptible to legal risks.

Additionally, it would be interesting to examine the relationship between recordkeeping standards and other professional standards used within an organization. As mentioned in Chapter 6, recordkeeping standards are only a small percentage of the vast array of standards used by different professions. Are these standards compatible with each other or are they in conflict? How can an organization use multiple standards simultaneously and ensure they each support specific goals without compromising operations in other areas?

### **7.5.2 Legal Research**

Several studies could be conducted to address the relationship between recordkeeping and the law; the findings may help strengthen records management theory and practice. For instance, records professionals may benefit from a study on how the courts have assessed the admissibility of specific types of records. Though the legal literature indicates that all records should be treated equally, it would be useful to examine whether judges emphasize different sets of criteria when reviewing different types of records. For example, are medical records assessed differently from police records, and police records differently from government records? This research may influence how records professionals manage their records.

Additional research could be conducted to compare the findings of this study against similar research in other common law jurisdictions, such as the United States, United Kingdom, and Australia. Since, in theory, all common law countries adhere to the same or similar sets of criteria, do judges apply these criteria in similar or different ways? Are recordkeeping standards more important in these jurisdictions than they proved to be in Canada? Comparative research will highlight differences that may benefit all jurisdictions studied.

### **7.6 Limitations of Study**

Throughout the course of this study, this author identified several limitations of the research. One of the primary limitations is in the ability to generalize the findings of this study. The constructivist design of the research study implies that its findings cannot be assumed to apply to other Canadian provinces or to other common law jurisdictions, such as the United States or England, without further validation.

Given the nature of this study as a doctoral dissertation project, the author developed and conducted the analysis alone. Though intercoder reliability testing is viewed as a central component

of content analysis methodology,<sup>11</sup> it was not considered a feasible approach in this particular study. The exploratory nature of the study precluded the review and testing of the coding scheme by other researchers. The complex and unique nature of this research project, coupled with its high number of codes, would have limited the ability of independent coders to properly and accurately assess the codes.<sup>12</sup> Therefore, the codes used to review the case law were not independently tested. These codes, however, represent the precise language used by the judges, and the author spent considerable time researching the meaning of the particular terms used, so that he could interpret them accurately in relation to the research questions under investigation. The author hopes subsequent research will build on the findings of this data and that perhaps a more expansive analysis can be undertaken at some time in the future.

The sample of case law that formed the corpus for this study is selective and not representative of all Canadian rulings. The reality is that many evidentiary issues are not contested and many such rulings are not reported or appealed.<sup>13</sup> A comprehensive examination of the rulings from all provinces and territories would have been ideal, but the considerable volume of case law emanating from British Columbia and Ontario gave the author a manageable sample on which to conduct a viable content analysis to draw some preliminary conclusions for the basis of an exploratory study. Again, future academic research may benefit from expanding the samples to reach across the country.

In determining the codes used to analyze the recordkeeping standards, the author focused on rulings that contained inadmissible records, since the focus of the study was on discovering why records were not admitted as evidence. The author did consider a selection of rulings that involved

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<sup>11</sup> Young Ik Cho, "Intercoder Reliability," in *Encyclopedia of Survey Research Methods*, ed. Paul J. Lavrakas (Thousand Oaks, CA: Sage Publications, 2008), 345.

<sup>12</sup> Johnson, "Content-Analytic Techniques and Judicial Research," 186.

<sup>13</sup> Swift, 473.

admissible records and found that the criteria supported the author's findings. However, it may be useful to develop a research study that carries out a systematic analysis of Canadian rulings that contain business records admitted as evidence. Such a study may expand on the findings of this exploratory research to consider issues of admissibility and inadmissibility in a manner broader than was possible with this research.

