NEED TO KNOW

OCTOBER 2015

lavery Lawyers

Class Actions

CONSUMER LAW AND CLASS ACTIONS: BEWARE OF UNILATERAL AMENDMENTS TO CONTRACTS INVOLVING SEQUENTIAL PERFORMANCE

BENJAMIN DAVID GROSS, LUC THIBAUDEAU, MYRIAM BRIXI, DESPINA MANDILARAS and ANNE-SOPHIE LAMONDE

with the collaboration of Sibylle Ferreira, articling student, and Sophie Labrecque, student-at-law

LAVERY CLOSELY MONITORS NEW DEVELOPMENTS IN CONSUMER LAW CLASS ACTIONS AND IS COMMITTED TO KEEPING THE BUSINESS COMMUNITY INFORMED OF THE LATEST DEVELOPMENTS IN THIS AREA OF THE LAW BY REGULARLY PUBLISHING NEWSLETTERS DEALING WITH NEW CASE LAW OR LEGISLATIVE CHANGES WHICH MAY IMPACT, INFLUENCE, OR EVEN TRANSFORM PRACTICES IN THIS AREA.

Over the past 18 months, the Superior Court of Québec, in three class actions [1], conducted an analysis of unilateral amendment clauses [2] in service contracts pertaining to the telecommunications industry. In these decisions, which we will refer to hereinafter as the "Telecom Trilogy", the Court refused to recognize the validity of the clauses that were submitted to it and ordered the restitution of additional fees paid by consumers pursuant to rate changes.

The Court highlighted the importance of disclosing to a co-contracting party the entire range of fees that such party may be called upon to pay over the term of a service contract, including related or additional fees. [3] The disclosure of fees is subject to strict parameters set out in the provisions of the *Consumer Protection Act* [4] and the *Civil Code of Québec*. [5]

These cases reiterate, as a matter of principle, the importance of a fixed-term service contract's enforceability, with little regard for the inherent risks to which merchants are exposed due to the unpredictability of market conditions. In a fixed-term contract, merchants are generally the ones assuming such risks. [6] However, in the context of an indeterminate-term contract, the consumer, upon receipt of the notice of amendment sent by the merchant, must decide whether to accept such amendments and the new terms of the contract or to terminate the contract.

---

1 *Laflamme* v. *Bell Mobilité Inc.*, 2014 QCCS 525 (2014-02-18), inscription in appeal, 2014-03-18 (C.A.) ("*Laflamme*"); *Martin* v. *Société Telus Communications*, 2014 QCCS 1554 (2014-04-08), inscription in appeal, 2014-05-08 (C.A.) and Application to dismiss the appeal, 2014-05-28 (C.A.) ("*Martin*"); *Union des consommateurs* v. *Vidéotron s.e.n.c.*, 2015 QCCS 3821 (2015-08-21) ("*Union*").

2 A unilateral amendment clause allows a contracting party, in this case, the service provider, to make changes to a contract prior to its expiry.

3 It is to be noted that the qualification of such fees (related or additional) has yet to be analyzed.

4 CQLR, c. P-40.1 ("C.P.A."), sections 11.2 et 12.

5 CQLR, c. C-1991 ("C.C.Q."), articles 1373 et 1374.

6 Subject to the distinctions discussed in this article.

UNILATERAL AMENDMENT CLAUSES AND SECTION 12 OF THE C.P.A.

In the three cases analyzed by the Superior Court, the service contracts contained clauses allowing for the unilateral amendment by the service provider of certain contractual terms and conditions, including rates and/or usage fees, upon delivery of a 30 days' written notice.[7] In two of those cases, the service provider had introduced new fees that applied to incoming text messages, whereas in the other case, the service provider had set an internet usage allowance system that resulted in increased charges to the user. In all three cases, the service providers had provided their clients with 30 days' prior notice of the amendments to the terms of the contract. The Court found that the amendment procedure that was followed breached section 12 of the C.P.A., which prohibits merchants from claiming fees from the consumer when they are not precisely indicated in the contract.[8] The objective of the provision is to [TRANSLATION] "*ensure that the consumer enters into a consumer contract in an informed manner*"[9], with a clear understanding of the circumstances.

The unilateral amendment clauses contained in the service providers' contracts failed to set out objective criteria specifying the nature or frequency of such future amendments or increases[10], which resulted in the consumer being unable to specifically foresee the magnitude of further cost increases that would be added to the obligations already set out in the initial contract.

UNILATERAL AMENDMENT CLAUSES AND THE CIVIL CODE OF QUÉBEC

In the *Laflamme* case, the Court also analyzed this issue in the light of the provisions of the C.C.Q.[11] Article 1373 C.C.Q. states that a prestation arising out of a contract must be "*possible and determinate or determinable*". Article 1374 C.C.Q. adds that the prestation "*may relate to any property, even future property, provided that the property is determinate as to kind and determinable as to quantity*". In applying these provisions, Justice Nantel determined that a unilateral amendment clause is not automatically invalid, but that in order to be valid, it must contain the following elements:

- The subject of the modification; and
- Prior indications, objective criteria and thresholds that [TRANSLATION] "*are not solely controlled by the beneficiary of the clause*"[12] allowing for the co-contracting party [TRANSLATION] "*to anticipate the triggering event and the extent of the modification*".[13]

In Laflamme, the terms of the unilateral amendment clause[14] did not make it possible to establish or clearly determine the specific value of the increase in costs which may result from such an amendment to the contract, making such clause illegal under the C.C.Q.

