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Editor's Comments

It is our pleasure to send you the 5th edition of our Insurance law Newsletter.

It features a comment on the Supreme Court of Canada judgment regarding the rules governing false and misleading representations under Quebec's Consumer Protection Act (CPA).

We would also like to take this opportunity to remind you that we offer continued education seminars that are recognized by the Chambre de l'assurance de dommages and the Quebec Bar on insurance law and civil liability matters.

Please do not hesitate to contact us to learn more on these seminars.



M^{re} Paul A. Melançon

Richard v. Time¹: the triumph of the Latin maxim *caveat venditor*?

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The facts

The facts of this case date back to 1999 when Jean-Marc Richard received mail from the company Time Inc. The letter informed him that he was the lucky winner of a significant sum. However, further analysis of the letter revealed the presence of various conditions in small print. Nevertheless, still convinced to be the coveted prize winner, Mr. Richard immediately returned his reply coupon. Only after a long wait in vain did Mr. Richard finally discover the reality of this contest. Far from being the winner, Mr. Richard was actually only part of a list of addressees who had been sent a similar notice. To be the lucky winner, the participant had to be awarded the winning number designated before the notices were sent and needed to return his reply coupon within the time limit. It was only in the event that the winner did not come forward that the prize would have been subsequently drawn among those who had duly returned their reply coupon.

Frustrated, Mr. Richard engaged in a legal battle that only ended in February 2012 before the Supreme Court. The highest court in the country had to determine whether Time Inc. had engaged in a prohibited practice within the meaning of the *Consumer Protection Act* (hereinafter "C.P.A.") and, if so, whether Mr. Richard was entitled to compensatory and punitive damages under section 272 C.P.A. In this important judgment, the Supreme Court has specified the parameters necessary to assess whether or not a commercial representation is false or misleading and the conditions required to sue for damages under s. 272 C.P.A.

The assessment of a false or misleading commercial representation

As part of its judgment, the Supreme Court has developed a two-step analysis to determine whether a commercial representation is false or misleading.

- **The first step is to determine the "general impression"³ that the representation is likely to convey to a "credulous and inexperienced consumer".**

With respect to the concept of "general impression", the Supreme Court has defined it as "the one a person has after an initial contact with the entire advertisement"⁴ and that

should not consist of “an opinion resulting from an analysis”⁵ as suggested by the Court of Appeal. Therefore, the Supreme Court concluded that:

- Both the layout and the meaning of the words used in the advertisement are relevant⁶;
- Reading over the entire text once should be sufficient to assess the general impression conveyed by the advertisement⁷;
- The advertisement should not be approached by the consumer as if it were a commercial contract that would require a careful and detailed reading and should be viewed with confidence rather than suspicion⁸.

Regarding how this “general impression” test must be applied, the Supreme Court overruled the perspective of the consumer “with average level of intelligence, scepticism and curiosity”⁹ adopted by the Court of Appeal and adopted the lower level of sophistication of “the average consumer, who is credulous and inexperienced”¹⁰. It follows that the “general impression” conveyed by a commercial representation must be assessed from the perspective of a consumer who is not necessarily careful, diligent and well-informed and who “is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.”¹¹

- **The second step of the analysis aims at assessing whether this general impression is consistent with reality. Insofar as it differs from it, the commercial representation will therefore constitute a "prohibited practice" within the meaning of the C.P.A.**¹²

The conditions for granting compensatory or punitive damages

After qualifying the representation at stake as misleading, the court was asked to rule on the conditions required for a recourse for compensatory or punitive damages under s. 272 C.P.A. to succeed.

- First of all, it is necessary to prove a breach of the C.P.A. In this regard, the Supreme Court has stated that any infringement of the C.P.A. may give rise to a recourse in damages, whether the breach deals with a substantive rule or a formal requirement prescribed by the C.P.A.¹³
- Secondly, it is required to have a sufficient legal interest. On this matter, the Supreme Court concluded that the recourse in damages under the C.P.A. is available only to natural persons who have entered into a consumer contract with a merchant or a manufacturer. It follows that the consumer who has merely seen the commercial representation that qualifies as a prohibited practice does not possess sufficient legal interest¹⁴.
- In addition, the court confirmed the previous position according to which any failure to fulfil an obligation imposed by the C.P.A. gives rise to an absolute presumption of prejudice to the consumer. In other words, this means that the burden of proof that rests

on the consumer is reduced and that the merchant cannot claim that the consumer suffered no prejudice in order to dismiss the recourse¹⁵.

- Finally, the court established the autonomy of punitive damages. In practice, this means that if the conditions for granting damages are met, the consumer will have the option to claim contractual remedies, compensatory damages and punitive damages or just one of those remedies¹⁶.

The lessons to be learned

It is crucial to note the tone adopted by the Supreme Court. By muting the traditional Latin maxim *caveat emptor*¹⁷, the highest court in the country seems to shift the emphasis on consumer protection and accountability of the merchant. However, all is not lost for advertisers and their clients: they see themselves provided with a good practice guide, due in great part to the clarity and detailing of the judgement.

The pedagogical approach adopted by the Supreme Court in the writing of this decision has already started to bear fruit. Indeed, only one year after this judgment was rendered, we can see that on several occasions the lower courts have applied the lessons taught in this decision, whether in the context of the assessment of a false or misleading representation or in the application of the conditions required for a successful recourse for compensatory or punitive damages¹⁸.

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1. *Richard v. Time Inc.*, [2012] 1 R.C.S. 265.
 2. RSQ, c P-40.1.
 3. Section 218 C.P.A.: “To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.”
 4. *Richard v. Time Inc.*, *supra* note 1 at para 57.
 5. *Ibid.*, at para 59.
 6. *Ibid.*, at para 53.
 7. *Ibid.*, at para 56.
 8. *Ibid.*, at para 60.
 9. *Ibid.*, at para 63.
 10. *Ibid.*, at para 72.
 11. *Ibid.*, at para 71.
 12. *Ibid.*, at para 78.
 13. *Ibid.*, at para 112.
 14. *Ibid.*, at para 105.
 15. *Ibid.*, at para 123.
 16. *Ibid.*, at para 145.
 17. “Let the buyer beware”.
 18. *Ouellette v. Performance Laurentides inc.*, 2012 QCCQ 14843 (CanLII); *9180-3577 Québec inc. v. Cour du Québec*, Division des petites créances, 2012 QCCS 5983 (CanLII); *9119-6154 Québec inc. (SKG Design) v. Zakaib*, 2012 QCCQ 14002 (CanLII); *Lambert v. Trois Diamants Autos (1987) Itée*, 2012 QCCQ 10781 (CanLII); *9135-4530 Québec inc.*, 2012 CanLII 68295 (QC RACJ); *Union des consommateurs v. Air Canada*

2012 QCCS 4091; 9080-5128 Québec inc. v. Morin-Ogilvy, 2012 QCCS 1464 (CanLII).

The content of this newsletter is intended to provide general comment only and should not be relied upon as legal advice.

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