This study does not discuss admissibility issues associated with electronic records. Legal scholars have argued that "digital technology has fundamentally changed the world of real evidence, particularly regarding authentication of informational records"<sup>14</sup> and the judicial system needs to create new foundations to ensure the information's authenticity.<sup>15</sup> Some Canadian legislation has been amended to address electronic records.<sup>16</sup> Though this author was prepared to explore matters related to electronic records and their admissibility, the data set for this study contained only two electronic business records as declared by the presiding judges, out of a total of 477 records identified.<sup>17</sup> Such a small sample of electronic business records did not permit the author to conduct any detailed analysis or develop strong conclusions about the admissibility of electronic records. Therefore, addressing electronic records in general, or their admissibility in particular, was a topic that would have required developing a different data set, transforming the scope of this project beyond its original intentions.

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<sup>14</sup> George L. Paul, "The 'Authenticity Crisis' in Real Evidence," *The Practical Litigator* 15, no. 6 (November, 2004), 46. See also Rudolph J. Peritz, "Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence," *Northwestern University Law Review* 80, no. 4 (1986): 956-1002 and Stanley A. Kurzban, "Authentication of Computer-Generated Evidence in the United States Federal Courts," *IDEA: The Journal of Law and Technology* 35, no. 4 (1995): 437-460.

<sup>15</sup> George L. Paul, *Foundations of Digital Evidence* (Chicago: American Bar Association, 2008).

<sup>16</sup> In 1988 the province of Prince Edward Island assented its *Electronic Evidence Act*, RSPEI 1988, c E-4.3, and two years later, the legislator of the Yukon Territories assented its version of the same statute: *Electronic Evidence Act*, RSY 2002, c 67. In 2000, Canadian federal legislators added subsections 31.2-31.8 of the *Canada Evidence Act*, while Ontario legislators amended the Ontario *Evidence Act* to include subsections 34.1(1)-34.1(11); both amendments specifically address the admissibility of electronic evidence.

<sup>17</sup> *R v Nicholas* (2004), CarswellOnt 8225 (Ct J), [2004] OJ No 6186 (QL) and *R v LB*, 2009 BCSC 1194, [2009] no 1741 (QL)



## 7.7 Final Thoughts

The admissibility of business records is an issue that requires the ongoing attention of records professionals but has not received much attention so far. The reasons are not clear. It could be that records professionals are not concerned with legal risks associated with admissibility issues. Or it could be that the amount of duties required of records professionals prevent them from devoting their time and energy to these issues. This author believes that the issue of records as legal evidence cannot be overlooked. This study has shown that Canadian judges require counsel to demonstrate that a business record is trustworthy before the record can be admitted as evidence. The failure to admit business records as legal evidence costs an organization time and money, can damage its reputation, and can result in serious penalties if a civil or criminal case is lost on the basis of weak evidence.

The challenge for records professionals is not, in most circumstances, ensuring that business records are trustworthy. Instead, the difficulty lies in understanding how that trustworthiness is demonstrated in a court of law and then ensuring records practices support the creation of a record that meets that test. How can records professionals know what they need to do, and how they need to do it?

Recordkeeping standards may serve as a catalyst, pushing an organization to establish a more transparent and accountable records management program. The value of recordkeeping standards has been recognized by authors such as Duff, who says that by “highlighting the similarity between recordkeeping requirements and the requirements delineated in authoritative statements in the law, auditing standards, and professional best practices, [records professionals] will increase the power of their message.”<sup>18</sup> However, as this study has indicated, standards that address legal issues need to be more rigorous when making recommendations about records practices,

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<sup>18</sup> Duff, 105.

particularly in relation to how an organization may mitigate legal risks. Until these changes occur, records professionals will continue to work diligently but blindly, as they struggle to formalize procedures that help their organizations create authentic and reliable records that might be accepted as evidence in a court of law. It is hoped that, someday, effective, accountable, legally compliant records management practices will ensure that organizations have a clearly established “usual and ordinary course of business.”

