Translated from the original French

|  |  |
| --- | --- |
| Touré c. Groupe BMTC inc. (Brault & Martineau inc.) | 2023 QCCS 1126 |
| SUPERIOR COURTJP1827 |
|  |
| CANADA |
| PROVINCE OF QUEBEC |
| DISTRICT OF | MONTREAL  |
|  |
| File No.: | 500-06-000531-109200-06-000128-101 |
|  |
|  |
| DATE: | March 28, 2023 |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |
| PRESIDING:  | THE HONOURABLE | ANDRÉ PRÉVOST, J.S.C. |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| File No.: 500-06-000531-109***Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations that if they did not purchase the additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, they would have to pay the costs of repair or replacement***The Classand**KERFALLA TOURÉ** Representative - Plaintiffv. **GROUPE BMTC Inc. (BRAULT & MARTINEAU INC.)** DefendantandPRESIDENT OF THE OFFICE DE LA PROTECTION DU CONSOMMATEUR Intervenor |
| File No.: 200-06-000128-101***Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations that if they did not purchase the additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, they would have to pay the costs of repair or replacement***The ClassandLUC CANTIN Representative - Plaintiffv.AMEUBLEMENTS TANGUAY INC. DefendantandPRESIDENT OF THE OFFICE DE LA PROTECTION DU CONSOMMATEUR Intervenor |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |
| **CORRECTED JUDGMENT****(article 338 CCP)** |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

1. **IN VIEW OF the judgment rendered on March 24, 2023, disposing of these files;**
2. **IN VIEW OF the fact that a clerical error was made in paragraph 306 of the judgment;**
3. **CONSIDERING that this error should be corrected.**

**FOR THESE REASONS, THE COURT:**

1. **CORRECTS paragraph 306 of the judgment rendered on March 24, 2023, in these files so that it reads as follows:**

**[306]** **Counsel for the plaintiffs submit that the date corresponding to three years before the initial application for authorization was filed should be used, that is, November 15, 2007, for the class related to Brault & Martineau and November 24, 2007, for the class related to Ameublements Tanguay.**

1. **WITHOUT COSTS.**

|  |  |
| --- | --- |
|  | **[signed]** |
|  | **THE HONOURABLE ANDRÉ PRÉVOST, J.S.C.** |

|  |
| --- |
| Translated from the original French |
| Touré c. Groupe BMTC inc. (Brault & Martineau inc.) | 2023 QCCS 1126 |
| SUPERIOR COURTJP1827 |
|  |
| CANADA |
| PROVINCE OF QUEBEC |
| DISTRICT OF | MONTREAL  |
|  |
| File No.: | 500-06-000531-109200-06-000128-101 |
|  |
|  |
| DATE: | March 24, 2023 |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |
| PRESIDING:  | THE HONOURABLE | ANDRÉ PRÉVOST, J.S.C. |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| File No.: 500-06-000531-109***Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations that if they did not purchase the additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, they would have to pay the costs of repair or replacement***The Classand**KERFALLA TOURÉ** Representative - Plaintiffv. **GROUPE BMTC Inc. (BRAULT & MARTINEAU INC.)** DefendantandPRESIDENT OF THE OFFICE DE LA PROTECTION DU CONSOMMATEUR Intervenor |
| File No.: 200-06-000128-101***Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations that if they did not purchase the additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, they would have to pay the costs of repair or replacement.***The ClassandLUC CANTIN Representative - Plaintiffv.AMEUBLEMENTS TANGUAY INC. DefendantandPRESIDENT OF THE OFFICE DE LA PROTECTION DU CONSOMMATEUR Intervenor |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |
| **CORRECTED JUDGMENT** |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**Table of Contents**

I. **Overview** 4

II. **Background** 4

III. **Procedural context** 5

A. The applications for authorization at first instance 5

B. The Court of Appeal’s judgment on authorization 6

C. Summary of the originating applications 10

D. Summary of the conduct of the proceedings on the merits 11

IV. **Does the Impugned Representation violate the *CPA*?** 12

A. Particularities of the *CPA* 15

*i.* *The legal warranty of quality and fitness* 15

*ii.* *Merchants, manufacturers, and advertisers’ obligation to provide information* 16

B. When does the representation constitute a prohibited practice 17

*i. The test to determine whether a representation is false or misleading .*………………………………………………………….19

C. Does the representation on the duration of the manufacturer’s warranty comply with the *CPA*? 22

D. Evidence of the Impugned Representation 23

*i. Comerco’s protection plan and the training of salespersons* 23

*ii.* *The salespersons’ representations at the time of purchase of a protection plan* 26

