The Admissibility of Social Media Evidence in Canada:

Part 1

Wayne K. Gorman

Any trials arising out of the events in Washington, D.C., on Wednesday, January 6, 2021, are likely to result in attempts to introduce what has been described in Canada as "social media evidence," i.e., text messages, Facebook postings, selfies, etc. (see Lisa A. Silver, *The Unclear Picture of Social Media Evidence*, MANITOBA L. J., 43, no. 3 (2020) at 111). Professor Silver has noted that "social media is often the context in which criminal offences can be committed. It can provide a space in which offences are committed and it can provide proof of it as well" (at 117-118).

Interestingly, social media evidence is often viewed as extremely reliable because it is presented in a manner in which judges can hold, see, and review on their own. Like other documentary evidence, it can be viewed as superior to testimonial evidence, though it is subject to many of the same inherent frailties (see ***Scott v. Harris***, 550 U.S. 372 (2007), for an example of how viewing the same video recording led numerous judges to different conclusions).

Some of the issues raised by electronic evidence were summarized by the authors of MCWILLIAMS' CANADIAN CRIMINAL EVIDENCE (Casey Hill, David M. Tanovich, and Louis P. Strezos, 5th. ed., Toronto: Canada Law Book, 2020, loose-leaf) in the following manner (at paragraph 24:90.10):

> Electronic evidence poses unique problems from an evidentiary standpoint. One problem is classification. Are records generated on, or even by, a computer analogous to documents, to real evidence, or to neither? Is a printout the original? Are there any "originals" for electronic evidence?

In this column, I am going to review how this relatively new area of evidence law has developed in Canada. As will be seen, in assessing the admissibility of such evidence, Canadian judges have relied upon both common-law principles and statutory provisions contained within the Canada Evidence Act, R.S.C. 1985. The column, because of its length, is divided into two parts. The first part, presented here, will consider the admissibility of social media evidence in Canada at common law. The second part (which will be presented in volume 57:3), will consider the admissibility of such evidence in Canada pursuant to the Canada Evidence Act as well as a summary/conclusion.

PART 1

This area of evidence law has received significant appellate consideration in Canada in 2020 and early 2021. One of the most important areas considered in these decisions involves the issue of authentication. This is, in many ways, the key question because it is crucial to admissibility. However, before considering this area of law, the first question to ask is: Does a trial judge have to hold a *voir dire* when social media evidence is sought to be introduced?

IS A *VOIR DIRE* NECESSARY?

In ***R. v. Durocher***, 2019 SKCA 97, this question arose in the context of a trial in which the Crown was allowed to introduce text messages said to have been sent by the accused to the complainant (L.A.) through Facebook.

L.A. testified that the accused "had sent Facebook messages to her several days before the alleged assaults took place, saying 'gross things.' On several such occasions, she responded by telling him to 'shut up' and once used the abbreviation 'STFU' (shut the fuck up). L.A. says she continued to receive Facebook messages from Mr. Durocher for several weeks after the alleged assaults took place." When asked how she knew that it was the accused who had sent her the messages, she responded: "Because it says his name."

These messages were entered as evidence without a *voir dire* being held. The accused was convicted and appealed, arguing that the trial judge erred in allowing the social media evidence to be introduced without conducting a *voir dire*.

The Saskatchewan Court of Appeal indicated that the "impugned evidence in this appeal concerns an out-of-court statement purportedly made by Mr. Durocher who, at trial, took issue with whether he was the author of the Facebook messages. Mr. Durocher now argues this evidence should not have been admitted without a ruling to that effect following a *voir dire*" (at paragraph 41).

The Court of Appeal held that a *voir dire* was not necessary "to address threshold admissibility when authorship is in issue. Considering that the authorship of the Facebook messages was at issue, the trial judge was only required to consider whether the evidence proved on a balance of probabilities that Mr. Durocher wrote the Facebook messages" (at paragraph 46). The Court of Appeal stressed that in "exercising his gatekeeper function at the threshold admissibility stage, the trial judge only needed to be satisfied on a balance of probabilities that the statements were made by Mr. Durocher. He was entitled to rely on circumstantial evidence to do so and, importantly, he was not required to hold a *voir dire* to make a threshold determination at this stage" (at paragraph 52).