UNILATERAL AMENDMENT CLAUSES AND SECTION 11.2 C.P.A.

On June 30, 2010, the legislator introduced section 11.2 C.P.A. which, in certain circumstances, allows for the unilateral amendment of consumer contracts where prescribed conditions are met,[15] such as the delivery by the merchant of a 30 days' prior notice to the consumer stating the nature of the amendment, its effective date, as well as the right of the consumer to refuse it and terminate the contract without penalty up to 30 days after the amendment becomes effective.

However, under section 11.2 C.P.A., the amendment of an *essential element* of a fixed-term contract is prohibited, which includes the nature of such goods or services that are the object of such contract, the price of the goods or services or, if applicable, the term of the contract.

---

7 Each of the service contracts contained terms such as "*upon not less than 30 days notice*", "*subject to a minimum notice period of 30 days*", or "*after having provided you with a 30 day notice*".

8 *Laflamme*, par. 46.

9 *Martin*, par. 37.

10 *Martin*, par. 38.

11 One of the subclasses of the class action was not composed of consumers within the meaning of the C.P.A.

12 *Garderie éducative La Souris Verte inc.* v. *Chrétien*, 2010 QCCS 4843, par. 49, cited in *Laflamme*, par. 66.

13 *Laflamme*, par. 66.

14 The clause was drafted as follows: "We will not increase your basic monthly voice Plan or excess airtime charges during the course of the commitment period, provided that you remain eligible, throughout the entire commitment period, for the Plan and the services you have chosen. (...) During the term, we may increase other charges (including network access fees), and may also charge additional fees after having provided you with a 30 day prior notice". (*Laflamme*, par. 33.)

15 Sections 11.2 and 12 C.P.A. apply to all types of consumer contracts. We are only discussing their application within the context of telecommunications service contracts; however the basic principles remain the same, regardless of the type of contract, with the exception of variable credit contracts pursuant to section 129 C.P.A., to which the rules set out in section 11.2 C.P.A. do not apply.

To date, no court has applied or interpreted section 11.2 C.P.A., which was not applicable in the context of the three class actions discussed above, since the contested clauses were used by the suppliers prior to this provision being passed. However, Justice Paquette, in *Martin*, commented on the matter.[16] She noted that section 11.2 C.P.A. was passed in line, and not inconsistently with section 12 C.P.A. and that its purpose is to consolidate the principle according to which the consumer must not be taken by surprise. She concluded that had section 11.2 C.P.A. been in force when the supplier increased the cost of a service included in the contract, the amendment would have been unenforceable against the consumer since the consumer could not terminate the contract without penalty. Moreover, the amendment was made in respect of the price, which is an essential element of the contract that cannot be modified, notwithstanding section 11.2 C.P.A., given the fact that the contract was for a fixed-term.

Although section 11.2 C.P.A. provides for a strict process that merchants must follow when amending the terms of a consumer contract, it appears from the interpretation of the Court in the Telecom Trilogy, that this provision is nevertheless more flexible than articles 1373 and 1374 C.C.Q. Indeed, section 11.2 C.P.A. does not require that a unilateral amendment clause contain [TRANSLATION] "*predetermined indications which [...] illustrate the type of amendments which may be brought about*" or of the "*objective criteria and markers*". Furthermore, section 11.2 does not include any requirement for [TRANSLATION] "*the clause [...] to clearly allow the consumer to have detailed knowledge of the amount of the fees which will be charged to him for any given service during the contract*".

RECONCILING THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION'S (THE "*CRTC*") WIRELESS CODE AND SECTION 11.2 C.P.A.

The *Wireless Code* adopted by the CRTC (the "**Code**") came into force on December 2, 2013. It is the result of a series of consultations with various stakeholders of the telecommunications industry and aims to regulate its practices. The *Code* prohibits telecommunication enterprises from unilaterally amending the main clauses in their service contracts, but not the other terms therein. Nothing is specified in respect of amendments to other terms where they would affect the price. The *Code* was invoked in two cases, and the Court explicitly dealt with the argument in the *Martin* case.

However, the judges concluded that the *Code* could not apply to the facts put before them as such facts had occurred prior to its coming into force.

Justice Paquette did however mention that the terms of the contract dealing with pay-per-use services, such as text messaging fees, were not considered to be key terms, and could therefore be unilaterally amended pursuant to the Code.[17] This interpretation will certainly be the subject of comments and reactions. The interpretation of "principal terms" and "accessory terms" will most likely be the subject of a debate to be closely followed in the coming years.

