COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-023758-139, 500-09-023759-137,
500-09-023760-135, 500-09-023761-133
(500-06-000447-082, 500-06-000448-080,
500-06-000388-070, 700-06-000005-092)

DATE: February 20, 2015

CORAM: THE HONOURABLE **NICHOLAS KASIRER, J.A.**
JEAN-FRANÇOIS ÉMOND, J.A.
MARK SCHRAGER, J.A.

No: 500-09-023758-139

VÉRONIQUE DION
APPELLANT – Plaintiff / Representative
v.

COMPAGNIE DE SERVICES DE FINANCEMENT AUTOMOBILE PRIMUS CANADA
RESPONDENT – Defendant

No: 500-09-023759-137

GISÈLE DANEAU
APPELLANT/ INCIDENTAL RESPONDENT – Plaintiff / Representative
v.

GENERAL MOTORS ACCEPTANCE CORPORATION DU CANADA LIMITÉE (GMAC)
RESPONDENT/INCIDENTAL APPELLANT - Defendant

No : 500-09-023760-135

RACHEL DUBÉ
APPELLANT/INCIDENTAL RESPONDENT – Plaintiff / Representative
v.

NISSAN CANADA FINANCE, DIVISION DE NISSAN CANADA INC.
RESPONDENT/INCIDENTAL APPELLANT - Defendant

No: 500-09-023761-133

MICHEL ST-PIERRE
APPELLANT – Plaintiff / Representative
v.

BANQUE ROYALE DU CANADA
RESPONDENT - Defendant

JUDGMENT

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[1] The Court is seized with appeals from four judgments of the Superior Court, District of Montreal, and in one case, the District of Terrebonne (the Honourable Claudine Roy) as well as incidental appeals in the matters of *Daneau v. GMAC* (500-09-023759-137) and *Dubé v. Nissan Canada Finance, Division de Nissan Canada inc.* (500-09-023760-135).

[2] For the reasons of Schrager, J.A., with which Kasirer and Émond, JJ.A., concur, the Court dismisses all of the appeals and incidental appeals, with costs, as follows:

[3] **DISMISSES** the appeal in file number **500-09-023758-139** with costs;

[4] **DISMISSES** the appeal in file number **500-09-023759-137** with costs;

[5] **DISMISSES** the appeal in file number **500-09-023760-135** with costs;

[6] **DISMISSES** the appeal in file number **500-09-023761-133** with costs;

[7] **DISMISSES** the incidental appeals in each of the files number **500-09-023759-137** and **500-09-023760-135** with costs.

NICHOLAS KASIRER, J.A.

JEAN-FRANÇOIS ÉMOND, J.A.

MARK SCHRAGER, J.A.

Mtre Fredy Adams
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For all the appellants

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For Compagnie de services de financement automobile Primus Canada and General Motors Acceptance Corporation du Canada Limitée (GMAC)

Mtre Marc-André Landry
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For Nissan Canada Finance, Division de Nissan Canada inc.

Mtre Yves Martineau
Mtre Guillaume Boudreau-Simard
STIKEMAN ELLIOT S.E.N.C.R.L., S.R.L.
For Banque Royale du Canada

Date of hearing: December 2, 2014

REASONS OF SCHRAGER, J.A.

INTRODUCTION

[8] Each Appellant has inscribed in appeal against one of four judgments all rendered on June 26, 2013 by the Superior Court, sitting for the district of Montreal and in one case, the district of Terrebonne (the Honourable Claudine Roy). The judgments treat four class actions against each of Compagnie de Services de Financement Automobile Primus Canada ("Primus"),[1] General Motors Acceptance Corporation of Canada ltd ("GMAC"),[2] Nissan Canada Finance, division of Nissan Canada inc. ("Nissan"),[3] and Royal Bank of Canada ("RBC").[4]

[9] Respondents Primus, GMAC, Nissan and RBC are sometimes hereinafter referred to collectively as the "Merchants" and the Appellants are sometimes hereinafter referred to collectively as the "Consumers".

[10] The class actions against GMAC and Nissan were granted while those against Primus and RBC were dismissed.

[11] In each of the files, the Consumers claimed reimbursement from the Merchants of a portion of the charges paid by the Consumers for the publication of their contracts at the Register of personal and movable real rights ("RDPRM"). Each Consumer and member of the classes authorized for purposes of the actions acquired automobiles under instalment sales contracts or under long term leases. In each case, the Merchants charged an amount for such publication which represented the sum of two amounts: (1) the fee payable to the RDPRM imposed by the *Tariff of fees respecting the register of personal and movable real rights*[5] ("Tariff") made pursuant to the *Act respecting registry offices;*[6] and, (2) the fees (plus sales tax) charged by a service provider to effect such publication. The charges were represented by a single figure and were not broken down as between amounts payable to the RDPRM and the amounts payable to the service provider.

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1 *Dion c. Compagnie de services de financement automobile Primus Canada*, 2013 QCCS 3654 [*Primus*].
2 *Daneau c. General Motors Acceptance Corporation du Canada ltée (GMAC)*, 2013 QCCS 3655 [*GMAC*].
3 *Dubé c. Nissan Canada Finance, division de Nissan Canada inc.*, 2013 QCCS 3653 [*Nissan*].
4 *St-Pierre c. Banque Royale du Canada*, 2013 QCCS 3657 [*RBC*].
5 *Tariff of fees respecting the register of personal and movable real rights*, CQLR, c. B-9, r. 2.
6 *Act respecting registry offices*, CQLR, c. B-9.

[12] Appellants contend that such practice constituted a false and misleading representation contrary to the provisions in Title II of the *Consumer Protection Act* ("*C.P.A.*").[7] Appellants argued that the description of the amounts in each of the contracts gave the false impression that the whole amount was payable to the RDPRM.

[13] The judge came to the conclusion that only the contracts of Nissan and Primus and certain contracts of GMAC contained false or misleading representations. However, she refused to reduce the Consumers' obligations to allow them to recover the sums paid over and above the fees payable to the RDPRM because of the Appellants' admission that the Consumers would have purchased or leased the vehicle despite the representation and the amount of the charge. The judge applied recent jurisprudence of the Supreme Court of Canada[8] and concluded that there was not sufficient nexus between the content of the representation and the service covered by the contract. In other words, the judge, on the basis of the admission, decided that despite the falsity or misleading nature of the representation, the Consumer was not influenced by same and would have entered into the contract of purchase or lease of the vehicle, notwithstanding.

[14] Nevertheless, the judge condemned GMAC and Nissan to pay punitive damages of $150,000 each. RBC was not condemned to punitive damages as there was no infringement of the *C.P.A.* In the case of Primus, given that it changed its policy prior to the trial by not imposing the charge in question, no punitive damages were awarded.

[15] In appeal, Appellants seek compensatory damages from all four Respondents equal to the amount of the service charge. They also claim punitive damages totalling more than $80,000,000 divided as follows: $41,323,600 against GMAC, $15,843,800 against Nissan and $25,645,600 against RBC, all calculated on the basis of $100 per class member.

[16] GMAC and Nissan have filed incidental appeals as they contend that the judge erred in law in applying Title II of the *C.P.A.* According to them, Title II does not apply to a contractual recourse as between consumer and merchant. Moreover, they contend that in any event the awarding of punitive damages was, in the circumstances, inappropriate.

FACTS

[17] The facts are similar in each file.

[18] Consumers, wishing to purchase an automobile on credit, signed either an instalment sale contract or a long-term lease with an option to purchase.

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7 *Consumer Protection Act*, CQLR, c. P-40.1.
8 *Richard v. Time Inc.*, [2012] 1 S.C.R. 265, 2012 SCC 8 [*Time*], para. 124.

[19] In both cases, the contracts of each Merchant are standard forms used by them but completed at the premises of the car dealership and signed by the representatives of the auto dealers. The latter interact directly with the Consumers and make whatever representations precede the signing of the contract. The four Merchants do not deal directly with consumers.

[20] Once signed, each of the contracts is assigned by the car dealership to one of the four Merchants and the latter causes the publication of the contracts at the RDPRM. To do so, they use the services of a company which effects such publications, pays the disbursements to the RDPRM and charges same back to the Merchant together with a fee. The sum of these two amounts (plus sales tax on the fee) is charged by the dealership to the Consumer at the time of the signing of the contract.

[21] As stated above, the amount charged and paid by the Consumer is a global sum which includes the disbursement to the RDPRM and the service provider. The actual amount of the fee payable to the RDPRM may vary since the Tariff includes a sliding scale determined by duration of the publication and a reduction for electronic filing.

