Review of recent Québec Court of Appeal decisions on consumer protection

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Consumer law in Québec remains in constant evolution, and the *Consumer Protection Act* (CPA) continues to be the subject of many court decisions each month.

In this new article in our series on consumer law, we present recent developments in this area from the perspective of Québec Court of Appeal decisions over the past 12 months, which shed some light on the rules of the CPA.

The following summaries are not detailed statements of the facts in each case. Rather, they are intended to highlight the lessons in consumer law that can be gleaned from the Québec Court of Appeal.

Judgment on fees for the registration of rights in the Register of Personal and Movable Real Rights
2021 QCCA 676

This decision concerns the administration fees charged by lenders to register their warranty (reservation of ownership) in the Register of Personal and Movable Real Rights (RDPRM). These fees are charged in addition to the mandatory fee for RDPRM registration. It was rendered in the context of an application to institute a class action.

The appeal focuses on two distinct grounds. The first contends that the administration fee and the RDPRM fee must be disclosed separately in the contract, that is, by clearly indicating, on two separate lines, the amount of the administration fee and the RDPRM fee. The absence of such a breakdown, according to the claim, would be a violation of section 12 of the CPA, which prohibits the charging of fees that are not specified in the contract.

The Court rejected this first ground, explaining that it is not necessary to break a fee down into components in a disclosure when the fee is minimal in relation to the value of the contract and when these components cannot have a determining effect on a person's willingness to enter into the contract. It also emphasized that the description of the fee, that is, the text describing its purpose and scope, must always be accurate and not misleading–which was the case in this instance.

The second basis of the appeal, which was not rejected by the court at the authorization stage, is based on the claim that these administration fees are excessive and contrary to section 8 of the CPA and article 1437 of the CCQ.

Judgment confirming a declaration of invalidity of CPA provisions regarding telecommunications
2021 QCCA 730

In a decision handed down on May 5, 2021, provisions that would have required blocking access to online lotteries and gambling by telecommunication companies were declared of no force or effect by the Court of Appeal. These provisions were amendments to the CPA adopted by the National Assembly in 2016. However, the coming into force of these amendments had been suspended since their adoption, presumably pending the outcome of this litigation.[1]

In particular, they would have required Internet service providers (ISPs) to block access to sites identified as "unauthorized" by Québec authorities.

The Court concluded that the "pith and substance" of the amendments was not the protection of online consumers, but rather giving Québec authorities the ability to compel providers to block access to online gambling sites. According to the Court, the effect and purpose of these provisions would be to regulate, control and substantially interfere with ISPs' management of their methods and systems for emitting, receiving and transmitting Internet signals, which is an area entirely under federal parliamentary jurisdiction.

The findings nevertheless suggest that it remains possible for validly enacted provincial legislation to regulate Internet transactions in connection with the activities of telecommunications companies. The judges indicated that this could be the case, for example, in the regulation of online contracts, such as the sale of goods over the Internet, or in matters of defamation. This is precisely what the Court of Appeal confirmed almost a year later another decision summarized below.

The application for permission to appeal this judgment to the Supreme Court was denied on March 24, 2022.

Judgment declaring CPA provisions constitutionally valid in the context of a distance service contract
2022 QCCA 408

In this decision, the Court of Appeal confirmed the constitutionality of certain CPA provisions and declared them applicable in the context of telecommunications companies. This appeal was made in the context of a penal proceeding and had to do, more specifically, with the following provisions of the CPA:

- 11.2 (unilateral amendments to contracts)
- 11.3 (rules for termination of service contracts)
- 13 (prohibition of penal clauses)
- 214.2 (content of contracts for the successive performance of services provided at a distance)
- 214.7 and 214.8 (contract termination fees)

The arguments in defence of this appeal were mainly that these provisions are unconstitutional and that their pith and substance is to regulate the terms, conditions and rates of telecommunications services.

However, the Court of Appeal concluded that the contested provisions do not interfere with federal jurisdiction over telecommunications and that their pith and substance is about consumer protection, which is an area of provincial jurisdiction (s. 92(13) – Property and Civil Rights – *Constitution Act, 1867*).

Thus, the Court stated, "Though it is inarguable that the provisions at issue do affect, and even impinge upon, the pricing of telecommunications services, they do not interfere with the federal power to implement the objectives of the [*Telecommunications Act*]" [Translation] and do not constitute serious and substantial interference with the telecommunications companies' business.

The ruling therefore supports the theory of co-operative federalism. The Court also pointed out that "just as in the case of banking, which is under federal jurisdiction, telecommunications is also subject to basic provincial rules such as those relating to contracts, including consumer contracts in general and contracts for the provision of services at a distance" [Translation].

Beyond the constitutional aspects, another element of interest is worth noting: the Court of Appeal provides new insight into the potential application of rules arising from sections 214.1 et seq. of the CPA (Contracts involving sequential performance for a service provided at a distance). In particular, the Court points out that these rules may apply to the provision of online video games, cloud data storage or database subscriptions.

