



Quebec Court of Appeal affirms award of punitive damages without compensatory damages in a consumer class action

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On February 20, 2015, the Quebec Court of Appeal released its **joint decision** in four related class actions.^[1] The plaintiffs in those proceedings had claimed compensatory and punitive damages with respect to statements in instalment sale or long-term motor vehicle lease agreements that allegedly constituted misrepresentations under Quebec's **Consumer Protection Act (CPA)**. The Court of Appeal upheld the Superior Court judgments, which dismissed the claims either entirely (in the case of defendants Royal Bank of Canada and Primus) or in part (in the case of the other two defendants). The trial judge's punitive damages award against the latter was upheld, however.

The registration charges in the agreements

The plaintiff classes consisted of consumers who had entered into instalment sales or long-term leases of motor vehicles for which the defendants had provided financing. The contracts in question disclosed an amount itemized as registration charges as part of the credit charges (as required by the CPA). The registration charges were what the seller or lessor would pay for publication of the long-term lease or instalment contract in the Quebec **Register of Personal and Movable Real Rights (RDPRM)**, a registration necessary for the seller/lessor to protect its ownership rights.

The plaintiffs' allegation

The issue in the class actions was the plaintiffs' allegation that the defendants' RDPRM registration charge disclosure was misleading because the charge, as disclosed by certain of the defendants, included the amount of fees paid to a third-party service provider which had actually effected the registrations. The plaintiffs claimed compensatory damages in the form of a reimbursement of a portion of the registration charges, as well as punitive damages.

What the Court of Appeal decided

The Quebec Court of Appeal's rulings on the application of the misrepresentation provisions, compensatory and punitive damages and recourses available under the CPA are of particular interest. The main issues discussed in the appeal are briefly summarized here.

Do the business practices provisions of the CPA apply to misrepresentations in a contract as well as misrepresentations made during the pre-contractual phase? Yes.

- The legislature could not have intended to limit the application of prohibitions against false or misleading representations only to the pre-contractual phase of merchant-consumer dealings. These provisions may also apply to the contract itself.
- A clause in a contract may be a representation as well as an expression of mutual rights and obligations.
- Therefore, if a provision in a contract containing a representation is lacking clarity, the Court will use the ordinary rules of contractual interpretation to determine the meaning of the representation, which rules include looking to the context, the intent of the parties and the other clauses in the contract. Then the Court will use the general impression rule in Section **218** of the CPA and the standard of the ordinary hurried and relatively unsophisticated consumer to determine whether the representation, so interpreted, misleads the consumer.

Were the RDPRM charges disclosed in a misleading manner? Some yes, some no.

- There is no requirement under the CPA to break down and subdivide all the components of other credit charges, such as this fee.
- Clauses suggesting that the amount paid was solely that paid to the RDPRM, were misleading.
- Clauses indicating that the registration charges included other charges than the amount paid to the RDPRM, such as the clauses used by RBC in its contract, were not misleading.

Was the appropriate recourse under s. 271 or s. 272 of the CPA? Section 272, as instituted.

- This issue is of some importance because s. **271** does not provide for an award of punitive damages and, prior to this judgment, many jurists had believed that there was an absolute presumption of prejudice in actions based upon s. **272**.
- The plaintiffs' argument that the disclosure of RDPRM charges communicated false information that the \$54 was payable solely to defray RDPRM charges "can fuel a Section 272 recourse".
- The Court of Appeal appears to have settled a controversy over whether sections **271** and **272** are mutually exclusive, holding that nothing precludes the possibility that a given fact pattern may fall under both sections. The Court stated that if the statement relating to the RDPRM charges is a misleading representation, it can give rise to a recourse under s. **271** as well as under s. **272**, because it is part of the obligatory (under the CPA) contents of the contract. The consumer must, however, choose the recourse that he or she wishes to exercise, as the s. 271 and 272 recourses cannot both be exercised at the same time (cumulatively).

Should compensatory damages be awarded? No.

- The Court of Appeal confirmed the trial judge's finding that there is no automatic, absolute presumption of prejudice even once it is held that the defendant has engaged in a prohibited practice such as a misrepresentation. Such presumption will only be triggered once the four conditions set out by the Supreme Court in its 2012 ruling in *Richard v. Time Inc. (Time)* are met. One of the conditions is that there must be a sufficient nexus between the content of the (mis)representation and the service/goods covered by the contract. Since plaintiffs here had admitted that they would still have entered into these contracts had they known that a portion of the costs would be used to pay for third-party services and not to the RDPRM directly, the condition of nexus was not met and there was no presumption of prejudice.

Should punitive damages be awarded? No, with respect to RBC (which had properly disclosed) and Primus (which had changed its practice). Yes, with respect to the others.

- The Court of Appeal adopted the Supreme Court's approach in *Time*. In determining whether to award punitive damages, the Court should (i) aim to prevent and discourage ignorant, careless or seriously negligent conduct by merchants and manufacturers; and (ii) take into account whether a merchant has attempted to diligently rectify errors and problems; whether the merchant's violations were intentional, malicious or vexatious, and whether the merchant's conduct displayed ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights.
- Various factors are considered in determining the quantum of punitive damages. As noted by the Supreme Court of Canada in *Time*, the gravity of the merchant's fault is the most important factor and is evaluated as a function of the conduct of the merchant and the seriousness of the infringement of the consumer's rights.
- It is significant that the Court of Appeal refused to modify the amount of punitive damages awarded to take into account the number of contracts involved (e.g. to award a certain amount to each class member). Rather, the trial judge's punitive damage awards of \$150,000 each against GMAC and Nissan Canada Finance were upheld. In the Court of Appeal's view, since the purpose of the award was to encourage a change in the defendants' standard form contracts, the number of times that the standard form had actually been used in the past was of little importance.

The plaintiffs and Defendant Nissan are seeking leave to appeal to the Supreme Court of Canada.

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^[1] *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333 (*Daneau v. General Motors Acceptance Corporation du Canada Itée* (GMAC); *Dubé v. Nissan Canada Finance, division de Nissan Canada inc.*; *St-Pierre v. Royal Bank of Canada*).

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