

APPENDIX C

[see page 77]

UNIFORM ELECTRONIC EVIDENCE ACT

Definitions

1. In this Act,

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

Comment: 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" means data that is recorded or stored 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, other than a printout referred to in Sub-section 4(2).**

Comment: "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 stored 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. It would apply to voice mail, since the information has been recorded in or by a device similar to a computer. Likewise video records are not covered,

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though when the video is transferred to a Web site it would be, because of the involvement of the computer. Music recorded by a computer system on a compact disk would be covered. In short, not all data recorded or stored in "digital" form is covered. A computer or similar device has to be involved in its creation or storage. The term "similar device" does not extend to all devices that create or store data in digital form. Although things that are not recorded or preserved by or in a computer system are omitted from this Act, they may well be admissible under other rules of law. This Act focuses on replacing the search for originality, proving the reliability of systems instead of that of individual records, and using standards to show systems reliability.

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.

However, printouts that are used only as paper records, and whose computer origin is never again called on, are treated as paper records. See subsection 4(2). In this case the reliability of the computer system that produced the record is irrelevant to its reliability.

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

Comment: 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 physical and electronic 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 for proving the integrity of a record by proving the integrity of the system that produced it.

Application

2.(1) This Act does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

Comment: The admission of a 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 modified 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.

2.(2) A court may have regard to evidence adduced under this Act in applying any common law or statutory rule relating to the admissibility of records.

Comment: However, some other rules of law invite the court to consider the reliability of the proposed evidence, or its origins. The evidence adduced under this Act to show the reliability of the record-keeping system may also be used to assess compliance with other rules of evidence.

Authentication

3. The person seeking to introduce an electronic record [in any legal proceeding] 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.

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Comment: Section 3 codifies the common law on authentication, which applies equally to paper records. 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 Conference decided that the question should be dealt with only once.

The words "in any legal proceeding" relate to the application of this Act. If the enacting jurisdiction places the Act in a general evidence statute, then the application of that statute will govern, and the bracketed phrase can be omitted, here and in subsequent sections.

Application of the best evidence rule

4. (1) [In any legal proceeding,] Subject to Subsection (2), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.

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. However, 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. It will often 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. Neither the production of an original record nor the production of evidence of system reliability guarantees the integrity of the record, but it supports its integrity to the degree that courts have been willing to admit the record, subject to argument about its weight.

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. Someone who keeps some paper originals, say for archival purposes, should be able to produce the electronic versions in evidence, if the requirements of this Act about integrity can be satisfied.

(2) [In any legal proceeding,] An electronic record in the form of a print-out that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule.

Comment: The purpose of this Act is to provide for rules for electronic records, those produced or stored in a computer or readable at the time of their use only with the help of a computer. Many records today are produced using a computer with word-processing software and then printed. The electronic file is never used again. Business correspondence is an example. The record “lives its life” on paper, and the paper is presented in evidence. The reliability of the computer system is not at issue. This subsection allows such a record

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to be treated as a paper record. The paper printout would be the original for the purposes of the best evidence rule.

Presumption of integrity

5. In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed [in any legal proceeding]

(a) by evidence that supports a finding that 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 there are no other reasonable grounds to doubt the integrity of the electronic records system;

Comment: This section sets out a set of presumptions of integrity of the system, to satisfy the requirement of section 4.

The first 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 Conference intends 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 paragraph (c), one could lead evidence of the system where that record was recorded or preserved, to create the presumption in paragraph (a).

(b) if it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

Comment: This paragraph deals with an electronic record obtained in the course of litigation from an adverse 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. Parties wishing to introduce records from friendly parties may bring evidence to support the presumption in paragraph (a).

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

Comment: This paragraph creates a presumption of reliability of business records of someone who is not a party to the proceeding, where the proponent of the record did not control the making of the record. Where the proponent has such control, it will be able to provide evidence to support the presumption in paragraph (a). The qualification prevents

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parties from contracting out their data processing or record management then claiming that what are in fact their own records are someone else's. It will be a matter of evidence in each case whether the person on whose behalf records were kept controlled the manner of production of the records or has access to evidence for paragraph (a).

The paragraph 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 concept of business records here is intended to include more than strictly commercial operations. It will apply broadly to enterprise records of organizations not devoted to making a profit, such as governments or not-for-profit organizations.

Standards

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

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 5 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 the International Standards Organization (source of the ISO norms) 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.

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, have not been clearly valid or enforceable in law. The Conference believes that they should be enforceable between the parties to them, and contrary views were not received in the consultation. The agreed rules on how evidence is to be handled are standards within the meaning of this section and can be duly considered by the court.

Proof by affidavit

7. The matters referred to in subsection 4(2) and sections 5 and 6 may be established by an affidavit given to the best of the deponent's knowledge or belief.

Comment: This section allows affidavit evidence instead of oral evidence to support the use of the record under subsection 4(2), the presumptions in section 5 and the compliance with standards under section 7. The person making the affidavit may not know personally

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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.

The Act does not say who should give the affidavit. The party seeking to introduce the evidence will have to decide who its most persuasive witness may be.

Cross-examination

8.(1) A deponent of an affidavit referred to in Section 7 that has been introduced in evidence may be cross-examined as of right by a party to the proceedings who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced.

Comment: The right to cross-examine on the affidavits provided by this Act may not be clear in every enacting jurisdiction. Here it is express.

(2) Any party to the proceedings may, with leave of the court, cross-examine a person referred to in paragraph 5(c).

Comment: The record-keeping practices of the non-party referred to in paragraph 5(c) may be relevant to admissibility in some cases. That person will not usually be the deponent of the affidavit in support of admitting the record. This subsection gives the opponent of the evidence the opportunity to cross-examine the record-keeper, if the court agrees. A court would want to be sure that the person is not being disturbed frivolously.

Repeal

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

Comment: This Act asserts a general confidence in the use of electronic records, if their integrity is sufficiently supported. 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.