

The Unclear Picture of Social Media Evidence

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Digital evidence does not reside easily in our rules of evidence. Although the end product can be viewed as a form of real evidence, akin to documents or static pieces of paper,¹ digital evidence defies such neat evidentiary categorization. It is not static. It moves and changes. At its core, digital evidence cannot be passed hand to hand like a document. Rather, it flows from one form to another through a web of technology. Instead of viewing our evidential rules afresh in light of the special attributes of digital evidence, we attempt to “cut and paste” digital evidence into the traditional Wigmore evidentiary rules.²

Overlaid onto this new digital world is the heady atmosphere of social media, which can provide the source of such evidence. Social media evidence is part diary, part conversation, part image, part bravado, part truth, and presents in real time, past time, or even infinite time. Our legal relationship to social media, as they say in Facebook status-speak is, well, “complicated.” To relieve our sense of legal disquiet, we naturally turn to those evidentiary rules that we already have in place for support. These rules, codified in our statutory electronic document framework in the *Canada Evidence Act*,³ were created to assist in the introduction of computerized data or electronically stored information (ESI). The sections provide evidentiary shortcuts for the admissibility of a broad spectrum of digital evidence, including social media evidence. Instead of embracing social media for what is — an online community — we have simplified it in the name of administrative efficiency.

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¹ Michael T Clanchy, *From Memory to Written Record: England 1066-1307* (Hoboken: John Wiley & Sons, 2012).

² *R v Ball*, 2019 BCCA 32 at para 65 [Ball].

³ RSC 1985, c C-5 [CEA].

Administrative efficiency and legal process rights do not necessarily share the same objectives.⁴ With simplification of introduction comes the potential for cutting *Charter* imbued corners without due regard to the negative potentialities such easy admissibility can create. Those potential negative effects, involving an unfair trial leading to a miscarriage of justice, should not be considered fanciful. As we have seen in other admissibility simplifications, such as with expert evidence, if our admissibility methodology is not mindful of the potential harm admissibility rules can produce, the integrity of our justice system may be at risk. This does not mean that we cannot use the old evidentiary framework. This means we must do so with new age mindfulness by ensuring those checks and balances inherent in our admissibility principles are consistently applied by the court. We have those evidentiary tools at hand, notably the gatekeeper function, which protects the integrity of the trial process. In this digital age, we must not be reticent to use our “old” tools in our approach to “new” forms of evidence.

Unfortunately, even within the statutory framework our courts struggle with this form of evidence. Admissibility requirements are inconsistently applied. Where once evidentiary rules provided clarity, in the realm of social media those rules simply obscure. Not only are the rules in flux, but the manner in which the evidence is given adds to the complexity. This uneven treatment brings into question whether our legal principles are robust enough for the digital age. How the courts apply these rules will impact the future of our criminal law and may challenge our conception of evidence.

Part I of the article will provide the backdrop for our incursion into digital space as we take an exponential journey through the advent of social media and the appearance of social media as a form of evidence in the courtroom. In Part II of the article, we take a deeper look at the construction of evidentiary categories and the preference for social media evidence to be viewed in the courtroom as documentary evidence, providing a perfect platform for the application of the CEA. We will then identify the myriad problems in the admissibility process in Part III. This discussion will situate admissibility concerns within recent provincial appellate cases, highlighting, in real terms, the potential for miscarriages of justice under the present approach. Finally, in Part IV, a practical solution will be provided consistent with the special nature of social media evidence by drawing on features found in another enhanced admissibility approach, namely expert evidence.

⁴ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536, Lamer J.

I. THE ADVENT OF SOCIAL MEDIA EVIDENCE

A. Social Media as Community

Before we discuss social media as evidence, we need to understand social media itself. Social media is not just a consequence of the Internet, it is the essence of it. The Internet or the ARPANET, as it was first created in the 1970s, was a collaborative community of like-minded researchers who wanted a digital space or cyberspace to share technological resources.⁵ This drive to be in collaboration is not just an academic trait but is also inherent in our humanity. Indeed, it is our need for togetherness and collaboration that creates community. Aristotle, who was active well before the electronic era, opined that we are social beings.⁶ This social aspect of community is realized through our ability to communicate. In order to create this community, we need space, be it real or virtual. Social media is just such a dedicated place where we can form “communities of interest.”⁷ The original premise of social media, as an academic research platform, emphasizes the openness and label free attitude of cultural togetherness where “anything goes.”⁸ Of course, in the cyberworld where this “goes” may be viral, creating communities that stretch across the globe.

It is the digital side of social media that lends itself to creating a community space, which is uniquely personal and collective. It is the technological version of community, which synthesizes us and them into a community of one and many. Through the digital platform, social media compresses and distorts time and space such that “netizens”, or those who use social media, are at the same time everywhere and nowhere. This incorporeal status changes our concept of community in a radical way, particularly in the legal sense of the word. The ungrounding of community from an earthly physicality gives social media content a meaning in law. This is cyberspace as we know it, spinning into the void with a panoply of ideas, which must be reined in by the strictures of the legal world.

By placing the two side-by-side, we can see the disconnect between our cyberworld and our earthly one. Yet, the two are intertwined. Social media

⁵ Judy Malloy, “The Origins of Social Media,” in Judy Malloy, ed, *Social Media Archeology and Poetics* (Boston: MIT Press, 2016) 3 at 3.

⁶ Aristotle, *Politics*, translated by Benjamin Jowett (Kitchner: Batoche Books, 1999) at Book One, 1253a (translated as “political animal”).

⁷ Malloy, *supra* note 5.

⁸ *Ibid* at 4.

is dependent on community as we know it, as it is community as we understand it – just in a slightly off-kilter package. This sci-fi attitude of social media does bend the mind. Being “here, there, and everywhere”⁹ blurs our conventional approaches to social norms. This does not necessarily require us to discard those norms, but it does require us to view those norms through a digitized perspective. In the legal world, this conversation is heavily explored within the section 8 reasonable expectation of privacy doctrine, where social media erases the line between public and private spheres. This disappearance of space is of no concern in the social media world, but it raises numerous issues in the legal material one. Law is not easily unfettered from long-held social practices. It feeds on continuity and tradition. Social media does not.

The peripheral mechanics of social media is evident; it arises from our desire to gather together in a community. Yet, this is a community undefined by quantity, quality or placement. Flowing from community, is the need to communicate ideas to one or to all. In law, it is the communication which becomes the representation of the flow of ideas and the anchor to which the legal rules and principles can attach.

B. Social Media as an Evidential Artefact

I have argued thus far that social media is a means of human collectiveness and community, ephemeral notions that are difficult to intellectualize. Yet, there is a concreteness to social media. This dual nature of what can be seen and what is not seen arises from social media’s uncanny ability to act as both conduits of communication and representations of communication. It is this capacity, to enable community and to create community, that defines social media as a singular space and place. It is more than a marketplace of ideas; it is a living room of experience. How, then, does the law turn a place into a piece of evidence?

Social media as a conduit and representation of communication leaves a trace of itself by creating a social artefact. A social artefact is described as “a discrete material object, consciously produced or transformed by human activity, under the influence of the physical and/or cultural environment.”¹⁰ Social media naturally produces these social artefacts, be it a conversation

⁹ The Beatles, “Here, There and Everywhere,” recorded 1966, *Revolver*, Parlophone, released 1966, record.

¹⁰ Mark Suchman, “The Contract as Social Artifact” (2003) 37:1 *Law & Soc’y Rev* 91 at 98.

in a chat room, a picture on Instagram, or an emoji on Facebook. When such artefacts become subject to a criminal investigation, the social object becomes a legal one. Within the legal landscape, therefore, the social artefact found in social media can be reconstituted as a legal artefact or, more specifically, an evidential artefact.

Evidence is, as described, a legal construct. Social media information, as a social artefact, starts outside of the rule of law but needs those rules to become evidence. A chat room conversation or a Facebook image travels through a specific set of evidentiary rules and principles before becoming an evidential artefact proffered at trial. Evidence has physicality and weight, but it is also a state of mind. A chat room conversation may comply with the requisite evidentiary rules, but it only becomes evidence upon judicial approbation and pronouncement. Before that judicial acceptance, the proffered item is merely an evidence “becomer”¹¹; it has only the potential of being considered evidence at trial. It is a chat in a chat room, nothing more. It is, therefore, in the courtroom, where that potential is actualized. It is in that admissibility process where social media transforms into evidence and becomes subject to the rule of law.

C. Social Media as Evidence

In criminal cases, social media evidence has steadily increased as part of the evidentiary record of a case. Unsurprisingly, this increase lags behind the actual usage rates. Facebook, which was created in February 2004 and reached its first 100 million users world-wide by 2008,¹² is not mentioned in Canadian criminal case law¹³ until that 2008 milestone year.¹⁴ To give this mention perspective, there were a total of 12 such mentions in 2008 criminal cases.¹⁵ Further, in none of these 12 decisions is Facebook a matter

¹¹ “becomer” (last modified 14 November 2019), online: *Witictionary* <en.wiktionary.org/wiki/becomer> [perma.cc/2CYL-UMNG].

¹² Geoffrey A Fowler, “Facebook: One Billion and Counting”, *The Wall Street Journal* (4 October 2012), online: <www.wsj.com/articles/> [perma.cc/3LLG-YKMR].

¹³ Based on a WestLaw database search, excluding commissions and tribunals.

¹⁴ See *R c Cormier*, 2008 QCCQ 44, Durand JCQ [*Cormier*]. But see *V(WR) v V(SL)*, 2007 NSSC 251 at para 31, MacAdam J (first mention in non-criminal case).

¹⁵ *Cormier*, *supra* note 14; *R v Sather*, 2008 ONCJ 98 [*Sather*]; *R v P(AP)*, 2008 ONCJ 196; *R v Alshammiry*, 2008 CarswellOnt 9534 (Ont Ct J) rev’d 2010 ONCA 550; *R v Mompresvil*, 2008 ONCJ 734; *R v Blake*, 2008 ONCJ 384; *R v S(J)*, 2008 CarswellOnt 6310 (Ont Sup Ct J); *R v Woods*, 2008 ONCJ 395; *R v Goulette*, 2008 NBPC 48; *R v Alshammiry*, 2008 CarswellOnt 9533 rev’d 2010 ONCA 550; *R v B(BS)*, 2008 BCSC 1526; *R v D(R)*, 2008 ONCJ 584.

of controversy or the subject of an admissibility discussion. In one decision, expert evidence was called at trial to explain how Facebook is used and why it used as a social network platform.¹⁶

Facebook Messenger became the communication platform for the Facebook community in 2011.¹⁷ By this time, the mentions of “Facebook” increase in case authority¹⁸ with the first Supreme Court of Canada criminal case mention in the 2013 decision of *R v Vu*.¹⁹ Of course, *Vu* stands as the seminal decision on using search warrants to search computers. Specifically, in *Vu*, the search involved retrieving MSN chat communications and Facebook images.²⁰ A broad database search, covering all mentions of the “Facebook” term, brings over 4000 case mentions. Approximately half of those cases are from the past three years.

Twitter, a slightly newer platform created in 2006,²¹ receives much less case attention with 423 decisions since the first mention in the 2009 criminal case of *R v Puddicombe*.²² Again, over half of those mentions are from the past three years. Only three decisions of the Supreme Court of Canada have thus far mentioned Twitter, with two of those three decisions being criminal cases.²³ Although Facebook dominates in the social media lives of many,²⁴ recent studies suggest that teenagers are shifting to image-

¹⁶ *Sather*, *supra* note 15 at para 9.

¹⁷ Joshua Boyd, “The History of Facebook: From BASIC to Global Giant” (25 January 2019), online: *Brandwatch* <www.brandwatch.com/blog/history-of-facebook> [perma.cc/XZM7-RH7X].

¹⁸ Westlaw search for “Facebook” before 2011 results in 479 decision but the same search for the two year period, from January 1 2012 to January 1 2014, result in 632 case mentions, including three from the Supreme Court of Canada: *A.B. (Litigation Guardian of) v Bragg Communications Inc*, 2012 SCC 46; *Sun-Rype Products Ltd v Archer Daniels Midland*, 2013 SCC 58; *R v Vu*, 2013 SCC 60 [Vu].

