IN FACT AND IN LAW

MARCH 2012

Class Actions
Consumer Law

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CLASS ACTIONS AND CONSUMER LAW: OBLIGATIONS RESULTING FROM THE SALE OF ADDITIONAL WARRANTIES; WHAT WAS THE LAW PRIOR TO BILL 60?

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CONSUMER LAW AND THE *CONSUMER PROTECTION ACT* (THE "*CPA*") ARE AIMED FIRST AND FOREMOST AT ECONOMIC ACTIVITIES IN THE RETAIL SALES SECTOR. SPENDING IN THIS SECTOR REPRESENTS MORE THAN 65% OF SPENDING IN THE PROVINCE. CONSUMER LAW IS ALSO AN AREA OF THE LAW THAT THE COURTS ARE FREQUENTLY CALLED UPON TO ANALYZE AND, IN MANY INSTANCES, THE DISPUTE ARISES IN THE CONTEXT OF A CLASS ACTION. MANY PEOPLE FEEL THAT THE CLASS ACTION IS AN APPROPRIATE PROCEDURAL VEHICLE FOR DEALING WITH CERTAIN PROVISIONS OF THE *CPA*, SUCH AS THOSE CONCERNING PROHIBITED COMMERCIAL PRACTICES.

In recent months, several judgments concerning this area have been rendered and they shed some light, which is always welcome, on certain obligations imposed on merchants by the *CPA*. The subjects dealt with in these judgments are topical and involve products and services currently offered by many merchants.

In a series of bulletins, we will comment on some of these judgments. The present bulletin looks at a number of Superior Court judgments that deal with the sale of additional warranty contracts.

THE ADDITIONAL WARRANTY CASES

In these cases, the issue in dispute was essentially whether, prior to June 30, 2010, merchants had an obligation to inform consumers of the existence of the legal warranty before proposing that they purchase an additional warranty.

The sale of additional warranties in the markets for electronic and household appliances and other consumer goods is an issue over which a lot of ink has been spilled, particularly in the context of the debates that, on June 30, 2010, led to the coming into force of Bill 60, which amended the *CPA*.

Prior to June 30, 2010, the *CPA* did not impose any specific obligation on merchants offering contracts of additional warranty. Since June 30, 2010, the situation has changed: before proposing to a consumer that he/she purchase a contract that includes an additional warranty on goods, a merchant must first inform the consumer, verbally and in writing, of the existence and nature of the legal warranty provided for in sections 37 and 38 of the *CPA*. This obligation to inform consists more particularly in the merchant giving to, and reading to, the consumer, a document, the text of which is prescribed in the *Regulation respecting the application of the Consumer Protection Act* (the *"Regulation"*).

The *CPA* provides that a contract of additional warranty is: "a contract under which a merchant binds himself toward a consumer to assume directly or indirectly all or part of the costs of repairing or replacing goods or a part thereof in the event that they are defective or that they malfunction, otherwise than under a basic conventional warranty given gratuitously to every consumer who purchases the goods or has them repaired".

In the fall of 2010, 10 motions for authorization to institute a class action were served on 10 retailers in the Montreal and Quebec City regions. Each of these motions sought authorization to institute a class action on behalf of natural persons to whom an additional warranty on the goods sold by the targeted merchant was proposed and/or sold. Two of the motions were filed in the judicial district of Quebec while the other eight were filed in the judicial district of Montreal.

These motions all contained, in more or less the same words, the same allegations and repeated, against each of the targeted merchants, the same criticisms: the merchant must inform the consumer of the fact that the additional warranty that he is selling is useless because the scope of the protection it provides is already covered by the legal warranty against latent defects. By not providing this information and by not disclosing the existence of the legal warranty to the consumer, the merchant is making false representations and failing to mention an important fact, thus breaching the provisions of sections 219 and 228 of the *CPA*.

So, indeed, the motions alleged that the provisions of the *CPA* that came into force on June 30, 2010 did nothing other than declare the state of the law as it has always existed and that the merchant's obligation to disclose the existence of the legal warranty against latent defects has always been present in Quebec law. Each petitioner claimed that if the merchant had disclosed the existence of such legal warranty, he/she would not have bought an additional warranty. Furthermore, the motions alleged that since June 30, 2010 the merchants had not complied with the new provisions of the *CPA*. The motions failed to state in what respect they did not comply.

