Relying on Digital Evidence in Court Proceedings

A Note on Language

In this toolkit, we will sometimes use the word woman/women and feminine pronouns for simplicity and to recognize the significant impact technology-facilitated violence has on women and girls. We recognize that TFGBV also impacts trans, non-binary, and Two-Spirit people. We hope that all people impacted by TFGBV will find these documents useful.

Submitting Evidence in Court

Part 1: Evidence Law and Gathering Evidence for Court

This document provides general information and uses clear, plain language wherever possible. It is intended to support evidence submission for civil and family proceedings, as well as criminal proceedings. If any of the words or phrases used in this document are not clear, you can consult Definitions of Legal Terms: Civil and Family Law or Definitions of Legal Terms: Criminal Law for clarification.

What is Evidence and What is it Used for?

In a trial, each side is responsible for telling their story about what happened. These two versions of events will likely differ from one another. Evidence is the information presented in court to convince the judge or jury that one version of events is true. Most evidence in a trial is “testimony,” meaning people (“witnesses”) are called before the court to explain what they saw or experienced. Sometimes physical evidence, including digital evidence and other documents, will be shown to the judge or jury for them to consider as well. After listening to all of the witnesses and viewing all of the evidence, the judge or jury will determine the outcome of the case.

The law of evidence can often be complicated. There are rules about when evidence can be admitted in court. Just because you want to use something as evidence does not mean that the court will allow you to do so. It is important to make sure that the evidence you plan to use in court will be accepted by the court. If possible, you should consider contacting a lawyer for assistance with this process. For a list of legal information and resources across Canada, see Legal and Victim Service Supports and Resources. You can also consult the Canadian Judicial Council's Civil Law Handbook for self-represented litigants.

When is Evidence Not Required?

Evidence is only required to prove facts that you and the other party do not agree on. It is not necessary to present evidence of facts that you both agree are true. If you and the other party agree, a statement of agreed facts can be filed with the court. This will save you time in court since you will not have to prove these facts.

Types of Evidence

Evidence can come in many forms. You may not use all types in your case. Not all forms of evidence will be relevant or necessary in every case. Below is a list of common types of evidence that may be used in court. Be aware that the court will keep the evidence that you submit. If you want to keep a copy of the evidence for yourself, you should make a copy before you give it to the court.

Testimonial Evidence

Testimony, or words spoken in court by a witness, is the most common form of evidence. When an individual shares their knowledge of certain facts or events by telling the court what they know, it can be used as evidence to support one's case. This type of evidence is called testimonial evidence.

> *Example: Y*ou are trying to prove that Brian ran a red light. If you saw Brian run the red light, you have knowledge of this fact and can tell the court that you saw Brian run the red light. The information that you give to the court would be considered testimonial evidence. If you didn't see Brian run the red light but your friend Linda did, you can call Linda as a witness to tell the court what she saw.

An individual who presents testimonial evidence in a case is called a "witness." Witnesses usually tell the court about the things they have done, seen, or heard. In civil or family cases, you can be a witness and ask others to be witnesses. In criminal cases, Crown counsel will decide who to call as witnesses and will likely require you to act as a witness and give testimony if you are the victim in a case.

There are two key types of testimonial evidence: oral evidence and affidavit evidence. They both consist of the knowledge that a witness has regarding relevant facts or events. The main difference between oral evidence and affidavit evidence is how a witness's knowledge is presented to the court. Oral evidence involves the witness going to court and speaking in court while affidavit evidence is a written statement and does not require the witness to be in court.

Oral Evidence

Oral evidence, also known as *viva voce* evidence, is the information that a court hears from witnesses who are speaking in the courtroom. Oral evidence is presented to the court through a process called "direct examination," where the witness answers questions in court. In civil cases, you or your lawyer will question your witnesses. If you are your own witness and do not have a lawyer who can ask you questions, you can just tell the court about what you know. In criminal cases, Crown and defence counsel question their own witnesses. As you would likely be a witness for the Crown in a criminal case, Crown counsel would conduct your direct examination.

After a witness tells their story through direct examination, the opposing party will conduct a "cross-examination." This is when the other side has a chance to question you and/or your witnesses (in a civil case) or when you will be questioned by defence counsel (in a criminal case). The cross-examining lawyer will likely be trying to undermine your credibility or create doubt about your version of events during cross-examination, so it can be a very stressful experience.

A witness is usually physically present in court to give oral evidence. However, a witness may ask permission to give their evidence by video if they have a good reason why they are unable to make it to court (for example, if they are out of the country).

Affidavit Evidence

Affidavit evidence is information that is presented to the court as a written statement. Affidavits are generally only used in civil or family law proceedings, not in criminal proceedings. If you are preparing an affidavit, after you have written your statement you must find someone who has the authority to take oaths and swear to them that your statement is true. You can only swear to the truth of your statement if you can personally verify that everything you have said in it is true. Your written statement (i.e. the affidavit) is then submitted to the court as evidence. You must also send a copy of the affidavit to all the parties in your lawsuit or legal proceeding.

Documents

Documents are records of information, facts, or events. Documents can be presented to the court as evidence to help a party prove their version of events. It would be helpful for you to locate and save any documents that might be related to your case so that they are available if you need to use them.

Paper Documents

Paper documents include any information that has been recorded on paper. Common examples of paper documents are receipts, diary pages, bank statements, and doctor's notes. When submitting a paper document to the court, it is acceptable to submit either the original paper document or a copy of the original document. However, the original is preferred. Recall that the court will keep these documents, so you should be sure to retain a copy or the original for your own records.

Electronic Documents

Electronic documents include any information that is recorded digitally. Common examples of electronic documents are text messages, emails, and social media posts. You can present digital evidence to the court by printing out screenshots, emails, etc., or by presenting it in digital format on a CD, DVD, or USB drive. If you plan to rely on non-paper documents in a court proceeding, it is important that you check with the Court Registry where your matter is being heard to determine whether the necessary technology to display this evidence will be available. You will either have to request equipment from the court or ask for permission to bring your own device, such as a laptop. You will most likely not be allowed to display digital evidence on your phone in court unless the court approves.

Videos and Photos

Photos and videos of information or events that are related to your case may be useful as evidence. This can include video screen recordings of information displayed on your digital device. For more information on using videos as evidence, see Preserving Video Recordings as Digital Evidence.

Audio Recordings

Audio recordings of information or events that are related to your case may be useful as evidence. This can include voicemails or audio recordings from your phone. For more information on using audio recordings as evidence, see Preserving Audio Recordings as Digital Evidence.

Improperly Obtained Evidence

Improperly obtained evidence can include:

- Videos or audio recordings made secretly[1]
- Stolen documents
- Hacked phone messages or emails

If your evidence has been improperly obtained, whether by you or police officers (in criminal cases), there is a good chance that the court will not accept the evidence because they do not want to encourage bad behaviour. When improperly obtained evidence is accepted, it is usually because the evidence is very reliable despite the fact it has been obtained improperly, and is very important to the case. Even if you think a piece of improperly obtained evidence is central to your case, be prepared for the possibility that the judge will not accept it.

Relevance

The most basic rule of evidence is that evidence must be relevant.

Relevant evidence *is information that makes a material fact more probable.*[2]

A material fact is a fact that will affect the outcome of the case, such as one that helps prove a legally required element of the case. There must be a connection between the evidence that a party presents, and the material fact they are trying to prove by showing that evidence to the court. Evidence that is irrelevant will not be accepted by the court.

> *For example, if you are trying to prove that Brian ran a red light, any evidence that makes it more or less likely that Brian did run a red light would be relevant. Eyewitness testimony from someone who saw him run a red light would be highly relevant, as would dashcam footage of him running a red light. Evidence that Brian cheats on his taxes and is therefore a bad person and therefore might be more likely to have run a red light would likely not be considered relevant.*

Preparing Your Evidence with Relevance in Mind

As mentioned above, only relevant evidence is accepted in court. When preparing for court, it is important to make sure you have not overlooked relevant evidence that could help your case. In criminal cases, it is Crown counsel's responsibility to turn over all relevant evidence to an accused person. You should ensure that the police and/or the Crown have all relevant evidence that you possess about your case in a criminal proceeding. In civil proceedings, it will be your responsibility to turn over all relevant evidence that you are hoping to rely on to the other party.

It is important to avoid getting sidetracked by irrelevant evidence. There might be evidence or information that you feel is relevant to the case but is, legally speaking, not relevant. In civil cases, if you put forward irrelevant evidence it can distract you and the judge from the real issues in the case, making the case more complicated and time-consuming than it needs to be. In criminal cases, you will not have a say in what evidence gets presented to the court, as Crown counsel will make this determination. It is best for you to turn over all potentially relevant evidence that you have to the police or Crown counsel so they can decide what is and is not legally relevant.

Below are some things to consider when determining the relevant evidence in your case.

1. What are the material facts of your case?

To figure out the material facts, you must first understand the law that applies to your case. The law will require you to prove the basic elements of your case in order to win. The elements that you must prove will depend on what your case is about. For general information about what laws may apply to your case of technology-facilitated violence, see: Legal Protections for TFGBV: What Laws Apply to You?; Legal Remedies for Image-Based Sexual Abuse; Legal Remedies for Online Stalking, Harassment, Spying, and Threats; and Peace Bonds and Protection Orders for Victims of TFGBV.

> *Example: I*f you wish to obtain a protection order against a family member, the law requires you to prove that you are a family member who is at risk of family violence. Thus, the basic elements of your case that you must prove are (1) that you are a family member and (2) that you are at risk of family violence.

Once you have determined the basic elements that must be proved, you can start identifying the material facts of your case. Material facts are facts that will help you prove the basic elements of your case.

> *Example: To* obtain a protection order, the key element that must be proved is that you are at risk of family violence. Material facts are facts that help prove the risk of family violence. This could include evidence of threats made against you. You could demonstrate this by testifying that you have been threatened, or by presenting a copy of a text message in which your family member threatened you. A copy of a text message in which the family member was rude to you, on the other hand, would probably not be considered relevant as it does not assist in proving whether or not you are at risk of violence.

2. After figuring out the material facts of your case, what evidence are you going to use to establish the material facts?

Think about the information that is available that could help prove the material facts. This includes information in your possession and the possession of other people. If other people have relevant knowledge or documents regarding a material fact, you will want to call them as a witness for your case.

Evidence that you think will help establish the material facts of your case is relevant evidence that should be presented to the court. However, be aware that even though you believe that a piece of evidence is relevant, the court may not always agree with you.

3. You should try to limit the amount of irrelevant evidence that you present in court.

Evidence that does not help establish a material fact is irrelevant and will not be accepted by the court. As you prepare your evidence for court, keep in mind that you should not be bringing up everything the other party has ever done wrong. All you need to do is bring up evidence that establishes the material facts of your case. It can be tempting to show the court evidence of all the ways the other party has wronged you. However, unless this evidence also helps prove the material facts of your case, it is likely not relevant.

Hearsay

Evidence that is hearsay is generally not admissible in court. Hearsay is a statement made by a person who is not giving testimony to the court. The statement is used to prove that what that person said was true.

Hearsay is a complicated subject. It can be difficult to determine what is hearsay in the first place, and there are many exceptions to the general rule that hearsay is inadmissible. Further, hearsay will sometimes be admitted on a case-by-case basis if it is highly valuable evidence.

What is Hearsay?

