

**SUPREME COURT OF CANADA**

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| **Citation:** Pellerin Savitz LLP*v.* Guindon, 2017 SCC 29, [2017] 1 S.C.R. 575 | **Appeal Heard:** February 22, 2017  **Judgment Rendered:** June 9, 2017  **Docket:** 36915 |

Between:

Pellerin Savitz LLP

Appellant

and

Serge Guindon

Respondent

**Official English Translation**

**Coram:** McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 36) | Gascon J. (McLachlin C.J. and Karakatsanis, Wagner, Côté, Brown and Rowe JJ. concurring) |

Pellerin Savitz LLP *v.* Guindon, 2017 SCC 29, [2017] 1 S.C.R. 575

Pellerin Savitz LLP Appellant

v.

Serge Guindon Respondent

**Indexed as:** Pellerin Savitz LLP ***v.*** Guindon

2017 SCC 29

File No.: 36915.

2017: February 22; 2017: June 9.

Present: McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for quebec

*Prescription — Extinctive prescription — Beginning of prescription period — Action for recovery of lawyer’s professional fees — Fee agreement providing for 30‑day period for payment of invoices — Lawyer bringing action to claim unpaid fees after several invoices had been sent — Trial judge concluding that action was prescribed, because it had been instituted more than three years after date of each invoice — Court of Appeal instead holding that prescription had not begun to run until expiration of 30‑day period specified in fee agreement for payment of each invoice — Date when lawyer’s right to claim professional fees arose — Whether action is prescribed — Civil Code of Québec, art. 2880 para. 2.*

In September 2011, G retained the services of a law firm. The parties entered into a fee agreement providing, among other things, that every invoice would be payable within 30 days and that after that time, interest would be computed and charged. Between October 5, 2011 and March 1, 2012, the lawyer sent five invoices to the client. On March 21, 2012, the client informed the lawyer that he was terminating the contract. On March 12, 2015, the lawyer brought an action to claim the unpaid fees. The trial judge dismissed the action, concluding that it was prescribed because it had been instituted after the prescription period, that is, more than three years after each invoice was prepared and sent. The Court of Appeal confirmed that the action was prescribed as regards the first four invoices. But it held that prescription had not begun to run until the expiration of the 30‑day period specified in the fee agreement and accordingly ordered the client to pay the invoice of March 1, 2012.

*Held*: The appeal should be dismissed.

The beginning of the period of extinctive prescription is, as provided for in art. 2880 para. 2 of the *Civil Code of Québec*, the day on which the right of action arises. In contract, the creditor’s right of action arises once the debtor’s obligation has arisen and is exigible. When this occurs varies with the circumstances, and especially with the terms of the contract itself. These principles apply to agreements for professional fees, which can provide for billing procedures that might alter the beginning of the prescription period.

In this case, the lawyer’s action is prescribed except in respect of the invoice of March 1, 2012. The parties’ fee agreement established when the client’s obligation to pay was to become exigible. It provided that every invoice was to be payable within 30 days. As a result of that suspensive term, each payment did not become exigible, and the prescription period therefore did not begin, until the 31st day after the invoice had been sent.

The time that work (“*travaux*”) is completed, which applies under the *Civil Code of Québec* in the context of contracts of enterprise, is inapplicable to contracts between a lawyer and his or her client, which are not for the carrying out of a work (“*ouvrage*”). The nature of a lawyer’s work is the provision of services for a certain period of time, not the delivery to a client of a finished product that the client can use. Sometimes, the lawyer’s role is also to represent the client in court. A contract between a lawyer and a client can thus be characterized as a contract for services, a mandate or a mixed contract, depending on the nature of the services being provided. None of these types of contracts are subject to rules to the effect that prescription begins to run only upon termination of the contract. A court must therefore refer to the general rule set out in art. 2880 para. 2 of the *Civil Code of Québec* and determine when the right of action arose on the basis of the circumstances of the case before it.

Although lawyers are, because of their ethical obligations, generally barred from suing their clients while still acting for them, this does not have the effect of suspending prescription until the termination of the contract. A lawyer whose client has not yet paid an account that is due and exigible is certainly placed in a difficult situation. However, this situation does not result in an impossibility in fact to act that suspends prescription. Instead, the lawyer must make a choice: either let prescription run while continuing to act for the client despite the client’s failure to pay, or go to court to claim the fees he or she is owed while ceasing to act for the client.

