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New Developments in Consumer Law

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Lavery closely monitors the development of class actions dealing with consumer law and is committed to keeping the business community informed of the latest developments in this area of the law by regularly publishing newsletters dealing with new case law or legislative changes which may impact, influence, even transform the practices in this area.

The courts of Quebec recently dealt with two issues of interest in the context of two class actions instituted by consumers. The courts:

> interpreted sections 271 and 272 of the *Consumer Protection Act* (C.P.A.)[1], ruling that a violation of the provisions of the C.P.A. does not systematically give rise to the remedies provided under these two sections, and thereby limiting the remedies available to consumers; and
> noted that they are flexible in their interpretation of the requirements for authorizing a class action under article 1003 of the *Code of Civil Procedure* (C.C.P.)[2], in particular, in circumstances where it is evident that a significant number of consumers may be members of the group, there is less of a need for the plaintiff to take steps to specifically identify the members as the merchant likely possesses all the relevant information that the court will need to identify the potential members of that group.

BREACH OF AN OBLIGATION ARISING FROM THE C.P.A. AND POSSIBLE REMEDIES PURSUANT TO SECTIONS 271 OR 272

In March 2015, the Superior Court of Québec clarified the scope of sections 271 and 272 C.P.A. in the case of *Lacasse* v. *Banque de Nouvelle-Écosse*[3]. The applicant was seeking the authorization to institute a class action on behalf of all the consumers who had a motor vehicle financed by the Bank of Nova Scotia (the **"Bank"**) in Quebec since November 22, 2010. The remedy in respect of which the authorization was sought aimed to obtain the reimbursement of the death and disability insurance premiums paid, as well as punitive damages on the grounds that the Bank had failed to treat such insurance premium as a credit charge and, accordingly, had not calculated the credit rate in the contract in accordance with sections 70 (b), 71 and 72 C.P.A. and 54.1 of its implementing regulation. The applicant maintained that this constituted a breach of section 272 C.P.A. While acknowledging that the contract did not disclose the credit rate as a percentage, the Bank argued that this constituted a requirement as to form, that instead section 271 applied, and that the Bank could thus raise in defence the fact that the consumer had suffered no prejudice.

Ms. Justice Danielle Mayrand agreed with the Bank and dismissed the motion on the grounds that the applicant had suffered no prejudice. She noted that [TRA NSLATIO N] "section 271 sanctions the failure to comply with requirements as to form at the time of the formation of the consumer contract (for which the consumer may demand the nullity)"[4] while section 272 C.P.A. applies to [TRA NSLATIO N] "substantive obligations governing the behaviour of the merchant, irrevocably deems the actions stemming from the behavior to cause a prejudice to the consumer, and authorizes much harsher sanctions such as punitive damages."[5]The judge concludes that the applicant had failed to

demonstrate that the Bank had contravened section 272 C.P.A.; the omission to calculate and disclose the credit rate in the contract is a breach of paragraph 2 of section 271 C.P.A. which governs the form of a contract of credit. Furthermore, the applicant had not proved that she had suffered a prejudice related to the failure to disclose the credit rate in the contract. In the circumstances of the case, since the interest rate applicable to the amount of the premium was 0%, the failure to disclose the credit rate had no effect on the amount the applicant paid. The applicant had entered into the insurance contract with full knowledge and could neither maintain that she was misled by such omission nor maintain that she would not have entered into the contract if the credit rate had been properly disclosed.

COMMENTS

While the Court of Appeal recently noted that different facts give rise to each of the remedies under sections 271 and 272 C.P.A. and that their mutually exclusive nature gives to the consumer the choice as to which remedy to pursue,[6] the Court in *Lacasse* limits the scope of this choice, reminding us that not all breaches by a merchant constitute the violation of a substantive obligation giving rise to the remedies under section 272 C.P.A.

Merchants who enter into contracts with consumers must remain mindful of the consequences of remedies based on section 271 and 272 C.P.A., such as compensatory and punitive damages, but must also know that the nature of the alleged breach sets up their remedy, and that defences under section 271 C.P.A. are available, as said section does not create an irrevocable presumption of prejudice.