Hearsay is usually defined in two parts. Hearsay is (1) an out-of-court statement (2) that is being offered for the truth of its contents.[3] If your evidence is hearsay, the general rule is that it will not be accepted by the court.

An out-of-court statement is something someone said before the trial that you or another witness want to repeat to the court. This can be through testifying as to what was said, playing a recording of the person making a statement, or tendering a document written by another person or containing a statement by them. If you want to rely on something someone else said in court, **you should always try to have that person come and testify in person**.

> *Example: Linda told you that she saw Brian run a red light. If you were to testify that Linda told you she saw Brian run a red light, this would be hearsay and would likely not be admissible. Instead, you should call Linda as a witness so that she can testify that she saw Brian run a red light.*

If the person who made the out-of-court statement does not want to be a witness, they may be subpoenaed by the Crown in a criminal case. In civil matters, if a person does not wish to testify, you may be able to issue a subpoena to have them testify as a witness.

To be hearsay, a statement must be offered for the truth of its contents. This means that the reason you are putting this evidence before the court is because you want the judge or jury to be convinced that what the person said was true.

> *Example: If you tell the court Linda told you she saw Brian run a red light because you want to prove that Brian ran a red light, hitting your car, you would be relying on this statement for the truth of its contents, making it hearsay. If you tell the court Linda told you she saw Brian run a red light because you want to prove that Linda is a liar (for example, if you know Linda was sleeping at the time Brian ran the red light), this evidence would not be hearsay. You would not be relying on it* to show that Brian ran a red light (the truth of its contents), but rather another reason (to show Linda is a liar).

Exceptions to the Hearsay Rule

It might seem like the hearsay rule will exclude a lot of relevant evidence. However, there are many exceptions to the general rule against hearsay. One important exception is that **hearsay is allowed if you are making an interim**

application. You will likely not have to worry about hearsay if you are going to court for an interim application, as hearsay will be admitted if you can identify the person who made the statement.

There is also something called **the "principled approach"** to hearsay, which may allow for hearsay evidence to be accepted by the court on a case-by-case basis if it is highly useful and won't unfairly disadvantage the other party. To be admitted under the principled approach, the evidence must be necessary and reliable, the person who made the statement must be unavailable (e.g. deceased or impossible to locate), and the statement must either have been made in a trustworthy setting (e.g. a recorded interview with police officers) or in circumstances indicating the statement is likely to be genuine. If a piece of evidence is important to your case but contains hearsay, you should still attempt to have it admitted but be prepared for the possibility that it may not be admissible.

Other exceptions include:

- **Statements by a party**. If the statements you want to rely on were made by the opposing party (or the accused in a criminal matter), they will generally not be considered hearsay. So, if the opposing party (or the accused) is your ex-partner, any emails, text messages, etc., they sent to you, or anything they said to you, will not be considered hearsay.
- **Business r**ecords. Many documents fall under the business records exception. This includes documents such as telephone records, hospital records, receipts, etc. Even though these records were created by someone who is not testifying before the court, they can be relied on if they were created in the ordinary course of business. Not all records created during the course of business will fall within this exception. It may need to be determined by the judge whether a particular record meets this exception or is properly considered hearsay.
- **Statements against interest**. If a person makes a statement that is likely to cause them harm, such as acknowledging that they committed a crime, you can sometimes get these statements admitted as exceptions to the rule against hearsay. These statements will only be allowed if the person is **unavailable** to testify (meaning they cannot be located, are deceased, or cannot testify for some other valid reason). If you wish to rely on a statement an opposing party or the accused made that is against their interest, you may do so under the "statements by a party" exception (above).
- **Spontaneous utterances**. In some circumstances, if a person makes a statement that is clearly spontaneous and relates to a matter that is relevant to the case, you may rely on these statements. This might include someone witnessing a shooting and immediately yelling "Mike just shot someone!" There are specific requirements for spontaneous utterances and they are assessed by the court on a case-by-case basis. As with the "statements against interest" exception, the person who made the statement must be **unavailable** to testify (meaning they cannot be located, are deceased, or cannot testify for some other valid reason).

Hearsay in Family Law Cases

In family law cases, there is a possibility that the court will accept hearsay as evidence even if it does not fall under an exception. However, once hearsay evidence is admitted, the judge may decide to give the evidence little to no weight because hearsay is usually unreliable evidence. This means that hearsay will probably not be very persuasive evidence even if it is admitted.

Opinion Evidence

When witnesses testify, their evidence is supposed to be about the facts of the case. When witnesses start to talk about their own opinions, it is considered opinion evidence, which is generally not admissible.

Example: A witness testifies "I definitely think Brian is guilty and should go to prison." This is inadmissible opinion evidence.

This does not mean that a witness is never allowed to include opinion in their testimony. People regularly express opinions without even noticing. Witnesses are allowed to talk about their "lay opinions." Lay opinion generally means an opinion that an ordinary person would naturally incorporate into their story.

*Example: I*t would likely be acceptable for a witness to say, "Brian was slurring his words, stumbling a lot, and drinking from a large bottle of vodka. He seemed drunk." *While the witness does not know for a fact that Brian was intoxicated, the opinion that the witness reached that Brian seemed drunk is acceptable evidence as these are the kinds of judgements people regularly reach in their day-to-day lives. A reasonable person observing Brian would likely come to the same conclusion based on his behaviour.*

Witnesses do not need to worry about accidentally including their opinions in their testimony. The line between opinion and fact can often be blurry. The purpose of this section is to remind you that evidence is about facts, not opinions. Do not start talking about why you should win your case when giving evidence. You, your lawyer, or Crown counsel will have an opportunity to do this during the closing arguments after all your evidence has been presented.

Privileged Information

Certain forms of communications are "privileged," meaning they do not need to be disclosed during litigation and are generally not admissible at trial. Privilege only applies to communications (e.g. conversations, emails, and letters), not facts.

*Example: I*magine a situation where you cannot remember whether you ran a red light on Friday night. Your lawyer then tells you that they found surveillance footage showing that you did run a red light. This conversation with your lawyer is a communication. However, from this conversation, you now know that you ran a red light. It is a fact that you ran a red light. Depending on other factors, your communications (i.e. the conversation) with your lawyer could potentially be privileged. Let us assume for the example that the conversation is privileged. This means that you have a right to keep the conversation a secret. If you are asked in court to repeat what your lawyer said to you, you do not have to repeat the conversation for the court. However, if somebody asks you in court whether you ran a red light on Friday night, you would have to answer truthfully and say yes. You do not have a right to stay silent when someone asks you to tell them about a fact that you have knowledge of. Your conversation with your lawyer is privileged, but the fact that you ran a red light is not privileged.

Solicitor/Client Privilege

If you have a lawyer, most communication between you and your lawyer is considered privileged and the opposing party (including an accused in criminal cases) does not have a right to see these communications or hear testimony about what was said in them. Neither you nor your lawyer can be compelled to share this information in court.

It is important to remember that privilege also applies to communications with a lawyer that was not formally retained (hired). For example, even if you only had one meeting/consultation with a lawyer and did not retain that lawyer for your case, privilege still applies to that consultation.

Solicitor-client privilege can be waived by the client, meaning that a client can decide to disclose the contents of their communications with their lawyers. This should only be done in the rarest of circumstances, and only if they are fully aware of the risks of waiving this privilege.

There are some other exceptions to solicitor-client privilege. In certain cases, if there is a risk to public safety or if someone will be wrongfully convicted of a crime, the parties can share this information in court.

It is important to note that if you are a victim in a criminal case, Crown counsel is not your lawyer and as such solicitor-client privilege **does not apply to your communications with Crown counsel**. For more information on the differences between the civil and criminal systems, see Legal Protections for TFGBV: What Laws Apply to You?

Litigation Privilege

Documents or communications that were created by a lawyer when planning for a case (or in contemplation of litigation), that were meant to be confidential and where privilege has not been waived, are inadmissible.

Once the case has ended, these documents and communications are no longer protected by this privilege.

Matrimonial Communications Privilege

Communications between married spouses during their relationship are privileged, meaning one spouse cannot be compelled to disclose the contents of these communications if they do not wish to. However, this form of privilege can be waived (meaning it no longer applies) by either spouse. For example, if you wish to rely on text messages sent to you by an ex-husband while you were married, you may do so, as you would be waiving privilege in these messages.

Settlement Privilege

When you and an opposing party have a legal dispute, the two of you may try to settle your disagreement outside of court. Settlement privilege is the right to keep any communications regarding a potential settlement private. This means that if you end up going to court, you cannot use settlement communications from the opposing party as evidence, and they cannot use these communications against you. Settlement communications are not limited to oral communications. Written communications such as emails and text messages are also covered by settlement privilege.

Both parties can agree to waive this privilege, but it cannot be done by one side. Examples of settlement discussions include mediation, settlement proposals, and responses to those proposals (which are often marked “without prejudice”). They also include Judicial Case Conferences, Family Case Conferences, and Settlement Conferences. Exceptions to this rule are the orders which were made at those conferences.

There are a few exceptions to settlement privilege including:

- When the communication is a threat or involves something illegal
- When you and the opposing party disagree on whether or not a settlement was reached

Settlement communications can be used in court as evidence under these circumstances.

Therapy Records, Psychiatric Records, and Other Health Records

It is worth noting that many communications are surprisingly **not automatically privileged**, including communications between you and your therapist, you and your doctor, you and your Victim Service Worker, etc.

A court may find these communications to be privileged on a case-by-case basis, but these findings are not automatic. If you are discussing matters relevant to a criminal case or litigation with a care provider, you may want to ask if they will

refrain from taking notes and let them know that they may be called to testify about their discussions with you.

For a court to find communications between you and a third party (other than a lawyer or spouse, as set out above) to be privileged, the communications must meet the "Wigmore test," which requires that:

- The communication was made in confidence that it would not be shared;
- This confidence is essential between the two parties and their relationship;
- The relationship must be one that the community fosters (for example, between a religious leader and one of their followers, a doctor and their patient, etc.); and
- The injury to the relationship that would occur, if the information were shared, outweighs the benefit it would give to the case.

Weight

After all of the evidence from both parties to a case has been admitted, the judge or jury (called the "trier of fact") will determine how much weight to give each piece of evidence. The trier of fact will determine the reliability and trustworthiness of the evidence. Evidence that is given more weight will have a greater impact on the outcome of your case. Evidence that is given little to no weight will not affect the outcome of your case very much.

Credibility

Credibility is a fundamental issue for any testimonial evidence presented in court. Credibility is whether the person testifying is believable. Credibility is central to the judge's analysis. If a witness is found to be credible, their testimony will carry much more weight than if they are found not to be credible. Factors that impact the credibility of a witness include:

- **The ability of the witness to remember events accurately.** For example, was the witness intoxicated when they witnessed the event in question? Since the event, did something occur that impacted the witness's memory of the event?
- **Biases that the witness may have toward one party.** For instance, if your mother acts as a witness in your case, her testimony may be perceived as biased given her connection to you.
- **Whether the witness's testimony conflicts with other pieces of evidence.** For instance, if the witness tells the court that they have never been to Hawaii, but the other party shows the court Facebook photos of the witness vacationing in Hawaii, the witness's credibility will suffer.

