

THE CONSUMER PROTECTION ACT WILL AFFECT NEW CONTRACTS

LUC THIBAudeau

ON JUNE 16, 2009, THE MINISTER OF JUSTICE INTRODUCED BILL 60 ENTITLED AN ACT TO AMEND THE CONSUMER PROTECTION ACT AND OTHER LEGISLATIVE PROVISIONS (THE "BILL") IN THE NATIONAL ASSEMBLY.

This Bill is part of the ongoing measures by the Minister of Justice and the Office de la protection du consommateur (Consumer Protection Bureau) to provide for the comprehensive regulation of commercial practices involving goods and services contracts used by consumers. The *Consumer Protection Act* (the "CPA") contains a broad range of content and form requirements affecting the drafting, formation, execution and cancellation of nominate and identified contracts. With this Bill, the Minister of Justice now proposes to legislate with respect to three new types of contracts, and sets out certain rules regarding all the contracts for which the CPA requires a written instrument. The legislator's goal is to ensure that the consumer has access to all possible information before entering into a contract with a merchant in terms of the price of the contract, the components, terms and conditions of payment and execution, and the amendment or cancellation thereof.

The amendments proposed by the Bill constitute the second phase of the review of the CPA, which was started in 2006 and included, *inter alia*, the division on distance (or remote) contracts (Bill 48). A third phase is also planned dealing with the regulation of contracts of credit.

The Bill proposes the following main amendments to the CPA:

- ▶ the prohibition of the unilateral amendment of contracts governed by the CPA (new sections 11.2 and 11.3);
- ▶ the prohibition of certain specific clauses in contracts governed by the CPA (new sections 11.2, 11.3, 13 and 19.1);
- ▶ additional conditions governing the sale of extended conventional warranties (new sections 35.1 and 52.1);
- ▶ new conditions governing the sale of prepaid (gift) cards (new sections 187.1 to 187.4);
- ▶ a special regime for contracts involving the sequential performance of a service provided at a distance (new sections 214.1 to 214.11);
- ▶ mandatory disclosure of the total price payable by the consumer (clarifying the terms of section 224(c));
- ▶ the prohibition of so-called "negative option" billing practices (new section 230(c));
- ▶ the extension of the scope of injunctive relief (new section 316).

Some of these amendments may impact the activities of numerous merchants. These new provisions merit study to clearly identify the meaning of the proposed changes and their practical effect on merchants' activities.

The Bill also adds to the regulatory powers of the government (section 350).

Some amendments were also made to the *Travel Agents Act*, *An Act respecting prearranged funeral services and sepulchres* and *An Act respecting the collection of certain debts*.

If adopted, the provisions of the Bill will come into force on the date or dates to be fixed by the government, no doubt in the fall of 2009 or the winter of 2009-10.

A. UNILATERAL AMENDMENT OF CONTRACTS GOVERNED BY THE CPA

These sections apply generally to all consumer contracts for which the CPA requires a written instrument. These new provisions are intended to inform the consumer of the conditions for the amendment or cancellation of the contract entered into with the merchant.

The new sections 11.2 and 11.3 of the CPA (a) prohibit any stipulation under which a merchant may unilaterally amend a contract, and (b) prohibit any contractual stipulation under which the merchant may unilaterally cancel a fixed-term service contract involving sequential performance. While there are some exceptions to these prohibitions, they are quite limited. The contract must expressly provide for the cases and conditions in which the merchant may amend a clause of its agreement with the consumer, and that the consumer must be given 60 days' notice thereof.

If the amendment entails an increase in the consumer's obligations, he may refuse the amendment and cancel the contract. He may also cancel the contract if the amendment entails a reduction in the merchant's obligations.

It is important to note that the new section 11.2 will not apply to the amendment of a variable credit contract under section 129 of the CPA. Interest rates may still fluctuate.

A merchant may not amend a provision in a contract relating to one of its essential terms (such as, for instance, the price, nature of the goods or services that are the subject of the contract, or the term of the contract), except in the case of a fixed-term service contract. This also is a provision of general application. These new provisions do not prevent the merchant from amending the contract during the term, but are intended to ensure that the consumer is informed ahead of time and has the opportunity to cancel the contract if he does not agree with or is disadvantaged by the amendments proposed by the merchant.