This, however, appears to "beg the question." Authentication will always require some evidence. How is this evidence to be considered without a *voir dire* if the admissibility of the evidence is contested? This does not mean that the *voir dire* has to be extensive. For instance, in Canada statements made by the

accused to someone other than a "person in authority" are generally admissible as an exception to the hearsay rule and do not require a *voir dire* (see ***R v S.G.T.*** [2010], 1 SCR 688, at paragraph 20).[1] But, if it is argued that the statement was not made by the accused, some evidence that it was must be presented. As noted in ***R. v. Ball***, 2019 BCCA 32, "as with other admissibility issues, where there is reason to question whether an electronic document meets the statutory requirements, a *voir dire* should be held and a reasoned determination made as to its admissibility" (at paragraph 67).

In ***Ball***, the accused was convicted of the offence of arson. At his trial, his girlfriend (Ms. Lacey) testified that the accused had sent her Facebook messages indicating that he had committed the offence. The Crown introduced photographs the police had taken from a computer screen illustrating the contents of the messages. The British Columbia Court of Appeal noted that Ms. Lacey "was the only Crown witness called to explain the operation of Facebook Messenger, which she characterized as similar to text messaging" and that a *voir dire* had not been held.

The accused appealed from conviction. The appeal was allowed and a new trial was ordered. The British Columbia Court of Appeal pointed out that the Facebook messages "were extremely important Crown evidence. They included Mr. Ball's alleged admission to setting the fires and a computer-generated time stamp associating the first message with the time" of the fire. . . . Nevertheless, their admissibility was not questioned and a *voir dire* was not conducted. Therefore, the judge did not make a reasoned determination on whether the photographed messages were admissible and, if so, the permissible use for their computer by-product content" (at paragraph 81).

Professor Silver notes that authenticity "requires an investigation into whether the real evidence is what it claims to be. This differs from testimonial evidence where the person, for admissibility purposes, is taken at their word, leaving credibility issues for the final determination" (at 122). She concludes that "an electronic evidence admissibility *voir dire* should be required in all instances where social media evidence will be introduced. This is so 'a reasoned determination' may be made on its admissibility. The trial judge should not wait for counsel to engage the process but should raise the issue at the outset. For consistency, the *voir dire* should apply the admissibility regime under the *Canada Evidence Act*" (at 153).

Interestingly, in ***Durocher***, despite having concluded that the trial judge did not err in failing to hold a *voir dire*, the Court of Appeal indicated that that it would have been "preferable" for a *voir dire* to have been held in relation to whether the Canada Evidence Act's threshold authenticity and integrity requirements had been established by the Crown (at paragraph 96):

> Since the Crown sought to adduce electronic documents into evidence, it would have been preferable for the trial judge to have conducted a *voir dire* to determine threshold authenticity and integrity. However, bearing in mind the low bar attached to s. 31.1, the functional approach adopted by the courts with regard to its application, the presumption of integrity under the *CEA* and the fact the trial judge ultimately found Mr. Durocher was the author of the Facebook messages, I am satisfied that the evidence adduced by the Crown was capable of authenticating the Facebook messages.

Despite what may have been said in ***Durocher,*** anytime an objection to the introduction of social media evidence is raised, it is imperative that a *voir dire* be conducted. There may be times that admissibility can be readily established, but this does not alter the *voir dire* requirement.

AUTHENTICATING ELECTRONIC EVIDENCE

Evidence in the form of text messages, Facebook postings, and other electronic communications, once unknown, are now common forms of evidence sought to be introduced in Canadian courts. They constitute various forms of evidence, including confessions and prior inconsistent statements. They can be of great probative value, though they raise concerns about how their reliability can be ensured. Thus, the admission of such evidence, like many forms of evidence, requires proof of authentication, including, in certain cases, proof that they were sent by a relevant party. However, this proof must be analyzed in the context of the manner in which people in present-day society communicate.

Statements contained in text messages or other forms of electronic communication are a type of evidence that has been admitted for centuries. It is not the content of the evidence that is new. It is the format that is new. For instance, there would be nothing wrong with counsel cross-examining a complainant on a telephone call purportedly made to the accused or the Crown seeking to introduce a letter sent to by the accused, if relevant.