The judge will listen carefully to what each party says in court or submits in written documents. You can help establish your credibility by telling the truth in court, including admitting when you do not know or cannot remember certain facts, and being as accurate as possible when providing information and answering questions. If you do not understand a question, you can ask for the question to be repeated or rephrased before answering to make sure you understand it correctly. Only provide answers to the question asked. If you do not know the answer to a question, tell the court. Your credibility will also be enhanced if you are clear and direct when testifying, avoid contradictions and arguments, and act courteously to all parties. While this can be very difficult in highly-charged emotional situations such as family court proceedings, remaining calm and clear will impress the judge and should increase your chances of getting the outcome you desire in court.

Part 2. Presenting Evidence in Court

Giving Testimonial Evidence

Testimonial evidence can be either oral evidence or affidavit evidence. What type of evidence will be used will depend on the court and the type of proceeding. Affidavits are usually only used in certain civil applications. Most testimonial evidence will be delivered through oral testimony (i.e. a witness speaking in court).

Providing Evidence Through an Affidavit

An affidavit is a written statement of facts regarding the issues of your case. In some civil cases and applications, oral evidence (i.e. testimony) will not be required. Instead, you must work with each of your witnesses to prepare written affidavits. Affidavits will be used as evidence in court. If you are a witness for your case, you will also have to prepare an affidavit. The rules of evidence discussed in the first section of this document all apply when a witness writes their affidavit statement.

There are certain forms that you must fill out and several procedural requirements when you prepare an affidavit. These will vary depending on the type of application or case, the particular court (provincial court, superior court) and your province or territory. For example, each witness must find someone who has the authority to take an oath and then swear that their affidavit is true. The Canadian Judicial Councill's Civil Law Handbook for self-represented litigants contains some general information about preparing affidavits.

Giving Oral Evidence in Court

Oral evidence is given by witnesses in court. A witness who is giving evidence will tell the court about the things that they have done or witnessed. They will do this during direct examination, and then a lawyer for the other side or the opposing party themself will ask the witness questions during cross-examination. In a civil trial, you can call your own witnesses and act as a witness in your own case. In criminal trials, if you are the victim of an offence, Crown counsel will probably require you to give oral evidence as a witness.

The process of acting as a witness involves you speaking in court. In criminal matters, Crown counsel will ask you questions during direct examination. In civil matters, if you have a lawyer, your lawyer will ask you questions during direct examination and you will give your evidence by answering those questions. If you do not have a lawyer, you can just tell the court about the things that you have done or witnessed related to your case. Just make sure that you are aware of the different rules that may apply to your evidence. These can be found in the previous section of this document and in Objections to Evidence.

When speaking in court, make sure that your story is easy to follow and that you are not sidetracked by irrelevant evidence. You should also try to be as detailed as possible when giving evidence. Always clearly state the date and time when each event occurred so that you can present a clear timeline. When giving your evidence, it usually makes the most sense to talk about the events in chronological order. This means that you should start with the earliest events and end with the most recent events. You will not be allowed to read from a script in court. It is a good idea to outline your testimony so that you do not forget any important points.

When you talk about events that you and the other party disagree on, you do not need to explain to the judge why the other side's version of the story is wrong. If you and the other party disagree on how an event occurred, you only need to give a detailed description of your version of the event.

> *Example: You and Alex disagree about the details of a conversation. You remember asking Alex to stop following you, while Alex claims that you told him you wanted him to walk you home. During your testimony, you should only focus on telling the court the details of the conversation as you remember them. Do not argue that your version of the conversation is the correct one. In a criminal case*, it will be the Crown's job to make this argument while in a civil case, you or your lawyer will have a chance to make closing submissions where you can address this.

Questioning Other Witnesses

In criminal trials, you (as the victim) may be the only witness for the Crown, or there may be others who will give testimony just as you did. In civil matters, after you have given your evidence, you or your lawyer can call other witnesses to give their evidence. If you have a lawyer, your lawyer will ask each witness questions. The witness will give evidence by answering the questions. If you do not have a lawyer, you will have to ask the questions yourself. The process of questioning a witness is called a "direct examination" or an "examination-in-chief."

If you are the one conducting the direct examination, it is a good idea to start by asking your witness simple, direct questions. These are questions about things that are facts. This will help the witness get used to answering questions in front of the judge. Examples of questions to start with could include:

- Do you live at X address with the applicant/plaintiff?
- Do you work at X with the respondent/defendant?
- How many years have known the applicant/plaintiff?

Once you finish asking the context questions, you can ask questions about the events that are important to establish material facts in your case. These questions will relate to the issues that are being contested. The answers that your witness gives will act as evidence for your case. Usually, it is a good idea to ask about the events in chronological order.

One important rule to remember when questioning your witnesses is that you are not allowed to ask leading questions. Leading questions are questions that suggest an answer, and can usually be answered "yes" or "no."

> *Example: "Didn't you hear* James yelling threats?" is a leading question, as it suggests to the witness that James yelled threats.

If you ask a leading question, the other party can object to the question and if the judge agrees with the objection, your witness will not be allowed to answer the question (for more information on objections, see Objections to Evidence). It is best to ask non-leading questions and let the witness testify in their own words. A non-leading question is usually an open-ended question that does not suggest the answer.

> *For example: "What did James say?" and "How did James seem when he said that?" are examples of non-leading question*s that can result in the same evidence as the leading question above.

To illustrate leading questions, consider an example where you are trying to get your witness to tell the court that they saw the respondent (Alex) following the applicant (you) home.

A series of leading questions would be:

Q1: On October 3rd, did you walk home from work on First Street at 2 pm?
A1: Yes.

Q2: While you were walking home, did you see the applicant walking on the same street?
A2: Yes.

Q3: Was Alex following the applicant in his car?
A3: Yes.

Q4: Did the applicant ask Alex to stop following her?
A4: Yes.

A series of non-leading questions would be:

Q1: When did you leave work On October 3rd?
A1: 2 pm.

Q2: What street did you take?
A2: I took First Street.

Q3: What did you see on that street?
A3: I saw the applicant walking while Alex was following her in his car.

Q4: What did the applicant do?
A4: She told Alex to stop following her.

It can be hard to predict the answer to open-ended questions. For example, Q3 ("What did you see on that street") could result in numerous possible answers, such as:

- *I saw the applicant walking on the street.*
- *I saw the applicant and Alex together.*
- *There was a traffic jam and there was a band playing on the sidewalk.*

None of these answers mentions Alex following the applicant. You would have to ask more questions to get the witness to tell the court that she saw Alex following the applicant.

Because non-leading questions are so open-ended, it is a good idea to prepare your witnesses for what to expect in court, and what questions you will ask. When preparing a witness, you cannot ask the witness to give certain answers. Saying to a witness, "you should tell the court that you saw Alex following me home" is inappropriate. However, to prepare your case, you could ask the witness if they saw Alex following you home that day. If the witness does remember seeing Alex following you home, then you can ask them to testify about it. If they do not remember seeing this, then their testimony may not be relevant to your case.

Refreshing a Witness' Memory

Even if you spend time preparing a witness, it is possible that when they give evidence in court they will suddenly forget to mention details that are important to your case. For example, your witness previously told you they heard Alex yelling threats at you while he followed you home from work. During your witness's testimony, you ask them what they saw and heard, but they do not mention that Alex threatened you. You are not allowed to ask a leading question such as "Didn't you hear Alex yell threats?" So how do you get your witness to tell the judge that they heard Alex yell threats? If your witness prepared e a document about the incident, then that document can be used to refresh their memory. The

document could be almost anything. Text messages, diary entries, and sketches are all examples of documents that can be used. However, the document must have been created by the witness while their memory of the event was still fresh.

The steps to refreshing a witness's memory are quite simple:

1. "Exhaust" the witness's memory. Ask your witness if they can remember anything else from the event in question.
2. If they say no, ask the judge if you could refresh your witness's memory with a document.
3. Pass the document to your witness.
4. Ask the witness if they recognize the document, and how the document was created. For example, "Are these text messages that you sent to me after you saw Alex following me on October 3rd?"
5. Confirm that the document was made when your witness's memory was still fresh. You could ask, "Did you text me these messages right after you saw Alex following me?"

Objections

During the questioning of your witness, the other party can object if they think that you have asked an improper question. The other party will say "objection" and then explain why they are objecting. You then have a chance to respond to the objection. The judge will decide if the objection is justified or not. If the objection is justified, then the witness cannot answer your question and you will have to ask another question.

You are also allowed to make objections when the opposing party is questioning their witnesses or seeking to admit evidence. For instance, if you think the other party is asking their witness a question that has no relevance to the case, you can object. The steps to making an objection are:

1. Stand up after the other party has asked their question and before the witness has started answering the question.
2. Address the judge and state what your objection is.

There are many bases on which you or the opposing party can object to evidence. For detailed information about objections to evidence, see Objections to Evidence.

Cross-Examination

Every time a witness finishes giving evidence in court, the other party will get an opportunity to ask them questions. This process is called "cross-examination." The other party will ask you (if you testified) or your witness about the evidence that they have given.

The purpose of cross-examination is generally to poke holes in the witness's version of events or otherwise undermine their credibility. It is usually the most stressful part of giving testimony. You can set yourself up for a successful cross-examination by fully explaining your evidence (including details of your evidence that may cast you in an unfavourable light) during your direct examination, and remaining calm and collected during cross-examination.

If you have a lawyer, your lawyer will conduct the cross-examination for you and ask the other party's witnesses questions. If you do not have a lawyer, you will have to conduct the cross-examination yourself. The Canadian Judicial Council's Civil Law Handbook for self-represented litigants contains a useful guide to conducting cross-examination.

Presenting Documents and Photos

Before you go to court, you should organize all the documents and photos you intend to present to the court. See Preserving and Storing Evidence of TFGBV: Best Practices for information on how to collect and store your digital evidence.

In criminal cases, Crown counsel will be responsible for submitting all evidence to the court. You are not responsible for organizing or presenting evidence before the judge in a criminal matter.

In civil cases, if you have a large number of physical documents, it may be a good idea to organize all the documents in a binder. You can use numerical divider tabs to separate each document. You should also number the pages of each document. Afterwards, make three copies of the binder so that you can provide the judge, the other party, and your witness with a document from the binder if necessary. This way you can easily show the court the document or photo by asking them to go to a tab and page number in your binder. Then everyone can easily look at the same thing.

The process of presenting documents and photos to the court is called “entering an exhibit” or “introducing an exhibit.” A witness must “introduce” the document to the court before it can be accepted by the court as evidence. Once a document is accepted as evidence, it becomes an exhibit.

When are Documents Introduced?

If a witness is giving oral evidence in court, then documents must be introduced orally by the witness during this time. If evidence is being provided through an affidavit, then documents are introduced as attachments to the affidavit. In either case, each document must come in through the evidence of a witness, either you or one of the other witnesses in your case. The witness who introduces the evidence should be someone who can authenticate that document, meaning someone who can explain what the document is and how it came to be. For more information, see Authentication of Digital Evidence. If you can confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

Re-examination

Re-examination is an opportunity to ask your witness questions after they have been cross-examined. Sometimes the cross-examination of your witness may result in issues or inconsistencies with their story. The purpose of re-examination is to give you a chance to clear up those issues. When you are re-examining your witness, you can only ask them questions related to issues brought up during cross-examination. You are not allowed to ask them questions about things that were not mentioned during cross-examination.

Presenting Video and Audio Recordings

The process of presenting video and audio recordings in court is similar to the process of introducing documents or photos. However, there are some important differences.

