

# **Social Media in Evidence**

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*Social Media in the Courts*

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## SOCIAL MEDIA IN EVIDENCE

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**Social media** are computer-mediated tools that allow people to create, share or exchange information, ideas, and pictures/videos in virtual communities and networks... Furthermore, social media depend on mobile and web-based technologies to create highly interactive platforms through which individuals and communities share, co-create, discuss, and modify user-generated content.<sup>1</sup>

Social media are an online phenomenon, increasingly popular and increasingly mobile, that link users in a non-hierarchical way – not one person or company or government sending to many people, but many sending to many. Their content is a form of electronic record or document – or rather takes a number of forms of electronic record. This paper will look at challenges that e-records pose for the traditional law of evidence, how that law has worked to adapt itself to the electronic age, and how the adapted law can be made to work for records originating in social media.

### I. Electronic records

Why do people care about electronic documents?<sup>2</sup> What is it about them that causes concerns about the applicability of the usual rules of law? While it is true that some of the concerns diminish with closer analysis, electronic documents are different in several ways from those on paper.<sup>3</sup>

Electronic documents are a set of instructions about electric current, to turn the current on or off. A bit is a yes-or-no (one or zero) instruction about current flow. A byte is a combination of seven or eight bits. There are enough possible combinations in a byte to permit the designation of the characters of most alphabets and numbers from zero to nine. Electronic documents commonly show the results of these electronic instructions as words or numbers on a screen, or printed out on paper. Though they “look like” writing, several concerns have prevented their general acceptance as writing.

First, the storage of electronic instructions may be uncertain. The storage medium, whether a computer's hard drive, a removable medium like a compact disc or magnetic tape, may not be stable. Some data may

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\* The author is General Counsel, Justice Policy Development Branch, Ministry of the Attorney General (Ontario). The views in this article are not necessarily those of the Ministry.

1 Wikipedia, “Social Media”, online: [http://en.wikipedia.org/wiki/Social\\_media](http://en.wikipedia.org/wiki/Social_media)

2 This article will use “electronic document” and “electronic record” interchangeably. Some statutes use one expression, some another, but never with any difference in meaning intended. Alberta uses “record” in both the *Alberta Evidence Act* and the *Electronic Transactions Act*. Ontario is not consistent internally. The *Evidence Act*, R.S.O. 1990 c. E.5, s. 34.1, speaks of electronic records. The *Electronic Commerce Act, 2000*, S.O. 2000 c. 17, speaks of electronic documents. The latter phrase is easier to translate into French, and has made some legislative headway in Canada for that reason.

3 These questions are examined in more detail in J.D. Gregory, “Authentication Rules and Electronic Records”, (2002), 81 *Canadian Bar Review* 529.

be lost over time, even without human intervention. Data may also be lost in transmission to other media. The software and hardware needed to retrieve the data may evolve, and keeping up with that evolution may affect the integrity of the data.

Second, retrieving the data can be problematic. Sometimes data are created in one format (such as Microsoft Word) and retrieved in another (such as OpenOffice). Not all the instructions are compatible among all systems, so content or format may be affected even in apparently routine operations.

Third, as electronic documents are just a collection of instructions, they are susceptible to having the instructions changed by anyone with the right software and access to the document. Once they have been changed, the resulting document may show no sign of the change. A copy of the instructions may be perfect, not distinguishable in any manner from the version first created. Further, evidence of origin – like a signature – is itself electronic and thus subject to the same undetectable alterations as the signed text.

One Canadian expert on electronic records management has said that electronic records are not like paper in a filing cabinet, they are like drops of water in a pool. The tools for managing them therefore have to be different, and demanding.<sup>4</sup>

These factors make it harder for people to evaluate the reliability of electronic documents. While words and numbers on paper are vulnerable in many ways, literate society has centuries of experience in deciding what is reliable and in using means to reinforce reliability when it is important. We have been dealing with electronic documents for much less time, and many people are thus uncomfortable estimating and reinforcing their reliability.

## **II. Electronic Evidence**

Wherever one finds electronic information relevant to one's case, whether in one's own files, from one's own witnesses, on discovery from the other side or from the Internet, one needs to be assured that it is admissible in court. What the judge makes of the admitted evidence is a matter of weight, which may involve re-arguing some of the reliability points that affect admissibility as well.

### **(a) Admissibility in general**

Are electronic documents reliable enough to be admitted in evidence? What supporting or foundational evidence needs to be presented to ensure their admission? These questions occupied the Ontario Court of

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<sup>4</sup> K. Chasse, "Electronic Discovery ...", Slaw.ca blog, February 12, 2015, online: <http://www.slaw.ca/2015/02/12/electronic-discovery-the-concept-and-purpose-of-the-sedona-canada-principles-2nd-edition/>.