Any amendment to a contract in contravention of the proposed section 11.2 will be unenforceable against the consumer.

As for the proposed section 11.3 of the CPA, it provides that a merchant may not unilaterally cancel an indeterminate-term contract involving sequential performance unless it gives written notice thereof to the consumer at least 60 days before the cancellation date.

In the case of fixed-term service contracts, any stipulation pursuant to which the merchant may unilaterally cancel such a contract is prohibited. However, we are nevertheless inclined to believe that the merchant may still, pursuant to the general rules of the law of obligations, cancel a service contract if the consumer is in default. In our opinion, the legislator should have been more specific with respect to the cases in which merchants would nonetheless be justified in terminating a fixed-term service contract.

B. PROHIBITED OR INAPPLICABLE CLAUSES

The legislator also intends to amend section 13 of the CPA by providing that, from now on, any contractual stipulation requiring a consumer to pay charges, penalties or damages, other than accrued interest, upon the non-performance of his obligations, is prohibited.

This new section seeks to counteract certain case law according to which the current section 13 does not prohibit penal clauses intended to set the amount of the merchant's damages in advance upon the consumer's non-performance of an obligation.

However, it is quite realistic and reasonable from a commercial standpoint to expect that a merchant may sustain damages due to the cancellation of a contract by a consumer or the non-performance of the consumer's obligations. Moreover, this principle was recognized by the Quebec Court of Appeal. In addition, the courts always have the power to amend any such liquidated damages clause where they deem it unreasonable. One should also ask if accelerated payment clauses in case of default will still be allowed.

Furthermore, this new section would not prevent a merchant from claiming damages from a consumer, but it must then prove them in accordance with the balance of probabilities rule.

Further on, we will consider the special regime applicable to sequential performance service contracts, particularly Internet hosting and cell-phone contracts.

In the proposed section 19.1, the legislator has also provided that any clause, in a contract between a merchant and a consumer, that is not applicable in the province of Quebec must be immediately preceded by a prominently presented statement to this effect.

This provision will obviously affect the operations of many merchants. Efforts should be made here to ensure that merchants do not become victims of regional disparities because of the distinctiveness of certain Quebec statutes. Everyone is familiar with the old saying "*ignorance of the law is no excuse*". This saying should also apply to the consumer. Are we also to conclude here that the legislator recognizes that the rules will be different in Quebec? Is the legislator not bound by the agreements and models agreed on between the federal and provincial governments which are intended to harmonize certain rules of consumer law? The fact remains that, by adopting this provision, the legislator will be acknowledging that certain contractual clauses may be legal elsewhere but not in Quebec.

C. EXTENDED CONVENTIONAL WARRANTIES

Section 35.1 provides that before proposing to enter into a contract with a consumer that offers an extended conventional warranty on goods, the merchant must inform the consumer, orally and in writing, of the content of the legal warranty set out in section 38 of the *CPA*, as well as the existence of any manufacturer's conventional warranty.

This section is not particularly clear. The legislator would be wise to specify what is meant by "inform the consumer orally and in writing". Does this imply that the merchant and its staff must be versed in legal matters in order to be able to interpret section 38 of the *CPA* for consumers who make such a request? As for the conventional warranty, what does the disclosure of "the object and duration" of the warranty entail?

Understandably, the consumer needs to be aware of the content of the warranties attached to a product (whether legal or conventional) to avoid concluding an extended warranty contract when it is not really necessary.

Since one of the obvious reasons for the adoption of this new section 35.1 is to prohibit the sale of an extended conventional warranty unless it really provides the consumer with additional protection to the manufacturer's warranty, it is important to consider whether a "turnkey" warranty will meet these conditions, or whether such a program should not rather be characterized as after-sales service? What will happen to true after-sales service contracts? We must also consider how the information required for the purchase of an extended warranty will be disclosed for a contract concluded at a distance. These are just a few of the questions the courts will have to resolve if the Bill is passed.

For some time now, the Office de la protection du consommateur has been working on regulating the sale of extended warranties. Much has been written on the topic and it was even the subject of a class action suit. In our opinion, the legislator might well have considered a "middle ground", such as giving the consumer a grace period to cancel an extended warranty contract in certain very specific cases. Such a grace period would allow the consumer to make an informed decision about the warranty, while allowing merchants to fulfill their obligations without having to give legal training to their staff.