In each class action, the remedy sought was the same: the voiding of all the contracts of additional warranty concluded with the targeted merchant and the payment of punitive damages to each member of the targeted groups. Thus, the situation amounted to nothing less than a formal attack against the industry of contracts of additional warranty.

It should be noted that in each of the cases filed in the district of Montreal, each petitioner amended his/her proceedings simultaneously by adding that the targeted merchant had represented that if he/she did not purchase an additional warranty then he/she would have to pay for any breakdown, repair or replacement of the item purchased.

Justice Dominique Bélanger of the Superior Court rendered judgment in the two cases in the judicial district of Quebec on June 20, 2011 while Justice André Prévost, sitting for the same Court in the judicial district of Montreal, ruled in seven of the other cases on January 16, 2012[1]. In all of the cases, the motions for authorization to institute a class action and to be granted the status of representative were dismissed. The reasons of Justices Bélanger and Prévost were roughly the same. These nine cases are presently all in appeal.

JUSTICE BÉLANGER'S JUDGMENTS

In Justice Bélanger's view, the petitioners' legal syllogism did not hold up. She concluded that the fact that a merchant did not inform a consumer of the existence of the legal warranty against latent defects at the time of the offering or the sale of an additional warranty did not constitute, before June 30, 2010, a commercial practice prohibited by the *CPA*. Contrary to what was alleged in the motions, the coming into force of the provisions of Bill 60 did not codify the state of the law as it existed previously:

> *[Translation]*
> "[38] By pleading that a merchant's obligation to inform a consumer of the existence of a legal warranty existed even before the legislative amendment, the petitioner is, in a way, alleging the pointlessness of the legislative amendment. After all is said and done, the legislature would have had nothing to reform, but it would have done so anyway.
>
> [39] However, the legislature does not speak for nothing. [...]
>
> [44] The Court notes that the Bill provides for the imposition on merchants of a duty to inform, for the purpose of remedying consumers' lack of knowledge. The goal is very specific, that is to impose an obligation on merchants, an obligation that did not exist previously."
> *[Underlining added]*

The judge stated that the petitioners were attempting to give a retroactive effect to the new provisions of the *CPA*, while the Bill did not provide for any such retroactivity. She added that even in the provisions of Bill 60, there is no statement anywhere that merchants must inform consumers of the fact that the legal warranty is free or inform them of the ins and outs of the legal warranty. Indeed, that would make no sense:

> *[Translation]*
> "[59] We can certainly think that the legislature did not want the employees of Ameublements Tanguay to have to give a lesson in law to the customers."

It should be noted that this aspect was one of the main points that was debated in parliamentary commission at the time of the debates that led up to the passing of Bill 60: to what extent should merchants have to give a lesson in law to consumers?

Justice Bélanger also recognized that there is a difference between the legal warranty against latent defects and an additional warranty: the conditions under which they may be exercised. She relies on a text published by the Office de la protection du consommateur:

> *[Translation]*
> "[61] In addition to that, if the legal warranty is free, its implementation may not be, because it requires a case-by-case analysis and although there is a good chance that it will work in the consumer's favour, it is incumbent upon him to show that the problem that has arisen prevents the property from being used normally, or that the property has not had a reasonable lifespan taking into account its price and the appropriate use that has been made of it."

[1] The *St-Amant* v. *Groupe Dumoulin* case was suspended due to a notice of suspension of proceedings filed in the Court's file on May 12, 2011.

Thus, the judge could not subscribe to the petitioners' arguments whereby they alleged that an additional warranty is useless. On the contrary, the exercise of the rights resulting from an additional warranty is not always dependent on a latent defect. It is quite often peace of mind that the consumer buys. For example, in one of the cases before Justice Bélanger, the protection plan provided by the additional warranty covered the replacement of the goods without repairs, which is quite different from the protection provided by the legal warranty. Not being useless, an additional warranty does not entail a false representation by the merchant who offers it.

