Electronic Evidence Act (draft) and Comments 1997

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Civil Section Documents - Uniform Electronic Evidence Act and comments

Definitions

1. In this Act,

(a) "data" means representations, in any form, of information or concepts.

(b) "electronic record" means data that is recorded or preserved on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.

(c) "electronic records system" includes the computer system or other similar device by or in which data is recorded or preserved, and any procedures related to the recording and preservation of electronic records.

Application

2. This Act does not affect the application of any common law or statutory rule relating to the admissibility of documents or other records, except for the rules relating to authentication and best evidence.

Authentication

3. Subject to this Act or any other Act of [the enabling jurisdiction] or to an exception provided by the common law, the person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Best evidence rule

4. In any legal proceeding, the best evidence rule is satisfied in respect of an electronic record on proof of the integrity of the electronic records system in or by which the data was recorded or preserved.

Presumption of integrity

5. In the absence of evidence to the contrary, the integrity of the electronic records system is proven if it is established that

(a) at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record; and

(b) there are no other reasonable grounds to doubt the integrity of the electronic records system.

Other applicable presumptions

6. In the absence of evidence to the contrary, the integrity of the electronic records system is proven if it is established that

(a) the electronic record was recorded or preserved by a party to the proceedings other than the party seeking to introduce it; or

(b) the electronic record was recorded or preserved in the usual and ordinary course of business by a person who is not a party to the proceedings.

Proof by affidavit

7. The matters referred to in sections 5 and 6 may be established by an affidavit given to the best of the deponent's knowledge or belief.

Standards

8. For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved, having regard to the type of business or endeavour that used, recorded or preserved the electronic record and the nature and purpose of the electronic record.

Repeal

9. [Repeal provisions which require retention of original after microfilming.]

Comments

Section 1

Comment:

(a)The definition of "data" ensures that the Act applies to any form of information in an electronic record, whether figures, facts, or ideas.

(b)"Electronic record" fixes the scope of the Act. The record is the data. The record may be on any medium. It is "electronic" because it is recorded or preserved in or by a computer system or similar device. The Act is intended to apply, for example, to data on magnetic strips on cards, or in smart cards. As drafted, it would not apply to telexes or faxes (except computer-generated faxes), unlike the United Nations Model Law on Electronic Commerce. It would also not apply to regular digital telephone conversations, since the information is not recorded, but only transmitted by or in a computer system or similar device, However, it would apply to voice mail, since the information has been recorded or preserved in or by a

computer system. Likewise video records are not covered, though when the video is transferred to a Web site it would be, as the recording or preservation has been accomplished in or by a computer system. Information recorded on paper by means of a typewriter would be a paper record and is not caught by the definition of "electronic record", but once that paper record is captured by electronic imaging technology, then the imaged form would constitute an electronic record.

In short, not all data in "digital" form is covered. A computer or similar device has to be involved in recording or preserving the data,

QUESTION: Does this distinction (that is, recording or preserving in or by a computer system or similar device) work in practice? Where information can be readily transferred from non-digital to digital form, should different rules of evidence apply depending on whether a computer or similar device is involved in recording or preservation? Although any thing that is not recorded or preserved by or in a computer system or similar device is omitted from this Act, they may well be admissible under other rules of law. This Act focuses fairly narrowly on replacing the search for originality, proving the reliability of systems instead of that of individual records, and using standards to show systems reliability.

One will note that paper records that are produced directly by a computer system, such as printouts, are themselves electronic records, being just the means of intelligible display of the contents of the record. Photocopies of the printout would be paper records subject to the usual rules about copies, but the "original" printout would be subject to the rules of admissibility of this Act.

(c)The system that produced an electronic record will often include procedures for how all records, or electronic records, are to be created and stored, including access controls, security features, verification rules, and retention or destruction schedules. The Act makes the reliability of the record-keeping system relevant to proving the integrity of a particular record.

An electronic record is not part of the system that produced it. Section 4 provides that the integrity of a record can be proved by proving the integrity of the system that produced it. If the system included the record itself, section 4 would not work.

Section 2

Comment:

As noted in the Consultation Paper, it is not necessary to change the law of hearsay in order to ensure the proper admission of electronic records. The admission of any record may depend on hearsay rules such as the business records rule or the bank records rule, in some jurisdictions. This Act does not change those rules.