[22] The charge is described in various ways by the Merchants and in varying manners depending on the nature/type of the contract (instalments sale or lease) and the period during which the contract was signed. All of the charges were entered into the schedule to the contract[9] stipulated in the *C.P.A.* and in all instances under the section addressing credit charges ("Frais de crédit"), under the heading "Autres composantes" ("Other components"), which are imposed by the *C.P.A*. The following are the different phraseologies used by the standard form contracts to describe the charge in question:

1. Primus
   - Frais d'inscription au RDPRM
   - Frais de publication
2. GMAC
   - Frais de publication des sûretés mobilières
   - Autres composantes (frais du RDPRM, etc.)
   - Frais de publication des sûretés mobilières, taxes inc. [sic]
   - Frais du RDPRM, etc.
   - Autres composantes (frais du RDPRM (s'il y a lieu))
3. Nissan
   - Frais de publication des documents de location
   - Frais de publication (RDPRM)
   - Frais de publicité (RDPRM)

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[9] An example of the relevant Schedule 5 taken from the Nissan judgment is annexed to these reasons to aid the reader to better visualize the situation.

4. RBC

Autres composantes – Préciser : RDPRM (54.00) + ARTICLES NON IMPOSABLES

[23] Appellants contend that the drafting of the contracts and specifically the abovementioned phrases imposing the charge give the false or misleading impression that the amount charged represents the amount payable to the RDPRM and is therefore a prohibited business practice under Title II of the *C.P.A.* More specifically, Appellants base their assertion on Sections 219 and 227.1 of the *C.P.A.*:

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.	**219.** Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.
227.1. No person may, by any means whatever, make false or misleading representations concerning the existence, charge, amount or rate of duties payable under a federal or provincial statute.	**227.1**. Nul ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse concernant l'existence, l'imputation, le montant ou le taux des droits exigibles en vertu d'une loi fédérale ou provinciale.

THE JUDGMENTS IN FIRST INSTANCE

[24] The judge identified the issues before her as follows:

1) does Title II of the *C.P.A.* (including Sections 219 and 227.1) apply to actions on contract?

2) if Title II applies to actions on contracts, are the aforementioned descriptions false and misleading and thus contrary to Sections 219 and 227.1 of the *C.P.A.*?

3) assuming an affirmative answer to the foregoing questions, do the Consumers have a right to the reduction of their obligations (i.e. reimbursement for the service portion of the charge) and to punitive damages, the whole pursuant to Section 272 *C.P.A.*?

[25] The judge answered "yes" to the first question, that Title II of the *C.P.A.* applies to a contractual relationship. Despite certain *dicta* in *Time*[10] that Title II applies to the

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[10] *Time*, *supra* note 8.

pre-contractual phase of dealings between Consumers and Merchants, the Supreme Court did not rule out that provisions of Title II can apply to a contract according to the reading of the judge in first instance. Several provisions in Title II (for example, Section 235 *C.P.A.*), make explicit reference to a prohibited practice "in a contract made with a consumer". Also, the legislature, in the judge's opinion did not intend to exclude the application of Title II to contracts. Despite the contract being a memorandum of the parties' obligations and rights, it can also include representations. The judge underlined that the two notions are not mutually exclusive, as in the present case where the drafting of the contract provides that a Consumer is obliged to pay a certain amount, and the description of such amount is, allegedly, misrepresented by the Merchant in the text of the contract.

[26] On the second issue, the judge ruled that the following clauses were misleading:

> in Primus' contracts:
>
> Frais d'inscription au RDPRM
> Frais de publication
>
> in GMAC's contracts:
>
> Frais de publication des sûretés mobilières
> Frais de publication des sûretés mobilières, taxes inc. [sic]
> Autres composantes (frais du RDPRM (s'il y a lieu))
>
> in Nissan's contracts:
>
> Frais de publication des documents de location
> Frais de publication (RDPRM)
> Frais de publicité (RDPRM)

[27] These clauses were not misleading:

> in the case of GMAC
>
> Autres composantes (frais du RDPRM, etc.)
> Frais du RDPRM, etc.
>
> in the case of RBC[11]
>
> Autres composantes – Préciser : RDPRM (54.00) +

[11] In the case of RBC, clause 12 h) in its form of contract offered additional explanation so that the aforementioned insertion was not deemed misleading by the judge.

ARTICLES NON IMPOSABLES

[28] On the third issue and despite her conclusion that the representations cited above were misleading, the judge did not reduce the obligations of the Consumer nor did she award a reimbursement of the service charge because of the admission of the Consumers stipulating that they would have signed the contract even if they had known that part of the charge was payable to a service provider and not the RDPRM. As such, the misleading character of the representation had no impact on the Consumer. The judge relied on *Time* where Justices LeBel and Cromwell speaking for the Supreme Court[12] laid down four steps to satisfy in order that an irrebuttable presumption of prejudice arise from a violation of the *C.P.A.* The fourth arm of that test (i.e. that there be sufficient nexus between the representation and the Consumer's decision to contract) was not satisfied in the opinion of the judge. Nevertheless, the judge condemned GMAC and Nissan to punitive damages because she concluded that their actions of misleading the consumer demonstrated serious ignorance or recklessness.

ISSUES IN APPEAL AND SUMMARY OF THE PARTIES' POSITIONS

Does Title II of the *C.P.A.* apply to contracts?

[29] Did the judge err in law in deciding that the provisions of Title II of the *C.P.A.* dealing with business practices apply to contracts entered into between merchants and consumers?

[30] More specifically, did the judge err in law in applying section 227.1 *C.P.A.* to a provision in a contract between a merchant and a consumer? The judge also applied Section 218 (also contained in Title II) which comprises the general impression test to a provision of contract. Section 218 reads as follows:

> **218.** 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.
>
> **218.** Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

[31] Appellants' cases rest principally on the application and interpretation of Section 227.1 *C.P.A.* to the contracts signed by the Consumers in the four cases. They contend that Section 227.1 *C.P.A.* prohibits the misrepresentation of any amount payable under a statute (in this case, the Tariff) by "any means", including by means of a provision in a contract. Respondents urge that Title II applies only to the pre-contractual phase of the merchant-consumer relationship.

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[12] *Time*, *supra* note 8, para. 124.

[32] Respondents also contend that it is the ordinary rules of contractual interpretation contained in the *Civil Code of Québec* ("*C.C.Q.*") which should apply to the interpretation of the contract between a merchant and consumer and that the application by the judge of the general impression rule in Section 218 *C.P.A.* to the contract between the parties constituted an error of law.

Interpretation of Section 227.1 *C.P.A.*

[33] Did the judge err in her reading of Section 227.1 *C.P.A.* (i.e. that 227.1 does not require a precise statement of the exact amount paid or payable in virtue of a statute)? Did the judge commit a mixed error of fact and law in concluding that the impugned contractual provisions were not misleading and more significantly the addition of qualifying words such as "etc." or "et accessoires" removed the clauses from the ambit of the prohibition in Section 227.1 *C.P.A.*?

[34] Appellants interpret Section 227.1 *C.P.A.* with the aid of Section 12 *C.P.A.* which provides that no cost can be claimed from the consumer unless the amount thereof is "precisely indicated" in the contract. Thus, the Appellants contend that the Merchants were obliged to break down the amount as between the fee payable under the Tariff and the fees charged by the service providers for effecting the publication.

[35] Respondents contend that Section 227.1 *C.P.A.* does not impose an obligation to break down the amount. They continue that nothing is misleading in the manner in which the contracts were drafted because the amount charged was that which the Merchants paid to have the contracts in question published in the RDPRM as required by law to protect their rights.

Is the appropriate recourse under Section 271 *C.P.A.* or Section 272 *C.P.A.*?

[36] Did the judge err in fact and in law in entertaining a recourse under Section 272 *C.P.A.*? Should she have limited Appellants' recourse to Section 271 *C.P.A.* or in other words, are these two sections mutually exclusive?

Prejudice

[37] Did the judge err in law by subjecting the presumption of prejudice under Section 272 to the four-step test set down by the Supreme Court in *Time*? Rather, should she have decided that once a prohibited practice is contained in a contract then it is presumed that the consumer has suffered harm?

[38] Appellants contend that once the judge determined that a provision of the contract was misleading, there was a prejudice giving rise to a remedy for the

Consumer under Section 272 *C.P.A.* Appellants rely on the judgment of this Court in *Household Finance*:[13]

> [43] La violation par le commerçant (l'appelante) des dispositions relatives au calcul du crédit va à l'encontre de l'article 91 de la *Loi* et, à ce titre, il s'agit d'une violation d'une condition de fond dont la sanction doit s'exercer en application de l'article 272 de la *Loi*. C'est d'ailleurs la conclusion à laquelle en arrive le juge de première instance lorsqu'il indique « En vertu des articles 272 et 8 de la *LPC*, le Tribunal a déjà accordé l'annulation et, du fait même, le remboursement des frais de retard ».
>
> [44] Le consommateur a donc le droit d'obtenir la réduction de son obligation vu l'irrespect par le commerçant d'une condition de fond imposée par la *LPC.* Ainsi, toute la théorie de l'appelante quant à l'absence d'un préjudice pour l'intimée Gagné, en regard des calculs des frais de crédit qui, même en incluant les pénalités payées, seraient moindres que ceux que celle-ci aurait dû payer, devient non pertinente et ne lui est d'aucun secours en application de l'article 272.

