

Restrictions to Unilateral contractual amendments... and to punitive damages

The recent decision of the Superior Court of Quebec in the *Martin v. Société Telus Communication*¹ class action puts into perspective other recent decisions² from the same court regarding the award of punitive damages in consumer protection cases.

background

This class action, which was initiated in 2008 and authorized by the Court of Appeal in December of 2010, dealt with the unilateral amendment by the Defendant of existing cell phone contracts which sought to introduce fees for incoming text messages, which were previously free of charge. The Class Plaintiff, a customer whose contract was unilaterally amended, was seeking to recover the fees paid following the rate increase, as well as an award for moral and punitive damages. The class plaintiff alleged that the Defendant was in breach of the *Quebec Consumer Protection Act*

¹ 2014 QCCS 1554 ; inscribed in appeal, C.A. Montreal, 500-09-024420-143.

² *Dubé c. Nissan Canada Finance, division de Nissan Canada inc.*, 2013 QCCS 3653 ; inscription in appeal, C.A. Montréal, 500-09-023760-135, July 23, 2013; *Daneau c. General Motors Acceptance Corporation du Canada ltée (GMAC)*, 2013 QCCS 3655, see our article from January 2014 in [Repères EYB2014REP1466](#) (in French only).

(the “CPA”)³ by omitting to specify a potential price increase in the initial contract. The CPA indeed provides that no costs may be claimed from a consumer unless the amount thereof is indicated with precision in the contract. On the other hand, the Defendant argued that each of its contracts with the class members specifically provided that certain fees could be modified upon a 30 day notice to the consumer and that the disputed modification was consequently valid.

decision

The Superior Court determined that the unilateral modification of the fees during a fixed-term contract was not permitted pursuant to the CPA and ordered the collective recovery of the fees paid by the class members following this modification. In other words, the Defendant was required to specify in the contract the content and the value of future amendments for such changes to be valid. Given the nature of the contract, the disclosure requirement applied to all of the features being offered (phone calls, text messaging, voicemail, etc.) at the time of the initial contract and not only to the services which were initially subject to charges. Since the CPA provides that the essential elements of a contract, such as the price, cannot be amended unilaterally by the merchant, the latter could not modify the contract as it did, even in respect of services which were initially free. The clause allowing a modification of any aspect of the contract upon a simple notice by the Defendant was insufficient, since the consumer did not know at the time she entered into the contract that such a price change would occur or the precise amount she would be charged for this service after the modification.

The Court did not grant the claim for moral damages as the Class Plaintiff did not provide sufficient evidence with regards to such

³ RSQ, c P-40.1, s. 12.

claim. The Court also concluded that the repayment of the sums received due to the illegitimate price increase was sufficient to fulfill the CPA's dual objectives of deterrence and prevention, so that an award of punitive damages was not necessary under the circumstances. The fact that the Defendant continued to bill its customers for the incoming text message services despite the introduction of the class action proceedings was not sufficient to justify granting an award of punitive damages, since the Defendant had a defensible position and had governed itself accordingly. Citing the Supreme Court's decision in *Times*, the Court concluded that the Defendant did not "display ignorance, carelessness or serious negligence with respect to [its] obligations and consumers' rights under the [CPA]"⁴ and that therefore, there were no grounds to award punitive damages.

conclusion

The final outcome of these issues remains uncertain as the decision is being appealed by the Defendant. The Court's reasoning, if it is maintained by the Court of Appeal, will have consequences on merchants' practices. Indeed, clauses providing for a right of the merchant to unilaterally modify the fees or other essential terms during the course of a consumer contract, which are not uncommon, could be subject to more frequent disputes. In such an eventuality, it is useful to bear in mind that in this case, the Court considered that services which were provided for free to the consumer (or that were not otherwise specified in the price structure of the services) such as charges for incoming text messages, form an integral part of the consumer contract and cannot be unilaterally modified. Merchants will therefore have to

⁴ *Richard v. Time Inc.*, 2012 CSC 8.

be careful going forward when charging for services which were previously being offered for free to their existing clients.

With regards to awards for punitive damages, this decision distinguishes itself from those rendered in June 2013 in class actions instituted against financing companies for the purchase or lease of automotive vehicles⁵, one of which is also being appealed. In these decisions, the Court determined that the contracts in dispute contained false or misleading representations under the CPA. The Court then condemned the Defendants to punitive damages since they had not modified their contracts in order to comply with the CPA, even after class action proceedings contesting their validity had been instituted.

These two decisions therefore differ from the one rendered in the present case, where the Court refused to grant the punitive damage claim despite the fact that the Defendant had continued to bill the disputed charges after having been informed of the class action proceedings. Hence, the Court recognized that it is not necessarily reprehensible for a party to defend its position and act accordingly, notwithstanding a judicial challenge to the content of its contracts. In a context where the regulations governing the contracts between merchants and consumers impose a relatively rigid framework and where class actions are on the rise, we consider the Court's approach to be more just

⁵ See note 2.

towards merchants. The Court, in passing, recognized in this judgment that defending a class action can be burdensome and is not without consequence for merchants.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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