**Cases Cited**

**Referred to:** *Leblanc v. Sœurs de l’Espérance*, [1978] 2 S.C.R. 818; *Morin v. Canadian Home Assurance Co.*, [1970] S.C.R. 561; *Beaulieu v. Paquet*, 2016 QCCA 1284; *Dupuy v. Leblanc*, 2016 QCCA 1141; *Benhaim v. St‑Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Re 9022‑8818 Québec inc.*, 2005 QCCA 275; *Dallaire v. Dallaire*, 2013 QCCS 1556; *Percé (Ville) v. Roy*, 1995 CanLII 4974; *M.D. v. Plante*, 2009 QCCS 6113; *Bailey v. Fasken Martineau DuMoulin, s.r.l.*, [2005] R.R.A. 842; *Bérocan inc. v. Masson*, [1999] R.J.Q. 195; *Géoret inc. v. Garderie Morin inc.*, [2000] AZ‑50187544; *Bureau v. Chapleau*, 2008 QCCQ 4709; *Fraser, Milner, Casgrain v. Viau*, [2001] AZ‑50187880; *Lapointe Rosenstein v. 172302 Canada inc.*, 2002 CanLII 15986; *Gagnon v. Voyer*, 2008 QCCQ 10256; *Gestion Immo‑Concept inc. (Financière HFC) v. Martial Excavation inc.*, 2013 QCCS 1139; *Kounadis* *Perreault, s.e.n.c. v. Bois d’Or*, 2013 QCCQ 8359; *Desjardins & Legault CA inc. v. Serour*, 2016 QCCQ 3318; *Gagnon v. Caron*, 2007 QCCQ 12736; *Bélec v. Martin*, 2015 QCCQ 13838; *Bertrand v. Veillet*, 2006 QCCQ 15374; *Bernatchez v. Bergeron*, [2000] AZ‑00036682; *Arruda v. Brière*, 2014 QCCQ 6882; *Parizeau v. Lalonde*, 2014 QCCQ 11332; *Lapointe v. Vigneault*, 2009 QCCQ 2673; *Bernard v. Hernandez Sanchez*, 2014 QCCQ 5171, aff’d 2016 QCCA 136; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3; *Oznaga v. Société d’exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113; *Roy v. Fonds d’assurance responsabilité professionnelle du Barreau du Québec*, 2009 QCCA 459; *Dehkissia v. Kaliaguine*, 2011 QCCA 84.

**Statutes and Regulations Cited**

*Act respecting the Québec sales tax*, CQLR, c. T‑0.1, ss. 32.3, 82, 83, 422, 437.

*Civil Code of Lower Canada*, art. 2236.

*Civil Code of Québec*, arts. 1617, 2098, 2110, 2111, 2116, 2117 to 2124, 2184, 2185, 2880 para. 2, 2904, 2921, 2925, 2931.

*Code of Professional Conduct of Lawyers*, CQLR, c. B‑1, r. 3.1, ss. 48, 71, 72.

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APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Vézina and Bélanger JJ.A.), 2016 QCCA 138, [2016] AZ‑51250248, [2016] J.Q. no 548 (QL), 2016 CarswellQue 502 (WL Can.), setting aside in part a decision of Laporte J.C.Q., 2015 QCCQ 5004, [2015] AZ‑51184376, [2015] J.Q. no 5819 (QL), 2015 CarswellQue 6239 (WL Can.). Appeal dismissed.

Damien Pellerin, for the appellant.

Jean‑Yves Côté, for the respondent.