[39] Appellants submit that this precludes the application of the four conditions set down as a test by the Supreme Court in *Time.*[14]

[40] Did the judge err in fact and in law in dismissing the subsidiary position of the Consumers that notwithstanding the absence of any presumption of prejudice, Appellants had proved the prejudice caused by the misrepresentation? Appellants argue in the alternative that even if the interpretation and application of Section 272 *C.P.A.* by the judge was correct and that no presumption of prejudice arose, then there was nevertheless, in the evidence, a prejudice in that the improper disclosure of the information impeded the Consumers from negotiating the charge; something they would have been able to do had proper information been disclosed.

The action of the class representative did not succeed

[41] With respect to Respondent GMAC, can a class action be maintained despite that the particular case of the class representative might be unfounded based on the Court's ruling? Respondent GMAC contends that since the class representative in its case signed two contracts containing clauses that the judge ruled were not offensive ("Frais du RDPRM, etc."), then the class action must be dismissed; if the class representative has no case, then the class case must fail.

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13 *Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, 2006 QCCA 1319 [*Household Finance*], paras. 43 and 44.

14 *Time*, *supra* note 8, para. 124.

The *de minimis* argument

[42] Is the misleading disclosure in this case subject to the materiality or *de minimis* rule contained in Section 63 of the *Regulation respecting the application of the Consumer Protection Act* ("*C.P.A. Regulation*")[15] which reads as follows:

> **63.** In a contract for the loan of money and in a contract involving credit, the credit rate disclosed must not be less than the annual percentage, computed in accordance with section 53 or 54, as the case may be, by more than ¼ of 1%.
>
> **63.** Dans un contrat de prêt d'argent et dans un contrat assorti d'un crédit, le taux de crédit divulgué ne doit pas être inférieur de plus de 1/4 de 1% au pourcentage annuel calculé conformément à l'article 53 ou 54 selon le cas.

[43] The Merchants maintain that in the event that disclosure was misleading then such contravention of Sections 12 and 227.1 *C.P.A.* is without effect since the calculation of the fee portion charged in relation to the capital cost of the vehicle would be less than 0.25%. This is the *de minimis* rule in Section 63 of the *C.P.A. Regulation*. The Appellants maintain that their case does not turn on the amount of disclosure nor to the computation of the credit charges, nor their percentage as related to the capital costs of the vehicle. Rather, the Appellants maintain that the amount charged for publication was not properly explained or disclosed to the Consumers so that they were led to believe, on a general impression basis, that they were paying something imposed pursuant to a statute where in reality it was only a portion of the amount charged which was imposed by government authority.

Punitive damages

[44] Was the award of punitive damages against GMAC and Nissan correct and is the quantum appropriate? Should punitive damages have been awarded against RBC? The Appellants did not put in issue the judge's refusal to award punitive damages against Respondent Primus.

DISCUSSION

Does Title II of the *C.P.A.* apply to contracts?

[45] Fundamental to Appellants' cases is the application of Section 227.1 *C.P.A.* to a contract. Respondents argued that the judge erred in law in finding that provisions contained in Title II of the *C.P.A.* could apply to a contract. I find no error of law in the judge's conclusion on that matter.

[46] The trial judge referred to the Supreme Court in *Time*:

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[15] *Regulation respecting the application of the Consumer Protection Act*, CQLR, c. P-40.1, r. 3.

> [114] (...) Unlike the obligations imposed under Title I of the Act, which apply to the contractual phase, the prohibitions against certain business practices set out in Title II apply to the pre-contractual phase. As Françoise Lebeau notes, Title II of the *C.P.A.* imposes on merchants, manufacturers and advertisers a duty to act honestly and an obligation to provide information during the period preceding the formation of the contract (p. 1020). The legislature's objective with respect to business practices is clear: to ensure the veracity of pre-contractual representations in order to prevent a consumer's consent from being vitiated by inadequate, fraudulent or improper information.
>
> [114] [...] Contrairement aux obligations imposées en vertu du titre I de la loi, qui régissent la phase contractuelle, les interdictions relatives à certaines pratiques de commerce réglementent la phase précontractuelle. Comme M[e] Françoise Lebeau l'a souligné, les dispositions du titre II de la *L.p.c.* imposent aux commerçants, aux fabricants et aux publicitaires un devoir de loyauté et une obligation d'information au cours de la période précédant la formation du contrat (p. 1020). Le législateur poursuit un objectif évident en matière de pratiques de commerce : celui d'assurer la véracité des représentations précontractuelles afin d'éviter que le consentement du consommateur soit vicié par une information déficiente, frauduleuse ou abusive.

[47] The trial judge correctly characterized the Supreme Court's *dictum* saying that the facts before it dealt with a "pre-contractual" situation. She also underlined that several sections found in Title II of the *C.P.A.* apply on their face to contracts, citing as an example Section 235 *C.P.A.*:

> **235.** No person may, directly or indirectly, in a contract made with a consumer, make the grant of a rebate, payment or other benefit dependent upon the making of a contract of the same nature between that person or consumer and another person.
>
> **235.** Aucune personne ne peut, directement ou indirectement, dans un contrat passé avec un consommateur, subordonner l'octroi d'un rabais, d'un paiement ou d'un autre avantage, à la conclusion d'un contrat de même nature entre, d'une part, cette personne ou ce consommateur et, d'autre part, une autre personne.

[48] More significantly, the trial judge added that the legislature could not have intended to limit application of prohibitions against false or misleading representations to the pre-contractual phase of merchant-consumer dealings.

[49] Lastly, the judge correctly underlined that a contract may well include a representation as well as an expression of mutual rights and obligations. She cites as an example the clause in the contracts in this case obliging the Consumer to pay "Frais de publication de documents de location". Clearly, in this example, the clauses in

question were both descriptive of a Consumer's obligation to pay and a representation of that which was being paid.

[50] There is no error in the judge's finding in this regard.

[51] Appellant RBC has however argued that the application of Section 218 *C.P.A.* (or the "general impression rule") by the judge constituted an error of law since in so doing she supplanted the rules of contractual interpretation. Despite counsel's able argument, I disagree for the reasons which follow.

[52] The general impression rule is not a rule of contractual interpretation. One source of the general impression rule can be found in the *Competition Act*[16] where ss. 52(4) and 53(1) address false and misleading publicity on a "general impression" basis. Another possible source can be found in trademark law where the first impression test is used to determine whether the tort of passing off has occurred.[17] The general impression rule was incorporated into the *C.P.A.* upon its promulgation in Quebec[18] in 1978 to deal with phenomena similar to passing off – i.e. the impression formed by a "(...) casual consumer somewhat in a hurry (...) with imperfect recollection (...) who does not pause to give the matter any detailed consideration or scrutiny (...)".[19] The origins of the rule are not found in rules of contractual interpretation.

[53] I do not see any incompatibility between Section 218 *C.P.A.* and the articles of the *C.C.Q.* dealing with interpretation of contracts such as Articles 1425 to 1432 *C.C.Q.* Rules of interpretation of contract definitely apply to Consumer contracts. Indeed, these rules of the *C.C.Q.* dovetail nicely with the *C.P.A.* Articles 1435 and 1436 *C.C.Q.* make direct reference to the consumer. Article 1432 *C.C.Q.* provides that doubt is always resolved in favour of the consumer.

[54] Once a provision of a contract lacking clarity is interpreted with the aid of the rules in the *C.C.Q.*, then in determining whether any representation in such contract misleads the Consumer, the general impression rule in Section 218 *C.P.A.* is applied.

[55] For example, in the case of RBC, the judge, if only implicitly, applies Article 1427 *C.C.Q.*:

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning	**1427.** Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de

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16 *Competition Act*, R.S.C. 1985, c. C-34.

17 *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] 1 S.C.R. 824, 2006 SCC 23 per Binnie J., para. 20; see also *Pepsi-Cola Company of Canada ltd v. The Coca-Cola Company of Canada ltd,* [1940] S.C.R. 17, 35 where the Supreme Court referred to "... the general impression on the mind of the ordinary person." in a trademark case.

18 S.Q. 1978, c. 9, s. 218.

19 *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, *supra* note 17.

derived from the contract as a whole.	l'ensemble du contrat.

[56] The judge stated that since the contract must be read as a whole then the meaning of "Autres composantes" in the Schedule to the contract must be read with the provisions of Article 12 h) of the RBC contracts which gave further explanations on the nature of the charge.[20] Having interpreted the contract in this matter, the judge ruled that on a general impression basis the charge appeared to represent more than the fee paid to the RDPRM.

[57] In the other cases at bar, the judge undertook no exercise of contractual interpretation as such since there appeared to be no need to interpret the clauses found in the Schedules to the contracts.

[58] The judge examined the clauses on the general impression basis. She found that clauses providing:

> Autres composantes (frais du RDPRM, etc.)
> Frais du RDPRM, etc.
> Autres composantes – Préciser : RDPRM (54.00) + ARTICLES NON IMPOSABLES

were not misleading because on a general impression basis, it appears to the reader that the charge includes elements other than the RDPRM fee. The other clauses:

> Frais d'inscription au RDPRM
> Frais de publication
> Frais de publication des sûretés mobilières
> Frais de publication des sûretés mobilières, taxes inc. [sic]
> Autres composantes (frais du RDPRM (s'il y a lieu))
> Frais de publication des documents de location
> Frais de publication (RDPRM)
> Frais de publicité (RDPRM)

on a general impression basis, convey the idea that the amount of the charge represents the RDPRM fee solely, which is not true and as such is a misrepresentation caught by Section 227.1 *C.P.A.*

[59] I ascertain no error in this reasoning or finding by the trial judge.