• Kerfalla Touré 27

• Luc Cantin 29

• Pamela Osi 32

• Louiselle Aird-Bélanger 34

• Louis Lacoste 36

• Claude Bernier 37

• Jonathan Bilodeau 39

• Christiane Dechêne 40

E. Is the Impugned Representation inherently false or misleading? 46

V. **Prescription** 54

A. Suspension of prescription 55

B. The date used to calculate prescription 58

VI. **Damages** 61

A. The consumer’s recourse under section 272 *CPA* 62

B. The application for compensatory damages 63

C. The application for punitive damages 67

VII. **Conclusions:** ………………………………………………………..………..73

# ****OVERVIEW****

1. The Court is rendering judgment today in five related but separate matters between consumers and furniture, appliance, and electronics merchants.[[1]](#footnote-1)
2. The disputes concern the legality of representations made by salespersons working for these merchants when additional warranties were sold for products purchased by the consumers before June 30, 2010.
3. After analysis, for the reasons set out below, the Court finds that:
4. the evidence of false or misleading representations by the salespersons of the merchants in question is either non-existent or clearly insufficient;
5. the wording of the representations, as it appears in the pleadings, is not inherently false or misleading;
6. a significant portion of the actions are prescribed;
7. there is no evidence of damage suffered by the class members covered by the class actions; and
8. there are no grounds justifying an award of punitive damages.

# BACKGROUND

1. On February 4, 2014, the Court of Appeal authorized the class action in these files and in five others that raise similar issues:[[2]](#footnote-2) *Claude Roux* *c*. *2763923 Canada inc. (Centre Hi-Fi)* (500-16-000538-104), *Jinny Guindon c*. *The Brick Warehouse LP* (500-06-000533-105), *Jacques Filion c*. *Corbeil Électrique* (500-06-000535-100), *Serge Tahmazian c*. *Sears Canada inc.* (500-06-000537-106), and *Jean-Michel Normandin c*. *Bureau en Gros (Staples Canada inc.)* (500-06-000547-105) (the Related Files). The President of the Office de la protection du consommateur is an intervenor in all the files.
2. The Court of Appeal defined the class in each file as follows:

[translation]

**Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations that if they did not purchase the additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, they would have to pay the costs of repair or replacement.**

1. The files involving *Corbeil Électrique* and *Sears Canada* were subsequently stayed.
2. In the *Ameublements Tanguay* file, Luc Cantin replaced Sonia Tremblay as representative plaintiff.
3. On April 8, 2015, the undersigned judge authorized the class action in *Carole Cake Rochon* *c*. *Meubles Léon ltée* (500-06-000706-149).[[3]](#footnote-3) That case is similar to the others.
4. On January 7, 2020, the Court took note of the parties’ consent for the files to be heard together and ordered that the evidence was to be presented in one file at a time. The length of the trial was estimated at 22 days, and it was subsequently scheduled for September 12 to October 20, 2022.
5. On June 21, 2022, the Court was informed of an agreement in principle reached in *Jean-Michel Normandin c*. *Bureau en Gros (Staples Canada inc.)*. That case was therefore withdrawn from the trial involving the other parties.
6. This judgment covers the files involving Groupe BMTC (Brault & Martineau) and Ameublements Tanguay because the additional warranty offered to the members of both classes is issued by Comerco Inc. and is the same for both defendants.

# PROCEDURAL CONTEXT

1. The history of the proceedings in this file and in the Related Files was raised by the parties on more than one occasion. It is worth addressing now, as reference will be made to it throughout this judgment.

## The applications for authorization at first instance

1. Between November 15 and December 16, 2010, in the judicial districts of Montreal and Québec, counsel for the plaintiffs filed nine (9) applications for authorization to institute a class action related to the sale of additional warranties covering appliances, electronics, and furniture.[[4]](#footnote-4)
2. The classes on behalf of whom the representative plaintiffs intended to act were described as follows:

[translation]

**All natural persons who were offered and/or purchased an extended warranty in Quebec on goods sold [by one of the respondents].**

1. The background to the applications is the same, with only a few slight variations. The causes of action focus on the following two submissions:[[5]](#footnote-5)
* When they offered the consumers the possibility of purchasing an additional warranty, the respondent merchants failed to mention the existence of the legal warranty applicable to the goods sold; and
* The additional warranties sold by the merchants are useless or, at least, not more advantageous than the legal warranty and, accordingly, the mere fact of offering them is a false and misleading representation within the meaning of the *Consumer Protection Act*[[6]](#footnote-6) (the *CPA*).
1. The applications for authorization in *Fortier* *c*. *Meubles Léon* and in *Tremblay c*. *Ameublements Tanguay* were instituted in the judicial district of Québec and heard by Dominique Bélanger J.S.C., as she then was, on March 29 and 30, 2011. Shortly after the hearing and before she rendered judgment, counsel for the plaintiffs amended all the applications for authorization, except the one in *Fortier* *c*. *Meubles Léon*, to add another cause of action based on the following submission:
* in particular, the respondent’s salesperson [in the case of *Ameublements Tanguay*, the explanatory pamphlet] represented to the applicant that if he did not purchase this additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, he would have to pay the costs of repair or replacement.[[7]](#footnote-7)
1. On June 20, 2011, Bélanger J. dismissed the applications for authorization presented in *Fortier* *c*. *Meubles Léon* and *Tremblay c*. *Ameublements Tanguay*, as she was of the view that the allegations did not establish any arguable case against those defendants.
2. On January 16, 2012, the undersigned judge reached the same conclusion and, accordingly, also dismissed the applications for authorization in the seven (7) files in the judicial district of Montreal.
3. The judgments were appealed.