Thus, the authors of ELECTRONIC EVIDENCE IN CANADA note that "proof of authenticity and reliability is not concerned specifically with the substantive content of the proffered ESI [electronically stored information], but rather with where the ESI comes from, how it was obtained and handled, whether it can be trusted to be what it purports to be, and how reliable a source of information it is about a material issue (Graham Underwood and Jonathan Penner, Thomsen Reuters, 2020, loose-leaf, at 11-11). The authors also point out that authenticity "is not the same as reliability. 'Authenticity' refers to the quality of the ESI in being what

Footnotes

1. In ***R v S.G.T.***, the Supreme Court made a "distinction between an admission and a confession." The Court stated (at paragraph 20):

   > Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an accused to ordinary persons, such as friends or family members, they are presumptively admissible without the necessity of a *voir dire*. It is only where the accused makes a statement to a "person in authority", that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.

its proponent claims it to be. Authenticity is a measure of the likelihood that the proffered ESI is actually what it is described as, whereas 'reliability' is a measure of how well the proffered ESI communicates useful information about a matter that is in dispute" (at 11-15).

The Court of Appeal of Newfoundland and Labrador has made the same point, holding that "authentication does not mean the document is genuine . . . a piece of electronic evidence does not have to meet an additional standard of proof like the balance of probabilities or beyond a reasonable doubt in order to be admitted into evidence. Individual pieces of evidence tendered in a trial are admitted on the basis of relevance to a fact in issue, subject to exclusionary rules and the prejudice versus probative value inquiry" (see ***R. v. Martin***, 2021 NLCA 1, at paragraph 49).

THE TWO STAGES OF AUTHENTICATION

Authentication has two distinct stages: threshold admissibility and ultimate weight. It has also been held that the "threshold for authentication of evidence, both at common law and under s. 31.1 of the *Canada Evidence Act*, is modest: there must be evidence that is capable of supporting a finding that the electronic document 'is that which it is purported to be'" (see ***R. v. Farouk***, 2019 ONCA 662, at paragraph 60). I intend to consider the admissibility issue from both the common-law perspective and how this is achieved through the Canada Evidence Act.

AUTHENTICATION AT COMMON LAW

In ***Durocher***, it was noted that at "common law, authentication is a prerequisite to the admissibility of a document at trial." The Saskatchewan Court of Appeal explained that "this 'simply means that the trier of fact must be satisfied that the document in issue is what it purports to be.' . . . Methods of authentication include *viva voce* testimony, common law rules and presumptions, or statutory instruments" (at paragraph 75).

The issue of authentication was also considered by the Ontario Court of Appeal in ***R. v. C.B.***, 2019 ONCA 380. This case illustrates how easily authentication can be established in Canada.

In ***C.B.***, the accused was convicted of the offence of sexual assault. At his trial, the complainant (DP) was cross-examined on text messages she had purportedly exchanged with the accused. This was designed to contradict her testimony. DP agreed that telephone number from which various texts were sent was her cellphone number.

In convicting the accused, the trial judge ruled that the questioning in relation to the text messages was of no "probative value" because it had not been established that DP had sent the messages.

On appeal, the Ontario Court of Appeal ordered a new trial, holding that the trial judge "erred in concluding that the text messages had no probative value because they had not been properly authenticated by direct evidence" (at paragraph 73).

The Ontario Court of Appeal indicated that "the requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be. . . . At common law, authentication requires the introduction of some evidence that the item is what it purports to be. The requirement is not onerous and may be established by either or both direct and circumstantial evidence" (at paragraphs 64 and 66).

The Court of Appeal pointed out that "text messages may be linked to particular phones by examining the recorded number of the sender and receiving evidence linking that number to a specific individual, as for example, by admission. . . . As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient. . . . And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight" (at paragraphs 70 and 72).

The Court of Appeal concluded that the evidence presented at the trial was "capable of supporting a finding that the text messages were what they purported to be: an exchange of communications between D.P. and the appellant C.B. The trial judge erred in holding, as he appears to have done, that the authenticity threshold could only be met by direct evidence from the sender or expert opinion evidence from a forensic examiner" (at paragraph 77).

