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Legal newsletter for business entrepreneurs and executives, Number 16

March 1, 2013

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SOME PRACTICAL ADVICE ON THE RECORDING OF CUSTOMER PHONE CALLS IN QUEBEC

Guillaume Laberge

Many businesses engage in the practice of recording customer calls. They do so for various reasons, including to verify quality of service, to handle complaints or to train employees.

Because these recordings contain customers' personal information, certain precautions must be taken in the collection and retention of such information, especially since the subsequent use thereof, without a customer's consent, may infringe on his privacy rights.[1]

The Québec *Act Respecting the Protection of Personal Information in the Private Sector*[2] ("*APPIPS*") does not govern this process and, to the best of our knowledge, the Commission d'accès à l'information du Québec has not yet ruled on the issue.

The Office of the Privacy Commissioner of Canada has published *Guidelines for Recording of Customer Telephone Calls*[3] for private sector companies operating in Canada. Given that the obligations imposed by the *Personal Information Protection and Electronic Documents Act*[4] ("*PIPEDA*") are substantially the same as those imposed by *APPIPS*, it is our opinion that the federal guidelines should be followed by Québec companies.

The Office of the Privacy Commissioner is of the view that the recording of customer calls is permitted under *PIPEDA* subject to compliance with certain requirements, applicable both to incoming and outgoing calls.

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First, the collection of information must be motivated by a specific purpose. In Québec, the *APPIPS* expressly provides that, "*[a]ny person collecting personal information to establish a file on another person or to record personal information in such a file may collect only the information necessary for the object of the file*"[5]. This suggests that the use of such recordings for purely administrative purposes would be difficult to justify in view of this requirement. Customer service representatives must exercise caution when recording phone calls and must refrain from asking questions or making comments that could result in the collection of information that is unrelated to the reasons for recording the call.

Federal guidelines also stipulate that in order to comply with *PIPEDA*, it is necessary to inform the person, at the outset, that his or her call may be recorded. A customer's consent may be obtained in several ways. He or she can be verbally advised either by an automatic recording or by a customer service representative. According to federal guidelines of the Commissioner, a clear statement by the company printed on customers' monthly statements could also suffice.

Furthermore, a reasonable effort must be made to inform the customer of the reasons for the recording. It is important to note that the company must communicate clearly the real reason. It cannot claim, for example, that the recording is for the purpose of quality control when in fact it will be used to fulfill other objectives, as legitimate as those may be.

However, a caller's tacit consent may be inferred if, knowing the conversation is being recorded for a particular purpose, the caller does not object thereto and continues the conversation. If the caller refuses to allow the recording, he must be offered certain practical solutions, such as to not have the call recorded, to present himself at the nearest branch or point of sale, or to submit a complaint, question or comment online or by mail. In our opinion, it is not necessary that these options be presented at the outset of each call but they can be outlined in the company's privacy policy, for example, or as a stipulation appearing on customers' monthly statements.

Notwithstanding a few exceptions, telephone conversations cannot be recorded without the express or implied consent of the person whose personal information is being collected. Included in the exceptions, under *PIPEDA*, consent is not required when the purpose of the recording is debt recovery or investigation of potential fraud. In such circumstances, the need to obtain consent could adversely affect the company's ability to obtain accurate information.

Lastly, the guidelines only address the protection of personal information of customers. However, the recordings may also infringe the privacy rights of employees. Therefore, employees should also be informed of the practice and the reasons for the recording.

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[1] *Civil Code of Québec*, S.Q. 1991, c. 64, arts. 35 and 36.

[2] R.S.Q., c. P-39.1.

[3] Office of the Privacy Commissioner of Canada, *Guidelines for Recording of Customer Telephone Calls*, June 10, 2008, available online: https://www.priv.gc.ca/resource/fs-fi/02_05_d_14_e.asp

[4] S.C. 2000, c. 5.

[5] Section 5, APPIPS.

