COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-06-000177-028

SOUS LA PRÉSIDENCE DE L'HONORABLE WILLIAM FRAIBERG, J.C.S.

FRANÇOIS RIENDEAU
Requérant
c.
BRAULT & MARTINEAU INC.
Intimée

MOTIFS DU JUGEMENT RENDU SÉANCE TENANTE LE 13 JANVIER 2004 [1]

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[1] This is a motion to authorize a class action.

[2] Attracted by a newspaper ad of Respondent Brault & Martineau, ("Brault") in June 2001, Petitioner François Riendeau, purchased $1,962 of merchandise at Brault's St. Léonard branch. Brault is a chain of 12 stores in Quebec selling furniture, major appliances and consumer electronics.

[3] Mr. Riendeau claims that the ad he saw was the same in its material aspects as one published in the Journal de Montréal a year later which he produced in proof. This later ad offered purchasers two options: "24 versements égaux sans frais, sans intérêt **…"

[1] Demande de transcription des motifs du jugement reçue le 23 janvier 2004.
Réception de la cassette d'enregistrement le 28 janvier 2004.

or "payer en juin 2003 (a year later), aucun dépôt, paiement ni intérêt *, sans frais d'administration, sans supplément."

[4] Both the double and the single asterisk referred to two footnotes, in miniscule print, in the bottom right corner of the double page ad. The footnotes were not in separate paragraphs but one run-on text. Each footnote contained *inter alia*, "Ne payez que la taxe de vente. Sujet à l'approbation du crédit."

[5] Elsewhere, the ad invited readers to apply for various credit cards.

[6] Nowhere, including the footnotes, did it indicate any interest or other charge if purchasers under the two options offered failed either to pay one of the 24 installments or to pay the entire purchase price a year after the purchase.

[7] Mr. Riendeau claims that he believed the words "aucun paiement" extended to taxes. He was therefore shocked to learn once he made the purchase that he had to pay Quebec sales tax and G.S.T. immediately. He admits he did not read the footnote.

[8] He also complains that the ad induced him to enter a credit contract without disclosure of the information required by section 247 of the *Consumer Protection Act* (the "CPA") and section 85 of the Application Regulation thereunder.

[9] He now seeks to represent all Brault customers who were affected by similar publicity during the three years preceding his application and seeks damages on his own and their behalf.

[10] Within the governing framework of Art. 1003 C.C.P., Mr. Riendeau's application gives rise to these questions requiring the Court's decision:

1. Since only those Brault customers who chose to pay one year later could have been affected by the text "aucun depot, paiement, ni intérêt", and therefore protest at having to pay the taxes, (no promise in such words having been made to those, who paying in 24 instalments, would have to limit their complaint to the absence of disclosure of credit terms), are the questions thus raised related, even if not identical or similar?

2. Can he base his complaint on a newspaper ad published a year after his purchase rather than the one he in fact read, or at least one contemporaneous with it?

3. Can Mr. Riendeau claim to have been injured when the *Sales Tax Act* is of public order and it is notorious that all purchases attract the taxes unless expressly exempt? Moreover, can he make such a claim, given his failure to read the footnote which clearly indicated the

requirement of paying them. In other words, do the facts seem to justify the conclusions Mr. Riendeau seeks?

4. Is Mr. Riendeau barred from exercising any recourse founded on the inadequacy of credit information on the ground that the only credit contract contemplated by the ad involved full payment either over 24 months or within a year, without interest or credit charge of any kind, and Brault honoured those terms?

5. Can he exercise a recourse founded on a failure to disclose credit charges when he himself, having incurred none, suffered no loss since he paid the entire purchase price within a year? i.e., Must a member of the class have incurred a compensable loss in order to make a claim?

DISCUSSION

Absence of actual or contemporaneous ad in proof

[11] First of all, there is no *a priori* requirement that written proof be offered by a consumer exercising a right under the CPA. Section 263 says as much.

[12] Mr. Riendeau's affirmation, together with his production of an ad published a year later in the Journal de Montréal which he clams contains identical material terms, creates a rebuttable presumption that Brault was using similar publicity at the time of his purchase.

[13] If false, the assertion is easily rebuttable by Brault, but they have so far failed to do so. Therefore at this stage Mr. Riendeau has offered enough *prima facie* proof to satisfy Art. 1003 (b) C.C.P.

Are the claims of misleading advertising concerning the sales taxes and inadequate disclosure concerning the credit terms related?

