

The Government of Quebec Adopts a Position on Electronic Commerce and Information Technology

By Johanne L. Rémillard

Introductory Comments

On June 21, 2001, the Quebec National Assembly passed and gave assent to Bill 161 entitled “*An Act to establish a legal framework for information technology*” (the “Act”). The provisions of the new Act will come into force on the date or dates to be determined by the government.

While the Act has been clarified, it remains nonetheless a technical document in many respects. The purpose of this publication is to provide general information regarding those provisions of the Act which deserve particular attention.

The Concept of “Document”

The Act provides that information inscribed on a medium constitutes a document. This information may be rendered using any type of intelligible writing, including any system of symbols that may be transcribed into words, sounds or images. Databases which are the source for the creation of documents and technology-based documents contained in a medium based on information technology (electronic, magnetic, optical, wireless or other, including a combination of technologies) will henceforth be considered to be documents in virtue of the Act.

A technology-based document, even when the information it contains is fragmented and dispersed in one or more media, will now be considered to form a whole. Conversely, separate technology-based documents, even when combined into a single document for transmission or retention purposes, will not lose their distinct nature.

Legal Value and Integrity of Documents

Henceforth, a technology-based document whose integrity has been ensured will have the same legal value as if it were a paper-based document and will be subject to the same legal rules. The integrity of a document will be ensured if the medium which contains the information is stable and if it is possible to verify that the information it contains has not been altered. In assessing the integrity of a document, it will be necessary to take into account the security measures applied to protect the document throughout its life cycle, from the moment of its creation until its destruction.

A technology-based document may be used as a means of proof and may be admissible as evidence. Depending on the quality of the medium or technology used, a technology-based document will be presumed to be exact or authentic or, if there is some uncertainty, it may require some proof of authenticity.

Summary

Introductory Comments	1
The Concept of “Document”	1
Legal Value and Integrity of Documents	1
Equivalence of Documents Used for the Same Purposes	2
Maintenance of the Integrity of Documents Throughout Their Life Cycle	2
Establishing a Link Between a Person and a Technology-based Document	4
Linking Processes	4
Modes of Identification and Location ..	4
Certificates and Directories	4
Establishment of Technological and Legal Infrastructures	5
Harmonization of Systems, Norms and Standards	5
Regulatory Powers of the Government ..	6
Interpretation and Amending Provisions	6
Interpretation Provisions	6
Amendments to Certain Provisions of the Civil Code and the Code of Civil Procedure	6
Other Amendments	7
Conclusion	7



Equivalence of Documents Used for the Same Purposes

Documents contained in different media will henceforth have the same legal value if they contain the same information, if the integrity of each document has been ensured and if each document complies with the applicable legal rules. These documents may be used for the same purposes. If one document is lost, another document may serve to reconstitute it. In the event of a divergence between documents in different media, the document containing information that has not been altered shall prevail, unless evidence to the contrary is adduced.

Certain differences as to form (e.g.: page numbering, format, recto or verso presentation, etc.) will no longer be considered as affecting the integrity of a document.

Technology-based Documents as Originals

A technology-based document whose integrity has been ensured may fulfil the functions of an original for the purposes of establishing the following:

- the document is the primary source from which copies have been made;
- the document is unique, notably through the inclusion of an exclusive or distinctive component or the absence of any form of reproduction; and finally,

- the document is the first form of a document linked to a person, it being possible to verify that the document is unique, to identify the person and to maintain the link between the person and the document throughout the life cycle of the document.

As regards the last two paragraphs, the processes will have to be based on technical norms and standards approved by a recognized body referred to in the Act.

Where the function of affixing a seal, stamp or other instrument is to preserve the integrity of a technology-based document or to demonstrate that the technology-based document is an original, to identify a person or to protect the confidentiality of such a document, that purpose may be achieved by taking into account the conditions set forth in the Act.

Copies of Technology-based Documents

The copying process used must offer a sufficient guarantee to establish that the copy contains the same information as the source document and that the copy is indeed a copy in due course. For the purposes of assessing the integrity of a copy, the circumstances in which the copy was made and the manner in which it was made must be taken into account by referring, in particular, to the technical norms or standards approved

by a recognized body referred to in the Act. The integrity of a copy generated by an enterprise within the meaning of the Civil Code or by the State will be presumed in favour of third persons.

