

Supreme Court of Canada confirms the validity of perpetual contracts

AUG 14, 2017 5 MIN READ

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Authors: [Éric Préfontaine](#), [François Laurin-Pratte](#)

In this Update

In a ruling dated July 28, 2017, a majority of the Supreme Court of Canada affirmed the validity of perpetual contracts in Québec law. In the judgment, *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, the majority dismissed the appeal and upheld the judgments of the Court of Appeal and the Superior Court of Québec.

Context

For additional context regarding this case, please consult [our earlier Osler Update](#) about the decision of the Court of Appeal of Québec.

As a reminder, the dispute centres on the application of a clause providing for the automatic renewal of a contract of affiliation between Uniprix Inc. (Uniprix), on one hand, and on the other, Gestion Gosselin et Bérubé inc. and a partnership, Manon Gosselin et Bernard Bérubé, pharmaciens, S.E.N.C. (the Gosselin Group), which together operate a pharmacy under the Uniprix banner.

The contract of affiliation had an initial term of five years, but the clause in question seemed to permit its automatic renewal for an equivalent period, unless the Gosselin Group notified Uniprix of its intention to terminate. The contract did not contain any limit on the number of renewals.

After two automatic renewals, Uniprix purported to avail itself of the clause at issue to terminate the automatic renewal. The Gosselin Group objected to this attempt, arguing that the clause gave it alone the exclusive right to terminate the renewal. It then instituted proceedings to have Uniprix's attempted termination declared illegal and to have the contract renewed.

Reasons and conclusions

The reasons of Wagner and Gascon JJ., for the majority, can be divided into three parts: (i) the interpretation of the automatic renewal clause; (ii) the characterization of the contract according to its duration; and (iii) the validity of perpetual contracts.

(i) The interpretation of the automatic renewal clause

The majority confirmed the interpretation given by the lower courts to the automatic renewal clause: The clause grants the Gosselin Group the exclusive option to terminate the renewal by sending Uniprix notice to that effect six months before the expiry of the five-year term. If the Gosselin Group does not exercise such option, the contract is automatically renewed for an equivalent period, without Uniprix being able to oppose it. The majority held the clause to be clear and unambiguous.

(ii) The characterization of the contract according to its duration

The majority acknowledged that the Gosselin Group's ability to terminate the renewal creates uncertainty as to the total duration of the contractual relationship of the parties. Still, this uncertainty does not transform the contract of affiliation into an indefinite contract. According to the majority, such characterization would be contrary to the intention of the parties. It would also be illogical in that it would allow any party to terminate the contract at any time by simple notice. However, the contract specifically provides for a renewable five-year term. Thus, a contract subject to an automatic renewal clause, even when it is left to the discretion of a single party, remains a fixed-term contract, even though its effect may be potentially perpetual. This solution raises the fundamental question: are such perpetual obligations valid in Québec law?

It should be noted that the dissenting judges do not accept this characterization of the contract as being of a fixed duration. They see it instead as an indeterminate contract that any party can terminate by sending reasonable notice. According to the minority, this characterization stems from the fact that the end of the contract is made unknown by the Gosselin Group's option to renew the contract in perpetuity. Given this conclusion, they refuse to rule on the validity of perpetual obligations in principle.

(iii) The validity of perpetual contracts

According to the majority, nothing in Québec civil law prohibits, in principle, perpetual contracts for two reasons.

First, the legislature, conscious of the issue of perpetuity, chose not to prohibit perpetual obligations for all contracts. On the contrary, with the adoption of the Civil Code of Québec in 1991, it decided to do so only for certain contracts, such as leases.

Second, perpetual obligations, in general, do not offend any fundamental value so as to make them contrary to public order. The aim here is to reconcile the principle of freedom to contract with that of individual freedom. While the individual freedom may result in certain perpetual contracts being contrary to public order, this is not the case with the contract of affiliation in question. In the case of a corporate and commercial contract such as this, there is no reason to limit the contractual freedom of the parties who have freely chosen to bind themselves in perpetuity.

Comment

In this decision, the Supreme Court confirms the validity of the principle of perpetuity in Québec law. By pronouncing on an important doctrinal controversy, it puts an end to the skepticism with which some saw perpetual obligations. It is now clear that, as a general rule, nothing prohibits perpetual obligations. Their enforceability depends on the intention of the

parties, following the wording of the contract and the usual rules of interpretation.

Thus, it is not necessary for the parties to a contract to provide for perpetuity expressly. Perpetuity may result from an automatic renewal clause, even one that is unilateral, as in the present case. It may also result from usage, as was already recognized by the Court of Appeal in *BMW Canada inc. v. Automobiles Jalbert inc.*, 2006 QCCA 1068.

Of course, the courts will be able to intervene should a given perpetual contract contravene public order. They may also do so, for example, in the case of a contract of adhesion, in which perpetuity may be considered abusive. Such interventions will depend on the circumstances of each case and, above all, on the application of the rules applicable to all contracts, whether perpetual or not.

The consecration of perpetual obligations requires the parties to commercial contracts, such as franchise agreements and the like, to pay attention to the duration of their contract. The use of an automatic renewal mechanism, which is common for this type of contract, can create perpetual obligations that the courts will not hesitate to enforce.