[14] Both deficiencies, if well-founded, arise from the same ads, directed at the same group of consumers who may have been affected by either or both. Since the same proof will likely be canvassed for both categories of complaint in order to identify the complainants, to determine the validity of their claims and to assess damages, it would be a waste of resources to treat each category as a separate class and to limit the class contemplated by Mr. Riendeau's proposed action to those customers who ended up paying sales taxes after believing they would not have to. (See *Meese* c. *Corp. financière Globex*, 1999 – 12-15, AZ-00021066, J.E. 2000-17. Dalphond, J. there held that in order to avoid a multiplicity of proceedings and attendant costs, one must avoid fractioning persons who have even a related claim against the same defendant in defining the class.)

Can Mr. Riendeau and others who believed they did not have to pay the sales taxes claim any compensable injury?

[15] While it is true that the *Sales Tax Act* is of public order, so too is the CPA. And while it is also true that parties to a taxable transaction cannot contract out of paying the taxes, it is not uncommon for vendors to assume them, in effect thus giving their buyers an equivalent reduction in the price. Mr. Riendeau's claim that he believed he would not have to pay the sales taxes in the circumstances attains a threshold of credibility leading the Court to conclude that other Brault customers likely had the same perception.

[16] Now it is true that if Mr. Riendeau had paid closer attention he would likely have noticed the fine print in the bottom corner of the ad that indicated otherwise. Does his failure to do so then bar his claim? While under Art. 1400 C.C.Q. such an omission may arguably be an inexcusable error, the CPA moderates the rigour of classic civil law principles, given its protective mission.

[17] Section 219 CPA provides that "no merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer."

[18] Section 216 CPA provides that representation includes an affirmation, a behaviour or an omission, while section 218 CPA provides that "to determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and as the case may be, the literal meaning of the terms used therein must be taken into account".

[19] In *Turgeon* c. *Pelletier*, [2001] R.J.Q. 291 (C.A.), Fish, J. held at paragraph 36 that it is by the standard of the credulous or inexperienced person that the misleading character of the publicity and the commercial practices of the CPA must be evaluated.

[20] Considering that the newspaper ad of the type that Mr. Riendeau read teems with information, saying in one place that there is no payment for a year, while elsewhere contradicting that statement in a manner not calculated to catch the attention of the reader, Mr. Riendeau's complaint that he was misled is sufficiently credible, according to the more tolerant standard of the CPA, to merit submitting the question to trial. A credulous, inexperienced reader may have been taken in by the promise of no payment and too distracted by the wealth of detail in the ad to pay attention to the obscure qualification of the promise.

[21] The Court therefore concludes that Mr. Riendeau has established a *prima facie* case that Brault's ads of the type that influenced him contained a misleading representation to consumers and thus constituted a prohibited practice under the CPA.

Adequacy of credit information

[22] The difficulty arises from sections 244 and 247 CPA. The former provision requires that any advice of credit offered to consumers in any advertisement must be limited to mentioning the availability of credit in the manner prescribed by regulation.

[23] Section 247 CPA provides that no person may make use of advertising regarding the terms and conditions of credit unless such advertising includes the particulars prescribed by regulation.

[24] Credit is defined as the right granted to perform an obligation within a term in consideration of certain charges (sec. 1(f) CPA).

[25] Section 80 of the Regulation respecting the application of the CPA (the "Application Regulation") provides as follows:

> Un message publicitaire concernant un bien ou un service et informant le consommateur sur le crédit qu'on lui offre, ne peut mentionner la disponibilité du crédit que de l'une ou plusieurs des façons suivantes:
>
> *a)* en indiquant le nom, la raison sociale, la marque de commerce ou le symbole social d'un commerçant qui conclut des contrats de crédit;
> *b)* en utilisant les expressions «crédit offert», «crédit accepté» ou «possibilité de crédit»;
> *c)* en illustrant une carte de crédit.

[26] The Court is of the opinion that Brault complied with this section, itself the application of section 244 CPA. It did nothing more than show the names and logos of a few credit card issuers, along with illustrations of the cards, thereby indicating that such credit facilities were available at its stores. The sample ad produced by Mr. Riendeau also contained the invitation, "Bénéficiez de nos facilités de financement."

[27] He claims, however, that Brault's advertising runs afoul of section 247 CPA. He argues that it makes use of this advertising, which concerns the terms and conditions of credit, without including the particulars required by regulation.

