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Class Actions

BEWARE OF PUNITIVE DAMAGES IN CONSUMER LAW!

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THE QUEBEC COURT OF APPEAL RECENTLY RENDERED A LONG-AWAITED DECISION IN A CONSUMER PROTECTION CLASS ACTION.

ON FEBRUARY 26th, THE COURT DISMISSED THE MAIN APPEAL AND CROSS-APPEAL IN *BRAULT & MARTINEAU INC. VS. RIENDEAU*[1] FOR THE REASONS FOR WHICH WERE WRITTEN BY JUSTICE DUVAL HESLER, WHICH WERE ENDORSED BY BOTH JUSTICE GENDREAU AND JUSTICE DALPHOND.

THE JUDGMENT AT FIRST INSTANCE

The Court of Appeal was asked to rule on the merits of a judgment of the Superior Court in the context of a class action[2].

This case originated from newspaper ads for the Defendant, Brault & Martineau, which advertised promotions by using expressions such as "[...] don't pay anything before [...]," "equal installments without fees or interest" or "no deposit, payment, nor interests" when referring to financing options offered by a third party.

Justice Duval Hesler summarizes well the decision at first instance:

> "[6] [translation] The trial judge concluded that the ad published by Brault & Martineau, the Appellant, contravened certain provisions of the *Consumer Protection Act (hereinafter: "CPA")* and that, consequently, the Appellant engaged in an illegal practice as defined in the CPA. The Court granted the Respondent punitive damages in the amount of $2M without concomitant award for compensatory damages, in accordance with Article 272 of the CPA. The Court further ordered collective recovery of the award and the establishment of a distribution mechanism."

According to Justice Duval Hesler, the appeal raises four main questions, namely:

- the nature of *expenses* or *discount rate* billed to Brault & Martineau by the third party who provides consumers with the financing offered to Brault & Martineau's customers;
- the general impression of Brault & Martineau's ad;
- the application of Articles 253 and 272 *CPA*;
- the autonomous award of punitive damages.

EXPENSES OR DISCOUNT RATES PAID BY BRAULT & MARTINEAU

The Court concluded that the trial judge was correct in establishing that the discount rate (the consideration paid by Brault & Martineau to the third party who offers the financing to Brault & Martineau's customers) was part of the net worth as defined in the *CPA* and that it cannot be considered a *credit charge* as per this Act. Thus, this judgment enables us to cast new light on the definition of *credit charge* as defined in the *CPA*.

ADVERTISING PRACTICES OF BRAULT & MARTINEAU

The Court declared that, even if the discount paid by Brault & Martineau did not constitute a *credit charge* as defined in the CPA, Brault & Martineau nonetheless advertised to consumers the availability of the credit; by doing so, the merchant had no another choice but to comply with the rules of the *CPA* and of its statutory regulations[3].

In this respect, Justice Duval-Hesler writes:

> "[34] [translation] Nevertheless, the fact remains that despite all claims to the contrary, the Appellant advertised the availability of the credit. By doing so, it is subject to the stipulations set forth in the *CPA* and *RLPC*. The Appellant cannot hide behind the fact that Visa Desjardins or another company provides the financing in order to claim that the advertisement does not publicize methods of credit. If the Appellant wants to publicize a method of credit, it must publicize all of them (Art. 85 RLPC) so as to provide consumers with the opportunity to make an informed decision in regards to using the financing services advertised. The Appellant's advertisement does not therefore fulfill the requirements set forth in the *CPA*, and specifically Article 228 (...)."

1 *Brault & Martineau Inc. v. François Riendeau and the Fédération des Caisses Desjardins du Québec*, CA (MTL) 500-09-018159-079 (Gendreau, Dalphond, Duval Hesler), February 26, 2010.

2 Judgment on October 17, 2007 (Claudine Roy, j.c.s.)

3 Regulations supporting the *Consumer Protection Act* (R.R.Q., 1981, C. P-40.1, r.1).

THE INTERACTION BETWEEN ARTICLES 253 AND 272 CPA

After a brief analysis, the Court confirmed that it is clearly established that the sanction for a prohibited practice as defined in the *CPA* is not limited to the rights of recovery as per Article 253[4] *CPA*. The purpose of this provision is to give access, in the event of prohibited practice, to a means of rectification as defined in Article 272[5] *CPA*, including punitive damages.

AUTONOMOUS AWARD FOR PUNITIVE DAMAGES

Lawyers in Québec involved in Consumer Law keenly anticipated the judgment because of the issue raised as to an award for punitive damages under the terms of the *CPA* in the absence of a concomitant award for compensatory damages. In first instance, Justice Roy stated that punitive damages could be awarded independently on an award for compensatory damages and condemned Brault & Martineau to pay a sum of 2 M$ to the class members.

The Court of Appeal confirmed Justice Roy's approach and, with this in mind, held as follows:

> "[42] [translation] In the event of violation of *CPA*, punitive damages may be granted without having previously concluded to an award of compensatory damages. In the present case, the trial judge did not grant compensatory damages and there is no reason to intervene. The *CPA* does not set aside the principles in the evaluation of damages. Compensatory damages may be awarded where evidence of a prejudice has been established. The Respondent did not prove such a prejudice."
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> [...]
>
> "[45] In my opinion, and at the risk of repeating myself, an illegal commercial practice, such as an ad that does not meet the requirements of *CPA*, in of itself justifies an award for punitive damages."

It is important to note that Justice Duval Hesler does not question the quantum of Justice Roy's award for punitive damages. Although the trial judge did not explain in detail her analysis of the application of Article 1621 C.C.Q. (evaluation of the quantum of the punitive damages), her analysis was based on the evidence, which constituted a discretionary authority reserved for trial judges and on which the Court of Appeal generally does not intervene.

CONCLUSION

The parties have confirmed that they do not intend to seek permission to appeal to the Supreme Court of Canada.

Now that the Court of Appeal judgment has the authority of a final judgment, it will be interesting to see if it will trigger a new wave of class actions in consumer protection. In the event of a prohibited practice as defined in the *CPA*, consumers, faced with the difficulty of establishing the existence of compensatory damages in their case, will likely be tempted to resort to the only means of granting punitive damages.

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[4] 253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph *a* or *b* of section 220, *a*, *b*, *c*, *d*, *e* or *g* of section 221, *d*, *e* or *f* of section 222, *c* of section 224 or *a* or *b* of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

[5] 272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant's or manufacturer's expense;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.