Thus, the simple admission that the text messages came from the witness's telephone was a sufficient basis for authentication and this admissibility.

In ***Durocher***, the issue involved text messages said to have been sent by the accused to the complainant (L.A.) through Facebook. The accused was convicted at trial and appealed from conviction, arguing that the trial judge erred in allowing this evidence to be introduced. The accused argued that it had not been proven that he sent the text messages.

On the issue of admissibility, the Saskatchewan Court of Appeal held that for "purposes of threshold admissibility, the Crown had to establish there was some evidence capable of supporting a finding—on a balance of probabilities—that the Facebook statements were made by Mr. Durocher" (at paragraph 48).

In considering this question, the Court of Appeal referred to the Supreme Court of Canada's decision in ***R. v. Evans*** [1993], 3 S.C.R. 653, in which the Supreme Court indicated that when the authorship of a statement attributed to an accused is in issue, a two-staged approach should be adopted (at page 668):

> . . . the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. In the second stage the contents are evidence of the truth of the assertions contained therein.

The Court of Appeal concluded in ***Durocher*** that the trial judge "properly applied the ***Evans*** test to determine threshold admissibility. Examining the circumstantial evidence as a whole, it was open to him to draw an inference that Mr. Durocher was

the author of the Facebook messages. L.A. provided *viva voce* testimony and a statement to the police that Mr. Durocher was the person who had sent the Facebook messages to her" (at paragraph 50).

The Court of Appeal stressed that in "exercising his gatekeeper function at the threshold admissibility stage, the trial judge only needed to be satisfied on a balance of probabilities that the statements were made by Mr. Durocher. He was entitled to rely on circumstantial evidence to do so" (at page 52).

In summary, the test for authentication and, thus, admissibility of social media evidence in Canada at common law involves a very low threshold, which can easily be established. What if the party seeks admission of an "electronic document" pursuant to the provisions of the Canada Evidence Act? This will be considered in Part 2.

Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

EDITOR'S NOTE

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Torres and his colleague Judge Reba Page. Judges Page and Torres lay down the gauntlet encouraging us to take up the challenges articulated in the articles that follow.

Next, we turn to one of the leading researchers and thinkers on implicit bias. If you are anything like me, you've had many trainings on implicit bias (and may have even taught a few) but you are tired of just learning about the problem and want to move to a meaningful discussion of what to do about it. Prof. Jerry Kang of UCLA brings his years of study and a truly delightful writing style to help you understand *What Judges Can Do About Implicit Bias.* I predict that this will be one of the most heavily circulated articles from *Court Review* across many years. We include a bench card illustrating Prof. Kang's discussion as our back cover.

The Washington State Supreme Court has long been a leader in tackling ways to improve racial justice in the courts. Two of its innovative champions, Chief Justice Debra Stephens and Judge Veronica Galvin, share with us some of what Washington has done and thoughts on how judges can take action in *Why Judges Should Not Mistake the Norm for the Neutral.*

In *A Call to Action,* we hear one judge's experience when he heard and heeded that call. Judge Gary Jackson shares his insights after a lifetime of championing the cause of racial justice, providing concrete examples of what judges can accomplish within the confines of our position.

Hewing to our theme of identifying practical steps to take on the path forward, we move to a report on the National Center for State Courts' Justice for All program in *Charting a Path Forward to Create Justice for All* by Danielle Hirsch and Lillian Wood.

For our final article, we turn to a movement previously started right here in the pages of *Court Review*. Judge Jamey Hueston (ret.) follows up her article of 2017, issue 54:2, to provide a prescription for reform in *The Compassionate Court: Reforming the Justice System Inside and Out.*

We also have contributions from our ethics columnist, Cynthia Grey, and our regular view from Canada by Judge Wayne Gorman. You may also enjoy the crossword and the Resource Page.

Our goal in this issue is to move forward from "awareness raising" about the shortcomings of justice in our system and move to pursuing constructive steps. You will agree with some of what you read in this issue and you may be outraged by some of it. My greatest hope is that you will be inspired to find the options that best fit your skills and outlook for addressing those broken windows in your courthouse—and that you will roll up your sleeves, pry those graffitied boards off the courthouse, get that new, better glass installed, and take down those barricades to our collective mission of delivering justice to all.

—David Prince