IN FACT AND IN LAW

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Consumer Law

ERRARE HUMANUM EST: TO ERR IS HUMAN, BUT THE COURT CANNOT ALWAYS FIX IT

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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. THIS NEWSLETTER DEALS WITH A RECENT DECISION FROM THE COURT OF QUEBEC HAVING TO DO WITH CONSUMER LOANS.[1] JUSTICE MARIE PRATTE, BASING HERSELF ON THE PROVISIONS OF THE *CONSUMER PROTECTION ACT* (**"CPA"**), REJECTED AN APPLICATION TO CORRECT AN INTEREST RATE THAT HAD BEEN ERRONEOUSLY INDICATED IN A MONEY LOAN CONTRACT.

[1] *Caisse populaire Desjardins d'Aylmer c. Roy*, 2012 QCCQ 287, January 16, 2012, the Honourable Marie Pratte, J.C.Q.

THE FACTS

In January 2005, a couple submitted a credit application in the amount of $27,000 for the purchase of an automobile. Their application was accepted and a loan form was drawn up, specifying an annual interest rate of 6.95%. However, the borrowers did not go through with it. Two months later, they applied for a loan in the reduced amount of $21,000. Since they were already approved for a $27,000 loan, they got the loan. However, an error was made and no interest rate was indicated on the loan form. The repayment terms were therefore calculated on the basis of an interest rate of 0% and the loan was repayable in 130 payments of $162.31. On that day, no one noticed that the loan was interest-free...

In 2008, the lending institution offered to "regularize" the borrowers' loan by proposing several scenarios, all of which were rejected. The issue was brought before the Court in June 2011 and a decision was handed down in January 2012.

THE QUESTIONS AT ISSUE AND THE COURT'S DECISION

The judge of the Court of Quebec had to determine if she could rectify the loan contract by adding the annual interest rate of 6.95%. Each party admitted the error: they both thought they were entering into an interest-bearing loan contract. And so the question was to determine if the Court could correct that error and under what conditions, since the evidence was insufficient to determine the interest rate at which the borrowers thought they were borrowing.

The lending institution claimed that the first credit application of January 2005, which stated that the interest rate was 6.95%, represented the intent of the parties. The Court did not accept that argument: [Translation] "the January 2005 credit application and the March 2005 loan agreement constitute separate legal acts." [2] Since the borrowers did not go through with the first application, they cannot be bound by its conditions. This application, unsigned, was cancelled. [3] The Court could not conclude that the parties had then expressed a common intent to enter into a loan with a rate of 6.95%. The judge noted that, as stated in Section 24 of the CPA, "offers, promises or agreements prior to a contract that must be evidenced in writing are not binding on the consumer unless they are confirmed in a contract entered into in accordance with this title," and that [Translation] "even if it was signed, the loan application would not bind the client, who remains free after all to borrow or not." [4]

The same goes for the March 2005 loan: a common intent to enter into a loan at a rate of 6.95% was not evidenced by the contract. The Court noted that the purpose of the CPA with regards to credit contracts is to ensure that all credit costs are known by the consumer. [5] As for modifying such a contract, Section 98 of the CPA provides that the parties must execute a new contract in writing. Section 100 of the CPA, which provides for the correction of a clerical error with the agreement of both parties, does not apply, since the borrowers never agreed to it. [6] The judge therefore rejected the lending institution's application for correction and refused to order its execution in the manner sought by the institution. Finally, she sided with the borrowers, who wanted to be reimbursed for the amounts withdrawn from their account as additional payments.

[2] Paragraph 62.

[3] Paragraph 66.

[4] Paragraph 70.

[5] See, among others, Sections 70, 71, 72, 80 and 81 of the CPA.

[6] Paragraph 73.

[7] *Richard c. Time Inc.*, 2012 CSC 8.

[8] Crédit Ford du Canada c. Gatien [1981] C.A. 638, on page 644.

CONCLUSION

"Errare humanum est" (To err is human). But this is only a maxim and, unfortunately, the law does not always provide the tools necessary to rectify the situation. The CPA was adopted to protect consumers from prohibited merchant practices, as the Supreme Court reminds us in the matter of *Time*. [7] However, its use must be clearly delineated, a fact that is recognized by Justice Beauregard of the Court of Appeal in a 1981 judgment: [Translation] "The Consumer Protection Act's purpose is to protect consumers from practices deemed abusive and not to provide them with means to shirk their obligations over trivialities." [8]

This decision represents a strict application of the CPA's principles and of the law in general: there can be no obligation without consent. The CPA sets the conditions for a credit contract to be binding. The Court concluded that these conditions were not present and that it was impossible, in light of the facts in this case, to prove that a loan contract bearing interest at 6.95% had been executed. It appears, however, upon reading the decision, that the borrowers were expecting to pay interest and had implicitly agreed to it.

This decision serves as a reminder to merchants: they have the obligation to ensure that the terms and conditions of a contract with a consumer truly reflect those intended by the parties. Vigilance is key!

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