Where a copy of a technology-based document must be certified, the requirement may be met by means of a process of comparison that verifies that the information contained in the copy and in the source document is identical.

Maintenance of the Integrity of Documents Throughout Their Life Cycle

The Act provides rules regarding the transfer, retention, consultation and transmission of documents in order to maintain their integrity throughout their life cycle.

(a) Transfer of Information

The information contained in a document (an original or a copy) may be transferred to another medium based on a different technology.

Excluding documents with an archival, historical or heritage value, which documents will have to be preserved in their original medium, it will be possible to destroy a source document and replace it with the document resulting

Johanne L. Rémillard has been a member of the Quebec Bar since 1973 and specializes in Business law. She has an MBA (1975) and has assumed management functions in several private-sector companies.



from the transfer thereof if the transfer is documented so that it can be shown, if necessary, that the document resulting from the transfer contains the same information as the source document and that its integrity has been ensured.

If a source document has been destroyed, no rules of evidence may be invoked against the admissibility of a document resulting from a transfer executed in conformity with the requirements of the Act and to which is attached the documentation referred to in the Act.

(b) Retention of Documents

Documents that are required to be retained by law may be destroyed if they have been transferred in an appropriate manner. The destruction of the document will have to satisfy the requirements of the Act.

Every modification made to a technology-based document in accordance with the requirements of the Act, during the period when the document must be retained, will form an integral part of the document, even if the modification is recorded in a separate document.

(c) Consultation of Documents

A document to which a person has a right of access must be intelligible, either directly or through the use of information technology. The wishes of the person having the right of access must be taken into account in choosing the medium or technology to be used.

The person responsible for access to a technology-based document containing confidential information will have to take appropriate security measures to protect such confidentiality. This person will also be able to establish restrictions on the use of extensive search functions relating to the confidential information contained in a technology-based document which has been made public for a specific purpose.

(d) Transmission of Documents

A document may be transmitted, sent or forwarded by any means, unless the exclusive use of a specific means of transmission is required by law.

A technology-based document will be presumed to have been received or delivered when it becomes accessible at the technological address indicated by the recipient for such purposes. Evidence of the transmission or receipt of a document may be established by any agreed means that provides guarantees of the transmission or receipt thereof. Where the law requires that more than one copy of a document be transmitted to a recipient, this requirement may be met by transmitting a single copy of a technology-based document via a communication network.

Confidential information must be protected by means appropriate to the mode of transmission. This means must be one that can be submitted in evidence, if necessary.

(e) Liability of Service Providers

One must distinguish between liability relating to the information being conveyed and liability attributable to the acts of third parties.

Liability Associated With Providing Services and With Maintaining and Transmitting Technology-based Documents

Service providers that use a communication network or that store or transmit technology-based documents on such a network will not be required to monitor the information in question or to inquire as to the circumstances which indicate whether the documents may give rise to the performance of illegal activities.

A service provider to whom a technology-based document has been entrusted must take the necessary measures to maintain its integrity and to ensure its security, notably with respect to the protection of personal information. However, a service provider may not prevent the persons responsible for access to the documents or the competent authorities from carrying out their duties with respect to the said documents.

Liability for the Acts of Service Users

Service providers that provide a communication network exclusively for the transmission of technology-based documents or that maintain such documents for the sole purpose of ensuring the efficiency of their subsequent transmission, will not be held liable for the acts performed by third parties with the documents maintained or transmitted, unless such service providers have participated in those acts.

Establishing a Link Between a Person and a Technology-based Document

Linking Processes

The link between a person and a document may be established by any process which allows for confirmation of the identity (or identification) and location of the person, confirmation of the link between the person and the document, and the identification of the document, including its origin and destination at any given time.

The link between a person and a document may be established by means of the person's signature. This signature may be affixed by means of any process that meets the requirements of the Civil Code (i.e., a personal and distinctive mark that is used regularly).