Likewise recorded evidence may be subject to many other rules, about privilege, about competence, about notice, about documents found in the possession of an accused person, that are not affected by this Act.

The Act is intended to affect existing law on authentication and best evidence, however, as noted in the Comments to sections 3 and 4.

Section 3

Comment:

Section 3 codifies the common law rule on authentication which applies equally to paper records. This formulation follows that set out in the "Proposed Canada Evidence Act", the Uniform Evidence Act and the U.S. Federal Rules of Evidence. It is also the common law position as stated by the Supreme Court of Canada in U.S.A. v. Shephard.[1] The proponent needs only to bring evidence that the record is what the proponent claims it is (e.g., "this record is an invoice"). This evidence is usually given orally and is subject to attack, like any other.

The Act does not open an electronic record to attacks on its integrity or reliability at this stage. That question is reserved for the new "best evidence" rule. Logically the question of integrity could be included in authentication, but the working group recommends that the question be dealt with only once.

Section 4

Comment:

The best evidence rule generally requires that the proponent of a record should produce the original record or the closest thing available to an original. For reasons set out in the Consultation Paper, the notion of "original" is not easily applicable to many electronic records. The Act therefore dispenses with the need for an original, by substituting another way of serving the purpose of the rule.

The purpose of the best evidence rule is to help ensure the integrity of the record, since alterations are more likely to be detectable on the original. The Act provides a different way to test the integrity of the record: evidence of the reliability of the system that produced the record. As noted in the Consultation Paper, it will usually be impossible to provide direct evidence of the integrity of the individual record to be admitted. System reliability is a substitute for record reliability.

The Act does not say expressly that the proponent of an electronic record does not have to produce an original, but the displacement of the usual best evidence rule will have that effect.

Even if there is an original of an electronic record, as in the case of an electronic image of a paper document, the Act does not require the production of the paper. Nor does it require that the original have been destroyed before the electronic image becomes admissible. The Act sets up a rule for admitting electronic records. Records retention policies, for paper or electronic records, are beyond its scope, and should not be determined by the law of evidence in any event. Someone who destroys paper originals in the ordinary course of business, ideally in accordance with a rational schedule, should not be prejudiced in using reliable electronic versions of those records.

Section 5

Comment:

This section sets out a presumption of integrity of the system, to satisfy the requirement of section 4. The presumption is based on evidence that includes both the computer system that produced the record and the record-keeping system in which it operates. Both are needed to show reliability.

This does not mean that a simple computer record needs the support of a sophisticated record-keeping system in order to be admissible. A small business, for example, may have a computer with off-the-shelf software and no "records management manual". The record-keeping system is implied in the operation of the computer. It should be recognized, however, that the integrity of records in such a system may be exposed to more successful attack in court.

The results of consultation on this point supported a fairly simple test of integrity at this stage. The integrity of most electronic records is not disputed; they are admitted in evidence routinely. This Act does not intend to make the process more difficult, or to provide grounds for frivolous but possibly expensive attacks on otherwise acceptable records. It does intend to point out the basic criteria on which integrity of an electronic record can be judged.

This presumptive evidence of reliability may be brought by anyone and about anyone's records. It is not limited to the proponent of a particular record. So for example if one wanted to introduce a third party's record, but that record was not produced in the ordinary course of business and thus could not benefit from the presumption in section 6, one could lead evidence of the system where that record was recorded or preserved, to create the presumption in section 5.

Section 6

Comment:

This section deals with an electronic record obtained from another party in the proceedings, or from someone who is not a party. The record is presumed reliable. If it is not reliable, then the other person has the opportunity to show the unreliability and rebut the presumption, since that person knows his or her or its own record-keeping system better than anyone else.

This section creates a presumption of reliability of business records of non-parties to the proceeding. It is similar to a provision of the Civil Code of Quebec, article 2838 (though that provision applies only to "juridical acts"). It also serves the purpose of the "bank record" provision in several Canadian evidence statutes, such as section 29 of the *Canada Evidence Act*. (This provision works with s. 2, which preserves the hearsay aspect of bank record rule. This section supports the reliability of the electronic bank record system.)