EMPLOYMENT PLACEMENT AGENCIES: WHO IS RESPONSIBLE FOR THE SOURCE DEDUCTIONS?

Carolyne Corbeil

Quebec employers are increasingly resorting to placement agencies to quickly meet their need for occasional workers. While this new business model is gaining in popularity and offers many

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advantages, it also upsets the traditional bipartite “employer-employee” relationship. Thus, since the placement agency functions as an intermediary between the client and the worker, a tripartite employment relationship is created. This raises the issue as to whether the employer-employee relationship remains intact and, if so, then who is responsible for the source deductions. The Court of Québec recently answered these questions in the case of *Agence Océanica inc. v. Agence du revenu du Québec.*[1]

FACTS

In this case, the placement agency, Océanica (hereinafter “**Océanica**”), was in the business of providing nursing staff for the short-term needs of hospitals, residential and long-term care centres (CHSLDs) and local community service centres (CLSCs) (hereinafter the “**clients**”). It operated as an intermediary between the clients and nurses: clients informed Océanica of their nursing staff requirements and Océanica did the recruiting. At the clients’ workplace, the nurses received their instructions from the clients, particularly in terms of the duties to be performed by them and their work methods, acting under the clients’ supervision. Océanica billed the clients for the nurses’ compensation, plus an amount for Océanica’s profit margin. Based mainly on the testimony of the nurses working for Océanica, it was apparent that they had no written employment contract with Océanica, they bore no risk of profit or loss, and they paid for their employment expenses themselves, without reimbursement by Océanica.

Océanica considered the nurses to be self-employed workers rather than employees. Thus, the compensation paid to the nurses would not be subject to the applicable source deductions in Quebec, i.e. for the QPP (Québec Pension Plan), QPIP (Québec Parental Insurance Plan), HSF (Health Services Fund) and CNT (Commission des normes du travail).

On the other hand, the Agence du revenu du Québec (hereinafter the “ARQ”) submitted that the nurses were not self-employed workers, but rather employees, and therefore assessed Océanica for the amounts due, plus penalties and interest, on account of the aforementioned source deductions on the compensation paid to the nurses.

Océanica appealed the assessment by the ARQ to the Court of Québec for a ruling on whether the nurses were employees or self-employed workers.

THE COURT OF QUÉBEC’S DECISION

After conducting a general review of the definitions of the concepts of employer and employee under various tax statutes, the Court admitted that there was not much substance to these definitions and that they were not very helpful in characterizing such a complex relationship as the one that existed between Océanica and its nurses. Nevertheless, the Court found that the payment of compensation was of particular importance for a person to qualify as an “employer” for purposes of the *Taxation Act*[2] (Quebec).

As for the concept of the employment contract under the *Civil Code of Québec*,[3] the Quebec case law has noted on many occasions that it must be analyzed on the basis of its three components, namely the performance of work, the compensation, and the relationship of subordination between employer and employee, with subordination being the main criterion for a finding of employee status. However, in the context of a tripartite relationship involving an intermediary, as opposed to the classic employment relationship between two parties, determining who is the true employer based on the subordination criteria may be difficult. Instead, a more general and broader analysis of the criterion of the employees’ legal subordination must be conducted and other criteria should also be considered, such as the selection of the employees, hiring, training, discipline, evaluation, etc. Thus, the Court took a more general approach to the relationship between Océanica and its nurses which was not limited to the nurses’ functions and to the degree of supervision exercised by Océanica over

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them.

The fact that some of the classic functions of the employer (i.e. recruiting, training and supervision) were shared between Océanica and the clients did not change the nature of the nurses' work *per se*. Indeed, if the clients had not been there to offer employment and Océanica had not functioned as the link between the clients and nurses, the nurses would have been unable to offer their services. The nurses were integrated into the clients' businesses and acted under their supervision. The nurses were not administering a business. To claim that the nurses were self-employed workers because Océanica, by itself, did not fulfill all the attributes of a classic employer would have led to an absurd result. For these reasons, the Court held that it was an error to claim that Océanica's nurses were self-employed workers.

