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HOW THE COURTS ASSESS DOCUMENTARY EVIDENCE IN GENERAL AND ELECTRONIC RECORDS SPECIFICALLY

LEGAL RULES GOVERNING ELECTRONIC RECORDS

Common law (case law), provincial and federal statutory law

OVERHEAD

Demonstrating the trustworthiness of records in the eyes of the law

Requirement to provide the tribunal with foundation evidence to support the claim that the records are trustworthy. Such evidence given orally or by affidavit.

Evidence law does not dictate how organizations should manage their records; but it will judge how they manage them. Therefore the rules of evidence carry significant implications for records management.

Difference between admissibility and weight

OVERHEAD

Admissibility rules

Admissibility does not mean "that the particular fact has demonstrated or proved the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence." The admissibility of evidence is a matter determined by the judge, the weight of evidence is a matter determined by the trier of fact, usually the jury.

3 main rules:

business records exception to the hearsay rule.
The rule governing the production of original documents
The rule governing authentication of documents.

1. Reliability

Business records exception to the hearsay rule

The theory underlying the rule prohibiting hearsay is that witnesses' assertions must be tested by cross-examination and confrontation in order to expose any deficiencies, distortions, or suppressions.

OVERHEAD

Hearsay evidence, as defined by McCormick, is "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter."¹

Under normal circumstances, such statements are excluded on the grounds that they cannot be tested by cross-examination.

Assumption: all testimony unreliable (causes: ambiguity, perception, sincerity, memory)

Exception

OVERHEAD FEA 30(1)

Under the Canada Evidence Act, records "created in the usual and ordinary course of business" are admissible.

OVERHEAD FEA 30(12)

¹ Charles T. McCormick, *McCormick's Handbook of the Law of Evidence*, edited by Edward W. Cleary, 2nd ed. (St. Paul, Minn.: West Publishing, 1972), 584.

"business" is defined broadly as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government". S. 30(12), "business".

The provincial Evidence Acts of British Columbia, Manitoba, Nova Scotia, Ontario and Saskatchewan have the additional requirement that "it must have been in the usual and ordinary course of business to create such records."

protection against danger of litigating parties admitting self-serving evidence

Requirements that have emerged from case law.

The business record provisions require that the record be made at or near the time of the act, transaction, occurrence or event recorded, because a substantial factor in the reliability of any system of records is the promptness with which transactions are recorded.

Where there is some delay in transcribing, then in each case, the Court must decide, as a matter of fact, whether the time span between the transaction and the recording was so great as to suggest the danger of inaccuracy by lapse of memory.

The Evidence Acts of British Columbia, Manitoba, Saskatchewan and Ontario explicitly state that the lack of personal knowledge by the maker of the record does not affect its admissibility, though it may affect its weight.

However, courts have been consistent in asserting that second-hand hearsay is only admissible under these provisions if the maker of the record and the supplier of the information recorded were both acting in the usual and ordinary course of business.

Summary: what constitutes a circumstantial probability of trustworthiness

1. created in usual and ordinary course of business
2. recorded at or near the time of the event, act, occurrence, transaction recorded;
3. observation and recording of act, transaction, etc. carried out in the course of a business duty

2. Identity

rules governing authentication

The rule requiring authentication is met by evidence sufficient to satisfy the court that the document is what it purports to be.

based on the common sense assumption that whenever a claim involves any element of personal connection with a physical object, that connection must not be presumed, but shown.

Records present a particular danger because it purports to declare its ownership on its face, either by a signature or some other means, and fact-finders might be inclined, on sight of a record, to accept that it is all that it purports to be.

Therefore, "the general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; *there must be some evidence of the genuineness* (or execution) of it."

Admission of author; comparison of hands, etc.

OVERHEAD

Business records:

Section 30(6) of the Canada Evidence Act stipulates that "the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the

circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record."

What this means: in the federal and provincial Evidence Acts, the authenticity of business records may be proved by foundation evidence that the records were made in the usual and ordinary course of business. Such evidence may be given orally or by affidavit. (personal authorship not so key)

30(8).

Integrity of record

Best evidence rule

If the purpose of authentication is to establish the identity of the record, the purpose of the best evidence rule is to establish its integrity.

As stated by Wigmore, the rule stipulates that, "in proving a writing, production must be made, unless it is not feasible, of the writing itself (MEANING THE ORIGINAL), whenever the purpose is to establish its terms."