Courts may soon answer these questions as a class action against two other service providers was recently authorized by the Superior Court of Québec, whose decision was upheld by the Court of Appeal.[18]

THE PENALTIES

Merchants who do not comply with section 12 C.P.A. are liable to the penalties listed at section 272 C.P.A.[19], including the possibility for the consumer to ask for the termination of the contract and the award of punitive damages. In each of the Telecom Trilogy cases, the Court ordered that the clients be compensated for the additional fees they incurred as a result of the amendments to their contracts. In *Union*, the Court also awarded punitive damages in favour of one of the subclasses[20], since the provider had failed to inform its new clients, who entered into same contracts, of the imminent increase in fees despite the fact that the decision to increase such fees had already been made. In the Court's opinion, the provider had failed to communicate an important fact, in breach of section 228 C.P.A. This breach, alone, justified the granting of punitive damages for an amount of $500 per member of the subclass. The Court's award of punitive damages illustrates that a class action award can amplify the C.P.A.'s deterrent force.

---

[16] *Martin*, par. 59-63.

[17] *Martin*, par. 67.

[18] *Amram* v. *Rogers Communications inc.* (and Fido Solutions inc.), 2012 QCCS 4453. Leave to appeal granted for the sole purpose of modifying some paragraphs of the judgment in the first instance, 2015 QCCA 105. Leave to appeal to the Supreme Court dismissed (S.C.C., 2015-09-24).

[19] For further information concerning the application of this section, please see our newsletter *Need to Know* published in August 2015: http://www.lavery.ca/en/publications/our-publications/1882-nouveautes-en-droit-de-la-consommation.html.

[20] The subclass consisted of members who had subscribed to an extreme high-speed internet plan after June 28, 2007.

COMMENTS

The Telecom Trilogy reminds merchants that they must disclose the amount of all fees that will be charged to their clients. Furthermore, section 11.2 C.P.A. adds to this principle a number of procedures for merchants to follow when relying on a unilateral amendment clause. These three decisions were appealed. It will be interesting to see whether the Court of Appeal will clarify the scope of section 11.2 C.P.A. and define the conditions under which such provision may cohabit with section 12 C.P.A. We might also wonder if the CRTC's policy will soften the application of the C.P.A. and give service providers arguments that focus the debate, not on price, but rather on distinctions as to what constitutes "principal terms" versus "accessory terms" of a contract.

Other decisions are anticipated in respect of unilateral contractual amendments. We might consider, for example, loyalty programs.[21] Indeed, two class actions in which it is alleged that illegal amendments of such programs were made have already been authorized[22], and a third application was recently filed.[23] It is to be expected that the courts will, in a subequent trilogy, provide additional clarifications in respect of the rights and obligations of merchants when amending consumer contracts unilaterally.

BENJAMIN DAVID GROSS
514 877-2983
bgross@lavery.ca

LUC THIBAUDEAU
514 877-3044
lthibaudeau@lavery.ca

MYRIAM BRIXI
514 878-5449
mbrixi@lavery.ca

DESPINA MANDILARAS
514 877-3067
dmandilaras@lavery.ca

ANNE-SOPHIE LAMONDE
514 878-5528
aslamonde@lavery.ca

[21] For a brand, business or an organization, consumer loyalty management is the art of creating and managing a durable personal relationship with each of its clients, particularly by awarding them benefits such as discounts or gifts once they have accumulated points earned through previous purchases.

[22] *Option consommateurs* v. *Corporation Shoppers Drug Mart*, 2012 QCCS 1078; *Neale* v. *Groupe Aéroplan inc.*, 2012 QCCS 902.

[23] Proceedings filed against the Toronto Dominion Bank on July 17, 2015: https://services.justice.gouv.qc.ca/DGSJ/RRC/DemandeRecours/DemandeRecoursRecherche.aspx.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE CONSUMER LAW GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

MYRIAM BRIXI mbrixi@lavery.ca 514 878-5449
DAVID ERAMIAN deramian@lavery.ca 514 877-2992
BRIGITTE M. GAUTHIER bgauthier@lavery.ca 514 878-5546
BENJAMIN DAVID GROSS bgross@lavery.ca 514 877-2983
ÉTIENNE GUERTIN eguertin@lavery.ca 514 877-2940
ANNE-SOPHIE LAMONDE aslamonde@lavery.ca 514 878-5528
DESPINA MANDILARAS dmandilaras@lavery.ca 514 877-3067
JEAN SAINT-ONGE jsaintonge@lavery.ca 514 877-2938
LUC THIBAUDEAU lthibaudeau@lavery.ca 514 877-3044
JEAN-PHILIPPE TURGEON jpturgeon@lavery.ca 514 877-2932

SUBSCRIPTION: YOU MAY SUBSCRIBE, CANCEL YOUR SUBSCRIPTION OR MODIFY YOUR PROFILE BY VISITING PUBLICATIONS ON OUR WEBSITE AT lavery.ca OR BY CONTACTING VICTOR BUZATU AT 514 878-5445.

▸ lavery.ca