Interpretation of Section 227.1 *C.P.A.*

[60] The trial judge decided[21] that the law does not require, *per se*, that "Autres composantes" in "Frais de crédit" be broken-down or sub-divided. Indeed, there are many items that can fall thereunder (as provided in Section 70 *C.P.A.*, such as interest,

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[20] Namely "(...) payer tous les frais accessoires aux recherches et à l'enregistrement y afférents".
[21] *Primus*, *supra* note 1, para. 38.

insurance, administration fees). Nevertheless, the merchant cannot misrepresent any item. The clauses referred to above which do not include any reference other than RDPRM were ruled by the trial judge to be misleading because the general impression given the consumer was that the charge was to defray only the RDPRM fee.

[61] In answer to the Consumers' submission, I believe that the judge's reading of Section 227.1 *C.P.A.* was correct in that it does not require that (for example) a charge of $54.00 be broken-down between (for example) $34.00 RDPRM and $20.00 to the service provider. What Section 227.1 *C.P.A.* does require is that the amount payable to the RDPRM not be misrepresented. Accordingly, the judge was correct in finding that descriptive words indicating something in addition to the RDPRM negated any misrepresentation.

[62] The Merchants argued that the ordinary, uninformed, naïve consumer does not know what the RDPRM is. That may be so, but such consumer does know that "Frais du RDPRM 54,00 $" means that he is being charged $54.00 for the RDPRM, whatever that may be. In any event, the *reductio ad absurdum* of this argument is that the consumer is so naïve or ignorant that no protection is appropriate!

[63] I see no error in the judge's reading of Section 227.1 *C.P.A.* or in her application of that section to the facts of this case that would justify any intervention by this Court.

[64] Merchants also argued that Section 227.1 *C.P.A.* applies only to amounts payable pursuant to a "statute", so that it would apply to the misrepresentation of sales tax where a consumer is obliged by law to pay the sales tax. This was the situation in this Court's decision in *Patenaude*[22] where the merchant's representation that no sales tax was payable on a purchase was held to be a misrepresentation giving rise to a recourse under Section 272 *C.P.A.*

[65] The *Act Respecting Registry Offices*[23] obliges a party requiring registration to pay. The Consumer was only obliged to pay in this case because of a contractual undertaking. The Merchants plead that Section 227.1 *C.P.A.* has no application because the obligation is created not by statute but by contract.

[66] I do not believe that such a narrow reading conforms to the broad liberal interpretation to be given to the *C.P.A.*[24] The obligation to pay as between the parties was imposed by the contract but nonetheless the RDPRM fee is a "duty" payable under a provincial statute as foreseen by Section 227.1 *C.P.A.* The Merchants were prohibited

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22 *9070-2945 Québec inc. c. Patenaude*, 2007 QCCA 447, paras. 39 and 40-45.

23 *Supra* note 6, s. 8.

24 *Time*, *supra* note 8, paras. 103-104; *Union des consommateurs c. Air Canada*, 2014 QCCA 523; *Nichols c. Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746, p. 748 (C.A.), Gendreau J.A.; *Paquette c. Crédit Ford du Canada*, [1989] R.J.Q. 2153, p. 2156 (C.A.), Richard J.A. (ad hoc), p. 5.

by Section 227.1 *C.P.A.* from making any misleading representation about the amount of the duty payable under the Tariff.

[67] The Merchants' argument that the amounts were payable under the Tariff and not under a "statute", has no merit either. The Tariff is created as a matter of law under an enabling statute,[25] the *Act Respecting Registry Offices*.[26] The use of the word "statute" in Section 227.1 *C.P.A.* is sufficiently wide to encompass duties payable under subordinate enactments such as a regulation or tariff since these can only exist pursuant to a statute. Moreover, it is common legislative drafting practice that while a statute enables the imposition of a duty, the regulations, decrees or tariffs establish the actual amount payable.[27]

Is the appropriate recourse under Section 271 or 272 *C.P.A.*?

[68] Merchants pleaded in first instance and before this Court that the complaint of the Consumers might have given rise to the possibility of a recourse against the Merchants under Section 271 *C.P.A.* but not under Section 272, as instituted. These sections provide as follows:

> **271.** If any rule provided in sections 25 to 28 governing the making of contracts is not observed or if a contract does not conform to the requirements of this Act or the regulations, the consumer may demand the nullity of the contract.
>
> In the case of a contract of credit, if any of the terms and conditions of payment, or the computation or any indication of the credit charges or the credit rate does not conform to this Act or the regulations, the consumer may at his option
>
> **271.** Si l'une des règles de formation prévues par les articles 25 à 28 n'a pas été respectée, ou si un contrat ne respecte pas une exigence de forme prescrite par la présente loi ou un règlement, le consommateur peut demander la nullité du contrat.
>
> Dans le cas d'un contrat de crédit, lorsqu'une modalité de paiement ou encore le calcul ou une indication des frais de crédit ou du taux de crédit n'est pas conforme à la présente loi ou à un règlement, le consommateur peut demander, à son choix, soit la

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25 *Regulations Act*, CQLR, c. R-18.1, s. 2; *Co-operative Committee on Japanese Canadians v. Canada (Attorney General)*, [1947] A.C. 87 (P.C.), p. 106-107; Patrice Garant, *Droit administratif*, 6th Ed., Cowansville, Yvon Blais, 2010, pp. 252-254.

26 *Supra* note 6, s. 8.

27 See e.g. *Regulation governing the municipal tax for 9-1-1*, CQLR, c. F-2.1, r. 14; *Regulation respecting the scale of fees and duties related to the development of wildlife*, CQLR, c. C-61.1, r. 32; *Tariff of fees respecting land registration*, CQLR, c. B-9, r. 1 (repealed and replaced by S.Q. 2011, c. 18, s. 317); *Regulation respecting travel agents*, CQLR, c. A-10, r. 1; *Regulation respecting the tariff of duties, fees and costs made under the Act respecting the preservation of agricultural land and agricultural activities*, CQLR, c. P-41.1, r. 6; *Regulation respecting insurance contributions*, CQLR, c. A-25, r. 3.1; see also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., LexisNexis, 2014, pp. 412 and 415.

demand the nullity of the contract or demand that the credit charges be cancelled and that any part of them already paid be restored.	nullité du contrat, soit la suppression des frais de crédit et la restitution de la partie des frais de crédit déjà payée.
The court shall grant the demand of the consumer unless the merchant shows that the consumer suffered no prejudice from the fact that one of the above mentioned rules or requirements was not respected.	Le tribunal accueille la demande du consommateur sauf si le commerçant démontre que le consommateur n'a subi aucun préjudice du fait qu'une des règles ou des exigences susmentionnées n'a pas été respectée.
272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations (...) the consumer may demand, as the case may be, subject to the other recourses provided by this Act, (...) *(c)* that his obligations be reduced; *(d)* that the contract be rescinded; *(e)* that the contract be set aside; or *(f)* that the contract be annulled, without prejudice to his claim in damages, in all cases. He may also claim punitive damages.	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement [...] le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas: [...] *c)* la réduction de son obligation; *d)* la résiliation du contrat; *e)* la résolution du contrat; ou *f)* la nullité du contrat, sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[69] Had the Consumers exercised the Section 271 *C.P.A.* recourse then the Merchants could have pleaded in defence that no prejudice had been caused. Moreover, since Section 271 *C.P.A.* does not foresee the possibility of a condemnation for punitive damages then no award for punitive damages would have been possible according to Article 1621 *C.C.Q.*

[70] The Merchants explain that since the issue here concerns the content of a portion of the credit charges in each of the contracts, then Section 271 *C.P.A.* applies. The law imposes the obligation that this information be included in the contract so that Section 271 *C.P.A.* should apply. As LeBel J.A., as he then was, stated in *Boissonneault c. Banque de Montréal*:[28]

> Cette notion de forme du contrat ne comporte pas seulement les règles relatives à la forme matérielle du contrat, à la dimension du papier utilisé, à sa qualité, aux

[28] [1988] R.J.Q. 2622 (C.A.), pp. 2626-2627.

> caractères d'imprimerie... Elle comprend aussi les mentions obligatoires, en somme le contenu intellectuel du contrat.
>
> L'article 272 sanctionnerait plutôt des obligations de comportement du commerçant distinctes de celles qui visent la rédaction des actes qu'il passe avec le consommateur.