English version of the judgment of the Court delivered by

Gascon J. —

1. Overview
2. The question in this appeal is one that arises regularly in the courts, both in Quebec and elsewhere in Canada. However, it is rarely raised in this Court. The appellant, a law firm, frames it in terms that seem absolute: Does the prescription period for a claim for a lawyer’s professional fees begin to run on the billing date, the date of termination of the mandate or contract for services, or the date of performance of the last professional service?
3. In my view, the question can be put much more simply and does not need to be answered in absolute terms: Under art. 2880 para. 2 of the *Civil Code of Québec* (“*C.C.Q.*” or “*Code*”), what is the date on which the law firm’s right to claim its professional fees arose? Framed in this way, the question requires nothing more than a factual determination based on the circumstances of the specific case before the court.
4. In the circumstances of this appeal, the Court of Appeal answered the question correctly. Having regard to the wording of the fee agreement between the parties and the content of the invoices sent by the law firm, prescription began to run on the 31st day after each invoice was sent, not upon termination of the parties’ contractual relationship. The appeal must therefore be dismissed.
5. Background
6. In September 2011, the respondent, Serge Guindon (“client”), retained the services of the appellant, Pellerin Savitz LLP (“lawyer”), to [translation] “[r]eview [his] file, draft pleadings [and] represent [him]” in litigation (A.R., at p. 77). The parties entered into a fee agreement providing, among other things, that “[e]very invoice shall be payable within thirty (30) days [and that] after that time, interest shall be computed and charged at an annual rate of 15%” (*ibid.*, at p. 79). On signing the agreement, the client gave the lawyer a $400 advance.
7. On October 5, 2011, the lawyer sent the client a first invoice, to which was applied the amount of the advance that had been received in partial payment. The lawyer subsequently sent four more invoices, the last of which, dated March 1, 2012, was for services provided up to February 22, 2012. Each invoice contained statements that it was [translation] “payable on receipt” and that it bore interest at an annual rate of either 12% or 15%; the last two invoices gave the client a 30‑day “grace period” (*ibid.*, at pp. 97‑105). The client made a partial payment on March 5, 2012 and then informed the lawyer on March 21, 2012 that he was terminating the contract.
8. On March 12, 2015, the lawyer brought this action to claim the unpaid fees. The client replied that the action was prescribed because it had been instituted more than three years after each invoice was sent. The lawyer countered that the action was not prescribed, because the prescription period had not begun to run until the termination of the mandate on March 21, 2012.
9. At trial, Judge Laporte of the Court of Québec concluded that the action was prescribed (2015 QCCQ 5004). In his view, prescription does not begin to run until the day the right of action arises, that is, when the claim is created by preparing and sending a bill of account (art. 2880 para. 2 *C.C.Q.*). The fact that the lawyer charged interest from the date of each invoice was also significant, as each invoice could have only one date of exigibility. Moreover, the concept of “the time that work is completed” is relevant only for contracts of enterprise (art. 2116 *C.C.Q.*) and does not apply to a contract for services like the one between the lawyer and the client. In the trial judge’s opinion, *Leblanc v. Sœurs de l’Espérance*, [1978] 2 S.C.R. 818, a decision the lawyer relied on that had been rendered under the *Civil Code of Lower Canada* (“*C.C.L.C.*”), did not indicate generally that prescription for professional fees runs from the time that work is completed. Finally, because in many cases a contract between a lawyer and his or her client is one of successive performance, prescription runs with respect to payments due even though the parties continue to perform the contract (art. 2931 *C.C.Q.*).
10. The Court of Appeal affirmed the substance of that decision but ordered the client to pay the invoice of March 1, 2012, which in any event was a debt he acknowledged (2016 QCCA 138). The court found that the claim relating to that final invoice was not prescribed, given that prescription had not begun to run until the expiration of the 30‑day period specified in the fee agreement.
11. Analysis
12. The main issue in this case is whether the lawyer’s action is prescribed. The parties acknowledge that the applicable prescription period is three years (art. 2925 *C.C.Q.*). All that must be done, therefore, is to identify the beginning of that period, that is, the date when the lawyer’s right of action arose (art. 2880 para. 2 *C.C.Q.*). In the alternative, it must be determined whether prescription was suspended, as the lawyer contends.
    1. Beginning of the Prescription Period