## The Court of Appeal’s judgment on authorization

1. The hearing before the Court of Appeal was held on October 2 and 3, 2013, before Nicole Duval Hesler C.J.Q. and François Doyon and Jacques Dufresne JJ.A. The judgment, rendered on February 4, 2014:
* dismissed the appeals in *Fortier c*. *Meubles Léon* and *Blondin c*. *Distribution Stéréo Plus*; and
* allowed the other appeals in part, with dissenting reasons by the Chief Justice, who would have dismissed them.
1. It is worth addressing the reasons set out by Dufresne J.A. for the majority and the dissenting reasons of Duval Hesler C.J.Q.
2. At the outset, it should be noted that the three judges agreed to dismiss all the appeals on the basis of the first two submissions to the effect that (i) the defendants failed to mention the existence of the legal warranty (the First Submission) and (ii) the fact that the additional warranties were useless (the Second Submission). The Chief Justice’s dissent was limited solely to the issue of false representations (the Third Submission).
3. Addressing the First Submission, Dufresne J.A. noted that the legislature has never prohibited the sale of additional warranties, which the plaintiffs in fact concede in all the files.[[8]](#footnote-8) He also noted the addition of section 228.1 *CPA*, which came into force on June 30, 2010, and states:

**228.1.**Before proposing to a consumer to purchase a contract that includes an additional warranty on goods, the merchant must inform the consumer orally and in writing, in the manner prescribed by regulation, of the existence and nature of the warranty provided for in sections 37 and 38.

In such a case, the merchant must also inform the consumer orally of the existence and duration of any manufacturer’s warranty that comes with the goods. At the request of the consumer, the merchant must also explain to the consumer orally how to examine all of the other elements of the warranty.

Any merchant who proposes to a consumer to purchase a contract that includes an additional warranty on goods without first providing the information mentioned in this section is deemed to have failed to mention an important fact, and therefore to have used a practice prohibited under section 228.

1. He noted that the *Act* that introduced this provision into the *CPA* was not retroactive[[9]](#footnote-9) and concluded that:

[translation]

[95] Before the coming into force of section 228.1 *CPA*, the *Act* did not impose any express or implied obligation on the merchant to explain the existence and content of the legal warranty set out in sections 37 and 38 *CPA* before recommending that their clients purchase an additional warranty. …

…

[98] Section 228.1 *CPA* is new law. It creates a new mandatory practice for merchants, without retroactive effect. This provision and its corresponding regulation contain several disclosure obligations specific to merchants, such that before section 228.1 *CPA* came into force, merchants did not have an obligation to inform consumers of the existence and content of the legal warranty.

[99] … Therefore, it cannot reasonably be argued that the appellants committed a fault by failing to inform their clients of the existence of the legal warranty. In this respect, the appeal must fail.

[Emphasis added.]

1. In short, he agreed with the trial judges’ opinion that prior to June 30, 2010, merchants were not required to inform consumers of the existence and content of the legal warranty when offering them an additional warranty.
2. In addition, he noted that in light of the allegations set out in the applications for authorization, in the event they were granted, the classes should be limited to members who did business with the defendants before June 30, 2010.[[10]](#footnote-10)
3. He also dismissed the appeal on the plaintiffs’ Second Submission concerning the uselessness of the additional warranties, while noting that the analysis of this submission was closely connected to the First, as they were both essentially invoked in support of the same cause of action.[[11]](#footnote-11)
4. Echoing the findings made at trial, he recognized the intrinsic value of the additional warranties, [translation] “if only with respect to their implementation, to the relaxation of the consumer’s burden of proof, and to the clarification of their duration”.[[12]](#footnote-12)
5. He added that additional warranties give consumers greater peace of mind and that, moreover, they provide several advantages over the legal warranty such as preventive maintenance service, evening and weekend service, protection against loss of food, protection against power surges, in-home service, a replacement option after a certain number of repetitive breakdowns, etc.[[13]](#footnote-13)
6. Next, Dufresne J.A. provided the following summary of his conclusions on the First and Second Submissions, with which the two other judges in fact agreed:

[translation]

[115] … The applications for authorization, based solely on the respondents’ failure to mention the existence of the legal warranty and on the uselessness of the additional warranties offered or the fact that they are less advantageous than the legal warranty, are clearly unfounded. The judges were right not to grant the authorization sought for these closely-related causes of action.