D. CONTRACTS FOR THE SALE OF PREPAID (GIFT) CARDS

Sections 187.1 and following constitute a new division of the Act, i.e. division V.1 dealing with the sale of prepaid cards, in the chapter on contracts. This division applies to the issue, sale and use of gift certificates, gift cards or any other similar medium of exchange that are paid in advance and allow a consumer to acquire goods or services from one or more merchants.

These provisions do not state whether they will govern gift cards issued as part of a promotion (therefore without payment of a consideration) or any cash-backs given by a merchant. We assume that this is not the case since the consumer makes no payment in these cases. The same should hold true for credit notes given under a product returns policy. Hopefully, the legislator will clarify these issues when the regulations are enacted, as was done in Ontario.

Section 187.2 of the *CPA* obliges the merchant to inform the consumer, before entering into a prepaid card contract, of the conditions applicable to the use of the card, and to explain how the consumer can check the balance on the card. If this information does not appear on the prepaid card, the merchant must provide it in writing to the consumer (187.2, paragraph 2).

Such an obligation raises the following questions: (a) are we to understand that the presence of terms and conditions appearing on the back of a prepaid card will constitute the disclosure under section 187.2, and (b), where the information does not appear on the card and the merchant has provided a copy thereof in writing to the consumer, should the merchant obtain confirmation from the consumer that he has read it? Might the contract itself be an external clause? The Bill does not require a written instrument for this type of contract. This will no doubt be remedied before the amendments come into force.

Section 187.3 of the *CPA* states that any stipulation providing for an expiry date on a prepaid card is prohibited unless the contract provides for unlimited use of a service. This provision is similar to provisions already in force in other jurisdictions, especially Ontario and California. Could gift certificates be imprescriptible? We would tend not to think so and, where the consumer does not use the certificate, the prohibition against an expiry date should not prevent the prescription of the merchant's obligations under the *Civil Code of Québec*, i.e. after three years.

Section 187.4 of the *CPA* provides that the consumer may not be charged for the issuance or use of a prepaid card. The provision does not state whether the consumer can be charged in the event of the loss or theft of a prepaid card, or what the consequences of any such loss or theft would be.

The legislator should harmonize these new provisions as much as possible with those already existing in the other provinces of Canada, since many issuers of such gift cards or prepaid cards do business across Canada and allow their customers to use these payment instruments in several provinces.

However, with respect to the sale of prepaid cards for services rendered at a distance, the question arises as to how the merchant will discharge its obligations, since this type of prepaid card will be subject to two different divisions under the new *CPA*, the division governing contracts for the sale of prepaid cards, and the division governing contracts involving sequential performance for a service provided at a distance.

E. CONTRACTS INVOLVING SEQUENTIAL PERFORMANCE FOR A SERVICE PROVIDED AT A DISTANCE

For the most part, this new division of the *CPA* applies to cell-phone contracts. Cable and satellite television, Internet access and/or hosting and alarm system protection service contracts would also be affected. The Office de la protection du consommateur reports having received and dealt with numerous complaints involving these types of contract, in particular, relating to the incomplete nature of certain representations made before the contract was drafted, the contractual terms and conditions, content and conditions for the cancellation thereof, and the penalties claimed by merchants. The legislator also states that it considered the impact of certain business practices on a more vulnerable customer base, namely young people.

We question whether certain after-sales service programs would not be governed by these provisions.

We might also question whether these new provisions are within the scope of the National Assembly's legislative power. A recent decision rendered on the issue of conversion costs and credit cards concluded that the *CPA* could apply in some areas under federal jurisdiction. It will be interesting to see if this question will be raised again in the context of the application of these provisions to the cell-phone and cable television industries.

The legislator intends to regulate contracts involving sequential performance for a service provided at a distance by, among other things, imposing several obligations on merchants, such as expressly informing the consumer when the terms and conditions of the contract are being amended and allowing the consumer to accept or refuse the amendment and terminate the contract, as the case may be.

These measures are part of a series of provisions and rules that also regulate the so-called negative option practice, which presumes that the consumer has given his consent, where no contrary indication is received from him. The legislator's intervention here on this subject is more general in nature.