Therefore, the Court found that the nurses were employees of Océanica. Indeed, the judge stated that by inserting itself into the classic relationship between the clients and the nurses, Océanica assumed some of the employer's functions, such as the recruiting and payment of the nurses' compensation. In this regard, the Court found that Océanica acted as the clients' mandatary and had entered into binding obligations on their behalf. As a result, Océanica became responsible for the clients' tax liabilities, in accordance with the concept of mandate set out in the *Civil Code of Québec*.[4]

COMMENTS

The Court essentially took a two-pronged approach to this decision. Firstly, it dismissed Océanica's argument that the nurses were self-employed workers. Secondly, since the nurses were found to be employees, the Court had to determine who was liable for the source deductions. The Court strongly emphasized the role of the person paying the compensation in reaching the conclusion that the nurses were employees of Océanica, since Océanica paid them their wages directly.

At first sight, this decision confirms the role of the employment agency as an employer of workers and its obligation to make the source deductions in Quebec from the compensation paid to them. Thus, employment agencies should remember that they must be vigilant with respect to the status of their personnel and the tax obligations for which they are responsible.

However, the Court's conclusion regarding the mandator-mandatary relationship between Océanica and the clients may lead to confusion. Indeed, it is unclear what effect this conclusion would have in a situation in which the placement agency is delinquent and fails to make the requisite source deductions.

Finally, it should be noted that Océanica has appealed this decision to the Québec Court of Appeal. Hopefully, the Court of Appeal will take the opportunity to clarify the conclusion of the Court of Québec. We will be following these developments closely. Until then, caution is advised...

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1 2012 QCCQ 5370.

2 R.S.Q., c. I-3 and amendments.

3 S.Q. 1991, c. 64 ("C.C.Q.").

4 Article 2157 C.C.Q.

WHAT ARE YOUR RECOURSES IF YOU BELIEVE A CONTRACT IS ABOUT TO BE, OR HAS BEEN, AWARDED TO ANOTHER BIDDER?

Julie Cousineau

Questions concerning the legality of the call for tenders process are regularly submitted to the courts. Obviously, when the contract contemplated in a call for tenders is important, each of the

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businesses that went through the process will have an interest in, and will want to obtain, the contract.

What should you do if your business is not awarded the contract you wanted so badly? Below is a brief description of the legal remedies available in light of the recent case law. It should be noted that the remedies described below can be instituted against any business, whether public or private. However, in the case of an action against the government itself, it will not be possible to institute injunction proceedings, but it is possible to obtain a safeguard order in very exceptional circumstances. (We will not consider those circumstances in this article.)

Firstly, before anything else, you must ensure that you responded to all the requests and formalities set out in the call for tenders. It goes without saying that the courts will not be able to sanction the party contracting out the work (the client) at the behest of a bidder that did not comply with the rules laid down in the call for tender documents.[1]

GENERAL RECOURSE: DAMAGES

Several recourses are available to aggrieved bidders. Most often, they will institute an action in damages seeking compensation for the losses they have suffered and profits they were deprived of. The bidder's lost profits must be proven with well-documented evidence to obtain the amounts claimed, and will not be awarded unless it is clearly proven that the bidder ought to have received the contract. Note that the evidence of damages generally requires the disclosure of sensitive information belonging to the aggrieved company, such as profit margins or financial statements.

