IN FACT AND IN LAW

APRIL 2012

lavery
LAW ▸ BUSINESS

Consumer Law

THE SUPREME COURT CLARIFIES THE PARAMETERS FOR ASSESSING WHETHER A COMMERCIAL REPRESENTATION IS FALSE OR MISLEADING: THE AVERAGE CONSUMER IS CREDULOUS AND INEXPERIENCED

LUC THIBAUDEAU

with the collaboration of Bernard Larocque

LAVERY FOLLOWS THE EVOLUTION OF CONSUMER LAW CLOSELY. ITS SPECIALIZED EXPERTISE IN THE FIELDS OF RETAILING AND CLASS ACTIONS HAS BEEN CONFIRMED MANY TIMES BY STAKEHOLDERS IN THE MILIEU. LAVERY MAKES IT ITS DUTY TO KEEP THE BUSINESS COMMUNITY INFORMED ABOUT THESE MATTERS BY REGULARLY PUBLISHING BULLETINS THAT DEAL WITH JUDICIAL AND LEGISLATIVE DEVELOPMENTS THAT ARE LIKELY TO LEAVE THEIR MARK AND INFLUENCE OR EVEN TRANSFORM PRACTICES IN THE MILIEU. THE PRESENT BULLETIN ANALYZES A RECENT DECISION OF THE HIGHEST COURT IN THE COUNTRY THAT WILL NOT FAIL TO MAKE WAVES IN AN AREA THAT AFFECTS ALL OF US, THAT IS ADVERTISING.

On February 28, 2012, the Supreme Court issued its judgment in the case of *Richard* v. *Time Inc. et al.* and, reversing the Court of Appeal's decision, partially reinstated the judgment of Justice Carol Cohen of the Superior Court who concluded that a commercial representation was false and misleading. According to the highest court in the country, the Court of Appeal erred in ruling that the average consumer has "an average level of intelligence, scepticism and curiosity".

THE FACTS

In this case, Mr. Richard had received a letter from Time (the **"Document"**), written in English, announcing to him 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 xxxxST!
>
> YOU WILL FORFEIT THE ENTIRE $833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!"

The Document was signed by a certain Elizabeth Matthews. Convinced that he had won the prize, Mr. Richard (**"Richard"**) returned the reply coupon and subscribed to Time magazine for two years. That gave him the right to receive, free of charge, a camera and a photo album, which were delivered. However, the long-awaited cheque was never received. Confident about his course of action, Richard tried to contact Ms. Matthews at Time to claim his prize. He was told that this person did not exist. Richard claimed his prize in vain. Claiming to have won the contest and to be entitled to the amount of $833,337, he instituted proceedings against Time Inc. and Time Consumer Marketing Inc. (**"Time"**), seeking a judgment for the amount stated in the Document, that is to say $833,337.

THE SUPERIOR COURT'S JUDGMENT

In the court of first instance [1], the judge awarded the claim in part, noting that the Document induced error by means of the false and misleading representations that it contained, such as that it had been signed by a certain person when in reality that person was fictitious, and that Richard had won the contest. The judge ruled that the Document breached several provisions of the *Consumer Protection Act* ("***CPA***") and gave Richard the general impression that he had won, despite the presence of fine print indicating that such was not the case and that it was only an invitation to participate. Stating that the Document did not contain any obligation to pay, Justice Cohen nevertheless ordered Time to pay Richard $1,000 in damages for moral injuries and $100,000 of punitive damages.

THE COURT OF APPEAL'S JUDGMENT

On December 15, 2009, the Quebec Court of Appeal [2], in a judgment written by Justice Jacques Chamberland, reversed the above-mentioned judgment. According to the Court of Appeal, despite the form of the Document sent to Richard, it was obvious that he had not won and Time had unambiguously disclosed all of the conditions of the contest to him. Justice Chamberland declined to conclude that Time had breached the *CPA*, even though it was not expressly stated that Richard's number was not the winning number. It was a contest, and in any contest there are winners and losers.

As for the use of the name of a fictitious person, Justice Chamberland was of the opinion that this approach did not infringe the *CPA*. The Document came from Time and had been transmitted by Time, the contest being theirs. For Justice Chamberland, the fact that Time used a pen name to personalize its mail did not breach the *CPA*.