Subsections 214.2 (a) to (n) of the *CPA* set out the mandatory information that must appear in contracts involving sequential performance for a service provided at a distance. This mandatory information includes the total value of the economic inducements given in consideration of the contract, in particular, the amount of any premium, including a partial rebate on the sale or lease price of goods or services purchased or leased when the contract was entered into.

The legislator wishes to ensure that the consumer always has all the information necessary to easily determine the total value of the economic inducements he has been given, whether upon the cancellation of the contract, or at any other time. The information on these economic inducements will be used to calculate the cancellation indemnity charged by the merchant and payable by the consumer in the event of the early termination of the contract.

In addition, the merchant must disclose all the optional services that the consumer chooses to add to the other services purchased, as well as the monthly rate for each optional service. The merchant must also disclose in the contract the manner in which the consumer may obtain any information on the user rates for services not included in the services purchased, as well as services that are available beyond the restrictions and limits of the contract, such as the geographical limits.

The contracts must also disclose the circumstances in which the consumer may rescind, cancel or amend the contract, as well as any conditions or costs associated therewith, and lastly, the conditions which the consumer must meet to terminate the contract upon its expiry.

Note that any clause in a contract with a term of more than 60 days which provides for the renewal of the contract upon the expiry thereof is prohibited (section 214.3), unless the renewal is for an indeterminate term.

Furthermore, the merchant must give written notice to the consumer between 90 and 60 days before the contract expiry date informing him of such date (214.4).

Section 214.6 of the *CPA* provides that the consumer may, at any time and at his discretion, cancel the contract upon written notice to the merchant. The cancellation takes effect when the notice is sent or on the date specified therein by the consumer. In such case, the only amount the merchant may claim from the consumer is the aforementioned cancellation indemnity (214.2). The merchant may not claim any cancellation indemnity from the consumer where the contract is cancelled due to the merchant's unilateral amendment thereof (214.6).

Where the consumer unilaterally cancels a fixed-term contract in consideration of which the merchant gave one or more economic inducements, the cancellation indemnity may not exceed the total value of the inducements given. The amount of this indemnity will decrease in accordance with the terms and conditions prescribed by regulation. The indemnity payable may not in any event exceed \$50 (214.7).

Where the consumer unilaterally cancels an indeterminate-term contract, the merchant may not claim any cancellation indemnity from him unless the merchant gives him a full or partial rebate on the sale price of the goods purchased in consideration for the said contract. However, the indemnity may not exceed the amount of the unpaid balance of the sale price of the goods when the contract was concluded (214.8).

Section 214.9 of the *CPA* provides that if the consumer has paid a security deposit, the merchant may not cancel a contract for failure to pay outstanding amounts under the contract when they fall due, for as long as the amounts due do not exceed the amount of the deposit. However, the merchant must notify the consumer in writing where it uses all or part of the security deposit to collect any amounts not paid when they fall due. Any security deposit not used after the contract is cancelled must be returned to the consumer within 30 days of the contract expiry date.

These new rules regulate new activities that have emerged particularly in recent years. The new provisions correspond to the complaints and comments that were received from consumers. The legislator's intention is to give the consumer greater freedom in the choice of his service provider. The industry will have to adapt to the course charted by the Bill. The legislator's avowed goal is to ensure that the consumer is no longer captive to his service contract. You can be sure, on the other hand, that the legislator has understood that it would also be opening the door to increased solicitation of the consumer by his service providers' competitors.

F. DISCLOSURE OF THE TOTAL PRICE PAYABLE BY THE CONSUMER

The Bill adds another paragraph to section 224 of the *CPA*. In accordance with this paragraph, and for the purposes of interpreting subsection 224(c), the price advertised by a merchant must include the total amount the consumer must pay for the goods or services. This total need not include the duties chargeable under a federal or provincial statute. Merchants must therefore include any amount in the retail price of the product which they are required to pay, such as a charge to an environmental organization, even where they do not retain the amount.

When this provision takes effect, it will force merchants doing business across Canada to adopt practices and policies specific to the province of Quebec, since merchants outside Quebec are not required to disclose the total price and may bill separately for any amounts payable to environmental organizations.

