

THE CANADIAN LEGAL FRAMEWORK FOR EVIDENCE IN THE DIGITAL ECONOMY: A DISJUNCTION?

Corinne Rogers

Donald Force

SLAIS Research Day
11 March 2011

Acknowledgements

- Prof. Anthony F. Sheppard, UBC Faculty of Law
- Dr. Luciana Duranti, Professor of Library, Archival and Information Studies, UBC
- Kelly E. Lau, graduate student in archival science
- Brian Carter, Mark Crisp and Jason Shabestari, J.D. candidates in the Faculty of Law
- Social Sciences and Humanities Research Council (Funding Agency)

Background

- 2010: Government of Canada launched “digital economy strategy” consultations



- SSHRC funded 25 studies through *Knowledge Synthesis Grants*

Project's Purpose / Goals

- Investigate Canada's legislative framework with respect to the digital economy
 - Examine existing laws and conventions in context of current and developing information and communications technologies
 - Establish whether they are adequate to the task of regulating proof of facts and transactions in the digital economy

Digital Economy

- ① What is the Digital Economy?
- ① What legal instruments govern the digital economy?
 - Evidence acts
 - Rules of Court
 - Interpretation Acts
 - Canada's electronic transaction acts

Research Questions

- ⦿ Are the existing rules and procedures consistently and effectively used to regulate proof of facts and transactions in the digital economy?
- ⦿ What are the ways in which the law is challenged by the proliferation of digital materials offered in evidence?
- ⦿ What are the consequences for the administration of justice of any inadequacies that may be found?

Interpretation of the law...

...depends on interpretation of its definitions

- ⦿ Document
- ⦿ Record
- ⦿ Electronic
- ⦿ Digital
- ⦿ Electronic information
- ⦿ Storage medium
- ⦿ Writing

Findings

- ① *The traditional best evidence rule has little meaning in the digital environment, but the intent of the best evidence rule needs to be captured in a systematic way.*
- ② *There is no consensus about the application of the hearsay rule and its exceptions to all forms of digital evidence.*
- ③ *Functional equivalence between digital and paper transactions can only be attained by expressly providing for it in particular statutes, rather than by exclusive reliance on implicit cross-reference in a separate, self-contained statute such as the Uniform Electronic Commercial Transactions Act.*
- ④ *Canadian law reform agencies are eager to bring laws up to the digital era but require further research and expertise to inform their recommendations.*

Findings

- ⦿ *A network of statutes and regulations that have developed over decades spanning rapid and dramatic technological development governs documentary evidence in electronic form.*
- ⦿ *Across Canada, definitions in provisions of the various statutes that relate to proof of transactions in the digital economy require revision to achieve uniformity, and to become or remain technology-neutral.*
- ⦿ *Terminology such as “records,” “documents,” and “data,” within Canadian statutes and rules have been defined inconsistently, and, as a result, challenge the judicial system’s intentions to reduce costs associated with the discovery process and reduce the time necessary to conduct legal hearings.*
- ⦿ *The concept of authenticity and the means and need for authentication are little understood.*

Findings

- ⦿ *A network of statutes and regulations that have developed over decades spanning rapid and dramatic technological development governs documentary evidence in electronic form.*
- ⦿ *Across Canada, definitions in provisions of the various statutes that relate to proof of transactions in the digital economy require revision to achieve uniformity, and to become or remain technology-neutral.*
- ⦿ *Terminology such as “records,” “documents,” and “data,” within Canadian statutes and rules have been defined inconsistently, and, as a result, challenge the judicial system’s intentions to reduce costs associated with the discovery process and reduce the time necessary to conduct legal hearings.*
- ⦿ *The concept of authenticity and the means and need for authentication are little understood.*

Document

⦿ **BC Supreme Court Rules**

- Includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device

⦿ **Nova Scotia's Rules of Civil Procedure**

- *Not* electronic information, including a print version of electronic information and a non-digital sound recording, video recording, photograph, film, plan, chart, graph, or record

*Toronto Police Services Board v. (Ontario)
Information and Privacy Commissioner (2009)*

- ⦿ Toronto journalist requested information from Toronto police department
- ⦿ Electronically stored information located in databases
- ⦿ Retrieval possible but special software & algorithms required
- ⦿ Is the information a “record” and should it be produced per the Act?

Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner (2009)

*Municipal Freedom of Information and Protection of
Privacy Act (R.S.O. 1990, c. M. 56)*

- a) any record of information however recorded, whether in printed form, on film, by electronic means or otherwise...any other documentary material, regardless of physical form or characteristics, and any copy thereof

AND

- b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution

Next Steps

- 3-year grant to propose solutions to the identified problems
- Waiting to hear from SSHRC

Thank You