1. Because the application for authorization in *Fortier c.* *Meubles Léon* was limited solely to the first two submissions, contrary to the other files, the appeal in that case was dismissed.
2. However, the majority and the dissenting judges disagreed on the Third Submission.
3. This submission is worded identically in each file. It reads as follows[[14]](#footnote-14) (the **Impugned Representation**):

[translation]

6.1 The respondent’s salesperson represented to the applicant that, among other things, if the applicant did not purchase this extended warranty and there was a breakdown after the manufacturer’s one-year warranty expired, the applicant would have to pay the costs of repair or replacement.

1. Dufresne J.A. began his analysis by expressing his disagreement with the position of the undersigned judge that the repetitive and systematic nature of this representation made to all the members by so many merchants selling different products was surprising in the absence of allegations suggesting that there was a scheme.[[15]](#footnote-15)
2. He explained that on its own, such a mechanically repeated allegation would be insufficient to establish an arguable case but that here, this statement was also found in some of the documentary and testimonial evidence in the record, which could be characterized as a factual basis at the preliminary stage.
3. To clarify his position, Dufresne J.A. added the following:

[translation]

[124] When one the respondents’ salespersons represents to one of the appellants that if he or she does not purchase an additional warranty and a breakdown occurs after the manufacturer’s warranty expires, he or she will have to pay the costs of repair or replacement, the salesperson’s argument is in practice used to promote the sale of an additional warranty or, in other words, to urge the consumer to purchase this warranty. Is it a false representation within the meaning of the *CPA*? That is not clear, but given the requirement of subparagraph 1003(b) CCP[today, subparagraph 575(2) CCP], it is preferable to leave this question for the trial judge, who will have a more complete picture to make this determination.

1. The majority therefore allowed the appeal and authorized the class actions, limiting them, however, to only the cause of action related to the Impugned Representation.
2. Duval Hesler C.J.Q. was of the view that the authorization judges could assess the *prima facie* plausibility of this allegation on the basis of the simple standard of common sense in the context of a last-minute amendment.[[16]](#footnote-16)
3. She agreed with the authorization judges and accordingly, would have dismissed the appeals.
4. Last, it should be added that the Court of Appeal confirmed the dismissal of the application for authorization in *Blondin c*. *Distribution Stéréo Plus* because it had been brought against the wrong person.

## Summary of the originating applications

1. The number of members involved in each file is not specified. The plaintiffs base their claim instead on the number of additional warranties sold by the defendants between January 1, 2005, and June 30, 2010, (the Relevant Period) to quantify the damages. Here is the result:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Number of warranties sold** | **Compensatory damages** **(plus taxes)** | **Punitive damages** |
| **Groupe BMTC (Brault & Martineau)** |  773,704  | $126,633,663.00 | $2,500,000.00 |
| **Ameublements Tanguay** |  640,617  | $75,132,937.00 | $2,500,000.00 |
| **2763923 Canada (Centre Hi-Fi)** |  74,275 | $9,481,946.50 | $1,000,000.00  |
| **Brick Warehouse** |  770,345 | $51,177,642.00 | $2,000,000.00 |
| **Meubles Léon** |  74,846 | $12,260,125.83 | $1,000,000.00  |
| $748,460.00 |

1. The compensatory damages correspond to the value of the additional warranties sold by each of the defendants.
2. In the file involving Meubles Léon, the plaintiffs claim additional punitive damages of $748,460 in connection with its violation of section 256 *CPA*. This cause of action is brought solely against this particular defendant.
3. In short, according to the plaintiffs, the Impugned Representation was made **2,297,787** times by all of the defendants’ salespersons during the Relevant Period. It should be noted that the plaintiffs did not provide any explanation regarding the determination of the start date of the Relevant Period, January 1, 2005.