¹⁹ *Supra* note 18 at para 28.

²⁰ *Ibid.*

²¹ Amanda MacArthur, “The Real History of Twitter, in Brief” *Lifewire* (1 July 2019) online: <www.lifewire.com/history-of-twitter-3288854> [perma.cc/3AJZ-4RXH].

²² *R v Puddicombe*, [2009] OJ No 6472 (ON SC), Benotto J (application for publication ban on first degree murder and conspiracy to commit first degree murder).

²³ *Crookes v Wikimedia Foundation Inc*, 2011 SCC 57 (decision on online defamation); *R v J(KR)*, 2016 SCC 31 (child pornography discussion and how social media has “fundamentally altered” social context for sexual offences); *R v Vice Media Canada Inc*, 2018 SCC 53 (mentioned as part of the facts).

²⁴ J Clement, “Number of Facebook users worldwide 2008-2019” (last visited 9 August 2019), online: *Statista* <www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [perma.cc/HLE7-HR7E] (Facebook is the biggest social

based social media such as YouTube, Instagram, and Snapchat.²⁵ All of these platforms are mentioned to varying degrees in case law: YouTube²⁶ 433 hits since 2007, Instagram²⁷ 221 since 2014, and Snapchat²⁸ 112 since 2016. It is only a matter of time until these case mentions increase.

By far, the most prolific social media communication is through text messaging,²⁹ either through SMS/MMS platforms or Facebook Messenger.³⁰ The term “text message” returns over 5000 case mentions using a simple plain language search. The short form name, “texting,” returns approximately 1400 mentions. If the search is broadened to include e-mail, another communication platform arising from the beginnings of social networking,³¹ approximately 5000 decisions mention “email” with about 900 more referencing the older term “electronic communication.” Still broader are the approximately 1500 mentions of “social media” in case law.

The purpose for this statistical journey is to highlight the increased presence of social media in the Canadian courtroom. Although this simple database analysis gives no insight into why the social media terms are mentioned in cases, it does give context to the use of social media as evidence in court. In fact, social media is often the context in which criminal

network worldwide with 2.41 billion monthly active users as of the second quarter of 2019).

²⁵ Monica Anderson & Jingjing Jiang, “Teens, Social Media, and Technology 2018” (31 May 2018), online: *Pew Research Center* <www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/> [perma.cc/GFR6-NNFS].

²⁶ See e.g. *R v Neeld*, 2007 BCPC 212 (first case mention of YouTube). See also “History of YouTube” (last visited 11 November 2019), online: *Wikipedia* <en.wikipedia.org/wiki/History_of_YouTube> [perma.cc/TTV6-6CBJ] (YouTube was established in 2005).

²⁷ See e.g. *Stokes v Stokes*, 2014 ONSC 1311 (oldest case mention); *R v G(PG)*, 2014 NSPC 79 (oldest criminal case mention). See also Dan Blystone, “The Story of Instagram: The Rise of the #1 Photo-Sharing App” (19 May 2019), online: *Investopedia* <www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp> [perma.cc/SJB9-YVKK] (Instagram was released in October 2010).

²⁸ See e.g. *R v F(T)*, 2016 BCPC 6 (oldest case mention). See also Mark Molloy, “Who owns Snapchat and when was it created?,” *The Telegraph* (25 July 2017) online: <www.telegraph.co.uk/technology/0/owns-snapchat-created/> [perma.cc/PKR6-U8WQ] (Snapchat was released in July 2011).

²⁹ See *R v Marakah*, 2017 SCC 59 at paras 18, 33–37, McLachlin CJC.

³⁰ J Clement, “Leading messaging Apps used in Canada as of May 2018” (22 March 2019), online: *Statista* <www.statista.com/statistics/882273/canada-leading-messaging-apps/> [perma.cc/V27T-B6NC].

³¹ David R. Woolley, “PLATO: The Emergence of Online Community.” in Judy Malloy, ed, *Social Media Archeology and Poetics* (Boston: MIT Press, 2016) 116.

offences can be committed. It can provide a space in which offences are committed and it can provide proof of it as well.

For social media to cross that threshold from the digital space to the place of trial requires the application of the rules of evidence. However, unlike social media, those rules are not multi-dimensional or community-building. They are fact focused and decision oriented. Although much has been done in the last two decades to untether evidentiary principles from rigidly organized evidentiary rules, those rules are still treated as sacrosanct requirements, “ancient and hallowed,”³² and impervious to change. The disjunct between social media and social media as evidence lies at the inconsistent and confusing manner in which such evidence is treated in court. The disharmony is not just awkward, but it is dangerous as it weakens the gatekeeper function of the trial judge. But it is the categorical approach to evidence, more than anything else, that creates the perfect environment for this weakening of judicial oversight, a weakening re-enforced by the admissibility process.

II. CATEGORIZING SOCIAL MEDIA EVIDENCE

A. The Underlying Objectives of Evidence and the Gatekeeper Function

In teaching evidence, it is crucial to remind students, throughout the course, of the underlying objectives of the law of evidence. This contextual framework is important; without it, the law of evidence becomes a jumble of rules to be memorized by rote instead of an intellectual exercise, which provides a firm basis for argument in the context of a real case. A lawyer who objects to the admissibility of evidence without understanding why they are doing so cannot possibly persuade a judge on the issue unless the lawyer understands why opposing counsel wants the information introduced. This ability to respond requires two kinds of knowledge: knowledge of the case and knowledge of the law. Knowledge of the case requires a lawyer to pre-think the facts and legal issues in their case to arrive at a working theory or theme.

Theme and theory are basic advocacy tools. But these tools are only the machinery. To articulate the case knowledge, the lawyer must have the law

³² See e.g. *R v Leipert*, [1997] 1 SCR 281 at para 9, 143 DLR (4th) 38, McLachlin J (referencing informer privilege, which is a rule of evidence).

knowledge. The law knowledge is “[t]he ultimate aim of any trial, criminal or civil” which is “to seek and to ascertain the truth.”³³ This truth-seeking function of a trial informs the rules of evidence and permits judges “to do justice according to [the] law.”³⁴ Justice is an action, as in “to do” justice and therefore implies positive acts of fairness and equity. In criminal law, justice is not just a “to do” action; even when a judge is not “doing” justice, they must ensure that there is not a lack of it. A lack of justice can lead to not just an absence of it but, worse, a miscarriage of justice.

The term “miscarriage of justice” is elusive. It has no definite meaning. Rather, it describes an event when, according to subsection 686(1)(a)(iii) of the *Criminal Code*, the trial error “is severe enough to render the trial unfair or to create the appearance of unfairness.”³⁵ Justice Cromwell, as he then was, on the Nova Scotia Court of Appeal, describes these two types of unfairness within the meaning of subsection 686(1)(a)(iii) in *R v Wolkins*.³⁶ The first form of unfairness relates to the actual trial itself while the latter form involves the integrity of the administration of justice that is at risk when what happens during a trial “shakes public confidence.”³⁷ Often, a miscarriage of justice occurs when the “principles of fundamental justice” have been violated,³⁸ yet another elusive term. Principles of fundamental justice are not exhaustive but consist of those fundamental rules society sees as crucial to ensure and maintain justice in our judicial system.³⁹ The connection between these fundamental principles and our justice system are expressed in our evidentiary process.

Evidentiary rules, which serve to operationalize substantive law’s use in the adversarial system,⁴⁰ must continually fulfill the dual objectives of truth and justice. These rules are made to be wielded not only by lawyers, but also by judges. In the evidentiary world, judges have a positive duty “to do justice,” not only as the ultimate decision maker but also as the continuing

³³ *R v Nikolovski*, [1996] 3 SCR 1197 at para 13, 141 DLR (4th) 647, Cory J [*Nikolovski*].

³⁴ *Imperial Oil v Jacques*, 2014 SCC 66 at para 24, Lebel & Wagner JJ.

³⁵ *R v Khan*, 2001 SCC 86 at para 69, Lebel J [*Khan*].

³⁶ 2005 NSCA 2.

³⁷ *Ibid* at para 89.

³⁸ See e.g. *R v Broyles*, [1991] 3 SCR 595, [1992] 1 WWR 289 (violation of the accused right to silence); *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7 (violation of right to counsel); *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733 [*Lifchus*] (error in charge to the jury on the burden of proof).

³⁹ *R v Malmo-Lavine*; *R v Caine*, 2003 SCC 74 at paras 112–13.

⁴⁰ David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin, 2015) at 2.

gatekeeper. This dual judicial role ensures that the dual objectives of the rules of evidence – truth and justice – are never forgotten or set aside during the course of a trial.

The gatekeeping concept provides apt imagery in the application of evidentiary rules. Evidence is admitted through the “gate” by an arms-length guardian whose sole function is to provide oversight to the entire trial process.⁴¹ A gatekeeper does not make findings of fact. Rather, the gatekeeper balances the costs and benefits of the evidence free from the additional burden of that final value judgment. By separating the function of gatekeeper from final arbiter, we ensure that the evidence used in that final decision is not weighed down by prejudice or coloured by improper reasoning. It creates a level field of justice upon which admissible evidence is heard, weighed, and valued. Without this calibration of the underlying objectives, the rules become empty and are applied without knowledge to the detriment of the system and the people who are affected by it.

B. The Categorical Approach to Evidence

Rules do not live in a vacuum. In practical terms, most legal concepts do not live separate and apart. This is even more so for evidence, which is often referential to another piece of evidence. Connections between pieces of evidence often require connections between the rules of evidence. Traditionally, these connections were viewed through the lens of categorization, in which differing types of evidence were labelled and pigeon-holed for further treatment. This structural rigidity is still embedded in the more relaxed principled approach brought in by the Supreme Court of Canada to re-align the traditional rules with the underlying dual objective of evidence rules: truth and justice. Social media evidence highlights the weaknesses in this approach as it defies evidentiary categorization, often blurring the lines between the air-tight categories employed in the law of evidence.

Categories abound in the rules of evidence. We can view the entire law of evidence through the lens of meta-categories. Justice Paciocco and Lee Stuesser in *The Law of Evidence*⁴² describe three types of evidential rules: “rules of process,” “rules of admissibility,” and “rules of reasoning.”⁴³

⁴¹ See *R v Grant*, 2015 SCC 9 at para 44, Karakatsanis J [*Grant*].

⁴² Paciocco & Stuesser, *supra* note 40.

⁴³ *Ibid.*

Process-oriented evidentiary rules engage the how part of evidence; it can help us understand how evidence is introduced in court. For instance, issues involving the scope of cross examination⁴⁴ would fall under this process category. The rules of admissibility involve how the evidence, which is created by the process, such as cross examination, is admitted as part of the evidential record. Many of our rules of evidence revolve around this discussion, such as the admissibility of hearsay⁴⁵ or expert testimony.⁴⁶ The third meta-category engages the rules of reasoning. After the testimony is given and the content of that testimony is admitted, the trier of fact must assess that evidence in the final fact-finding portion of the trial. The application of the burden of proof to this assessment is an example of this kind of rule.⁴⁷

These three categories seem linear in time: first, we elicit evidence, second, we determine if it is admissible, and third, the trier of fact assesses the admitted evidence. Yet, viewing these categories as merely linear reinforces the categorical approach. Evidence, like social media, bounces around categories and is difficult to compartmentalize. How a question is asked in court can engage admissibility concerns (hearsay for example) and concomitantly cause decision-making difficulties (what to do with hearsay).

Moving from big picture evidence to the types of evidence proffered in court also suggests a categorical scheme. Evidence can be testimonial or real.⁴⁸ Testimonial evidence is directly observed by the trier of fact and is based on inferences drawn or reasoning. Real evidence, on the other hand, is based on the “direct self-perception”⁴⁹ of the senses. The trier of fact, when faced with real evidence, becomes the witness as they hear the accused in the wiretap, read the inculpatory document, or see the bloody shirt. Because of this personal direct relationship between the trier and the evidence, threshold authenticity becomes a precondition to admissibility. Authenticity requires an investigation into whether the real evidence is what it claims to be. This differs from testimonial evidence where the person, for

⁴⁴ See *R v Lyttle*, 2004 SCC 5.

⁴⁵ See e.g. *R v Khelawon*, 2006 SCC 57.