A person's signature affixed to a technology-based document may be set up against that person, if the integrity of the document and the link between the signature and the document have been ensured on a continuous basis.

Modes of Identification and Location

A person who, following a verification carried out on the premises or by remote access, is able to confirm the identity or identification of any other person whomsoever, may do so by means of any document, including a certificate. The integrity of the document or certificate and the confidential information it contains must be protected, and its consultation must be logged daily.

The identity or identification, as the case may be, of this "other person" may be verified by reference to the registers kept pursuant to the Civil Code or the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, or it may be verified on the basis of the person's characteristics, including biometric characteristics.

Recording of Biometric Characteristics

The Act provides a strict framework for the recording of the biometric characteristics or measurements of individuals. The identity of an individual may be established by recording only the minimum number of personal characteristics and only with the individual's knowledge.

The creation of any database of biometric characteristics must be disclosed to the Commission d'accès à l'information; the Commission may prohibit the bringing into service of the database or order its destruction if the database constitutes an invasion of privacy.

Certificates and Directories

A certificate may be used to confirm a person's identity, the identification of a partnership or association, the correctness of the identifier of a document or other object (e.g., an algorithm, a server, etc.), the attributes of a person (e.g., function, rights and privileges), document or other object, or the link between them. A certificate

may be attached directly to another document used for purposes of communication or be made accessible through a directory available to the public. The Act describes the basic information which every certificate must contain.

The functions of a directory are relatively similar to those of a certificate. Directories must be constituted in accordance with the technical norms or standards approved by a recognized body referred to in the Act.

A service provider may offer all or some of the certification or directory services. Service providers must also adopt a policy statement regarding their services, as set forth in the Act, and make such policy statement accessible to the public.

Voluntary Accreditation of Certification Service Providers

Certification service providers may join a voluntary accreditation scheme. Accreditation will be granted by a person or body designated by the government. Accreditation will give rise to the presumption that the certificates issued meet the requirements of the Act.

Conditions for the Grant and Renewal of Accreditations

In addition to the information contained in the above-mentioned policy statement, the following elements will be taken into account, among other things:

- whether the identity of the applicant for accreditation has been established;
- the extent of the applicant's expertise and the regularity and extent of its audits;
- the availability of its financial guarantees for operating purposes;
- the guarantees offered as to its integrity and independence;
- the integrity, accessibility and security of the certificates provided;
- the fulfilment of the other obligations which are usually incumbent upon service providers.

Service Providers Located Outside Quebec

Certificates issued by certification service providers on the basis of standards other than those applicable in Quebec may be considered to be equivalent to certificates issued by service providers accredited in Quebec. Equivalency will be recognized by the person or body designated by the government. The same will apply to directory services.

Obligations of Holders and Beneficiaries of Certificates

A person who provides information in order to be issued a certificate must inform the certification service provider of any change affecting the information.

Moreover, a person who wishes to rely upon a certificate (namely, the beneficiary of the certificate) must first verify the certificate and obtain confirmation from the service provider of the genuineness, identity or identification of any party to a communication by means of a technology-based document, or of the correctness of an object identifier. The verification may also be made in directories, by means of a device for consultation on the premises or by remote access.

Obligation of Diligence and Indemnification

Service providers (certification and directory), holders of certificates and beneficiaries thereof will have an obligation of diligence.

Each of these persons will be liable for any damage resulting from the inaccuracy or invalidity of a certificate or of any information contained in a directory, unless the person shows that he or she committed no fault in the performance of his or her obligations. Where two or more of these persons are liable, the obligation to compensate the damage will be a joint obligation; if liability cannot be determined, it will be apportioned equally among them. Finally, if there is no fault on the part of any of these persons, they may still be required to compensate the damage jointly and in equal shares.

Establishment of Technological and Legal Infrastructures

Harmonization of Systems, Norms and Standards

The Act provides for the creation of a multidisciplinary committee to promote the harmonization of the technical processes, systems, norms and standards established for the purposes of the Act. The committee will be chaired by a representative of the Bureau de normalisation du Québec (the "Bureau").

