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How Bill 60 will affect the *Consumer Protection Act* ?

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On December 4, 2009, following various amendments, the Quebec government assented to Bill 60, the *Act to amend the Consumer Protection Act and other legislative provisions* (“**Bill 60**”). This new legislation will come into force on the date or dates to be set by the government, but not later than June 30, 2010.

In this bulletin we will analyze the main amendments made by Bill 60 to the *Consumer Protection Act* (the “CPA”).¹ These amendments will require that merchants revise their consumer contracts, as the current practices in several industries will henceforth be prohibited or changed.

it prohibits any provision which gives a merchant the right to unilaterally amend a contract,² unless the provision also (i) specifies the elements of the contract that may be amended unilaterally, provided that the essential elements (ex. the nature of the goods or services, the price and the term of the contract) of the contract can only be amended in the case of an indeterminate-term service contract; (ii) provides that the merchant must send to the consumer, at least 30 days before the amendment comes into force, a written notice setting out the new clause only, or the amended clause, the clause as it read formerly and the rights of the consumer; and (iii) provides that the consumer may refuse the amendment and rescind or cancel the contract without cost, penalty or cancellation indemnity within 30 days after the amendment comes into force,

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Prohibited stipulations in contracts

Bill 60 broadens the list already found in the CPA of provisions which may not be included in consumer contracts.

The new legislation adds the following prohibitions:

¹ R.S.Q., c. P-401.

² Except a contract extending variable credit covered by Section 129 CPA.

if the amendment entails an increase in the consumer's obligations or a reduction in the merchant's obligations;³ any amendment by a merchant in contravention of the above provisions cannot be invoked against the consumer;

it prohibits any provision under which a merchant may unilaterally cancel a fixed-term service contract involving sequential performance, except under articles 1604, 2126 and 2129 of the *Civil Code of Québec* ("CCQ") (i.e. if the consumer fails to comply with his obligations or for serious grounds), and also prohibits a merchant from cancelling an indeterminate-term service contract involving sequential performance without providing at least 60 days' written notice before the date of cancellation if the consumer has not defaulted on his obligation;⁴

articles 2125 and 2129 CCQ allow a person who retains the services of a supplier to unilaterally resiliate the contract of services or enterprise by written notice to the provider of services or contractor, only paying him actual costs and expenses as of such date, the value of the work performed and the value of the property furnished in certain cases. Bill 60 prohibits a provider of services and a contractor from excluding the application of these provisions in a contract;⁵

it still prohibits a contract from including a penal clause providing for the payment of an amount if the consumer does not perform his obligations, but specifies that this prohibition does not apply to contracts of sale or long-term contracts of lease of automobiles, except with respect to

charges and subject to the conditions which will be set out in a regulation;⁶

a stipulation in a contract that is inapplicable in Quebec under the CPA or any of its regulations may not be included in the contract, unless it is preceded by an explicit and prominently presented statement to that effect.⁷

The current provisions of the CPA were limited to the following: the prohibition against merchants (i) limiting their liability and that of their representatives,⁸ (ii) deciding unilaterally that the consumer has failed to satisfy any of his obligations or that a fact or circumstance has occurred,⁹ (iii) obliging the consumer to refer a dispute to arbitration or restricting the consumer's right to go before a court or participate in a class action.¹⁰

The provisions of Bill 60 that relate to prohibited stipulations do not apply to contracts in effect when those provisions come into force.¹¹

This means that merchants will have to quickly revise their contracts to remove any provisions which will henceforth be prohibited. Also, companies doing business in differences provinces and countries often adopt a standard contract which does not comply with the CPA and its regulations in all respects in terms of its wording, taking the position that they would honour their obligations if a consumer asked them to. In other situations, merchants choose instead to only make reference to certain provisions which could vary depending on the applicable laws of the province or country in question, assuming that the provisions only applied when the governing laws of the jurisdiction covered

³ S. 2 Bill 60 (s. 11.2 CPA).

⁴ S. 2 Bill 60 (s. 11.3 CPA).

⁵ S. 2 Bill 60 (s. 11.4 CPA).

⁶ S. 3 Bill 60 (s. 13 CPA).

⁷ S. 4 Bill 60 (s. 19.1 CPA).

⁸ S. 10 CPA.

⁹ S. 11 CPA.

¹⁰ S. 11.1 CPA.

¹¹ S. 34 Bill 60.

by the contract did not prohibit it. This type of practice will have to be revised to clearly state that these provisions do not apply in Quebec.

