

THE *TIME INC. V. RICHARD* DECISION: THE FINE PRINT STILL THE SUBJECT OF MUCH DEBATE

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ARTICLE 219 OF THE *LOI SUR LA PROTECTION DU CONSOMMATEUR* (CONSUMER PROTECTION ACT -HEREINAFTER: "LPC") STATES THAT NO MERCHANT MAY, BY ANY MEANS WHATSOEVER, MAKE A FALSE OR MISLEADING REPRESENTATION TO A CONSUMER. ARTICLE 238 STATES THAT NO MERCHANT MAY FALSELY DECLARE THAT THEY POSSESS A STATUS OR IDENTITY. THESE PROVISIONS AIM TO ENSURE THAT CONSUMERS HAVE ACCESS TO ALL THE INFORMATION THEY NEED TO MAKE AN ENLIGHTENED DECISION WITH RESPECT TO PURCHASES, AND THAT THE MERCHANT HAS CLEARLY REPRESENTED THE ATTRIBUTES OF A GOOD OR SERVICE BEING OFFERED. BUT WHAT CONSTITUTES FALSE OR MISLEADING REPRESENTATION, EXACTLY? TO WHAT POINT MAY MERCHANTS "DEFORM" REALITY IN THEIR ADVERTISING MESSAGES TO CONSUMERS?

On December 15, 2009, the Court of Appeal of Quebec rendered its decision in *Time Inc. v. Richard*¹ and threw some light on both of these articles and the criteria to be applied to the average consumer. Judge Chamberland² of the Court of Appeal reversed the decision of Judge Cohen of the Superior Court³ which ordered Time Inc. and Time Consumer Marketing Inc. ("**Time**") to pay Mr. Jean-Marc Richard ("**Richard**") the sum of \$101,000. Judge Cohen had deemed that Time's sweepstake and, more particularly, a letter sent announcing to its recipient that he had won a prize, were false and misleading and contravened Articles 219 and 238 of the *LPC*.

Although leave to appeal this decision is being sought before the Supreme Court⁴, it is nevertheless important to analyze the decision of the Court of Appeal since it will, if upheld by the Supreme Court, constitute a notable development in consumer protection law.

THE FACTS

Richard had received a letter from Time announcing that:

"OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF \$833,337.00!

WE ARE NOW AUTHORIZED TO PAY \$833,337.00 IN CASH TO MR JEAN MARC RICHARD!

A BANK CHEQUE FOR \$833,337.00 IS ON ITS WAY TO xxxxST³!

YOU WILL FORFEIT THE ENTIRE \$833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!"

Richard responded to the letter and claimed his prize, but in vain. He alleged that, having accepted Time's offer, the company should pay him the sum of \$833,337.

THE JUDGMENT OF THE SUPERIOR COURT

At the trial court, Justice Cohen refused to endorse Richard's allegations, according to which he was owed the sum of \$833,337, since he had accepted Time's offer. According to Judge Cohen, this offer was conditional and contained no clear contractual obligation to pay. However, Judge Cohen decided that Time's sweepstake contravened several provisions of the *LPC* in that the document sent to Richard contained a number of false and misleading representations likely to mislead consumers.

¹ *Time Inc. v. Richard*, 2009 QCCA 2378 (C.A.), December 15, 2009.

² Judges Morin and Rochon both endorsed the motives of Judge Chamberland.

³ *Richard v. Time Inc.*, 2007 QCCS 3390 (C.S.), July 16, 2007.

⁴ *Richard v. Time Inc.*, Supreme Court, case 33554; application for leave to appeal filed on February 8, 2010; response by respondent to application for leave to appeal filed on March 5, 2010.

For example, evidence was given showing that the person signing the letter to Richard did not exist and was fictitious, something which, according to Judge Cohen, contravened Articles 219⁵ and 238⁶ of the *LPC*. The Judge also held that the letter sent by Time contained false and incomplete information specifically designed to mislead the reader, both by its choice of wording, the size of the characters used for the exceptions and waivers, as well as the vague and ambiguous nature of the information itself. She therefore accorded no legal value to this "fine print," even if the said fine print contained caveats as well as all the information required with regard to the Act.

According to Justice Cohen, the document sent by Time could give the general impression that Richard had won a prize, which exceeded the public order provisions of the *LPC*. Moreover, she declared that the documents sent to Richard were in violation of the *French Language Charter*⁷, since they were written only in English.

Justice Cohen ordered Time to pay Richard the sum of \$1,000 in compensatory damages (essentially a symbolic amount) as well as the sum of \$100,000 in punitive damages, for a total of \$101,000.

THE DECISION OF THE COURT OF APPEAL

The Court of Appeal overturned the decision on December 15, 2009.