If you plan to rely on video or audio recordings as evidence in a court proceeding, you must check with the Court Registry where your matter is being heard to determine whether the necessary technology to play these recordings will be available. You will either have to request equipment from the court or ask for permission to bring your own device, such as a laptop, to play the video recording in court. You will most likely not be allowed to play a recording on your

phone in court unless the court approves. You may need to transfer the video recordings onto DVDs or consider other ways of presenting the videos.

It is recommended that you or someone else make a transcript of the video recording. It can be helpful for the court to be able to read what was said in the recording, as it saves time and may be clearer than listening to the recording's audio. Additionally, there may be situations where you are not allowed to play a video recording in court. In these situations, a transcript may be allowed as evidence instead. For example, if there is a lot of irrelevant background noise or interruptions in your recording, a judge may prefer the transcript to the recording. In these cases, you might still be able to use a transcript of the relevant portions of your recording as evidence.

If it is safe to do so, and you have Internet access, there are helpful online transcription tools such as www.descript.com or Google Voice Transcription through Google Docs. If you use a secondary transcription service, you will want to double-check all transcriptions to ensure that the transcript is correct by reading it and listening to the audio recording. You can correct any mistakes so the transcript is accurate.

In criminal cases, Crown counsel will be responsible for preparing all relevant evidence and for ensuring there is a way to play any video or audio recordings in court.

Introducing Audio and Video Recordings through a Witness in Court

The witness who introduces the evidence should be someone who can authenticate that recording, meaning someone who can explain what the recording is and how it came to be. Ideally, it should be the person who captured the recording. For more information, see Authentication of Digital Evidence. If you can confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

Technology-Facilitated Gender-Based Violence (TFGBV) is part of a continuum of violence that can be both online and in-person. If you or someone you know is experiencing TFGBV, you are not alone. You can use sheltersafe.ca to find a shelter/transition house near you or call/text the Kids Help Phone to discuss options and create a safety plan. You don't need to stay in a shelter to access free, confidential services and support.

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Adapted with permission from BCSTH's Technology Safety project, based on their resource Submitting Evidence in Court.

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1. In Canada, it is legal to secretly record a conversation you are a part of. You must be the person who does the recording –you cannot ask a friend to record a conversation that you are involved in unless they are involved in the conversation a well. It is illegal to record a conversation that you are not a part of (i.e. eavesdropping or wiretapping
2. Sopinka, Lederman & Bryant,The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)

3. Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)

Authentication of Digital Evidence

Introduction

Digital evidence such as text messages, e-mails, and social media posts are often relevant to cases involving technology-facilitated gender-based violence (TFGBV). All documentary evidence (including physical paper records and digital evidence) must be authenticated to be admitted and considered by a judge or jury in deciding a case.

Authentication requires the party submitting a piece of evidence to demonstrate that the evidence is what it claims to be.[4] This will generally be done by having a witness testify about what the document is and how it came into existence.

This document is intended to help guide you through the process of authenticating digital evidence in court. The rules about authentication and your role in the court process will vary somewhat depending on whether your legal matter is civil or criminal, and what province or territory the case is being heard in. The next section details some key differences in authenticating documents in criminal courts vs. civil courts. For more information on the differences between criminal and civil trial processes in the context of technology-facilitated violence, see Legal Protections for TFGBV: What Laws Apply to You?

Authenticating Documents: Criminal Cases vs. Civil Cases

Criminal Cases

If you are involved in a criminal trial as a victim of TFGBV, you will not be considered a party to the legal proceeding. In criminal cases, the dispute is technically between the Crown, which represents the Canadian public, and the accused person, who may be represented by defence counsel or may represent themselves. If you are the person harmed by the accused's technology-facilitated violence, you are considered to be a "complainant," and are not entitled to have a lawyer appear for you or to run your case.

Your role as a complainant will be to tell the police, Crown counsel, and the court what you experienced and to give your evidence, digital and otherwise, to the police. On some occasions, you will provide evidence to the Crown counsel so that it can be used at trial. Crown counsel will determine what evidence and information is legally relevant and has to be turned over to the accused person and their lawyer. It is also the role of the Crown counsel to submit evidence about the case to the court. You will not be able to control what evidence or information the judge receives, what arguments are made about whether it should be accepted, whether it is accepted, or how it is treated.

If you are entering the criminal law system as an *accused* person (if you have been formally charged with a criminal offence), you may have to represent yourself if you do not qualify for legal aid and are unable to afford a lawyer. You would have to enter evidence into the court record yourself. This document can also assist accused women to understand how they would be expected to admit evidence at trial.

The rules for authenticating digital evidence in criminal court are found in the *Canada Evidence Act*. The *Canada Evidence Act* applies to all criminal cases and includes important rules about introducing digital evidence to the court.

However, the *Canada Evidence Act* does not provide complete information about how to introduce evidence to a court. This document is intended to fill some of these gaps.

The *Canada Evidence Act* defines an "electronic document" as:

> *D*ata that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, print out or other output of that data.[5]

This definition is very broad and includes essentially all information that is stored digitally, such as text messages, voice memos, emails, videos, photos, direct messages (DMs), and social media posts. Any information saved on your cellphone or computer will likely fall within this definition. Anything that is stored digitally which can be read, heard, or seen in court may be considered an electronic document. It is not limited to what someone might commonly think of as a "document," such as a PDF or Word document.

When the Crown or defence brings electronic evidence to the court, it will need to be in a format that the court can see and use. This will likely require you or the police to take screenshots or print emails so that a paper record can be admitted to the court. If you only bring your phone or computer in to show the police or court the evidence on it, it may not be accepted in that form, or they may be required to take your phone or computer for some time to access the evidence. If you print out an email or a screenshot of a text, it will generally still be considered "digital evidence" even though it is now on paper. For more information on preparing digital evidence for court, see Preserving and Storing Evidence of TFGBV: Best Practices and Submitting Evidence in Court.

The *Canada Evidence Act* requires that all electronic documents be authenticated and satisfy a version of the "best evidence rule."[6] These requirements have been interpreted by the courts as being essentially the same as the "common law" requirements discussed later in this document. As such, the information about authentication and the best evidence rule discussed later in this document will generally apply in the context of criminal proceedings.

If both Crown and defence counsel agree that a document is authentic, there will not need to be a separate hearing to determine whether a document has been authenticated. In all other cases, there will be a *voir* dire, which is a separate hearing during or before a trial, where the judge will need to determine whether an electronic document has been properly authenticated and may be admitted as evidence.

Civil or Family Cases

In civil cases, your role as a victim of technology-facilitated violence will be very different than in the criminal justice process. Generally, you (the "plaintiff") will be suing the perpetrator (the "defendant") for the harm they have caused you. You may be seeking a protection order preventing the perpetrator from contacting you, or you may be trying to introduce digital evidence in a family law proceeding, such as a custody proceeding. In all of these circumstances, you can be represented by a lawyer or you can represent yourself. If you have a lawyer, you will work with them to ensure you have collected all relevant digital evidence and they will prepare or help you prepare the evidence to present in court.

If you do not have a lawyer, you will be responsible for preparing and presenting your digital evidence in court (see Submitting Evidence in Court). It will be your responsibility to authenticate all of your documentary evidence, including digital evidence. This document is intended to help you understand how to do this. In civil cases, you only need to authenticate your evidence if the other side raises the possibility that it is not authentic. However, since authenticating evidence is relatively simple (as will be explored below), it is best practice to always authenticate any documentary (including digital) evidence to ensure there are no disputes about the document's authenticity later in the trial or on appeal.

Depending on where the trial is taking place, the rules for authenticating digital evidence will either be set out in a particular piece of legislation (a written law) or will be governed by the "common law," which is based on court decisions and legal precedent. The following provinces and territories have legislation governing the authentication of digital evidence in civil trials:

- Northwest Territories – *Evidence Act,* RSNWT 1988, c E-8, s. 37.1
- Nunavut – *Evidence Act,* RSNWT (Nu) 1988, c E-8, s. 37.1
- Alberta – *Alberta Evidence Act,* RSA 2000, c A-18, ss. 41.1-41.8
- Saskatchewan – *The Evidence Act,* SS 2006, c E-11.2, ss. 54-59
- Manitoba – *The Manitoba Evidence Act,* CCSM c E150, ss. 51.1-51.6
- Ontario – *Evidence Act,* RSO 1990, c E.23, s. 34.1
- Nova Scotia – *Evidence Act,* RSNS 1989, c 154, ss. 23A-23H

The following provinces' and territories' rules about authenticating electronic documents are governed by the common law:

- Yukon
- British Columbia
- Quebec
- Newfoundland and Labrador
- Prince Edward Island
- New Brunswick

The remainder of this document describes general rules and procedures for authenticating digital evidence based on the **common law**. The *Canada Evidence Act* (referred to above), and provincial evidence legislation have been interpreted as being generally consistent with the common law, so even if your trial will be taking place in one of the jurisdictions that has its own evidence legislation, the general information in this guide should still be helpful. However, ***you should always consult the relevant legislation (linked to above) and, if possible, consult with a lawyer to ensure you properly understand the law.*** For a list of legal resources in your area, see Legal and Victim Service Supports and Resources.

Authenticating Documents: General Information

While electronic documents must generally be authenticated before they are admitted as evidence, the threshold for authentication is low. This means it should not be difficult to authenticate your electronic evidence. As set out above, all that you are generally required to provide is *some evidence* that the document is what you claim it is. For example, if you want to rely on a printout of screenshots of an Instagram direct message, you just need to provide some evidence that demonstrates that the document actually represents a screenshot of an Instagram conversation.

Technically, you do not need to prove anything more than this – for example, you do not need to prove that the conversation was between you and a specific person.[7] However, as the law is not completely clear in this area,[8] it is always best practice to put forward as much information about the digital evidence, how it was created, and why you think it represents what you claim it does, as possible. In the case of an Instagram DM, you would want to collect and include the following information:

- The date and time the conversation took place

- The date and time you took the screenshot
- Screenshots of the photo and handle/name of the person who sent the message
- A screenshot of the Instagram profile of the person who sent you the message
- Any other relevant Instagram DM conversations with this same person

You will also want to explain why you think the messages came from a specific person through your testimony. This can include telling the court whether you have spoken with this person through this account before, whether you can identify who they are in real life, whether you are familiar with their account, and whether you know how to use that particular social media app or website.[9]

Although the threshold for authentication is low, there have been some cases where electronic documents were found to have been not properly authenticated because it was unclear if they had been tampered with and, as a result, the documents were rejected. For this reason, **you should never alter electronic evidence that you have collected**. Further, recent case law indicates that if digital evidence comes from a messaging or other application that is not commonly known (for example, not Facebook, email, Twitter, etc.), there may be a higher standard for having that evidence authenticated.[10] If you are relying on evidence from a relatively unknown mobile application, you should consider gathering information about how the application operates to ensure authentication.

Best Evidence Rule

The "best evidence rule" is a rule of evidence that operates alongside authentication concerning documentary evidence. This rule developed before the invention of computers, when "document" referred to a physical document such as a written contract or a photograph. The best evidence rule generally required the original document, such as the original signed contract or a photograph printed from the film of a camera, be provided to the court, rather than a copy. This rule was created because it was easier to see if an original record had been altered or changed. If the original was not available, the party trying to admit the evidence would have to explain why they were using a copy.

As the world has become more digital, the concept of an "original" document is less relevant. Exact copies of the same document now often exist in multiple places at the same time. If someone emails a photo to another person, both people will have an identical copy of the same photo saved in each of their individual email folders. There is no single, original hard copy. As a result, the courts have had to change some of the original rules of evidence to address these differences between digital and non-digital documents.