13. Extinctive prescription “is a means of extinguishing a right owing to its non‑use or of pleading a peremptory exception to an action” (art. 2921 *C.C.Q.*). It is [translation] “considered indispensable for social order” because of the two crucial roles it plays (P. Martineau, *La prescription* (1977), at para. 235). First, extinctive prescription makes it possible to avoid “litigation that would, because of the passage of time since the relevant facts, be marked by confusion and uncertainty” (*ibid*.). This is particularly important [translation] “[i]n a modern society based on the speed and stability of economic exchanges”, in which “[t]he law must, after a certain time, acquire a certainty that permits a crystallization of the legal situation and a consolidation of the rights of the parties and those of third parties” (J.‑L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1‑1294). Second, extinctive prescription is a means to sanction negligence on the part of the right holder, whose silence [translation] “is equivalent to abandonment” (P.‑B. Mignault, *Le droit civil canadien* (1916), vol. 9, at p. 336).
    * 1. Arising of the Right of Action
14. The beginning of the period of extinctive prescription is the “day on which the right of action arises” (art. 2880 para. 2 *C.C.Q.*). As this Court has stated, “the prescription of an action cannot begin to run before the right to institute it originates” (*Morin v. Canadian Home Assurance Co.*, [1970] S.C.R. 561, at p. 565). The arising of the right of action and the beginning of the prescription period are highly factual questions; how they are answered varies from case to case depending on the circumstances and calls for great deference on the part of an appellate court (C. Gervais, *La prescription* (2009), at p. 106; Mignault, at p. 522; *Beaulieu v. Paquet*, 2016 QCCA 1284, at para. 20 (CanLII); *Dupuy v. Leblanc*, 2016 QCCA 1141, at para. 22 (CanLII); on the standard of review, see also *Benhaim v. St‑Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36‑39).
15. In contract, the creditor’s right of action arises once the debtor’s obligation has arisen and is exigible (*Re 9022‑8818 Québec inc.*, 2005 QCCA 275, at para. 51 (CanLII); J.‑L. Baudouin and P.‑G. Jobin, *Les obligations* (7th ed. 2013), by P.‑G. Jobin and N. Vézina, at No. 1127; Martineau, at para. 247). When this occurs varies with the circumstances, and especially with the terms of the contract itself. For example, an obligation with a suspensive condition does not arise until the fulfillment of the condition, and an obligation with a suspensive term is not exigible until the expiry of the term (Baudouin and Jobin, at No. 1127). Prescription does not begin to run until the condition is fulfilled in the first case, and until the term expires in the second. Indeed, this is what was expressly stated in art. 2236 *C.C.L.C.* and is restated in general terms in art. 2880 para. 2 *C.C.Q.* (ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 1808).
16. These principles apply to agreements for professional fees, which can [translation] “provide for billing procedures that might alter the beginning of the prescription period” (Gervais, at p. 121; see, for example, *Dallaire v. Dallaire*, 2013 QCCS 1556, at paras. 18 and 28 (CanLII)). It was to this variety of possibilities that Céline Gervais (now a Court of Québec judge) was referring when she stated that “[w]here claims for professional fees are concerned, the most widely accepted beginning is the termination of the mandate or the completion of the work or services” (p. 121 (emphasis added)). Contrary to the contention of the lawyer in the instant case, the beginning of the prescription period for the recovery of lawyers’ professional fees is not uniform. Rather, it depends on the date when the right of action arose, which varies from case to case depending on the circumstances.
    * 1. Application to This Appeal
17. In this case, the parties’ fee agreement established when the respondent’s obligation to pay was to become exigible. It provided that [translation] “[e]very invoice shall be payable within thirty (30) days” (A.R., at p. 79). As a result of that suspensive term, each payment did not become exigible, and the prescription period therefore did not begin, until the 31st day after the invoice had been sent.
18. Moreover, the invoices sent by the lawyer were neither described as nor intended to be interim accounts. On the contrary, each invoice was marked [translation] “payable on receipt”, which clearly indicated to the client that the payment was exigible.
19. Finally, although this is not determinative, the parties agreed that the invoices would bear interest starting on the 31st day after they were sent. Clearly, that interest was provided for to compensate for any delay in payment (art. 1617 *C.C.Q.*); such a delay can exist only if a payment is due and exigible. Again, the invoices sent to the client reiterated that interest would accrue for any delay in payment.
20. Furthermore, the lawyer implicitly recognized that the client’s debt became exigible after each invoice date. When the first invoice was prepared on October 5, 2011, the lawyer transferred the advance received from the client when the fee agreement was signed into the lawyer’s general account (A.R., at p. 97). Such a transfer could be justified only if the debt it was meant to cover was exigible.
