The Admissibility of Social Media Evidence in Canada

Part 2: The Canada Evidence Act

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In Part 1 of this column, I reviewed the law concerning the admissibility of social media evidence in Canada at common law. In this second part, I will consider its admissibility pursuant to the Canada Evidence Act. *Reprinted in* R.S.C. 1985, c. C-5. As noted in Part 1, the issue of authentication of social media evidence has been addressed by Canadian judges through both the common law and the Canada Evidence Act (Act). In *R. v. Hirsch*, it was suggested that the provisions in the Canada Evidence Act dealing with the admissibility of social media evidence "is a codification of the common law rule of evidence authentication." [2017] SKCA 14 at para. 18. This is true, but as will be seen, the statutory provisions are much broader than that, including how an "electronic document" is defined.

WHAT IS AN ELECTRONIC DOCUMENT?

The Canada Evidence Act contains several provisions dealing with the admissibility of "electronic documents". Section 31.8 provides the following broad definition of what constitutes an electronic document:

> [It] means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.

This definition has been described by one author as "[A] definition of imposing breadth, particularly when combined with the definition of 'data' in subsection 31.8—'representations of information or of concepts, in any form.' The statutory provisions do not therefore catch only documents in the conventional sense. They also catch at least some audio and video recordings." David M. Paciocco, *"Proof and Progress: Coping with the Law of Evidence in a Technological Age"* (2013) 11 CAN. J. L. & TECH. 181 at 190.

Paciocco also suggests that "[This] definition is broad enough to cover copies of all documents stored in a computer, such as business records, bulletin boards from Facebook or other social media, emails, and or 'tweets.'" Paciocco at 189.

A COMPUTER SYSTEM

The Canada Evidence Act also defines what constitutes a computer system. Section 31.8 provides the following definition:

> [C]omputer system means a device that, or a group of interconnected or related devices one or more of which,
> (a) contains computer programs or other data; and
> (b) pursuant to computer programs, performs logic and control, and may perform any other function.

In *R. v. Richardson*, the New Brunswick Court of Appeal held that:

> Facebook posts and messages, e-mails and other forms of electronic communication fall within the definition of an "electronic document." Home computers, smartphones and other computing devices fall within the definition of a "computer system." (Citation omitted). Likewise, MSN messages recorded or stored on a computer are "data" which falls within the definition of an "electronic document." [2020] NBCA 35 at para. 22.

In *R. v. Ball*, the Court noted "[T]he admissibility of Facebook messages and other electronic communications recorded or stored in a computing device is governed by the statutory framework." [2019] BCCA 32 at para. 67.

The broad definitions provided ensures that all forms of social media evidence will be subject to the admissibility criteria set out in the Canada Evidence Act, which is set at a minimal level.

AUTHENTICATION PURSUANT TO THE CANADA EVIDENCE ACT

The Canada Evidence Act, under the heading "Authentication of electronic documents," states the following at section 31.1:

> Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

This is the same test applied at common law and, as we saw in Part 1, it creates a very low threshold for admissibility. If, for instance, a witness says, "I received or sent this text message to or from Mr. Smith," then subject to relevance, the text is admissible. In *Hirsch*, it was noted that section 31.1 of the Canada Evidence Act "merely requires the party seeking to adduce an electronic document into evidence to prove that the electronic document is what it purports to be. This may be done through direct or circumstantial evidence," [2017] SKCA 14 at para. 18.

In *R. v. Martin*, the Court of Appeal for Newfoundland and Labrador pointed out that the language of section 31.1 is important. [2021] NLCA 1 at para. 47. The Act stipulates that

"[T]here must be evidence capable of supporting a finding that the electronic evidence sought to be admitted is what it purports to be." *Ibid.* This creates a very low threshold for admissibility. *Ibid* at para. 60. The Court of Appeal held that:

> Evidence "capable of supporting" a finding is quite different from evidence "determining" or "capable of determining" a finding. In other words, the evidence only needs to assist the trier of fact in determining whether the electronic document is what it purports to be. Moreover, as the Court in *C.B.* noted, section 31.1 does not limit how or by what means the threshold may be met. (Citation omitted). Neither does it impose a particular standard for threshold admissibility of electronic evidence. What is required is only some evidence that is logically probative of whether the electronic document is what it purports to be. Whether the electronic document will be relied on is a matter for the judge in weighing and balancing all of the admissible evidence and finally determining the case. *Ibid* at para. 47.[1]