Because there is usually no true, single "original" document when it comes to most digital evidence, the courts will instead want to know if the system the file was saved on was functioning normally at the time the evidence was created or saved.[11] When digital evidence, such as a screenshot from someone's social media page, is submitted as evidence, the court wants to know whether the record *system* (e.g. the phone it was saved on, or the social media page it was displayed on) was reliable, meaning it would not have altered the electronic document and the information would not have been stored inaccurately. As a result, you should provide the court with evidence about the reliability of the system on which the digital evidence was stored.

You or another witness will likely have to explain how the system works (for example, you may need to tell the court the basics about a social media platform, such as how to sign in to Facebook, send messages to friends, delete messages, or comment on posts) and describe why you believe the platform was working normally when the evidence was created (for example, nothing seemed out of the ordinary when you signed in or checked your messages). You should also be prepared to explain why you believe your phone, computer, or other device was functioning normally when the evidence was saved (usually by testifying that you hadn't noticed anything strange about how the computer was functioning).

In some circumstances, the courts may presume the integrity of a system or platform, meaning specific evidence that it was functioning properly won't be required. These circumstances include:

- When the document was recorded or stored by someone "adverse to the party seeking to introduce it." For example, if you are attempting to enter a photograph you located on the opposing party's computer, the integrity of the computer system will be presumed unless the opposing party can prove otherwise;
- When the document was made using a routine system by someone who isn't a party to the case and the person seeking to admit the document did not store the document themselves. For example, a report generated by Instagram and sent directly to your lawyer.

Procedure

All documentary evidence, including electronic evidence, must be "introduced" through a witness giving testimony or through an affidavit. An affidavit is a written statement that is sworn under oath and then submitted to the court. It is used in place of live testimony before a judge or jury. Affidavits are generally only considered acceptable evidence in civil court, and only for applications (rather than trials), although this may vary from province to province. While electronic evidence may be authenticated through oral testimony or affidavit, ***the remainder of this document will discuss authenticating electronic evidence through live witness testimony.*** The general principles and considerations discussed below apply to both oral testimony and affidavits, the difference being that in affidavits the relevant information will be provided to the court in writing. For information on introducing evidence generally, see Submitting Evidence in Court.

As discussed above, authentication requires that a witness tell the court why a document is what they (or the Crown) claim it is. This document discusses you as the witness authenticating digital evidence, but the same considerations apply to all witnesses who are authenticating digital evidence. It is best that whoever "created" the digital document (for example, the person who took the screenshot of the Instagram DM) be the person to testify about and authenticate the document, though this is not a strict requirement. What is most important is that the witness testifying about the document has sufficient relevant knowledge of the event captured in the document and how the document (the screenshot or printout) was created.

If you did not create the digital evidence yourself, you can still provide evidence of its authenticity in certain circumstances.[12] In *R v Hirsh*,[13] a woman wanted to show a screenshot of someone's Facebook profile as evidence at the trial. She was not able to take a screenshot of the profile herself, because the person had blocked her on Facebook. However, her friend was still Facebook friends with the account she wanted to access, so her friend took a screenshot of the account. It was acknowledged during trial that the witness had no way of knowing whether the screenshots had been edited because she did not take them herself. The court also acknowledged that it would have been preferable for the friend who took the screenshots to testify to their authenticity. However, the court still accepted the witness's testimony because she was familiar with the owner of the Facebook profile, she had access to the profile before she was blocked, and she was able to recognize the user's style of writing.

Authenticity *does not* necessarily require a third-party (i.e. someone other than you or the opposing party) to testify and authenticate digital evidence. For example, if you are relying on Facebook screenshots, you do not need a representative from Facebook to testify in court about how Facebook works. It is generally appropriate for you to authenticate your own evidence if you can truthfully testify to its authenticity under oath.[14]

Even though, in some circumstances, authentication is not necessary unless questions about authenticity are raised by the other party, it is always a good idea to authenticate your electronic documents in the manner described below.

The process of authenticating evidence is quite simple:

1. Tell the court exactly what your evidence is.
    a. *Examples: "This is a photocopy of my receipt for a purchase from Walmart on X date." And "This is a printout of the messages I received from my ex-husband over Instagram."*
    b. You will say this to the court through either oral testimony or an affidavit.
    c. If the evidence is unusual in any way, mention this in your description of the evidence.
        i. *Example: If the evidence has been edited, such as deleting certain text messages from a conversation, you should say this to the court. You should not present an edited version of a conversation to the court without explaining how and why you edited it and the differences between the original and the edited version.*

2. If you are presenting digital evidence, you should be able to explain how the program or application you obtained the evidence from functions.
    a. *Example: If you want to submit a Snapchat video, you should be able to tell the court how Snapchat generally works. You could say "Snapchat is a messaging application where users send each other pictures or videos that then disappear shortly after the recipient has viewed them."*
    b. This is especially important if it is an app or program that may not be well known.

3. If the evidence is an original document (such as a store receipt, diary entry, signed contract, etc.), you should say so. If the document is a copy of such a document, you should explain why you are not bringing the original document to court. It is always best to provide the court with an original document, if possible.
4. If you used an application to organize or store the evidence, you should explain this to the court.
    a. *Example: Sometimes it is easier to use a third-party application to save large volumes of text messages than trying to save them all using the standard screenshot function on your phone. You should be able to explain to the court how any such third-party application functions.*

5. If the evidence was created or saved by another person, you or the Crown should try to have that person testify about how the document was created.
    a. *Example: If a friend took a screenshot of something on the opposing party's Facebook page and then sent it to you, that friend, not you, should testify about the circumstances of taking that screenshot.*

6. Do not misrepresent your evidence.
    a. Do not say that your evidence is something that it's not. If you do not know the answer to a question asked or are missing information, it is better to just say that than to try to fill in the gaps. Do not state anything that you do not know.

7. Tell the court how you know that the evidence accurately represents what you say it represents.
    a. *Examples: "This is a photocopy of my receipt for a purchase from Walmart on X date. I made the photocopy from the receipt I received after completing my purchase. I checked the photocopy against the original and the copy accurately reflects the original receipt." And "This is a printout of the messages I received from my ex-husband over Instagram. I took a screenshot of the messages I received on my phone and then I printed out the screenshot. I checked the printout against the original messages I received, and the printout accurately reflects the messages I received."*

Summary: To authenticate a document, the witness should tell the court what the document is by describing when the document was created, who created it, whether it is an original or whether any changes have been made to it, and how it is relevant to an important fact or a legal issue in the case.

Take these steps if you are the witness introducing a document:

1. Begin by giving the court oral evidence on the events of your case.
    a. *Example: "On June 1, 2022, I was sitting at home when I heard my phone buzz. I checked my phone and saw a message from my ex-husband, Paul."*

2. When you reach the point in your testimony where the document comes up, you can hand over a copy of the document to the judge and the other party. If you organized all of your documents in a binder, just identify which tab to turn to in the binder.
    a. *Example: "Please turn to Tab 7 of the plaintiff's documents "*

3. Tell the court what the document is.
    a. *Example: "This is a printed version of a screenshot of my text message conversation with Paul from June 1, 2022."*

4. Give the court more details about the document. These details may include:
    a. **When?** When was the screenshot taken? When were the text messages sent? When did you receive the letter?
        i. *Example: "As captured in the screenshot, I received the message from Paul at 11:13 p.m. on June 1, 2022. I took a screenshot the next morning, June 2, 2022, at 8:45 a.m. and saved a copy in the "Paul" folder on my iPhone."*

    b. **Who?** Who took the photo? Who sent you the messages? Who took the screenshots? Who sent you the letter? Who is in the photos?
        i. *Example: "I know it was Paul who sent me the message because the message was from the number I had saved for him in my phone, which he had consistently messaged me from throughout our marriage and afterwards. At Tab 8 of the plaintiff's documents, you can see a screenshot of his contact information that I took and saved on my phone on June 2, 2022."*

    c. **Accurate?** Were there any changes made to the evidence? For instance, have messages been deleted from the conversation? Have you cropped the photo? What programs did you use to alter the document? Do the changes to the document make the document less relevant?
        i. *Example: "This screenshot contains our entire conversation from the evening of June 1, 2022. You can see his previous message to me was on April 3, 2022, arranging daycare pickup for our child. I never received any communications from Paul after June 1, 2022.*

    d. **Reliable?** Is the evidence reliable? Is the photo a realistic depiction of what happened? Did printing out the photo cause it to become too blurry?
        i. *Example: "This screenshot accurately depicts what was captured on my iPhone during the morning of June 2, 2022, and accurately reflects my text message conversation with Paul on the night of June 1, 2022."*

    e. **Relevant?** How is the document relevant? Sometimes it is obvious that the document is relevant, so you do not have to explain. For instance, if your case is about obtaining a protection order against your ex-husband, threatening text messages would be relevant.
        i. *Example: "The messages from Paul on the evening of June 1, 2022, contain clear threats to my safety."*

5. Ask the judge, "May I mark this document/photo as the next exhibit?" If the judge agrees, then the document is marked as an exhibit. This means that the document has been accepted by the court.
6. Once the document has been marked as an exhibit, you should point out things about the document that stand out.
    a. *Example: "Paul sent me the first message, 'I am going to kill you,' 5 hours after we saw each other at the grocery store and he saw me with my new boyfriend. This message caused me to feel very frightened, which is why I immediately responded 'You are scaring me.'"*

7. Once you finish going over the document, you can continue giving the rest of your oral evidence if you still have more evidence to present.
    a. *Example: "The next day, on June 2, 2022, I saw Paul's car drive by my house very slowly..."*

8. The marked exhibit can be used when you make your closing argument as to why you have proven your case with facts and that the judge should decide in your favour. You can refer back to the document as evidence to prove your case.
    a. *Example: "As demonstrated by the text message conversation marked as Exhibit A, Paul used extremely threatening language in his messages to me, which caused me to fear for my safety. Because of this and the other threatening behaviours on June 1 and June 2, you should grant my application for an emergency protection order."*

If you are not the witness introducing the document but another witness is doing so, here are the steps to take:

1. The witness will be sitting on the witness stand. Unless you have a lawyer, you will have to ask the witness questions about the document.
2. Begin the direct examination of your witness.
3. When you reach the point in your witness's testimony where the document comes up, you can hand over the document to the witness. You should also give the judge and the other party a copy of the document. If you organized all of your documents in a binder, just identify which tab to turn to in the binder.
4. Ask the witness what the document is.
5. Ask more questions regarding the details of the document. These details may include:
    a. **When?** When was the photo taken? When were the text messages sent? When did you receive the letter?
    b. **Who?** Who took the photo? Who sent you the messages? Who took the screenshots? Who sent you the letter? Who is in the photos?
    c. **Accurate?** Were there any changes made to the evidence? For instance, have messages been deleted from the conversation? Have you cropped the photo? What programs did you use to alter the document? Do the changes to the document make the document misleading?
    d. **Reliable?** Is the evidence reliable? Is the photo a realistic depiction of what happened? Did printing out the photo cause it to become too blurry?
    e. **Relevant?** How is the evidence relevant? Sometimes it is obvious if the document is relevant, so you do not have to explain. For instance, if your case is about obtaining a protection order against your ex-husband, threatening text messages would be relevant.