At the date of publication, the time limit for filing an application for leave to appeal to the Supreme Court had not expired.

Judgment confirming the legality of the practice of allowing consumers to exceed their credit limits
2021 QCCA 414

The court of appeal has confirmed that the practice of certain credit card issuers to allow consumer to go over their credit limit is in compliance with the Québec *Consumer Protection Act* and more specifically with section 128 of the CPA.

The plaintiff argued that, applying the modern method of interpretation, section 128 of the CPA–as it read prior to its most recent amendment–should be interpreted as prohibiting the practice of allowing a person to go over their credit limit. According to this argument, the purpose of these provisions–namely consumer protection and protection against over-indebtedness–warranted this conclusion. However, the Court of Appeal rejected the plaintiff's arguments.

In this case, the Court of Appeal discusses, among other things, the principles applicable to legislative interpretation in the context of the CPA. The court points out that the discussions in parliamentary committee when section 128 of the CPA was adopted (in 1977) and when it was amended (in 2017) confirm that the legislator did not intend to

prohibit the practice of allowing consumers to go over their credit limit. The intent was rather to prohibit unilateral increases in credit limits (that is, permanent increases).

The Court also pointed out that the practice of allowing a person to go over its credit limit is permitted under the Credit Business Practices Regulations applicable to banks.

Leave to appeal to the Supreme Court was denied on March 10, 2022.

Judgment confirming the validity of a seizure before judgment in the context of an instalment sale contract
2021 QCCA 1893

This case confirms that a lender may carry out a seizure before judgment on a motor vehicle sold and financed by an instalment sales contract[2] governed by the CPA.

In this case, the lender who financed the purchase of the vehicle obtained a seizure before judgment in accordance with the *Code of Civil Procedure* and repossessed the vehicle.[3] The consumer contested the seizure, invoking the fact that the CPA is a statute of public order and contains mandatory rules for any repossession of a vehicle (section 138, CPA). These rules do not provide for the possibility of seizure before judgment.

In light of the facts, the Court ruled that compliance with the vehicle repossession mechanism in the CPA was incompatible with the circumstances of the case, given the urgency to act and the stakes at hand. In this case, the facts were very unfavorable to the consumer. Notably, the debt amounted to more than $62,000, the consumer had not made any payments since the purchase and was impossible to reach by phone or e-mail. It was also revealed that the consumer had quit their job and that their credit rating had dropped drastically since the sale of the automobile.

Judgment on the disclosure of the cost of credit in a contract, when a discount is available for payment in cash
2021 QCCA 962

This case concerns the interpretation of sections 70(g), 271 and 272 of the CPA. Section 70 requires, in the context of a credit agreement, that the lender disclose and determine the applicable credit charges, including all components of such charges. To understand this decision, it is important to note that the CPA expressly provides that the components of credit charges include “the value of the rebate or discount to which the consumer is entitled if he pays cash”. In other words, the CPA states that the value of a cash discount that the consumer may have had if they had paid in cash, is a cost of credit and must disclosed as such.

The Court emphasized that violations of the disclosures requirements of section 70 are have to do with non-conformity of the calculation or indication of the credit fees. Consequently, a defence of no prejudice is available to the lender, according to section 271 of the CPA. The Court therefore confirmed it is section 271 of the CPA that applies to a violation of section 70, and not section 272. It must be understood that in practice, section 272 of the CPA is the one most often used by litigants, since it allows for punitive damages and can also creates an absolute presumption of prejudice. The Court thus confirmed that the remedies provided for in CPA sections 271 and 272 are mutually exclusive.

In this case, the Court noted that the evidence on the record establishes that no harm resulted from the violation of section 70(g). Therefore, it concluded that the appeal would fail and rejected the claim.

The application to appeal this judgment to the Supreme Court was denied on June 9, 2021.

Judgment on the application of the CPA in the context of a specific regulatory regime (toll bridge built and operated under a private public partnership)
2021 QCCA 1182

This case involves an application for authorization to institute a class action regarding fees for passage over a toll bridge in the greater Montreal area. The application had been denied by a lower court.

Specifically, this action seeks reimbursement of collection and administration fees charged to motorists who were late in paying the toll.[4] One of the main arguments put forward in support of this claim being that these fees do not reflect the actual costs incurred by the operation of the bridge.

The arguments raised are based on CPA sections 8 (lesion) and 13 (prohibition of penal clauses), as well as CCQ articles 1437 (abusive clauses) and 1623 (abusive penal clauses). The plaintiff also claimed unjust enrichment, undue receipt and extra-contractual civil liability of the toll bridge operator, in the alternative. In other words, the plaintiff submitted all possible bases that they could think of and wanted the court to pick one that would be applicable. This approach was criticized by the Court that said that it was a practice to be proscribed. The Court restated that it is up to the plaintiff to qualify their claim and to limit themselves to the alternatives that can only be decided by the evidence.

