

42. Digital Evidence

June 2014

This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.

This policy guideline addresses digital evidence which is submitted on electronic devices. Examples of digital evidence are:

- Photographs
- Video recordings
- Audio recordings

LEGISLATIVE FRAMEWORK

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*¹ (the Legislation) allow the Director to establish Rules of Procedure. The Rules of Procedure establish requirements for the exchange and submission of evidence. Rule 42-1 addresses electronically-submitted evidence.

GENERAL CONSIDERATIONS

Paper Documents Given Precedence

When paper documents are used alongside with digital copies of the same documents, such as transcripts of audio recordings alongside the recording or emails, the printed version (paper document) is given precedence, and is relied upon in the proceeding. If someone believes the transcript is not accurate, they should state their concerns at the hearing.

Relevance

Evidence is relevant if it relates to the issues identified on the application for dispute resolution.

Evidence always conveys knowledge about something. For example, video evidence might show the condition of a rental unit or an audio recording might verify that one party received a notice from the other.

¹ *Residential Tenancy Act* s. 9(3); *Manufactured Home Park Tenancy Act* s. 9(3)

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Reliability and Authenticity

The Residential Tenancy Branch may consider the reliability and authenticity of the digital evidence.

Reliability is the degree to which the material conveys accurate information about a material fact. It addresses the question “How good a source of information about the event is this digital evidence?”

The person submitting the digital evidence may be questioned about its trustworthiness. They may be asked to demonstrate that the digital evidence is what it claims to be and that it is identical in every material respect to the original digital file – that it is authentic.

Digital evidence can be authenticated by agreement or with oral testimony by the author or a third party.

Standard of Proof: Balance of Probabilities

The standard of proof to be applied is the balance of probabilities. When reliability or authenticity is challenged, the person submitting digital evidence is required to prove reliability or authenticity on the balance of probabilities.

Proof is contextual. The question “What information is the digital evidence being presented to convey?” helps determine whether or not the digital evidence reliably conveys that information. This means the digital evidence may be demonstrated to be reliable for one purpose, but not necessarily for others. For example, a photograph might show that it rained on a particular day, but might not show that water pooled on the roof of a building.

DIGITAL EVIDENCE ON THE INTERNET

Internet evidence, such as a bylaw posted on a municipality’s website or contact information posted on a company’s website, should be submitted as a printed document. Internet information may be considered depending upon a variety of circumstances relating to reliability which include, but are not limited to:

- whether the information comes from an official website from a well-known organization;
- whether the information is capable of being verified;
- whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

It is up to the Residential Tenancy Branch to determine what significance, if any, that information posted on the Internet would have on the issues to be decided. If the Internet-based evidence is not sufficiently reliable, it may not be considered.

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DIGITAL PHOTOGRAPHS

To be considered, the party submitting digital photographs must demonstrate that:

- the photograph fairly and accurately represents the facts; and
- there is no intention to mislead.

When a landlord or tenant submits a digital device that is full of images, they must satisfy the Residential Tenancy Branch that the above criteria are met with respect to each photograph.

As with any digital evidence, the party submitting the photographs must take steps to ensure that all parties can access or view them and that the photos are clear, legible and numbered. As with all digital evidence, a written description of the numbered photographs should be submitted with the printed evidence.

AUDIO RECORDINGS

For an audio recording to be considered, it must:

1. be properly authenticated by a witness capable of doing so;
2. be a complete, or reasonably complete, recording of the transaction or statement in respect of which it is offered;
3. not be misleading or confusing;
4. be of sufficient quality as to be intelligible; and
5. add valuable information that is not available in printed form.

Audio recordings that violate privacy laws² or that are obtained illegally may not be considered.

Sometimes, an audio recording will start and stop, omitting parts of a sequence of events. These recordings are not complete in the sense that they omit parts an ongoing sequence of events or statements in a conversation. Audio recordings that have gaps are less likely to be found to be sufficiently reliable to be considered, since it may not be possible to determine whether they are misleading. Even if they are admitted, they may be accorded little weight.

Use of transcripts of audio recordings

Transcripts of audio recordings may be submitted as evidence alongside the recording itself. Factors to be considered when deciding whether or not to permit the use of transcripts include:

1. the length of the audio recording;

² See the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act* at www.bclaws.ca.

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2. the measure of its assistance to understanding the contents of the recorded statement; or
3. the ability to assist in deciding the matter.

VIDEO RECORDINGS

To be considered, the party submitting the evidence must demonstrate that:

- the video recording fairly and accurately represents the facts; and
- there is no intention to mislead.

Factors that can be used when considering video recordings as evidence are:

1. the authenticity of the video recording;
2. the quality of the video and audio reproduction, and its reliability in relation to a matter on the application for dispute resolution;
3. the presence or absence of relevant material in the video; and
4. whether the information in the recording is available in other forms, and whether it adds significant value to the body of evidence.

Video recordings that violate privacy laws³ or that are obtained illegally may not be considered.

As is the case with all digital evidence, video recordings must be authenticated before being admitted into evidence. The evidence must be a fair and accurate representation of the events depicted on it. Authentication of video recordings can be provided by the person who actually created the video recording, by a person who was present when the video recording was created and who can attest to its authenticity, by the person who submitted the evidence or by evidence from other witnesses. The person or persons who authenticate the video recording must be in a position to give evidence about how the video recording was made, where and what it depicts, when it was made, and that the depiction it contains is a fair and accurate representation.

Video recordings must be of good quality and give a clear picture of events. Video recordings may be edited so long as the editing does not have the effect of making the recorded evidence misleading.

EMAILS AND TEXT MESSAGES

Most often, printed versions of emails or text messages should be provided as evidence. When a party wishes to provide emails or text messages in the form of digital

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evidence, the party must provide compelling reasons why the digital format should be considered.

The party submitting the digital copies of email or text messages must, by oath or affirmation, state it is:

1. authentic. Alternatively, the party may provide a witness capable of doing so;
2. a fair and complete copy of the original transmission;
3. not misleading or confusing.

Proving that an intended recipient did indeed receive an email relies on a statement from that person. It is important not to confuse the fact that the recipient's mail server may have received an email (e.g., by generating an auto-reply message) with the recipient themselves actually downloading the message. In the absence of a denial of receipt, the email may be considered to have been received.