21. In spite of this, the lawyer argues that, although the amounts claimed in each invoice were due as of the billing date, they were nonetheless not exigible until the termination of the contract. I disagree. Not only is this argument contrary to the actual terms of the agreement between the parties and of the invoices that were sent, but it also leads to an incongruous and undesirable result. Its effect would be that a lawyer who charged a client for fees periodically would be unable to claim anything from the client while the contract was being performed even though the lawyer would in the meantime be required to remit the corresponding taxes to the tax authorities (see, for example, *Act respecting the Québec sales tax*, CQLR, c. T‑0.1, ss. 32.3, 82, 83, 422 and 437). Moreover, given that the lawyer would have no exigible claim until the termination of the contract, no amount would be considered unpaid before then. The lawyer in question would therefore have no serious reason for seeking a court’s authorization to cease acting for his or her client, for example, even if it became clear that the client would be unable to pay (*Code of Professional Conduct of Lawyers*, CQLR, c. B‑1, r. 3.1, s. 48 para. 2(3)).
22. In short, the result of this approach is that a lawyer would have to remit to the government taxes corresponding to the amounts billed to his or her client despite being unable to obtain payment or to cease acting for the client before the termination of the contract. The effect of the appellant’s categorical position is that these consequences would extend to all contracts entered into by a lawyer with a client. I cannot imagine that to be the state of the law, let alone a reflection of effective and sensible management of a professional practice.
23. In contrast, an approach based on a factual determination — a determination that varies from case to case depending on the circumstances — of the time when the right of action arose as provided for in art. 2880 para. 2 *C.C.Q.* gives the parties the necessary flexibility to agree when payments will be exigible. For example, they could decide that nothing will be exigible before the termination of the contract, regardless of any interim accounts that might be sent, in which case prescription would not begin to run until the time of termination. Where, however, a lawyer sends his or her client invoices for which payment is exigible in accordance with an agreement they have entered into, the lawyer cannot rely on the “termination of the mandate” as a basis for delaying the beginning of the prescription period.
    * 1. “Time That Work Is Completed” or “Termination of the Mandate”
24. In this regard, the appellant’s argument that prescription for claims for lawyers’ professional fees always runs from the time that “work is completed” or from the “termination of the mandate” does not withstand scrutiny. This argument confuses the types of nominate contracts provided for in the *C.C.Q.* and the rules associated with them, while giving the case law on the matter an import that it quite simply does not have.
25. It is only in the context of contracts of enterprise that the *C.C.Q.* refers to the time when “work [“*travaux*” in the French version] is completed”. Contracts of enterprise are contracts whose purpose is the carrying out of physical or intellectual work (“*ouvrage*” in the French version) (art. 2098 *C.C.Q.*). The word “work” (“*ouvrage*”) is not defined in the *Code*, but the wording of art. 2110 *C.C.Q.* suggests that it refers to a finished product that is completed at a specific time at which the client takes delivery of it. In particular, the *Code* sets out special rules for immovable works (arts. 2117 to 2124 *C.C.Q.*).
26. In the context of a contract of enterprise, the *Code* expressly states that the client’s obligation to pay is deferred until work (“*travaux*”) is completed, which is “when the work [“*ouvrage*”] has been produced and is ready to be used for its intended purpose” (arts. 2110 and 2111 *C.C.Q.*). Because the exigibility of the payment is deferred, the *Code* also specifies that “[t]he prescription of rights to pursue remedies between the parties begins to run only from the time that work is completed” (art. 2116 *C.C.Q.*).
27. This same line of reasoning was followed in *Leblanc* and in *Percé (Ville) v. Roy*, 1995 CanLII 4974 (Que. C.A.), although those decisions were rendered in the context of the *C.C.L.C.*, which contained no equivalent provision. In both *Leblanc* and *Percé*, engineers had collaborated to carry out works — a hospital and a water treatment plant, respectively (*Leblanc*, at pp. 822‑23; *Percé*, at p. 3). Because of the nature of their work and the provincial tariff governing them, their fees were not exigible until the work had been completed, and the prescription period did not begin to run until that date (*Leblanc*, at pp. 826‑27; *Percé*, at p. 4). *Leblanc* and *Percé* did not establish a general principle that prescription for every claim for professional fees runs from the termination of the contract. On the contrary, they confirmed that the time that “work is completed” is relevant only in the case of contracts of enterprise, as the *C.C.Q.* now provides.
