To Terminate or Not to Terminate: that is the question
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Recently, an Ontario judge, in *Atos IT Solutions v. Sapient Canada*, was asked to consider whether a termination of a subcontract was valid. The stakes were high as the subcontractor, Siemens, who had been hired to replace a complex software system, claimed damages for wrongful termination of contract in an amount exceeding 6 million dollars. The key facts in the case were as follows:

1. The subcontract was signed on June 4, 2007;

2. Throughout the duration of the project, numerous issues were raised by the general, Sapient, with Siemens' work, including issues relating to lack of manpower, poor workmanship and delay.

3. In April 2009 the owner and Sapient began to renegotiate a portion of the prime contract that covered Siemens' work scope.

4. On June 26, 2009 Siemens sent a notice to Sapient requesting that the parties attempt to discuss some of the issues on site that the parties were experiencing pursuant to the dispute resolution provision in the subcontract. Although this provision did not contain anything like a binding arbitration clause, it did require the parties to resolve their disputes by initially engaging in some informal discussions and negotiations.

5. On June 29, 2009 Sapient provided Siemens with a letter giving Siemens formal notice that Sapient was terminating the subcontract for "material breaches" pursuant to section 17.2:

> 17.2 Sapient may terminate this Agreement for cause by providing notice to Subcontractor of such termination if:
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> 17.2.1 Subcontractor commits a material breach of its obligations under this Agreement and, subject to Section 17.2.2, fails to cure such breach within 30 days of receipt of notice of such breach by Subcontractor provided that Sapient's sole termination rights with respect to Subcontractor's failure to achieve Application Support Service Levels will be set out in Schedule 8.1;
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> 17.2.2 Subcontractor commits a material breach of its obligations under this Agreement and such breach is not capable of being cured;
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> . . .
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> 17.2.4 Sapient exercises its rights of termination pursuant to any provision of this Agreement (including its Schedules) that provides for a specific termination right of Sapient.

6. Sapient's termination notice went on to say that the quality control issues on site were simply incapable of being cured such that the subcontract was being terminated effective immediately

7. On June 30, 2009 Sapient executed a new contract with the owner to provide a number of services that were within Siemens' original work scope. On that same day, the owner also approved and paid Sapient almost 8 million dollars for work performed to date. Sapient paid none of this money to Siemens.

8. Sapient then sued Siemens for wrongful termination of the subcontract. Siemens counterclaimed for damages arising for delay.

In considering whether or not the termination of the subcontract was lawful, the judge paid particular attention to the fact that the termination notice was served by Sapient only three days after Sapient had received a request from Siemens to use the dispute resolution provisions in the subcontract. The judge also reviewed a number of internal emails exchanged between employees of Sapient. Many of these emails suggested that Sapient, in deciding to terminate the subcontract, was primarily motivated to improve its financial position with the owner in the prime contract as opposed to genuine concern about Siemens' contract performance. Based on these two factors, the judge concluded that the subcontract had been terminated by Sapient in bad faith.

Sapient then tried to argue that it had a right to terminate at least a portion of Siemens' work scope on the basis of a different subcontract clause, section 17.4, which gave Sapient a right to terminate a certain work scope, immediately, without cause. However, the first time this clause was raised or mentioned was in front of the judge.

Although section 17.4 might have given Sapient the ability to terminate a portion of the work scope without cause, the judge wasn't prepared to let Sapient now rely on it. As the judge believed that Sapient fully intended to terminate its entire subcontract with Siemens for cause, it was no longer open to Sapient to rely on the termination for convenience provision. Although the judge did reduce the amount of money that Sapient needed to pay Siemens to account for some responsibility for delay, Siemens still walked away with a judgment worth more than $6,000,000.

Some of the key lessons and reminders that might be taken away from this case are:

1. Choose when and which provision you rely upon to terminate a contract wisely. Trying to prove cause, when you have a convenience clause, may be more effort than it's worth.

2. Be careful what you "type". Your internal emails are disclosable in a lawsuit. One of the key pieces of evidence in this case were the emails from the general contractor that showed the "real reason" why the sub was being terminated. These emails had a big impact on how this case was decided.