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Consumer Law: the Time Decision, again

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Consumer law and class action suits go well together. In the recent *Girard*[1] decision, the Quebec Court of Appeal, in an opinion by the honourable Jacques Dufresne, noted certain principles that should guide the courts of first instance in the factual analysis of a consumer law case. In so doing, the Court of Appeal is reviewing the lessons of the Supreme Court of Canada in *Time*[2] and applying them in the context of a class action.

THE ABSOLUTE PRESUMPTION OF PREJUDICE

The *Time* decision was related to an individual recourse brought by Mr. Jean-Marc Richard on the basis of misrepresentation for an announcement by Time that he had won sweepstakes in which he had not participated.

In that case, which involved a violation of the *Consumer Protection Act*[3], the Supreme Court set out four criteria for determining whether a consumer could benefit from an absolute presumption of prejudice and, therefore, from one of the remedies provided for in section 272 of the CPA:

1. [Official English version] that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act;
2. the consumer saw the representation that constituted a prohibited practice;
3. the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract;
4. a sufficient nexus existed between the content of the representation and the goods or services covered by the contract.[4]

The *Girard* case, for its part, was brought as a class action based on misrepresentations as to the calculation of a rebate offered by a provider of cable television, Internet and telephone services. Specifically, Mr. Girard criticized the service provider for not having disclosed a 1.5% fee payable to the Local Program Improvement Fund (LPIF) to its subscribers and for having miscalculated that fee.[5] The Superior Court allowed the class action and ordered the service provider to pay members of the group nearly $6.5 million in compensatory damages and $1 million in punitive damages. The service provider appealed.

Specifically, the judge of first instance found that she did not have to resort to the irrebuttable presumption of prejudice set out in *Time*, since it was clear that the consumer had suffered prejudice. For judge Dufresne, this constituted an error, but not one that justified the intervention of the Court of Appeal:

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> [Translation] In fact, had she conducted an examination of the four criteria set out in the *Time* decision, she would nevertheless have concluded that the appellant should be ordered to reimburse the LPIF costs paid by its subscribers, members of the Group, beyond the actual cost of their cable television package.[6]

Regarding the first criterion of the analytical framework, the Court of Appeal opined that the members of the group had been victims of a business practice prohibited by the *Consumer Protection Act* due to the erroneous calculation of fees payable to the LPIF.

Regarding the second criterion of the analytical framework, namely the awareness of the misrepresentation, judge Dufresne stressed that the members of the group had not been informed of the existence of the fees at the time the contract was made, nor of their method of calculation, the contract, as well as the invoice, being silent on this last point[7]. The second criterion of the *Time* decision was thus satisfied. We must conclude that the second criterion can be applied to an omission by the merchant, in the present case that of failing to disclose the method of calculation.

The third criterion was not the subject of argument before the Court of Appeal. As for the fourth criterion —that of sufficient nexus— the service provider argued that Mr. Girard had admitted in his testimony that he would have entered into the contract even if he had known that the LPIF fees had been erroneously calculated and that the situation did not present [official English version] “sufficient nexus between the content of the representation [engaging in a prohibited business practice] and the goods or services covered by the contract”[8] required by the *Time* decision. According to this fourth criterion, [official English version] “the prohibited practice must be one that was capable of influencing a consumer’s behaviour with respect to the formation [...] of the contract”[9]. Because Mr. Girard admitted that he would have entered into the contract anyway, one might think that the failure to reveal the method of calculating the LPIF would not have had any bearing on the formation of the contract. However, judge Dufresne does not hold with this argument:

> [72] [translation] [...] The misrepresentations, meaning the failure to disclose the method of calculation used and its repercussions, namely the act of collecting more from the respondents than the appellant itself pays to the CRTC for the LPIF, were capable of influencing their decision to contract with the appellant for its cable television services according to the terms and conditions on which they actually contracted.[10]

Thus, according to this excerpt, one might think that the fourth element of the analytical framework should be applied objectively. This approach stems from the Supreme Court’s use of the wording [official English version] “must be [...] capable of influencing a consumer’s behaviour”[11]. The Court of Appeal suggests here that the evaluation of the fourth element of the Time analytical framework must be objective, considering in particular the wording “must be capable” used by the Supreme Court. Yet, in its decision in the *Dion* case rendered in 2015, another panel of the Court of Appeal adopted a subjective approach, *in concreto*:

> [85] The judge in first instance correctly applied the aforementioned to the instant case when she held that the last criterion had not been satisfied given the stipulation that the Consumers would have purchased or leased a vehicle had the charge in question been itemized or broken down. There was, accordingly, no nexus between the prohibited practice and the Consumers’ behaviour. The Consumers’ decision to pay the amount of the charge or to “perform the contract” was not influenced by the prohibited practice. Thus, there was no presumption of prejudice. [12]

This question may deserve to be revisited. It is true that an objective approach benefits consumers in that it reduces their burden of proof. However, it seems that the subject of the third criterion of the Time analytical framework argues in favour of a more factual, more concrete approach. That is what

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is stated in the (original) English version of justice Cromwell's reasoning in *Time*: *"that the consumer's seeing that representation resulted in the formation [...] of the consumer contract"*[13]. The use of this concept of "result" suggests to the decider to proceed in a subjective manner to an analysis of the facts of the case. With respect to the fourth criterion, the English version of the decision is also telling: *"a sufficient nexus existed between the content of the representation and the goods or services covered by the contract"*[14]. This concept of "existence" also invites to proceed with a subjective analysis.

Consumer law cases must be decided in accordance with the rules of civil law. This is moreover one of the lessons from *Time*[15]. A subjective approach appears more compatible with the general principles of civil law according to which a sufficient causal connection is necessary to establish the existence of a cause of action.