Justice Chamberland agreed with the conclusions of Judge Cohen to the effect that the documents received by Richard were not equivalent to an offer and only constituted an invitation to participate in a sweepstake, at no cost. He also concluded, in agreement with Justice Cohen, that attribution of the prize to the recipient was conditional upon

- 1) Richard registering for the sweepstake within the prescribed time limit,
- 2) the number that had been attributed to him being the winning number and lastly,
- 3) his answering a general knowledge question. According to Justice Chamberland, from a reading of the documents sent, it was impossible to conclude that Time was

offering to pay Richard the prize money of US\$833,337 unreservedly and on the single condition that he manifest his intention to accept the prize, regardless of whether he held the winning number. Judge Chamberland was of the opinion that, in spite of the document's form, there was no doubt or ambiguity as to the conditions posed and Time had clearly and without ambiguity divulged all the rules of the sweepstake.

Justice Chamberland then confirmed that Justice Cohen was right to conclude that the *LPC* applied to the dispute between the parties, whether a contract had been concluded or not:

"[25] [translation] Firstly, Article 217 *LPC* states that the commission of one or other, or of several, of the practices forbidden is not subordinate to the conclusion of a contract. Furthermore, since we are here concerned with supposedly false and misleading declarations, whose avowed objective is to incite the reader to subscribe to a magazine, it would be contrary both to common sense and the object of the *LPC* that this should only apply whenever a consumer has acceded to the advances of the merchant and concluded a contract⁸.

[26] Secondly, there was in fact a contract between the appellants and the respondent concerning the participation of the latter in the sweepstake. The appellants made an offer to him to participate, at no cost, in the sweepstake, which he did. The number attributed to him was not the winning number, so that the appellants did not owe him the prize that the sweepstake offered. However, in my opinion, it is nevertheless the case that there was a contract concluded between the parties concerning the participation of the respondent in a sweepstake. The fact that it concerned a free participation and that the respondent did not win is irrelevant to the existence of the contract⁹."

Nevertheless, Judge Chamberland refused to conclude that the documentation sent to Richard by Time contravened the provisions of the *LPC*, even if Time had not expressly mentioned that the ticket number held by Richard might not be a winning number, since it involved a competition. Obviously, there are winners and losers in such a case. Judge Chamberland expressed it as follows:

"[28] [translation] I will pass quickly over the violations of Articles 228¹⁰ and 238c¹¹ *LPC*. In my opinion, and I say this with respect for the trial judge in this case, I do not believe that the appellants are at fault for not having written, in black and white, that the number held by the respondent might not be the winning number. This was a sweepstake in which, by definition, there are only a few winning numbers, all others being in consequence losing numbers and it was not necessary, in my opinion, to state it more clearly.

⁵ 219. No merchant, manufacturer or advertiser may, by any means whatsoever, make false or misleading representations to a consumer.

⁶ 238. No merchant, manufacturer or advertiser may, by any means whatsoever: a) falsely pretend that they are certified, recommended, sponsored or approved by a third party, or affiliated or associated to such; b) falsely pretend that a third party recommends, approves, certifies or sponsors their product or service; c) falsely declare themselves to possess a status or identity.

⁷ Charter of the French Language, L.R.Q., Chapter C-11.

⁸ *Consumer Protection Office v. 139561 Canada Ltd*, J.E. 91-1511 (C.S.).

⁹ See also, *Léo Chevalier v. Société des loteries du Québec and others*, C.Q. Montreal, 500-22-060293-019, March 26, 2004, Judge de Pokomandy, AZ-50232443.

¹⁰ 228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

¹¹ 238c). No merchant, manufacturer or advertiser may, by any means whatsoever: (...) c) falsely declare themselves to possess a status or identity.

It need only be said that it is a sweepstake, that there will only be a certain number of winners and only one major prizewinner. If this message is clear – and we shall see later whether it was or not – one cannot, in my opinion, reproach the appellants for having remained silent regarding an important fact, to wit, not mentioning the possibility that the number held by the recipient of the documentation is not the winning number."

(our underlining)

As for using the name of a fictitious person in order to promote its sweepstake, Judge Chamberland was of the opinion that this approach did not contravene the *LPC*, since the documentation originated with the appellants, was sent to consumers by the appellants and it was their sweepstake. Nobody is misled. The fact that the appellants used a pseudonym to "personalize" their mail-out did not contravene the *LPC*.

Lastly, Justice Chamberland analyzed the allegations of Richard to the effect that Time's representations were false and misleading. He agreed with Justice Cohen (and established jurisprudence) that the false and misleading character of the declaration could be understood "*in abstracto*," as in reference to the average consumer, in this case a French speaker. He noted that it is not necessary to demonstrate that the consumer has actually been misled, but only that such a possibility exists.

Therefore, the following question had to be answered: "Was the documentation sent to the respondent of such a kind as to allow its recipient to believe that he was the lucky winner of \$833,337?" Judge Chamberland answered this question by first describing the profile of the average consumer. He believed his character to be that of a sensible and realistic person, able to distinguish between reality and the representations made to him:

"[41] [translation] It seems to me that the average consumer, regardless of his language, knows that money doesn't fall out of trees. Who would believe that they had won nearly a million dollars US in a lottery whose existence he was not even aware of and in which he had not purchased a ticket?"

