



YOUR FIRST IMPRESSION: CAN YOU REALLY TRUST IT?

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1. Introduction

CONGRATULATIONS, you just won the GRAND PRIZE OF \$1,000,000! You are the LUCKY ONE among all the participants. Please fill in the reply card attached and send it to us within 5 days and you will receive a \$1,000,000 cheque. Now that you are a MILLIONNAIRE, why not take advantage of this special offer and subscribe to our magazine?

At first glance, there is no doubt you are the winner. However, after a more careful read of the document, some passages leave you perplexed. Welcome to the wonderful world of sweepstakes. These widespread contests, especially in the publishing community, are really publicity stunts. Generally, a sweepstakes is a contest in which one person wins the jackpot. To receive the prize, that person must be assigned the winning number, return a reply card within the prescribed delay and correctly answer a general knowledge question. Of course, the visual intentions are to be appealing, but what happens when the impression is so strong that a person is convinced of winning the jackpot?

2. Resume

In a recent case, *Richard v. Time Inc.*¹, the Supreme Court of Canada (herein after, the "**Court**") had the opportunity to examine this kind of advertising. More precisely the Court analyzed the provisions under the Quebec *Consumer Protection Act*² on prohibited business practices and thereby fixed the guidelines for false or misleading representations provided by the C.p.a.. According to the Court, the promotional document that Time Inc. (herein after "**Time**") sent to Mr. Jean-Marc Richard (herein after "**Richard**"), gave the general impression, following a first reading of the

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¹ 2012 SCC 8.

² R.S.Q., c. P-40.1 (hereinafter the "C.p.a.").

[Texte]

document by an average consumer, that Richard was the winner of the grand prize. Indeed, in the opinion of the Court, even if it contained no statements that were literally false, the document in question was full of misrepresentations. The judges unanimously concluded that this marketing technics represented a prohibited business practice under the C.p.a.

In its analysis, the Court reviewed the evolution of consumer law in Canada and based its decision on the objective that the legislature pursued in enacting the C.p.a. Indeed, the Court restated that the main objective under the C.p.a. is the protection of the consumer in these relations with traders. Thus, in the Richard case, the protection of vulnerable persons against the dangers of some advertising methods was the basis of judge's decision. In order to respect the intent of the legislature, the Court stated that the general impression test under C.p.a. shall be applied from the perspective of the average consumer, who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement. Moreover, the Court recalls that one must give importance not only to the text, but its entire context, including how it is presented to the consumer.

It would be reasonable to expect that this decision could have a deterrent effect on questionable practices in the advertising industry. Indeed, the Court recognized that Time had intentionally violated the C.p.a. in a calculated manner and that violation was capable of affecting a large number of consumers, whereas nothing in the evidence indicates that Times took corrective action to make its advertising consistent. But as mentioned by Justices LeBel and Cromwell, even if not negligible, the impact of the fault committed by Time remains limited. That is why the Court estimated that an amount of \$15,000 suffices in the circumstances to fulfil the preventive purpose of punitive damages, underlines the gravity of the violations of the C.p.a. and sanctions the conduct of Time in a manner that is serious enough to induce them to cease the prohibited practices in which it have been engaging, if they have not already done so. It is therefore appropriate to ask if this decision will have a real impact on business practices of the advertising industry.

3. The factual background

On August 26, 1999, Mr. Jean-Marc Richard, received by mail a document entitled "*Official Sweepstakes Notification*". It was in the form of a "letter" addressed to him, in English only, and began with a sentence that immediately caught his attention: **OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF \$833,337.00!** This opening sentence, combined with conditional clauses in smaller print, clearly illustrates the technique used in the writing and layout of the document: several exclamatory sentences in bold uppercase letters,

whose purpose was to catch the reader's attention by suggesting that he or she had won a large cash prize³.

Convinced he was the winner, Richard returned quickly the reply card and also subscribed to the Time magazine for two years. A short time later, he began receiving regularly, issues of the magazine. But, there was no trace of the cheque he was expecting. After a certain time, Richard finally talked with a Time representative in the Department of Marketing and he was informed that the document was only an invitation to participate in the sweepstakes and that he would not receive the prize. Following this conversation, Richard filed a motion to institute proceedings in Superior Court to obtain the payment of the prize.