[71] This issue has been articulated under the guise of whether Sections 271 and 272 *C.P.A.* are mutually exclusive. The Supreme Court did not answer the question in either of *Time* or *Bank of Montreal v. Marcotte*. Although, in the latter the Supreme Court described the ambit of both Sections as follows:

> [90] (...) Section 271 applies only when the merchant fails to conform to the rules regarding the formal requirements of the formation of consumer contracts, including the terms and conditions of payment and the computation and disclosure of credit charges and the credit rate. In contrast, s. 272 applies to substantial breaches of the Act that result in prejudice to consumers.[29]
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> [90] [...] L'article 271 s'applique seulement lorsque le commerçant ne respecte pas les exigences formelles prescrites en matière de contrat à la consommation, y compris les modalités de paiement ainsi que le calcul et la mention des frais et du taux de crédit. En revanche, l'art. 272 s'applique lorsqu'un manquement à une règle de fond prévue à la Loi cause un préjudice aux consommateurs.

[72] The Supreme Court noted that in *Household Finance*, the Quebec Court of Appeal held that Sections 271 and 272 were mutually exclusive. The Supreme Court did not express an opinion since it decided that only Section 272 *C.P.A.* applied to the breach in the *Marcotte* case.

[73] In *Household Finance*, as the Supreme Court noted, this Court decided that the recourses under Sections 271 and 272 *C.P.A.* are mutually exclusive or more precisely that the two recourses could not be exercised in a cumulative fashion:

> Je suis cependant d'avis que le juge de première instance a erré en ordonnant la suppression et le remboursement de tous les frais de crédit en application de l'article 271 puisque la *Loi* ne permet pas le cumul des recours prévus aux articles 271 et 272 (...).[30]

[74] In *Fédération des Caisses Desjardins c. Marcotte*, Dalphond J.A.[31] referred with approval to the dissenting opinion of Beauregard J.A. in *Household Finance* and

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29 *Bank of Montreal v. Marcotte*, 2014 SCC 55 [*Marcotte*], para. 90.
30 *Household Finance*, *supra* note 13, para. 55.
31 *Fédération des caisses Desjardins du Québec c. Marcotte*, 2012 QCCA 1395.

commented, *obiter*, that Sections 271 and 272 were not necessarily mutually exclusive explaining with the following hypothetical case:

> (...) en présence d'une indication ou d'un calcul non conforme à la *LPC* s'inscrivant dans une pratique que le commerçant sait ou devrait savoir contraire à la loi. (...)[32]

[75] In the present case, the judge in first instance answered the Merchants' argument succinctly stating in response to the argument in the Primus judgment, for example:[33]

> [47] Primus tente d'abord d'inviter le Tribunal à appliquer l'article 271 de la *Loi* plutôt que l'article 272. L'article 271 ne s'applique pas ici et Mme Dion ne le demande pas.

[76] In the undersigned's opinion, there is nothing in the *C.P.A.* which precludes that a given fact pattern might potentially fall under Section 271 or 272 (which is in essence the manner in which Roy J.S.C. treated the issue in first instance). Here, the presentation in Annex III of "Autres composantes" as part of the obligatory disclosure of credit charges could, if improper, potentially give rise to a recourse under Section 271. However, Appellants' cases is that, "$54.00 Frais de publication RDPRM" (for example) is misleading since it communicates the (false) information that the $54.00 is payable solely to defray RDPRM charges. This can fuel a Section 272 recourse. In this example, "Autres composantes" is a representation which if misleading can give rise to a recourse under Section 272 but also under Section 271 since it is part of the obligatory contents of the contract. In my view, the fact that a representation is made in a contract does not take it out of the purview of prohibited practices in Title II nor out of the purview of Section 272 for a recourse based on such prohibited practices. There is nothing surprising in law generally speaking that one set of facts could give rise to more than one potential recourse. There is nothing different in matters of consumer protection where more than one possible recourse arises. In such circumstances, it is the Plaintiff who may decide which recourse to exercise, although both the 271 and 272 recourses cannot be exercised at once, or "cumulatively", as this Court decided in *Household Finance*.

[77] GMAC's counsel protested that the Consumers' choice of proceeding under Section 272 deprived the Merchants of a defence of absence of prejudice. However, once one accepts that either recourse is available then the Merchants have not been deprived of a defence that is simply unavailable. Moreover, given the interpretation and application of Section 272 by the judge, this argument has no merit on the facts given the outcome in this case.

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32 *Ibid.*, para. 66.
33 *Primus*, *supra* note 1, para. 47.

[78] I can see no error in first instance regarding the judge's ruling on the exercise by Appellants of a recourse under Section 272 *C.P.A.* rather than Section 271 *C.P.A.*

Prejudice

[79] Appellants' argument that the violation of Section 227.1 *C.P.A.* leads inextricably to an irrebuttable presumption of prejudice cannot be sustained.

[80] Appellants find support for their position in Section 253 *C.P.A. in fine*:

> **253.** Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph *a* or *b* of section 220, *a*, *b*, *c*, *d*, *e* or *g* of section 221, *d*, *e* or *f* of section 222, *c* of section 224 or *a* or *b* of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.
>
> **253.** Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes *a* et *b* de l'article 220, *a*, *b*, *c*, *d*, *e* et *g* de l'article 221, *d*, *e* et *f* de l'article 222, *c* de l'article 224, *a* et *b* de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.

[81] Section 253 *C.P.A.* provides that in the event of a finding of one of the prohibited practices referred to therein, then it is presumed that had the consumer been aware of the prohibited practice he would not have contracted or at least not at the stipulated price. However, Section 227.1 *C.P.A.* and the practice therein prohibited is not mentioned.[34] Section 253 *C.P.A.* is thus of no help to Appellants in arguing that a prejudice to them must be presumed.

[82] As well, the passage quoted above from the judgment of this Court in *Household Finance*[35] is not of assistance to Appellants' argument. In that case, the majority found that the late charges imposed on the consumers who had purchased home furnishings on credit violated Section 91 of the *C.P.A.* The Court thus modified the description of the class and ordered reimbursement of the late charges. The consumers were accorded the right to recover that which was illegally charged by the merchant; there was no need to invoke a presumption of prejudice.

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[34] *Time*, *supra* note 8, para. 122.
[35] *Household Finance*, *supra* note 13.

[83] Appellants invoke the judgment of this Court in *Perreault c. McNeil PDI inc.*,[36] in support of their argument that once the Merchant is shown to have violated a provision of the *C.P.A.*, an absolute presumption of prejudice for the consumer arises. That decision refused authorization of a class action where the Court held that the provision of the *C.P.A.* had not been violated. There is nothing in the decision of *Perreault* that suggests that Section 253 *C.P.A.* applies beyond the limits of its own drafting. The judgment in *Perreault* says no more about the presumption than to quote the decision of this Court in *Turgeon c. Germain Pelletier ltée*[37] which was approved by the Supreme Court in *Time*.[38]

[84] The Appellants cannot overcome the Supreme Court's discussion of prejudice in *Time* and the conditions set forth for a presumption of prejudice to arise when Section 253 *C.P.A.* does not apply:

> [123] (...) In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 *C.P.A.* to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on [TRANSLATION] "fraud that has been uncovered and is not prejudicial". The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act.
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> [123] [...] À notre avis, la commission d'une pratique interdite peut entraîner l'application d'une présomption absolue de préjudice. En conséquence, le consommateur n'a pas à prouver le dol et ses conséquences selon les règles ordinaires du droit civil pour avoir accès aux mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.* De même, le commerçant ou le fabricant poursuivi ne peut soulever un moyen de défense basé sur le « dol éclairé et non préjudiciable ». La sévérité des sanctions prévues à l'art. 272 *L.p.c.* n'est pas un concept à géométrie variable : la présomption irréfragable de préjudice peut s'appliquer à toutes les contraventions aux obligations imposées par la loi.
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> [124] This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the Act. It is therefore
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> [124] L'application de la présomption absolue de préjudice présuppose qu'un lien rationnel existe entre la pratique interdite et la relation contractuelle régie par la loi. Il importe donc de préciser les

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36 *Perreault c. McNeil PDI inc.*, 2012 QCCA 713.
37 *Turgeon c. Germain Pelletier ltée*, [2001] R.J.Q. 291, [2001] R.D.I. 28 (C.A.).
38 *Time*, *supra* note 8, para. 123.

> important to define the requirements that must be met for the presumption to apply in cases in which a prohibited practice has been used. In our opinion, a consumer who wishes to benefit from the presumption must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 C.P.A.
>
> conditions d'application de cette présomption dans le contexte de la commission d'une pratique interdite. À notre avis, le consommateur qui souhaite bénéficier de cette présomption doit prouver les éléments suivants : (1) la violation par le commerçant ou le fabricant d'une des obligations imposées par le titre II de la loi; (2) la prise de connaissance de la représentation constituant une pratique interdite par le consommateur; (3) la formation, la modification ou l'exécution d'un contrat de consommation subséquente à cette prise de connaissance, et (4) une proximité suffisante entre le contenu de la représentation et le bien ou le service visé par le contrat. Selon ce dernier critère, la pratique interdite doit être susceptible d'influer sur le comportement adopté par le consommateur relativement à la formation, à la modification ou à l'exécution du contrat de consommation. Lorsque ces quatre éléments sont établis, les tribunaux peuvent conclure que la pratique interdite est réputée avoir eu un effet dolosif sur le consommateur. Dans un tel cas, le contrat formé, modifié ou exécuté constitue, en soi, un préjudice subi par le consommateur. L'application de cette présomption lui permet ainsi de demander, selon les mêmes modalités que celles décrites ci-dessus, l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.*

[85] The judge in first instance correctly applied the aforementioned to the instant case when she held that the last criterion had not been satisfied given the stipulation that the Consumers would have purchased or leased a vehicle had the charge in question been itemized or broken down. There was, accordingly, no nexus between the prohibited practice and the Consumers' behaviour. The Consumers' decision to pay the

amount of the charge or to "perform the contract" was not influenced by the prohibited practice. Thus, there was no presumption of prejudice. There was no evidence and indeed the stipulation indicated that the Consumer would have paid the amount in any event. Moreover, the amount charged was the actual amount of the Merchants' total cost to cause the contract to be published at the RDPRM; the Merchants did not profit by the practice. This was the trial judge's conclusion and I find no error in it.