G. PROHIBITION OF SO-CALLED "NEGATIVE OPTION" BILLING PRACTICES

Subsection 230(c) prohibits the merchant from requiring the consumer, to whom goods or services have been provided or rendered free of charge or at a reduced price for a fixed period, to send a notice at the end of such period indicating that he does not wish to obtain such goods or services at the regular price. This negative option billing practice is routinely used in telemarketing. Note that this section does not apply to all types of negative option billing. The option may still be offered to consumers where the goods or services are not provided at a discount for a fixed period. With respect to service contracts, the merchant must still comply with the provisions of section 214.6, which entitles the consumer to cancel a contract at any time that involves the sequential performance of a service provided at a distance.

H. EXTENSION OF THE SCOPE OF INJUNCTIVE RELIEF

Section 316 broadens the cases in which the courts of law may render orders against prohibited business practices.

This section also provides that where a consumer advocacy body has been constituted as a legal person for at least one year, it may apply for an injunction and will, for this purpose, be deemed to have the requisite interest to bring actions, suits or other legal proceedings.

Where an order is not complied with, it may be the subject of a motion for contempt of court brought by the president of the Office de la protection du consommateur, or by the consumer advocacy body referred to in the foregoing paragraph.

We question the rationale for the broadening of this power. Several organizations have already assumed the mantle of defending the weak and oppressed, and an increase has been observed in recent years in class action suits that were more or less well-founded. The courts already have very broad powers under the *CPA*. It would have been preferable to have introduced more stringent conditions in the form of a screening procedure for such bodies and the proceedings they propose to bring, to prevent abuse.

I. TRANSITIONAL PROVISIONS

The sections of the Bill dealing with prohibited contractual provisions will not apply to contracts that are already in effect when the Bill comes into force. However, provisions in existing contracts that are contrary to the proposed sections 13 (penal clauses) and 187.3 (gift cards with expiry dates) of the *CPA* will be without effect for the future.

J. REGULATORY POWERS

The legislator intends to amend the *CPA* to provide for additional regulatory powers and, in particular, the power to "identify prohibited contract stipulations, in addition to those provided for in this Act".

It would not be surprising if the addition of these regulatory powers were largely influenced by submissions made by the Office de la protection du consommateur. We trust that this power will be exercised with moderation and justification.

K. OTHER LEGISLATIVE AMENDMENTS

The Bill also proposes certain amendments to the *Travel Agents Act*, *An Act respecting prearranged funeral services and sepultures* and *An Act respecting the collection of certain debts*.

The principal amendment to the *Travel Agents Act* provides for an extension of the prescription period for penal proceedings to two years. This measure was necessary to harmonize the prescription period under the *Travel Agents Act* with the prescription periods under other statutes which are also monitored by the Office de la protection du consommateur.

A similar provision was incorporated into the *Act respecting prearranged funeral services and sepultures*.

The sole amendment made to the *Act respecting the collection of certain debts* was the insertion in the Act of section 14.1. This section provides that the president of the Office de la protection du consommateur may refuse to issue and may suspend or cancel a permit if the applicant or holder has failed to comply with a voluntary undertaking made under the *CPA* or whose application has been extended by an order-in-council.

CONCLUSION

The purpose of these amendments, if adopted, is to adapt the *CPA* to the business practices of certain developing sectors and thereby provide for their regulation. These amendments reflect the main comments and complaints received by the Office de la protection du consommateur in recent years and endeavour to provide a response to the main issues they raise. However, in our view, the legislator should be concerned with harmonizing these new provisions with those of the other provinces.

The *CPA* is increasingly becoming a tool for imposing transparency on merchants in their dealings with consumers, who will be even more protected with the adoption of these new provisions. Chances are that they will require interpretation by the courts in the not-so-distant future. Hopefully, they will benefit consumers who have been cheated, but will not be used to obstruct the legitimate and justified practices of merchants.

As Justice Beaugard of the Quebec Court of Appeal noted in a judgment rendered in 1981:¹ [translation] "The purpose of the *Consumer Protection Act* is to protect consumers from practices that are judged abusive, not to arm them with the means of evading their obligations by relying on technicalities."