Superior Court and Quebec Court of Appeal

In Superior Court, Justice Cohen stated that the document gave the general impression that Richard had won the grand prize. In her view, the general design of the document amounted to a false or misleading representation within the meaning of s. 219 C.p.a. and Time was ordered to pay to Richard \$1,000 in compensatory damages and \$100,000 in punitive damages.

Justice Chamberland, of the Court of Appeal, disagreed with the Superior Court's judgment and stated that he could not conclude that the document might give the average Quebec consumer the general impression that the recipient is the grand prize winner. According to him, a careful reading of the document was sufficient to dispel that impression. Thus, a consumer must be suspicious of advertising that seems too good to be true. The Court of Appeal set aside the award for compensatory and punitive damages against Time.

Consumer Law among Canada: The Quebec situation

In the 50s, changes in the marketplace led to the rise of the consumer society. Faced with this liberalization of markets, both the Parliament of Canada and the Quebec

³ Supra note 2 at paragraph 7: [...] *It will be helpful to reproduce some passages from the Document to better illustrate the specific features of this technique:*

If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we'll confirm that

WE ARE NOW AUTHORIZED TO PAY \$833,337.00 IN CASH TO MR JEAN MARC RICHARD!

[...] And now that we've been authorized to pay the prize money, the very next time you hear from us if you win, it will be to inform you that

A BANK CHEQUE FOR \$833,337.00 IS ON ITS WAY TO — ST!

[...] The truth is, if you hold the Grand Prize winning number,

YOU WILL FORFEIT THE ENTIRE \$833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!

legislature realized the vulnerability of consumers increased and they tried to resolve the problem by adopting a system more focused on protecting consumers. In *Richard c. Times Inc.*, the Court's focus is on Quebec's legislation.

Recognizing the vulnerability of consumers under a contractual fairness model based on freedom of contract, consensualism and the binding forces of contracts, Quebec legislature adopted the C.p.a. to ensure a real equality between merchants and consumers. Thereby, the C.p.a. is a model of contractual fairness based on a scheme of public order that is an exception to the traditional rules of the general law.

This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices, calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the old maxim *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor* — let the seller beware⁴.

4. The Case

One of the main objectives under Title II of the C.p.a. is to protect consumers from false or misleading representations, indeed many of the practices it prohibits relate to the veracity of information provided to consumers. In this case, the courts had to determine if the document sent to Richard by Time was a prohibited business practice.

Specifically, this case raises the following issue: *What is the proper approach in Quebec for determining whether an advertisement constitutes a false or misleading representation for the purposes of the Consumer Protection Act?*⁵ Thus, the Court has made a complete analysis of s. 218 C.p.a., which specifies how to evaluate whether a representation is false or misleading:

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.

(our emphasis)

Following the method of analysis prescribed by s. 218 C.p.a., two elements must be considered: the “general impression” and the “literal meaning of the terms used”. The Court did not elaborate on the interpretation of the term “literal meaning of the terms used” and it simply recognized that each word contained in a representation should be interpreted according to its ordinary meaning⁶. As for the notion of “general

⁴ Supra note 2 at paragraph 43.

⁵ Supra note 2 at paragraph 32.

⁶ Supra note 2 at paragraph 47.

impression”, this caught more the Court’s attention and it must be subject to further explanation.

The general impression

The Court first upheld the Quebec case law to the effect that the general impression conveyed by a representation must be analyzed in the abstract, this is, without considering the personal attributes of the consumer⁷. The Court also noted that commercial representation, whether or not caused prejudice to one or more consumers, is not a relevant factor. This approach is in line with the preventive character of the C.p.a.