[86] Appellants invoke subsidiarily before this Court testimony of certain Consumers, members of the class to the effect that had they known the details of the charge in question they would have negotiated. Appellants argued that this in itself is a prejudice. I disagree. This Court speaking through Baudouin J.A. decided in *Harmegnies c. Toyota Canada inc.*,[39] that it is doubtful that the fact of being unable to negotiate a purchase price would constitute a prejudice that would apply across a proposed class of consumers. In that case, Toyota's single retail non-negotiable pricing policy was under scrutiny. Baudouin J.A. noted that while some might feel deprived of an advantage, others might be relieved. Moreover, he noted that the difficulty of quantifying such prejudice adds to the difficulty of qualifying it as a prejudice. This observation certainly finds application in the present case.

[87] Of most significance is the fallacy of the assertion that knowing that the Merchant's cost to publish had two components enhanced the bargaining position of the Consumer. The lack of a breakdown of the charge into two elements did not in any way diminish the ability to negotiate the payment of the amount. In any event, this is a question of fact or mixed fact and law and no palpable error has been made out by Appellants in the trial judge not considering such evidence and argument as proof of prejudice.[40]

The action of the class representative did not succeed

[88] Counsel for GMAC argues that because the representative of the class, Appellant Daneau signed contracts which, ultimately the judge found to contain a description which was not misleading (i.e. "RDPRM, etc."), then her claim is unfounded. Because her claim is unfounded then the class action should have been dismissed.

[89] The judgment of May 26, 2009 authorizing the class action defines the group as :

> Tous les consommateurs résidant au Québec qui ont financé l'achat ou la location de leur véhicule avec General Motors Acceptance Corporation du Canada Limitée (GMAC), et qui ont payé, pour l'inscription de droits au Registre des droits personnels et réels mobiliers, des frais supérieurs à ceux du tarif, et

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39 *Harmegnies c. Toyota Canada inc.*, 2008 QCCA 380, para. 51.
40 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

> ce, depuis le 7 mars 2004 jusqu'au jugement final sur la requête en autorisation.[41]

[90] Accordingly, Appellant Daneau maintains her representative character even though the clause in her contract was not misleading. The Supreme Court in *Marcotte*[42] held that the law permits a class representative to act as such even when the representative has no direct cause of action or legal relationship with each defendant. In that case, a class action was instituted against a number of banks to recover conversion charges imposed by those banks, issuers of credit cards, on foreign currency transactions. The class representative was a customer/credit card holder of one bank but not of all the defendant banks. The Supreme Court approved the reasons of Dalphond J.A., when he distinguished the ability to represent the class adequately "as required by Article 1003 d) *C.C.P.*" from the ability to obtain judgment against the defendant. The Supreme Court underlined the malleability of the sufficient interest criterion to act as a class representative.[43]

[91] Decisions of this Court previous to *Marcotte* had held that once a class action is authorized a defence that the class representative had no direct cause of action would not be entertained.[44]

[92] In *Marcotte*, the Supreme Court disagreed with this,[45] but stated that:

> [43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action.[46]
>
> [43] Rien dans la nature du recours collectif ou dans les critères d'autorisation prévus à l'art. 1003 n'exige une cause d'action directe par le représentant contre chaque défendeur ou un lien de droit entre eux.

[93] The issue under Article 1003 *Code of Civil Procedure* ("*C.C.P.*") is whether the representative can adequately represent the class.

[94] Here, Appellant Daneau could and did certainly represent the class. The variety of wordings used by GMAC or its dealerships in describing the RDPRM was not an issue in the authorization judgment. The fact that the wording in Appellant Daneau's contract was not considered misleading on the merits is not an impediment to a finding

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41 Translation by the undersigned: "Consumers resident in Quebec who financed the purchase or lease with GMAC and who paid an amount for publication in the RDPRM superior to the amount imposed by the Tariff (under the RDPRM Regulations)".

42 *Marcotte*, *supra* note 29.

43 *Ibid.*, para. 37.

44 *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694, para. 22; *General Motors of Canada ltée c. Billette*, 2009 QCCA 2476, paras. 50-51.

45 *Marcotte*, *supra* note 29, para. 41.

46 *Ibid.*, para. 43.

that other phraseologies in contracts of other group members should lead to a condemnation. There is nothing in the law that requires that the recourse for the class members be identical. Rather, Article 1003(a) *C.C.P.* requires "that their recourses raise identical, similar or related questions".

[95] The recourse of other class members does not automatically fail when the individual recourse of the class representative cannot succeed.

The *de minimis* argument

[96] Counsel for GMAC and Primus also invoke the *de minimis* rule found in Section 63 of the *C.P.A.* Regulation,[47] which I quote again for convenience:

> **63.** In a contract for the loan of money and in a contract involving credit, the credit rate disclosed must not be less than the annual percentage, computed in accordance with section 53 or 54, as the case may be, by more than ¼ of 1%.
>
> **63.** Dans un contrat de prêt d'argent et dans un contrat assorti d'un crédit, le taux de crédit divulgué ne doit pas être inférieur de plus de 1/4 de 1% au pourcentage annuel calculé conformément à l'article 53 ou 54 selon le cas.

[97] GMAC and Primus counsel states that if one were to compute the difference between the disclosed credit rate and what it would be, absent the amount of the service provider fee, the difference would not exceed 0.25%.

[98] It is not necessary to do the calculation because the argument is incorrect. Appellants' cases were never about the percentage representing the credit rate in the schedules to the contracts. Indeed, the space for such amount was not even completed in some instances, certainly without complaint by Appellants before this Court. Neither were Appellants' cases about the amount of the charge for the service of publication, *per se*. Appellants' admission indicated that all class members would have purchased or leased anyway and testimony of some members indicated that they did not find the amount charged to them by the service provider to be unreasonable. Appellants' claim was about the description of the charge and more specifically the information provided was misleading given the requirements of Section 227.1 *C.P.A.* This has nothing to do with the percentage value of the credit charges.

[99] Accordingly, this argument must fail.

Punitive damages

[100] In each of the GMAC and Nissan files, the judge awarded $150,000 of punitive damages. Both Appellants and Respondents have appealed.

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[47] *Supra* note 15.

[101] In the Primus and RBC files, the judge did not award punitive damages.

[102] In the RBC file, the judge concluded that there was no contravention of the *C.P.A.* such that neither compensatory nor punitive damages were awarded. The Consumer party has appealed.

[103] The judge did not award punitive damages in the Primus matter, underlining the dissuasive purpose of such awards and the fact that Primus had modified its practice and stopped billing for RDPRM registrations even before the judgment of the Superior Court authorizing the class action. There is no appeal from this part of the Primus judgment.

Summary of the parties' positions on the punitive damages

[104] In the GMAC and Nissan matters, the Appellant Consumers contend that the quantum of the award ($150,000 in each file) is insufficient. They underline that given the number of contracts involved[48] the amount awarded results in a payment of $0.36 for each member of the class in GMAC and $0.94 for each member of the class in Nissan. In these circumstances, the Consumers contend that the amount will have no dissuasive effect and thus the judge failed to exercise her discretion in a judicious fashion.

[105] Appellants take exception with the judge's observation that the violation of the *C.P.A.* by GMAC and Nissan was not egregious ("peu de gravité"). Appellants underline that the practice in question took place over a period of nine years in both cases. Appellants submit that the jurisprudence of this Court[49] favours a significant award of punitive damages given the period of time over which the contraventions took place and the fact that neither GMAC nor Nissan corrected the situation particularly since a correction would have been easy to effect. Appellants add that the Supreme Court in *Time*[50] stated that amongst the elements to be considered by a Court awarding punitive damages is the change in attitude by the merchant, if any, after the violation of the *C.P.A.*

[106] Appellants plead that condemnations of $100 per class member or $41,323,600 against GMAC and $15,843,800 against Nissan would be appropriate.

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48 413 236 contracts in the GMAC file and 158 438 contracts in the Nissan file.
49 *Household Finance*, *supra* note 13; *Billette c. Toyota Canada inc.*, 2007 QCCA 847.
50 *Time*, *supra* note 8, para. 178.