## Summary of the conduct of the proceedings on the merits

1. The defendants in all the files allege that the plaintiffs ignored the Court of Appeal judgment by constantly repeating in their pleadings the three initial submissions, or causes of action, even though the first two were dismissed, thereby forcing proceedings to dismiss.
2. It all began when the originating applications were filed between June 6 and August 13, 2014. They repeat the three initial submissions in their entirety. By judgment dated January 8, 2015, the Court granted the defendants’ application to strike allegations to ensure consistency between the originating applications and the conclusions of the Court of Appeal.[[17]](#footnote-17)
3. Meanwhile, a new application for authorization to institute a class action was filed on August 20, 2014, by Carole Cake Rochon against Meubles Léon, again repeating the same three submissions and thereby ignoring the conclusions of the Court of Appeal. In its judgment dated April 8, 2015, authorizing the class action, the Court again ensured consistency between its conclusions and those of the Court of Appeal.[[18]](#footnote-18)
4. One month later, the plaintiff Cake Rochon filed her originating application, again ignoring the framework imposed by the Court of Appeal and the authorization judgment, thus forcing Meubles Léon to file an application to strike allegations. Finally, the plaintiff amended her application at the hearing to make it consistent, which nevertheless required a Court hearing.[[19]](#footnote-19)
5. On February 12, 2016, the plaintiffs raised the issue again and sought authorization to amend the originating applications in all the files to reinstitute the causes of action dismissed by the Court of Appeal, on the grounds that it had changed its approach to these questions of law in *Fortin c*. *Mazda Canada inc.*[[20]](#footnote-20) That application was dismissed by the undersigned on May 30, 2016,[[21]](#footnote-21) and leave to appeal was refused by Vauclair J.A. on September 30, 2016.[[22]](#footnote-22)
6. On November 2, 2018, Centre Hi-Fi announced that it would file a cross-application for abuse of procedure due to the repeated requests for information and documents in connection with the pre-trial examination of its representatives.[[23]](#footnote-23)
7. The requests to set down for trial by joint declaration were completed on September 20 and October 1, 2019.
8. Let us now turn to the analysis of the central issue in dispute.

# DOES THE IMPUGNED REPRESENTATION VIOLATE THE *CPA?*

1. In all the files, the plaintiffs submit that the Impugned Representation was made to all the members, while specifying that its wording may have varied from one case to another but that its substance remained the same in all cases.[[24]](#footnote-24)
2. They submit that the Impugned Representation constitutes a prohibited practice under Title II of the *CPA*, thus:
3. the premise that the manufacturer’s warranty is for one (1) year (or for the period specifically set out in the warranty) is misleading because the manufacturer is required to provide a warranty of longer duration;
4. stating that the client is not protected or that he or she must pay the costs of repair or replacement in the event of a breakdown after one (1) year (or after the period specifically set out in the warranty expires) if the client does not purchase an additional warranty is false because the good purchased has a significantly superior warranty.[[25]](#footnote-25)
5. These practices denounced by the plaintiffs all involve the existence and scope of the legal warranty of quality and fitness from which consumers benefit under the *CPA*.
6. Their arguments are essentially based on the following provisions of the *CPA*:

**37.** Goods forming the object of a contract must be fit for the purposes for which goods of that kind are ordinarily used.

**38.** Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.

**53.** A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.

The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.

The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.

The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.

**54.** A consumer having entered into a contract with a merchant may take action directly against the merchant or the manufacturer to assert a claim based on an obligation resulting from section 37, 38 or 39.

Rights of action against the manufacturer based on an obligation resulting from section 37 or 38 may be exercised by any consumer who is a subsequent purchaser of the goods.

**216.**  For the purposes of this title, representation includes an affirmation, a behaviour or an omission.

**219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

**227.** No merchant, manufacturer or advertiser may, by any means whatever, make false representations concerning the existence, the scope or the duration of a warranty.

**228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

**272.** If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

1. the specific performance of the obligation;
2. (b) the authorization to execute it at the merchant’s or manufacturer’s expense;
3. that his obligations be reduced;
4. that the contract be rescinded;
5. that the contract be set aside; or
6. that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

1. The following provisions of the *Regulation respecting the application of the Consumer Protection Act* are also relevant:[[26]](#footnote-26)

**25.4.** A stipulation intended to exclude or restrict the warranty provided for in section 37 or 38 of the Act is prohibited.

**25.6.** A stipulation intended to exclude or limit the rights conferred on a consumer by section 53 or 54 of the Act is prohibited.

1. Finally, the plaintiffs also refer to the following provisions of the *Civil Code of Québec* (CCQ):

**1400.** Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.

An inexcusable error does not constitute a defect of consent.

**1401.** Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that error, the party would not have contracted, or would have contracted on different terms.

Fraud may result from silence or concealment.

**1407.** A person whose consent is vitiated has the right to apply for annulment of the contract; in the case of error occasioned by fraud, of fear or of lesion, he may, in addition to annulment, also claim damages or, where he prefers that the contract be maintained, apply for a reduction of his obligation equivalent to the damages he would be justified in claiming.

