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THE SUPERIOR COURT REFUSES TO AUTHORIZE A CLASS ACTION AGAINST A FURNITURE AND ELECTRICAL HOUSEHOLD APPLIANCES GIANT

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THE HONOURABLE JUSTICE LOUIS-PAUL CULLEN OF THE SUPERIOR COURT RENDERED A JUDGMENT ON SEPTEMBER 23, 2011 WHICH DISMISSED A MOTION FOR AUTHORIZATION TO EXERCISE A CLASS ACTION INSTITUTED BY MR. KERFALLA TOURE (HEREINAFTER "TOURE") AGAINST BRAULT & MARTINEAU (HEREINAFTER "B & M").¹

In order for a class action to be authorized by the Superior Court, the Code of Civil Procedure sets out the four conditions which must be fulfilled. Among them, the petitioner must show that the facts alleged in his motion seem to justify the conclusions sought.² In other words, the petitioner must convince the court that his recourse presents a true color of right. In the present case, the Court decided that it was precisely this criterion that was not met and, as a result, it did not authorize the exercise of the proposed class action.³

The issue raised by Toure was the fact that B & M offered consumers the choice between paying cash, in which case B & M would pay the GST and the QST, and making 50 interest-free payments, in which case the customer would have to pay the amount of the taxes at the time of the purchase.

Availing himself of the recourses provided for in Sections 271 and 272 of the *Consumer Protection Act* (hereinafter the "CPA"),⁴ Toure filed a motion for authorization to exercise a class action. He claimed that the discount equivalent to the two taxes, from which he would have benefited if he had paid cash, should have been considered as a "credit charge" (as this expression is understood in the CPA).⁵ He also alleged that B & M contravened the CPA [*Translation*] "by requiring, in advance, on a loan of money, a credit charge or interest that it concealed or failed to disclose to him".⁶

B & M claimed in its defense, that Toure's recourse was not well-founded in law. Firstly, the discount that it offered was not a "credit charge" because the contract of credit was offered by a third party. Secondly, the discount did not have to be included in the credit rate nor disclosed in the advertising, the contract of credit nor the statement of account because the contract of credit entered into by Mr. Toure was for a variable credit. Thirdly, the discount was not interest. Finally, B & M invoked the absence of prejudice suffered by Mr. Toure.⁷

The Court of Appeal had previously established a precedent whereby recourses under Sections 271 and 272 are not cumulative.⁸ This rule was hereby reaffirmed by Justice Cullen. Moreover, the Court of Appeal had also already distinguished between these two recourses: [*Translation*] the requirements as to form mentioned in Section 271, that is the intellectual content of the contract, includes the obligation to insert mandatory provisions and information in the written contract, whereas Section 272 sanctions a merchant's behavioral obligations.⁹

In the Toure case, the Court reviewed this aforementioned case law and reaffirmed that a consumer who institutes an action under Section 271 of the CPA must necessarily suffer a prejudice stemming from the merchant breaching an obligation imposed on him by the CPA.

In this case, the Court was of the opinion that:

[*Translation*]

"[...] the sole fact that a consumer makes a payment by means of a credit card issued by a financial institution for property purchased would not subject the selling merchant to the obligations relating to contracts of credit that the CPA imposes on credit card issuers".¹⁰

Therefore, in view of the fact that there was neither a contract of credit nor a contract for the loan of money between Toure and B & M, no breach of the rules governing contracts of credit under the CPA could possibly exist.

¹ *Toure v. Brault et Martineau*, 2011 QCCS 5343.

² *Code of Civil Procedure*, R.S.Q., c-25, art. 1003(b).

³ *Toure v. Brault et Martineau*, supra note 1, para 96.

⁴ *Consumer Protection Act*, R.S.Q., c-40.1, sections 271-272.

⁵ *Ibid*, art. 69-70.

⁶ *Toure v. Brault et Martineau*, supra note 1, para 5.

⁷ *Ibid*, para 44.

