JOINT SESSION OF THE UNIFORM AND CRIMINAL LAW SECTIONS

1995 MINUTES

Uniform Electronic Evidence Act

Presenters: John Gregory, Joan Remsu, Don Piragoff (The working group also included Edward Tollefson.)

The Uniform Law Section and the Criminal Law Section, sitting in joint session, received from the Ontario Commissioners and the Federal Commissioners a report on electronic records as evidence. The meeting discussed the need for special legislation on the subject and the relation of any new legislation to the *Uniform Evidence Act*. (See Appendix N at http://www.law.ualberta.ca/alri/ulc.)

The report reviewed the legal background to the issues surrounding principles of documentary evidence. It then considered two options for approaching the issues. The first option is a short statute to facilitate the use of computer records in evidence. The second is longer statutory provisions to rework all of the law that applies to the admission of records in evidence, including computer records. It was agreed that there was a need for more consultation. There was no consensus on which of the two approaches presented was preferable. It was agreed that the Act should not put up roadblocks to admission of electronic evidence and that the same rules should apply to all business records, whether or not they are electronic evidence.

A number of comments were suggested for the consideration of the study committee:

- *Canada Evidence Act* business records provisions only address hearsay issues, not authentication or best evidence issues
- the hearsay issues revolve around necessity and reliance; was the record made in the ordinary course of business
- the best evidence issues will look at whether the record is the original or a functional equivalent of it
- a "duplicate" (photocopy, printout) should be assumed to be as good as the original unless the opposing party proves otherwise
- eventually we will jettison the distinction between originals and copies

- discussing the difference between a database and a print out of it is just semantics
- in addressing authentication issues, the notice idea works in civil cases but not criminal cases
- a constitutionally based approach addresses the basic issue, which is adjudicative fairness
- the Act needs to affirm admissibility
- the Act should not require preliminary evidence because this is just another way of creating documents
- the issue of reliability of computer-generated records should be de-emphasized because it is just a symptom of a lack of comfort with new technology
- the Act should not put up roadblocks to admission of electronic evidence
- the potential for fraud and forgery is greater with computer-generated evidence; the Act will need to address integrity issues but not over-react to them; potential (fraudulent) manipulation of data exists with respect to all kinds of evidence
- we do not need new principles: new issues may arise in their application, but the principles are the same
- the purpose of pretrial discovery is to define issues like this
- some say the issue is not about admissibility but weight, sufficiency of evidence to prove a case; others say there are also questions of admissibility
- the view was also expressed that the existing rules are sufficient
- we cannot resolve difficulties by having special rules for electronic evidence; the same rules should apply to all business records; the solution is to fix the common law rules
- electronic evidence has to be admissible; the issue is what protection exists for persons against whom the evidence is going to be used
- judges need guidance respecting what questions should be asked
- without amendments judges will develop the law; amendments should accommodate admissibility and should be minimalist amendments at first
- the basic principle to follow is that parties need opportunities to check, challenge, confront: is it possible to prove the information is false?
- if the legislation is too specific it will be out of date before the ink is dry
- rules of evidence need to be broadened beyond a documentary perspective
- philosophical and practical problems were expressed respecting private agreements

- the courts should express public policy, not be bound by "private policy" of parties; if the parties do not want to be bound by public policy they should go to arbitration
- private agreements respecting computer-produced evidence will always have an impact on third parties
- agreements between parties could be considered by courts in determining business reliability
- issues will arise with respect to unequal bargaining power (banks v. consumers)
- it may be acceptable to say that parties could agree on admissibility but not necessarily weight

RESOLVED:

That the evidence study committee should:

1. Revise the consultation document on electronic evidence to incorporate the directions given at the 1995 meeting.

2. Conduct further consultations, inside and outside government, with the Bar and others, to focus on the principles of electronic evidence.

3. Following this consultation, prepare a new draft Uniform Electronic Evidence Act and circulate it to the same people and groups consulted in the first round.

4. Incorporate the opinions received from that step into a proposal for a Uniform Electronic Evidence Act and submit it to the 1996 meeting of the Uniform Law Conference for discussion and, if appropriate, adoption.

Financial Exploitation of Crime

Presenters: Carol Snell, Graeme Mitchell (The working group also included Andrea Seale of Saskatchewan, Paul Saint-Denis of Canada, Tim Rattenbury of New Brunswick and Earl Fruchtman of Ontario)

The two Sections received from the Saskatchewan Commissioners a report recommending that a joint committee of the Uniform Law Section and Criminal Law Section be established to review a list of specific issues raised in the report and to present to the 1996 meeting recommendations for a Uniform Act respecting the Financial Exploitation of Crime. The report reviewed ULC activities on this issue in the past. It also looked at developments in the law in Canada and the United States since the issue was last considered by the Criminal Law Section in 1984. Issues and recommendations respecting the constitutional implications of the regulation of financial exploitation of crime were also explored. A copy of the 1984 report to the Criminal Law Section was appended.

RESOLVED:

1. That a joint committee of the Uniform Law Section and Criminal Law Section be established to present to the 1996 meeting recommendations for a Uniform Act respecting the Financial Exploitation of Crime.

2. That the report be printed in the Proceedings. (See Appendix G at page 164)

Jury Reform

Presenters: Moira McConnell, Graeme Mitchell, Alex Pringle (The working group also included Doug Moen of Saskatchewan, Heather Holmes of Canada, John Twohig of Ontario and Graham Walker of Nova Scotia)

The two Sections received from the Nova Scotia, Saskatchewan and Alberta Commissioners a report on principles for the selection and composition of juries as well as a review of case law in this area. Based on the deliberations in this session and previous years, the following points emerged:

- there is general agreement that the main purpose of the jury and the processes for selecting the jury are to ensure, in a criminal trial, that the accused person is tried by an impartial adjudicator.
- both provincial and federal law contribute to achieving this purpose.

- impartiality is achieved in two ways:

  * by ensuring that the array present in court is the result of a selection process which does not either expressly or in its administration exclude any person other than those specified in the eligibility criteria in each province (a fair representation of the community);
  * by ensuring, through the mechanisms available in the *Criminal Code,* that the individuals selected for the jury are in a position to act impartially in the case.

- there appears to be general support for the following:

  * provinces should make use of a list or lists which are most likely to include all eligible persons in the province;
  * the selection mechanism should be computerized (further discussion is needed to resolve the issue of whether the random selection process should be oriented to inclusion of particular groups or simply to ensuring no explicit exclusion);
  * the concern for inclusion should not result in jurors becoming representatives of particular groups or in the jury system reflecting a quota system, as this could undermine the legitimacy of the jury system as an impartial system;
  * the cost to individuals in serving on juries needs to be recognized in the jury system through, for example: adequate compensation for their time; greater distribution of the obligation to serve through a reduction in the number of exemptions and exclusions in provincial law; relief from service for personal hardship and hardship to another (granted by administrative decision-makers in most cases);
  * the issue of access to justice for parties to civil litigation, where the cost for civil juries is borne by the parties, should be reviewed.

- there seemed to be agreement that the relationship between judicial districts and the need to have a jury drawn from the community in which the offence occurred should be considered by provinces in selecting an array for a trial, subject to the accused person's right to a change of venue.

- the provisions of the *Criminal Code* dealing with the challenge to the array, the power to peremptorily challenge a juror and the basis upon which a challenge for cause may be made were referred to the Criminal Law Section for further consideration.

RESOLVED:

1. That the reports of the study committee be received.

2. That the discussion be recorded in the minutes to provide a useful basis for further activity in the constituent jurisdictions.