Another Canadian Court of Appeal has expressed a note of caution. In *R. v. Aslami*, the accused was convicted of an offence in which the primary evidence against him was phone and Facebook messages he purportedly sent to his former partner. [2021] ONCA 249. In setting aside the conviction, the Ontario Court of Appeal noted that the cell phone number from which the messages were sent was registered to someone other than the accused. The Court of Appeal cautioned trial judges to:

> Be very careful in how they deal with electronic evidence of this type. There are entirely too many ways for an individual, who is of a mind to do so, to make electronic evidence appear to be something other than what it is. Trial judges need to be rigorous in their evaluation of such evidence, when it is presented, both in terms of its reliability and its probative value. *Ibid* at para. 30.

However, this ignores the "presumption of integrity" that the Canada Evidence Act creates for electronic documents.

A PRESUMPTION OF INTEGRITY

Sections 32.1(a) and (b) of the Canada Evidence Act indicate that the "best evidence rule in respect of an electronic document is satisfied" by "proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored." Section 31.3 creates a "presumption of integrity" in relation to electronic documents by deeming such documents to be reliable and accurate if the person seeking to enter them, establishes:

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

Thus, if one of the above prerequisites is established, document integrity is deemed to exist, unless the opposing party presents "evidence to the contrary," which is capable of rebutting the presumption. *See* section 31.3. This is interesting because it reverses the usual burden of proof from the Crown to the accused when the Crown seeks to introduce an electronic document.

THE MANNER OF USAGE

The matters referred to in sections 31.2(2) and 31.3 can be established by affidavits. *See* section 31.6(1). In addition, the Canada Evidence Act provides further assistance to the party seeking admission of an electronic document by allowing evidence of the manner of "usage" of the system from which the electronic document was retrieved. Section 31.5 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.

Based upon this definition, the criteria for admissibility would appear satisfied by, for instance, something as simple as a witness testifying to having received a Facebook message in the "normal manner." This provision seems to invite judicial notice.

THE THRESHOLD TEST CONTAINED WITHIN THE CANADA EVIDENCE ACT

In *R. v. Durocher*, the Saskatchewan Court of Appeal considered section 31.1 of the Canada Evidence Act. The Court of Appeal held that:

> [The] burden of proof to establish threshold authenticity for purposes of s. 31.1 is low and, once satisfied, the

Footnotes

1. It has been suggested that though "This emphasis on the low threshold for admissibility accords with previous case law on electronic documents . . . *Martin* seems to set a new low bar." *See* Lisa Dufraimont, case comment on *R. v. Martin*, NJI Criminal Law e-Letter 315, April 23, 2021).

document is admissible and available for use by the trier of fact. . . . To meet this threshold, the proponent need only provide sufficient evidence of authenticity from which the trial judge could reasonably find the document to be what it purports to be. [2019] SKCA 97 at para. 82.

Similarly, in *Richardson*, the New Brunswick Court of Appeal held that:

> [The Canada Evidence Act] determines how threshold admissibility of electronic documents is determined, not ultimate admissibility. In addition to the threshold statutory requirements, electronic documents—like any other form of document—must satisfy common law rules to support the admission of their contents, such as being legally relevant and complying with rules applicable to hearsay evidence when documents are adduced for the truth of their contents. [2020] NBCA 35 at para. 24.

The Court of Appeal also held in *Durocher* that the presumptions contained in the Canada Evidence Act in relation to "electronic documents" are "aimed at providing some assurance that no changes in the information found in the document have been caused by technical reasons or human intervention." [2019] SKCA 97 at para. 89. One might suggest just the opposite. The presumptions take away the opportunity to make such an argument at the admissibility stage.

As noted in Part 1, in *Durocher*, the contested evidence was a Facebook text messages said to have been sent by the accused to the complainant, L.A. The Court of Appeal concluded that these messages were admissible pursuant to the Canada Evidence Act simply because "L.A. provided some evidence capable of supporting a conclusion that [the messages were] what L.A. claimed it to be." [2019] SKCA 97 at para. 94. What was that evidence? L.A. testified that the accused sent her text messages. Thus, they were admissible because the Canada Evidence Act mandates admissibility because "[T]he integrity (or reliability) of the electronic document is not open to attack at the authentication stage of the inquiry." [2017] SKCA 14 at para. 18.