28. Therefore, the time that “work is completed” or the “termination of the mandate”, on which the appellant relies in the case at bar, is inapplicable to contracts between a lawyer and his or her client, which are not for the carrying out of a work. The nature of a lawyer’s work is the provision of services for a certain period of time, not the delivery to a client of a “finished product” that the client can use. Sometimes, the lawyer’s role is also to represent the client in court. A contract between a lawyer and a client can thus be characterized as a contract for services, a mandate or a mixed contract, depending on the nature of the services being provided (Baudouin, Deslauriers and Moore, at No. 2‑124; *M.D. v. Plante*, 2009 QCCS 6113, at para. 34 (CanLII); *Bailey v. Fasken Martineau DuMoulin, s.r.l.*, [2005] R.R.A. 842 (Sup. Ct.), at p. 847; *Bérocan inc. v. Masson*, [1999] R.J.Q. 195 (Sup. Ct.), at p. 198). But it is not a contract of enterprise.
29. Unlike a contract of enterprise, neither a contract for services nor a mandate is subject to rules to the effect that prescription begins to run only upon termination of the contract. In the case of mandate, the *Code* states that the parties must hand over what they owe each other upon termination of the mandate, but this does not mean that payments cannot be exigible during the term of the contractual relationship (arts. 2184 and 2185 *C.C.Q.*). Moreover, it often happens that a contract for services between a lawyer and his or her client is a contract of successive performance, and the *Code* in fact provides in respect of such contracts that “prescription runs with respect to payments due, even though the parties continue to perform one or another of their obligations under the contract” (art. 2931 *C.C.Q.*). Thus, regardless of whether a contract between a lawyer and a client is a mandate, a contract for services or a mixed contract, a court must, to identify the beginning of the prescription period, refer to the general rule set out in art. 2880 para. 2 *C.C.Q.* and determine when the right of action arose on the basis of the circumstances of the case before it.
30. Furthermore, the numerous decisions on which the appellant relies reflect this principle. The conclusions reached by the courts in those decisions can be justified having regard to the facts of the cases before them. Contrary to the appellant’s submissions, therefore, the decisions in question must not be interpreted as having the effect of establishing a general principle that, in every case, the prescription period for a claim for a lawyer’s professional fees begins upon termination of the contract.
31. In fact, most of the decisions in which it was held that the prescription period began upon termination of the contract were rendered in cases in which, unlike this one, the invoices had been sent after the contract of the lawyer or professional had terminated. Because there was no agreement establishing when the obligations were to be exigible, it was open to each of the courts in question to find, on the basis of the circumstances of the case before it, that the lawyer or professional in question could sue the client as of the date when the last service was provided (see, for example, *Géoret inc. v. Garderie Morin inc.*, [2000] AZ‑50187544 (C.Q.); *Bureau v. Chapleau*, 2008 QCCQ 4709, at paras. 38‑41 (CanLII); *Fraser, Milner, Casgrain v. Viau*, [2001] AZ‑50187880 (C.Q.), at para. 12; *Lapointe Rosenstein v. 172302 Canada inc.*, 2002 CanLII 15986 (C.Q.), at paras. 2‑4 and 16; *Gagnon v. Voyer*, 2008 QCCQ 10256, at paras. 13, 20 and 30 (CanLII); *Gestion Immo‑Concept inc. (Financière HFC) v. Martial Excavation inc.*, 2013 QCCS 1139, at para. 34 (CanLII); *Kounadis* *Perreault, s.e.n.c.. v. Bois D’Or*, 2013 QCCQ 8359, at para. 16 (CanLII); *Desjardins & Legault CA inc. v. Serour*, 2016 QCCQ 3318, at paras. 23‑24 (CanLII); *Gagnon v. Caron*, 2007 QCCQ 12736, at para. 48 (CanLII); *Bélec v. Martin*, 2015 QCCQ 13838, at para. 13 (CanLII); *Bertrand v. Veillet*, 2006 QCCQ 15374, at paras. 39‑42 (CanLII)).
32. In cases like the instant case in which the lawyer’s contract terminated after the last invoice had been sent, some courts have held that the prescription period began on the date of termination of the contract (see, for example, *Bernatchez v. Bergeron*, [2000] AZ‑00036682 (C.Q.), at para. 19; *Arruda v. Brière*, 2014 QCCQ 6882, at paras. 10‑12 (CanLII); *Parizeau v. Lalonde*, 2014 QCCQ 11332, at paras. 18‑20 (CanLII)). Others have instead held that it began on the invoice date, following the same line of reasoning as the trial judge in the instant case (*Lapointe v. Vigneault*, 2009 QCCQ 2673, at paras. 21‑22 and 26 (CanLII); *Bernard v. Hernandez Sanchez*, 2014 QCCQ 5171, at paras. 12‑13 (CanLII), aff’d 2016 QCCA 136, leave to appeal sought from this Court, file No. 37015). In each of those cases, however, the court’s conclusions could be justified having regard to the facts before it. Moreover, again unlike in the instant case, there was no reference in any of those decisions to the terms of a fee agreement that could have altered the beginning of the prescription period.
