

Newsletter



Robinson Sheppard Shapiro
Avocats • Lawyers

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Thinking of walking away from a deal? Better be careful...

We've all had second thoughts after closing a deal that turns out to be less than optimal. Usually, this is just a reminder of the need to consider our decisions more carefully. But acquiring the wrong company, or buying it for an inflated price, is far more than a costly lesson. It can be a catastrophe.

The first reflex after making a non-optimal decision may be to try to get out of it, invoking the slightest shortcoming in the obligations incurred by the vendor as a fatal flaw voiding the contract.

Vidéotron recently learned that this may not be the best solution. In *Investissements Novacap inc. c. Vidéotron, s.e.n.c.* (2015 QCCS 138, currently under appeal), the Superior Court taught the company a multi-million-dollar lesson.

Facts: The deal that went sour

In spring 2000, the plaintiffs (two companies and an individual) put their shares in a few cable television companies up for sale. Vidéotron is the highest bidder, with an offer for \$40 million. An initial letter of intent is signed in July

2000. In August 2000, Vidéotron conducts a first round of due diligence. The formal closing is to take place shortly after the approval of the transaction by the CRTC.

In October 2000, Québecor takes over Vidéotron.

In December 2000, Québecor experiences cash flow problems. At that time, the formal closing of the sale of the plaintiff's companies to Vidéotron had not yet occurred. Under pressure from Québecor, the closing is repeatedly postponed. Vidéotron starts to give signs that it wishes to walk away from the transaction.

Finally, on September 14, 2001, Vidéotron cancels the contract, alleging a major shortcoming discovered when the due diligence was updated.



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The companies were eventually sold to third parties in October 2004, at a lower price.

Was there cause for cancellation of the sale?

True, over time, the overall financial portrait of the target companies evolved. For instance, the financial statements of June 30, 2001 reflected a decrease in business from the August 2000 due diligence. This is usual, and only temporary: in the Province of Quebec, tens of thousands of tenants move out on July 1, cancelling their cable TV services only to reconnect from their new address a few weeks later.

The Court did not consider any of the glitches raised as a sufficient cause to cancel the contract. Under the agreement, the vendors were given 10 days to remedy a default. Vidéotron did not invoke a precise default, thereby depriving the vendors of the opportunity to remedy it.

Besides, as the Court noted, the purchaser was itself responsible for postponing the formal closing of the sale. For some 10 months after it became a subsidiary of Québecor, Vidéotron accumulated delays and requests for pointless details. The vendors have always obliged diligently. Vidéotron could not abruptly decide that the vendors had failed to meet their obligations.

Vidéotron failed to meet its burden of proving that its decision was based on valid legal grounds.

Good faith has always been a legal requirement under Quebec's civil law: fair play is an essential element of negotiations and deals. By failing to honour the original agreement, Vidéotron had acted in bad faith and was liable for the resulting damages.

The Court awarded the plaintiffs the difference between the price agreed on with Vidéotron and the effective purchase price of the companies. Damages were then awarded to the tune of \$18 million, plus interest and the special indemnity allowed by Article 1619 of the Civil Code, for a total of around \$34 million.

What can be learned from this decision?

Looking for loopholes and raising artificial obstacles are not valid means of walking away from a deal that is no longer advantageous. In such circumstances, consult with a lawyer. Perhaps there are clauses and exit strategies that only an expert will see, which will allow you to cancel the agreement. A lawyer can also negotiate the cancellation: paying some compensation will undoubtedly be less costly than a judgment such as the one rendered against Vidéotron.

And if you are in the opposite position, and see that the other party to a deal is attempting to get out of it, your lawyer can take steps to protect your rights before recovery of damages becomes virtually impossible.

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