1. Before analyzing the plaintiffs’ arguments, it is worth recalling certain particularities specific to the *CPA*.

## Particularities of the CPA

1. The *CPA* is a law of public order whose purpose is to protect consumers in their relations with merchants.
2. It must receive a [translation] “fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit”.[[27]](#footnote-27)
3. The *CPA* was enacted in 1971, and at the time it applied only to contracts involving credit or distance contracts. It was subsequently amended to expand its scope of application, which is now much more extensive. It was summarized as follows by the Supreme Court in *Richard v*. *Time Inc.*:[[28]](#footnote-28)

[41] Today’s *Consumer Protection Act* establishes a much more elaborate legal scheme than the previous version did. Its enactment reflects the Quebec legislature’s desire to extend the protection of the *C.P.A.* to a broader range of contracts and to explicitly regulate certain business practices that are considered fraudulent as regards their effect on consumers. In practical terms, the Act is divided into seven titles that reflect the main concerns of Quebec consumer law. Title I, “Contracts Regarding Goods and Services”, contains provisions whose primary purpose is to restore the contractual balance between merchants and consumers. Title II, “Business Practices”, identifies certain types of business conduct as prohibited practices in order to ensure the veracity of information provided to consumers through advertising or otherwise.

[42] These two main titles are supplemented by, among others, Title IV, which sets out the civil and penal recourses that can be exercised to sanction violations of the Act by merchants.

[Emphasis added.]

### *The legal warranty of quality and fitness*

1. Sections 37 and 38 *CPA*, supplemented by section 53, are set out in Title I. They specify the scope of the warranty of quality and fitness of goods purchased by consumers to which sellers and manufacturers are bound.
2. As the Court of Appeal stated in *Mazda*,[[29]](#footnote-29) these provisions form a coherent whole that includes presumptions, mainly that of the existence of a hidden cause, also expanding the traditional conception of latent defect, which was often limited solely to the malfunction of the good. Thus:

[translation]

[70] … An action based on the warranty set out in section 37 *CPA* requires the consumer to prove a serious loss of use and that he or she was not aware of that condition at the time of the sale. For the rest, the presumptions set out in the *Act* establish the other traditional factors specific to the determination of latent defects.

1. In short, once the serious loss of use of the good and the fact that this condition was not known at the time of the sale are established, the consumer benefits from the presumption that a latent defect existed at the time of the sale.

### *Merchants, manufacturers, and advertisers’ obligation to provide information*

1. The obligations imposed on merchants, manufacturers, and advertisers by Title II of the *CPA* apply to them regardless of whether a consumer contract exists.[[30]](#footnote-30) They are bound by a duty to act honestly and an obligation to provide information during the period preceding the formation of the contract “to prevent a consumer’s consent from being vitiated by inadequate, fraudulent or improper information”.[[31]](#footnote-31)
2. The obligation to provide information in consumer law is so important that it has led the legislature to move away from certain concepts applied in civil law. The Supreme Court stated the following in this regard in *Time*:[[32]](#footnote-32)

[43] The measures to protect consumers from fraudulent advertising practices are one expression of a legislative intent to move away from the maxim *caveat emptor*, or “let the buyer beware”. As a result of these measures, merchants, manufacturers and advertisers are responsible for the veracity of information they provide to consumers and may, should such information contain falsehoods, incur the civil or penal consequences provided for in the legislation. As Judge Matheson of the Ontario County Court explained in *R. v. Colgate‑Palmolive Ltd.*, 1969 CanLII 1005 (ON SC), [1970] 1 C.C.C. 100, a case involving federal law, the maxim *caveat venditor* is now far more appropriate to describe the merchant‑consumer relationship.

[Emphasis added.]

1. The prohibition set out in section 219 *CPA* against making false or misleading representations to a consumer is broad because it uses the words “by any means whatever”. It is therefore not limited to a written text; it includes verbal representations, images, drawings, and signs,[[33]](#footnote-33) as well as the failure to mention an important fact and the merchant’s behaviour.[[34]](#footnote-34)
2. An “important fact” is information that, had it been communicated to the consumer at the proper time, would have influenced the consumer’s decision to enter into the contract or the terms and conditions of the contract.[[35]](#footnote-35)
3. Of course, providing evidence of verbal representations may be more delicate because, by its very nature, it may place in opposition different, even contradictory, versions of the message conveyed by the merchant, manufacturer, or sponsor.
4. In *Time*, the advertisement considered misleading was entirely in writing. It was thus easier to conduct a specific analysis by focussing on the text used, the emphasis placed on certain words or expressions, and the inserts and the design used in its presentation.[[36]](#footnote-36)
5. In the files at issue here, the Impugned Representation made by the merchants was mainly verbal, although in some cases, an explanatory document may have been given to consumers.

## When does the representation constitute a prohibited practice?

1. Section 218 *CPA* sets out the approach to determine whether a representation constitutes a prohibited practice. It 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.