[42] It seems to me that the average consumer would seek to understand the situation. He would read the documentation he had been sent. It seems to me he would quickly understand that he might perhaps be the winner of US\$833,337, but that it was a bit too soon to start rejoicing: 1) he would have to return the coupon within the prescribed time limit, 2) his number would have to be the winning number and lastly, 3) he would have to answer a general knowledge question."

(underlining by Judge Chamberland)

Having reviewed the relevant clauses in the documentation sent to Richard, Justice Chamberland wrote:

"[49] [translation] I find it difficult to believe that, after reading this document, the average consumer could still have the impression, even in a general sense, that he had won US\$833,337, with no other formalities. It seems quite clear to me that, from the documentation received, he would know that he has to register in the sweepstake and, especially, hope to hold the winning number. He would also know that his chances of winning were not very good, being 1/120 million."

Judge Chamberland took it for granted that the average consumer would take note of all the documentation sent, including the fine print. He presumed that the average consumer is no more naive than the average person. He could not be content merely to read the main headlines and catchy slogans, without consulting the notes at the bottom of the page in fine print. He must try and understand the situation. The average consumer is able to understand the fine print and reduce the oft-exaggerated claims of an importunate merchant to more realistic proportions. Judge Chamberland wrote:

"[50] [translation] The average Quebec consumer is no more naive than most other people. I imagine him as averagely intelligent, averagely sceptical and averagely curious. He knows, or so it seems to me, that advertising is, almost by definition, inclined to be excessive. He would have learned a long time ago that he cannot rely on bold print and enticing slogans, printed largely in block letters; that one must also read the fine print at the bottom of the page (toward which several seemingly innocent asterisks nearly always refer the reader) in order to understand all the conditions of the offer. The daily inserts advertising cars, furniture and electrical goods, holiday trips south, investment funds, computers and cellphones all offer perfect examples of this... not to mention the rest.

[51] The sweepstake run by the appellants is of the same kind, without the asterisks and fine print at the bottom of the page however. With respect for other opinions, I can see some catchy phrasing in the documentation sent to the respondent, but no declarations that are misleading, unfair or deliberately ambiguous¹². I suspect that even the respondent, a knowledgeable businessman operating on the local and international scenes, in both French and English, perfectly understood what the sweepstake was all about and what his chances of winning were, right from the very beginning."

¹² See also, *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995); for a survey of the lottery question in the United States and for the numerous references it contains, the article by Julie S. James, entitled "Comment: Regulating the Sweepstakes Industry: Are Consumers Close to Winning?" (2001) 41 *Santa Clara L. Rev.* 581, is of interest.

This decision of the Court of Appeal is important in that it provides, in a more up-to-date manner, a definition of the average consumer and, especially, criteria for evaluating the average consumer. For a long time, consumers have been thought of as "credulous and inexperienced," and this interpretation has considerably benefited any consumer who has sought a decision to determine whether or not he has been short-changed. By this decision, the Court of Appeal has raised the bar of criteria for evaluating the average consumer. The ruling confirms the current trend of the courts to consider 20th century consumers as individuals who are sensible, educated and have a good understanding of their rights. The advent of the Internet, the rapidity with which information circulates, the creation of organizations aimed at protecting the rights of consumers and the globalization of markets has led to a growing awareness on the part of consumers. Benefiting from the existence and support of consumer organizations, the average consumer has learned to discipline himself and think before buying. Since the *LPC* requires merchants to make clear disclosures, the average consumer can compare offers from merchants and choose the one that is most advantageous. He is aware that in these modern times competition is ferocious, and that advertising often exceeds reality or is likely to deform it. He must be fully aware of this and take it into account.

Although leave to appeal this decision is pending, the courts will not be able to ignore the stricter and more demanding criteria outlined by the Court of Appeal in their analysis of consumer behaviour whenever they have to evaluate the nature and general impression created by representations or declarations made by a merchant, or the circumstances surrounding the consent given by a consumer. Gone are the days when one might presume that all consumers were credulous and inexperienced.

This decision will have repercussions on advertising aimed at consumers. The fine print now has a well-defined and established judicial value; from now on, the consumer will be presumed to have taken notice, particularly when an enticing advertising slogan should be logically completed by the fine print below, which is generally the case.

On the commercial side, this decision will allow merchants to broadcast or publish inviting and catchy advertising messages, as long as they are not false or misleading and that all the pertinent supplementary information is divulged to consumers.

Judges Duval-Hesler, Gendreau and Dalphond have also endorsed this principle in *Brault & Martineau v. Riendeau*¹³, a decision handed down on February 26, 2010 in which the Court of Appeal upheld a decision by Judge Claudine Roy ruling that while all the information, whether given in the fine print or not, is provided, the message is not misleading.

This question about the fine print is thus still very much in debate and the decision of the highest court in this country on this question may very well, should leave to appeal be granted, settle the issue definitively.

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¹³ *Brault & Martineau Inc. v. Riendeau*, February 26, 2010, 500-09-018159-079 (C.A.).

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