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## **Appendix A: Business Records Exception Provisions of the *Canada Evidence Act*, *British Columbia Evidence Act*, and the *Ontario Evidence Act***

This appendix represents the precise wording of the business records exception to the hearsay rule sections of three statutes: the *Canada Evidence Act*, *British Columbia Evidence Act*, and the *Ontario Evidence Act*. The wording quotes directly the sections of the Acts at the time of the writing of this dissertation.

### ***Canada Evidence Act*, RSC 1985, c C-5**

30(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, 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.

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

- (a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or
- (b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

- (a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or
- (b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so

produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, 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.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section,

“business”

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department,

branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

“copy” and “photographic film”

“copy”, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and “photographic film” includes a photographic plate, microphotographic film or photostatic negative;

“court”

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“legal proceeding”

« procédure judiciaire »

“legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

“record”

“record” includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

### **British Columbia *Evidence Act*, RSBC 1996, c 124**

42 (1) In this section:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

(b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

(3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

(4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

(5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

**Ontario Evidence Act, RSO 1990, c E.23**

35. (1) In this section,

“business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

“record” includes any information that is recorded or stored by means of any device.

(2) 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.

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party’s intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) 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.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

## Appendix B: Original Code Book

This appendix is the original code book developed for this study. The code book lists the fifty-five codes divided among the different admissibility authorities.

<b>Common Law</b>	
1.	Witness did not have personal knowledge of the facts
2.	No evidence record made contemporaneously
3.	Business routine unclear or unknown
4.	Not purported to be a business record
5.	Failure to satisfy best evidence rule (no explanation why original record could not be produced)
6.	Witness not under a duty to record the particular act
7.	Maker of the record had motive to misrepresent (opinion)
8.	Unclear where the record came from
9.	Unclear how the record was prepared
10.	Unclear who made the record
11.	Maker of the record had motive to misrepresent (litigation)
12.	Not required to keep the record
13.	No evidence record kept in the usual and ordinary course of business
14.	Not made in the routine of business
15.	Unclear if record was properly made
16.	No witness to cross-examine
17.	Other evidence available
18.	Witness's qualifications unclear
<b>Canada Evidence Act</b>	
19.	30(1) — Where oral evidence would not be admitted
20.	30(1) — Record not made in the usual and ordinary course of business
21.	30(7) — Failure to provide appropriate notice to use the records
22.	30(10)(a)(i) — A record made in the course of an investigation or inquiry
23.	30(3) — No explanation for not being able to produce the original
24.	30(12) — No evidence of the record being a business record of the organization
25.	30(6) — No affidavit evidence produced to account for the record at issue
26.	30(10)(a)(ii) — A record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding

<b>British Columbia Evidence Act</b>	
27.	42(2) – Direct oral evidence would not be admissible
28.	42(2)(b2) – Record not created in a timely manner after the fact
29.	42(2)(a) – Record was not made in the usual and ordinary course of business
30.	42(2)(b) – Not the usual and ordinary course of business to create the record
31.	42(4) – Legal proceedings pending
32.	42(1) – Not a business record
<b>Ontario Evidence Act</b>	
33.	35(2) – Is not any writing or record made of an act, transaction, occurrence or event (i.e., is an opinion)
34.	35(2) – Not made in the usual and ordinary course of business
35.	35(2) – Was not the usual and ordinary course to make the record
36.	35(2) – Not made at or within a reasonable time of the act
37.	35(3) – Insufficient notification
<b>Principled Approach</b>	
Necessity	
38.	Reasonable effort not made to determine if a person would attend the trial
39.	Witness could testify
40.	Evidence at issue compromised
Reliability	
41.	Insufficient evidence to determine how the record was created
42.	Insufficient evidence to determine the source of the record
43.	Insufficient evidence to determine how the record was used
44.	Statements made with litigation imminent or pending
45.	Insufficient evidence to determine who made the record
46.	Insufficient evidence to determine when the record was produced
47.	Author of the record had motive to misrepresent the contents of the record
48.	Record not made in the routine or usual and ordinary course of business
49.	Insufficient evidence to determine how the record was produced
50.	Insufficient evidence to determine if witness did not misrepresent statement
51.	Contradicted witness testimony
52.	Statements self-serving
53.	Is an opinion
54.	Opposing counsel could not review the record
55.	No duty to make the record

## Appendix C: Coding Results per Each Admissibility Authority

This appendix provides the initial coding results of the rulings according to each admissibility authority. The appendix contains details about the number of records coded per criterion and the number of rulings each code represents.

