Impact of technology on the practice of law

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Technology is now a part of our day-to-day lives, and we've learned how to use it. But what about our judicial institutions? What impact does technology have on the administration of proof and the practice of law?

The Court of Appeal provides us with some solutions (and grounds for discussion) in its recent case of *Benisty v. Kloda* [1]

Charles Benisty (hereinafter "the appellant") initiated an appeal in June 2009 against Samuel Kloda (hereinafter "the respondent") as well as CIBC Wood Gundy (hereinafter "CIBC"). The appellant is claiming that the respondent committed errors in fulfilling the mandate that he had entrusted to him with regard to certain financial transactions completed between November 2004 and September 2008. The respondent was a financial consultant and Executive Vice-President of the Montréal branch of the CIBC.

Prior to the initiation of legal proceedings, the appellant recorded some of their telephone conversations, as part of discussions that took place between the respondent and himself, without the knowledge of the respondent. He states that he acted in this manner because he was convinced that the appellant was lying to him and was conducting unauthorized transactions in his accounts. In total, 60 conversations were recorded between April and October 2008.

In first instance, judge Benoît Emery overturned the appellant's recourse. He allowed the respondent's objection with the introduction into evidence of a series of audio recordings of telephone conversations between the respondent and the appellant. Judge Emery considers that the recordings are not a technological document, but rather a material element that must be subject to separate proof to establish its authenticity and legal value. In fact, Judge Emery states: "It is clear from listening to the recordings, that they are fraught with interruptions, cut-offs, or voluntary or non-voluntary deletions", and therefore they are not authentic. He goes on to say: "[...] these incomplete and sometimes incoherent excerpts that, at times support the appellant's cause, and at times, the respondent's, seem to reveal everything and its opposite – wherein lies the need for evidence that is independent from its reliability and authenticity.[2]"

The appellant is appealing the Superior Court judgement. He purports namely that the judge erred by declaring the audio recordings inadmissible as evidence.

He reiterates the argument to the effect that the cassettes, on which audio recordings of the telephone conversations he had with the respondent were made, constitute technological documents within the meaning of the Act to Establish a Legal Framework for Information Technology[3] (hereinafter "LFIT Act"). He says that the cassettes benefit from the presumption of authenticity stipulated in article 2855 QCC and, consequently, it is the respondent's responsibility to establish that this technological support does not ensure the integrity of the document and its authenticity.

For his part, the respondent is rather of the opinion that the audio recordings on a magnetic medium do not fall within the scope of the LFIT Act. He therefore considers that it is the appellant's responsibility to establish authenticity.

The Court of Appeal says that the application and interpretation of the LFIT Act, which came into force in 2001, was never actually subject to the decisions of the courts and, therefore, it feels that it is useful to analyze the matter brought before it by the parties.

The Court of Appeal was, in connection with this matter, facing a specific situation: in fact, in the first instance, the appellant had presented six (6) audio cassettes on which were recorded his conversations with the respondent, for a total recording duration of about six (6) hours. However, in appeal, the appellant had selected 50 excerpts of these conversations that he had transferred onto a CD for a listening duration of roughly one (1) hour. In other words, the appellant chose to substitute a CD for the cassettes produced in the Superior Court, under the same evidence docket (P-60).

First off, judge Lévesque, who drafted the motives to which judges Dufresne and Healy subscribe to, qualifies these audio recordings in this matter as "material elements of proof". He explains that when "a person is recorded without his knowledge during a telephone conversations or interview, this is considered a material element of proof, whereas a person who records himself and recites a dictation attempts instead to establish a testimony"[4].

Consequently, judge Lévesque reiterates that for a recording to be admitted as evidence, its authenticity must be proven [5].

Consequently, the Court of Appeal asked the question as to whether the audio recording is a "technological document" within the meaning of the LFIT Act. In this respect, judge Lévesque points to the existence of a doctrinal controversy that qualifies an audio recording on magnetic tape differently, more commonly referred to as a cassette, from a recording on a USB key or on CD. According to author Mark Philips, on whom the respondent is basing his argument, a cassette is not a "technological document" since the technology relative to the cassette is "analog", whereas the most recent technologies are digital (such as magnetic hard drive, USB key, CD, etc.).