[28] Section 85 of the Regulation provides as follows:

> Toute publicité d'un commerçant concernant les modalités du crédit d'un contrat de crédit variable et comprenant l'une des mentions suivantes:
>
> *a)* la durée de chaque période pour laquelle un état de compte est fourni;
> *b)* les frais d'adhésion ou de renouvellement;

> *c)* le délai pendant lequel le consommateur peut acquitter son obligation sans être obligé de payer des frais de crédit;
> *d)* le paiement minimal requis pour chaque période;
> *e)* un tableau d'exemples des frais de crédit à payer;
>
> doit les comprendre toutes.

[29] Brault contends that it made no use of advertising concerning terms and conditions of credit, since it charged nothing for allowing purchasers to pay the purchase price either over 24 months or within one year and did nothing illegal by publicizing that fact.

[30] Mr. Riendeau retorts that since Brault is able to grant purchasers a delay to pay only by assigning its purchase price receivables to credit card companies, when it advertises either the 24 month or the one-year option, it attracts the application of section 85 of the Regulation.

[31] Even if the contract extending variable credit is offered by a third party, the credit card issuer, it is Brault that advertises at least one of its particulars, namely, the period during which the consumer may discharge his obligation without being required to pay credit charges. It must therefore advertise all of the particulars required by Section 85 of the Regulation and it has not done so.

[32] According to Mr. Riendeau, the promise of no credit charge for either of the periods indicated (24 months or a year) is the bait by which Brault entices the consumer to enter a variable credit contract that does involve such charges, which are not disclosed until the time of the purchase rather than in the advertising, as section 247 CPA and its corollary, section 85 of the Regulation, require.

[33] Mr. Riendeau contends, persuasively the Court believes, that a merchant cannot evade liability under the CPA by advertising terms and conditions of credit even if it is offered by other merchants.

[34] In order to have the privilege of delayed payment under the two options advertised, the consumer must be credit-approved, then enter into a contract of variable credit with a credit card issuer who ends up extending the delay for payment in the place of Brault.

[35] The obligation to pay interest is incurred to the credit card issuer if the consumer fails to pay according to the schedule he has chosen.

[36] The transition from Brault to the credit card issuer is seamless. It results in one continuing liability of the consumer, first to one merchant, then to the other. He is told the good news that no interest is payable to the vendor if the payment schedule is complied with but not the bad news of the interest payable to the credit card issuer if it is not.

[37] At this stage at least, a serious argument can be made that Brault should not be able to avoid compliance with the CPA and the Application Regulation just because it does not charge the interest itself. It in fact advertises a contract of variable credit but includes only one of its terms in advertising it, namely the delay during which the purchaser can pay the price without incurring any credit charge. Once it mentions that requirement of Section 85 of the Aplication Regulation, however, it must include all the others.

Must a member of the class incur a compensable loss to make a claim?

[38] The Court does not believe that a monetary loss must invariably be established. Section 272 CPA in permitting the aggrieved consumer to seek damages would include moral damages on that account. It is plausible that a consumer, though obliged to pay sales taxes as a matter of public order, may nevertheless claim moral damages, however modest, arising from his or her chagrin at having been led to believe that none were payable.

[39] A consumer who pays credit charges without having been informed what they are in the advertising that induced him to make the purchase from Brault may, by virtue of the second paragraph of section 271 CPA, ask that the credit charges be cancelled and that any already paid be refunded.

[40] Furthermore, even if consumers suffer no "loss" from having to pay credit charges after the delay granted for payment because they pay on time, they may still have a claim for punitive damages under section 272 CPA, the latter being preventive rather than compensatory. Such consumers might plausibly contend that they would not have presented themselves at the Brault store in the first place had they been aware of the inevitability of credit charges for late payment.

[41] The question will have to be dealt with by the trial judge. At this stage the claim for punitive damages, even where compensatory damages or moral damages cannot be established, is a recourse that seems to be justified, to some degree, by the facts alleged.

[42] For all the foregoing reasons, the Court:

[43] Grants Petitioner's motion and authorizes the institution of the class action he proposes, with costs.

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WILLIAM FRAIBERG, J.C.S.

TRUDEL JOHNSTON
(Me Philippe Trudel, Me Bruce Johnston et Me Michel Bédard)

Procureurs du requérant

FASKEN MARTINEAU
(Me Brigitte Chrétien et Me Pierre Lefebvre)

Procureurs de l'intimée

Date d’audience : Le 13 janvier 2004