The mission of the committee can be summarized as follows:

- ensure the compatibility of different media, technologies and technical norms and standards for the production, signature and use of technology-based documents in communications;
- avoid the multiplication of processes;
- promote the standardization of certificates and directories;
- guarantee the integrity of technology-based documents and the document management measures taken with respect thereto throughout their life cycle;
- standardize auditing practices;
- make recommendations regarding the application of the Act;
- develop practice guides; and, finally,
- report on its work to the Bureau on an annual basis.

Where the Act requires that a technical process, norm or standard be approved by a recognized body, the recognition may be given by the International Electrotechnical Commission (IEC), the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the Standards Council of Canada or the Bureau de normalisation du Québec, among others.

Regulatory Powers of the Government

The government will have broad regulatory powers over certification service providers, in order to ensure the security of communications made by use of technology-based documents, and concerning the terms and conditions of the use of a specific medium or technology, when it is required in the public interest.

Interpretation and Amending Provisions

Interpretation Provisions

The concept of a “document” set forth in the Act will apply to all documents referred to in legislative texts, regardless of the specific term used and depending on the context.

A reference made in a law to the possibility of using one or more specific means of transmission will not preclude the use of another means of transmission appropriate to the medium of the document, provided the law in question does not require the exclusive use of a specific means of transmission.

Where a law provides that a signature may be engraved, printed or lithographed on a paper-based document, it shall be construed as allowing a signature to be affixed otherwise than by hand.

Finally, any legal provision which establishes that an offence may be committed through the use of a document shall be construed as including any document, whether it is paper-based or contained in another medium.

Amendments to Certain Provisions of the *Civil Code* and the *Code of Civil Procedure*

The Act introduces the following amendments:

- **Definitions of the term “signature”:** this term will henceforth include every personal and distinctive mark affixed to a document, as opposed to the term “on a document”, which was the former expression.

- **Amendments to the provisions on proof set forth in Title Two of the *Civil Code*:**

- Former Division VI entitled “Computerized Records” will now be called “Media for Writings and Technological Neutrality”. This division has been redrafted and includes the following changes:

- (i) a writing, regardless of its medium, will be a means of proof, unless the use of a specific medium or technology is required by law;

- (ii) the integrity of a copy, of a statute or a writing drawn up in a medium based on information technology must be ensured for it to be used to adduce proof in the same way as a paper-based document;

- (iii) the integrity of a document will be ensured if it is possible to verify that the information it contains has been maintained in its entirety and that the medium used provides the required stability and consistency to the information;

- (iv) regarding the rules of evidence, it will not be necessary to prove that the medium of a document and the entire process used to communicate the document have ensured its integrity, unless the use of the document for evidentiary purposes is contested and the person contesting its use establishes, upon a preponderance of evidence, that the integrity of the document has been compromised.

- Former Division VII entitled “Reproduction of Certain Documents” has been renamed “Copies and Documents Resulting from a Transfer” and contains the following changes:

- (i) a document may be reproduced either by generating a copy in the same medium, or by transferring the information contained in the document to a medium based on different technology.

A copy may also replace an original document which has been reproduced, if the copy is certified by a person in authority and if it is “documented” as provided for in the Act.

- (ii) a copy which has been certified by a person in authority, as mentioned in the preceding paragraph, shall be supported, if necessary, by a statement from the person in authority establishing the context in which the reproduction was made and the means used to ensure the integrity of the copy.

- **Proof of the authenticity of a technology-based document:** evidence of the authenticity of a technology-based document will be required only if there is uncertainty as to whether its integrity has been maintained.
- **Technology-based documents as originals:** it will be possible to use a technology-based document or a copy thereof, as the case may be, as an original, provided that the requirements set forth in the Act have been met.

- **Affidavit required where the integrity of a technology-based document is contested:** the affidavit will have to state precisely the facts and reasons suggesting a probable violation of the document’s integrity.

Other Amendments

The Act also includes other amendments, among them amendments to the *Act respecting access to documents held by public bodies and the protection of personal information*, the *Real Estate Brokerage Act*, the *Consumer Protection Act*, the *Act respecting the collection of certain debts*, the *Interpretation Act* and, finally, the *Code of Penal Procedure*.