1. The analytical approach provided for in that provision thus includes two factors: the “general impression” given by a representation and the “literal meaning” of the words used in it.[[37]](#footnote-37)
2. At the outset, it should be noted that the second element simply means that every word used in a representation must be interpreted in its ordinary sense, that is, in accordance with the meaning usually given to it in everyday life.[[38]](#footnote-38)
3. What does general impression mean? In other words, what are its characteristics?
4. First, the determination of the general impression is analyzed in the abstract, without considering the personal attributes of the consumer in question.[[39]](#footnote-39) In *Time*, the Supreme Court accepted the concept of the credulous and inexperienced consumer,[[40]](#footnote-40) whom it described in several ways:
* 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;[[41]](#footnote-41)
* average consumers, who are not particularly experienced at detecting the falsehoods or subtleties found in commercial representations;[[42]](#footnote-42)
* credulous persons, that is, average consumers who are prepared to trust merchants on the basis of the general impression conveyed to them by their advertisements, not that they are incapable of understanding the literal meaning of the words used if the general layout of the advertisement does not render those words unintelligible.[[43]](#footnote-43)
1. Second, the general impression does not come from a rushed or partial consideration of the representation, but rather from an initial contact with the entire representation, in its context. In *Time*, the Supreme Court addressed this aspect as follows:

[55] In our opinion, the respondents are wrong to downplay the importance of the layout of an advertisement. 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.

[56] However, the respondents are right to say that the general impression referred to in s. 218 *C.P.A.* is not the impression formed as a result of a rushed or partial reading of an advertisement. The analysis under that provision must take account of the entire advertisement rather than merely of portions of its content. But it is just as true that the analytical approach required by s. 218 *C.P.A.* does not involve the minute dissection of the text of an advertisement to determine whether the general impression it conveys is false or misleading. The courts must not approach a written advertisement as if it were a commercial contract by reading it several times, going over every detail to make sure they understand all its subtleties. Reading over the entire text once should be sufficient to assess the general impression conveyed by a written advertisement, and it is that general impression that will then make it possible to determine whether a representation made by a merchant constitutes a prohibited practice.

[57] 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. …

[Emphasis added.]

### *The test to determine whether a representation is false or misleading*

1. To determine whether a representation is false or misleading under section 218 *CPA*, it is necessary to engage in a two-step analysis:[[44]](#footnote-44)
2. describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and;
3. determining whether that general impression is true to reality.
4. If the representation in question is not true to reality or not likely to be, the merchant has engaged in a prohibited practice.[[45]](#footnote-45)
5. The general impression may not be true to reality if the representation is false or misleading.[[46]](#footnote-46) The term “misleading”, or in French, “*trompeur*”, is not defined in the *CPA*. We must therefore refer to its ordinary meaning. The dictionary *Le Grand Robert de la langue française* defines the French word *trompeur* (misleading)by referring to the verb “*tromper*” (mislead), the primary meaning of which is [translation] “to induce error with respect to facts or intentions by using lies, dissimulation and cunning”.[[47]](#footnote-47)
6. The plaintiffs have the burden of proving the facts on which their claims are based, in accordance with the rule set out in the first paragraph of article 2803 CCQ:

**2803.** A person seeking to assert a right shall prove the facts on which his claim is based.

A person who claims that a right is null, has been modified or is extinguished shall prove the facts on which he bases his claim.[[48]](#footnote-48)

[Emphasis added.]

1. Two elements warrant particular attention here.
2. First, because the Impugned Representation was primarily verbal, evidence of its content is not only essential, but it must also describe as accurately as possible the context in which it was made and the words used by the merchant so that the Court may determine the general impression it conveys from an objective standpoint to a credulous and inexperienced consumer.
3. Thus, in accordance with the teachings of the Supreme Court in *Time*, this evidence cannot be limited to the general impression of one consumer personally because the Court would then, to some extent, be delegating its duty to analyze to that consumer.
4. Confusing the subjective general impression of a consumer with the requirements of the test set out in section 218 *CPA* would be an error that the Supreme Court in *Time* tried to avoid, because:
5. the subjective general impression of the consumer in question will be influenced by his or her personal attributes, whereas the general impression must be established in the abstract;[[49]](#footnote-49) and
6. the subjective general impression of the consumer in question will depend on the attention he or she directed to the content of the Impugned Representation, whereas the relevant general impression must be “the one a person has after an initial contact with the entire” representation, taking into account the words used.[[50]](#footnote-50)
7. In short, the general impression test set out in *Time* should not be confused with the general impression described by one of the plaintiffs or members. It is an objective test that uses the perspective of the credulous and inexperienced consumer and is based on the general impression formed, after an initial contact, as a result of the words used in the Impugned Representation and the context in which it was made.[[51]](#footnote-51)
8. Hence the importance of proving the content of the Impugned Representation as accurately as possible.[[52]](#footnote-52)
9. Second, because the files in this matter are class actions, the Court must also ensure that the Impugned Representation was repeated consistently to the members of the classes concerned.
10. The following comments of Deschamps J., on behalf of the majority in *Bou Malhab v*. *Diffusion Métromédia CMR inc*,[[53]](#footnote-53) shed an interesting light on the issue:

[52] This Court has stated on several occasions that a class action is merely a procedural vehicle and that its use does not have the effect of changing the substantive rules applicable to individual actions (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-8; *St. Lawrence Cement*, at para. 111). In other words, the class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.