However, Justice Chamberland said that he agreed with Justice Cohen (and the consistent case law) who stated that the false or misleading character of a statement is to be assessed "*in abstracto*", by reference to an average consumer. He stated that it was not necessary to demonstrate that the consumer had really been misled, but only that there was a possibility of that. However, for Justice Chamberland, the average consumer is sensible and realistic, and knows how to distinguish between reality and the representations made to him:

> [Translation]
>
> "[41] It seems to me that the average consumer, whatever his language may be, knows that money does not grow on trees. Who would believe that he had won almost one million American dollars in a lottery that he did not know existed until then and for which he had not bought a ticket?
>
> [42] It seems to me that the average consumer would try to understand. He would read the documentation that was sent to him. It seems to me that he would understand quickly that perhaps he will be the winner of US$833,337, but that it is a little early to rejoice: 1) he must return the participation coupon within the prescribed period of time, 2) his number must be the winning number and lastly, 3) he must answer a question of a general nature." [underlining by Justice Chamberland]

Justice Chamberland ruled that the average consumer could read the entire Document, including the fine print. He also assumed that the average consumer is no more naive than the average person and that he cannot content himself with only reading the main headings and catchy slogans. He concluded that the average consumer knows how to put the exaggerated wording of a catchy offer into perspective.

Were we on the verge of witnessing the advent of a new kind of consumer, that is, the sophisticated consumer of the 21st century? Could we talk about a refinement of the notion of the consumer-Netsurfer to which the Supreme Court had referred in the *Dell* case [3]? The Supreme Court did not see things in that way. On February 28, 2012, a unanimous bench of seven judges whose reasons were written by Justices LeBel and Cromwell partially reinstated the decision of Justice Cohen, reducing the punitive damages to $15,000 [4].

1 *Richard* v. *Time Inc. & al.*, [2007] R.J.Q. 2008 (S.C.).

2 [2010] R.J.Q. 3 (C.A.).

3 *Dell Computer Corporation* v. *Dumoulin*, July 13, 2007, Supreme Court of Canada.

4 *Richard* v. *Time Inc.*, 2012 SCC 8.

THE SUPREME COURT'S JUDGMENT

The principal issues tackled in this decision were the following: (1) what is the appropriate method, in Quebec, for assessing whether an advertisement constitutes a false or misleading representation within the meaning of the *CPA*? (2) in the absence of a contract between the merchant and the consumer, can the latter bring an action for damages based on the commission of a prohibited act? (3) what are the necessary conditions for claiming punitive damages as provided for in section 272 of the *CPA*? (4) should punitive damages be awarded in this instance and, if so, what criteria must be used to determine the amount ?

From the outset, in its description of the facts, the Court set the tone for the reasons that followed: "the Document's visual content and writing style are central to the issue of whether the mailing of the Document constitutes a prohibited practice within the meaning of the *CPA*." [5]

THE APPROPRIATE METHOD

In its analysis, the Court first examined the general objectives of consumer law and the structure of the *CPA*. It stated that following World War II, the advent of the consumer society caused new concerns to appear, anxieties about an increased vulnerability of consumers. The passing of legislation on consumer protection was aimed at governing certain commercial practices judged to be fraudulent toward consumers. One of the main objectives of Title II of the *CPA* is to protect consumers against false or misleading representations. To do so, the criteria for assessing a representation are set out in section 218 of the *CPA*, which states that the "the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account". While the expression "literal meaning" does not raise any interpretation problems, the Court focused on the notion of "general impression", which required certain explanations [6].

The Supreme Court quickly confirmed, like Justice Cohen and the Court of Appeal, that this notion must be considered *in abstracto*, that is to say by forgetting about the personal attributes of the consumer who has instituted the proceedings [7]. On this point, Richard maintained that, above all, one must take into account the visual technique of the advertising and the meaning of the words used, and Time retorted that the general impression criterion should not be assimilated to one of instant impression and that the text of section 218 of the *CPA* suggested a method of analysis that rather put the emphasis on the text of the advertisement. The Court dismissed that argument:

> "[58] We cannot therefore accept the distinction proposed by the respondents between "instant impression" and "general impression". In actual fact, the respondents are asking this Court to apply a standard much more exacting than that of the first impression. This conclusion flows necessarily from their position on the application of the general impression test to the facts of the case at bar. To explain why their advertising strategy does not contravene Title II of the *CPA*, they state that the "documents . . . were in the possession of [the appellant] for a lengthy period of time and [that he] was able to read them carefully on several occasions before sending in the Official Entry Certificate" (R.F., at para. 46 (emphasis added))." [8]

Therefore, one cannot replace the search for the "general impression" by "an opinion resulting from an analysis". However, that was the approach adopted by the Court of Appeal [9]. That approach was inappropriate. According to the Court, it too closely resembles the classical civil law approach to contract analysis. The purpose of the provisions of the *CPA* is to make merchants responsible for the content of their advertisements on the basis of the general impression that they convey. It is presumed that the real meaning of an advertisement is that conveyed by the first impression and, according to the Supreme Court, the Court of Appeal did not respect that principle [10]. The consumer does not have to read twice and is presumed to have understood.