According to this author, the definition given by the LFIT Act of a "technological document" therefore excludes analog documents.

The Court of Appeal does not uphold the theory posited by author Mark Phillips. It prefers the interpretation under which a recording on magnetic tape is considered a technological document. Despite the noted discrepancies in the text of article 2874 CCQ in comparison with those of the provisions in the LFIT Act, judge Lévesque considers it necessary to retain the interpretation that most closely complies with the purpose of the Act and the lawmaker's intention. He notes that the LFIT Act came into force in 2001, whereas the Civil Code of Québec was cam into effect ten (10) years before that. Thus, on the one hand, this specific Act must take precedence over the provisions of the Civil Code, whose scope is more general in nature. Moreover, judge Lévesque refers to two (2) case study maxims that make it possible to deduce the lawmaker's intention:

[77] Two case study maxims make it possible to deduce the lawmaker's intention. Under the first, "precedence must be given to the most recent legislation, the legislative standard that is subsequent to the other standard in conflict". In fact, when a new law is passed, the lawmaker is deemed to be aware of those laws that already exist. We could, therefore, presume that he wanted to implicitly repeal those standards that were not compatible with the new ones. The second principle stipulates that precedence must be given to the specific statute as compared with the statute of general application.

The Court of Appeal therefore arrived at the conclusion that a recording on magnetic tape, such as a cassette, is a technological document. More generally, it retains that a "technological document" must be considered a document whose medium uses information technologies, whether this medium is analog or digital[6];

Subsequently, the Court of Appeal examined articles 2855 and 2874 of the Civil Code, along with articles 5, 6 and 7 of the LFIT Act, in order to outline the principles applicable to the legal value to be assigned to a technological document. When is there presumption of authenticity? When is there presumption of integrity? When is there exemption of proof for a party when a technological document is introduced as proof?

After analyzing various theories supported by different authors, the Court of Appeal retained the following regarding the procedure to follow when introducing a technological document as evidence:

[99] […] articles 2855 and 2874 CCQ require the demonstration of distinct or separate proof of authenticity of a document presented as evidence. Thus, a technological document generally includes an inherent documentation, such as metadata, making it possible to identify an author, the date of creation, or even whether modifications were made to the document. Since such metadata constitute inherent proof of a technological document — and not a distinct or separate proof, as is required by the first part of articles 2855 and 2874 CCQ — and that they fulfill the same role as a traditional proof of authenticity, the lawmaker exempts that party from additionally establishing a separate proof.

[100] Thus, article 7 LFIT Act does not create presumption of integrity of a document, but only a presumption that the technology used by its medium makes it possible to *ensure its integrity*, which I refer to as technological reliability. The nuance arises from the fact that an attack on the document's integrity may come from various sources; for example, we can mention that the information may be altered or manipulated by an individual without technology being at fault.

[101] Articles 2855 and 2874 CCQ indicate that a separate proof of authenticity is required in the case indicated in the third paragraph of article 5 *EFIT.*, i.e., in the case where the medium or technology does not make it possible to either confirm or deny whether the document's integrity is ensured.

[102] Hence, the idea that a technological medium is deemed reliable (article 7 *LFIT Act.*) differs from the notion that such a medium may effectively ensure the document's integrity (article 5 al. 3 *LFIT Act.*). It is a subtle distinction. A technology may, therefore, be reliable (7 *LFIT Act.*) without making it possible to affirm that we may conclude that the integrity of the document is ensured: this added insurance is provided by the technological documents that include an inherent documentation, or metadata, that prove *the integrity of the document*.

[103] In other words, the exemption of proving the document's authenticity applies where the medium or technology used make it possible to ensure the integrity of the document. This is not a case of presumed technological reliability under article 7 *LFIT Act.*, but of the specific case of technological documents that include metadata and that, consequently, prove their own integrity.

[104] However, in the absence of intrinsic documentation making it possible to ensure the

document's integrity, which is the case set out by article 5, al. 3 *LFIT Act*., the party that wants to produce such a document must establish this distinct traditional proof of its authenticity:

[…]

[105] Thus, when an audio recording is accompanied by metadata and this documentation satisfies, in the court's opinion, the authenticity requirement of the document, the party that produces this recording will be exempt from proving its authenticity. […]

To summarize, the party seeking to present as evidence the audio recording must prove its authenticity[7], but will not be required to prove the reliability of the technological medium used by virtue of the presumption established by article 7 LFIT Act. This article establishes a "presumption of reliability" of the technological medium by virtue of which the technology used makes it possible to ensure the document's integrity. This integrity itself is not presumed[8].