As for the composition of the proposed group, Justice Bélanger noted that the group was quite broad but even so there were several common questions, the answers to which might further the group's case. The determination of the existence of a prohibited practice was one of them. The issue of whether there had been false representations was another. However, there were more specific issues that remained and it would have been necessary to create sub-groups to take into account, for example, the various types of warranties and different products. In all cases, it would have been necessary to exclude the consumers who had benefited from their additional warranties as well as those who wished to keep their warranties. Also, those whose recourses were prescribed would have to be treated differently. Therefore, the judge came to the conclusion that the recourse based on the uselessness of the additional warranties did not meet the similarity or relatedness criterion provided for in article 1003 (a) of the *Code of Civil Procedure*.

That aspect of Justice Bélanger's decision seems above all based on a criterion of convenience. Indeed, the inconveniences resulting from the creation of a multiplicity of sub-groups would have prevailed over the existence of one or two common issues to be decided. It will be interesting to see how the Court of Appeal resolves this issue.

Then, Justice Bélanger considered the representative character of the petitioners to act on behalf of the groups. She noted that in one of the cases submitted to her the petitioner was an employee of the law firm that instituted the class action. She also noted that *[Translation]* "the allegations relating to the criterion in article 1003 (d) of the *Code of Civil Procedure* are very similar, if not identical, in most of the 10 motions for authorization to institute a class action". She was preoccupied by the fact that it was the lawyers who were running the class action and not the petitioners. After these few remarks, Justice Bélanger concluded that she did not have to decide the issue of the representativeness of the petitioners, in view of her conclusions with respect to the other criteria.

[2] See also: *Blondin* v. *Distribution Stéréo Plus Inc.*.

[3] See also: Guindon v. The Brick Warehouse LP and Normandin v. Bureau en Gros (Staples Canada Inc.); see also Filion v. Corbeil Électrique and Tahmazian v. Sears Canada Inc., in which an additional benefit was the replacement of the device if the same problem arose three times.

JUSTICE PRÉVOST'S JUDGMENTS

Justice André Prévost rendered seven judgments dated January 16, 2012. Concerning the criterion of appearance of right, firstly he noted that the legal syllogism proposed was the same in all the cases, including the cases submitted to Justice Bélanger. Secondly, he declared himself in agreement with the judgments rendered by Justice Bélanger. However, Justice Prévost pushed Justice Bélanger's reasoning a little further and added certain comments relating to the characteristics that distinguish the legal warranty from additional warranties.

Exercising the legal warranty requires proof, by he/she who invokes it, of the following elements: (a) the presence of a latent defect; (b) sufficiently serious; (c) existing at the time of the sale; and (d) not known to the buyer. Except for cases in which the latent defect is glaring, it is often difficult to determine the existence of these elements.

It is otherwise in the case of an additional warranty. An additional warranty provides the purchaser with peace of mind for a defined period. In the case of *Roulx* v. *Centre Hifi*, the additional warranty provided the same benefits as a manufacturer's warranty[2] and included advantages such as replacement of defective parts without having to prove a latent defect in the device, the possibility of obtaining compensation equivalent to the difference between the price paid and a lower price, if there was one, advertised by a competitor within the period of 30 days following the purchase, and lastly the possibility within the same period of exchanging the product for another one.

In the case of *Touré* v. *Brault & Martineau inc.*, the additional warranty included certain services such as preventive maintenance, travel by a technician to the home and replacement of defective parts without being necessary for the consumer to prove that there was a latent defect in the device[3].

Justice Prévost then examined the amendments made simultaneously by the seven petitioners to the effect that it was represented to them that *[Translation]* "if a breakdown occurred after the expiry of the manufacturer's one year warranty, he/she/they would have to meet the cost of the repairs or replacement". In addition to the fact of being surprised that the exact same representation was made to all of the petitioners, Justice Prévost considered whether that representation was really false or misleading. He concluded as follows:

> *[Translation]*
> "[39] Interpreted literally, it is not. At the time when it is stated, the vendor cannot assume that the device is affected by a latent defect. Moreover, as the manufacturer's warranty covers a one-year period, the vendor can reasonably assume that if a latent defect exists at the time of the sale there is a very strong probability that it will manifest itself during that period.