6. Ask the judge, "May I mark this document/photo as the next exhibit?" If the judge agrees, then the document is marked as an exhibit. This means that the document has been accepted by the court.
7. Once the document has been marked as an exhibit, you can ask the witness more questions about the document. For instance, your mother is the witness and the document that she introduced is a text message conversation where your ex-husband threatened her over 20 times in a week. You may want to point out that number to the court. You could do this by asking the witness: "How many text messages do you usually receive from X in a week?" and "What is the nature of these text messages?"
8. Once you finish going over the document, you can continue the direct examination of your witness if you still have more questions to ask them.
9. The marked exhibit can be used when you summarize your argument.

Incomplete or Edited Digital Documents May Still Be Authenticated

The court does not require you to show that your digital documents are identical to the original digital files. For example, on some social media platforms, it is possible to delete sent messages. If an abuser has deleted messages they sent you from your chat, it will be impossible to take screenshots of the "original" conversation, because part of it has been deleted. However, you can still screenshot the remaining conversation that has not been deleted. In this case, you cannot claim that the screenshot represents the original conversation because some portion has been deleted. However, you can say that the screenshot accurately represents the remaining portions of the original conversation.

A digital document does not need to be an exact copy of the original digital file; it can be a copy of a modified version of the original file. However, modification of a document should be avoided whenever possible. What is important is that the document is an accurate representation of the information that it claims to show. Thus, you should always carefully review the document that you plan to use to clearly and accurately testify that the document is what you say it is. You may have to explain or provide a reason if your digital documents look revised or altered.

Examples of situations where a digital document may require more explanation include:

- If the document does not include contextual information, such as the time and date of a message.
- If the conversation being captured between two people does not flow logically (for example, if it is obvious that some of the texts have been removed from the document).
- If the document is inconsistent with other documents that are being presented as evidence.

In *R v Aslami*,[15] the Ontario Court of Appeal found that the trial judge failed to consider certain issues with the reliability of messages sent via an application called "TextNow." The Court noted that there was nothing in the content of the messages themselves that proved they had been written by the accused, and there was no expert testimony about how the TextNow application functioned. The Court cautioned that trial judges need to be very careful in dealing with certain forms of electronic evidence given the potential for this evidence to be manipulated, and found that the Crown should have called an expert to address the reliability of the evidence.

Somani v *Jilani*[16] is a case where suspicious digital documents were not authenticated. In this case, Mr. Somani attempted to present as evidence a text message printout. The printout in question showed a single text message from Mr. Somani. There was no response to the text from Ms. Jilani. Ms. Jilani argued that she would have responded to the message had she actually received it. This piece of Mr. Somani's evidence was unusual because all other printouts of conversations between Mr. Somani and Ms. Jilani consisted of large volumes of text – not just a single text. Lastly, Ms. Jilani testified that Mr. Somani was an expert with computers and would likely know how to produce a falsified printout of a text message. The judge found that the printout was suspicious and was not satisfied that it was authentic.

You should try to gather your evidence comprehensively and consistently. This could include preserving the whole text conversation rather than just one or two texts that you think are relevant as it is important to present the entire context of a conversation to the court. Establishing a consistent manner of capturing screenshots and gathering documentation will be helpful to show the court that you have a process you follow in your evidence collection. This can aid in the authentication of your documents before a court.

Anonymous Messages Can Be Authenticated

It is not necessary, *during the authentication step*, to identify the author of a digital message.[17]Women are often harassed by anonymous or fake profiles. Evidence from an anonymous or fake profile is still admissible in court. At the

authentication stage, you only need to show that the screenshots are what you say they are: an accurate representation of the harassing messages you received from the anonymous or fake account.

Forensic digital evidence, like an IP address, that links the fake social media account to an actual person's Internet account is not necessary to establish authenticity. Forensic digital analysis may be more important to other elements of your court matter, such as identifying the source to issue and serve a court order.

Even though the authentication stage does not require proof of identity, it can be important to a victim's case to identify the person who has been harassing them anonymously. While you may not be able to hire an IT expert to conduct a forensic analysis, you may be able to prove through circumstantial evidence that the anonymous messages came from a specific person. This evidence could include other messages sent by that person from a different account clearly associated with them (such as their primary phone number or email address), messages containing references to events or facts only that person would know, images of that person posted on the anonymous account's social media profile, etc. It is important to save digital evidence because it can be helpful to prove the identity of an anonymous person. Saved texts or emails from the anonymous account can be compared against the other anonymous messages to show similarities in language or knowledge of private information. These similarities could suggest that the anonymous poster is a specific individual, such as an intimate partner or family member. Similarities between these messages could demonstrate that the same person sent them.

Documents Downloaded from Third-Party Applications

Care should also be taken if digital evidence is being processed through a third-party app, such as an app that backs up or makes recordings of your messages.

In *Sylvestre v Sylvestre*,[18] a printout of text messages using a third-party app was not authenticated. In that case, the witness used the "Decipher Text" computer app and testified that printouts presented as evidence contained messages transferred from her phone to her computer using this app. She did not explain how the application worked, and as such there was a gap in explaining how the messages she received on her phone were reflected in the computer printouts. Had she explained how the app converted text messages into printouts, the evidence might have been authenticated. Similarly, if she had taken screenshots of the messages rather than using Decipher Text, the evidence likely would have been authenticated.

Based on *Sylvestre*, screenshots are preferable to the use of third-party apps. A screenshot printout is a depiction of what one would see on the screen of a smartphone. For more information on preserving digital evidence using screenshots, see: Preserving Digital Evidence via Screenshot. There is no need to provide technical evidence showing how taking a screenshot works, as this is generally known by judges and juries.

In certain circumstances, it may still be helpful to collect your digital evidence through a third-party app. In cases where there are thousands of text messages or emails, it could be helpful to use a third-party app to download or organize these messages rather than screenshotting them one by one. If using a third-party app, authentication is not overly complex. To the best of your ability, you need to explain to the court how the application works in a way that is understandable to someone with no prior knowledge of the application. You can testify that the printouts from the application accurately represent the text messages that you received on your phone because you have compared the printouts to the text messages and can confirm their accuracy. This type of testimony may be sufficient for authentication.

Circumstantial Evidence

Circumstantial evidence is evidence about the circumstances surrounding an event that may help prove that an event happened. Circumstantial evidence may be used to determine the authenticity of a document.[19]Circumstantial evidence can be helpful when you do not have direct proof that an event occurred. An example could include another person having your phone all day, that person being the only other person who knows your passwords (such as an intimate partner), and a nude photo of you being posted on your Instagram account that day. The fact that he was the only person to have your phone and knew your passwords is circumstantial evidence that it was he who posted the photo. Circumstantial evidence can be challenged by the other party. They can provide testimony of other circumstances or events to explain the contested evidence.

Circumstantial evidence that can be used to authenticate messages has included:

- The use of a nickname in the message that only the accused called the complainant[20]
- Consistency between the contents of messages and events that were going on at the relevant time[21]
- Testimony of the complainant or another witness about how the document was created[22]
- Evidence that the complainant received previous communications from the account[23]
- The messages appearing to be from an account associated with the accused's name[24]

How to Challenge the Authenticity of the Other Party's Documents

If you suspect that the other party's documents have been edited or are inauthentic, you can dispute the authenticity of their documents. However, as previously noted, the burden to establish authenticity is very low. The other side only needs to tender some evidence that the document is what they say it is. This could be as simple as a statement from the opposing party that the printout or file saved on a USB drive looks like a copy of a message they received via e-mail or on social media. Concerns about whether the document has been fabricated or falsified in some way should technically be dealt with later in the trial – a document may still be considered legally "authentic" even if it has been forged or altered.

If the other party's testimony does not sufficiently explain the context of the digital document or how they know that the document is authentic, you can state they have not met the authenticity standard. If you believe the documents have been edited or modified, you should raise this. While this may not be sufficient to have the documents excluded because they are inauthentic, in some cases it may be. In other cases, this will be relevant to the weight the judge ultimately gives these documents as evidence (see below). It may be helpful to submit your own unedited version of text messages, emails, or other social media posts to support the fact that the other party's documents have been altered. Signs of editing may include:

- Incorrect or missing dates and times
- Conversations that do not flow logically
- Documents that are inconsistent with other related documents
- Screenshots that show gaps in the conversation

Circumstantial evidence might be useful to indirectly show that the other party's documents are not authentic. For example, if the other party tries to submit text message screenshots that are timestamped, evidence that they were at work or otherwise unavailable during that time could be used as circumstantial evidence. This evidence would show that the other party was doing something else during the time that the messages were allegedly sent. This could help the court infer that the text message screenshots are inauthentic because the other party was working and could not have sent them.

If the other party used a third-party application to download or organize their documents, or they are attempting to rely on evidence captured using little-known messaging or social media applications, you can argue that the evidence has not been authenticated unless the other party has put forward expert evidence or very clearly explained how these platforms operate.

Authentication vs. Weight

It is important to remember that even if evidence is admitted to the court, this doesn't mean that the judge or jury will believe all of the information in the electronic document. After the evidence is authenticated and admitted, the judge or jury will still need to decide how much "weight" to give the evidence. At the end of the trial, they will decide whether the evidence is trustworthy or relevant in light of all of the other evidence when making their final determination about which party should succeed in their legal claim. Even if doubts about who authored the messages, or whether the evidence has been tampered with, were not enough to have the evidence ruled inadmissible, such claims may lead to the judge or jury deciding not to give the evidence much weight, or rejecting it entirely.

Technology-Facilitated Gender-Based Violence (TFGBV) is part of a continuum of violence that can be both online and in-person. If you or someone you know is experiencing TFGBV, you are not alone. You can use sheltersafe.ca to find a shelter/transition house near you or call/text the Kids Help Phone to discuss options and create a safety plan. You don't need to stay in a shelter to access free, confidential services and support.

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Adapted with permission from BCSTH's Technology Safety project, based on their resource Authentication of Digital Evidence for Protection Order Matters in BC Family Court or BC Civil Courts and Admitting Digital Evidence in Criminal Court.

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1. In Canada, it is legal to secretly record a conversation you are a part of. You must be the person who does the recording –you cannot ask a friend to record a conversation that you are involved in unless they are involved in the conversation a well. It is illegal to record a conversation that you are not a part of (i.e. eavesdropping or wiretapping
2. Sopinka, Lederman & Bryant,The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)
3. Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)
4. R v Martin, 2021 NLCA 1.
5. Section 31.8.
6. Sections 31.1, 31.2.
7. R v Hirsch, 2017 SKCA 14.5

8. While technically it does not appear that you need to prove who was actually involved in an electronic conversation in order to authenticate that evidence, courts have sometimes seemed to conflate the concepts of authorship and authentication. For more information,see Suzie Dunn & Moira Aikenhead, “On the Internet, Nobody Knows You are a Dog: Contested Authorship of Digital Evidence in Cases of Gender-Based Violence” (2022) 19 CJLT 371.
9. R v Hirsch, 2017SKCA 14 at para 19.
10. R v Aslami, 2021 ONCA 249.
11. R v Ball, 2019 BCCA 32 at para 72-73.
12. Zhang v Sun,2016 BCSC 1418.
13. 2017 SKCA 14.
14. Ainger v Posendorf, 2019 ONSC 2220.
15. R v Aslami, 2021 ONCA 249
16. 2018 BCSC 1331.
17. R v Hirsch, 2017 SKCA 14.
18. 2018 SKQB 105.
19. British Columbia (Securities Commission) v Alexander,2013 BCCA 111.
20. R v Soh, 2014 NBQB 20.
21. R v CB, 2019 ONCA 380; R v Durocher, 2019 SKCA 97.
22. R v Himes, 2016 ONSC 249; R v Phagura, 2018 BCSC 2541; Soh.
23. R v Durocher, 2019 SKCA 97; Phagura, 2018 BCSC 2541; Soh
24. R v Hirsch, 2017 SKCA 14; R v CB, 2019 ONCA 380; Durocher

Objections to Evidence

This document provides an overview of some of the more common forms of objections that can be used in court proceedings. It will help you to prepare for making and responding to objections during a civil trial. ***Note: if you are a victim of technology-facilitated gender-based violence (TFGBV), you will not have the right to make objections in criminal cases, as you are not considered a party to the proceeding.*** For more information on the differences between criminal and civil trial processes in the context of technology-facilitated gender-based violence, see Legal Protections for TFGBV: What Laws Apply to You?