Applying these principles in the case under analysis, the Court of Appeal arrives at the conclusion that the judge of first instance erred by deciding that the cassettes did not constitute a technological document. It maintains, however, that the first judge was correct in affirming that the authenticity of the audio recordings must be proven for them to be accepted as evidence. Therefore, in appeal, the appellant did not provide the same technological medium as that which was presented during the first instance. Six (6) cassettes were presented in the Superior Court, whereas one CD representing a summary of these recordings was presented instead in the Court of Appeal. Thus, it was not sufficient in the Court of Appeal to compare the technology and the different mediums of the proof presented, since it was impossible to distinguish the content of the cassettes from those of the CD in order to determine whether they presented the same information.

By virtue of the rules of proof, the reproduction of an original may be made by a copy or a transfer[9]. The copy shall be made on the same medium, whereas the transfer will be made on a technological medium that is different from the original. Since the Court had no way to determine with certainty that the content of the CD was the same as that of the cassettes, it concluded that it simply did not have the same legal value.

Lastly, the Court concluded that the appellant did not discharge his burden of demonstrating that the first instance judge had made an error that could justify their involvement. This ground of appeal was therefore rejected[10].

Overall, the Court of Appeal rejected in any case all of the other claims put forth by the appellant, noting that the latter faces a critical challenge: he was not persuasive.

Our takeaway from this case is that the administration of a piece of evidence on a technological medium is no simple matter, and it must not be taken lightly. It is not easy to navigate the various provisions set out in both the *Civil Code and the LFIT Act* in order to extract the principles applicable to matters of proof. The Court of Appeal retains that the presumption of integrity set out in article 7 of the LFIT Act applies exclusively to the technological medium and not its content. It emphasizes that there should not be confusion between the integrity of a document and the capacity of a technology to ensure it. Also, it suggests referring to the presumption set out in article 7 of the LFIT Act as a "presumption of technological reliability" instead of a "presumption of integrity of medium".

Lastly, it specifies that establishing the authenticity of an audio recording comprises two (2) components:

1) The qualities related to the methods of creation; and,

2) The qualities related to the information itself contained on the technological medium.

A party seeking to dispute the reliability of a technological medium must, by virtue of article 89 of the CCQ, produce *an affidavit* “indicating in specific detail the facts and motives that make an attack on the integrity of the document likely”.

An example of the administration of such technological proof may be found in the matter of *Forest v. Industrial Alliance*[11]. In this matter, photographs taken from the appellant’s Facebook account were submitted as an element of material proof. Attached was an *affidavit*, proclaiming the authenticity of the document, from the intern who took the screen capture. Regarding the identity of the informants, the appellant’s spouse confirmed, during the hearing, that it was in fact he himself who had taken the photographs in question. Since the opposing party did not offer any objection, the authenticity was established.

While the *Civil Code of Québec* and its related laws strive to cover every situation that may arise in connection with presenting evidence on a technological medium, it is undeniable that technology is progressing at a rate that is far outpacing that set by lawmakers. That being the case, it is also the responsibility of attorneys to collaborate and innovate in the administration of their proof so as not to find themselves in an endless debate when seeking to determine the authenticity of specific evidence they are attempting to present.

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1. 2018 QCCA 608.
2. Judgement on appeal, par. 97
3. CQLR, c. C-1.1.
4. Paragraph 60
5. Art. 2855, the CCQ.
6. 9, par. 119 of the decision.
7. CCQ., art. 2855 and 2874.
8. 9, par. 120 of the decision
9. *LFIT Act*, art. 12, 15, 17 and 18 and CCQ, art. 2841.
10. We should note that the other grounds of appeal presented by the appellant were all rejected as well, and that the Court, in a written judgement rendered by the Honorable Jacques J. Lévesque, j.c.a., rejected the appeal with legal fees.
11. 2016 QCCS 497.