AWARD OF PUNITIVE DAMAGES

Another important aspect of the Court of Appeal's decision on *Girard* is the "punitive damages" component. Remember that at the court of first instance, the first judge had granted an award of punitive damages of one million dollars in addition to a monetary award of more than six million dollars. On appeal, the Court of Appeal reduced this award to $200,000.

Relying once again on the *Time* decision, judge Dufresne noted certain principles that must guide the court when awarding punitive damages:

> [210] [Official English version] Where a court decides to award punitive damages, it must relate the facts of the case before it to the objectives that underlie such damages and ask itself how, in this particular case, awarding them would further those objectives. It must try to fix the most appropriate amount, that is, the lowest amount that would serve the purpose.[16]

(emphasis added).

Then:

> [Official English version] Having regard to this objective and the objectives of the C.P.A., violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the C.P.A. may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violations.[17]

Judge Dufresne recognizes that these principles argue in favour of an award of punitive damages as a remedy for the violation of the C.P.A. However, he considers the amount of one million dollars to go far beyond what is indicated by the circumstances to satisfy the objectives of the Act[18]. He also reiterates that the amount of punitive damages awarded, while being sufficient to serve the preventive function of the C.P.A., must be proportional to the seriousness of the alleged breaches[19]. However, all these factors being taken into consideration, the seriousness of the alleged breach is the most important[20].

On this point, judge Dufresne considers that, while not trivial, the seriousness of the C.P.A. violation should be put into perspective. He considers that the award of over six million dollars in compensatory damages carries a significant punitive effect and surely serves as a deterrent. In this sense, judge Dufresne considers that the decision of the Superior Court does not adequately assess the behaviour of the service provider before, during and after the violation of C.P.A. Even if the [21]

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service provider's defense proved to be unfounded, it did not amount to an abusive practice .

This intervention by the Court of Appeal in determining the amount of punitive damages could be characterized as exceptional. In *Time*, the Supreme Court recognized a certain discretion by the court of first instance in the award of -punitive damages: [Official English version] *"[i]t should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it"*[22]. This discretion, however, seems limited and must respect the duty of restraint of the judge who grants punitive damages.

The *Girard* decision thus confirms the exceptional nature of the punitive damages, as recognized by the Supreme Court in *Time*[23], and the need in consumer law for such damages to be justified in the general context of attaining the objectives of the *Consumer Protection Act*, namely (1) the restoration of an equilibrium in contractual relations between merchants and consumers and (2) the elimination of unfair practices that could distort the information available to the consumer and prevent him from making informed choices[24].

CONCLUSION

The Court of Appeal's decision in Girard will likely become the topic of much discussion. Consumer law is an area particularly conducive to class action suits and the four-part test set out in the *Time* decision to determine the applicability of the absolute presumption of prejudice will surely be used again by the courts in the near future. The question of whether the analytical criteria should be assessed objectively or subjectively certainly deserves to be discussed in greater depth. This question is of particular interest in the context of class actions.

With respect to the "punitive damages" component of the decision, it appears that the decision in first instance is one of the rare cases where the Supreme Court accepts that an appellate court may review a first instance decision to award such damages. Justice Cromwell wrote in *Time*: [Official English version] *"[a]n assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court"*[25]. Considering the Court of Appeal's intervention in the *Girard* decision, we may assume that the duty of restraint of the trial judge is central to achieving this objective.

The deadline for requesting permission to appeal to the Supreme Court is August 11. So this is a case to follow!

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1. *Vidéotron* v. *Girard*, 2018 QCCA 767 (hereinafter: "***Girard***").
2. *Richard* v. *Time*, 2012 SCC 8 (hereinafter: *"**Time**"*).
3. CQLR c. P-40.1 (the "**C.P.A.**").
4. *Time*, para. 124.
5. *Girard*, para. 13.
6. *Girard*, para. 48.
7. *Girard*, paras. 65-66.
8. *Time*, para. 124; *Girard*, para. 70.
9. *Time*, para. 124; *Girard*, para. 70.
10. *Girard*, para. 72. (emphasis is added unless indicated otherwise)
11. *Time*, para. 124.
12. *Dion* c. *Compagnie de services de financement automobile Primus Canada,* 2015 QCCA 333, para. 85.
13. *Time*, para. 124 (emphasis added). ENGLISH VERSION: "that the consumer's seeing that representation resulted in the formation [...] of [the] contract". However, the French version reads: *"la formation, la modification ou l'exécution d'un contrat de consommation subséquente à cette prise de connaissance"* [translation: the formation, modification

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or execution of a consumer contract following that awareness] (emphasis added).

14. *Time*, para. 124 (emphasis added). ENGLISH VERSION: *"a sufficient nexus existed between the content of the representation and the goods or services covered by the contract".* However, the French version reads: *"une proximité suffisante entre le contenu de la représentation et le bien ou le service visé par le contrat"* [translation: a sufficient nexus between the content of the representation and the good or service concerned in the contract] (emphasis added).
15. *Time*, para. 111.
16. *Time*, paras. 210 & 215; *Girard*, para. 100.
17. *Time*, para. 180; *Girard*, para. 102.
18. *Girard*, para. 103
19. *Girard*, para. 105.
20. *Time*, para. 190.
21. *Girard*, para. 111.
22. *Time*, para. 190. This is consistent with existing case law. See: *Banque de Montréal* v. *Marcotte*, [2014] 2 SCR 725, 2014 SCC 55, para. 98; *Cinar Corporation* v. *Robinson*, 2013 SCC 73, para. 134; and *Dion*, paras. 128-129.
23. *Time*, para. 150.
24. *Time*, paras. 160-161. See also: *Banque de Montréal* v. *Marcotte*, [2014] 2 SCR 725, 2014 SCC 55, para. 55.
25. *Time*, para. 190.

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