Common Law Codes (BC & ON)		# of Records Coded	# of Rulings Represented
1.	Witness did not have personal knowledge of the facts	16	7
2.	No evidence record made contemporaneously	6	4
3.	Business routine unclear or unknown	5	2
4.	Not purported to be a business record	5	1
5.	Failure to satisfy best evidence rule (no explanation why original record could not be produced)	5	2
6.	Witness not under a duty to record the particular act	4	3
7.	Maker of the record had motive to misrepresent (opinion)	4	4
8.	Unclear where the record came from	4	1
9.	Unclear how the record was prepared	4	1
10.	Unclear who made the record	4	1
11.	Maker of the record had motive to misrepresent (litigation)	4	3
12.	Not required to keep the record	2	1
13.	No evidence record kept in the usual and ordinary course of business	1	1
14.	Not made in the routine of business	1	1
15.	Unclear if record was properly made	1	1
16.	No witness to cross-examine	1	1
17.	Other evidence available	1	1
18.	Witness's qualifications unclear	1	1



Canada Evidence Act Codes (BC & ON)		# of Records Coded	# of Rulings Represented
19.	30(1) — Where oral evidence would not be admitted	18	7
20.	30(1) — Record not made in the usual and ordinary course of business	15	5
21.	30(7) — Failure to provide appropriate notice to use the records	13	5
22.	30(10)(a)(i) — A record made in the course of an investigation or inquiry	9	7
23.	30(3) — No explanation for not being able to produce the original	7	1
24.	30(12) — No evidence of the record being a business record of the organization	5	1
25.	30(6) — No affidavit evidence produced to account for the record at issue	5	1
26.	30(10)(a)(ii) — A record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding	2	2

British Columbia Evidence Act Codes		# of Records Coded	# of Rulings Represented
27.	42(2) – Direct oral evidence would not be admissible	27	13
28.	42(2)(b2) – Record not created in a timely manner after the fact	11	4
29.	42(2)(a) – Record was not made in the usual and ordinary course of business	5	2
30.	42(2)(b) – Not the usual and ordinary course of business to create the record	7	4
31.	42(4) – Legal proceedings pending	7	5
32.	42(1) – Not a business record	1	1

Ontario Evidence Act Codes		# of Records Coded	# of Rulings Represented
33.	35(2) – Is not any writing or record made of an act, transaction, occurrence or event (i.e., is an opinion)	13	3
34.	35(2) – Not made in the usual and ordinary course of business	8	1
35.	35(2) – Was not the usual and ordinary course to make the record	2	2
36.	35(2) – Not made at or within a reasonable time of the act	5	2
37.	35(3) – Insufficient notification	12	5

Principled Approach Codes (BC & ON)	# of Records Coded	# of Rulings Represented
Necessity		
38. Reasonable effort not made to determine if a person would attend the trial	9	3
39. Witness could testify	14	6
40. Evidence at issue compromised	2	1
Reliability		
41. Insufficient evidence to determine how the record was created	52	2
42. Insufficient evidence to determine the source of the record	9	2
43. Insufficient evidence to determine how the record was used	5	1
44. Statements made with litigation imminent or pending	4	3
45. Insufficient evidence to determine who made the record	3	2
46. Insufficient evidence to determine when the record was produced	2	1
47. Author of the record had motive to misrepresent the contents of the record	2	1
48. Record not made in the routine or usual and ordinary course of business	1	1
49. Insufficient evidence to determine how the record was produced	1	1
50. Insufficient evidence to determine if witness did not misrepresent statement	1	1
51. Contradicted witness testimony	1	1
52. Statements self-serving	1	1
53. Is an opinion	1	1
54. Opposing counsel could not review the record	1	1
55. No duty to make the record	1	1

## Appendix D: Number of Records Coded per Each Category

This appendix indicates the number of records coded per each category as well as identifies which codes were placed in which of the six categories.