⁴⁶ See e.g. *White Burgess v Haliburton*, 2015 SCC 23 [White Burgess].

⁴⁷ See e.g. *Lifchus*, *supra* note 38; *R v W(D)*, [1991] 1 SCR 742, 63 CCC (2d) 397.

⁴⁸ See Wigmore, *Evidence* (Chadbourn Rev, 1972), § 1150 at 322.

⁴⁹ John Henry Wigmore, *Evidence in Trials at Common Law*, revised by John T McNaughton (Boston: Little, Brown and Company, 1961) vol 4 at 1150 (also references as “autoptic preference”).

admissibility purposes, is taken at their word, leaving credibility issues for the final determination.

C. Categorizing Social Media Evidence

Social media evidence presents deeply embedded categorization difficulties. Social media evidence is a mere representation of a community, a community which flourishes beyond the bounded space of the courtroom and beyond our imagination. It is also a representation of communication. There are multi-layers to this communication. It can present as words, but, in reality, it is words channelled through the digital space. It can also present as an image that requires interpretation and iconic meaning. It can be instantaneous or not. It can be printed out and, therefore, tactile or not. It can be transient or leave a permanent record somewhere. What this shape-shifting means is that social media evidence cannot be easily controlled through the categorical structure. Social media evidence is legitimately many different kinds of evidence – from real to testimonial, from documentary to pictorial.

Categories of evidence can mix, such as when testimonial evidence is required to introduce real evidence. For example, the witness to a stabbing identifies the knife used at the time. Nevertheless, mixing does not change the essential nature of the witness as testimonial and the knife as real evidence. Social media evidence does blur these categories to such a degree that the law of evidence must step in to give it a familiar label, a category by which the lawyers and judges can comfortably apply the known rules of evidence for admissibility purposes. Unfortunately, the courts have not applied consistent categories to social media during the admissibility process.

1. *Categorizing Through the Admissibility Process*

i. Social Media as Real Evidence

By 2011, admissibility of Facebook evidence started to attract case commentary. One of the first decisions to discuss Facebook admissibility issues was the civil case, *McDonell v Levie*.⁵⁰ Admissibility is discussed in the

⁵⁰ 2011 ONSC 7151 [*McDonell*]. It should however be noted that there are earlier civil decisions grappling with Facebook evidence during the discovery process. One of the earliest examples is in *Weber v Dyck*, [2007] OJ No 2384, 158 ACWS (3d) 205 (Ont Master), in which Master Pope ordered production of MySpace photographs in a claim

broadest sense, relying on the civil rule requirement for relevancy as the standard for determining admissibility.⁵¹ Relevancy is not the only concern. Justice Arrell, in ordering the Plaintiff to “preserve and print” photographs from the account, also considered privacy concerns.⁵² Almost three weeks later, the British Columbia Court of Appeal released *R v Vu*.⁵³ Although admissibility of images from the seized computer and cell phone and the information taken from MSN messenger and Facebook were an issue in the case, the decision was firmly fixed on the constitutionality of the search and seizure.⁵⁴

Admissibility of Facebook evidence was directly in issue a few months later in *R v RL*.⁵⁵ In this *voir dire* ruling, Justice Eberhard considered the admission of “five pages from the complainant’s Facebook.”⁵⁶ The evidence was in the form of a computer print-out of the pages done by the accused person’s wife, who was the complainant’s Facebook “friend.” Another witness, who was not an expert but merely a user, was called to explain how the profile name of the Facebook account could only be changed by the person with the account password.⁵⁷ Justice Eberhard found the evidence was “presumptively”⁵⁸ from the complainant’s Facebook account and “that as a form of record”⁵⁹ of the complainant’s statements, they were admissible. The balance of the ruling determines the relevancy of the contents, page by page. Some pages are not relevant and immediately found inadmissible.⁶⁰ Other pages are deemed inadmissible as their content offers “small probative value on points otherwise admitted, patent prejudicial effect, diversion of the focus of the trial and the effect it would have on the trial continuing expeditiously.”⁶¹

Although Justice Eberhard did not attempt to label or categorize the Facebook evidence, he does refer to the evidence as “pages,” suggesting a

for damages as a result of injuries suffered in a motor vehicle accident. The photographs showed the Plaintiff playing the piano.

⁵¹ *McDonell*, *supra* note 50 at para 6.

⁵² *Ibid* at para 16.

⁵³ 2011 BCCA 536.

⁵⁴ *Ibid* at para 18.

⁵⁵ 2012 ONSC 2439, Eberhard J [RL].

⁵⁶ *Ibid* at para 1.

⁵⁷ *Ibid* at para 2.

⁵⁸ *Ibid* at para 3.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at para 11.

⁶¹ *Ibid* at para 23.

documentary approach. Indeed, even before the decision in *RL*, the law provided for admissibility of electronic documents through amendments to the *Canada Evidence Act* in 2000.⁶² Social media evidence, as a printed page, fits nicely within the electronic document definition under section 31.8 of the Act. Yet, this regime is not applied systematically to social media evidence. For instance, similar to the *RL* approach, Madam Justice Bruce applied common law admissibility rules in admitting Facebook evidence in the 2013 *Moazami* decision.⁶³ Justice Gogan applied common law principles to the statutory sections in *R v Bernard*.⁶⁴

In the 2014 decision of *R c Soh*,⁶⁵ the defence opposed the admissibility of the Facebook evidence because the Crown failed to comply with the CEA regime. Some of the evidence was produced by the police as a photograph image of the computer screen showing the Facebook profile. On this basis, the Crown argued for admissibility of the evidence as “real evidence” pursuant to the common law admissibility rules for photographs. Madam Justice LaVigne found that both the screen captures and the photographs of the screen⁶⁶ were electronic documents and, therefore, admissible under the CEA. She also found that the probative value outweighed prejudicial effect, such that the evidence would not be excluded under the gatekeeper function.

Whatever the label, either record or image, by 2014, social media evidence is perceived as “real evidence” that can be introduced through the CEA. Two years later, following the *Soh* decision, Justice Gogan of the Nova Scotia Supreme Court also applied the CEA regime to the admissibility of screenshots or photographs of Facebook Wall posts in *R v Bernard*.⁶⁷ Applying the regime to the screenshots, according to Gogan J, is a matter of “common sense” as “one should not be able to circumvent the admissibility rules for electronic information simply by taking a photograph of the information.”⁶⁸ Justice Gogan then made an explicit finding “that the information is properly characterized as documentary electronic information.”⁶⁹

⁶² See CEA, *supra* note 3, ss 31.1-31.8.

⁶³ *R v Moazami*, 2013 BCSC 2398.

⁶⁴ 2016 NSSC 358 [*Bernard*].

⁶⁵ 2014 NBQB 20, LaVigne J.

⁶⁶ See also *R v Avanes*, 2015 ONCJ 606 [*Avanes*].

⁶⁷ *Supra* note 64, Gogan J.

⁶⁸ *Ibid* at para 44.

⁶⁹ *Ibid* at para 50.

ii. Social Media as Image

Yet, the CEA approach did not erase the tension between words and image. Categorization, as we have seen, is further complicated by introduction of the evidence as a photograph of the computer screen. Admissibility of photographic evidence is treated differently.⁷⁰ Historically, photographic evidence was considered more “scientific” and, therefore, more objective than an eyewitness to an event.⁷¹ This concept of image-based objectivity is reflected in the Supreme Court of Canada decision in *R v Nikolovski*.⁷² There, the majority decision, written by Justice Cory in 1996, mused on the evidentiary value of video-recorded evidence as “a constant, unbiased witness with instant and total recall of all that is observed.”⁷³ This praise for the image resurfaced more recently in *R v St-Cloud*⁷⁴ where, in Justice Wagner’s view, video evidence is “more reliable” than circumstantial or testimonial evidence.⁷⁵

Despite this view, although the image is produced through a scientific process, that self-same science provides a perfect platform for manipulation and fabrication of the image.⁷⁶ This raises inherent admissibility concerns with both the authenticity and integrity threshold requirements. Within this context, the admissibility of photographic evidence was thoroughly discussed and reviewed in the 1968 decision of the Nova Scotia Court of Appeal in *R v Creemer and Cormier*.⁷⁷ The resultant framework for admissibility includes factors that recognize and protect against the potential for manipulation. Admissibility, therefore, depends on accuracy “in truly representing the facts,”⁷⁸ the item’s “fairness and absence of any intention to mislead”⁷⁹ and their “verification”⁸⁰ under oath by a person capable of doing so.⁸¹

⁷⁰ Rodney GS Carter, “Ocular Proof: Photographs as Legal Evidence” (2010) 69 *Archivaria* 23.

⁷¹ *Ibid* at 33–34.

⁷² *Supra* note 33.

⁷³ *Ibid* at para 21.

⁷⁴ 2015 SCC 27.

⁷⁵ *Ibid* at para 160.

⁷⁶ Carter, *supra* note 70 at 35–36.

⁷⁷ (1967), [1968] 1 CCC 14, [1967] NSJ No 3 (NSCA) [*Creemer*].

⁷⁸ *Ibid* at 21.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ *Ibid*. See also Carter, *supra* note 70 at 38–39.

The *Creemer* framework was applied in the exclusion of an unattributed digital photograph downloaded from an internet social media website in *R v Andalib-Goortani*.⁸² Notably, Justice Trotter, as he then was, in this 2014 decision, applied the *Creemer* common law framework and not the available CEA electronic document regime to the admissibility issue. Subsequent courts have also applied the common law *Creemer* admissibility framework to audio and visual digital recordings.⁸³ To add to the confusion, in *R v Tello*, a 2018 decision on the admissibility of digital photographs of text messages, Justice Campbell applied the *Creemer* framework in finding the photographs were properly admitted.⁸⁴ Even in the context of the CEA admissibility regime, we can see the influence of the *Creemer* framework. For instance, returning to the *Bernard* decision, Justice Gogan, in declining to admit the photographs or screen captures of the Facebook Wall posts under the CEA regime, is “mindful” of Justice Trotter’s decision in *Andalib-Goortani*.⁸⁵

It should be noted that the *Creemer* framework is not a constant in the admissibility of image-based evidence. In *Nikolovski*,⁸⁶ Justice Cory found authentication and, therefore, admissibility depended on establishing that the “videotape has not been altered or changed, and that it depicts the scene of the crime.”⁸⁷ Conversely, the Alberta Court of Appeal in *R v Bulldog*⁸⁸ interpreted the authenticity test differently. There, the Court suggested that the admissibility of digital-recorded evidence requires the Crown show “a substantially accurate and fair representation of what it purports to show.”⁸⁹ Arguably, *Bulldog* dilutes the effect of *Nikolovski* by re-focusing the burden on the Crown to show an absence of manipulation to requiring the Crown to show that the image is, on the whole, an accurate and fair depiction of what it claims to be. The concern in *Bulldog* is whether the evidence, as an image, is a fair representation of the events depicted, not whether the image has been altered.⁹⁰ It is accuracy not alteration that matters.⁹¹ Even though

⁸² 2014 ONSC 4690, Trotter J [*Andalib-Goortani*].

⁸³ See e.g. *R v Penney*, 2002 NFCA 15 [*Penney*]; *R v Parsons*, 2017 CanLII 82901 (NLSC) [*Parsons*].

⁸⁴ 2018 ONSC 356 at para 9.

⁸⁵ *Bernard*, *supra* note 64 at para 58.

⁸⁶ *Supra* note 33.

⁸⁷ *Ibid* at 816.

⁸⁸ 2015 ABCA 251 [*Bulldog*].

⁸⁹ *Ibid* at para 33.

⁹⁰ *Ibid* at para 32.

⁹¹ *Ibid*.

this test may be more in line with the authentication requirement under the CEA, accuracy is not an embedded requirement under the CEA authentication section 31.1.