The purpose of the rule is to ensure the admissibility of electronic records from non-parties whose record-keeping systems are not susceptible to ready proof as part of the proceeding.

QUESTION: Is this rule too broad? Does it make such records too easy to admit, given the risk that they may be unreliable? If so, how does someone wanting to admit such records demonstrate the reliability of the system that produced them? Should the presumption operate for a narrower class of records, such as those in financial institutions?

The concept of business records here is intended to apply broadly to enterprise records of organizations not devoted to making a profit, such as governments or not-for-profit organizations.

Section 7

Comment:

This section allows the evidence to support the presumptions in sections 5 and 6 to be put in by affidavit instead of by oral evidence. The person making the affidavit may not know personally every aspect of the record-keeping system, but if the person informs himself or herself of the relevant information, then the affidavit will be acceptable. Cross-examination on the affidavit may expose relevant gaps in the information, of course. If doubt is cast on the reliability of the affidavit, then the person presenting the electronic record may have to provide more detailed support of the record-keeping system.

Section 8

Comment:

The Act makes the court (or other tribunal using the statutory rule) consider the reliability of the record-keeping system, either on the creation of the presumption or on its merits, if the presumptions in sections 4 through 6 are rebutted. In either case, this section makes relevant the adherence of that system to recognized standards for the kind of record and the kind of business in question. For example, records managers in some industries have established procedures or rules about how their kinds of records are to be handled. The Canadian General Standards Board has adopted a national standard on Electronic Imaging and Microfilm as Documentary Evidence. International bodies such as ISO are also producing relevant standards.

This Act does not make compliance with such standards obligatory to get electronic records admitted, but it makes them relevant to the question of admissibility. Records managers seeking to create systems that will produce records that can be admitted in evidence may take some comfort in that rule.

The language of the section does not require that the standards be external to the person whose records are in issue. One could show compliance (or not) with one's own standards. Whether this would be as effective as complying with more broadly based standards is a practical question left to the records managers of the proponent of the evidence.

QUESTION: We have not mentioned the relevance of compliance with standards in determining the probative value, i.e. the weight, of the evidence. It is unusual for statutes to try to guide the court in matters of weight. Once the evidence is admitted, the court may consider a wide range of factors to give it its due. Should

the Act mention the weight of the evidence in connection with compliance with standards?

Section 9

Comment:

This Act asserts a general confidence in the use of electronic records, if their integrity is sufficiently supported. During consultations, it was suggested that current provisions in several evidence statutes dealing with microfilmed records do not show a similar confidence, though similar factors are in issue. Several statutes in Canada allow the admission of microfilmed records, but still require that the original paper record be kept for six years and produced on demand. These records are usually those with the greatest legal effect, such as contracts, invoices, purchase orders, and the like.

The ULCC believes that the law should allow people to keep their records in the way that suits their business purposes best. In other words, the law should generally be neutral about the medium in which records are kept. Instead it should set out rules by which the law can apply to records in different media, such as the rules about admitting electronic records in this Act.

As a result, the ULCC recommends that the rules in evidence statutes requiring the retention of paper originals of microfilmed records should be repealed.

QUESTION: Do we have to say that the current rules about the integrity of microfilmed records are sufficient? Or that they be re-examined in the light of the principles of this Act?

Agreements about evidence

Comment:

Many businesses that deal with each other electronically have made detailed agreements on the rules for handling electronic communications, including the use of confirmation messages, the maintenance of logs, and the like. These "trading partner agreements", as they are sometimes called, frequently deal with matters of evidence. For example, they may forbid a party from disputing the reliability of electronic records produced in accordance with the agreement.

These agreements on matters of evidence have not been clearly valid or enforceable in law. Some members of the ULCC believes that they should be enforceable between the parties to them, and contrary views were not received in the consultation.

However, it is the view of the working group that the current provisions of the Act will allay the concerns that motivated these trading partner agreements, by clarifying the basis on which electronic records may be admitted.

Moreover, the basic rule of system reliability is supplemented by section 8 on standards. This section would apply to the rules (standards) in the trading partner agreements on how

records should be managed between the parties. Therefore no special provision is needed to enable the parties to rely on their rules.

Footnote: 1 (1976), 30 C.C.C. (2d) 424, per Ritchie J. for the majority of the Court