



Information Technology and the Federal Courts Rules

A Discussion Paper of the Federal Courts Rules Committee, Sub-Committee on Technology

Background

The Sub-Committee on Technology is seeking to identify obstacles to the use of information technologies in the Federal Courts Rules and to propose changes that would not substantially alter the effect of the Rules. The focus is on revising the Rules and not on implementing new technologies. This discussion paper outlines a number of possible revisions to the Rules to facilitate the use of information technologies.

Issue 1 - Definitions

One approach to modernizing the Rules to facilitate the use of information technologies is to update the definitions to include electronic transmissions and records where the Rules currently refer more traditional forms of communicating and storing information.

a) “address for service”

The current definition of “address for service” does not contemplate electronic communications. The definition could be supplemented with a third paragraph as follows:

“address for service” includes an address for receiving electronic communications

This definition would be relevant for rules such as rules 66, 140, 145, 209, 340, and 493. Rule 66 concerns the Heading of documents. Rule 140 concerns non-personal service. Rule 145 provides for situations in which no further service is required. Rule 209 and 340 provides for the solicitor of record. Rule 493 provides for caveat warrants.

b) “books and records”

There is currently no definition of the term “books and records” in the Rules. Where the books and records are permitted to be kept in electronic form the Rules could be amended to contemplate that possibility. This could be achieved by adding a definition of “books and records” as follows:

“books and records” includes books and records in electronic form

This definition would be relevant for such as rules 12 and 21. Registrars are mandated by Rule 12 to attend sittings of the court to (b) keep a record of every material event that transpires during the sitting and to (c) keep and be responsible for all books and records of the Court used at the sitting. Rule 21 mandates the Administrator to keep all books and records necessary for recording the proceedings.

c) “court file”

The current definition of “court file” provides that it “means the file maintained pursuant to rule 23 or 24”. To clarify that the court file may contain electronic documents, the definition could be supplemented as follows:

“court file” means the file maintained pursuant to rule 23 or 24 and may contain electronic documents (emphasis added)

d) “document”

“Document” is currently defined in Rule 222(1), but the definition is provide only for the purposes of Rules 222-232 and 295 concerning discovery. Rule 222(1) defines “document” as including “an audio recording, video recording, film, photograph, chart, graph, map, plan, survey, book of account, computer diskette and any other device on which information is recorded or stored.”

However, the term “document” also appears elsewhere in various places in the Rules, such as in Rules 21-26 concerning court records. The introduction of electronic documents more generally into the litigation process, could necessitate clarification of the fact that documents in other rules may also include electronic documents.

The Personal Information Protection and Electronic Documents Act (PIPEDA) provides that “‘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.”

Accordingly, the current definition in Rule 222(1) could be relocated to the definitions section, and it could be replaced with a definition based on the PIPEDA.

Furthermore, the Rules do not currently contemplate electronic copies of documents. However, if the term “document” is revised to include electronic records, then it might be unnecessary to clarify that a “copy” could be in electronic form. Accordingly, this definition might not need to be amended.

e) “form”

“Form” is not currently defined in the Rules. The following definition could be added to clarify that a “form” could be a document in electronic form:

“form” includes documents stored in an electronic medium

f) “registry”

The definition of “registry” was removed from the Rules in 2004. However, before e-filing was permitted, the hours of operation of the Registry under Rule 15 had the effect of determining the times of day during which documents could be filed. Where e-filing is permitted, the hours during which matters may be filed are determined separately from the hours of operation of the Registry. Accordingly, it could be helpful to clarify that the hours of operation of the “registry” are those of the Registry office and do not necessarily correspond with the times during which documents may be filed. The following definition could be re-introduced

“Registry” means the premises established for the performance of the function of the registrar

g) “service”

“Service” is not currently defined in the Rules. Electronic service is provided for in Part I of the Practice Direction of July 21, 2009 “Electronic Legal Service and Electronic Filing in the Federal Court” (E-Service and E-Filing Directive), which is attached. The availability of electronic service could be indicated in the definitions section by defining “service” as follows:

“service” includes, where provided, electronic service

h) “sign”, “signed” and “signature”

“Signature” is not currently defined in the Rules. The Personal Information Protection and Electronic Documents Act, (“PIPEDA”) defines “electronic signature” as follows: “electronic signature” means a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to or associated with an electronic document.”