This question of whether social media is image or document is an important one considering the potentially differing admissibility requirements. The concern with admissibility of both types of evidence is the authenticity of the evidence. However, as will be discussed later in this article, the fulfillment of the Best Evidence Rule through the use of presumptions of integrity, creates an admissibility imbalance between the common law image approach and the statutory one. The CEA presumptions place the onus onto the party objecting to the introduction of the evidence to raise a realistic concern with the integrity of the digital evidence. Some of the CEA requirements are fulfilled by the introduction of some evidence on the issue.⁹² With image-based admissibility, the burden of proof is firmly fixed on the party introducing the image. The standard too may arguably be different, with the common law generally applying a balance of probabilities standard for admissibility issues.⁹³ The standard for admissibility of image-based evidence is not as clear, with some courts viewing authenticity as a threshold issue needing only “some evidence.”⁹⁴ While in *Bulldog*, the Alberta Court of Appeal, without definitively approving of the balance of probabilities standard for admissibility, applied it.⁹⁵

This difference is also important on an esoteric level, as our discussion brings us into the realm of visual culture and the cross-disciplinary field of visual jurisprudence. Visual jurisprudence, a concept promoted by Richard K. Sherwin, Director of the Visual Persuasion project at the New York Law School, calls for the synthesis of the rule of law with emotion.⁹⁶ Namely, a recognition that what our eyes see is not translated merely into data but into a compilation of thoughts, emotions, and interpretations.

The visual interpretative and representative function is found in evidence, particularly social media evidence. Social media evidence is encased in the visual. It is created and appreciated through the “spectator’s

⁹² See CEA, *supra* note 3, ss 31.2, 31.3(a) and “evidence capable of supporting a finding.” See also footnote 137.

⁹³ *Bulldog*, *supra* note 88 at para 38.

⁹⁴ See e.g. *Andalib-Goortani*, *supra* note 82 at para 25; David Tanovich, “*R. v. Andalib-Goortani: Authentication & the Internet*” (2014) 13 CR (7th) 140.

⁹⁵ *Supra* note 88 at paras 38, 40–41.

⁹⁶ Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque* (UK: Routledge, 2012) at 5–6 [Sherwin, “*Visualizing Law*”].

gaze”⁹⁷ where imagery abounds. This relationship between observer and social media is the unseen presence in social media evidence that confounds the court’s own relationship with such evidence as the trier of fact. The image that social media projects carries with it a partial gaze that superficially reflects the full meaning of the evidential artefact. The placement of the trial judge, as the decision-maker, further obscures meaning as the judge also views the evidence through a judicial gaze drawing inferences of fact based on the rule of law and the judge’s own emotive responses to the evidence.

The reality of how an image impacts the spectator runs contrary to the legal concept of “acting judicially.”⁹⁸ To act “judicially” requires dispassionate, disengaged consideration where the trier of fact applies the law and adjudicates “on the basis of the record and nothing else.”⁹⁹ Yet, this judicial action cannot be equated with the judicial gaze, which emanates from the human personality. As Sherwin suggests, “law lives differently in a visual expressive system than in one exclusively made up of words.”¹⁰⁰

The constellation of issues raised by social media evidence is more than the rules of evidence. It engages us in the re-imagining of the legal landscape. It requires us to “gaze” at our rules of evidence with eyes wide open to the impact our rules have in cyberspace. Instead of collapsing evidence into neat legally created categories, we must create space in the judicial gaze to widen the purposive lens. We must build into our rules of evidence a sense of the visual and encourage our decision-makers to embrace “visual literacy”¹⁰¹ as an aspect of their judicial function.

This “embodied seeing”¹⁰² will provide a richer and more robust evidential framework in which our new electronic age can reside in the rule

⁹⁷ This is a key concept of visual cultural studies. See Marita Sturken & Lisa Cartwright, *Practices of Looking: An introduction to Visual Culture*, 2nd ed. (New York: Oxford University Press, 2009) at 103–05 (the spectator’s gaze refers to our relationships with images).

⁹⁸ *R v Biniasis*, 2000 SCC 15 at para 39, Arbour J.

⁹⁹ *Ibid* at para 40.

¹⁰⁰ Sherwin, “Visualizing Law”, *supra* note 96 at 18.

¹⁰¹ *Ibid* at 30, 40 (“visual evidence cannot be reduced to a mere application of the rules of evidence – all of those rules do come into play but in order to determine matters of admissibility, reliability, authenticity, probative value, non-prejudicial – must go beyond these set rules and understand how visual images make and convey meaning, both explicitly and implicitly”).

¹⁰² Richard K Sherwin, “What Authorizes the Image? The Visual Economy of Post-Secular Jurisprudence” in Desmond Manderson, ed, *Law and the Visual: Representations, Technologies and Critique* (Toronto: University of Toronto Press, 2018) 330 at 333.

of law. Giving the digital space in our rule of law recognizes the normative aspect of law as a reflection of who we are as a society and what matters to us. It provides legitimacy for that emotive connective “feeling” we have when we read, hear, or talk about the impact of law on our everyday lives. This connection promotes law’s legitimacy and “binds us to law’s authority.”¹⁰³ As we return to the law of evidence and the underlying premises of that body of rules, we will take this sensibility of the visual with us.

iii. Social Media as Testimonial

The final twist to social media evidence is its ability to sound like testimonial evidence. Although distilled to an animate hard piece of evidence like a document or photograph, Facebook messaging and even Instagram imagery involves a narrative that is crystallized into a written or textual conversation, either with one’s self or with others. This diary-like quality of social media evidence suggests documentary evidence with a healthy dose of testimonial features.

Social media evidence can also be purely testimonial, adding another layer to the confusion of how to handle social media evidence. Such evidence can “live” as part of a person’s historical narrative as events the witness has experienced or directly observed. In that case, a witness may testify to such an observation without engaging social media as a “real” evidential artefact. The Ontario Court of Appeal considers just that situation in the 2019 *R v Farouk*¹⁰⁴ decision. The website evidence was not admitted as being highly prejudicial with low probative value, yet part of the phone number was referenced at trial and again highlighted in the Crown’s closing address to the jury. The argument on the appeal that the evidence was either hearsay or electronic evidence and, therefore, must be authenticated, was dismissed. Justice Harvison-Young, in dismissing the appeal, found the evidence was not electronic documentary evidence pursuant to the *CEA* but was merely testimonial in nature.¹⁰⁵

iv. Social Media Evidence as Documentary Evidence

One of the more popular ways of viewing social media evidence is through the statutory electronic document admissibility regime in the

¹⁰³ *Ibid* at 335, 337.

¹⁰⁴ 2019 ONCA 662 [*Farouk*].

¹⁰⁵ *Ibid* at paras 59-60.

Canada Evidence Act. This regime is decidedly documentary based, providing a stream-lined admissibility process based on the integrity of the container, being the computer, to provide a *prima facie* admissibility process. Integrity is also a prerequisite to admissibility, but court interpretation of that requirement fails to match the enhanced integrity requirements found with image-based digital evidence. The CEA regime was created after thorough discussion and detailed recommendations of the Uniform Law Conference (ULC), which discussed the issue from 1993 to 1997.¹⁰⁶

From the beginning, the ULC considered digital evidence as documentary evidence. This makes sense considering the recommendations were very much connected to computerized documents, particularly those flowing from a civil action and subject to discovery requirements. This explains why integrity focuses on the computer as container as opposed to the actual data, which cannot be understandable, in its raw form, to the human imagination. Although, the CEA fits the documentary profile, it does not, as will be discussed, fit the social media one as well. This is not to suggest that the those involved in the Uniform Law Conference were missing the complexities of social media evidence. Rather, this occurred because social media evidence was simply not on the radar at the time, either historically or as a future proposition. Social media, therefore, became subject to this regime more by its final resting place as the computer/container. The definition of electronic document was broad enough to capture social media in its computerized form, which packaged the information into a documentary scheme.

The creation of the e-discovery process in civil matters also supports this documentary approach to digital evidence. The e-discovery process is informed by the Sedona Principles and the 14 principles arising out of the Sedona Conference in the United States.¹⁰⁷ These principles form the basis of changes to the Federal Rules of Civil Procedure in 2006 on “electronically stored information” or ESI.¹⁰⁸ Specifically, the principles provide organizing rules to assist in the use of ESI in litigation matters. Those principles migrated to Canada and became known as the Sedona Canada Principles,

¹⁰⁶ See “Older Uniform Acts” (last visited 2 May 2020), online: *Uniform Law Conference of Canada* <ulcc.ca/en/uniform-acts-new-order/> [perma.cc/B398-RSSX].

¹⁰⁷ The Sedona Conference, “The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production” (2018) 19 *Sedona Conference J* 1.

¹⁰⁸ *Ibid.*

which were originally drafted by the Sedona Working Group 7, published in 2008, and updated in 2015.¹⁰⁹ The revised principles specifically include social media as ESI. Although the principles recognize the differences inherent in ESI and traditional paper documents,¹¹⁰ they focus on the e-discovery process involving the storing and production of ESI.

There is a cautionary quality to the Sedona Principles. The principles not only create a workable framework for the exchange of ESI documents, they also continually remind the litigator of the uniqueness of that framework. Issues of preservation and technological acumen lie at the heart of these principles, creating an approach to ESI that preserves the integrity of the process and the integrity of the justice system. Of necessity, the principles are obligatory in tone but describe the obligations as a shared responsibility with counsel, the court, and the entire administration of justice. This concern for the authenticity of the ESI is an important feature of the principles and will be further discussed under the next part of this article.

It becomes clear when contrasting the historical approach to electronic information in the *CEA* with the approach to ESI in civil e-discovery rules, that although both premise their subsequent rules on electronic artefacts as documents, e-discovery rules are more purposive than categorical. The civil rules are driven by the concern for storage, manipulation, and integrity in light of lawyers' obligation to disclose. They also arise at a later juncture when social media is becoming a social phenomenon. Conversely, the *CEA* is concerned with admissibility and providing, as do many sections in the *CEA*, an efficient and effective way of admitting evidence at trial. This is not a purely statutory desire, but it is consistent with evidential objectives of truth-seeking and with the evidentiary rules favouring categorical admission with exclusion as an exception.

The representation, therefore, imposed by common law and statutory law conceptualizes social media evidence as a piece of paper, a print-out, and a document. It is something to be archived and then introduced in court like a record. This approach compresses the intricacies of social media onto a page. Like other documentary pieces of evidence, the law also provides for evidential short-cuts to ensure admissibility and use is streamlined. This

¹⁰⁹ The Sedona Conference Working Group 7, "The Sedona Canada Principles Addressing Electronic Discovery" (November 2015), online (pdf): <www.canlii.org/en/info/sedonacanada/2015principles_en.pdf> [perma.cc/FN68-YZNB].

¹¹⁰ *Ibid* at v.

obscures the real picture of social media evidence and perpetuates the false conception of social media evidence as a piece of paper to be stamped and filed as Exhibit “A”.

Documentary evidence is familiar territory for the law of evidence. As early as the 13th century, documentary evidence enjoyed pride of place in the courtroom over parole testimony.¹¹¹ In his seminal treatise on the subject, *From Memory to Written Record: England 1066-1307*, Professor Clanchy traces the legal shift in the British courts from testimonial evidence, based on human memory and perspective, to the written word as artefacts of the events. Instead of the dynamic, colourful presentation of personal recollection and description, the courts turned to the black and white of the tightly controlled print medium. Documents, unlike testimony, could be handled and seen but not heard. Much like Justice Cory’s comments on the superiority of recordings over witness testimony, documents could be viewed and re-viewed by the court at leisure and, therefore, were less demanding of the trier. Moreover, documents were “durable and searchable,”¹¹² representing literate, educated society. On this basis of perceived objectivity, documentary evidence became the “official memory”¹¹³ as opposed to the personal one.

Even the word “document” signifies how we view objects so labelled: the Latin root of the word, *docere*, means “to show, teach, cause to know,”¹¹⁴ giving the object a doctrinal flavour. This root meaning underlies the Latin word *documentum* meaning “example, proof, lesson.” Later, in the medieval world, as written discourse became more widespread, “document” gained the further meaning of “official written instrument, authoritative paper.” This suggests documents are a repository of knowledge, providing proof of its content. Documents, therefore, have a built-in conception of probative value. This is consistent with court treatment of documentary evidence. The justice system tends to take documents at face value, hence the evidentiary short cuts for documentary admission in both common law and statutory

¹¹¹ Clanchy, *supra* note 1.

¹¹² *Ibid* at 26.

¹¹³ *Ibid* at 25–30.

