

THE ADMISSIBILITY OF
EVIDENCE
IN CANADIAN COURTS

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A summary of the Review and Recommendations
submitted to the Federal/Provincial Task
Force on Uniform Rules of Evidence by

THE CANADIAN MICROGRAPHIC SOCIETY

THE ISSUE

Uncertainty exists as to whether business records will be accepted as evidence in Canadian courts if they are in the form of microfilm. Moreover, the Federal and Provincial Laws of Evidence are not uniform in this respect.

Without positive assurance that microfilmed records will be accepted in all jurisdictions, there is an understandable reluctance to fully utilize modern micrographic information - handling technology. The only alternative for Canadian business, is to retain or make records that conform to accepted but outdated legislation.

In this paper we will describe the resulting dilemma faced by Canadian organizations who must bear the burden of unnecessary overhead costs and decreased efficiency. We will also present a recommendation by the Canadian Micrographic Society, recently submitted as a formal Briefing Paper to the Federal/Provincial Task Force on Uniform Rules of Evidence.

INFORMATION HANDLING

Traditionally, the courts have always considered paper to be the primary form of business records...hence the repeated use of terms such as "document", "original" and "duplicate" in our Laws of Evidence. The fact is, however, that microfilm, word processing, magnetic storage, electronic mail, data transmission, computer networks, and various kinds of computer support systems are now used extensively in modern business practice, either individually or in combinations, and in some cases these systems produce no paper at all. Furthermore, it is apparent that this converging of technologies will continue to expand in Canada.

A critical observation, therefore, is that Canadian business now carries out many of its routine transactions with "processed" information. Obviously, this situation is far removed from the simpler type of business paperwork used in years gone by.

TYPICAL BUSINESS PROBLEMS

The first problem as we have already suggested, is that our existing Laws of Evidence do not adequately cover modern business techniques. This creates uncertainty within the business community concerning how to maintain "legal" records, which results in extreme caution and slow technological growth.

It also creates unnecessary expense for both business and government, who feel they must retain their records in paper form "just to be safe". This has resulted in millions of cubic feet of records being held in storage and tremendous warehousing costs.

Another problem relates to the fact that the Federal Government and each of the Provinces legislate on evidence...and that there is no uniformity in the current laws. In Canada, where many businesses have interests in more than one province, this leads to the rather absurd situation wherein a Company must conform to laws that are not in agreement, and thereby impose severe constraints on attempts to, say, microfilm their records. One example of this is the "six-year provision" contained in some provincial Acts, which technically allows the Court to insist upon receiving "the original" as evidence during that period. This is especially restrictive, and costly, for Companies operating in more than one Province.

What lawyers and judges may not realize is that the refusal to accept a particular microfilmed document as evidence may compel a company or organization to retain their paper documents even though they are put onto microfilm for day-to-day business use. The alternative of destroying the documents after filming, and thereby "taking a chance" may be too dangerous. This situation gives rise to the possibility that Canadian Companies could be storing millions of documents because of a single court decision giving recognition to outmoded business practices.

LEGAL ISSUES

The legal issues involved are varied and complex. The first to arise when submitting business documentation as evidence in Court proceedings are how to prove that the record is genuine, and how to prove that the contents are true. The first of these is usually agreed upon by opposing counsel prior to the Court hearing and therefore does not present a problem. The second aspect, however, is of vital importance, particularly with regard to the "processed" type of business information discussed earlier.

For example, there are at least two problems relating to 'hearsay' evidence when litigation involves the use of computers and data-banks. If a person who fed information into the computer did not come by the facts, or experience the events recorded, directly himself, but rather, obtained the information from someone who also lacked personal, direct knowledge of the facts that he passed on...the resulting microfilm or paper printout contains at least double hearsay. It is an open question whether our current laws would allow for records containing such information.

The second 'hearsay' problem rests on the distinction between information stored in a computer and information created by a computer. A computer program may create a balance sheet out of information stored in the computer and provide output containing both types of information. There is a great deal of uncertainty as to the admissibility of documents containing 'created' as well as 'stored' information.

