Update: Subscriptions to digital and at-a-distance services in Québec

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This is the latest article in our series on Québec consumer law.

In Québec, specific rules apply to subscriptions to subscription-based services that are provided at a distance to consumers. These rules (the Rules) are found in a section of the *Consumer Protection Act* (the CPA) entitled "Contracts involving sequential performance for a service provided at a distance."[1]

In a decision rendered earlier this year, the Court of Appeal confirmed the particular scope of the Rules when it upheld the Superior Court's decision.

The Court took the opportunity to present situations where the Rules may apply. They include subscriptions to:

- mobile and residential telephone service;
- cable television;
- Internet access;
- online video games, remote monitoring services, or satellite radio services;
- databases and cloud data storage.[2]

The result is that subscriptions to services provided to consumers online are likely to fall within the scope of these provisions, in addition to mobile and residential telephone services.

Why are the details provided by the Court of Appeal illuminating?

The scope of these Rules, outside of the telecommunications sector (e.g., mobile phone service) and remote monitoring services (e.g., alarm systems connected to an alarm central), was not necessarily clear, as explained hereafter.

As one consumer law author explains, despite the Rules' broad scope and apparent technological neutrality, the legislator seemingly intended to target primarily cellular contracts, Internet or cable services, satellite television services and remote monitoring

services.[3] In discourse on consumer law, other authors have specified that, while the Rules section appears general in scope at first, it is in fact intended to govern contracts between telecommunications companies and consumers.[4]

The previous Court of Québec decision, in the case that led to the Court of Appeal judgment at hand, noted some ambiguity as to the true nature of the provisions at issue.[5] Indeed, all of the higher courts' decisions to date on the Rules have been rendered in cases related to telecommunications.

These questions are not novel. At the time the Rules were adopted, during a detailed study by a parliamentary committee, the members of parliament questioned the practical scope of the provisions and expressed related concerns. At the time, the Young Bar of Montréal highlighted that section 214.1 of the CPA, the section that sets out the scope of application of the Rules, was broad and imprecise as to the scope of application and suggested that it be clarified, which was not done.[6] The Barreau du Québec made comments to the same effect, recommending that explicit mention be made of the contracts covered in what was to become the section devoted to *Contracts involving sequential performance for a service provided at a distance.*[7]

In this context, the Court of Appeal decision helps clarify the scope of the rules.[8]

Summary of rules applicable to subscriptions to digital and other distance services

Mandatory content of the contract

First, the contract must be in writing and include the items listed:

- Names and addresses of consumer and the merchant
- Merchant's phone number and technological address (e.g., email address) and merchant
- Place and date of contract execution
- Contract term and expiry
- Detailed description of each service covered by the contract
- The monthly rate for each service covered by the contract (including optional services), or the monthly cost if the rate is calculated on a basis other than monthly
- The monthly rate for each related fee, or the monthly cost if the rate is calculated on a basis other than monthly
- The total amount the consumer must pay monthly under the contract
- Restrictions on the use of each of the contracted services, including the geographic limits within which such services may be used
- Description and list price of any good sold or offered as a bonus in connection with the service (e.g., a modem for Internet access) This description must specify if the item is refurbished
- Description of any bonus services (e.g., discounted or free services)
- Nature of the economic inducements given by the merchant in consideration of the contract, including such bonuses as a partial discount on the price of a good or service purchased or rented on the making of the contract (N.B.: this

requirement was drafted with an eye to discounts on mobile devices, which are often granted when subscribing to a cell phone service)
- The total amount of the economic inducements to be used to calculate the cancellation penalty that may be required from the consumer
- A statement that only the economic inducements identified in the contract will be used to calculate the penalty for termination by the consumer
- The method of obtaining rates for services that do not appear in the contract or exceed its limitations and restrictions
- The circumstances required for the consumer to terminate or amend the contract, and the nature and value of the fees to be charged
- Conditions that must be met for a consumer to terminate the contract before the end of the term

These elements must all be stated clearly and legibly at the beginning of the contract.

Regulation of automatic renewals

If the contract is for more than 60 days, automatic renewal is allowed only on an open-ended basis. For example, if the subscription is for a one-year period, automatic renewal for an additional one-year period upon expiry is prohibited.

