TORYS

The Overcompensation Scheme in Québec Consumer Protection Class Actions

By Marie-Ève Gingras and Sylvie Rodrigue

Québec was the first Canadian province to adopt a class action regime in 1978, seven years after having passed its first *Consumer Protection Act*[1] (CPA). Class actions were quickly considered as the most suitable vehicle for consumer protection proceedings because of both the relatively small monetary amount of each individual claim and the potential number of impacted consumers. Québec now has the most generous class action and consumer protection regimes of all Canadian jurisdictions, which arguably leveled out the economical imbalance between consumers and merchants/manufacturers.

In restoring this *economical* balance, however, the courts construed the consumer protection class action regime so as to create a *legal* imbalance, this time at the merchants/manufacturers' expense. The courts developed various legal notions that not only favour class members in consumer protection class actions, but that also strip the defendants from some of their most fundamental judicial rights. As a result, defendants are often being ordered to pay amounts far exceeding the damages actually suffered by class members and sometimes, when no harm has been suffered at all.

We will examine below how the interplay of consumer protection law and class action proceedings led to an overcompensation scheme through the interaction of (I) the absolute presumption of prejudice, (II) the collective recovery rule, and (III) the denaturation of punitive damages.

I. The Absolute Presumption of Prejudice

As in most other jurisdictions, Québec's contractual and extracontractual civil liability regimes require that the triptych composed of a fault, a prejudice and a causal link be proven.[2] Broadly speaking, this golden rule was generally – yet unevenly – applied to consumer protection matters in that the proof of an actual prejudice was

[1] *Consumer Protection Act*, RSQ, c P-40, replaced in 1978 by the *Consumer Protection Act*, CQLR c P-40.1.

[2] See, for example, *Prévost-Masson v. General Trust of Canada*, 2001 CSC 87, para. 15, and *3329003 Canada inc. v. DeFrancesco*, 2017 QCCS 2456, para. 37.

required for a defendant to be found liable.[3] In 2012, however, the Supreme Court of Canada (SCC) formally put an end to this principle with respect to the prohibited business practices set out in the CPA. These practices include a wide spectrum of offences, ranging from misleading representation, false advertising and inexact pricing, to inertia selling, false testimonies and advertisement aimed at children.

In its landmark ruling *Richard v. Time*[4] (*Time*), Canada's highest Court decided that the use of a prohibited business practice entails an absolute presumption of prejudice that automatically gives rise to the remedies set out in section 272 CPA, including the reduction of the consumer's obligation and the annulation of the contract.[5]

The SCC held that the absolute presumption of prejudice applies to any and all forbidden business practices set out in the CPA that are actually seen by a consumer who thereafter enters into a consumer contract, provided that there exists a sufficient nexus between the representations violating the CPA and the goods or services covered by said contract.[6] These conditions, however, are almost never assessed by the courts, which assume that the mere commission of a prohibited business practice automatically leads to the absolute presumption of prejudice and the availability of the remedies set out in section 272 CPA, without the consumer having to demonstrate that he suffered any prejudice or that he was actually misled. To sum it up, *Time* created no less than a consumer protection strict liability regime.

Up until very recently, the absolute presumption of prejudice was only applied to the remedies set out in section 272 CPA. The award of compensatory damages was still subject to the demonstration of a fault, a prejudice and a causal link, as recently noted in *Vidéotron v. Union des consommateurs*[7] (*Vidéotron*). In this case, the Québec Court of Appeal (QCA) opined that a claim in damages remains subject to the *jus commune* and that consequently, the consumer must prove his damage and the causal link with the infringement to the CPA. Only three months after the QCA rendered the foregoing decision, however, the Superior Court set aside this rationale and held that the absolute presumption of prejudice also applies to compensatory damages in the context of the extracontractual liability that arises from section 272 CPA, noting that it considered that *Vidéotron* unduly restricted the principles established by the SCC in *Time*.[8] In other words, the Court suggested that in consumer protection class actions, compensatory damages may be awarded without even having to demonstrate that an actual damage was suffered.

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[3] See, for example, *Riendeau v. Brault & Martineau inc.*, 2007 QCCS 4603, para. 221-224 (conf. *Brault & Martineau inc. v. Riendeau*, 2010 QCCA 366) and *Ata v. 9118-8169 Québec inc.*, 2006 QCCS 3777, para. 47, 53-55 and 69. *A contrario*, see *Service aux marchands détaillants ltée (Household Finance) v. Option Consommateurs*, 2006 QCCA 1319, para. 44 and *Nichols v. Toyota Drummondville (1982) inc.*, 1995 CanLII 5322 (QCCA), p. 4.

