Is an audio recording on magnetic tape a technological document?

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Despite its coming into force in 2001, the courts have frequently avoided commenting on the application and interpretation of the *Act to Establish a Legal Framework for Information Technologies*[1] (hereafter the "LFIT Act"), preferring instead to rely on the provisions in the Civil Code of Québec[2].

In the decision of Benisty v. Kloda[3], judge Jacques J. Levesque, rendering the ruling of the Court of Appeal, referred to the LFIT Act to conclude that a recording on magnetic tape is a technological document.

The qualification of a technological document

After having reviewed the doctrine and the case study law, judge Dufresne concluded that it would be erroneous to state that an audio recording on magnetic tape does not constitute a technological document[4], as per the definition of this expression in subparagraphs 1 and 3 al. 4 of the LFIT Act.Hence, the testimony on a magnetic medium is a technological document[5].

In spite of article 2874 CCQ, which appears to suggest that a statement on magnetic tape may be something other than a technological document, one must retain the interpretation of technological document as set out in the LFIT Act, which is more recent and incidentally more detailed in terms of technology management and, in addition, "specifically dedicated to the consistency of treatment of various mediums"[6].

We should point out that the court is also of the opinion that the LFIT Act includes "all of the mediums, except paper and its physical equivalents"[7].

Presumption of integrity: integrity of medium or of content?

The scope of the presumption of integrity set out in Article 7 of the LFIT was the subject of doctrinal controversy. Following a comparative reading of the articles in the CCQ with the LFIT Act provisions, the judges confirm that the exemption of the proof of the integrity of a technological document applies only to the medium, the technology, the system or process used[8].

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The content of a technological document does not benefit from the presumption of integrity. In fact, according to the court, a medium or a process does not make it possible to infer, de facto, that the integrity of its content is ensured. The presumption of integrity is the presumption that "the technology used by its medium ensures its integrity"[9]. Thus, the exemption of proving authenticity applies "where the support or technology used make it possible to ensure the integrity of the document"[10]. The presumption of integrity does not apply to content.

Without the intrinsic proof of the integrity of the technological document by means of the metadata or a convincing documentation, the party seeking to present this document as proof must establish separate proof of its authenticity, as set out in articles 2855, 2874 CCQ and article 5 al 3 of the LCCJTI.

Proof of authenticity

The decision of the Court of Appeal also confirms that technological documents do not benefit from a presumption of authenticity[11]. Moreover, when accompanied by their metadata, they will satisfy the requirement of authenticity. This judgement also stipulates that authenticity consists of two components, "either (1) qualities related to the details regarding production and (2) qualities related to information"[12].

In the matter at hand, since the Appellant's technological documents did not have the intrinsic documentation to ensure the integrity of the medium of the technological documents, proof of authenticity was required.

Copy Tranfer

This judgement reiterates[13] the distinction between the copy that is based on the same medium (art. 12 to 15 of the LFIT Act) and the transfer by ensuring that the medium is based on a different technology (art. 17 and 18 LFIT Act). The Appellant having in the case proceeded to transfer the information from audio cassette to CD, must document the transfer "so that it can be proven, as needed, that the document resulting from the transfer contains the same information as the source document"[14]. Since no element could help demonstrate that the recordings resulting from the transfer contained the same information, the court concluded that recordings on CD did not have the same legal value as those contained on cassette. Denying the recordings to be admitted as proof is therefore confirmed by the Court of Appeal.

Summary of principles:

An audio recording on magnetic tape is a technological document;
This may be a material element of proof or a testimony, depending on the content of the recording;
The technological document "must be considered a document whose medium uses information technologies, whether this medium is analog or digital"[15];
The presumption of integrity applies to the medium of the technological document;
Moreover, the content of a technological document does not benefit from the presumption of integrity;
When presenting an audio recording as testimony or as a material element, a separate proof of authenticity is required when the medium or technology used does not make it possible to confirm that the integrity of the medium is ensured;
In order to establish proof of authenticity, a party must demonstrate the details related to the production and content of a technological document; and
The reproduction of a document may be made by copy (on the same medium or on a medium that is not based on a different technology) or by means of a transfer (on a medium based on a different technology) provided that it is

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proven that the method of transfer does not impact the integrity.

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1. *Act to Establish a Legal Framework for Information Technologies*, RSQ.,c. C-1.1
2. *Civil Code of Québec*, C.C.Q. 1991, c. 64 (the “CCQ”).
3. Benisty v.Kloda, 2018 RLRQ 608
4. *Ibid*., par. 126
5. The court essentially refers to the thesis defended by authors Vincent Gautrais and Patrick Gingras: Vincent GAUTRAIS and Patrick GINGRAS, « La preuve des documents technologiques », in Barreau du Québec - Service de la Formation continue, Congrès annuel du Barreau du Québec, Montréal, 2012, online: https://edoctrine.caij.qc.ca/congres-du-barreau/2012/1755866973 (page consulted on April 24, 2018), p. 41
6. Vincent GAUTRAIS and Patrick GINGRAS, « La preuve des documents technologiques », in Barreau du Québec - Service de la Formation continue, Congrès annuel du Barreau du Québec, Montréal, 2012, online https://edoctrine.caij.qc.ca/congres-du-barreau/2012/1755866973 (page consulted on April 24, 2018), p. 41
7. Benisty v.Kloda, 2018 QCCA 608, par. 80
8. Ibid., para. 93.
9. *Ibid*., par. 100.
10. *Ibid*., par. 103
11. *Ibid*., par. 95
12. *Ibid*., par. 106
13. See for example: Directeur des poursuites criminelles et pénales v. *3341003 Canada inc.* (Pizzédélic Restaurant), 2015 QCCQ 8159; Tabert v. Equityfeed Corporation, 2017 QCCS 3303, B.L. v. Maison sous les arbres, 2013 QCCAI 150; Lefebvre Frères Ltd. v.aisona Giraldeau, 2009 QCCS 404.
14. *Act to establish the legal framework for information technology*, R.S.Q., c. C-11., Art. 17.
15. Benisty v.Kloda, 2018 QCCA 608, par. 119

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