For automatic renewal of a contract with an initial term of more than 60 days, written notice must be provided to the consumer between the 90th and 60th day prior to renewal. This notice must inform the consumer of the renewal date.

The consumer may terminate the contract at any time

The consumer may terminate the contract at any time, even if a term is specified. To do so, the consumer must send a written notice to the service provider. In practice, this means that the CPA and its regulations limit the amounts that can be claimed from the subscriber as a cancellation penalty.[9]

For example, in the case of a fixed-term contract, the maximum amount that can be claimed as a cancellation penalty is $50 or less in some cases, particularly where the customer has not received any economic inducement for signing the contract.

Other rules that apply specifically to these contracts

When access to a service requires the use of an item purchased or leased by the consumer from the merchant, the CPA regulates the fees that may be charged to the consumer during repair of the item.[10]

It also regulates practices regarding security deposits.[11]

Some other CPA rules of interest that apply

The CPA also sets out several other rules that may have an impact on the content of the contracts at issue. These rules generally apply to all contracts covered by the *Consumer Protection Act* and are therefore not specific to contracts for the sequential provision of a service at a distance.

Examples include rules governing contract amendments and rules prohibiting arbitration clauses or excluding the application of Québec law. Depending on whether the contract is signed in person or at a distance, other rules will also apply. If the service is paid for by credit card, there are further rules regarding pre-authorized debits.

What is the scope of the Rules?

For these Rules to apply, there must be a consumer contract as defined by the CPA. This means, in particular, that subscription contracts between two companies for online services are not subject to these rules.[12]

The contract must also be for the recurring provision of a service provided at a distance. As the Court of Appeal explains, this could be a subscription to a service providing online video games or providing alarm and monitoring systems that are centrally monitored.

However, these Rules should not apply to a contract whose primary purpose is the supply of goods rather than services. For example, they should not apply to a home-delivered subscription to a printed periodical, nor to a contract for the recurring supply of goods,[13] even if the merchant allows subscription at a distance. These are not contracts for the performance of "services provided at a distance".

Finally, these Rules do not apply to financial services contracts, lottery subscriptions or contracts with a travel agent. Such contracts are expressly excluded from the scope of the Rules. Exclusions also apply to educational, training and support services.

If you have any questions about the Rules or this article, please contact our team of commercial lawyers. Several of our team members have extensive experience in the preparation of consumer contracts and regularly provide advice on consumer law and the *Consumer Protection Act*.

[1] Sections 214.1 to 214.11 of the CPA.

[2] Paragraph 25 of the Court of Appeal judgment.

[3] Pierre-Claude Lafond, *Droit de la Protection du consommateur: Théorie et pratique*, 2nd edition, Éditions Yvon Blais, Montréal, p. 108.

[4] Nicole L'Heureux and Marc Lacoursière, *Droit de la consommation*, 6th edition, Éditions Yvon Blais, Cowansville, 2011, p. 381.

[5] See paragraph 136 of the decision.

[6] Young Bar of Montréal, « Mémoire de l'Association du Jeune Barreau de Montréal sur le projet de loi nº 60 : Loi modifiant la Loi sur la protection du consommateur et d'autres dispositions législatives », 16 October 2009, p. 7.

[7] Barreau du Québec, « Commentaires et observations du Barreau du Québec au sujet du projet de loi nº 60 intitulé « Loi modifiant la Loi sur la protection du consommateur et d'autres dispositions législatives », 15 October 2009, page 5.

[8] At the date of publication of this article, the time limit for filing an application for leave to appeal to the Supreme Court Court has expired and no application for permission appeal was filed.

[9] Section 214.6 of the CPA and 79.10 of the implementing regulations.

[10] Section 214.5 CPA. Such regulation also applies in the case of a leased item which the consumer cannot use during repair.

[11] Sections 214.9 to 214.11 of the CPA and 79.12 of the implementing regulations.

[12] It should be noted that the CPA has a broad scope of application and that it protects, under certain conditions, individuals who procure goods and services in a business context, such as professionals, craftspeople and farmers.

[13] By analogy, see this Superior Court judgment that was confirmed by the Court of Appeal, as well as *Ateliers d'usinage Malcor inc. c. Soniplastics inc.*, EYB 2000-18000 (QCCA).

By

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