Called to determine how the courts should appreciate the general impression given by a commercial representation, the Court upheld the contextual approach proposed by Richard. While Time proposed a method for analysis, which placed emphasis on the text of the advertisement rather than its visual component, the Court stated:

It must be remembered that the legislature adopted the general impression test to take account of the techniques and methods that are used in commercial advertising to exert a significant influence on consumer behaviour. This means that considerable importance must be attached not only to the text but also to the entire context, including the way the text is displayed to the consumer.⁸

(our emphasis)

A too meticulous dissection and an overemphasis of the details on a written advertisement are contrary to the principles underlying the method of analysis under s. 218 C.p.a.. Thus, a single reading of the entire written advertisement should be adequate to appreciate the general impression given by a commercial representation.

Emphasizing on the intention of the legislator to the effects ensures that consumers should view commercial representation with confidence rather than suspicion⁹. The Court’s opinion that the approach adopted by the Court of Appeals, that is, of an opinion resulting from an analysis, fails to meet the general impression test provided for in s. 218 C.p.a..

It is interesting to note the parallel that the Court made with the first impression test applied under the *Trade-marks Act*¹⁰ to determine whether a trade-mark causes confusion. This test, recently confirmed by the Court in the case *Masterpiece Inc. v.*

⁷ Supra note 2 at paragraph 49.

⁸ Supra note 2 at paragraph 55.

⁹ Supra note 2 at paragraph 60.

¹⁰ *Trade-marks Act*, R.C.S. 1985, c. T-13 (hereinafter the “T.m.a.”)

*Alavida Lifestyles Inc.*¹¹, restated the traditional approach by Binnie J. in the case *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the name Cliquot on the respondents' storefront or invoice, at a time when he or she has no more than an imperfect recollection of the VEUVE CLICQUOT trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.¹²

(our emphasis)

The purpose of a trade-mark is to function as a symbol of the source and quality of wares and services, to distinguish those of the merchant from those of another, and thereby prevent "confusion" in the marketplace¹³. Thus, the first impression test provided under the T.m.a. seems to be the most appropriate in order to pursue the objectives set by the C.p.a.

In sum, it is our opinion that the test under s. 218 C.P.A. is that of the first impression. In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used.¹⁴

(our emphasis)

The consumer

Secondly, the Court had to determine the perspective to adopt in relation to the assessment of the general impression provided by a commercial representation, that which, specifies the characteristics of the consumer under the C.p.a.. Although the recent case law refers to the concept of "average consumer", this notion is nothing less than the product of legal fiction. The Court thus had to determine the level of sophistication to be attributed to the average consumer.

Once again, it is interesting to note that the Court believed adequate to be inspired by the interpretive approach developed in the field of trade-marks. Indeed, in *Mattel, Inc. v. 3894207 Canada Inc.*¹⁵, the Court concluded that the average consumers protected by the T.m.a. are the "*ordinary hurried purchasers*"¹⁶. Indeed, in *Mattel* the

¹¹ [2011] 2. S.C.R. 387, paragraph 40-41 (herein after "Masterpiece").

¹² [2006] S.C.R. 824, paragraph 20 (herein after "Veuve Clicquot Ponsardin").

¹³ *Ibid* at paragraph 18.

¹⁴ Supra note 2 at paragraph 57.

¹⁵ [2006] 1 S.C.R. 772 (herein after "Mattel").

¹⁶ *Ibid* at paragraph 56.

Court was asked to clarify the standard to be used by the courts to determine whether a trade-mark causes confusion with a registered trade-mark:

[...] the standard is not that of people who never notice anything but of persons who take no more than ordinary care to observe that which is staring them in the face. [...] However, if ordinary casual consumers somewhat in a hurry are likely to be deceived about the origin of the wares or services, then the statutory test is met.¹⁷

(our emphasis)

Emphasizing on the limited level of sophistication attributed to the average consumer in the Canadian case law on the protection of consumers, the Court recognized and decided to apply the interpretative approach developed in *Mattel*:

The general impression test provided for in s. 218 C.P.A. must be applied from a perspective similar to that of “ordinary hurried purchasers”, that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer.¹⁸

(our emphasis)

The Court’s opinion is that the Court of Appeal changed the standard for the average consumer in defining them as an average level of intelligence, scepticism and curiosity. Following this definition, the general impression for the consumer would be guided by a thorough analysis allowing him to discover the real message behind the commercial representation.