This document is not meant to be a comprehensive guide to all of the legal rules regarding objections. You may need to consult with a lawyer or read additional legal materials about the laws of evidence to see what rules apply. For a list of legal resources available in your area, see Legal and Victim Service Supports and Resources. You can also consult the Canadian Judicial Council’s Civil Law Handbook for self-represented litigants.

What is an Objection?

An objection is when a party to litigation thinks that the other party is not following the rules of evidence or the rules of the court. In this situation, the first party can formally raise the issue with the judge who is hearing the matter and ask the judge for the appropriate remedy (for example, excluding inadmissible evidence). In some cases, the other party will have a lawyer. In others, the other party may not have a lawyer and they will be self-represented. If they do not have a lawyer, they will be the one introducing evidence to the court and asking the witnesses questions. You would make objections in the same way and on the same basis as you would if the other party had a lawyer. For simplicity, we describe either the lawyer for the other side or the person on the other side who is self-represented, as "the other party" in this document.

Objections can be made at court when witnesses are being questioned, or when a lawyer seeks to introduce evidence to the court at trial or other court hearings, such as an interim application hearing.

Who Can Make an Objection?

A lawyer or a self-represented litigant (i.e. someone who is representing themselves in court without a lawyer) can make an objection to the judge if they think that a rule of evidence or a court process is not being followed. For example, when someone asks a question that is not allowed to be asked, if the witness is saying something that is not allowed to be said, or if the evidence has not been properly entered into court. The objection can be about evidence that a party or a witness gives (either verbally or in an affidavit), about a question that a party or a lawyer asks a witness, or about documents entered as evidence. You can also object when the court process is not being followed. For example, if someone is trying to rely on an affidavit that was served outside of the timelines in the court rules, you could object.

How to Make an Objection

In a courtroom, if you believe you have a good reason to make an objection, you should stand up in court to get the judge's attention by properly addressing the judge ("Your Honour," "My Lord," or "My Lady," depending on the court) followed by "I have an objection to this evidence because..." (see a list of common objections below) and explain what your objection is to the court.

If you are objecting to a question the other party asked a witness, make sure you make your objection *before* the witness answers the question.

If you receive a document before the hearing and you intend to object to it, you should inform the other side in advance that you will object to the document being admitted into evidence and explain the reasons for the objection (see, Objecting to Documents below).

Once you have made your objection, you can sit back down. The judge may ask the other party to respond to your objection and may ask you to respond to what the other party said.

If you are representing yourself, you may also be a witness at your own trial. In these circumstances, the other party may ask you objectionable questions at trial when you are being a witness, and you will need to object to them yourself and ask the judge for a ruling on the objection before you answer them.

Anytime you make an objection, it is important that the ruling on the objection be reflected in the record of the court proceedings. If the judge did not make a clear ruling on the objection, ask for clarification on what they ruled before

moving on. Again, this will be helpful for you to have an accurate official court record if you have to appeal your case. The record of the court proceedings is the official accounting of the legal matter that is reviewed on appeal.

What Happens once an Objection has been Made?

Once an objection is made, whoever made the objection is essentially asking the judge to decide whether the rules of the court are being followed.

If the judge agrees that the rules are not being followed, the question or evidence will not be allowed, and the judge will say the objection has been "sustained." The document will not be admitted as evidence, the witness will not be allowed to answer the question, or the other party will be told by the judge to ask a different question or rephrase the question.

If the judge disagrees and thinks the rules have been followed, the question or evidence will be allowed, and the judge will say the objection has been "overruled.".The document will be admitted as evidence, the witness will be allowed to answer the question, and/or the other party will be allowed to continue with their questioning

What if the Other Party Makes an Objection about What I am Doing?

Both parties are allowed to make objections. You can make them yourself or the other party may make an objection to the questions you ask of witnesses or the evidence you try to introduce.

If you do not have a lawyer, it is important that you familiarize yourself with the grounds for objections, so that you know how to make an objection to the other side's evidence. It is also important to know these rules to ensure that your evidence is admissible and to know how to respond if the other side objects to your evidence.

If the other party objects to something you are doing, you will need to explain to the judge why you think your evidence, or question to the witness, should be allowed.

What Happens if My Objection is Overruled and the Evidence is Admitted?

Remember that even if the evidence is admitted, it does not mean that the judge or jury will believe it or think that it is important. If the evidence is admitted, the judge or jury will later decide how important or believable the evidence is. The courts refer to this as the evidence's "weight." If the evidence is given little or no weight, the judge will not rely on it much or at all when deciding the case. If evidence is given a lot of weight, then it will have more of an influence on the judge's decision about the case.

Why Would You Make an Objection?

One reason you would make an objection is if the other party is trying to introduce inadmissible evidence (i.e. evidence that is against the rules). The reason you would make this kind of objection is to have the judge decide if the document or witness's answer should be admissible (i.e. counted as evidence in the case) or not.

A second reason to object is to stop the inappropriate questioning of a witness. You would make this type of objection when a witness is being asked a question that is against the rules, or if the witness is being treated in an abusive manner.

It is important to make objections to make sure that no evidence that is against the rules is admitted. It is also important to make objections because it may help you if you want to appeal your case if the judge does not reach the conclusion you want them to. If you did not object to improper evidence when you had a chance at trial, you may not be able to bring the issue up during an appeal.

You can make objections about questions asked to a witness, answers given by a witness, or documents or items being introduced as evidence to the court.

There must be a *legal reason* for your objection. You cannot object to anything you wish would not be admitted as evidence or anything you don't like that is being asked or said. If you make an objection, you will have to explain why you are making it and there has to be a legally recognized reason to make it.

Below is a list of common, legally-recognized objections.

Types of Objections

This section provides a list of some common objections. We have divided them into three sections: general objections (which apply to both documents and oral evidence), objections for questioning a witness, and objections to documents.

Objections: General

Character Evidence

If the other party tries to introduce evidence about someone's character (i.e. whether they are a good person or not), you can object.

Character evidence is allowed if a person's character is a specific issue at trial (for example, in a defamation case you have to provide evidence about a person's reputation, so some character evidence might be relevant in that case) or if it is "similar fact evidence," meaning evidence of a pattern of behaviour (for example, if the person has done nearly the exact same thing in the past in a similar factual situation). All character evidence, including similar fact evidence, must be relevant to a fact in issue in the case to be admissible.

Hearsay

If a witness makes a statement about what another person previously said, or if the other party tries to introduce a document that includes something another person previously said, you can object. This is called hearsay evidence.

The law regarding hearsay evidence is quite complicated. Whether or not something will be hearsay will depend on who said it and what purpose it is being used for. There are also several exceptions to the general rule that hearsay is inadmissible. For more information regarding hearsay, see: Submitting Evidence in Court.

Misstating Evidence or Misquoting Witnesses

If the other party misstates evidence or misquotes witnesses, you can object.

No Foundation

In some instances, the party will have to establish some facts about something (i.e. establish a foundation) before they can ask a witness a question about it or introduce evidence about it.

For example, if the other party wanted to ask a witness about an email that they think the witness sent, they might ask that witness, “Why did you write this email?” However, if there is no proof that the email address belongs to the witness or that the witness wrote the email, you could object because there is no foundation for that question. The other party would have to show evidence that the email address belonged to the witness and that they were the one to write the email before they could ask the witness why they sent the email.

Opinion

If a witness gives, or is asked to give, their opinion on something, you can object. Ordinary witnesses (i.e. witnesses that are not expert witnesses) should only testify about facts that they are personally aware of and not give opinions. For example, if the other side asks a witness how likely it is that the defendant would send harassing emails, you could object to this question on the basis that they are asking for the witness’s opinion.

There are some exceptions to this rule. In some cases, where the opinion is made by an ordinary person and the facts and opinion are intertwined, and the witness is the best person to make this opinion, it might be allowed. If an ordinary person is making a personal observation about something that is commonly known, that can also be acceptable (for example, how fast they think a car was going when they saw it go by).

Qualified experts with special knowledge of something are allowed to give opinions on things within their expertise. The courts have specific rules about expert evidence, which you will need to familiarize yourself with if you or the other side intends to rely on expert evidence.

Self-Serving Evidence

Self-serving evidence is not generally admissible. An example of this is a witness repeating her previous statements about an issue at the hearing to confirm her current testimony at trial. However, in some cases, if the evidence is reliable and necessary, it can be allowed. If a witness’s credibility has been made an issue (for example, if they are accused of lying about something), a previous statement can be allowed to show consistency, but not to show what was said was true. This applies to prior consistent statements and other out-of-court evidence that is fully self-serving.

Prejudicial

If evidence is prejudicial (e.g. it is misleading, confusing, unnecessarily time-consuming, or unfairly surprising), you can object. The court will balance the prejudicial effect of the evidence (i.e. something that could be improperly harmful to someone or something and creates bias, partiality, or pre-judges an issue or the case) against the probative value of the evidence (i.e. something that is relevant and would legitimately help the court understand an issue or the case).

Notice and Disclosure

It is important for both parties to be fair to each other. Some court rules require each party to disclose to the other party a list of witnesses they plan on questioning and the documents they plan to use as evidence. That way, both parties can

be prepared and organized to argue their case. In some cases, if the other party has not shared evidence with you, you can object to the fact that the other party is using surprise evidence.

The courts have specific rules about disclosure (i.e. sharing evidence with the other side), which you'll need to familiarize yourself with to make sure that you are in compliance and address instances of non-compliance by the other party.

Privilege

Privileged documents and communications are considered private and cannot be shared with the other party or the court (in most cases). Certain types of relationships are protected by privilege to allow people to have open communication in trusting relationships or situations. A judge may also find that privilege exists in a particular relationship on a "case by case" basis. If the other party asks you or a witness to share information that is protected by privilege, you can object.

For information about the various forms of privilege, see Submitting Evidence in Court.

Relevance

If the other party tries to introduce documents or asks a witness a question that is irrelevant to the case, you can object.

However, you and the other party may have different opinions on what is relevant to the case and both sides may need to explain to the judge why they think the question is relevant or irrelevant to the case. The judge will decide whether the question is relevant or not.

Objections: Questioning a Witness

Abusive, Hectoring, or Harassing

If you see that the other party is being extremely abusive, harassing, or cruel when asking a witness questions during cross-examination, you can object.

However, it is important to note that the other party is allowed to be quite aggressive in their questioning of witnesses. Their behaviour has to cross the line from vigorous and aggressive questioning (which is allowed) to abusive (which is not allowed).

Abusive behaviour may include demeaning, humiliating, or mocking the witness. The judge will determine whether the other party has crossed the line, but the other party's behaviour will have to be extremely bad for the judge to agree with an objection to abusive, harassing, or vexatious questioning.