Respondent Nissan

[107] Respondent Nissan contests the granting of punitive damages by the judge and her characterization of the violation of the *C.P.A.* by Nissan as resulting from "ignorance de la Loi ou insouciance sérieuse".

[108] The failure to alter the practice should not be considered in deciding whether to award punitive damages as Nissan has the right to a defence and to continue the practice in question until a final decision of the Court. It believed in good faith not to be in contravention of the law; Nissan has not been proven to have acted in bad faith; it conducted itself with diligence and good faith during the litigation.

[109] Nissan contends that its actions in the marketplace were neither reckless nor malicious.

[110] Nissan underlines that the record discloses that the members of the class suffered no prejudice and Nissan gained no profit from the practice in question. Members of the class who testified confirmed that the charges were reasonable.

[111] Lastly, Nissan signed far fewer contracts with the offending clause than did GMAC. Therefore, it submits that the judge erred in condemning it to the same amount of punitive damages as GMAC.

Respondent GMAC

[112] Respondent GMAC submits that given that the four conditions for the application of Section 272 articulated by the Supreme Court in *Time* were not fulfilled, there is no statutory basis for the granting of punitive damages. GMAC adds however that if Section 272 *C.P.A.* is applicable it had the right to defend itself and take the position that no violation of the *C.P.A.* had occurred. Its position here is similar to that of Nissan, adding that the judgment of this Court in *Household Finance* does not apply because in that case the merchant, according to the evidence, had received and not heeded legal advice to modify the practice in question.

[113] In the alternative, GMAC contests any increase to the $150,000 award underlining the judge's finding that the violation of the *C.P.A.* here was not egregious and that no compensatory damages were awarded.

[114] GMAC feels that the amount of $41,323,600 sought by Appellants is excessive given the judge's characterization of the violation of the contravention of the *C.P.A.* and the fact that GMAC did not profit by the practice in question. This, combined with the other criteria referred to in Article 1621 *C.C.Q.* leads GMAC to conclude that the condemnation sought by Appellants is excessive and thus susceptible of bringing the administration of justice into disrepute.

RBC

[115] Given the decision not to intervene in the judge's denial of compensatory damages for the reason that RBC did not violate the *C.P.A.*, it is not necessary to deal in any detail with Appellant St-Pierre's contention that punitive damages of $100 per contract or $25,645,600 be awarded against RBC.

[116] It is however noteworthy that according to the evidence, the only complaint ever received by RBC was that of the class representative. Moreover, RBC modified its practice prior to the authorization of the class action against it to clarify even further clause 12 h) in its form of contract by stating explicitly that the consumer is called upon to pay any fees of any service provider required for the publication of the contract. Given these facts, RBC seeks a declaration from this Court pursuant to article 524 *C.C.P.* that the appeal with regard to the claim for punitive damages is abusive.

Primus

[117] No punitive damages were awarded against Primus given that it changed its practice and stopped charging for publication of contracts at the RDPRM. This conclusion of the trial judge has not been disputed by Appellants.

Discussion of Punitive Damages

[118] The following is a survey of the legal criteria applicable to the consideration of an award of punitive damages.

[119] Article 1621 *C.C.Q.* provides as follows:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose. Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is	**1621.** Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive. Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie,

wholly or partly assumed by a third person.	assumée par un tiers.

[Emphasis added.]

[120] Article 1621 *C.C.Q.* requires that punitive damages be specifically foreseen by law. In the present case, Section 272 *C.P.A. in fine* provides the possibility of an award of punitive damages:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, (...) the consumer may demand, as the case may be, subject to the other recourses provided by this Act, (...) without prejudice to his claim in damages, in all cases. He may also claim punitive damages. [Emphasis added.]	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, [...] le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas: [...] sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[121] In *Time*, the Supreme Court confirmed that in the absence of specific criteria in the enabling statute, then the criteria of Article 1621 *C.C.Q.* apply to the consideration of the awarding of punitive damages.[51] Even though the granting of punitive damages is exceptional[52] and the first goal is the prevention of prohibited practices,[53] the Supreme Court added that a court must also take into account the purposes of the legislation under which the punitive damages are being granted.[54] The Supreme Court foresees the following process for the consideration of an award of punitive damages:

1. A violation of an obligation under the *C.P.A.* giving rise to a recourse under 272 *C.P.A.*;

2. Given the absence of specific criteria in Section 272, the application of Article 1621 in the context of the legislative purposes of the *C.P.A.* as follows:

   i. the rebalancing of the relationship between consumers and merchants;[55]

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51 *Time*, *supra* note 8, paras. 154-155.
52 *Ibid.*, para. 150.
53 *Ibid.*, para. 155.
54 *Ibid.*, para. 156.
55 *Ibid.*, paras. 160, 161 and 162.

ii. the elimination of unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices;

iii. Securing the existence of an efficient market in which consumers can participate confidently.

[122] After summarizing the different currents in the case law, the Supreme Court laid down the following process to be followed in awarding punitive damages under the *C.P.A.*:

> [177] In our opinion, therefore, the purpose of the *C.P.A.* is to prevent 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.* (...)
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> [178] The mere fact that a provision of the *C.P.A.* has been violated is not enough to justify an award of punitive damages, however. Thus, where a merchant realizes that an error has been made and tries diligently to solve the problems caused to the consumer, this should be taken into account. Neither the *C.P.A.* nor art. 1621 *C.C.Q.* requires a court to be inflexible or to ignore attempts by a merchant or manufacturer to correct a problem. A court that has to decide whether to award punitive damages should thus consider not only the merchant's conduct prior to the violation, but also how (if at all) the merchant's attitude toward the consumer, and toward consumers in general, changed after the violation. It is only by analysing the whole of the merchant's conduct that the court will be able to determine whether the imperatives of prevention justify an award of
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> [177] Ainsi, selon nous, la *L.p.c.* cherche à réprimer chez les commerçants et fabricants des comportements d'ignorance, d'insouciance ou de négligence sérieuse à l'égard des droits du consommateur et de leurs obligations envers lui sous le régime de la *L.p.c.* [...]
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> [178] Cependant, le simple fait d'une violation d'une disposition de la *L.p.c.* ne suffirait pas à justifier une condamnation à des dommages-intérêts punitifs. Par exemple, on devrait prendre en compte l'attitude du commerçant qui, constatant une erreur, aurait tenté avec diligence de régler les problèmes causés au consommateur. Ni la *L.p.c.*, ni l'art. 1621 *C.c.Q.* n'exigent une attitude rigoriste et aveugle devant les efforts d'un commerçant ou d'un fabricant pour corriger le problème survenu. Ainsi, le tribunal appelé à décider s'il y a lieu d'octroyer des dommages-intérêts punitifs devrait apprécier non seulement le comportement du commerçant avant la violation, mais également le changement (s'il en est) de son attitude envers le consommateur, et les consommateurs en général, après cette violation. Seule cette analyse globale du comportement

punitive damages in the case before it.

(...)

[180] In the context of a claim for punitive damages under s. 272 *C.P.A.*, this analytical approach applies as follows:

- The punitive damages provided for in s. 272 *C.P.A.* must be awarded in accordance with art. 1621 *C.C.Q.* and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;
- Having regard to this objective and the objectives of the *C.P.A.*, violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the *C.P.A.* may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.[56]

[Emphasis added.]

du commerçant permettra au tribunal de déterminer si les impératifs de prévention justifient une condamnation à des dommages-intérêts punitifs dans une affaire donnée.

[...]

[180] Dans le cas d'une demande de dommages-intérêts punitifs fondée sur l'art. 272 *L.p.c.*, la méthode analytique ci-haut mentionnée s'applique comme suit :

- Les dommages-intérêts punitifs prévus par l'art. 272 *L.p.c.* seront octroyés en conformité avec l'art. 1621 *C.c.Q.*, dans un objectif de prévention pour décourager la répétition de comportements indésirables;
- Compte tenu de cet objectif et des objectifs de la *L.p.c.*, les violations intentionnelles, malveillantes ou vexatoires, ainsi que la conduite marquée d'ignorance, d'insouciance ou de négligence sérieuse de la part des commerçants ou fabricants à l'égard de leurs obligations et des droits du consommateur sous le régime de la *L.p.c.* peuvent entraîner l'octroi de dommages-intérêts punitifs. Le tribunal doit toutefois étudier l'ensemble du comportement du commerçant lors de la violation et après celle-ci avant d'accorder des dommages-intérêts punitifs.