¹¹⁴ The etymology of the proto-indo-european root word is “dek” meaning “to take, accept” also suggests an object that is acceptable and admissible. See “document” (last visited 12 November 2019), online: *Online Etymology Dictionary* <www.etymonline.com/word/document> [perma.cc/9JP4-62Y].

authorities.¹¹⁵ This is all the more reason for the law to be mindful of this documentary bias in admitting such evidence and in exercising the “second look” through the gatekeeper exclusionary discretion.

This preference for documentary records will be discussed further in the next part of the article, as the rules of admissibility of records and documents run parallel to this written record preference. The evidential documentary advantage will become clear in discussing the CEA rules surrounding admissibility. This advantage seems to disappear when applied to social media evidence, requiring a re-assessment of the social media evidence admissibility approach.

III. SOCIAL MEDIA EVIDENCE AND THE PROBLEM OF ADMISSIBILITY

A. Inconsistency

As discussed thus far, the penchant for pigeon-holing evidence into categories together with the unclear nature of social media evidence results in inconsistent approaches to the admissibility of social media evidence. This can be viewed as an admissibility continuum whereby social media as a novel form of evidence is admitted through the basic rules of evidence, then it is perceived by the court as either image or document by applying the common law “real” evidence principles involving authenticity. In the final step of the continuum, social media evidence is contained within an observable package with the emphasis on the end product as a print-out of pages. This final characterization of social media places this evidence neatly into the electronic document regime in the CEA, shedding the less structured common law approach.

This continuum, however, obscures the reality: case law suggests that the courts are rendering inconsistent admissibility decisions by using differing modes of admissibility. This creates differing tests and standards for admissibility dependent on how the court perceives the social media evidence. As discussed earlier, social media as image focuses on alteration of the image or intent to deceive. The image line of cases places the burden on the party introducing the evidence with no shortcuts or presumptions in place, as in the CEA. More importantly, inconsistency means the embedded

¹¹⁵ See e.g. *Ares v Venner*, [1970] SCR 608, 1970 CanLII 5. See also CEA, *supra* note 3, s 30.

safeguards found in our admissibility rules are missing. The move from applying the general rules for admissibility has resulted in few decisions invoking the gatekeeper function. Instead, social media evidence is admitted under the chosen admissibility regime and any residual concerns with the evidence is left to weight.

There is an argument that social media evidence that is primarily textual, such as Facebook messages and chatroom conversations, should be differentiated from social media as images such as Facebook photographs. Image carries with it the predilection for the trier of fact to readily accept image at face value despite testimonial evidence to the contrary.¹¹⁶ In the US Supreme Court decision of *Scott v Harris*,¹¹⁷ Justice Scalia upheld a summary judgment decision, dismissing a civil claim against the police for a negligent police chase that rendered the accused a paraplegic, purely on the basis of police in car video of the pursuit. In Justice Scalia's opinion, the video "speaks for itself."¹¹⁸ The strongly worded dissent by Justice Stevenson and subsequent social science study disagreed.¹¹⁹ Image is confined by its frame of reference, while the trier of fact must look beyond it.¹²⁰

Although image can be overwhelming and distract the trier of fact from the proper weighing of that evidence, admissibility of documentary evidence, through the best evidence rule (BER), is also concerned with alteration and accuracy. Indeed, as will be explored further below, the BER is founded on the court's search for truth through the pristine nature of the original document. The problem with favouring the CEA regime instead of the common law approach lies in how the CEA fulfills the BER through the application of presumptions of integrity that create short-cuts around the alteration and accuracy concerns. In a series of recent cases on

¹¹⁶ Sherwin, "Visualizing Law", *supra* note 96 at 38-40 (Sherwin refers to the Marx brothers classic, *Duck Soup*, where Chico dressed as Groucho challenges actor Margaret Dumount's exclamation that he (Groucho) already left her room as she see him leave "with her own eyes" by retorting "who are you going to believe, me, or your own eyes.")
¹¹⁷ 550 US 372 (2007).

¹¹⁸ To further validate that statement, the video was also posted on the SCOTUS website for public review.

¹¹⁹ Daniel M Kahan, David A Hoffman & Donald Braman, "Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism" (2009) 122:3 *Harv L Rev* 837.

¹²⁰ Anecdotally, while presenting this paper at a conference in Winnipeg, I took a Snapchat photograph of the Museum of Human Rights. My daughter responded with "Great pic. I see all the snow melted." What my daughter failed to see was the enormous pile of snow just outside of the photo frame of reference.

admissibility,¹²¹ appellate level courts have closed the admissibility continuum in favour of a consistent admissibility practice through the CEA electronic document regime. This assists in the inconsistency issue, but it has only exacerbated the true concern with admissibility, which is trial fairness. There is no room in the CEA regime for the gatekeeper function and once admitted under that regime, the social media evidence faces no further threshold scrutiny. The gatekeeper function involves the added benefit of keeping at the forefront throughout the trial the purpose or reason for the introduction of the evidence.

This connection between admissibility and weight is essential. Losing sight of the reason for admitting the evidence often results in trial errors at the appellate level. Admissibility and weight are separate enterprises but are linked. The true delicacy in a trial is to straddle the line between the two processes, which are both considering the same piece of evidence but through a different lens coloured by differing tests and standards of proof. Admissibility and weight must not be conflated,¹²² but proper admissibility sets the stage for a fair trial. Justice Dickson reiterates this sentiment in *R v Ball*, by finding that an accused person is “entitled to be tried on only carefully scrutinized and plainly admissible evidence.”¹²³ The integrity of the trial depends on the integrity of the admissibility process.

For example, a database search on admissibility of Facebook evidence lists 36 criminal cases.¹²⁴ Of the 33 cases,¹²⁵ 17 decisions do not enter into threshold admissibility discussions¹²⁶ even though, in some cases, the Facebook evidence is used as admissions made by the accused,¹²⁷ as expert

¹²¹ *R v Ball*, 2019 BCCA 32 [*Ball*]; *R v SH*, 2019 ONCA 669, aff'd 2020 SCC 3 [*SH*]; *R v Durocher*, 2019 SKCA 97 [*Durocher*].

¹²² *Durocher*, *supra* note 121 at para 45.

¹²³ *Supra* note 121 at para 88.

¹²⁴ Simple CanLII database search terms were used (i.e. “Facebook /s admissibility /s evidence” and specifying “R” in the case name box). Search was done as of October 2019.

¹²⁵ The list contained 35 cases but three of the cases were mentioned twice.

¹²⁶ *R v B(B)*, 2011 ONCJ 582 [*B(B)*]; *R v Eaton*, 2013 ONSC 3133 [*Eaton*]; *R v J*, 2013 NSSC 107; *R v Thorburn*, 2013 ABPC 230; *R v GT*, 2015 BCSC 1718 [*GT*]; *R v Niang*, 2015 ONCJ 719 [*Niang*]; *R v Yellowhead*, 2015 BCCA 389 [*Yellowhead*]; *R v JSM*, 2015 NSSC 312 [*JSM*]; *R v Vollrath*, 2016 ABPC 130 [*Vollrath*]; *R v Howe*, 2016 NSSC 267; *R v Bredo*, 2016 BCSC 2580; *R v Sheek-Hussein*, 2017 ONSC 1764 [*Sheek-Hussein*]; *R v Souvannarath*, 2017 NSSC 107; *R v ASD*; *R v Papatotiriou and Ivezic*, 2017 ONSC 7221; *R v CFN*, 2018 YKSC 19; *R v Simard*, 2019 BCSC 532.

¹²⁷ See *B(B)*, *supra* note 126 at para 49; *GT*, *supra* note 126; *JSM*, *supra* note 126 at para 53.

evidence,¹²⁸ or even proof of identification.¹²⁹ It is concerning that courts, when faced with such evidence, do not recognize the need to first determine whether the social media evidence is admissible as social media evidence and then consider the use for which the evidence will be made based on other evidentiary rules. Equally concerning, it is not clear in many of these decisions the role of counsel in identifying the need for such an admissibility discussion.

B. CEA & Authentication

The CEA, as suggested, is the admissibility regime of choice, so it is to the CEA we now must turn to fully appreciate the unclear picture of social media as evidence in the courtroom. The definition of electronic document under section 31.8 is broadly described as any “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.”¹³⁰ Social media as an evidential artefact easily fits this definition.

Notably, these sections repeatedly use the phrase “recorded or stored” as if both terms are functionally similar concepts. This may be so when using traditional ESI such as excel worksheets or word processing documents. Typically, in creating a digital invoice, we are recording and storing. We can then send the invoice via email and that invoice, when received by the recipient, can be said to store that electronic document. Conceptually, this does not hold true for social media evidence. A person can create the chat message through a computer device, but then that message resides in cyberspace and is not necessarily “stored” on any device at all. This issue is akin to the difficulties the courts have with finding an accused person in possession of child pornography under subsection 163.1(2) and why the alternate separate offence under subsection 163.1(3) of “transmitting” or “makes available,” is more applicable in certain circumstances.¹³¹ A traditional ESI often does reside in a computer system, where a Facebook profile page does not reside anywhere but in cyberspace. This cyber-evidence

¹²⁸ See *Eaton*, *supra* note 126.

¹²⁹ *Niang*, *supra* note 126; *Vollrath*, *supra* note 126 at paras 100-11; *Sheek-Hussein*, *supra* note 126 at para 100.

¹³⁰ CEA, *supra* note 3, s 31.8.

¹³¹ See *R v Morelli*, 2010 SCC 8.

can be retrieved through any computer system, but it is questionable whether it is then truly “stored.”

Generally, there are two separate but related requirements for admissibility under the CEA. The first step requires threshold authenticity under section 31.1.¹³² This authenticity stage parallels the common law requirement for admissibility of real evidence.¹³³ Although the Saskatchewan Court of Appeal in *Hirsch*¹³⁴ describes the section as a “codification”¹³⁵ of common law authenticity, there is a difference. Under section 31.1, the threshold for authenticity under the section is low, merely requiring “evidence capable of supporting a finding” that the evidence is what “it claims to be.”¹³⁶ This “some evidence”¹³⁷ standard of proof may be consistent with threshold authenticity under the common law, but it is lower than the balance of probabilities standard of proof that some courts have required for digital photographic and recorded evidence.¹³⁸ Although image based evidence has developed differently than textual, social media evidence is not always textual and is not, as argued, completely documentary. In fact, social media evidence, like photographs and digital recordings, is open to modification and fabrication.

Justice Paciocco, as he then was, in the *JV* decision, explains the lower standard as “more in the nature of a showing of a *prima facie* case for authenticity, than full establishment.”¹³⁹ Admissibility is, therefore, concerned with whether the evidence is “worth showing”¹⁴⁰ to the trier of fact. If it is, it is the province of the trier of fact to determine “what to make of it.”¹⁴¹ Although, this posits a bright line between admissibility and weight,

¹³² Section 31.1 of the CEA reads as follows: “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.”

¹³³ See *R v Hirsch*, 2017 SKCA 14 [*Hirsch*]; *R v CL*, 2017 ONSC 3583 [CL].

¹³⁴ *Supra* note 133.

¹³⁵ *Ibid* at para 18.

¹³⁶ *Ibid*.

¹³⁷ *R v Himes*, 2016 ONSC 249 at para 47 [*Himes*]. See also *R v CB*, 2019 ONCA 380 [CB], Watt JA (commenting on threshold authentication and the inference that could be drawn on authorship in the absence of evidence that gives an “air of reality” to a claim that this may not be so); *R v JV*, 2015 ONCJ 837 at para 10, Paciocco J.

¹³⁸ See *Bulldog*, *supra* note 83 at 38, 40. *Penney*, *supra* note 83 at para 47; *Parsons*, *supra* note 83; *R v Iyer*, 2015 ABQB 577 at para 9; *R v He*, 2017 ONCJ 790 at para 2.

¹³⁹ *JV*, *supra* at note 137 at para 11.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*. See also *R v Donald* (1958), 121 CCC 304, [1958] NBJ No 7 (NBCA) at para 7.

what is worthy evidence depends on threshold relevancy that, in turn, does depend on the genuineness of the real evidence. As mentioned, Facebook messages can be created by someone other than the accused, which can bring admissibility under the CEA into issue.¹⁴²

Compounding this problem is the standard of proof required for the second stage of CEA admissibility involving the best evidence rule and the presumptions of integrity, some of which require the higher standard of balance of probabilities as opposed to the “some evidence” standard.¹⁴³ This inconsistency in application of a standard “standard of proof” highlights the gaps in the electronic document admissibility regime and heightens the need for a gatekeeper function.

