NEED TO KNOW EXPRESS

JULY 2014

LABOUR AND EMPLOYMENT

lavery
LAW ▸ BUSINESS

# THE ASPHALTE DESJARDINS MATTER: THE SUPREME COURT OF CANADA OVERTURNS THE DECISION OF THE QUÉBEC COURT OF APPEAL

By Guy Lavoie and Élodie Brunet

On July 25, 2014, the Supreme Court of Canada rendered its decision in *Québec (Commission des normes du travail)* v. *Asphalte Desjardins inc.*[1] In this ruling, which overturned a judgment by the Québec Court of Appeal,[2] the Supreme Court concluded that an employer who receives notice of termination within a reasonable time period, as stipulated under article 2091 of the *Civil Code of Québec*[3] ("C.C.Q."), cannot, in turn, unilaterally and immediately terminate a contract of employment of an indeterminate term without having to give the employee notice of termination or pay an indemnity in lieu of such notice.

On March 19, 2013, the majority of the Québec Court of Appeal reversed the prevailing trend in the case law which held that where an employee gives notice to his employer of his intention to resign, the employer may waive the notice, provided it compensates the employee for the remainder of the period.

What follows is a brief analysis of the decisions rendered by the Québec Court of Appeal and the Supreme Court of Canada in this matter.

## The decision of the Québec Court of Appeal

In its decision, the Québec Court of Appeal proceeded with an analysis of the legal principles in dispute: the option of a party to an indeterminate term employment contract to unilaterally terminate it by giving reasonable notice of termination to the other party (article 2091 of the C.C.Q.) and the obligation of the employer to provide the minimum notice of termination of employment stipulated in the *Act respecting Labour Standards*[4] (the "Act") before terminating the employee's contract of employment (section 82 of the Act). Essentially, a majority of the Court of Appeal concluded that the right to reasonable notice of termination set out in article 2091 of the C.C.Q. benefits the party who receives it. However, the option to give notice is not elevated to the status of a "right" which may be invoked against the party who receives said notice. Consequently, in a case like that of *Asphalte Desjardins inc.*, the latter could, in its capacity as employer, waive the notice of termination given by its employee, completely or in part, without having to provide the notice of termination of employment stipulated at section 82 of the Act. In reality, it was the employee who had terminated the contract and not the employer.

We should point out that in the specific case of *Asphalte Desjardins*, the employee in question, a project manager who had access to the company's confidential information, was resigning in order to go work for a competitor. Asphalte Desjardins inc.'s decision to request that the employee leave immediately instead of on the announced departure date was due in part to the risk to the employer by maintaining the employment of an employee with access to sensitive information, while knowing full well that the employee would be working for a competitor in a few weeks.

## The decision of the Supreme Court of Canada

The Supreme Court of Canada overturned the Québec Court of Appeal's decision and concluded that an employer who receives reasonable notice of termination cannot, in turn, unilaterally terminate a contract of employment with an indeterminate term without itself giving notice of termination or paying an indemnity in lieu of such notice which includes at least the notice of termination of employment provided at section 82 of the Act.

The Court found that a contract of employment with an indeterminate term is not terminated when notice of termination is given. On the contrary, the contractual relationship continues to exist until the date specified in the notice of termination. Consequently, even after one of the parties to an indeterminate term contract of employment delivers notice of termination to the other party, both parties are bound to continue performing their obligations under the contract until the notice period expires. This includes the obligation of the party wishing to terminate the contract of employment prior to the expiration of the notice period provided by the other party, to in turn give notice of termination. In the opinion of the Court, it is inappropriate to deal with the issue from the perspective of "renunciation" of the notice period, and such an approach cannot have the effect of permitting a party to derogate from its obligations to the detriment of the other party's rights.

In essence, if the employer refuses to allow the employee to continue his or her employment and to pay him or her during the notice period provided, the employer will in effect be "terminating the contract" within the meaning of section 82 of the Act. However, this would not be the case if the employee were to announce his or her immediate resignation, offering, nonetheless, to continue working for a certain time. In such a case, the Court specifies that if the employer does indeed want the employee to leave immediately, there is a meeting of minds and notice of termination is unnecessary given that a contract for an indeterminate term can be terminated by agreement between the parties. Moreover, the Court added that the notice period chosen unilaterally by the employee cannot be imposed on the employer, a useful clarification in cases where an employee might give an unreasonably long notice period.[5]

Finally, the Court concluded that the Commission des normes du travail may claim an indemnity equal to three weeks' salary on the employee's behalf in respect of the balance of the notice given by the employee, together with the amount due in respect of the annual leave.

## Observations

It is worth noting that the fact that the departing employee had announced that he would be leaving to go work for one of Asphalte Desjardins inc.'s competitors does not appear to have played a particularly strong role in the reasons of the Supreme Court of Canada. Having been called upon to resolve a controversy in the case law, the Court elected to clarify certain general legal principles based on an analysis of the provisions set out in the *Act respecting Labour Standards* and the *Civil Code of Québec*, and set aside the analysis of the Court of Appeal. The Supreme Court also held that employees are "vulnerable" parties.[6] The Court went on to add that since the employee had not claimed the full indemnity stipulated in sections 82 and 83 of the Act, "it is preferable to leave the question of whether the notice period provided for in section 82 of the Act and the equivalent indemnity provided for in section 83 are matters of directive or protective public order for another occasion".[7]

From an employer's standpoint, it may appear unfair to have to pay an indemnity to an employee who has just announced that he or she is resigning in order to work for a competitor, whereas it would appear natural to refuse the right of the departing employee to remain on the job given his or her likely access to sensitive information. In practical terms, isn't an employee who resigns to go work for a direct competitor in a position to benefit from the notice of termination given, to the detriment of the employer? For an employer, having to pay the salary of an employee who has chosen to join the competition most certainly adds insult to injury, especially in those cases where, due to the circumstances, it is quite clearly the company that is the "vulnerable" party.

In any case, a subsequent decision on the directive or protective public order nature of sections 82 and 83 of the Act will most certainly be an interesting development and could serve to complete the analysis developed by the Supreme Court in the *Asphalte Desjardins* case.

Lavery will be monitoring the application of this Supreme Court decision and will keep you informed of any prevailing trend in the case law or noteworthy development in this regard.

---

[1] 2014 SCC 51 ("*Asphalte Desjardins*").
[2] *Asphalte Desjardins inc.* v. *Commission des normes du travail*, 2013 QCCA 484.
[3] LRQ c C-1991.
[4] CQLR c N-1.1.
[5] *Asphalte Desjardins*, par. 44.
[6] Id., par. 64.
[7] Id., par. 71.