[123] In summary then, once the Court is convinced that a merchant has violated its obligations under the *C.P.A.*, then the Court must determine whether the merchant displayed ignorance, carelessness or serious negligence or, acted intentionally, maliciously or vexatiously. In such event, the Court determines if and to what extent the punitive damages are called for, taking into account the criterion of prevention or

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[56] *Time*, *supra* note 8, paras. 177-180.

dissuasion, the behaviour of the merchant both before and after the violation, the legislative purpose of the *C.P.A.* and the other criteria set forth in Article 1621 *C.C.Q.*

Quantum

[124] Article 1621 *C.C.Q.* also applies to the determination of the quantum of punitive damages to be awarded. The Supreme Court reiterated the following criteria:

i. the amount awarded must not exceed what is necessary to fulfill the preventive purpose;[57]

ii. the gravity of the merchant's fault;

iii. the debtor's ability to pay;

iv. the extent of the compensation that the merchant is already bound to pay;

v. whether the payment of the punitive damages is fully or only partly assumed by a third person.[58]

[125] The Supreme Court underlined that the gravity of the fault is the most important factor and is evaluated as a function of the conduct of the merchant and the seriousness of the infringement of the consumer's rights.[59]

Individual or collective recovery and its impact on quantum

[126] In *Marcotte*,[60] the Supreme Court clearly rejected the idea that the nature of the recovery (individual or collective) should have a determining influence on the advisability of granting punitive damages and determining quantum:

> [104] (...) While there may be some truth to the idea that the aims and effects of collective recovery overlap with those of punitive damages, this overlap cannot be a factor in the legal test for the determination of punitive damages. By the Court of Appeal's reasoning, the threshold for awarding punitive damages would be higher in a class action where the plaintiffs were

> [104] [...] Bien qu'il puisse y avoir une part de vérité dans la thèse selon laquelle les objectifs et les effets du recouvrement collectif et ceux des dommages-intérêts punitifs se recoupent, ce recoupement ne saurait jouer dans l'analyse juridique servant à déterminer s'il y a lieu d'accorder des dommages-intérêts punitifs et leur montant. Selon le raisonnement

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57 *Time*, *supra* note 8, para. 210, confirming *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, para. 71.
58 *Time, supra* note 8, para. 199.
59 *Ibid.*, para. 200.
60 *Marcotte*, *supra* note 29, para. 104.

awarded collective recovery as opposed to individual recovery. We see no valid reason to so conclude. After all, collective recovery is nothing more than the full extent of a defendant's obligation if the plaintiffs make their case. The mode of recovery is not a factor set out by this Court's jurisprudence for assessing punitive damages under the *CCQ* nor would it be reasonable to include it as one.

[Emphasis added]

de la Cour d'appel, le seuil d'octroi de dommages-intérêts punitifs serait plus élevé dans le cas d'un recours collectif où le tribunal aurait ordonné qu'il soit procédé par recouvrement collectif plutôt que par voie de réclamations individuelles. À notre avis, il n'y a aucune raison valable de tirer pareille conclusion. Après tout, le recouvrement collectif n'est rien de plus que la pleine mesure de l'obligation du défendeur si les demandeurs établissent le bien-fondé de leur réclamation. Le mode de recouvrement ne fait pas partie des facteurs énoncés dans la jurisprudence de la Cour sur l'analyse servant à déterminer l'opportunité d'une condamnation aux dommages-intérêts punitifs fondée sur le *C.c.Q.*, et il ne serait pas non plus raisonnable de l'inclure dans cette analyse.

[127] Accordingly, in the present case, the award of punitive damages should not be reckoned on the basis of what the award would be if the Consumers had sued the Merchants individually nor, consequently, what the awards compute to on a per class member basis.

Norm of intervention in punitive damage awards

[128] In *Time*, the Supreme Court underlined the norm of intervention regarding the calculation of punitive damages as follows:

[190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it (*St-Ferdinand*, at para. 125; *Whiten*, at para. 100). Appellate intervention will be warranted only where there has been an error of law or a wholly erroneous assessment of the quantum. An assessment will be wholly

[190] On doit se rappeler que le tribunal de première instance jouit d'une latitude dans la détermination du montant des dommages-intérêts punitifs, pourvu que la somme fixée demeure dans des limites rationnelles, eu égard aux circonstances précises d'une affaire donnée (*St-Ferdinand*, par. 125; *Whiten*, par. 100). Une intervention en appel ne se justifiera qu'en présence d'une erreur de droit ou d'une erreur sérieuse dans l'évaluation du montant. L'erreur

> erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (...).
>
> [Emphasis added]

> d'évaluation sera jugée sérieuse lorsqu' 'il sera établi que le tribunal de première instance a exercé sa discrétion judiciaire d'une façon manifestement erronée, c.-à-d. lorsque le montant octroyé n'était pas rationnellement relié aux objectifs de l'attribution de dommages-intérêts punitifs dans l'affaire dont il était saisi [...].[61]

[129] In *Marcotte*, the Supreme Court cited its decision in *Cinar Corporation v. Robinson* [62] and added that appellate intervention should be restricted to cases where the amount of punitive damages awarded in first instance is not rationally connected to the purposes for which punitive damages are awarded (i.e. prevention, deterrence and denunciation).

Application to the circumstances of the cases at bar

GMAC and Nissan

[130] The amount of the punitive damages should not exceed that which is sufficient to fulfill their preventive purpose.[63]

[131] Here, the behaviour of the Merchants was characterized as ignorance or recklessness because 227.1 *C.P.A.* prohibits misleading disclosure of the amounts payable to the RDPRM. The GMAC and Nissan contracts do not clearly state that the charges in question are used to pay the RDPRM and the service provider which effects publication. Granted, had it not been for 227.1, the grounds for awarding punitive damages would have been still weaker, or perhaps nonexistent. The behaviour in question of the Merchants was certainly not antisocial. No costs were hidden. That which was charged to the Consumers was the amount actually disbursed by the Merchants for the publication of the contracts at the RDPRM. Accordingly, the purpose of awarding punitive damages here is to encourage or persuade GMAC and Nissan to clarify the drafting.

[132] Contrary to the submissions of GMAC and Nissan, they are not being penalized for having defended themselves. They are penalized for having a misleading clause in their contracts. The fact that they defended themselves was not considered as an aggravating factor by the judge. However, it should be underlined as the Supreme Court stated that as it is perfectly logical to take into account that a Merchant has changed his

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61 *Time*, *supra* note 8, para. 190.
62 *Cinar Corporation v. Robinson*, [2013] 3 S.C.R. 1168, 2013 SCC 73, para. 134.
63 Art. 1621 *C.C.Q.*; *Marcotte*, *supra* note 29, para. 100.

attitude at the time the award is being made. GMAC and Nissan could not benefit from this attenuating factor. This is not a penalty.

[133] Neither is there an error in the judgment concerning Nissan that the quantum of the punitive damages awarded against it is the same as that of GMAC even though the number of contracts signed by GMAC is far greater. The purpose here is to encourage a drafting change in a form. The number of times the form was used in the past is relatively unimportant.

[134] For similar reasons, that is the relatively minor violation of the *C.P.A.*, there is no reason to intervene to increase the quantum of the punitive damages awarded against GMAC and Nissan as pleaded by the Consumers. The absence of the gravity of the fault should be given due consideration and the amount awarded is sufficient together with the fact of the judgment to encourage an appropriate drafting change.

[135] The amount of the award per class member need not be a factor according to Article 1621 *C.C.Q.* The fact that the awards compute to $0.36 and $0.94 per class member is not indicative of any error on the part of the trial judge.

[136] Concerning the submission that it is not practical to distribute amongst the class members the sums awarded as punitive damages because they calculate to less than $1.00 per member, I reiterate that the Supreme Court, in *Marcotte*,[64] has stated that the manner of recovery (collective or individual) should not influence the determination of the quantum of punitive damages. The judge in first instance in this case was obviously aware of the practical problem just as she was aware of the contents of Article 1034 *C.C.P.* because she reconvened the parties to hear their representations concerning the distribution of the punitive damages.

[137] There is neither a serious error nor an absence of a rational nexus with the objectives of awarding punitive damages which could justify the intervention of this Court to modify the awards against GMAC and Nissan.

RBC

[138] Although the judgment in first instance should be maintained and a condemnation for punitive damages against RBC is not warranted, the appeal in this regard is not abusive as urged by RBC.

[139] The claim for punitive damages is in the present context tied to the issue of whether there has been a violation of the *C.P.A.* The claim that RBC's form of contract violated the *C.P.A.* was as arguable in appeal as it was in first instance so that seeking punitive damages can be no more abusive than seeking compensatory damages in this

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64 *Marcotte, supra* note 29, para. 104.

case. While raised briefly by RBC in its written submission in first instance the judge does not mention the punitive damages having concluded that there was no violation of the *C.P.A.* by RBC.

[140] RBC contends that Appellant St-Pierre was the only person who complained to it yet it still clarified the drafting of its form before the present class action was authorized. Appellant however rebuts by pointing out that the issue herein was already alive for a number of years in litigation with other automobile manufacturers and financiers.[65]

[141] In all of the foregoing circumstances the claim for punitive damages against RBC appears arguable and as such cannot be characterized as abusive.

[142] The amount of punitive damages claimed of $100 per class member (computing to a total of $25,645,600) may be the real irritant here. However, though the claim for this amount may be unfounded as explained above, it does have as Appellant argues, a basis in precedent.[66] As such, the claim for this quantum cannot be characterized as abusive.

CONCLUSIONS

[143] For all the foregoing reasons, I propose not to intervene in any of the four judgments and to dismiss all of the appeals and incidental appeals.

MARK SCHRAGER, J.A.

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65 *Billette c. Toyota Canada inc.*, *supra* note 49.
66 *Household Finance, supra* note 13.