5 Paragraph 9.

6 Paragraphs 36 to 48.

7 Paragraph 49.

8 Paragraph 58.

9 Paragraph 59.

10 Paragraph 60.

So, who is this consumer whose general impression we wish to know about? The Court concluded that the notion of the average consumer is comparable to that developed by the case law concerning trade-marks, that is the "ordinary hurried purchasers" who take no more than "ordinary care to observe that which is staring them in the face" [11], similar to that of the "credulous and inexperienced person" developed in Quebec case law of the last 30 years, which some may believe is old-fashioned. It's nothing of the sort. However, the Court notes half-heartedly that the average consumer is not ignorant:

> "[72] The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the *CPA* This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible." [12]
> [underlining added]

For many readers of this bulletin, this passage will set them thinking. It is permitted to think that the Court suggests that one must give credentials to the merchant's statements and that they are presumed not to omit any important fact in their representations made to consumers. The notion of the consumer "with an average level of intelligence, scepticism and curiosity" suggested by the Court of Appeal was rejected, not fitting with the portrait of the typical consumer that the *CPA* wishes to protect. He does not have the same level of sophistication as the average person. Moreover, this notion does not fit well with the appreciation "*in abstracto*" of section 218 of the *CPA*. [13]. Therefore, using a criterion that corresponds to that of a prudent and diligent consumer must be avoided. The use of a standard like that of the "consumer with an average level of intelligence" would lead the courts to develop a method of analysis based on the level of sophistication of the consumer in question in a given case, which would facilitate the exoneration of a merchant who is lucky enough to be sued by a consumer of above-average intelligence:

> "[75] [...] The court's role would then be to determine whether the consumer exercising the recourse was in fact misled rather than whether the advertisement in question constituted a false or misleading representation. This would decrease the level of protection provided to consumers by the *CPA*" [14]

According to the Court, the same goes for the consumer "with an average level of...scepticism and curiosity" used by Justice Chamberland. These criteria cannot be adopted. They would force the consumer to revise or check the representations made to him, thus ignoring the "*general impression*" criterion. What then about more sophisticated consumers who buy connoisseur goods? The Court does not say a word. The appropriate approach in the circumstances is an analysis in two steps, that is (1) what is the general impression conveyed by the advertising and (2) does that impression correspond to reality? If the answer to the second question is no, the merchant will have engaged in a prohibited practice within the meaning of the *CPA*.[15]

As for the Document, the Court first concluded that it takes care to present Richard as having won: "There were repeated indications that a cheque was about to be mailed to the appellant". It was also mentioned that he had to hurry to return the reply coupon, failing which he risked losing everything. According to the Court, even if the Document did not necessarily contain statements that were literally false, it gave the general impression that Richard had won. Furthermore, the contest rules were not at all apparent to someone reading the Document for the first time. These were important facts that could not be ignored. The Court concluded that there had been a breach of sections 219 and 228 of the *CPA*. There is only a fine line between that and concluding that an advertisement does not need to be false in order to contain misleading representations.

[11] Paragraph 67.

[12] Paragraph 72.

[13] Paragraphs 73-74.

[14] Paragraph 75.

[15] Paragraph 78.

As for the use of a pen name as the signatory of the Document, the Supreme Court stated that it agreed with the Court of Appeal's conclusion and noted that the Document did not contain any false representation concerning the author's identity [16].

THE RECOURSE IN THE ABSENCE OF A CONTRACT

Next, the Court tackled the necessary conditions and criteria for granting the recourses set out in section 272 of the *CPA*. Here, the Court puts an end to a certain tendency to the effect that the recourses set out in that section are not dependent on the existence of a contract. That tendency relied on the text of section 217 of the *CPA*: "The fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made." [17] The Court refused at this point to broaden the scope of application of the civil recourses under the *CPA* and ruled that the interest required to act under section 272 of the *CPA* depends on the existence of a contract covered by the *CPA*. The Court stated:

> "[139] Therefore, s. 217 *CPA* is not intended to govern the conditions under which the recourses provided for in s. 272 *CPA* are available and can be exercised. The principles that apply to s. 217 *CPA* are different from those that apply to s. 272 *CPA*, and the two provisions have different roles in the scheme of the *CPA* [...]" [18]

Section 217 applies only in cases of penal prosecutions commenced by the director of penal prosecutions and section 272 does not apply to a consumer who has not entered into a contract. Moreover, that is the result of the fact that advertisers are not included in the wording of section 272: they have not contracted with consumers. [19] We applaud this conclusion, which will be greeted with relief by all merchants targeted in a class action in which authorization is sought to represent a group that includes "those who were offered".

