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Update

The Court of Appeal rules on the award of punitive damages under the C.P.A. in class action proceedings

On February 20, the Quebec Court of Appeal upheld the judgments of the Superior Court rendered in the context of four class actions, which will be treated herein as one and the same file, *Dion c. Primus*[1].

This judgment addresses several interesting issues regarding the mechanics and structure of the *Consumer Protection Act* (the "C.P.A.") in the context of class action proceedings. We will address two of these issues: first, the awarding of punitive damages under section 272 and then, the consumer's choice of recourse under sections 271 or 272.

In this class action, the class was comprised of consumers who had purchased or leased an automobile, the financing of which was provided by one of the defendants. The class members claimed the reimbursement of a portion of the fees paid by the consumers for the publication of their contracts at the Register of personal and moveable real rights (the "RDPRM"). The class alleged that a portion of the RDPRM fees charged to them (e.g. CAD 15 out of a total of CAD 50) was not properly set out in the defendants' financing contracts. Also, not surprisingly, the class claimed punitive damages under section 272 C.P.A., varying between CAD 15 million and CAD 40 million depending on the number of class members and who contracted with each defendant.

The trial judge decided that the clauses dealing with the RDPRM fees in some of the contracts at issue were effectively misleading under the C.P.A. That said, in view of the fact that the consumers at issue would nevertheless have purchased or leased their automobiles if the amounts payable to the RDPRM had been correctly disclosed in the contract, the Superior Court did not order the reimbursement of such fees. The Court, however, ordered some of the defendants at fault to pay CAD 150,000 in punitive damages under section 272 C.P.A.

The Court of Appeal reiterated the rulings of the Supreme Court of Canada in Time[2]. It noted that:

- The awarding of punitive damages is exceptional and seeks to (i) rebalance the relationship between consumers and merchants, (ii) eliminate unfair and misleading practices and (iii) secure the confidence of consumers in regard to the market
- Once it is established that the merchant has violated the C.P.A., the Court must determine whether the merchant displayed ignorance, carelessness or serious negligence or, acted intentionally, maliciously or vexatiously

[1] *Dion c. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333.
[2] *Richard c. Time Inc.*, [2012] 1 R.C.S. 265.

– In such event, the Court must take into account the necessity of prevention and dissuasion as well as the behaviour of the merchant both before and after the violation

The Court of Appeal concluded in the case of certain defendants that their violation of the C.P.A. did not justify an award of punitive damages because they modified their financing contracts shortly after having been informed of the alleged breach of the C.P.A.

The Court of Appeal also noted that the individual or collective nature of the recourse does not determine whether punitive damages should be awarded, nor does it determine their quantum. On appeal, the class argued that the punitive damages awarded of CAD 150,000 (of the CAD 40 million claimed in one case) represented, on an individual basis, less than CAD 1 per member. The Court of Appeal ruled categorically that the amount awarded should not be reckoned on the basis of what the award would be if the consumers had sued the merchants individually. The fact that the amount attributed to each member of the class is insignificant from an individual point of view should not be considered in awarding punitive damages.

It is interesting to note that two of the defendants were ordered to pay the same amount of punitive damages (CAD 150,000), although the number of contracts at issue in the class actions varied greatly from one defendant to the other. Thus, the frequency or repetition of the violation was, in this instance, not considered a determinative factor.

The Court of Appeal also ruled on the appropriate recourse for the consumers. The merchants argued that the facts at issue gave rise exclusively to an action under section 271 C.P.A. and that the class could not invoke section 272 C.P.A. This nuance is significant because section 271, as opposed to section 272, does not create an irrebuttable presumption of prejudice and does not allow a claim for punitive damages.

The Court of Appeal ruled that:

– Section 271 sanctions the failure to comply with formal contractual requirements, whereas section 272 sanctions the merchants' substantial breach of the C.P.A.
– There is nothing in the C.P.A. that precludes a consumer from having recourse to one section or the other if permitted by the facts giving rise to the action
– In this case, both recourses were available because the disclosure of the fees charged was misleading (272) and the detailed disclosure of such fees is a mandatory component of the contract (271)
– The two recourses may not be exercised in a cumulative fashion; the plaintiff must choose

It remains to be seen how the Court of Appeal's rulings on this last point will be interpreted. According to this characterization of the scope of these sections, cases that fall under section 271 may, in general, also be brought under section 272. If the choice of recourse is in fact that of the consumer, section 271 essentially becomes inert. The recourse available under section 272 is clearly more favourable to the consumer, and we have trouble seeing in what circumstances consumers would opt for the recourse available under section 271.

Further information

If you would like further information on any issue raised in this update please contact:

Louis-Philippe Constant
E: louis-philippe.constant@clydeco.ca

Clyde & Co Canada LLP
1700 - 630 René-Lévesque Blvd
Montréal, QC H3B 1S6

T: +514 843 3777
F: +514 843 6110

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