Another uncertainty arises when it is desired to submit documentation in lieu of oral evidence. The problem here is ambiguity in the existing law. The uncertainty that is created is whether the law requires only that the matters dealt with in the document be relevant, or does it require as well, that those matters not be excluded by other rules of evidence. For example, it is possible that a microfilm record in the files of an engineering firm containing information about the design of a building, might not be admissible in court proceedings dealing with the construction of that building, even though the information is very relevant to the proceedings. The document might be excluded because it contains information which the maker of the document obtained from someone else, rather than by his own observation, or because it contains a professional expert opinion written by an engineer who was not qualified by testimony in court as an expert, or because it contains an appraisal of the good character of the engineer who designed the building.

The differences between Federal and Provincial legislation gives rise to more difficulties. For example, section 30.(1) of the Canada Evidence Act speaks of evidence in respect of "a matter", whereas the comparable provision in the Ontario Evidence Act, section 36.(2) restricts it to "acts, transactions, occurrences or events". If the Ontario interpretation is to be applied, then it would not allow for documents containing statements of opinion. Therefore, the usefulness of section 30 for microfilm records would be greatly limited because many business records contain statements which would qualify as inferences, assumptions, conclusions, implications and opinions.

We could point out several other weaknesses in current legislation as well. What is a "record", for example? Who "makes" a business record...is it the customer who wrote the letter, or the employee who "made" the file? Does a business record of an event qualify if it is not part of the "usual and ordinary course of business?"

The fact is, that these legal issues affect all business documents and not just the field of micrographics. But if organizations believe that such problems dictate that they must keep original documents which are as close to the original source of the event or facts recorded as possible, they will be reluctant to move away from their "paper originals" to data banking or microfilm, or any of the emerging modern information handling techniques.

THE SOCIETY'S POSITION

The Canadian Micrographic Society has examined with apprehension the increasing conflict between the present Laws of Evidence and the rapidly expanding technology in information handling. For obvious reasons, we recognize that the laws cannot "lead" technology but at the same time we believe that the Laws of Evidence should be constructed to recognize that the business world is moving beyond the traditional modes of information storage and retrieval.

One of the prime objectives of the Canadian Micrographic Society is to encourage the liberal discussion of subjects concerning micrographics. In recognizing the importance of that objective, and in view of the problems being encountered by the business community under current legislation, the Society wishes to be a useful vehicle whereby the concerns expressed by its individual and corporate members are given due consideration and exposure.

As the only chartered organization in Canada (1967) in the field of micrographics, the Canadian Micrographic Society is well-qualified to reflect the concerns of its members and to make recommendations on their behalf which, hopefully, will assist in preparing adequate legislation.

RECOMMENDATIONS

1. Uniformity

The Society recommends that the Federal and Provincial Evidence Acts be uniformly amended, and that they agree in the use of words and definitions. We believe that a lack of uniformity between Provincial and Federal legislation is a major cause of the current problems.

2. Admissability of Microfilm

It is recommended that microfilm copies of paper records be accepted in Canadian Courts in every case in which the original paper record could be received in evidence; and also that microfilm records that are generated from magnetic devices such as Computer Output be accepted in Canadian Courts in every case in which paper records generated from these devices could be received in evidence.

3. Hearsay and Real Evidence

The Society also recommends that the Federal/Provincial Task Force adopt the recommendations of the Federal Law Reform Commission that are set out in the Federal Draft Evidence Code which is currently under review. We believe the recommendations in section 31 of that draft code substantially expand the hearsay exceptions now available. Further, we believe the broad definitions in the Real Evidence section solve many of the problems faced by our members, the microfilm users.

4. Modernization

And finally, the Society suggests that revisions include broad definitions of terms such as business "record" and "original" document. We believe that the Law must formally recognize the fact that advancing technology has brought about tremendous changes in way we produce, store, and handle business information. The modern situation is that not only microfilm but all the newer mechanical and electronic processes that we use may contain or constitute the only 'original' copies of the record. Any doubt whatever about the admissibility as evidence of these newer forms of documentation is a serious hinderance to achieving the full benefits of modern technology.

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