LUC THIBAudeau ► 514 877-3044 ► lthibaudeau@lavery.ca

¹ *Crédit Ford du Canada v. Gelineau* [1981] C.A. 638, at page 644.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE COMMERCIAL LITIGATION GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

AT OUR MONTREAL OFFICE

SYLVIE BOULANGER 514-878-5592 sboulanger@lavery.ca
 PIERRE BOURQUE 514-878-5519 pbourque@lavery.ca
 LOUISE CÉRAT 514-877-2971 lcerat@lavery.ca
 JULIE COUSINEAU 514-877-2993 jcousineau@lavery.ca
 C. FRANÇOIS COUTURE 514-878-5528 fcouture@lavery.ca
 EUGÈNE CZOLIJ 514-878-5529 eczolij@lavery.ca
 PHILIPPE D'ETCHEVERRY 514-877-2996 pdetcheverry@lavery.ca
 MARIE-HÉLÈNE FANDRICH 514-877-3095 mhfandrich@lavery.ca
 JOCELYNE GAGNÉ 514-878-5542 jgagne@lavery.ca
 NICOLAS GAGNON 514-877-3046 ngagnon@lavery.ca
 JULIE GRONDIN 514-877-2957 jgrondin@lavery.ca
 RICHARD HINSE 514-877-2902 rhinse@lavery.ca
 BERNARD LAROCQUE 514-877-3043 blarocque@lavery.ca
 JEAN LEGAULT 514-878-5561 jlegault@lavery.ca
 PIERRE M. LEPAGE 514-878-5562 plepage@lavery.ca
 JEAN-PHILIPPE LINCOURT 514-877-2922 jplincourt@lavery.ca
 PAMELA MCGOVERN 514-877-2030 pmcgovern@lavery.ca
 J. VINCENT O'DONNELL 514-877-2928 jvodonnell@lavery.ca
 FRANÇOIS PARIZEAU 514-878-5671 fparizeau@lavery.ca
 MARTIN PICHETTE 514-877-3032 mpichette@lavery.ca
 ÉLISE POISSON 514-877-2906 epoisson@lavery.ca
 PATRICE RACICOT 514-877-2947 irose@lavery.ca
 JEAN-YVES SIMARD 514-877-3039 jysimard@lavery.ca
 MARC TALBOT 514-877-3035 mtalbot@lavery.ca
 LUC THIBAudeau 514-877-3044 lthibaudeau@lavery.ca
 MATHIEU THIBAUT 514-878-5574 mthibault@lavery.ca
 VINCENT THIBEAULT 514-877-3003 vthibeault@lavery.ca
 BRUNO VERDON 514-877-2999 bverdon@lavery.ca
 EMIL VIDRASCU 514-877-3007 evidrascu@lavery.ca
 JONATHAN WARIN 514-878-5616 jwarin@lavery.ca

AT OUR QUEBEC CITY OFFICE

PIERRE BEAUDOIN 418-266-3068 pbeaudoin@lavery.ca
 MARTIN-J. EDWARDS 418-266-3078 medwards@lavery.ca
 SOPHIE GINGRAS 418-266-3069 sgingras@lavery.ca
 CLAUDE LAROSE 418-266-3062 clarose@lavery.ca
 LOUIS ROCHETTE 418-266-3077 lrochette@lavery.ca
 MADELEINE ROY 418-266-3074 mroy@lavery.ca

AT OUR OTTAWA OFFICE

MARY DELLI QUADRI 613-560-2520 mdquadri@lavery.ca
 JACQUES Y. DESJARDINS 613-560-2522 jdesjardins@lavery.ca
 BRIAN ELKIN 613-560-2525 belkin@lavery.ca

SUBSCRIPTION: YOU MAY SUBSCRIBE, CANCEL YOUR SUBSCRIPTION OR MODIFY YOUR PROFILE BY VISITING PUBLICATIONS ON OUR WEBSITE AT lavery.ca OR BY CONTACTING CAROLE GENEST AT 514 877- 3071.

► lavery.ca

© Copyright 2009 ► LAVERY, DE BILLY, L.L.P. ► BARRISTERS AND SOLICITORS
 The content of this text provides our clients with general comments on recent legal developments.
 The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.

MONTREAL QUEBEC CITY LAVAL OTTAWA