Challenging Credibility

If one party wants to challenge the credibility of a witness, they must provide the witness with evidence that challenges their credibility so that they can properly respond to it. If the witness was not asked about it during their cross-examination, then the evidence cannot be entered into court later. It is not fair to challenge a witness's credibility with information they have not seen or after the cross-examination is over.

If the other party brings in this new evidence later, you can object to the evidence being introduced. The judge will then either refuse to admit the evidence, give it little or no weight, or allow it, but the witness will be given another

opportunity to be questioned about the evidence.

Argumentative

If the other party asks the witness to agree or disagree with a position that the other party assumes is true (often because it matches the argument their side is making) or is trying to draw a conclusion that has not been proven as true, you can make an objection that this is argumentative.

This happens when the other party asks the witness to agree or disagree with a statement that is not a statement of fact. A question about a statement of fact could be, “Do you agree the phone was an iPhone 11?” An argumentative question on the same issue would be, “Do you expect the court to believe that they could afford an iPhone 11?”

Calls for a Legal Conclusion

If the other party asks a witness to make a legal conclusion (for example, whether they think someone broke the law), you can object.

The only person in the trial who is allowed to make decisions about legal issues is the judge.

Compound or Multiple Questions

If the other party asks a question that is multiple questions in one (compound) or asks multiple questions at the same time, you can object to this.

The other party may be allowed to ask the questions separately.

Confusing, Ambiguous, or Vague

If the other party asks a witness a question that is not clear or misleading, you can object to that question as confusing, ambiguous, or vague.

The other party may have an opportunity to ask a clearer question or rephrase their question to make it clear and more specific.

Improper Re-Examination

Re-examination can happen after cross-examination in a trial.

If new information comes up in cross-examination, the other party can ask that witness questions about that new information.

During a re-examination, if the other party asks questions about things that were not new from the cross-examination, or should have been reasonably asked during the direct examination, you can object.

Leading the Witness

Leading questions are always allowed in cross-examination, but are generally not allowed in examination-in-chief.

During the examination-in-chief (i.e. when one party is asking their own witness questions), if the other party asks their own witness a question that contains or suggests the answer ("leading" the witness to the answer), you can object. Leading questions are questions that suggest an answer, and can usually be answered "yes" or "no."

> *For example: "Didn't you hear James yelling threats?" is a leading question, as it suggests to the witness that James yelled threats.*

An open-ended question, which is allowed, would be: "What did James say?" or "How did James seem when he said that?"

There are some exceptions to this rule. If the issue is not controversial, leading questions might be allowed. You will need to ask the judge permission to ask leading questions on undisputed facts before asking these types of questions. However, this is limited to truly uncontroversial points. For example, if the witness is the sister of the other party, then you could ask, "Are you James's sister?" instead of, "What is your relationship to James?"

Leading questions may be allowed if the witness is an adverse witness (i.e. a witness whose interest does not match the side that is questioning them) or a hostile witness (i.e. a witness who may be antagonistic or confrontational to the side that is questioning them). You will need to ask the judge permission to ask an adverse or hostile witness questions. You will have to explain to the judge why you think that the witness is an adverse or hostile witness.

An adverse witness is someone who is going to provide evidence that will not help the case of the person who is questioning them. There is no precise definition for a hostile witness, but a hostile witness generally means a witness whose feelings about an aspect of your case are so strong that they would not provide truthful evidence.

Repetition

If the other party asks a question that the witness has already answered repeatedly, so much that it is wasting the court's time or intimidating the witness, you can object to this.

However, lawyers are allowed to ask the same question more than once if the witness's answer was unclear or did not fully answer the question.

Speculative

If the other party asks a witness a question that makes them guess or speculate about what might have happened, you can object.

Objecting to Documents

A document can be physical, such as a handwritten note, or electronic, such as an email (however, you will typically have to print out a physical copy of the electronic document to show in court).

Each court will have its own rules for the disclosure of documents (i.e. when both parties need to exchange the documents they want to rely on in court) that you should review.

If you receive a document before the hearing and you intend to object to it, you should inform the other side in advance that you will object to the document being admitted into evidence and explain the reasons for the objection. The other side might decide not to rely on that document if you have a good reason to object to it. If the other side still intends to rely on the document, you should raise the objection with the judge at the hearing.

If you or the other party objects to a document or other evidence at the trial or hearing, the judge may decide to have a *voir* dire, which is like a mini-hearing about whether to admit the document into evidence. The objecting party will speak first to explain the reasons they are objecting. The party seeking to have the evidence admitted then gets a turn to respond and the objecting party has a final chance to reply. The judge will then decide whether to admit or exclude the evidence.

Affidavits

An affidavit is a document that contains facts that a witness has sworn to be true. It is only supposed to contain facts that the person can swear to be true and should not include opinions, arguments, or speculation. You can object to all of the contents of the affidavit, certain statements in it, or any document attached to it.

You would rely on the same bases for objections listed above. For example, you could object that one of the statements is prejudicial or that a document contains hearsay or an opinion, or is speculative.

If the court agrees that certain sections of the affidavit are against the rules, the judge will order those sections to be stricken from the affidavit or rule against the entire affidavit being introduced.

Authenticity Not Established

When a document or item is brought to court to be used as evidence, generally it must be authenticated. The authenticity of documents should be raised as soon as possible, ideally before trial, as this avoids wasting time during the trial. If the issue can be resolved between the parties before the hearing in court, this is preferable. Not all documents need to be authenticated. In some cases, if both parties agree the document is authentic, it can be accepted as authentic without going through the steps of authentication. However, if there is a disagreement about the authenticity of the document and the other party has not proven it is authentic and they try to admit it, you can object.

If it has not gone through the proper steps of authentication, you can object.

For more information about authentication and digital evidence, see Authentication of Digital Evidence.

Best Evidence Rule

For most physical documents, the party seeking to introduce the document will be expected to provide the court with the original version. For example, if a party wants to rely on a letter, the court would want the original hand-written letter, not a photocopy.

If the original is missing, someone else has it, it is impossible to get, or it has been destroyed, a copy may be accepted by the court if the party provides a good explanation for why they cannot produce the original or why a copy is good evidence.

If it is not the original document or the party does not have a good reason to use a copy, you can object.

For electronic documents, because there is usually no true single, “original” document, the courts will instead want to know that the system it was saved on was functioning normally (i.e. was working as it usually would and not in a way that would impact the contents of the document. For example, it would not be working properly if it were not saving the document accurately because of a glitch in the system).

If you think the system was not functioning normally and the original document may have been altered, you can object.

The party who was trying to admit the document would then need to explain that the electronic system was working properly.

For more information about the Best Evidence Rule, see Authentication of Digital Evidence.

Hearsay: Business and Medical Records

If a document is being admitted to prove its contents (i.e. whatever is said in the document is true), it will be considered hearsay unless it falls under one of the exceptions to the hearsay rule, as discussed in Submitting Evidence in Court.

There are special rules for business and medical records when the document was made in the usual course of business. Documents are admissible when it is the usual course of business to record the information that is being presented to the court as evidence. If there is a dispute about the records, whoever keeps the records at the business will have to come to court to testify that the record is authentic.

Records from financial institutions, such as bank records, are presumptively admissible even if they contain hearsay. If the records are disputed, a bank manager or accountant will need to provide an affidavit or a statement in court that the record is authentic. If there is no dispute – for example, bank account records that both parties accept as accurate records – then they will not need this affidavit or statement. It is common for both parties to accept bank records as accurate.

Parol Evidence Rule

This rule applies to contracts. It says that only what is written in the contract is allowed as evidence. Nothing that was agreed to outside of the contract that would contradict it, such as a conversation about the deal, is admissible. If someone tries to bring in additional evidence about the contract, you can object to it.

However, there are exceptions to this rule and sometimes additional evidence is allowed. For example, if there is evidence of fraud, mistakes, or unclear sections, additional evidence may be allowed to resolve the matter.

Additional considerations

Interim Applications

In family law trials, there are decisions that will need to be made by an interim application before trial. This will allow the court to make temporary orders on issues such as access times for the child, child support payments, and other critical issues that will need to be decided immediately and before the actual trial. The rules of evidence are slightly different for interim applications.

Exhibits at Trial

Whenever you introduce a document or an item as evidence in court, it must be designated as a numbered/lettered exhibit by the judge. It is important to pay attention to make sure that the judge numbers all documents and items. If they are not marked, they will not be considered part of the evidence of your trial. You should try to keep a list of all the exhibits and their numbers so you can refer back to them and you can be sure that they have been noted as evidence by the court.

When you are introducing evidence, you will want to ask the witness to identify the document and then ask the judge to mark the document as an exhibit. The judge will ask the other party if they object to it being entered as an exhibit and if they do not, the judge will say what exhibit number it is and the court clerk will confirm for the record what the exhibit it is and what identifier it has. If you do not do this, the exhibit will not be counted as evidence.

Sometimes the exhibit will be lettered rather than numbered. The important thing is to keep track of the items and the identifier given to them by the court.

Technology-Facilitated Gender-Based Violence (TFGBV) is part of a continuum of violence that can be both online and in-person. If you or someone you know is experiencing TFGBV, you are not alone. You can use sheltersafe.ca to find a shelter/transition house near you or call/text the Kids Help Phone to discuss options and create a safety plan. You don't need to stay in a shelter to access free, confidential services and support.

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Adapted with permission from BCSTH's Technology Safety project, based on their resource Objections to Evidence.

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1. In Canada, it is legal to secretly record a conversation you are a part of. You must be the person who does the recording –you cannot ask a friend to record a conversation that you are involved in unless they are involved in the conversation a well. It is illegal to record a conversation that you are not a part of (i.e. eavesdropping or wiretapping
2. Sopinka, Lederman & Bryant,The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)
3. Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)
4. R v Martin, 2021 NLCA 1.
5. Section 31.8.
6. Sections 31.1, 31.2.
7. R v Hirsch, 2017 SKCA 14.5
8. While technically it does not appear that you need to prove who was actually involved in an electronic conversation in order to authenticate that evidence, courts have sometimes seemed to conflate the concepts of authorship and authentication. For more information,see Suzie Dunn & Moira Aikenhead, "On the Internet, Nobody Knows You are a Dog: Contested Authorship of Digital Evidence in Cases of Gender-Based Violence" (2022) 19 CJLT 371.
9. R v Hirsch, 2017SKCA 14 at para 19.
10. R v Aslami, 2021 ONCA 249.
11. R v Ball, 2019 BCCA 32 at para 72-73.

12. Zhang v Sun,2016 BCSC 1418.
13. 2017 SKCA 14.
14. Ainger v Posendorf, 2019 ONSC 2220.
15. R v Aslami, 2021 ONCA 249
16. 2018 BCSC 1331.
17. R v Hirsch, 2017 SKCA 14.
18. 2018 SKQB 105.
19. British Columbia (Securities Commission) v Alexander,2013 BCCA 111.
20. R v Soh, 2014 NBQB 20.
21. R v CB, 2019 ONCA 380; R v Durocher, 2019 SKCA 97.
22. R v Himes, 2016 ONSC 249; R v Phagura, 2018 BCSC 2541; Soh.
23. R v Durocher, 2019 SKCA 97; Phagura, 2018 BCSC 2541; Soh
24. R v Hirsch, 2017 SKCA 14; R v CB, 2019 ONCA 380; Durocher

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