The Court reiterated “*the C.p.a. general objective of protecting consumers means that the appropriate test is not that of the prudent and diligent consumer.*”¹⁹ In fact, the standard proposed by the Court of Appeal would reduce the protection offered by the C.p.a. whereas the court’s role would then be to determine whether the consumer was in fact misled, rather than the publicity in question constituted a false or misleading representation as provided by the C.p.a..

Applying the Quebec courts’ line of authority to the effect that a consumer under s. 218 C.p.a., is credulous and an inexperienced consumer, the Court proposed to assess the veracity of a commercial representation in a two-step analysis:

[...] (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the

¹⁷ *Ibid* at paragraph 58.

¹⁸ *Supra* note 2 at paragraph 67.

¹⁹ *Supra* note 2 at paragraph 75.

answer at the second step is no, the merchant has engaged in a prohibited practice.²⁰

Analysis and violation

In order to determine if the document sent by Time to Richard constitutes a prohibited business practice as defined in the C.p.a., and specifically if it is a false or misleading representation, the Court should determine:

[...] whether a credulous and inexperienced consumer, after first reading the Document, would have been under the general impression that the appellant had won the grand prize or would instead have understood that the respondents were merely offering him an opportunity to participate in a contest with a minute chance of winning a cash prize.²¹

According to the Court, the general impression conveyed by the document is influenced by a strange collection of affirmations and restrictions, especially the following one, written in bold uppercase letters: **OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF \$833,337.00!** Despite all the conditions laid down in the document, on which the respondents placed great emphasis, a point was made in the document that referred to the appellant as the sweepstakes winner. There were repeated indications that a cheque was about to be mailed to the appellant. The Court concluded:

In our opinion, the trial judge did not err in finding that the Document was misleading. The Document conveyed the general impression that the appellant had won the grand prize. Even if it did not necessarily contain any statements that were actually false, the fact remains that it was riddled with misleading representations within the meaning of s. 219 C.P.A. [...]²²

(our emphasis)

Having concluded that the document constituted a prohibited business practice, the Court had restored in part the Superior Court's judgment, as Time was ordered to pay Richard \$1,000 in compensatory damages and \$15,000 in punitive damages, with interest from the date of service as sanctioned.

5. Conclusion

Although *Richard c. Time Inc.* ruling comes to reiterate the Quebec legislature's will to protect the consumer, but it is rather the means for which the Court adopts to

²⁰ Supra note 2 at paragraph 78.

²¹ Supra note 2 at paragraph 81.

²² Supra note 2 at paragraph 87.

achieve this, that needs our attention. Indeed, by its analysis of the criterion of the general impression under s. 218 of the C.p.a., the Court clarifies the path to take so that the courts can determine whether the message conveyed by the advertising is in line with what the consumer perceives. To achieve this, the Court concluded this by adopting the average consumer's viewpoint, that is to say, the credulous and inexperienced consumers, and the general impression is the one that emerges following an initial contact with the entire advertisement.

Despite some discrepancy between the objectives of these legal schemes, it is interesting to note the Court's parallels between the C.p.a. and the T.m.a.. Indeed, although the law on trade-marks is essentially set on ensuring the source and quality of the goods and services offered by a merchant, the consumer lies at the heart of the analysis method regarding the confusion. For this reason, the Court is able to introduce the criteria for the "first impression" and the "ordinary hurried purchasers" developed in *Masterpiece*, *Veuve Clicquot Ponsardin* and *Mattel* rulings to its analysis of the general impression, because they are in accordance with the pursuit of the legislator's objective for consumer protection.

With the advent of the consumer society, merchants are aware that the average consumer is not able to analyse and does not have the time to process all the information presented to him. Therefore, merchants are able to develop ways to substantially influence consumer behavior. Bombarded by advertising, it must be able to examine an advertisement with trust rather than mistrust and thus be able to assume that its first impression is in line with reality. And you, do you trust your first impression?



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