This low admissibility standard is mirrored by the low test employed under the section. The electronic document must first be authentic, meaning “what it is purported to be.” This requirement is fulfilled by some evidence the item is what it claims to be.¹⁴⁴ In *Himes*,¹⁴⁵ the Court found section 31.1 fulfilled where the complainant identified the print out copies of the Facebook messages as the messages the complainant received from the accused.¹⁴⁶ Similarly, in *Hirsch*, authenticity was fulfilled by the complainant’s testimony, who had a personal relationship with the accused, that the Facebook screen captures showed the Facebook profile page of the accused.

These cases suggest authentication also requires some evidence that the messages themselves are real. In *CB*, Justice Watt found, as a “matter of logic,” that the authentication of text messages is akin to the “reply letter doctrine” used in common law to authenticate written correspondence.¹⁴⁷ This view flattens out social media evidence into a handwritten letter sent through post or what we now call “snail mail.” As attractive as this logic is, it misses the point: the product of social media or the output of the data can be viewed as word-based and, therefore, looking like a letter, but social media does not crystalize into that final product until someone makes it so.

¹⁴² See *Ball*, *supra* note 121.

¹⁴³ See *SH*, *supra* note 121 (where Justice Tulloch in dissent suggests the standard for admissibility is lower under s. 31.3(b) of the CEA than under s. 31.3(a)).

¹⁴⁴ Rosemary Pattenden, “Authenticating ‘Things’ in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials” (2008) 12:4 *Intl J Evidence & Proof* 273 at 275.

¹⁴⁵ *Supra* note 137.

¹⁴⁶ *Ibid* at para 47.

¹⁴⁷ *Supra* note 137 at para 69.

Social media, while it travels through cyberspace, can be altered, modified, and fabricated. Replying to a text message does not mean that the person receiving the message is the intended recipient, nor does it mean the person who originally sent the message was the owner of the device or computer system which purportedly sent it.

In the 2019 *Ball* decision, Justice Dickson for the British Columbia Court of Appeal suggests that section 31.1 authentication does “not necessarily mean that it is genuine,”¹⁴⁸ leaving that issue to weight. This position seems at odds with common law conceptions of the authentication process. Authentication of real evidence is needed as a form of relevancy: if a proffered item is not genuine, then the items connection to the proceedings is severed. The difficulty lies in the scope of the claim of what it purports to be. For instance, a screenshot of a Facebook page taken by the investigating officer should not pass the authentication hurdle based only on the police officer’s evidence confirming the image looks like the one that he captured. The Facebook page only becomes relevant where there is some threshold evidence of identity – that it is the Facebook page of a particular person connected to the case at hand. Otherwise, the item is not what it purports to be. This threshold determination would require a consideration of whether the item is facially “genuine.” Although statutory authentication is not a virtue test, it still should require a relevancy test before turning to the BER and the presumptions of integrity.

C. The Best Evidence Rule and the Presumption of Integrity

Authentication is augmented by¹⁴⁹ or an “adjunct to”¹⁵⁰ the statutory application of the Best Evidence Rule (BER) under section 31.2. These descriptors, “augment” and “adjunct”, remind us that authentication and the application of the BER are related concepts. The use of the BER in the digital context confirms the evidentiary categorization of social media evidence as documentary. The BER, also known as the documentary originals rule, is premised on the belief that changes or alterations to a document can best be seen on the original document. In other words, copies are subject to either unintentional changes (think medieval scribes) or intentional ones (think white out and a photocopier). To ensure that the

¹⁴⁸ *Supra* note 121 at para 70.

¹⁴⁹ *Ibid* at para 72.

¹⁵⁰ *Supra* note 133 at para 23 quoting David M Paciocco, “Proof and Progress: Coping with the Law of Evidence in a Technological Age” (2013) 11:2 CJLT 181.

document entered and to be relied upon is a true reflection of its contents, the document so entered must be the original. Again, this rule is connected to relevancy, materiality, and the truth-seeking function of the trial. It is also connected to final weight, as the admissibility process ensures that the final probative weighing of the document will be done with the best evidence at hand.

The BER seems out of place in the digital world. According to Justice Baltman in *CL*, the BER in the digital world assures “the court that the document submitted is the same as the one that was input into the computer.”¹⁵¹ But does it? There are no “originals” in the digital world; ESI is just that, bits of data stored as a representation of a document. So too social media fits uncomfortably into the BER. By focusing on the end product as a document, the entire social media journey through the ethernet is ignored. Contextual nuances are removed in favour of the wrappings. This becomes even more apparent in the fulfillment of the BER under the *CEA*. Consistent with the emphasis on documents as an efficient form of probative evidence, the *CEA* electronic regime provides evidentiary short cuts to fulfill the BER. Justice Caldwell, in the *Hirsch* decision, opines that the BER presumptions are in place precisely because electronic evidence cannot be produced as originals.¹⁵² Instead, the presumptions substitute for the integrity of the document, which cannot be otherwise shown. This may explain the reason for the presumptions, but it does not alleviate the concerns with providing an evidentiary shortcut which cannot provide substantive integrity of the actual evidence introduced. Rather, the use of these presumptions give the trial process a false sense of integrity that is simply not there.

These shortcuts come in the form of a number of presumptions of integrity which, if factually proven, fulfill the BER requirement. The presumptions themselves are documentary oriented and reflect other non-digital documentary rules. For example, the presumption under paragraph 31.3(c) is consistent with section 30 business records, which are created in the “usual and ordinary course of business.” Unlike section 30, the electronic document is admissible but not for the truth of its contents. Again, these rules seem to have been written with traditional ESI in mind and not social media evidence.

¹⁵¹ *Ibid.*

¹⁵² *Supra* note 133 at para 22.

The presumptions under section 31.3¹⁵³ focus on the integrity of the process rather than the integrity of the evidence itself. This process emphasis looks to the container, be it artificial or connected to an individual, as a reliable substitute for the evidence itself. In other words, the concern is with where the evidence resides, not the integrity of the evidence itself. The presumption most relied upon for social media evidence is paragraph 31.3(a), establishing integrity through proof of “evidence capable of supporting a finding” of proper operation of the computer system where the evidence is recorded or stored. Typically, this proof requires evidence that the computer system was “operating properly” “at all material times.”

The proof can come in many forms depending on the circumstances. Generally, it comes from the person who owns or has custody of the computer system. The difficulty with using this presumption as proof of integrity is the ephemeral nature of social media evidence. As mentioned, social media evidence does not reside in any particular place, nor in any identifiable form. A Facebook profile page, for instance, can be accessed on multiple computing devices at multiple times. Proof of operation of whichever computer is used to access the information for trial is a poor indicator of the integrity of the actual evidence as contemplated by the BER. It certainly cannot ensure that the social media evidence “accurately reflects the original information input into a computing device by its author.”¹⁵⁴

As with authenticity, there is conflicting authority of the standard to be applied. Justice Dickson in *Ball* considered the standard for all of the presumptions to be on a balance of probability.¹⁵⁵ Other cases have discerned differences in the standard required for paragraphs 31.3(a) and 31.3(b). The Ontario Court of Appeal in *SH*¹⁵⁶ finds the threshold under paragraph 31.3(a) to be lower than the threshold in 31.3(b), based on the words used in each paragraph to describe the proof requirement. Paragraph 31.3(a) uses the familiar “evidence capable of supporting a finding,” which is also used under the authentication section under 31.1. As discussed earlier, courts have interpreted section 31.1 to require a low threshold. Paragraph 31.3(b) requires the circumstances be “established,” suggesting a

¹⁵³ There are other presumptions available such as section 31.4 of the CEA and the presumptions regarding secure electronic signatures but these are more closely aligned to the civil e-discovery process.

¹⁵⁴ *Ball*, *supra* note 121 at para 73; *SH*, *supra* note 121 at para 124; *Hirsch*, *supra* note 133 at para 23.

¹⁵⁵ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *JV*, *supra* note 137 at para 21.

¹⁵⁶ *Supra* note 121 at paras 25, 125.

higher threshold.¹⁵⁷ Although the words used in both subsections differ, case authority does not discuss the reasoning behind this critical differential.

Paragraph 31.3(b) permits the application of BER in circumstances where the electronic document was “recorded or stored by a party adverse in interest to the party seeking to introduce it.” For example, this presumption could be used when the accused person’s computer is seized and the Crown is seeking introduction of ESI from the computer. It could also include text messages found on an accused person’s smart phone.

In the *Hirsch* case, the Saskatchewan Court of Appeal found the Crown fulfilled the BER through the use of the paragraph 31.3(b) presumption by introducing copies of the accused’s Facebook page in the form of screen capture images taken by the complainant’s friend.¹⁵⁸ Justice Caldwell in *Hirsch* contemplates the possibility there are two electronic records in issue: one being the Facebook page as it appears on the computer screen and the other as created by the screen capture image.¹⁵⁹ While acknowledging the “fluidity and impermanence” of Facebook postings, Justice Caldwell found it more “compelling” to view the screen captures as providing the “best evidence” available for the Crown.¹⁶⁰

This reference to “best evidence” applies the more generous meaning of the phrase¹⁶¹ rather than the traditional original documents definition. It also suggests that courts are applying a “functional approach”¹⁶² to the admissibility of social media evidence. Such an approach is similar to the principled approach to admissibility now favoured in admitting hearsay statements.¹⁶³ In the context of social media evidence, this functional approach can bear out two meanings: it can assist in simplifying the highly technical aspects of digital evidence and permit judges to take a generous view of judicial notice. In the words of Justice Paciocco in his article on

¹⁵⁷ See also *Avanes*, *supra* note 66 at paras 55–57.

¹⁵⁸ *Supra* note 133 at para 7.

¹⁵⁹ *Ibid* at para 24.

¹⁶⁰ *Ibid*.

¹⁶¹ See Ron Delisle et al, *Evidence Principles and Problems* (Toronto: Carswell, 2015) at 409–410.

¹⁶² See David M Paciocco, “Proof and Progress: Coping with the Law of Evidence in a Technological Age” (2013) 11:2 CJLT 181. See also *Ball*, *supra* note 121 at paras 75–80.

¹⁶³ See *Khan*, *supra* note 35.

digital evidence, this approach will permit judges “to cope with technology that is broadly relied upon by ordinary persons.”¹⁶⁴

The other meaning applies the “functional approach to interpretation and application of the statutory framework,”¹⁶⁵ which appears to suggest a rather sweeping application to the electronic document regime. Although a functional approach may have some benefits, such as circumventing needless proof of how Facebook works, it can also cut the wrong corners in the name of pragmatism. This is apparent in *Hirsch* and recent appellate decisions like *Durocher*¹⁶⁶ and *SH*,¹⁶⁷ where the Courts are not so much concerned with the lack of proper admissibility procedure as they are with the outcome. In *Durocher*, the Saskatchewan Court of Appeal found that the trial judge was not in error when he failed to inquire into the admissibility of the social media evidence pursuant to the CEA. The majority decision in *SH* came to a similar conclusion where the trial judge, rather late in the trial, required CEA admissibility but through an inapplicable presumption of integrity under paragraph 31.3(b). Both appellate courts came to their position after applying the CEA requirements after the fact and finding the social media evidence admissible. Although this position is consistent with the notion of content over form, which appellate courts readily apply,¹⁶⁸ when the process is the point of the exercise, such as in admissibility, the functional approach loses its proper function and true meaning when the court enters into admissibility guess work at the appellate stage. This is particularly true when admissibility is a gatekeeper trial function connected to the ultimate trial verdict.

The *Ball* and *SH* decisions are an indication that the overlay of the CEA regime onto social media evidence is more complex than first imagined. For instance, in the 2015 *JV*¹⁶⁹ decision, Justice Paciocco, as he then was, found

¹⁶⁴ Paciocco *supra* note 162 at 226.

¹⁶⁵ *Ball*, *supra* note 121 at para 75.

¹⁶⁶ *Supra* note 121.

¹⁶⁷ *Supra* note 121.