CRITERIA FOR INSTITUTING A CLASS ACTION IN THE CONTEXT OF THE C.P.A.

In the case of Martel v. Kia Canada Inc.,[7] the main goal of the appellant was to purchase an economy car. Nevertheless, her dealer recommended preventive maintenance on account of the rigorous climate of Quebec in addition to the maintenance described in the “Normal Maintenance Program” set out in the owner’s manual she had been provided with when purchasing the vehicle. The appellant performed the preventative maintenance for the purpose of keeping the manufacturer’s warranty in good standing, but she considered that she had purchased the vehicle on the basis of misleading information and filed a motion to be authorized to institute a class action.

The trial judge dismissed her motion on the ground that she had failed to demonstrate that all conditions of article 1003 (a), (c) and (d) C.C.P. were satisfied. As to article 1003 (c) and (d), the judge reproached her for not having attempted to search for other consumers who had suffered a similar prejudice and could have been included in the group. The court found that she had not demonstrated the existence of a group whose members would have similar issues to raise before the courts and whom she was nonetheless seeking to represent.

The Court of Appeal of Quebec allowed the appeal and repeated what had been said in *Fortier* v. *Meubles Léon*[8], that is, that the legal and evidentiary thresholds to get past the authorization stage before the Quebec courts are rather low. The Court of Appeal relied on the principles set out by the Supreme Court of Canada in the cases of *Infineon*[9] and *Vivendi*[10], according to which [TRANSLATION] “The judge’s function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits”[11], meaning that the applicant has demonstrated serious colour of right and that he or she has a defendable case. Therefore, the burden at the authorization stage is not one of proof but rather only of demonstration.

Furthermore, all the members of the group are not required to view the prejudice suffered in the same way. The assessment of the prejudice for authorization purposes is objective and not

subjective in respect of each consumer involved in the action. Thus, the appellant was not required to demonstrate that the decision to purchase the vehicle or not was based in any way on the fact that the frequency of preventive maintenance was an important criteria for her, but also for other consumers of this same vehicle.

The Court of Appeal also relied on this occasion on a principle derived from the case of *Lévesque* v. *Vidéotron*[12] suggesting that the higher the number of consumers in a similar situation the more it is proper to draw some inferences, more particularly to presume that the merchant who is sued [TRANSLATION] “possesses the data necessary to estimate the number of consumers affected by the action and that [the merchant] is in the best position to identify them”[13].

COMMENTS

This decision of the Court of Appeal follows the trend from the last few years whereby the requirements of article 1003 C.C.P., reviewed at the stage of the class action authorization, must be analysed in a flexible and liberal manner. Thus, it seems that in certain cases, an applicant who seeks authorization to institute a class action will not be required to show that he or she took steps to identify consumers who dealt with the merchant in similar circumstances.

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1 *Consumer Protection Act*, CQLR c. P-40.1.
2 *Code of Civil Procedure*, CQLR, c. C-25.
3 2015 QCCS 890.
4 *Lacasse* v. *Banque de Nouvelle-Écosse*, 2015 QCCS 890, par. 22.
5 *Id.*, par. 25.
6 *Dion* v. *Compagnie de services de financement Primus*, 2015 QCCA 333.
7 2015 QCCA 1033.
8 *Fortier* v. *Meubles Léon*, 2014 QCCA 195, par. 65-70; cited in *Lacasse* c. *Banque Nationale de Nouvelle-Écosse*, préc., note 3.
9 *Infineon Technologies AG* v. *Option consommateurs*, 2013 CSC 59, par. 59-61.
10 *Vivendi Canada Inc.* v. *Dell’Aniello*, 2014 CSC 1.
11 Prec., note 10, par. 37.
12 *Lévesque* c. *Vidéotron s.e.n.c.*, 2015 QCCA 205, par. 27.
13 Prec., note 7, par. 35.