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contract for services in Québec: the client is still king when it comes to termination and to the service provider's compensation for loss of profit

summary

In *MDV Representations v Corporation Xprima.com inc*,[1] the Superior Court of Quebec recently dismissed the claims of the plaintiffs, two service providers, who unsuccessfully argued that the defendant client had wrongfully terminated their service contracts to provide web sponsorship services.

Article 2125 of the *Civil Code of Québec* ("**CCQ**") allows a party to unilaterally terminate ("resiliate") a service contract even though the work or provision of service is already in progress. However, Article 2125 of the CCQ is not of "public order," meaning the client and service provider can contract-out of its requirements. In this decision, the plaintiffs had tried to argue that they had contracted out of the provisions of Article 2125 since their service contracts contained language that allowed termination at a particular time and only if the plaintiffs had not met certain volume requirements. Although Mr. Justice Reimnitz agreed that Article 2125 of the CCQ could be contractually modified because it was not of public order, he concluded that the parties did not do so in unequivocal terms,

[1] 2012 QCCS 2451 (CanLII) [*MDV*]. The decision was rendered on June 4, 2012.

ruling that the defendant could therefore terminate the contract without reason.

On the question of the damages claimed by the service providers, the trial judge concluded that the damages claimed for wrongful termination were all losses of future profit calculated as though the contract would not have been terminated. Following the Court of Appeal's decision in *Pelouse Agrostis Turf inc v Club de Golf Balmoral*,[2] Mr. Justice Reimnitz ruled that such types of damages will only give rise to compensation where a client terminates a contract in bad faith or in an abusive manner, elements which the judge did not find in the case at hand.

the legal issues

Can a client to a contract for services validly renounce to its rights under Article 2125 of the CCQ? If so, what is required to give effect to such a renunciation? When a contract for services is unilaterally terminated by a client, what must the service provider establish in order to obtain damages for loss of profit?

the facts

In this decision, the plaintiffs were two service providers offering consulting services in the areas of web-related publicity and sponsorship. On June 30, 2005, the plaintiffs signed a one-year contract with the defendant Xprima, but fell short of the financial targets set forth in the agreement. Since, however, the financial results only fell short by a negligible margin, a second contract was signed in July 2006 for an additional two-year period. The duration/termination clause of the renewed contract read as follows [emphasis added]:

[2] 2003 CanLII 2728 (QCCA) [*Agrostis*].

> [Translation] **8. Duration of the contract**
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> This contract will be in force for a 2-year period, commencing on August 1, 2006. *zXprima reserves its right to terminate the contract on August 7, 2007, if at that time the Company does not reach a minimum sales volume (invoiced) of $1,000,000*.
>
> In the event of termination of the contract by Xprima, the amounts paid in representation fees will not be reimbursable.

On October 16, 2007, Xprima suddenly terminated the contract by written notice to the service providers without stating any reason for the termination. The service providers were surprised, since the minimum sales volume had already been reached by Xprima and the months of August, September and October had been particularly profitable for Xprima. The termination of this service contract was particularly dramatic for the plaintiff MC3 Media, for which the contract with Xprima represented 90 percent of its revenues. The only indication the service providers had concerning a potential termination of the contract before notice was received was a meeting held in January 2007. During that meeting, Xprima expressed certain complaints about the work of the plaintiffs, particularly concerning delays and problems related to the bimonthly representation reports of the plaintiffs, as well as the slow progress towards the financial target (as it then was).

At trial, the defendant Xprima mentioned that it was "generally unsatisfied" with the work of the plaintiffs, citing a list of minor complaints which together were alleged to be the reason for the termination. When it terminated the contract, Xprima paid the representation fees and the commissions due up to the end of October, but refused to pay any other amount claimed by the plaintiffs.

the ruling

The argument of the plaintiffs that the contract between them and Xprima was not a contract for services was summarily dismissed by the Court, since not only was the document entitled as such, it also possessed all the legal characteristics of a service contract.[3] The plaintiffs then argued that, under Section 8 of the contract (cited above), Xprima could only terminate the contract during the month of August 2007 and only if the financial target was not met.

Article 2125 of the CCQ defines the rights of a party to unilaterally terminate a service contract:

> **2125**. The client may unilaterally resiliate the contract even though the work or provision of service is already in progress.

This provision has traditionally been interpreted in both case law and doctrine as giving the client a right to unilaterally terminate a contract for services at any time and without any prior notice, leaving the service provider with only the remedy available in Article 2129 of the CCQ:

> **2129**. Upon resiliation of the contract, the client is bound to pay to the contractor or the provider of services, in proportion to the agreed price, the actual costs and expenses, the value of the work performed before the end of the contract or before the notice of resiliation and, as the case may be, the value of the property furnished, where it can be returned to him and used by him.
>
> For his part, the contractor or the provider of services is bound to repay any advances he has received in excess of what he has earned.

[3] These characteristic are included in Article 2098 of the CCQ which provides as follows : "A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay."

> In either case, each party is liable for any other injury that the other party may have suffered.