[4] 2012 SCC 8.

[5] *Id*., para. 123.

[6] *Id*., para. 124.

[7] *Vidéotron v. Union des consommateurs*, 2017 QCCA 738, para. 58.

[8] *Option Consommateurs v. Meubles Léon ltée*, 2017 QCCS 3526, para. 124 (*Léon*).

It is still unknown whether *Léon* will be quashed in appeal, but regardless of whether the absolute presumption of prejudice will remain limited to the remedies set out in section 272 CPA or whether it will also be extended to compensatory damages, we can assert that the consequences of this presumption are twofold in a class action context. First, the plaintiff is discharged from the burden of proving that class members suffered a prejudice as a result of the defendant's prohibited business practice. Second, the defendant is almost certainly bound to compensate consumers who did not suffer any actual damage.

Indeed, one can easily assume that in any prohibited business practice class action, a substantial number of class members actually entered into their contract with the defendant without having seen or believed the impugned false or misleading representation. This was recognized by the Superior Court of Québec [our translation]: "A remedial measure, in addition to being quantifiable, implies a compensation that is paid directly from the defendant to the class members (…). Admittedly, it can also benefit a determined group whose members are not exactly those who were actually aggrieved (…)."[9] Despite not having suffered any actual prejudice, these consumers would be entitled to a monetary compensation on the sole basis of the absolute presumption of prejudice. In our view, such damages awards that do not compensate any actual prejudice are punitive by nature.

This therefore denatures the procedural vehicle that a class action is supposed to be by creating a punitive consumer protection civil liability regime which only exists in a class action context, as outside of the class action context, the civil liability regime established by the CPA is a compensatory one. There is already a consumer protection punitive regime in the CPA via the penal provisions set out in section 277 CPA and following pursuant to which the *Office de la protection du consommateur*, the regulatory body established by the CPA, can impose penalties for violations of the CPA.

II. The Collective Recovery Rule

The foregoing rationale is especially true when collective recovery is ordered – that is to say when a defendant is sentenced to pay an aggregate amount equal to the prejudice suffered by the whole class. Whenever a reliable estimate of the class' prejudice can be made, collective recovery is given precedence over individual recovery,[10] where the defendant is only ordered to pay those class members who actually make a valid claim.

Collective recovery greatly increases the amount a defendant is bound to pay since it is determined on the theoretical claims of the whole class. Yet, as discussed above, the absolute presumption of prejudice results in the overestimation of the damages granted, especially when collective recovery is ordered. This was stressed out in the case of *Bank of Montreal v. Marcotte* (*Marcotte*), where the absolute presumption of prejudice found application and collective recovery was ordered. The QCA quashed the award of punitive damages since "a collective recovery

[9] *St-Pierre v. Meubles Léon ltée*, 2011 QCCS 2361, para. 44.

[10] *Code of Civil Procedure*, CQLR, c 25.01, art. 595. See also, for example, *Laflamme v. Bell Mobilité inc.*, 2014 QCCS 525, para. 115.

often comprises an important punitive aspect as compared to individual recovery."[11] However, the SCC overruled the QCA on this point in holding that "collective recovery is nothing more than the full extent of a defendant's obligation if the plaintiffs make their case."[12]

With all due respect for the learned judges of the SCC, we are of the view that in all consumer protection class actions where the absolute presumption of prejudice applies, collective recovery does not amount to "the full extent of a defendant's obligation", but rather to a defendant's *presumed and arbitrary* obligation. Not only does this obligation come from a presumption that cannot be rebutted by the defendant, but it also compensates a fair proportion of class members who assumably did not suffer any prejudice. The class is therefore overcompensated at the expense of the defendant, and since this overcompensation does not relate to any actual damage, one must come to the conclusion that it merely serves punitive purposes.

Moreover, as Québec has an opt-out class action regime, classes often comprise a number of members who are either unaware of or uninterested in the action. When collective recovery is ordered, many of these class members will not claim their individual share of the award; yet, these monies will not be returned to the defendant. Instead, they are usually granted to the *Fonds d'aide aux actions collectives*, a public fund responsible for funding class actions in Québec. Again, it is clear that these amounts serve a punitive rather than compensatory purpose.

III. The Denaturation of Punitive Damages

In addition to the compensatory damages and remedies listed therein, section 272 CPA also provides that punitive damages may be sought by the plaintiffs where the CPA was violated. However, the Superior Court recently admitted that the award of compensatory damages often serves a punitive purpose in a class action context.[13] Yet in spite of this, the courts very often award pure punitive damages to the plaintiffs in addition to compensatory damages, thus penalizing the defendant twice for the same offence.