Furthermore, in the event that a bidder participates in a second call for tenders launched by the client after participating in a first call for tenders (where the first call for tenders was canceled), if the bidder subsequently institutes an action in damages based on the first call for tenders, it may be dismissed on the grounds that the bidder waived this recourse when it decided to bid in the second call for tenders.[2]

APPLICATION FOR A DECLARATORY JUDGMENT OR ACTION IN NULLITY

Sometimes, an aggrieved bidder may wish to apply for a declaration by the court that the client did not comply with the tender process or that the process should be annulled, particularly in cases where the client is a public entity subject to a special statute establishing a framework for the call for tenders process (e.g. *Cities and Towns Act, Act Respecting Contracting by Public Bodies*). In such cases, the bidder may institute an action for a declaratory judgment or an action in nullity seeking a declaration that the tendering process engaged in is null and void. The main purpose of such actions is to obtain an answer to a clear question submitted to the court.

INJUNCTION OR APPLICATION FOR A SAFEGUARD ORDER

An aggrieved bidder may also apply to the court for an injunction or safeguard order to suspend a tender process that is underway (temporarily and incidentally to another action or on a permanent basis). However, it is important to know that it is difficult to succeed in an injunction action, among other things, because the criteria for a successful injunction are somewhat difficult to meet in the context of a call for tenders. Injunctions are an exceptional remedy and, since the courts have the discretion to grant or refuse them, they will frequently be reticent to intervene in a process governed by rules laid down in a statute or by the parties.

To obtain an injunction order, the following criteria must be met: a *prima facie* case, serious or irreparable harm, and the balance of convenience.

A *prima facie* case is met, in particular, where the applicant (the aggrieved bidder) proves to the court that the process does not comply with the applicable statutes (particularly in matters involving a public body), the client has failed to comply with the very process it put in place, or there is a

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major irregularity in this process. Indeed, the principle of the equality of bidders is a basic principle in tender matters that has been reaffirmed on many occasions by the courts. By itself, this criterion is generally not too difficult to meet.[3]

Once a *prima facie* case has been established, the bidder must show that it would suffer irreparable or serious prejudice, i.e. which is not compensable in damages. This criterion is more difficult to meet because, in several cases submitted to the courts, they have concluded that the prejudice was ultimately compensable in damages based on the profits which the applicant bidder hoped to make. Note that the loss of expertise where the contract is awarded to the bidder's competitor instead of the bidder, and the difficulties in assessing the amount of damages (due to mathematically complex calculations) were not found to be irreparable prejudice by the courts.[4] On the other hand, where the bidder can show that his business is at risk of shutting down, the courts will be more inclined to issue the order.[5]

Finally, if the court finds that the right on which the applicant is relying is not perfectly clear, it must decide which of the parties would suffer greater inconvenience if the order is rendered. In this regard, it should be noted that if the call for tenders involves a public body, it will benefit from a presumption that the contract contemplated in the call for tenders is made in the public interest. In such a case, it will be easier for the public body to turn the balance in its favour as compared with a private interest. On the other hand, there have been some cases involving public bodies in which the illegality committed by the public body was so great that the court concluded it was in the interest of the parties and the public to obtain a ruling on the issue of legality, while suspending the process in the meantime.[6]

Finally, the court will also consider whether there is sufficient urgency at certain stages of the application for an injunction or safeguard order.

CONCLUSION

If you feel that you have been wronged in the context of a call for tenders, it is important to quickly assess the solutions available to you. Depending on the facts and legal issues involved, one remedy may be more appropriate than another. In any case, to benefit from all the possible remedies, you should not wait too long before evaluating which solution is best for you.

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1 *Simplex Grinnel inc. v. Cégep de Sainte-Foy*, 2012 QCCS 4512.

2 *Entreprises Léopold Bouchard et Fils v. St-Tharcisius (Municipalité de)*, 2012 QCCS 4071 (appeal filed).

3 *RJR McDonald v. Canada (P.G.)*, [1994] 1 S.C.R. 311, p.46.

4 *Entrepreneur général Uuchii inc. v. Québec (Procureur général)*, 2012 QCCS 4500.

5 *Orthofab v. Régie de l'assurance maladie du Québec*, 2012 QCCS 1876.

6 Ibid, note 5.

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