Unfortunately, the Court declined to ask itself if the sending of a reply coupon constituted the conclusion of a contract within the meaning of the *Civil Code of Québec* (***"CCQ"***): "*At the very least, the parties entered into a contract for a subscription to Time magazine*" [20]. In that sense, Richard had the interest to take his action.

THE NECESSARY CONDITIONS OF THE RECOURSE BASED ON SECTION 272 CPA

The Court then approved a decision of the Court of Appeal [21] to confirm that the recourse under section 272 of the *CPA* is based on the premise that any failure to comply with an obligation imposed by the *CPA* leads to an irrefutable presumption of harm to the consumer. The sole proof of the breach of an obligation found in Title I of the *CPA* enables the consumer to obtain a remedy provided for in section 272, without there being any other condition. The merchant cannot raise the absence of harm [22].

A consumer claiming to be the victim of a practice prohibited by Title II must prove: (1) a breach of an obligation imposed by that Title; (2) the acquisition of knowledge, by him, of the representation that constituted a prohibited practice; (3) the subsequent formation of a consumer contract; and (4) a sufficient nexus between the content of the representation and the goods or services covered by the contract [23]. According to the latter criterion, the prohibited practice must be one that was capable of influencing his behaviour with respect to the formation, amendment or performance of the contract. When these requirements are met, the contract formed, amended or performed constitutes, in itself, a harm suffered by the consumer, who can demand one of the contractual remedies provided for in section 272 of the *CPA*. Whether it is commenced on a contractual or extracontractual basis [24], the recourse provided for in section 272 lightens the consumer's burden of proof, enables him to prove the fault of the manufacturer or merchant, and relieves him from having to prove that the merchant intended to mislead [25].

16 Paragraph 89.

17 Paragraph 102.

18 Paragraph 109.

19 Paragraph 104-107.

20 Paragraph 110.

21 *Beauchamp* v. *Relais Toyota Inc.*, [1995] R.J.Q. 741 (C.A.).

22 Paragraph 113.

23 Paragraph 124.

24 For example, in the case of fraud before the formation of the contract.

25 Paragraph 128.

In the present case, the Court ruled that Richard's recourse was extracontractual. However, he still had to prove that Time had engaged in a prohibited practice and also that he acquired knowledge of a false representation that constituted a prohibited practice and influenced the formation of a contract. According to the Court, Richard demonstrated that there was a rational link between the prohibited practices engaged in by Time and his subscription contract: the judge in first instance concluded that he would not have subscribed if he had not read the Document. Time did not succeed in showing that the amount of $1,000 granted by Justice Cohen constituted an error. That conclusion was therefore reinstated [26].

THE CRITERIA AND GRANTING OF PUNITIVE DAMAGES

Then, the Court analyzed the award of punitive damages and reaffirmed the judgment in first instance while reducing the amount awarded to $15,000. The Court reiterated several principles already stated, that is: (1) in Quebec, the civil law allows the granting of punitive damages only when a legislative provision provides for them [27]; (2) the plaintiff must have the interest required to claim them; (3) the court is bound by any criteria established in the enabling provision; (4) if the conditions for awarding them or the criteria for assessing them are not set out, those set out in article 1621 *C.C.Q.* will apply. For this purpose, the court must identify the conduct that is to be sanctioned to discourage its repetition, having regard to the general objectives of punitive damages and the objectives the legislature was pursuing in enacting the provision in question. The Court summarized the principles as follows: "The court must determine (1) whether the conduct is incompatible with the objectives the legislature was pursuing in enacting the statute and (2) whether it interferes with the achievement of those objectives." [28] Lastly, the Court reiterated that punitive damages have an autonomous character [29]. Consequently, section 272 of the *CPA* does not require the granting of compensatory damages before punitive damages can be granted. The Court expressed itself as follows regarding the applicable method:

> "[180] In the context of a claim for punitive damages under s. 272 *CPA*, this analytical approach applies as follows:
>
> • The punitive damages provided for in s. 272 *CPA* must be awarded in accordance with art. 1621 *C.C.Q.* and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;
>
> • Having regard to this objective and the objectives of the *CPA*, violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the *CPA* may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation." [30]

The Court confirmed the ruling of the judge in first instance that the Document was designed in such a manner as to mislead, and that this was intentional and calculated. Moreover, nothing in the evidence showed any behaviour that exhibited any regret on the part of Time, such as the taking of any corrective measures following the receipt of Richard's complaint.

