Court of Appeal Affirms Punitive Damages Must Be Proportionate to Gravity of Breach

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A recent decision by the Québec Court of Appeal in *Vidéotron v Girard*, 2018 QCCA 767 affirmed the award of compensatory and punitive damages against Vidéotron for overcharging consumers with fees related to the CRTC's Local Program Improvement Fund (LPIF). The Court upheld the Superior Court of Québec's finding that Vidéotron made false or misleading representations — a prohibited business practice under the *Consumer Protection Act* (CPA). The decision amended the interest allocation period and reduced the trial judge's award of punitive damages from $1,000,000 to $200,000.

Background

The respondent, Charles Girard, brought a class action against Vidéotron on behalf of subscribers who had paid LPIF fees imposed on video-on-demand rentals and cable packages. He alleged that these fees had not been disclosed and that they had been illegally billed or incorrectly calculated, thus constituting a prohibited business practice under the CPA. The Superior Court of Québec allowed the class action in part, finding that LPIF fees constituted fees payable under federal law within the meaning of s.227.1 of the CPA.

Vidéotron was ordered to pay compensatory damages of $3,267,581 for pay-per-view rentals and $3,152,042 for cable television packages, as well as $1,000,000 in punitive damages.

Court of Appeal Decision

The appeal judgment relates only to the award for overpayments made by subscribers of cable television packages, the calculation of interest awarded and punitive damages.

On appeal, Vidéotron argued that the trial judge had erred in failing to apply the four criteria developed by the Supreme Court of Canada in *Richard v Time Inc.*, 2012 SCC 8 (*Time*) for a claim under s.227 of the CPA.

While the Québec Court of Appeal agreed that the trial judge had relied on the burden of proof in civil matters instead of applying the criteria enumerated in *Time*, this error did not justify intervention by the Court. Even if the proper criteria had been applied, Vidéotron would have been ordered to reimburse fees paid by its subscribers in excess of the actual cost of their cable television packages.

Once the criteria set out in *Time* are met, consumers benefit from an irrebuttable presumption of prejudice. Applying the aforementioned criteria, the Court of Appeal found that Vidéotron had breached s.219 and s.227.1 of the CPA and engaged in a prohibited business practice by failing to clearly explain to its customers how LPIF fees were calculated.

The decision ordering reimbursement of amounts overpaid for the cable television service was, therefore, upheld.

Takeaway — Punitive Damages

The Court of Appeal amended the quantum of punitive damages despite a particularly high standard of review. The trial judge's punitive damage award of $1,000,000 was found to be excessive and disproportionate to the circumstances of the case. The Court considered Vidéotron's behaviour to be a relevant factor in deciding to reduce the quantum of punitive damages.

In Québec, punitive damages may be awarded under article 1621 of the *Civil Code of Québec* if provided for by law. That article indicates that punitive damages are essentially preventive. Under that provision, as the Supreme Court has already established, the undesirable conduct to be sanctioned must be denounced and the ultimate objective of an award of punitive damages must always be to deter wrongdoers and others from engaging in such misconduct of the same kind.[1] The award should thus serve the purpose of specific and general deterrence.

Accordingly, section 272 of the CPA explicitly provides for punitive damages. The simple fact of a breach of the CPA does not suffice to justify a punitive damage award. The behaviour of the merchant must be examined in light of all appropriate circumstances, including the gravity of their fault, the extent of reparations for which they are already liable, and their financial situation. The whole of the merchant's conduct must be analyzed, both at the time of the violation and after the breach, before awarding punitive damages. In deciding whether to award punitive damages, a court must align the facts of the case with the purposes for which the damages are awarded, to consider how, in a particular case, their award would further those purposes. The ultimate objective of an award of punitive damages must always be the deterrence of undesirable conduct.

Punitive damages do not have a compensatory purpose. The appropriate quantum of punitive damages is the lowest amount necessary to achieve the preventive purpose. Otherwise, the award may artificially inflate the amount of damages awarded. While the exercise is not mathematical, it cannot be arbitrary either. The quantum of punitive damages is delicate and subjective, and, therefore, must be based on a set of observable facts.

Applying the above principles to the facts at bar, the Court of Appeal found that a punitive damage award of $1,000,000 was unreasonable. While considering all the circumstances, the Court emphasized the gravity of Vidéotron's breach of its obligations to approximately 1.5 million subscribers. The Court, however emphasized that the merchant`s fault was rooted in a lack of transparency in the calculation of fees, rather than a deliberate effort to overcharge its subscribers.

A punitive damage award of $200,000 was therefore deemed to be sufficient and proportional to the gravity of the breach of s.272 of the CPA, while still having the desirable preventive effect.

[1] *Béliveau St-Jacques c. Fédération des employées et employés*, [1996] 2 SCR 345 at paras 21, 126 [*Béliveau St-Jacques*];*De Montigny v. Brossard (Succession)*, 2010 SCC 51 at para 53 [*De Montigny*].

By

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