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Following the termination of a senior executive, a clause in a stock option plan is declared abusive and the behaviour of the employer deemed oppressive

March 1, 2014

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In *Dollo* v. *Premier Tech Ltée*,[1] the Superior Court of Québec declared a clause contained in the Stock Option Plan (the **"Plan"**) offered by Premier Tech Ltée (**"Premier Tech"**) to some of its employees to be abusive and also declared Premier Tech's conduct towards a dismissed senior executive to be oppressive within the meaning of the *Canada Business Corporations Act* (**"CBCA"**).

THE FACTS
In May 1999, Premier Tech hired Christian Dollo (**"Dollo"**) as vice-president, finance. In 2001, Dollo was offered the opportunity to acquire stock options (hereinafter, the **"Options"**) of the corporation over time by participating in the Plan. Premier Tech's shares then became publicly traded and Dollo acquired some of the shares in accordance with the Plan. In June 2004, he became president of Premier Horticulture, one of Premier Tech's main subsidiaries.

Premier Tech once again became a private corporation in February 2007. At that time, some executives holding Options, including Dollo, were asked to acquire shares. As part of the privatization of Premier Tech, new Options were offered to Dollo.

During 2009, members of Premier Tech's management team felt that Dollo's performance fell short of the corporation's expectations and that the relationship of trust was deteriorating. At the same time, Dollo became aware of clause 8.01.2 of the Plan, which stipulated that in the event of termination for any reason other than the death, retirement or disability of the participant, he or she would lose all of his or her Options which were vested but not yet exercised unless the Board of Directors decided otherwise. Worried about the existence of this clause, he requested information from the corporation's management team and was reassured with respect to the possibility of losing

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his vested Options in the event of his termination.

In August 2010, Dollo was terminated. At the time, he held 71,100 shares of the corporation and 207,619 vested Options. During the months that followed, Premier Tech and Dollo settled their disputes, with the exception of Dollo's Options. During the fall of 2010, Dollo requested that the Board of Directors exercise its discretion under clause 8.01.2 of the Plan in order to allow him to retain his vested Options. The Board of Directors refused.

In March 2011, Dollo instituted proceedings against Premier Tech and its majority shareholder. He asked the Court to declare clause 8.01.2 to be abusive and to recognize his right to exercise his vested Options (in order to collect the profits in the amount of $1,313,847). He added that Premier Tech was abusing its rights and was acting in an oppressive manner within the meaning of the CBCA. He further submitted that he had been illegally terminated and, accordingly, he claimed the value of the Options that he would have acquired and that he could have exercised during the twelve months following his termination.

THE DECISION OF THE SUPERIOR COURT OF QUÉBEC

WAS CLAUSE 8.01.2 OF THE PLAN ABUSIVE?

The Court first concluded that the Plan constituted an adhesion contract and that the context of the privatization of the corporation did not offer Dollo any real possibility to intervene with respect to the main provisions of the Plan.

With regards to clause 8.01.2, the Court ruled that it was abusive and void. Following an in-depth analysis of the expert testimony, it concluded that such a clause [TRANSLATION] "is not found in the rules generally governing this type of contract" and that [TRANSLATION] "this type of clause is a rarity in the context of commercial practice." The Court added that Dollo's vested Options in fact constituted significant long-term incentive compensation. Under the Plan, this long-term compensation was not linked to Dollo's performance. Rather, the last Options which were granted to Dollo in 2007 were vesting at the end of each month, regardless of his performance. The Court deemed it to be unreasonable that the use of clause 8.01.2 would cause the loss of such vested compensation. The loss of compensation that was vested in Dollo for the previous years during which Premier Tech benefited from his dedication lead the Court to conclude that clause 8.01.2 was not only unreasonable but it was also excessive.

Finally, according to the Court, clause 8.01.2 was similar to a purely discretionary clause insofar as Premier Tech, in deciding to terminate Dollo, made a decision (namely, not to recognize that Dollo was entitled to exercise his vested Options) which depended entirely upon its discretion. Although the Court did not hold clause 8.01.2 to be truly purely discretionary, it was of the view that such a similarity supported it being qualified as abusive.

However, the Court dismissed Dollo's request regarding the Options he would have acquired during the twelve-month period following his termination since it would be inappropriate to provide a Plan member with "long-term compensation" to retain and motivate him while his employment was already terminated. Contractual justice demanded that this request be denied.

WAS DOLLO TERMINATED WITHOUT CAUSE?

The Court noted that Dollo's termination could only be qualified as an administrative dismissal. In this context, the following steps must be followed:

(1) The employee must be aware of the business' policies and his employer's expectations in his regard;
(2) He or she must have been notified of his or her shortcomings;
(3) He or she must have received the necessary support to correct him or herself and to reach his or

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her objectives;
(4) He or she must have been provided with reasonable time to adjust;
(5) He or she must have been warned about the risk of termination in the absence of improvement.

The Court found that Dollo was only informed of the reasons for his dismissal following the institution of the proceedings against Premier Tech, that he received no support which would have allowed him to improve and that he had received no warning as to the risk of termination. In light of these elements, the Court was of the opinion that Dollo had been terminated without cause.

WAS PREMIER TECH'S CONDUCT OPPRESSIVE WITHIN THE MEANING OF THE CBCA?
The Court last reviewed the issue of whether the conduct of Premier Tech and its majority shareholder justified recourse to the oppression remedy in accordance with section 241 of the CBCA. It first established that Dollo constituted a plaintiff under the CBCA since it is possible to attribute this status to a person who was promised a portion of the share capital of a corporation. In addition, when he petitioned the Board of Directors regarding the exercise of his vested Options, Dollo was still a shareholder of Premier Tech. Finally, Dollo was a "potential shareholder" who would have been entitled to additional shares were it not for (abusive) clause 8.01.2.

The Court mentioned that Dollo had legitimate expectations both of benefiting from the Plan, which constituted long-term compensation, and that his rights as an employee would be respected. According to the Court, Dollo had a right to expect that his termination be carried out in compliance with the steps provided for in the case law. Due to this non-compliance, Dollo was unable to exercise his options and protect himself from the brutal application of clause 8.01.2. The Court noted that simply declaring that clause 8.01.2 was void may not be enough to allow Dollo to benefit from the long-term compensation. In fact, [TRANSLATION] "legal and financial stumbling blocks [particularly the issue of financing the acquisition of the shares] will be found on the road to an easy resolution of this dispute."[2]

The Court therefore allowed the oppression remedy, concluding that the conduct of Premier Tech and its majority shareholder was abusive, and applied some remedial measures explicitly provided for at section 241 CBCA by:

(1) Ordering the issuance of Premier Tech shares to Dollo;
(2) Modifying the clauses of a contract to which Premier Tech was a party to settle the financing problems for the issuance of the shares (forcing Premier Tech to finance the issuance of the shares to Dollo);
(3) Ordering Premier Tech's majority shareholder to buy the shares so issued to Dollo, to reimburse Premier Tech for the financing of the issuance of the shares (that is, $612,857) and to pay the balance of the sale price to Dollo (that is, $1,313,847); and
(4) Modifying clauses in the unanimous shareholders' agreement in order to enable Dollo to receive the balance of the sale price of his shares notwithstanding the existence of certain provisions in the agreement which could have been invoked against him.

For the full text of the decision (in French), click here.

This decision of the Superior Court is currently on appeal.

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1. 2013 QCCS 6100.
2. Paragraph 356 of the decision.

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