



# InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

## Policy Cross-domain

## Archival Legislation in Canada

## Canada Evidence Act

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### Canada Evidence Act ( R.S. 1985, c. C-5 )

The *Canada Evidence Act* can be found at <http://laws.justice.gc.ca/en/C-5/>. At the time of this report the *Act* was updated to August 31, 2004.

The *Canada Evidence Act* was passed in 1985. Amendments relating to the admissibility of electronic records were made in 2000.

The information contained in this report has been compiled from examination of the *Canada Evidence Act*. For the purposes of this report I have examined sections relating to the admissibility of all records and specifically electronic records.

### 1. Admissibility of Records

The basis for the admission of records and documents and records can be found in Part 1 of the act under Documentary Evidence.<sup>1</sup> The original *Act* made provisions for the admissibility of business records and copies of business records:

#### Definitions Relating to the Admissibility of Business Records

“business” means 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;

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<sup>1</sup> See <http://laws.justice.gc.ca/en/C-5/15974.html#rid-16021>.

“record” includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

### **Business records to be admitted in evidence<sup>2</sup>**

The three requirements for records to be admissible are:

1. the record must be made in the usual and ordinary course of business
2. the record must be created at or near the time of the event it is recording
3. the observation and recording must have been done through a business obligation.

This section also allows for copies of records to be admitted as evidence in the case where provision of the original is not possible. In this case the copy of the record must be accompanied by 2 affidavits, one stating why it is not possible to provide the original and one attesting to the authenticity of the copy

## **2. Admissibility of Electronic Records**

The 2000 revisions to the *Act* took into account the increasing use of electronic records.

The admissibility of electronic records is dependant on the ability to prove the integrity of, not only the individual record but also the integrity of the system in which the records are created and maintained.

The following sections are taken directly from the *Act*:

### **Authentication of electronic documents 31.1<sup>3</sup>**

Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

### **Application of best evidence rule -- electronic documents 31.2 (1)<sup>4</sup>**

The best evidence rule in respect of an electronic document is satisfied

- (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
- (b) if an evidentiary presumption established under section 31.4 applies.

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<sup>2</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-30>.

<sup>3</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.1>.

<sup>4</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.2>.

## Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

### **Presumption of integrity 31.3<sup>5</sup>**

For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

- (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
- (b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
- (c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

### **Presumptions regarding secure electronic signatures 31.4<sup>6</sup>**

The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting

- (a) the association of secure electronic signatures with persons; and
- (b) the integrity of information contained in electronic documents signed with secure electronic signatures.

### **Standards may be considered 31.5<sup>7</sup>**

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.

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<sup>5</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.3>.

<sup>6</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.4>.

<sup>7</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.5>.

**Definitions Relating to the Admissibility of Electronic Records 31.8<sup>8</sup>**

The definitions in this section apply in sections 31.1 to 31.6.

“computer system” means a device that, or a group of interconnected or related devices one or more of which,

- (a) contains computer programs or other data; and
- (b) pursuant to computer programs, performs logic and control, and may perform any other function.

“data” means representations of information or of concepts, in any form.

“electronic document” means data that is recorded or stored on any medium in or by a computer system or other similar device and 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.

“electronic documents system” includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents.

“secure electronic signature” means a secure electronic signature as defined in subsection 31(1) of the *Personal Information Protection and Electronic Documents Act*.

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<sup>8</sup> See <http://laws.justice.gc.ca/fr/C-5/82510.html#article-31.8>.