> [40] All in all, it seems rather that the vendor is referring here to defects that do not match the criteria of a latent defect. In this context, the representation is not fundamentally false or misleading."

Justice Prévost added that it was at the least unlikely that all of the petitioners, who bought from seven different merchants, had been the subjects of that same representation. In the absence of factual allegations suggesting a strategy put forward by the industry, the normal tendency of the courts is to view this kind of allegation with much circumspection. For Justice Prévost, the allegations added by the petitioners at the time of the simultaneous amendments therefore appeared spurious and could not, in themselves, be the basis for that part of the syllogism concerning the making of misleading of representations by the respondent merchants.

Concerning the existence of similar, related or identical issues of law, Justice Prévost, although in agreement with some of the observations of his colleague Justice Bélanger, arrived at a different conclusion. Justice Prévost would have limited the group only to the consumers who were offered or purchased an additional warranty before June 30, 2010 [4].

Concerning the abilities of the petitioners to represent the groups, Justice Prévost noted that, in all the cases, the petitioners had not alleged any actions or steps that they might have taken and that might lead one to conclude that they were capable of ensuring the proper progress of the lawsuits for the benefit of all of the members of the groups. Justice Prévost concluded as follows:

> *[Translation]*
> "[79] The concern expressed by Justice Bélanger that the 10 lawsuits, including the present one, appear to have been commenced at the initiative of the lawyers and not of the petitioners is fully shared by the undersigned. If that is the case, it is reasonable to doubt the capabilities of the petitioners [...] to ensure adequate representation of the members."

The judgments in Ameublements Tanguay inc. and Meubles Léon Ltée were brought into appeal on July 19, 2011. The judgments rendered by Justice Prévost are also in appeal and it has recently been confirmed that the Court of Appeal will analyze all of these cases at the same time. Indeed, it is to be expected that the same arguments as those made before the Superior Court will be presented again before the Court of Appeal.

The judgments of Justices Bélanger and Prévost, if they are upheld, confirm that, although the criteria for authorizing a class action should be interpreted broadly and liberally, there is nevertheless a requirement to be fulfilled. It is not enough to allege that one has a recourse to exercise; one must also be able to demonstrate that such is the case.

From an economic perspective, the judgments of Justices Bélanger and Prévost provide some comfort to the industry of contracts of additional warranty. Since 1988, the *CPA* has recognized the contract of additional warranty and the possibility of "supplementing" the already existing warranty. In the age of disposable products, when everything is less and less expensive, the legal warranty, the main attribute of which is above all temporal, cannot cover everything indefinitely. Moreover, the exercise of the rights that flow from it is subject to several conditions, which justifies the passing of some period of time during which the consumer must await the merchant's decision to accept, or reject, his claim based on the legal warranty. The fulfilment of the conditions relating to the exercise of a legal warranty is above all a question of fact, whereas an additional warranty often does not include these conditions and provides for replacement of the goods right away and without any formalities. Additional advantages may also flow from such a warranty. That is what Justices Bélanger and Prévost decided.

But there is more. The class actions directed at the merchants, if they are authorized, will force the Superior Court to decide what is the normal lifespan of several common consumer products. In our opinion, that is not the goal sought by, or the spirit of, the *CPA*. The Court of Appeal should exercise restraint when it rules on these cases. Aside from certain provisions relating to sales of used vehicles, the *CPA* does not stipulate in any way what is the normal lifespan of a consumer product. Not only are the operational challenges raised considerable, but also the economic risks relating to judicial decisions in these cases are omnipresent.

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[4] It is important to note that the Supreme Court just decided, in the case of Richard v. Time, that a consumer who did not contract with the merchant has no civil remedy. This decision will be the subject of an upcoming bulletin. For now, it is sufficient to say that to the extent that the appeals would be allowed by the Court of Appeal, it is to be expected that consumers who "were offered" an additional warranty obviously will not be eligible to be included in the targeted group.