The requirement that a contract be in paper form

The CPA requires that contracts entered into by an itinerant merchant, contracts involving credit, contracts which include a conventional option to purchase goods leased and contracts of lease with guaranteed residual value, contracts involving sequential performance, contracts of sale and long-term contracts of lease of used automobiles and used motorcycles be evidenced in writing and in paper form. Bill 60 now allows these contracts not to be evidenced in paper form in the case of distance contracts.¹²

Contracts for the sale of prepaid cards

Bill 60 now governs prepaid cards issued by merchants. Prepaid cards include a certificate and card that is paid in advance and allows the consumer to acquire goods or services from one or more merchants, such as gift cards and calling cards.¹³

Merchants issuing this type of card will henceforth be subject to the following constraints:

before entering into a contract for the sale of the card, the merchant must inform the consumer of the conditions applicable to the use of the card and explain how to check the balance on the card; if this information does not appear on the

card, the merchant must provide it to the consumer in writing;¹⁴

subject to any exceptions which may be set out by regulation, a card may not provide an expiry date, unless the contract provides for unlimited use of a service;¹⁵

subject to any exceptions which may be set out by regulation, no charge may be made to the consumer for the issue or use of a prepaid card;¹⁶

the merchant must, when the consumer so requests, refund to the consumer an amount equal to the balance on the card when the balance is lower than the amount or percentage prescribed by regulation.¹⁷

As section 187.3 CPA prohibiting expiry dates will also apply to cards already issued when it comes into force, merchants will have to continue to honour cards which would otherwise have expired on a given date after the provision comes into force.

Service contracts involving sequential performance for a service provided at a distance

A complete section has been added to the CPA to cover contracts involving sequential performance for a service provided at a distance.¹⁸

¹² S. 6, Bill 60 (s. 25 CPA).

¹³ S. 9 Bill 60 (s. 187.1 CPA).

¹⁴ S. 9 Bill 60 (s. 187.2 CPA).

¹⁵ S. 9 Bill 60 (s. 187.3 CPA).

¹⁶ S. 9 Bill 60 (s. 187.4 CPA).

¹⁷ S. 9 Bill 60 (s. 187.5 CPA).

¹⁸ However, this new section does not apply to service contracts involving sequential performance covered by another section of the CPA, such as those relating to instruction, training or assistance for the purpose of developing, maintaining or improving the health, appearance, skills, qualities, knowledge or the intellectual, physical or moral faculties of a person. (See s. 189 CPA.)

These new provisions cover in particular packages for telephone services, including cellular telephones, cable and satellite distribution, Internet access and security and alarm systems, and make major changes to the practices of merchants who provide them.

The main changes made by Bill 60 with respect to contracts involving sequential performance for a service provided at a distance are the following:

the contract must be evidenced in writing and include several specific elements including the total amount the consumer must pay each month under the contract, the monthly rate for each of the services and the associated costs or their monthly cost, the geographical limits within which the services may be used, the description (including whether the goods sold are reconditioned) and the regular price of the goods sold or offered as a premium on the purchase of the service, the economic inducements given, including the rebate on the price charged for goods or services purchased or leased on the making of the contract;¹⁹

it is prohibited to provide that a contract for a term exceeding 60 days is renewed upon its expiry, unless the renewal is for an indeterminate term;²⁰

except for contracts whose term is 60 days or less, the merchant must inform the consumer of the expiry date of the contract by means of a written notice sent between the 90th and 60th day before that date;²¹

the merchant may not demand payment for services of which the consumer was deprived during the repair of goods supplied free of charge or sold to the consumer on the making of

the contract or during the term of the contract, if the goods were given to the merchant for repair while they were still under warranty and the merchant did not provide a replacement free of charge and the goods are necessary for the use of the services purchased; this provision also applies to services of which the consumer was deprived during the repair of goods leased from the merchant for the use of the services purchased;²²

the consumer may, at any time and at the consumer's discretion, cancel the contract by sending a notice to the merchant;²³

if the consumer unilaterally cancels the contract, the merchant is entitled to claim from the consumer the price of the services which have been provided to him, plus an indemnity calculated as follows;²⁴

for a fixed-term contract in consideration of which one or more economic inducements were given by the merchant, the cancellation indemnity may not exceed the value of the economic inducements (determined by regulation) and, when no economic inducement was given, the maximum indemnity the merchant may charge is the lesser of \$50 and an amount representing not more than 10% of the price of the services provided for in the contract that were not supplied;

for an indeterminate-term contract, no cancellation indemnity may be claimed from the consumer unless the merchant gave the consumer a rebate on all or part of the sales price of the goods purchased in

¹⁹ S. 11 Bill 60 (s. 214.2 CPA).