Articles 2125 and 2129 of the CCQ, however, had previously been interpreted by the courts as not being of public order and, as such, the rights associated to these Articles could be renounced by contract where such renunciation is made unequivocally.[4] In this case, Mr. Justice Reimnitz held that it was uncertain whether any renunciation was intended by the plaintiffs. He cited jurisprudence from the Quebec Court of Appeal to explain that a fixed term in a contract for services does not constitute a renunciation of the rights granted under Article 2125 of the CCQ.[5]

With regard to the damages claimed by the plaintiffs for future loss of profit, Mr. Justice Reimnitz concluded that no bad faith or abusive behaviour was present, which were required elements according to *Agrostis*, mentioned above. Furthermore, after emphasizing that no reason is required to terminate a contract for services, the judge indicated that the fact that Xprima actually had reasons—even minor reasons—to terminate the contract supported a finding that the contract was not terminated in bad faith or in an abusive manner.

analysis

It could be argued that, although Mr. Justice Reimnitz noted that the contract for services was for a fixed term, he did not put sufficient emphasis on the fact that Section 8 of the contract provided a complete termination mechanism and, more importantly, a time frame to use such a mechanism. Indeed, Section 8 provided that the contract could only be terminated in

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[4] For instance, in both *Societe canadienne des postes v Morel*, 2004 CanLII 21187 (QCCA) and *Gestion environnementale Nord-Sud inc v Ste-Marthe-sur-le-Lac (City of*), 2011 QCCS 1935 (CanLII), it was held that although the client accepted to resiliate the contract if one of the "events of default" took place, he still did not unequivocally renounce to his rights under Article 2125 of the CCQ. The Court found that the grounds for termination listed in the clause only added to the client's rights under Article 2125 of the CCQ. To the contrary, in *Boudreau v Intersan inc*, 2002 CanLII 23844 (QCCS), the Superior Court considered a termination mechanism clause as being an unequivocal renunciation without citing it at length in the judgment.

[5] See *Centre regional de recuperation CS inc v Laidlaw Waste Systems (Canada) Ltd*, 1996 CanLII 6498 (QCCA).

the month of August 2007 and only if the target was not met. Although previous case law had already established that the inclusion of a fixed term or a list of grounds for termination in a contract for services is insufficient to constitute a unequivocal renunciation of the rights under Article 2125 of the CCQ, the contract in the case at bar included a specific timing for the termination mechanism itself in Section 8. As such, there could be an argument that this particular part of Section 8 be considered as a renunciation of the rights conferred pursuant to Article 2125 of the CCQ. Indeed, a parallel could be drawn with the Superior Court's decision in *Gendron communication inc v Videotron ltd*[6] where it was held that a clause stipulating a limited period for the parties to be allowed to terminate a contract for services without reason should be considered as a unequivocal renunciation of the right to terminate such contract without reason after the stipulated period.[7] Such emphasis on the timing of the termination and its limitation could have been applied in MDV. Unfortunately, however, Mr. Justice Reimnitz did not appear to consider that particular characteristic of Section 8 of the service contract.[8]

As a result of this decision, renunciation clauses in service contracts should be drafted to clearly stipulate that the party contracting the service renounce the right under Article 2125 of the CCQ to unilaterally terminate the contract. Since a court will be looking for wording in the contract that clearly indicates an unequivocal renunciation, one way to achieve this is to specifically refer to the relevant articles of the CCQ in the renunciation clause to remove any doubt concerning the renunciation.

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[6] 2005 CanLII 42217 (QCCS).

[7] See also, for a similar reasoning by the Court of Appeal, *MCA Valeurs mobilieres inc v Valeurs mobilieres Marleau, Lemire inc*, 2007 QCCA 92 (CanLII) where the parties had agreed that the contract for services could not be terminated in the first three years of its execution.

[8] *MDV, supra* note 1 at para 96. Mr. Justice Reimnitz only wrote a short sentence at the end of his analysis concerning the impact of the fixed term of the whole contract, simply adding, concerning the ground of resiliation itself (i.e., the financial target): "[Translation] *The ground of resiliation stipulated in the contract does not constitute a clear and unequivocal renunciation of the rights recognized by Article 2125 CCQ*." Consequently, the question of the timing of the termination mechanism itself was never discussed.

Finally, on the issue of compensation for loss of profit: In this decision, the defendant did not offer any compensation to the service providers for their loss of profit incurred as a result of the early termination even though the reasons submitted by Xprima were minor and the service providers met their target. Accordingly, to be compensated for such losses, the Court's decision suggests that the party contracting the service must essentially have no reason for terminating the contract before the end of its term. This adds to the already very heavy burden placed upon service providers, in general, to demonstrate that the contract was terminated in bad faith or in an abusive manner in order to obtain compensation.

One strategy as a possible solution for alleviating this heavy evidentiary burden is to include a liquidated damages amount for loss of profits in the contract for services in the event of early termination. Such an amount could vary in relation to the work performed and could be negotiated between the parties. Liquidated damages amounts, even though such amounts have the potential to be lower than the actual loss suffered, are a compelling strategy to avoid the risks associated with the burden of having to prove bad faith or abusive behaviour before the court.

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a cautionary note