DOCUMENT INTEGRITY

The issue of "document integrity" as governed by section 31.1 of the Canada Evidence Act was considered by the Court of Appeal for Newfoundland and Labrador in *Martin*.

The Court of Appeal held that "system integrity is an admissibility issue," and an "admissibility requirement." [2021] NLCA 1 at para. 56. However, the Court of Appeal also held that the test for establishing system integrity is a low one. And the Court of Appeal emphasized the importance of the party objecting to the admissibility of social media evidence having the burden of providing "evidence to the contrary." The Court of Appeal indicated that section 31.3(a):

> Provides that integrity is presumed when, in the absence of evidence to the contrary, there is evidence capable of supporting a finding that the devices by or in which the electronic document was recorded or stored were operating properly. As discussed above in relation to section 31.1 with respect to authentication, "evidence capable of supporting a finding" represents a low threshold which is met by some relevant evidence which could be used to support a finding of system integrity. *Ibid* at para. 60.

The Court of Appeal, in considering section 31.2 of the Canada Evidence Act, indicated a trial judge need only "have some level of assurance that the device which stored or recorded the document did not alter, distort, or manipulate the electronic document so as to affect the integrity of its contents," for this element to be established. *Ibid* at para. 57.

In *Durocher*, the Court of Appeal noted that the accused had not presented any "evidence to the contrary." [2019] SKCA 97 at para. 95. Thus, there was no:

> Basis to doubt the integrity of the electronic document system, i.e., L.A.'s smart phone. While defense counsel took issue with whether Mr. Durocher was the author of the Facebook messages at trial, there was no suggestion that the messages might have been altered or tampered with. I am satisfied that the presumption of integrity set out in section 31.3(a) and section 31.3(b) of the CEA applied. L.A. was never challenged on her evidence and, as such, the presumptions were not rebutted by Mr. Durocher. *Ibid*.

Section 31.3 of the Canada Evidence Act was also considered by the New Brunswick Court of Appeal in *Richardson*. In concluding that electronic messages were properly admitted at trial, the New Brunswick Court of Appeal held that:

> Lay evidence that the messaging system was successfully used, and the messages displayed corresponded to what the different witnesses recalled, can form the basis for satisfying the s. 31.3(a) presumption, for this is evidence the computer system, having faithfully reproduced the information, must have been functioning as it should. *Ibid* at para 46.

The Court of Appeal concluded that the "threshold for authentication" was met because, Mr. Jamieson testified that the accused "was the other person in the MSN conversations." *Ibid* at para 51.

CONCLUSION ON AUTHENTICATION

In Canada, authentication requires the introduction of some evidence to establish that the document is what it purports to be. However, this does not require proof that the document is genuine or accurate. That is a question of weight not admissibility. Social media evidence can be authenticated even when it is disputed that it is what it purports to be.

It has been pointed out that "to authenticate an electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be." *Hirsch,* [2017] SKCA 14 at para. 18.

Thus, "[Authentication] for the purposes of admissibility is therefore nothing more than a threshold test requiring that there

be some basis for leaving the evidence to the factfinder for ultimate evaluation." Paciocco at 199.

DOES SUCH EVIDENCE CONSTITUTE HEARSAY?

Section 31.7 of the Canada Evidence Act indicates that sections 31.1 to 31.4 "[D]o not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence." Thus, the social media evidence sought to be entered must be otherwise admissible. *See R. v. N.P.*, [2021] BCCA 25. For example, if the social media evidence is found to be hearsay evidence, it will be presumptively inadmissible.

In *R. v. Singh*, it was pointed out that in assessing "text communications between the complainant and the accused," a trial judge "can properly rely on the timing, context, and tone of such prior communications to assess the credibility of both the complainant and the accused." [2021] BCCA 172 at para. 35. The British Columbia Court of Appeal also indicated that:

> [A] text or electronic exchange between a complainant and the accused can have independent cogency. This may be particularly true in the context of sexual assault cases where "there may be little other evidence to serve the court in its truth finding mission beyond the testimony of an accused and a complainant." *Ibid* at para. 37.

In *Durocher*, in which Facebook messages sent by the accused to the complainant were admitted, the accused argued that this social media evidence was inadmissible based upon the hearsay prohibition. The Saskatchewan Court of Appeal indicated that:

> Although there is consensus amongst academics that an admission constitutes admissible evidence, they differ on its rationale for admission: some contend it is an exception to the hearsay rule, yet others view it as part and parcel of the adversary system because the declarant is able to testify.