In this case, the Court concluded that the obligation of motorists to pay the toll fees arises from the legislative and regulatory framework that specifically governs tolls. It therefore rejected the assumption that the obligation of the drivers were based on a contract, as was advanced in the application on one of the grounds. This conclusion meant that the plaintiff could not claim any of the remedies usually available for a violation of CPA sections 8 and 13 and of CCQ sections 1437 and 1623, since these provisions all require the presence of a contract in order to be applicable. The Court also emphasized that in the presence of a tariff established by regulation, the appropriate means of challenge is not through class action but judicial review.

This decision confirms that when practices are expressly or implicitly permitted by a specific regulation which is completely outside the CPA, courts will be reluctant to find them illegal even when they appear at first glance to be inconsistent with some of the CPA requirements.

This is illustrated by a subsequent decision of the Superior Court that was rendered in March 2022 (2022 QCCS 936). In this judgment, the Superior Court dismissed an application for authorization to institute a class action against the Société des transports de Montréal. The application alleged that the fees that users had to pay to replace their expired Opus cards violated the prohibition on expiry of prepaid cards set out in the CPA. The Superior Court, relying on the principles illustrated in the above-mentioned

decision of the Court of Appeal, noted that the specific regulatory regime applicable to Opus cards had been respected in this case and that, consequently, the appropriate remedy for contesting these fees was judicial review.

Judgment regarding the CPA in the context of pet medications prescribed by veterinarians
2022 QCCA 553

This judgment has been rendered in the context of an application for authorization to institute a class action. In the judgment under appeal, the Superior Court concluded that the CPA does not govern the sale of pet medications prescribed by veterinarians and that such a contract is not a consumer contract.

Even though the Court of Appeal states that it is likely that the CPA does not apply to the sale of pet medications prescribed by veterinarians, the Court overturned the decision of the first judge on this matter. In the absence of case law on this question, the Court noted that factual evidence would be required to determine whether the contract falls within the scope of the CPA and authorized the class action in that regard.

Judgment clarifying the nature of the consumer's rights in an instalment sale contract in a bankruptcy context
2021 QCCA 1667

In this case, the lender, who had financed the purchase of a motor vehicle, was contesting the discharge of a consumer for the debt of an automobile loan (an instalment sales contract) regulated by the CPA in a context of bankruptcy.

The car had been severely damaged and was not insured. The lender sought to prevent the consumer from being discharged from the post-bankruptcy debt, arguing that the instalment sale of the vehicle was akin to acting as a "trustee or administrator of the property of others"[5] within the meaning of section 178(d) of the *Bankruptcy and Insolvency Act*. The Court of Appeal rejected the possibility that the rights conferred by an instalment sale under the *Consumer Protection Act* could be so qualified, which would likely have had other effects on the rights and obligations arising from an instalment sale contract.

Judgment on extended warranties and battery life for electronic devices
2021 QCCA 432

This judgment concerns an application for a class action on two separate subjects. The first one is the life span of rechargeable batteries in electronic devices and, more specifically, a lack of information in this regard prior to purchase. The second concerns the protection plans that could be purchased for these devices. In particular, it was alleged that there had been a systematic failure to inform consumers about the legal warranty when proposing the protection plan.

The Court noted that merchants have an obligation to advise consumers orally and in writing of the legal warranty provided for in CPA sections 37 and 38, before offering them an additional warranty under a protection plan. Any omission in this regard is a prohibited practice within the meaning of CPA section 228, which prohibits "failing to mention a material fact". The Court explained that this type of misconduct is "objective

and statutory" and therefore accepted that it could be assessed in the context of a class action.

The Court also pointed out that whether the absolute presumption of prejudice in CPA section 272 applies should not be decided at the stage of allowing a class action. In this case, the Court authorized the application to institute a class action on battery life, in particular on the basis of CPA section 228 (obligation to inform / prohibition to omit a material fact).

[1] The provisions were included in the 2016 *Budget Act*.

[2] An instalment sale is a contract under which the merchant retains ownership of the vehicle until full payment is made. This is the financing method most commonly used in Québec when purchasing a vehicle from a car dealership.

[3] The seizure before judgment was subsequently cancelled, although the decision cancelling it was subsequently stayed by the judgment granting leave to appeal.

[4]Cars that travel on this toll bridge are automatically identified and their owners are subsequently billed. In other words, it's an automated system that does not require the motorist to stop at a toll booth. The class action was for motorists who did not have an active customer account with the bridge owner at the time of their passage and who failed to pay the tolls on time after receiving a statement of account. These motorists were asked to pay an additional $35 collection fee, on top of the toll fee.

[5] *Bankruptcy and Insolvency Act*, section 178(1)(d).

By

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