



Editor's Comments

Dear all,

We would like to take this opportunity to inform you that our Colleague, M^{re} Bertrand Paiement, in collaboration with the Montreal Association of Insurance Women, will be presenting a conference recognized by the *Chambre de l'assurance de dommages (CHAD)* and the Quebec Bar on "Insurance covenants in commercial lease agreements and other commercial agreements".

The one-hour conference will be held on November 27, 2013, at the Mezzanine level of the 1250 René-Lévesque West building, at 12:00 p.m.

Please contact Ms. Monic Gagnon, Assistant Director, Communications, should you wish to attend the conference: 514 925-6443.



M^{re} Paul A. Melançon

Ditch the paper, not the evidence

The legal requirements of going paperless

M^{re} Bertrand Paiement, partner and
Oscar Miklos, articling student

In the digital age, an important question that many companies and organisations face is how they can transition from a paper-based work environment to newer digital mediums while preserving the evidentiary value of their documents. In short, what steps must be taken before powering up the paper-shredder?

The Quebec legislator's answer to this issue was the adoption of an *Act to Establish a Legal Framework for Information Technology*¹ ("the Act"), legislation that came into force on November 1, 2001. One of the underlying principles of the Act is that of technological neutrality. Section 5 of the Act states that "[t]he legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen."

The concept of technological neutrality can be best understood to mean that the law sets out the rights and obligations in a generic way so as to remain impartial to the technological framework put in place to accomplish a certain goal.² In other words, if the purpose is to adduce evidence of a contract, an electronic signature should be as valid as a signature on paper.

Nevertheless, it is impossible to overlook the reality that the digitalization of documents, along with the existence of a myriad of software that manipulate such files, can challenge the integrity of these documents. As such, a primary concern of the Act is the integrity of digital documents throughout their life cycle.³

For an organisation or company looking to go paperless, it is important to understand the provisions of the Act dealing with the concept of "transfer". The Act draws a distinction between a "copy" and a "transfer". Simply put, a copy constitutes the duplication of information from one medium to the *same* type

of medium whereas a transfer replaces one medium with another. An example of a copy would be a portable document format (PDF) file copied from a computer's hard drive on to a USB external flash drive. On the other hand, a paper document that is scanned and saved as a PDF document on a computer's hard drive constitutes a transfer.

In order for the product of a transferred document to hold the same evidentiary weight as an original, section 17 of the Act stipulates that two principal conditions must be fulfilled. Firstly, the transfer must be documented as prescribed by the act. Second, the integrity of the document must be ensured.

While at first glance, the two requirements may appear redundant, they correspond to two different stages. The first requirement concerns the actual moment of transfer, while the second aims to ensure that the document remains unaltered throughout its life cycle.⁴

Pursuant to section 17 of the Act, the “[t]ransfer documentation must include a reference to the original format of the source document, the transfer process used and the guarantees it purports to offer, according to the specifications provided with the product, as regards the integrity of the source document, if it is not destroyed, and the integrity of the resulting document.” In most cases, according to authors De Rico and Jaar, this documentation requirement can be fulfilled by simply providing the model number and instruction manual of the equipment being used to digitalize a document.⁵

The sparse case law available has raised the question of whether the courts would even impose this documentation requirement in cases where the original has not yet been destroyed.⁶ In *Lefebvre Frères*⁷, the Superior Court held that entries into an electronic agenda printed over ten years later on paper were admissible as proof. Notably, the Court's inquiry omitted the documentation requirement, focusing solely on testimonial evidence with respect to the integrity of the documents.

Fulfilling the integrity requirement can be accomplished by providing a witness who can testify that the document has remained unaltered since the date of the transfer. For example, in the case of a printed email, the witness could be either the person who sent the original email or the person who received it.⁸ The Act also facilitates the proof of integrity by providing a presumption of integrity of the *medium* of the document. This presumption relieves the party seeking to adduce the transferred document from having to call expert witnesses to provide complex scientific proof of the design and operation of the technology used in the transfer.⁹

Once the dual requirement of documentation and preservation of integrity have been met, it is possible to proceed with the destruction of the original document. Section 18 of the Act offers an additional layer of protection for those who have respected the transfer requirements by explicitly preventing an opposing party from invoking any rules of evidence against the admissibility of a document resulting from that transfer.

The law provides companies and organisations a clear path to a paperless environment. Given the challenges posed by new technologies, these rules had to be put in place to ensure the integrity of electronic documents. Only once they are adhered to can the paper-shredder be powered up.

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1. RSQ, c C-1.1, [*The Act*].
 2. Trudel, Pierre, *Introduction à la Loi concernant le cadre juridique des technologies de l'information*, (Cowansville: Éditions Yvon Blais, 2012) at p. 19.
 3. *Supra* note 1, at section 7.
 4. De Saint-Exupéry, Gilles, “Le document technologique original dans le droit de la preuve au Québec”, Montréal, Faculté des études supérieures, Université de Montréal, 2012 at pp. 119-120.
 5. De Rico, Jean-François, and Dominic Jaar, “Le cadre juridique des technologies de l'information” in *Développements récents en droit criminel*, Service de la formation continue du Barreau du Québec, 2008, Droit civil en ligne (DCL), EYB2008DEV1511 at p. 18.
 6. Gautrais, Vincent, and Patrick Gingras, “La preuve des documents technologiques” in *Congrès annuel du Barreau du Québec (2012)*, Congrès du Barreau, at p. 17.
 7. *Lefebvre Frères c. Giraldeau*, 2009 QCCS 404.
 8. *Supra* note 5 at p. 13.
 9. *Ibid.*

The content of this newsletter is intended to provide general comment only and should not be relied upon as legal advice.

For more information, contact one of the team members:

Frédéric Blanchette

514 925-6375
frederic.blanchette@lrmm.com

Louis P. Brien

514 925-6348
louis.brien@lrmm.com

Julia De Rose

514 925-6408
julia.derose@lrmm.com

François Haché

514 925-6327
francois.hache@lrmm.com

Selena Lu

514 925-6420
selena.lu@lrmm.com

Francis C. Meagher

514 925-6320
francis.meagher@lrmm.com

Antoine Melançon

514 925-6381
antoine.melancon@lrmm.com

Paul A. Melançon

514 925-6308
paul.melancon@lrmm.com

Meïssa Ngarane

514 925-6321
meïssa.ngarane@lrmm.com

Bertrand Paiement

514 925-6309
bertrand.paiement@lrmm.com

Daniel Radulescu

514 925-6403
daniel.radulescu@lrmm.com

Hélène B. Tessier

514 925-6359
helene.tessier@lrmm.com

Véronique Tremblay

514 925-6377
veronique.tremblay@lrmm.com

Ruth Veilleux

514 925-6329
ruth.veilleux@lrmm.com