Lastly, as regards the amounts awarded, the Court noted the seriousness of the acts committed, in particular the fact that the advertising was common practice and carried out on a broad scale, elements noted by the judge in first instance. However, following the example of the Court of Appeal, the Court set aside the argument of the judge in first instance who considered the breach of the *Charter of the French language* as an aggravating factor. As allowed by article 1621 *C.C.Q.*, one can take account of the patrimonial situation of the debtor of the punitive damages, in this case Time, when determining the amount. Basing itself on

[26] Paragraphs 141-142.

[27] Principles established in particular in the case of *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345.

[28] Paragraph 179.

[29] See *de Montigny* c. *Brossard (Succession)*, [2010] 3 S.C.R. 64.

[30] Paragraph 180.

this article, in the absence of instructions in the enabling statute, the Court should take into account: (1) the seriousness of the fault; (2) the patrimonial situation of the debtor; (3) the extent of the compensation already granted [31]; (4) whether the payment will be borne by the debtor or a third party. The restorative function will have more impact if it is the defendant and not a third party who pays the damages.

Other factors may be considered in the assessment of punitive damages such as the profits made and the offender's civil, disciplinary and criminal records. These factors will be considered by ensuring "*that the amount awarded as punitive damages is rationally proportionate to the objectives for which those damages are awarded*". All of these factors will thus be weighed up to achieve the objectives of the law. In the present case, the Court concluded that the granting of an amount of $15,000 would achieve the objectives of the *CPA*.

[31] The higher the compensatory damages, the more the risk of a subsequent offence is reduced.

[32] Paragraph 86.

CONCLUSION

By way of a conclusion, we suggest that you reflect on this passage in the decision of the highest court in the country: "However, it is unreasonable to assume that the average consumer would be particularly familiar with the special language or rules of such a sweepstakes and would clearly understand all the essential elements of the offer made to the appellant in this case." [32]

Must we understand that all of those who received the same document were convinced that their future was going to change? With the greatest respect for the Court, is there still not a grey zone? Where is the line that must not be crossed? Although this decision brings much clarity to the interpretation of the obligations imposed on merchants and manufacturers, it could have the effect of substantially transforming the world of advertisers, which is recognized as a bearer of fertile imagination and has many admirers.

LUC THIBAUDEAU
514 877-3044
lthibaudeau@lavery.ca

BERNARD LAROCQUE
514 877-3043
blarocque@lavery.ca

YOU CAN CONTACT THE MEMBERS OF THE FOLLOWING GROUPS
WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

CLASS ACTIONS

LOUIS CHARETTE 514 877-2946 lcharette@lavery.ca
MARIE COSSETTE 418 266-3073 mcossette@lavery.ca
C. FRANÇOIS COUTURE 514 878-5528 cfcouture@lavery.ca
EUGÈNE CZOLIJ 514 878-5529 eczolij@lavery.ca
ALEXANDRE GILBERT-VANASSE 418 266-3089 agilbertvanasse@lavery.ca
BERNARD LAROCQUE 514 877-3043 blarocque@lavery.ca
GUY LEMAY, CRIA 514 877-2929 glemay@lavery.ca
ANNE-MARIE LÉVESQUE 514 877-2944 amlevesque@lavery.ca
JEAN-PHILIPPE LINCOURT 514 877-2922 jplincourt@lavery.ca
ROBERT W. MASON 514 877-3000 rwmason@lavery.ca
IAN ROSE 514 877-2947 irose@lavery.ca
JEAN SAINT-ONGE, Ad. E. 514 877-2938 jsaintonge@lavery.ca
LUC THIBAUDEAU 514 877-3044 lthibaudeau@lavery.ca

CONSUMER LAW

DANIEL ALAIN DAGENAIS 514 877-2924 dadagenais@lavery.ca
PIERRE DENIS 514 877-2908 pdenis@lavery.ca
DAVID ERAMIAN 514 877-2992 deramian@lavery.ca
JOCELYNE GAGNÉ 514 878-5542 jgagne@lavery.ca
MARIE-HÉLÈNE GIROUX 514 877-2929 mhgiroux@lavery.ca
BENJAMIN DAVID GROSS 514 877-2983 bgross@lavery.ca
ÉDITH JACQUES 514 878-5622 ejacques@lavery.ca
LUC THIBAUDEAU 514 877-3044 lthibaudeau@lavery.ca
SPIRIDOULA VASSILOPOULOS 514 877-3012 svassilopoulos@lavery.ca