¹⁶⁸ See e.g. *R v Calnen*, 2019 SCC 6 at para 163, Martin J. (“jury charges do not have to adhere to prescriptive formulae); *R v REM*, 2008 SCC 51 at paras 25–27, McLachlin CJ (approving of Binnie J in *Sheppard* who warns against a formalistic approach in considering sufficiency of reasons and instead approves of a functional approach where the Court considers the sufficiency in light of the function of the reasons as informational, accountability, and meaningful appeal); *R v Boucher*, 2005 SCC 72 at para 29, Deschamps J, (“W(D) is not a sacrosanct formula that serves as a straitjacket for trial courts”).

¹⁶⁹ *Supra* note 137.

little trouble with paragraph 31.3(a). He found that the integrity of the computer system was established by inferring the accuracy of the chatroom messages from the evidence of the complainant. Therefore, remarked Justice Paciocco, the computer system “did what they were meant to do, namely capture the recognized conversation.”¹⁷⁰ Conversely, in the dissent of the 2019 *SH* decision, Justice Tulloch stresses the presumption under paragraph 31.3(a) requires evidence that the system was working at “all material times.”¹⁷¹ This was questionable on the evidence in *SH*, as the Crown failed to call evidence of the owner of the device.¹⁷² Similarly, in *Ball*, another 2019 appellate decision, the Crown failed to lead evidence of the accuracy of the time stamps from the verifying witness, resulting in a failure to establish the system was working at “all material times.”¹⁷³

Justice Tulloch went even further in his strict reading of the CEA requirements. The majority, in dismissing the appeal in *SH*, relied heavily on the data extraction evidence from the cell phone associated with the accused. In Justice Tulloch’s view, this showed the cell phone data was accurately extracted but was not “fully responsive” to BER concerns that “the data on the cell phone accurately reflected the information originally inputted into the cell phone by the appellant and C.H., or whether the cell phone was properly operating at the time when the messages were sent and received.”¹⁷⁴ The additional argument that an inference could be drawn because the cell phone was working properly from the fact the messages were stored “in a customary format” was rejected by Justice Tulloch.¹⁷⁵ In Justice Tulloch’s view, the proper operation requirement is linked to the temporal factor. This requires proof of proper operation “at all material times”

¹⁷⁰ *Ibid* at para 24.

¹⁷¹ *Supra* note 121 at para 126. Note, that in the brief majority decision of the Supreme Court of Canada upholding the majority decision, Justice Moldaver, on behalf of Justices Abella and Côté, found that the evidenced adduced by the prosecution after the reopening of their case was “essentially confirmatory” evidence of constructive possession and that the evidence, before the reopening of the case, was “overwhelming.” In those circumstances, the application of the curative proviso was appropriate. Justice Brown, with Justice Martin concurring, would have allowed the appeal and ordered a new trial on the basis that “the trial judge’s error in allowing the Crown to split its case led to an unfair trial, which miscarriage of justice cannot be cured.” Neither decision touches upon the admissibility regime for electronic evidence.

¹⁷² *Ibid* at para 129.

¹⁷³ *Supra* note 121 at para 82.

¹⁷⁴ *SH*, *supra* note 121 at para 131.

¹⁷⁵ *Ibid* at para 132.

through evidence the time stamps were “accurate or reliable.”¹⁷⁶ Accuracy may not be a concern in authentication under section 31.1 but it is, on a strict application of the 31.3(a) provision, a BER concern. This line of authority may bring the CEA requirements more in line to the photographic or image approach. However, a crucial dissimilarity exists: in the photographic/image regime, the burden of proof is firmly fixed on the party introducing the evidence while in the CEA regime, the opposing party must raise proof concerns.

To be fair, the presumptions can be rebutted by “evidence to the contrary.” There is very little authority on what kind of evidence is needed and what the standard of proof is in those circumstances. It does require the opposing party to lay a foundational evidentiary basis for challenging the presumptions. Unlike the admissibility process under common law, these presumptions create a default situation and if counsel is unaware of their obligations, that default situation turns a presumption into a mandated fact.

Presumptions are an oddity in law; one may view presumptions as creating a false reality or legal fiction whereby one set of facts are proven by a different set. Legal principle imposes this legal artifice by placing comfort in the notion that the party affected by the presumption has the knowledge and the ability to rebut the legally constructed fact. For example, the presumption that the person sitting in the driver’s seat of the car has care and control of the car for purposes of impaired driving offences makes factual and legal sense. It is the accused who has the information to rebut that presumption, and it is consistent with the permissible inference that a person intends the natural consequences of their actions.

The same cannot be said of the presumptions in the CEA. Certainly, under paragraph 31.3(a), the defence may not have the requisite knowledge to even appreciate that the computer system in question is not operating properly. Under 31.3(b), the presumption may make more sense as the evidence is emanating from the party’s own device. But, when it comes to social media, this advantage is fleeting: social media does not reside in a device, nor is it really stored in a device – typically if it “resides” anywhere, that place is in cyberspace. Similarly, social media evidence can be created from any device and yet still look like it came from the accused person. For example, in *Ball*, the defence argued that the Crown witness, who was called to authenticate the Facebook messages, falsified the messages and created

¹⁷⁶ *SH*, *supra* note 121 at para 132; *Ball*, *supra* note 121 at paras 84–85.

them by accessing the accused person's Facebook account.¹⁷⁷ Although in *Ball* admissibility was not properly considered at trial, Justice Dickson for the British Columbia Court of Appeal found that it was likely the Crown could not fulfill the paragraph 31.3(a) requirements.¹⁷⁸

The CEA, geared toward traditional ESI, fails to capture what social media is and how it presents at trial. The admissibility regime is difficult to apply, resulting in inconsistent applications of the sections and an unclear understanding of how the sections work. It also, as will be discussed next, needs to be embedded in an entire admissibility framework and should not stand alone as the key to the introduction of social media evidence at trial.

D. The Gatekeeper Function

The trial judge's role as gatekeeper is referenced repeatedly throughout this article. The exclusionary discretion requires the judge to determine whether otherwise admissible evidence should be excluded where the prejudicial effect of admission outweighs the probative value of that evidence. It is an essential step in the admissibility process, yet here too, this step is inconsistently applied when it comes to threshold admissibility of social media evidence. As referenced earlier in this article, a database review of admissibility decisions for Facebook evidence indicates that out of 15 decisions which do consider threshold admissibility, six engage in the gatekeeper function to varying degrees.¹⁷⁹ Of those six decisions, three cases applied the common law to threshold admissibility¹⁸⁰ and one case¹⁸¹ applied the exclusionary discretion after the Facebook evidence was admitted as accurate by the defence. Only in *Soh* (2014) and *TB* (2019) did the Court apply the gatekeeper function after determining admissibility under the CEA.

Significantly, none of the recent significant appellate decisions on the CEA electronic document regime¹⁸² mention the gatekeeper function as an additional missing piece to the CEA admissibility process. The only recent appellate decision to make a passing reference to the gatekeeper function is

¹⁷⁷ *Supra* note 121 at para 23.

¹⁷⁸ *Ibid* at paras 81-88.

¹⁷⁹ *RL*, *supra* note 55; *R v Moazami*, 2013 BCSC 2398 [*Moazami*]; *Soh*, *supra* at note 65; *R v Savoie*, 2016 ABQB 89 [*Sowie*]; *R v Macdonald*, 2016 ABQB 154 [*MacDonald*]; *R v TB*, 2019 ABPC 260.

¹⁸⁰ *RL*, *supra* note 55; *Moazami*, *supra* note 179; *MacDonald*, *supra* note 179.

¹⁸¹ *Sowie*, *supra* note 179.

¹⁸² See *Ball*, *supra* note 121; *SH*, *supra* note 121; *Durocher*, *supra* note 121.

Durocher.¹⁸³ The Saskatchewan Court of Appeal, in dismissing the conviction appeal, pointed to the failure of the defence counsel to “press for an admissibility *voir dire*, or suggest the evidence was not relevant or material to the charges or argue that the prejudicial effect of the Facebook messages exceeded their probative value.”¹⁸⁴ The gatekeeper function is considered an alternative basis to challenge the admissibility of the Facebook evidence instead of an integral part of a robust admissibility regime.

The Court in *Durocher* seems to suggest that the defence is required to request the exercise of judicial discretion before it should be engaged. This is not consistent with the purpose of the gatekeeper function, which visualizes the trial judge as the protector of the integrity of the justice system. It is also not consistent with other admissibility regimes such as expert evidence, similar fact and hearsay evidence where the application of the gatekeeper function is presumed and, therefore, is a core responsibility to be performed by the trial judge. A failure to conduct such a responsibility may attract appellate review.¹⁸⁵ This is reinforced by the Alberta Court of Appeal’s discussion of the hearsay issue where the “residual discretion” is specifically discussed as part of the principled approach to admissibility.¹⁸⁶

This lack of attention to the gatekeeper’s role in admissibility is most troubling. The evidentiary gatekeeper function is a “fundamentally important role” in which the judge “preserves” the accused person’s rights and the integrity of the justice system.¹⁸⁷ Although the entire admissibility process involves such a gatekeeper function, it is in the application of the exclusionary discretion where the gatekeeper truly shines. Here, the judicial discretion goes beyond admissibility as defined by the rigid rules of evidence. Instead, this function enters into the realm of fairness and equity. When properly exercised, the exclusionary function ensures a fair trial, which is the ultimate goal for all of those affected by the justice system.

The importance of this judicial second look at admissible evidence can be viewed in light of digital evidence realities and the drive for accuracy, continuity, and integrity of the evidence. The Sedona Canadian Principles, although applicable to the civil litigation e-discovery scheme, highlight the

¹⁸³ *Supra* note 121.

¹⁸⁴ *Ibid* at para 51.

¹⁸⁵ *R v Dominic*, 2016 ABCA 114.

¹⁸⁶ *Ibid* at para 57.

¹⁸⁷ *Grant*, *supra* note 41 at para 44, Karakatsanis J.

need for special caution in using digital evidence as “ESI behaves completely differently than paper documents.”¹⁸⁸ Further, “ESI can be mishandled in ways that are unknown in the world of paper. Electronic information can be overwritten, hidden, altered and even completely deleted through inadvertent, incompetent, negligent or illicit handling without these effects being known until later.”¹⁸⁹ This concern is echoed in other Sedona Principles concerned with continuity, alterations of metadata and the “dynamic, changeable nature” of the ESI. Although the principles continue to be focused on the final discoverable product as a readable document or at least retrievable data, not unlike the primary focus in the CEA, these sentiments suggest we need a more robust admissibility process, particularly in the criminal context where fair trial issues are of primary concern.

The advantages of applying the cost-benefit analysis of the gatekeeper cannot be overemphasized. For instance, the informativeness of the social media evidence would also be reviewed in considering the probative value of the evidence. Again, relevancy, accuracy, and reliability would be considered, not assessed as the ultimate trier, but weighed in relation to the possible prejudicial effect of the evidence. The potential prejudice could engage moral and/or reasoning prejudice. Social media evidence, depending on its presentation, can distract the trier from the testimonial evidence at trial. Viewed as documents with inherent probative value, a trier could place more weight on the evidence than is warranted. Further, the evidence can engage other admissibility concerns, such as hearsay and character evidence concerns, that can magnify the reasoning prejudice and may lead to moral prejudice as well.

Finally, as with expert evidence admissibility, the gatekeeper function ensures novel forms of evidence and novel admissibility procedures are, as Justice Dickson in *Ball* suggests, “carefully”¹⁹⁰ scrutinized through the gatekeeper function to ensure the fact-finding process remains focussed on whether the accused committed the offence beyond a reasonable doubt.¹⁹¹ There are parallels here to expert evidence admissibility concerns. For expert evidence, the concern is that the trier will take the evidence at face value due to the expertise and knowledge of the witness. Here, the concern is that the trier will take the evidence at its face value because those involved in the

¹⁸⁸ The Sedona Conference Working Group 7, *supra* note 109 at v.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ball*, *supra* note 121 at para 88; See also *SH*, *supra* note 121 at para 137.