33. In my opinion, it is necessary to consider each of the decisions in question in its specific context, and not to attribute to them a general import that they do not have. It is true that in some of them, the contracts at issue were erroneously characterized as mandates and the courts erroneously relied on a purported general rule to the effect that the prescription period for lawyers’ professional fees begins to run upon termination of the contract regardless of the circumstances of the specific case. From this standpoint, the approach taken in them is incompatible with the essentially factual nature of the determination of the beginning of the prescription period. The conclusions reached by the courts in the decisions in question could nonetheless be justified having regard to the facts of the cases before them.
34. In short, nothing in the *Code* or in the case law establishes an inflexible rule that prescription for claims for lawyers’ professional fees begins to run only upon termination of the mandate or the contract for services. Rather, the determination of the beginning of the prescription period is a factual question the answer to which varies from case to case depending on the circumstances and that turns on, among other things, the agreement between the parties and the terms of the invoices sent by the lawyer to his or her client.
    1. Impossibility in Fact to Act
35. In the alternative, the appellant argues that prescription was at any rate suspended until the termination of the contract. In the appellant’s view, this suspension resulted from the fact that, because of the ethical obligations of lawyers, it is impossible for a lawyer to act against a client as long as he or she is representing the client. Although this argument was raised in the courts below, it was not addressed in the reasons of either the Court of Québec or the Court of Appeal. In my opinion, it is without merit.
36. The *Code* does indeed provide that “[p]rescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others” (art. 2904 *C.C.Q.*). But as this Court has stated, this is an “exceptio[n] to the rule [that] prescription runs against all persons”, an exception that should not be “unduly extended” (*Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at paras. 47‑48, quoting *Oznaga v. Société d’exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113, at p. 126). A person arguing that it was impossible in fact for him or her to act must show [translation] “that the alleged obstacle was real” (*Commentaires du ministre*, at p. 1822).
37. It is true that lawyers have many ethical obligations toward their clients, including an obligation to avoid any situation of conflict of interest (*Code of Professional Conduct of Lawyers*, ss. 71 and 72). Where a client has not yet paid an account that is due and exigible, the lawyer is placed in a difficult situation and is generally barred from suing the client to claim the unpaid fees while still acting for him or her.
38. However, this situation does not result in an impossibility in fact to act that suspends prescription. Rather, it forces the lawyer to make a choice: either let prescription run while continuing to act for the client despite the client’s failure to pay, or go to court to claim the fees he or she is owed while ceasing to act for the client, as the *Code of Professional Conduct of Lawyers* allows (s. 48). As difficult as this choice may sometimes be, it is nonetheless available to the lawyer, as evidenced by the frequency with which motions are made in the practice chambers of Quebec courts by lawyers who wish to cease acting for clients because their fees have not been paid. An impossibility in fact to act cannot result from a rational choice that a creditor has and that he or she makes freely with full knowledge of the consequences (*Roy v. Fonds d’assurance responsabilité professionnelle du Barreau du Québec*, 2009 QCCA 459, at para. 3 (CanLII); see also *Dehkissia v. Kaliaguine*, 2011 QCCA 84, at para. 36 (CanLII)).
39. Conclusion
40. In summary, the facts of the case show that the appellant would like to be paid by its client, the respondent, while its contract is being performed without having prescription begin to run against it. This position is contrary to art. 2880 para. 2 *C.C.Q.* and disregards the fee agreement between the parties and the terms of the invoices sent to the respondent, according to which his obligation became exigible on the 31st day after each invoice was sent. As the Court of Appeal held, it was on that day that the appellant’s right of action arose and that prescription began to run. The appellant’s action is therefore prescribed except in respect of the invoice of March 1, 2012. I would accordingly dismiss the appeal with costs.

*Appeal dismissed with costs.*

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