(consistent with diplomatic definition: primitive, effective, complete; capable of generating consequences)

Why:

a copy is always liable to errors; (2) an original may contain subtle details that may be missing from the copy and that may be significant in terms of the record's meaning and

The essential principle of preferred evidence is that it is to be produced if it exists and is available. If it does not exist, or is unavailable, secondary evidence is admissible.

Statutory provisions governing the admissibility of specific classes of documents provide exceptions to the best evidence rule by specifically allowing the use of copies that have been authenticated by various means.

OVERHEAD SECTION 30(3)

The business records provision of the Canada Evidence Act, for example, allows a copy of a record to be admitted, if it is not "possible or reasonably practical" to produce the original.

Two affidavits must accompany the copy of the record, the first giving reasons why it is not possible or reasonably practicable to produce the record, the second, sworn by the person who made the copy, identifying the source from which the copy was made and attesting to the copy's authenticity.

Electronic Records as Evidence

Electronic records are a form of documentary evidence and so the traditional rules of evidence have been applied to them, either explicitly or by analogy.

Computer records and output are included within the definition of "record" under the business records provision of the Canada Evidence Act.

In 1998, in an effort to reduce the uncertainty and create consistency in the application of the rules of evidence governing electronic records, the Uniform Law Conference of Canada (hereafter ULCC) developed a model statute that establishes foundation requirements for admitting electronic records as evidence. The requirements are intended to ensure that electronic records meet a standard of trustworthiness equivalent to the one traditional paper records are required to meet.

A slightly revised version of the model statute was introduced to the House of Commons as part 3 ("Amendments to the Canada Evidence Act") of Bill C-6. Came into effect January 1, 2000.

Bill C-6: Part 3, amendments to the Evidence Act

OVERHEAD 31(8)

An electronic document is defined as "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.

BUT SEE ALSO 31(2)

(word processing documents that live their life on paper are not treated as electronic records)

Application of amendments to existing rules of evidence

OVERHEAD SECTION 31.7

The amendments do not affect the business records exception to the hearsay rule.

The reliability of a record's contents is determined in relation to the business context in which the record was created, rather than in relation to the technological context of its creation and can be adequately demonstrated under existing law.

OVERHEAD SECTION 31.1

There is a provision for authentication (section 56; addition of section 31.1)

but it basically reiterates the procedures for authenticating paper records

Amendments focus primarily on means of establishing the *integrity* of an electronic record

OVERHEAD: SECTION 31.3

Problem in an electronic environment: undetectable changes

The "function" of the best evidence rule is to ensure ...the integrity of the record to be produced in evidence.

It is presumably easier to tell that an original paper record has been altered than to determine any alteration by viewing a copy. In the electronic world, there may or may not be an original paper version of the electronic record.

Therefore, the search for integrity of an electronic record has to proceed in another way.

Rather than search for what might constitute an "original" document in an electronic recordkeeping environment, the amendments shift the focus of the rule away from record integrity and toward system integrity.

Move from dependence upon proof of the integrity of the original business document to a dependence on proof of the integrity of the recordkeeping system."

OVERHEAD SECTION 31.8 ELECTRONIC DOCUMENTS SYSTEM

an electronic documents 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."

Such procedures include "physical and electronic access controls, security features, verification rules, and retention or destruction schedules", which may or may not be embedded in the computer system itself.

OVERHEAD 31.3

Under section 31.3, the integrity of the electronic records system is presumed

(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

The test of integrity is a fairly simple one. According to the drafters of the Act, the decision to adopt a simple test at the admissibility stage was based on the fact that the integrity of most electronic records is not disputed.

The drafters considered but ultimately declined to endorse any particular industry standard as a minimum standard for electronic record trustworthiness.

Although the amendments do not make compliance with recognised standards obligatory to the admission of electronic records, they do make compliance with them a relevant consideration. In section 31.5, the Act states that:

OVERHEAD SECTION 31.5

for the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise, or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

Record creators still face the responsibility to design systems that will provide a rebuttable presumption of integrity.

Moreover, once an electronic record is admitted the opponent can challenge it on a number of grounds, including its lack of integrity.

Questions: when was this system last audited? Are all personnel trained on the system? How secure are the password protections?

OVERHEAD: SECTION 31.6 (1 AND 2)

The rule thus provides an incentive to businesses to adopt standards that will facilitate the admissibility of electronic records and strengthen their weight once they have been admitted into evidence.