### Category 1: Lack of Personal Knowledge of the Fact that Resulted in the Creation of the Record

Admissibility Authority	Codes	# of Records Coded
Common Law	Declarant did not have personal knowledge of the facts	16
Common Law	Maker of the record had motive to misrepresent (opinion)	4
Common Law	Unclear where the record came from	4
Common Law	Unclear how the record was prepared	4
Common Law	Unclear who made the record	4
Canada Evidence Act	30(1) – Where oral evidence would not be admitted	18
British Columbia Evidence Act	42(2) – Direct oral evidence would not be admissible	27
Ontario Evidence Act	35(2) – Is not any writing or record made of an act, transaction, occurrence or event	13
Principled Approach to Hearsay	Is an opinion	1
<b>Total</b>		<b>91</b>

### Category 2: Insufficient Information about the Record

Admissibility Authority	Codes	# of Records Coded
Principled Approach to Hearsay	Insufficient evidence to determine how the record was created	52
Principled Approach to Hearsay	Insufficient evidence to determine the source of the record	9
Principled Approach to Hearsay	Insufficient evidence to determine how the record was used	5
Principled Approach to Hearsay	Insufficient evidence to determine who authored the record	3
Principled Approach to Hearsay	Insufficient evidence to determine how the record was produced	1
<b>Total</b>		<b>70</b>

**Category 3: Record Not Created in the Usual and Ordinary Course of Business**

Admissibility Authority	Codes	# of Records Coded
Common Law	Not created in the routine of business	1
Common Law	No evidence record kept in the usual and ordinary course of business	1
Common Law	Business routine unclear or unknown	5
Canada Evidence Act	30(1) – Record not made in the usual and ordinary course of business	15
British Columbia Evidence Act	42(2)(a) – Record not made in the usual and ordinary course of business	5
Ontario Evidence Act	35(2) – Record not made in the usual and ordinary course of business	8
Principled Approach to Hearsay	Not made in the routine or usual and ordinary course of business	1
<b>Total</b>		<b>36</b>

**Category 4: Records Not Made Contemporaneously**

Admissibility Authority	Codes	# of Records Coded
Common Law	No evidence record made contemporaneously	4
British Columbia Evidence Act	42(2)(b2) – Record not created in a timely manner after the fact	13
Ontario Evidence Act	35(2) – Record not made at or within a reasonable time of the act	5
Principled Approach to Hearsay	Insufficient evidence to determine when the record was produced	3
<b>Total</b>		<b>25</b>

**Category 5: Not the Usual and Ordinary Course of Business to Create the Record**

Admissibility Authority	Codes	# of Records Coded
Common Law	Declarant not under a duty to record the particular act	4
Common Law	Unclear if the record was properly made	1
British Columbia Evidence Act	42(2)(b) – Not the usual and ordinary course of business to create the record	7
Ontario Evidence Act	35(2) – Was not the usual and ordinary course to make the record	2
Principled Approach to Hearsay	No duty to make the record	1
<b>Total</b>		<b>15</b>

**Category 6: No Explanation for Why Original Record Could Not be Produced**

Admissibility Authority	Codes	# of Records Coded
Common Law	Failure to satisfy best evidence rule (no explanation why original record could not be produced)	4
Canada Evidence Act	30(3) — No explanation for not being able to produce the original	7
<b>Total</b>		<b>11</b>