⁸ *Service aux marchands détaillants ltée v. Option Consommateurs*, 2006 QCCA 1319.

⁹ *Boissonneault v. Banque de Montréal*, [1988] R.J.Q. 2622 (C.A.), 2626.

¹⁰ *Toure v. Brault et Martineau*, supra note 1, para 63.

In addition, even if B & M had breached the CPA and had a valid contract of credit with Toure rather than the contract being between Toure and the financial institution (the Fédération des caisses Desjardins du Québec in the present case), the action would have been doomed to failure as Toure suffered no prejudice.

In the case of *Nathalie St-Pierre v. Meubles Léon Limitée*¹¹, authorization to exercise a class action suit was granted in similar circumstances; however, the consumer, who intended to pay cash for her purchase, had been convinced by a representative of Meubles Léon Limitée to finance said purchase by means of a credit card with a 0% interest rate. Contrary to our case, the consumer did not know, at the time of her purchase, that the price would not have been the same had she paid cash since she would have benefited from a 7% discount. The Court thus held that Meubles Léon Limitée had failed to disclose the information concerning credit charges required by the CPA.

In the case under consideration, the Court reiterated several times the importance of enabling and allowing the consumer to make a well-informed decision between a cash purchase or a purchase by instalments. Consequently, at the time of purchase, the consumer must be aware of the terms of each of the options provided to him or her. Not alleging the contrary, the Court concluded that Toure was indeed in a position of making a well-informed decision at the time of purchase.

B & M's advertisement stated that the financing was conditional to the approval of the consumer's credit by the banking institution's credit department. The contract of credit signed by Toure was entered into solely with the financial institution, and not with B & M. Therefore, Toure undertook to repay the amount owing to the credit card issuer and not to the merchant.

This decision clearly distinguishes between the responsibilities of each of the parties offering various methods of payment, one of which, offered by the financial institution, is not in any way linked to the other, which is offered by the merchant. This distinction remains relevant even if the merchant enters into an exclusive agreement with the financial institution for the purposes of offering the financing option to its clients and advertises this in its stores.

The essential points to underline may be summarized as follows:

- In order to ensure that the consumer makes a well-informed decision, the merchant must inform him or her of all of the methods and terms of payment that are offered at the time of purchase, despite the fact that some of these methods are offered by a third party (for example, the Fédération des caisses Desjardins du Québec). Furthermore, a consumer does not have a recourse with respect to a breach of the CPA if he or she cannot prove that it has caused him or her prejudice.
- As a result of this judgment, it appears to be necessary that in order to benefit from the dichotomy between the responsibilities of the parties offering two methods of payment:
 - the merchant must state in its advertisements that it is in the banking institution's discretion to grant or not to grant the financing;
 - the financial institution must notify its customer, that the payments are to be made only to such financial institution and not to the merchant, at the signing of the contract of credit.
- In this case, the financial institution was not a party to the legal proceedings. Would the result have been different if it had been? Probably not, because the Court seemed to suggest that each participant is responsible for his own statements. If the consumer is correctly informed of the details of each option, he or she is then in a position to make a well-informed decision.
- Also, the result probably would have been different if the merchant had itself offered both the discount in the case of a cash payment and an interest-free financing without going through a financial institution.

It should also be noted that a Bill to amend the CPA's rules governing consumer credit has recently been tabled¹². In its present form, this Bill would not have the effect of modifying the conclusions drawn from the case under consideration. However, Section 246 of this Bill would require a modification to the content of advertising messages, requiring that the credit rates disclosed include the value of the discount to which a consumer would become entitled if he or she paid cash.

Until such time as these amendments are adopted, we are advising merchants to first and foremost properly inform their customers of methods of payment that are offered to them at the time of their purchase.

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¹¹ *Nathalie St-Pierre v. Meubles Léon Limitée* 2005 CanLII 22765 (S.C.).

¹² Bill C-24, *An Act mainly to combat consumer debt overload and modernize consumer credit rules*, 2nd session, 39th legislature, Quebec, 2011.

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