²⁰ S. 11 Bill 60 (s. 214.3 CPA)

²¹ S. 11 Bill 60 (s. 214.4 CPA)

²² S. 11 Bill 60 (s. 214.5 CPA)

²³ S. 11 Bill 60 (s. 214.6 CPA).

²⁴ S. 11 Bill 60 (s. 214.7 and 214.8 CPA).

consideration of the service contract and entitlement to the rebate is acquired progressively according to the cost of the services used or the time elapsed; in such a case, the cancellation indemnity may not exceed the amount of the unpaid balance of the sales price of the goods at the time the contract was made and decreases as prescribed by regulation;

the merchant may not cancel the contract for failure to pay outstanding amounts under the contract when they become due for as long as the amounts due do not exceed the amount of the security deposit;²⁵

the merchant must notify the consumer in writing on using the deposit to collect amounts not paid when they become due;²⁶

the merchant must return the balance of any amount kept as a deposit to the consumer, with interest at the rate determined by regulation, within 30 days after the date on which the contract ends.²⁷

Providers of contracts involving sequential performance for a service provided at a distance will have no choice but to review their current practices and contracts carefully. Given the significant number of requirements and constraints introduced by Bill 60, we expect that these new obligations will be reflected by an increase in the cost of services provided to consumers. It should come as no surprise if telecommunication businesses, whose activities are governed by federal law, were to contest the application of Bill 60 on the grounds that its provisions are unconstitutional.

Business practices

Prohibited price practices

The CPA prohibited merchants from charging a higher price for goods or services than that advertised. Bill 60 specifies that more emphasis must be put on the price advertised than on the amounts of which the price is made up and include the total amount the consumer must pay for the goods or services.²⁸ However, the price advertised need not include the Quebec sales tax or the federal goods and services tax.

These new requirements will involve much greater transparency by merchants and certainly change several standard practices. In particular, we expect it will have an impact on the travel industry and the sale and lease of automobiles where advertising about prices does not always refer to the final price for consumers.

Additional warranties

Before selling an additional warranty on goods to a consumer, merchants must now inform the consumer orally and in writing, in the manner prescribed by regulation, of the existence and nature of the legal warranty²⁹ and the manufacturer's warranty offered free of charge with respect to such goods.³⁰ At the consumer's request, the merchant must also explain to the consumer orally how to examine all of the other elements of the warranty. In view of the comments made when Bill 60 was adopted, we assume that the legislator wanted these requirements to also apply to additional contracts of warranty which are in the nature of insurance. Distributors of this type of warranty products may therefore have to comply with the disclosure requirements under the

²⁵ S. 11 Bill 60 (s. 214.9 CPA).

²⁶ S. 11 Bill 60 (s. 214.10 CPA).

²⁷ S. 11 Bill 60 (s. 214.11 CPA).

²⁸ S. 12 Bill 60 (s. 224 CPA).

²⁹ Sections 37 and 38 CPA.

³⁰ S. 13 Bill 60 (s. 228 CPA).

CPA along with those under the *Act respecting the distribution of financial products and services*, R.S.Q. c. D-9.2.

Consumer's consent

A merchant may not require that a consumer to whom he has provided services or goods free of charge or at a reduced price for a fixed period send a notice at the end of that period indicating that the consumer does not wish to obtain the services or goods at the regular price.³¹

Who has an interest in instituting a recourse

In addition to the president of the Office de la protection du consommateur, a consumer advocacy body that has been constituted as a legal person for at least one year may also apply for an injunction ordering the person to cease engaging in the practice or ordering the merchant to cease including a stipulation inapplicable in Quebec in a contract. Organizations such as Option Consommateurs and the Union des consommateurs will henceforth be qualified to take such an action.³²

The availability of such an action to force compliance with the CPA and its regulations will likely make merchants much more careful about complying with it.

Conclusion

In view of the major changes resulting from Bill 60, merchants should immediately begin reviewing their contracts and practices so they will be able to comply with them as soon as they come into force. However, until such time as the Québec government adopts a regulation specifying a number of the

provisions of Bill 60, merchants cannot possibly complete their review. No draft regulation has as yet been published. No date has been set for the coming into force of Bill 60, but it will be not later than June 30, 2010.

As Bill 60 also affects business practices, insurers and others involved in the distribution of financial products and services will have to comply with it as well.

The changes made to the CPA are the second of three series of changes announced by the Quebec government. The next series of amendments should deal with contracts of credit, as opposed to the first, which covered distance contracts.

For more information, feel free to contact Sylvie Bourdeau or any other member of the group.

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³¹ S. 14 Bill 60 (s. 230 CPA).

³² S. 17 Bill 60 (s. 316 CPA).

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