Amendments to the Consumer Protection Act

Section 101 of the Act amends section 25 of the *Consumer Protection Act*, which is applicable to certain written consumer contracts, by providing that these contracts must be drawn up in paper form, thereby confirming that the status quo will be maintained for such documents.

Moreover, section 102 of the Act amends section 127 of the *Consumer Protection Act* as regards the receipt of a statement of account by a consumer. By virtue of this amendment, a consumer may request in writing that statements of account be sent to him or her at the consumer’s address for purposes of the receipt of technology-based documents.

Amendments to the Real Estate Brokerage Act

Section 99 of the Act amends section 34 of the *Real Estate Brokerage Act*, stipulating that a broker must give a duplicate of the contract, in paper form, to the individual who signed it.

Conclusion

Bill 161 is of great significance because it is intended to determine and govern the entire document management process that currently applies in Quebec, including our methods of communication, our business processes and the rules of evidence applicable to claims arising therefrom.

The Act requires businesses to review and adapt their internal document management systems so as to be in a position to properly implement, in light of the new provincial requirements, the technological conversion which has already been initiated on a national scale.

For additional information, please do not hesitate to contact the undersigned at the following e-mail address:

jremillard@lavery.qc.ca

Johanne L. Rémillard

You can contact any of the following members of the Business group in relation with this bulletin.

at our Montréal office

Diane Bellavance
 Fabienne Benoit
 Pascale Blanchet
 Michel Blouin
 Valérie Boucher
 Serge Bourque
 René Branchaud
 Patrick Buchholz
 Pierre Cadotte
 Pierre Caron
 André Champagne
 Andrea Daniels
 Pierre Denis
 Richard F. Dolan
 Georges Dubé
 David Eramian
 Réal Favreau
 Brian Forget
 Marie-Andrée Gravel
 Martin Joyal

Isabelle Lamarre
 André Laurin
 Alexandra Lee
 Larry Markowitz
 Jean Martel
 Nicole Messier
 Charles Nieto
 Philip Nolan
 André Paquette
 Luc Pariseau
 Jacques Paul-Hus
 Douglas S. Pryde
 Johanne L. Rémillard
 Stéphanie Séguin
 Michel Servant
 Yves St-Cyr
 Eric Stevenson
 Marc Talbot
 Vincent Tanguay
 Sébastien Vézina

at our Québec City office

Michel C. Bernier
 Martin J. Edwards
 Nicolas Gagné
 Jacques Gingras
 Louis X. Lavoie
 Simon Lemay
 Marie-Élaine Racine
 Jean-Philippe Riverin
 Louis Rochette
 Jean-Pierre Roy
 François Vallières

at our Laval office

Michel M. Dagenais
 André B. Gobeille
 Claire Gonnevill

You can contact any of the following members of the Technology, Entertainment and Intellectual Property group in relation with this bulletin.

at our Montréal office

Diane Bellavance
 Patrick Buchholz
 David Eramian
 Johanne L. Rémillard
 Ian Rose

at our Québec City office

Martin J. Edwards
 Laurier Gauthier
 Simon Lemay
 Louis Rochette
 Jean-Pierre Roy
 François Vallières

at our Laval office

André B. Gobeille

Montréal

Suite 4000
 1 Place Ville Marie
 Montréal, Québec
 H3B 4M4

Telephone:
 (514) 871-1522
 Fax:
 (514) 871-8977

Québec City

Suite 500
 925 chemin Saint-Louis
 Québec, Québec
 G1S 1C1

Telephone:
 (418) 688-5000
 Fax:
 (418) 688-3458

Laval

Suite 500
 3080 boul. Le Carrefour
 Laval, Québec
 H7T 2R5

Telephone:
 (450) 978-8100
 Fax:
 (450) 978-8111

Ottawa

Suite 1810
 360, Albert Street
 Ottawa, Ontario
 K1R 7X7

Telephone:
 (613) 594-4936
 Fax:
 (613) 594-8783

Web Site

www.laverydebilly.com

All rights of reproduction reserved. This bulletin provides our clients with general comments on recent legal developments. The texts are not legal opinions. Readers should not act solely on the information contained herein.