[2019] SKCA 97 at para. 63.The Court of Appeal concluded that it was "unnecessary to resolve the doctrinal basis for the admissibility of an out-of-court statement by an accused person in order to address Mr. Durocher's argument." *Ibid* at para. 65. This was because the:

> Statements made by Mr. Durocher in the Facebook messages are either not hearsay (because they were not adduced for the truth of their contents) or, if they are, they fell under a recognized exception to the hearsay rule and were presumptively admissible for the truth of their contents. *Ibid* at para 68.

THE ADMISSIBILITY OF SCREENSHOTS OF FACEBOOK POSTINGS

What if the police take a screenshot of a Facebook posting by the accused and the Crown seeks to introduce it as evidence?

This issue was considered by Court of Appeal for Newfoundland and Labrador in *R v. Martin*. In this case, the accused was charged with a number of weapon offences. At his trial, the Crown sought to introduce into evidence six screenshots depicting posts purportedly taken from the accused's Facebook page. The screenshots purportedly showed the accused holding a prohibited firearm. The screenshots were provided to the police by an anonymous source. Some of the officers that testified were able to identify Mr. Martin and his apartment as being depicted in the screenshots from having had contact with him and from having been inside his apartment.

The trial judge concluded that the evidence was inadmissible and the accused was acquitted. The Crown appealed from acquittal.

The Court of Appeal described the issue raised in the following manner:

> The issue on appeal is whether the trial Judge erred in excluding the screenshot evidence. Resolution involves determining whether the screenshot evidence was authenticated so as to meet the test for admissibility.

The appeal was allowed. The Court of Appeal indicated that Facebook posts "fall within the definition of electronic documents in section 31.8 of the Canada Evidence Act." [2021] NLCA 1 at para. 25. The Court of Appeal concluded that:

> The fact that the purported Facebook posts were captured in screenshots and tendered as such, in the absence of credible evidence that screenshot technology could have or did alter the Facebook posts depicted in the screenshots, is immaterial. What requires authentication are the Facebook posts depicted in the screenshots, which appear to be posts from Mr. Martin's Facebook. *Ibid* at para. 29.

The Court of Appeal held that the threshold requirement for authentication had been established because:

> [In] this case there was no evidence to the contrary. Mr. Martin did not testify on the *voir dire*. Neither he nor anyone else said that any person had tampered with any system on which the Facebook posts were recorded or stored, or that the posts had been altered so as to interfere with the integrity of their contents. In other words, Mr. Martin did not advance any "evidence to the contrary" that would rebut the presumption of system integrity found in section 31.3(a) of the Act. *Ibid* at para. 70.

Thus, "[T]he judge erred in failing to admit the screenshots of the Facebook posts purporting to be from Mr. Martin's Facebook. The low threshold required by the provisions of the Act regarding authentication and system integrity was met for the purposes of admissibility." *Ibid* at para. 74.

CONCLUSION

As we have seen, the threshold for the admissibility of social media evidence in Canada is a very low one that can be established with minimal evidence. When this is combined with a presumption of integrity, it results in social media evidence readily admissible in Canada.

In summary, for an electronic document to be admissible in Canada, the party seeking to have it admitted must:

1. Establish authentication. The test at common law and pursuant to the Canada Evidence Act is identical and con-

stitutes a very low threshold: that the document is what it purports to be;
2. This can be established by a witness describing what the item is, or how it was received or sent;
3. Authentication does not require proof that the document is genuine, only some evidence capable of establishing that it is what it purports to be (i.e., an electronic document);
4. There is a presumption of integrity in relation to computer systems, as a result of which the party seeking to have an electronic document admitted does not have to establish that the computer system was working properly when the document was created, found or copied; and
5. The onus rests on the opposing party to introduce evidence to the contrary when seeking to challenge the integrity of an electronic document.

Authentication of social media evidence involves a low threshold in Canada because it is a threshold issue and because of the nature of modern communications. The ultimate weight is to be assessed in the context of the totality of the evidence presented. As Professor Silver points out, in Canada, "There is no room in the [Canada Evidence Act] regime for the gatekeeper function and once admitted under that regime, the social media evidence faces no further threshold scrutiny." *See* Lisa A. Silver, *The Unclear Picture of Social Media Evidence*, (2020) 43-3 MANITOBA L.J. 111, at page 135.

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