

## **MONEY SERVICES BUSINESS OBTAINS INJUNCTION TO SUSPEND DE-RISKING BY CREDIT UNION**

**Marc Lemieux**

**May 25, 2019**

In a recent decision in the matter of *Net Xpress Intl. Inc. v. Fédération des Caisses Desjardins du Québec* (« *Net Xpress* »),<sup>1</sup> the Superior Court of Quebec issued an interlocutory injunction to prevent the de-risking of a money services business by a credit union.

The injunction will remain in place until trial, at which time a full hearing will be held to determine whether or not the injunction should be extended permanently.

The case is of interest because it highlights a special feature of the regulatory framework of credit unions in Quebec and the related special rights of members of such credit unions as regards the suspension or termination of their accounts.

Under section 382.1 of the *Act Respecting Financial Services Cooperatives* (the « *Act* »),<sup>2</sup> the suspension and termination of membership rights are subject to mandatory requirements.

More specifically, as provided by section 382.1, there must be serious grounds for the decision to suspend or terminate such rights and a process must be followed by the credit union to allow the member to make representations:

« 382.1. After informing a member of a credit union in writing of the grounds invoked and giving the member an opportunity to submit observations, the federation may suspend or expel the member from the credit union if it believes that the member's activities :

- (1) represent an unacceptable financial risk for the credit union;
- or
- (2) are contrary to the credit union's interests.

Before exercising the power given it in the first paragraph, the federation must inform the credit union of its intention and give it an opportunity to submit observations.

The federation informs the credit union of its decision. The credit union informs the member and enters the decision in its register. »

Net Express is a member of Caisse Desjardins du Centre-Est de Montréal (the « Caisse »). The Caisse is itself a member of a federation of credit unions, Fédération des Caisses Desjardins du Québec (the « Fédération »).

The Caisse and Fédération became concerned about Net Xpress as a result of the content of blog entries found on the internet. These entries accused one of the partners of Net Xpress in Africa of being involved in criminal activities.

Further enquiries established that the partner was serving a jail sentence after having been found guilty of the commission of a crime by the courts of Cameroun.

As well, the Caisse and Fédération had a two-year old report by a third party consultant finding deficiencies in Net Xpress' compliance to laws respecting the fight against money laundering and terrorist financing (« AML/ATF Laws »).

The Court noted that the agreement respecting the operation of Net Xpress' account allowed the Caisse to terminate it upon the giving of a notice.

However, Net Xpress argued that section 382.1 of the *Act* took priority over the agreement and that the conditions stated therein were not satisfied.

There does not appear to have been much debate as to whether or not section 382.1 of the *Act* applied to the suspension or termination of Net Xpress' account.

The hearing before the Superior Court appears instead to have focussed on whether or not as required by 382.1 of the *Act* the maintenance of the account and membership of Net Xpress was « contrary to the interests » of the Caisse.

The Caisse and Fédération argued that that was the case, as the continued operation of Net Xpress' account and the maintenance of Net Xpress' other privileges as member of the Caisse could attract potential civil and even criminal liability.

The Court dismissed these concerns as unfounded.

Not only were the blog entries anonymous, but the Caisse had not taken any steps to verify the accuracy of their content. In addition, after the two-year old report the consultant had issued a more recent report confirming substantial compliance to AML/ATF Laws.

Considering the very tangible impact that Net Xpress would suffer upon de-risking, the Court found that the evidence presented by the Caisse and Fédération did not tip the scales of justice in their favour.

The Court accordingly reinstated Net Xpress in all of its privileges as member the Caisse, including but not limited to the use of its account, until the trial.

Three takeaways can be drawn from this case.

Takeaway number one : In this modern day of financial crime and inappropriate use of the financial system, a provision such as section 382.1 of the *Act* may seem like a very blunt tool, not providing the financial institution with the kind of remedies it does indeed need to usefully prevent wrongful use by clients. It would be in the Fédération's interest to consider ways in which it could cause this provision to be amended, to achieve greater flexibility, and continue to respect due process.

Takeaway number two : Canada's Department of Finance has already noted that money services businesses have difficulties to accessing and maintain relationships with banks. Canadians that need affordable access to international remittances are penalised as a result of this problem.<sup>3</sup>

Perhaps legislative or regulatory intervention such as the introduction of provisions in the *Bank Act* that provide a framework for on-boarding and termination is one way in which to improve these relationships and the related remittance services to Canadians.

Takeaway number three : Section 382.1 of the *Act* is specific to credit unions in Quebec and credit unions in the rest of Canada do not appear to have a similar protection against de-risking. In Ontario, while due process is required, no condition is determined in relation to the seriousness of the underlying reasons.<sup>4</sup> There are no conditions at all in British Colombia other than a special resolution of the credit union's board,<sup>5</sup> and no conditions at all in Alberta.<sup>6</sup>

---

<sup>1</sup> *Net Xpress Intl Inc. v. Fédération des Caisses Desjardins du Québec*, 2019 QCCS 362.

<sup>2</sup> CQLR c C-67.3.

<sup>3</sup> Department of Finance, « Reviewing Canada's Anti Money Laundering and Anti Terrorist Financing Regime », <https://www.fin.gc.ca/activity/consult/amlatfr-rpcfa-eng.pdf> (accessed May 24, 2019), p. 39.

<sup>4</sup> Section 47, *Credit Unions and Caisses Populaires Act, 1994*, SO 1994 c. 11.

<sup>5</sup> Section 49, *Credit Union Incorporation Act*, RSBC 1996, c 82.

<sup>6</sup> *Credit Union Act*, RSA 2000, c C-32.