¹⁹¹ *R v Trochym*, 2007 SCC 6 at para 54, Binnie J.

justice system, lawyers, and judges alike simply do not properly understand what social media evidence is and how digital technology actually works. This is highlighted by Justice Tulloch's comments on the frailties in inferring proper operation of the system from the successful data extraction. These concerns are exacerbated by an admissibility regime founded on artificial presumptions of integrity that do not completely connect computer system operation integrity with the integrity of the actual evidence being introduced. Although trial objectives encourage parties to bring "forward the most complete evidentiary record possible,"¹⁹² admissibility will necessarily be circumscribed where the evidence may "distort the fact-finding process."¹⁹³

Another gatekeeper concern is privacy. In the *RL*¹⁹⁴ decision, one of the earliest reported decisions on the admissibility of Facebook evidence in the criminal context, the only case cited is the earlier *McDonnell*¹⁹⁵ civil decision, which specifically raises privacy as an admissibility concern. According to Justice Eberhard in *RL*, privacy concerns "may be overcome by relevance."¹⁹⁶ This concern is a decidedly gatekeeper issue. Justice Eberhard applied his gatekeeper function when he found that privacy concerns impact the prejudicial effect of the evidence, as any cross examination of the complainant on the Facebook contents would be "numbingly intimidating" involving "silly, profane, vulgar teenage rants."¹⁹⁷ In later decisions on admissibility, privacy as a gatekeeper issue does not figure as a factor.¹⁹⁸ Yet, privacy as a normative concept does loom large in section 8 search and seizure decisions. Considering social media and cyber communications do give rise to privacy concerns in the search and seizure of that evidence, it should be viewed as a valid consideration in the gatekeeper exclusionary discretion. The fact that it does not may be a function of the rigidly defined evidential rules, which lack this normative insight. At this early stage, gaps in the evidential approach to social media evidence already appear. It is

¹⁹² *Ibid.*

¹⁹³ *Ibid.* See also *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193; *R v J-LJ*, 2000 SCC 51 at para 29; *R v Bingley*, 2017 SCC 12 at para 13.

¹⁹⁴ *Supra* note 55.

¹⁹⁵ *Supra* note 50.

¹⁹⁶ *Supra* note 55 at para 3.

¹⁹⁷ *Ibid* at paras 12–15.

¹⁹⁸ A search did not produce any criminal decision other than *RL*, *supra* note 55, that includes privacy interests in the admissibility discussion.

perhaps this social media context of personal and private space that imbues social media evidence with a special quality.

E. Trial Fairness

The failure to engage in the gatekeeper function and the lack of a consistent judicial approach impacts trial fairness. Two 2019 appellate decisions, *Ball*¹⁹⁹ and the dissenting decision of Justice Tulloch in *SH*,²⁰⁰ connect the failure to properly conduct threshold admissibility of social media evidence to trial unfairness resulting in a miscarriage of justice. Justice Dickson's comments in *Ball* particularly reflect this sentiment when she cautioned that the accused is "entitled to be tried on only carefully scrutinized and plainly admissible evidence."²⁰¹ Justice Tulloch also comments on the repercussions of improper admissibility but focuses on the impact to the accused who is then "deprived... of a fundamental procedural right that was a safeguard of his right to a fair trial."²⁰²

Another recent decision from the Ontario Court of Appeal, *R v CB*,²⁰³ views the unfairness through a different perspective, involving the introduction by the defence of digital evidence that was deemed inadmissible at trial. In that case, the digital evidence consisted of text messages and photographs residing on a smart phone social media platform.

At trial, the defence sought to use the evidence in cross-examination of the complainants. Yet again, at trial, social media evidence was introduced and discussed without a clear basis for threshold admissibility as digital evidence. The trial judge in *CB*, without applying the CEA regime, found that the digital evidence had no probative value, as there was no forensic evidence connecting the content of the data to the complainant. In short, although the trial judge did not use the words "authenticate" or "authentication," the evidence was inadmissible due to a failure to authenticate.²⁰⁴ Yet again, appellate intervention is required and yet again, the appellate court applies common law and CEA principles to the decision, after the fact.²⁰⁵ In *CB*, Justice Watt, allows the appeal, quashes the convictions and orders a new trial.

¹⁹⁹ *Ball*, *supra* note 121.

²⁰⁰ *SH*, *supra* note 121.

²⁰¹ *Ball*, *supra* note 121 at para 88.

²⁰² *SH*, *supra* note 121 at para 42.

²⁰³ *Supra* note 137.

²⁰⁴ *Ibid* at para 56.

²⁰⁵ *Ibid* at para 78.

CB also exemplifies the other recurrent unfair trial dimension: the lack of evidence at trial to overcome the presumption for integrity. But CB takes this absence of evidence a step further. Here, the fresh evidence on appeal relating to the authenticity of the data extracted from the cell phone was admitted not only for authentication proper, but for impeachment purposes. The timing and authenticity of the text messages and photographs were a key issue in CB's defence. The data was needed for impeachment purposes to bring into question the credibility and reliability of the Crown's evidence. Justice Watt, speaking for the Court, admitted the fresh evidence for threshold authentication purposes and to be considered in a "credibility/reliability analysis."²⁰⁶

*R v Finck*²⁰⁷ serves as a different cautionary tale. In *Finck*, a new trial was ordered because trial counsel failed to introduce social media evidence, which was in counsel's possession.²⁰⁸ The *Durocher* case also serves as a warning to counsel to be vigilant where social media evidence is proffered at trial. Similar warnings can be gleaned from *SH*, where Crown and defence counsel failed to appreciate the significance of the evidence²⁰⁹ leaving it to the trial judge who, much later in the proceedings, realized that admissibility issues should be considered. Even in *Ball*, where the Court did send the matter back for a new trial based on miscarriage of justice, the trial unfairness was "largely borne of insufficient vigilance to ensure its protection."²¹⁰ It is important to note that in *Ball*, *Durocher*, and *Finck*, the grounds for appeal were also bound up with ineffective assistance of counsel concerns as a result of the lack of vigilance.²¹¹

Justice Tulloch, at paragraph 118 of *Ball*, suggested a heightened fairness concern in reviewing admissibility of "novel legal issues such as the admissibility of electronic documents." The uncertainty concerning the application of the CEA regime and the true nature of social media evidence are reflected in this novelty. Issues of accuracy, raised by the low threshold of section 31.1 and the liberal use of presumptions which do not logically connect with the underlying premise of the BER, further enhance trial fairness concerns. Both accuracy and integrity raise reliability issues.

²⁰⁶ *Ibid* at para 145.

²⁰⁷ 2019 NSCA 60.

²⁰⁸ *Ibid* at paras 53, 62.

²⁰⁹ *SH*, *supra* note 121 at para 58.

²¹⁰ *Ball*, *supra* note 121 at para 122.

²¹¹ See also *Yellowhead*, *supra* note 126.

Interestingly, Bill C-6, which amended the CEA to add the electronic document regime, suggested the amendments would “clarify how the courts would assess the reliability of electronic records used as evidence.”²¹² Reliability as an objective is noticeably lacking in the CEA regime. Yet, threshold reliability, according to Justice Karakatsanis in *R v Youwarajah* “serves an important function” as do “rules of evidence and principles governing admissibility of evidence.”²¹³ She went further and explained that those rules and principles:

[E]xist in the first place because experience teaches that certain types of evidence can be presumptively unreliable (or prejudicial) and can undermine the truth-seeking function of a trial. Rules of admissibility of evidence address trial fairness and provide predictability. They also provide the means to maintain control over the scope of criminal trials to keep them manageable and focussed on probative and relevant evidence.²¹⁴

Finally, an appellate caution. In the majority decisions of *SH*, *Durocher*, *Hirsch*, and *Farouk*, the CEA regime is applied after the fact by appellate courts to assess whether there is no substantial wrong or miscarriage of justice²¹⁵ for appellate purposes, without the benefit of a complete record testing admissibility issues at the time that the evidence was heard. To apply admissibility after the fact in an evidential vacuum, albeit in the context of appellate review, may further compound the fair trial concerns. As echoed by Justice Tulloch in *SH* at paragraph 119, it was incumbent on the Crown to “reveal” its case and the responsibility of the defence to respond at the time of trial when the proper mechanisms are in place to test the evidence. It is at trial where, ultimately, guilt or innocence are at risk and where issues should be litigated, argued, and properly determined, not at the time of the hearing of the appeal when the trial justice is long past.

IV. CONCLUSION: THE SOLUTION(S)

The specialness of social media and the problems surrounding the present approach to admissibility of such evidence have been identified, and now a solution is needed. There are two possible approaches: one which is pragmatic and the other, a more ideologically based solution. The pragmatic

²¹² *Avanes*, *supra* note 66 at para 60.

²¹³ 2013 SCC 41 at para 25.

²¹⁴ *Ibid.*

²¹⁵ See *Criminal Code*, RSC 1985, c C-46, s 686(1)(b)(iii).

solution does not create a new approach but rather looks to other evidential categories where the traditional admissibility framework was not robust enough to protect fair trial concerns. Novel legal regimes need a framework that recognizes the modernity of the evidence, yet also recognizes that novelty may breed complacency or the path of least resistance. Consistency and clarity are key to containing novelty. Therefore, a robust and well-described approach is required.

For this, we must turn to the expert evidence regime carefully circumscribed in *White Burgess v Haliburton*.²¹⁶ This renewed expert evidence regime melds the traditional with an enhanced gatekeeper function. It takes well-used criteria and then re-filters it through the gatekeeper lens with an additional reliability factor. It also bridges the evidential spectrum from threshold admissibility to gatekeeper and then onwards to ultimate weight. This same approach can be employed for the admissibility of social media evidence. It provides counsel and the court with a road map where vigilance is promoted and legal principles are used. As with expert evidence, 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”²¹⁷ 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 CEA.

The enhanced gatekeeper function, through the exercise of the exclusionary discretion, will lie at the centre of this new admissibility framework. Similar to the expert evidence approach, the gatekeeper function will enter into a cost benefit analysis filtering the issues engaged by the CEA admissibility requirements through the gatekeeper lens. In addition, as with the expert evidence regime, the gatekeeper step will also view the threshold reliability of the evidence in weighing the prejudicial effect in light of the probative value of the evidence. As part of this second look, the gatekeeper will be informed by case law and Sedona-like principles which embrace social media as a community space *qua* evidential artefact. Then, if admissible, those defining factors will continue through to the trial with the application of the higher standard of proof beyond a reasonable doubt and the full weighing of the evidence within the entirety of the trial evidence.

²¹⁶ *Supra* note 46.

²¹⁷ *Ball, supra* note 121 at para 67.

Although this is the recommended approach, this article has highlighted the inherent frailties in the CEA regime when it comes to social media evidence. Until the CEA sections are challenged or amended, the above recommendation will provide structure and scaffolding for the enhanced gatekeeper function. In any event, it is important to comment on the changes, which should be made to the CEA regime to bring it into line with the common law admissibility process. The standard of proof for fulfilling the BER should be entirely on a balance of probabilities. In fact, this standard is consistent with the “common law rule relating to the admissibility of evidence.”²¹⁸ That standard is not a heavy burden and will adequately protect the fair trial requirement. The use of integrity presumptions are also questionable but at least with an embedded enhanced gatekeeper function, counsel will be aware of their obligation to rebut the evidence and how to do so. The other option is to bypass entirely the CEA regime for social media evidence in favour of the common law approach. This would leave the CEA for the ESI as initially contemplated, which as Word documents and Excel sheets better fulfill the premise of the sections.

There is a more radical solution. This solution requires a bit of soul searching or net-angst as we fashion a unique admissibility regime reflective of the true nature of social media evidence. This would require a more contextual approach to admissibility that visualizes social media evidence as a community as opposed to mere evidentiary categories. If, instead, evidential rules are viewed as creating a community of information to be used in the determination of legal issues, the law of evidence would move away from categories and toward a multi-dimensional assessment of admissibility. This evidence-as-community approach would be referential to the representative feature of social media evidence in terms of how it enhances or advances a party’s case and also deferential to the ultimate objective of evidence as truth-seeking and fairness function. This, in my view, will require more than a tweak to our Wigmore rules and statutory procedures. It will need a re-visioning of who we are in the digital world and whether our Wigmore rules can stand the test of time.

²¹⁸ See *R v LTH*, 2008 SCC 49 at para 70, Rothstein J.