Besides, punitive damages are to be awarded with the aim of preventing "conduct on the part of merchants and manufacturers in which they display ignorance, carelessness or serious negligence with respect to consumers' rights and to the obligations they have to consumers under the C.P.A."[14] Moreover, if the foregoing criterion is met, "[c]onsumers can be awarded punitive damages under section 272 C.P.A. even if they are not awarded remedies or compensatory damages at the same time".[15] This rule – which is unique to Québec – diverts the CPA from its civil nature, granting it certain purely punitive purposes. In fact, the only other punitive damages that can be awarded

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[11] *Amex Bank of Canada v. Adams*, 2012 QCCA 1394, para. 57 (*Marcotte QCA*).

[12] 2014 SCC 55, para. 104 (*Marcotte SCC*).

[13] *Léon*, para. 142.

[14] *Time*, para. 177.

[15] *Id.*, para. 147.

on their own are those arising from a violation of the fundamental human rights set out in the Québec *Charter of Human Rights and Freedoms*[16] (*Charter*), as decided by the SCC in *de Montigny v. Brossard (Succession)*[17] (*Brossard*). In this case, the independent nature of punitive damages was most notably recognized because of the quasi-constitutional nature of the *Charter*. In the SCC's opinion, making the award of punitive damages provided for in the *Charter* subject to the success of a civil claim would go against the constitutional hierarchy.[18]

No such constitutional argument can be made in favour of the autonomous punitive damages scheme created in *Time*. In our view, assimilating the punitive damages provided for in a normal law such as the CPA to those set out in a quasi-constitutional law such as the *Charter* is both a distortion of the *Brossard* decision and a slippery slope on which circumspection is advisable.

Moreover, the merely *preventive* purpose of punitive damages that was declared in *Time* was quickly, yet implicitly set aside by the SCC itself. In *Marcotte*, as mentioned above, the QCA had quashed the award of punitive damages. The QCA concluded that "there was no need to impose punitive damages to discourage a practice that had been discontinued six years earlier by Amex and even before that by other Banks."[19] But the SCC overruled the QCA's reasons and decided that the trial judge was well-founded to award punitive damages on the sole basis of an ignorant, careless or serious conduct,[20] regardless of whether or not the defendants subsequently changed their conduct. Since it appears that punitive damages can now be awarded even where the defendant changed its impugned conduct on its own initiative, it appears that the *preventive* nature of the punitive damages provided for by section 272 CPA – and the CPA as a whole – are now of a purely penal nature. As mentioned above, given the fact that there are already penal provisions in the CPA, this denaturation of the punitive damages is unnecessary and unjustifiable.

Conclusion

The absolute presumption of prejudice alters the essence of the CPA, transforming it from a standard civil liability statute to a strict liability penal statute: the amount a defendant is bound to indemnify is not based on the damages suffered, but rather on the sole measure of its fault. Combined with the absolute presumption of prejudice and the collective recovery rule, the remedies set out in article 272 CPA depart from their remedial nature and have been entrusted with a substantial punitive purpose, since a number of unprejudiced class members are entitled to a compensation. Therefore, even in class actions where no ignorant, careless or serious conduct is proven, defendants end up paying implicit punitive damages. The fact that standard punitive damages may be awarded on

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[16] CQLR c C-12.

[17] 2010 SCC 51, para. 42.

[18] *Id*., para. 45.

[19] *Marcotte QCCA*, para. 58.

[20] *Marcotte SCC*, para. 109-113.

top of the foregoing remedies adds up to the punitive and overcompensating scheme of consumer protection class actions.

While the SCC has stated on numerous occasions that a class action is merely "a procedural vehicle whose use neither modifies nor creates substantive rights" and which "cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so"[21], the recent case law has in reality the effect of denaturing class actions by creating a consumer protection strict liability regime, which does not exist in Québec civil law outside of the class action context.

Notwithstanding the consumers' economical right to the compensation of the prejudice they actually suffered, the defendants' judicial right to a full answer and defence and economical right to compensate only for the prejudice actually suffered by the class members or for fair preventive punitive purposes should not be set aside.

Now that the balance is clearly favouring the plaintiffs in consumer protection class actions, it might be time for the courts' pendulum to swing back, not to the absolute benefit of the defendants, but certainly to a more balanced and fair position.

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[21] See, for example, *Bisaillon v. Concordia University*, 2006 SCC 19, para. 17 and *Bou Malhab v. Diffusion Métromédia CMR inc*., 2011 SCC 9, para. 52.

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