Furthermore, PIPEDA defines “secure electronic signature” as follows: “secure electronic signature” means an electronic signature that results from the application of a technology or process prescribed by regulations made under subsection 48(1) by the Governor in Council on the recommendation of the Treasury Board. A definition of secure electronic signature that refers to the applicable provisions of PIPEDA could be added to the Rules and referred to where the requirement of a secure electronic signature is appropriate.

The term “signed” could be defined in the rules as follows:

To “sign” includes, where provided, signing by way of electronic signature

The term “signature” could be defined in the rules as follows:

“signature” includes, where provided, an electronic signature

This definition would be relevant for the rules that refer to the signing of documents. For example, rule 52.2 requires an expert to sign an affidavit or a statement; rule 66 requires documents for use in a proceeding to be signed by the solicitor or party filing them; rule 123 deems the solicitor who has signed a document filed by a party to be the solicitor of record; rule 389 provides for the signing of a notice of settlement; and rule 392 provides that matters is disposed of upon the signing of an order.

Discussion Point - Should the definitions above be added or modified as discussed, or in other ways? Are there other changes to the definitions that could serve to eliminate obstacles to the use of information technology?

Issue 2 - Electronic service

Electronic service is not currently permitted for documents, such as originating documents, that must be served personally. Part I of the E-Service and E-Filing Directive notes that “[f]or this pilot phase of electronic legal service, personal service shall continue to be effected according to the requirements set out in the Federal Courts Rules.”

However, various rules provide for service in circumstances where personal service is not required. Where this is the case, Part I of the E-Service and E-Filing Directive provides for the manner in which the documents may be served electronically.

Rule 138 provides that “Unless otherwise provided in these Rules, a document that is not an originating document need not be served personally.” To clarify the availability of electronic service in these circumstances, the rule could be augmented to read:

Unless otherwise provided in these Rules, a document that is not an originating document need not be served personally and may be served electronically. (emphasis added)

Discussion Point - Should Rule 138 be amended to provide for electronic service of documents that need not be served personally?

Issue 3 - Issuing and filing documents

Rule 71, which provides for the various methods of filing of documents, does not currently contemplate the electronic filing and issuing of documents. Part II of the E-Service and E-Filing Directive establishes a protocol for e-filing. Rule 71(1) could be amended by adding

(d) filed electronically

Discussion Point - Should Rule 71 be amended to provide for electronic service of documents?

Issue 4 - Inspection of files

With the introduction of electronic files, Rule 26, concerning the inspection of files may need to be revised. On the one hand, the public increasingly expect to be able to access court files electronically in the same manner as they are able to access other public documents. On the other hand, the increased ease with which court files might be accessed electronically can eliminate the logistical hurdles that once served as a rudimentary protection of personal information.

In the United States, the Public Access to Court Electronic Records (PACER) service, an electronic public access service, has been introduced by the federal Judiciary to enable users to obtain case and docket information from federal appellate, district and bankruptcy courts. In response to the FAQ "Is all case data available to the public" on the PACER website (<http://www.pacer.gov/>), is the following answer:

No, a policy to protect private information while ensuring public access to electronic case information requires that personal identifiers be removed or redacted before the records become public. These identifiers include the first five digits of a Social Security number, financial account numbers, the name of a minor, a person's date of birth, and home addresses in a criminal case. In addition, certain types of documents may be unavailable to the general public.

Discussion Point - How should the rule for the inspection of documents be amended to provide for electronically stored files so as to facilitate access and protect personal information?

Issue 5 - Format of documents

The current rules provide for the format of paper documents. For example, Rule 65 specifies the required formats for documents prepared for use in a proceeding before the Federal Courts, and Rules 343, 344 and 348 provide for the filing and content of Appeal Books. With the introduction of electronic documents, the Rules should provide for the required specifications for electronic documents. The Supreme Court of Canada has recently published specifications for documents submitted electronically to the Court. These specifications are attached.

Discussion Point - Should the Rules provide for the required specifications for electronic documents? If so, should the Supreme Court of Canada specifications be adopted?

To make written comments, please email or write by June 17, 2011 to:

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