[53] The law of defamation therefore applies in its entirety in the class action context. As I mentioned above, for a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group (*Hôpital St-Ferdinand*, at para. 33). Of course, the class action procedure permits the judge to draw inferences from the evidence, but the judge must still be satisfied on a balance of probabilities that each element is present for each member (for injury, see *Hôpital St-Ferdinand*, at paras. 34-35).

[Emphasis added.]

1. Recall that the Court cannot take into consideration inferences, or presumptions of fact, unless they are serious, precise, and concordant (article 2849 CCQ).[[54]](#footnote-54)
2. Essentially, although the plaintiffs are not required to call every class member to testify to establish (i) the defendants’ fault, (ii) the injury suffered by each class member, and (iii) the causal connection, the evidence adduced must nevertheless be sufficient to establish by presumption the application of these three elements to every member.
3. Counsel of record were not able to find an example in the case law of a class action judgment on the merits finding that verbal representations had been proved with respect to every member.[[55]](#footnote-55) The extent of the evidence required to establish a presumption of the repetitive nature of the Impugned Representation made to the class members concerned in this file and in the Related Files will therefore be analyzed in the context of each file.

## Does the representation on the duration of the manufacturer’s warranty comply with the CPA?

1. The plaintiffs submit that the premise of the Impugned Representation that the duration of the manufacturer’s warranty is one (1) year (or the period specifically set out in the warranty) is misleading because the manufacturer is bound to provide a longer warranty.
2. The Court sees nothing false or misleading in this.
3. First, the information provided by the salesperson to the consumer on the existence and duration of the manufacturer’s conventional warranty is not only useful to the consumer, but also strictly factual.
4. Second, the Court of Appeal clearly resolved this issue in *Fortier* when it stated that before June 30, 2010, merchants were not required to inform consumers of the existence of the legal warranty set out in sections 37 and 38 of the *CPA*.[[56]](#footnote-56)
5. The plaintiffs are thus mistaken on this issue.
6. It remains to be determined whether stating that the client must pay the costs of repair or replacement in the event of a breakdown after one (1) year (or after the period specifically set out in the warranty has expired) if he or she does not purchase an additional warranty is false or misleading.

## Evidence of the Impugned Representation

1. It is appropriate here to reproduce the content of the Impugned Representation:

[translation]

The defendant’s salesperson represented to the plaintiff that, among other things, if the plaintiff did not purchase this extended warranty and there was a breakdown after the manufacturer’s one-year warranty expired, the plaintiff would have to pay the costs of repair or replacement.

1. Let us now consider the content of the additional warranty offered by Brault & Martineau and Ameublements Tanguay.

### *Comerco’s protection plan and the training of salespersons*

1. The additional warranty sold by Brault & Martineau and Ameublements Tanguay during the period in question (from January 1, 2005, to June 30, 2010) was provided by Comerco, an independent company.
2. Since 1998, the product has been commonly referred to as the “protection plan”, although its official name is “Service Protection Plus”.[[57]](#footnote-57) It was previously called the “extended warranty” and its content corresponded to what the *CPA* defines as a “contract of additional warranty”.
3. The protection plan has two components: (i) an additional warranty that usually has a duration of four years (it may be two or three years depending on the product) and that takes effect after the manufacturer’s warranty expires, on the same terms and conditions, and (ii) additional services covering:[[58]](#footnote-58)
* a preventive maintenance inspection;
* evening and weekend service;
* protection against repetitive breakdowns;
* protection against food losses;
* protection against product failure due to rust;
* protection against power surges;
* parts and labour coverage, or depending on the circumstances, a 10% discount on parts and labour;
* repairs to the manufacturer’s specifications;
* the guaranteed satisfaction of the client;
* service offered throughout North America; and
* the transferability of the protection plan from one owner to another.
1. The price of this protection plan is set by Comerco and varies according to the amount paid for the products it covers. It is divided in the following manner, using a price of $100 as an example:
* $40 for Comerco, of which $32 is a provision for claims, $1 is paid to the insurer guaranteeing them, and $7 is for expenses and profits;
* $60 for Brault & Martineau or Ameublements Tanguay, a portion of which is paid to the salesperson who sold the protection plan.
1. Comerco periodically offers training to salespersons on selling its protection plan. The training covers the details of the plan, including the terms and conditions of the contract and the best strategies for closing the sale.[[59]](#footnote-59)
2. Thus, once the consumer has chosen a product, it is recommended that the salesperson inform the consumer of the existence of the manufacturer’s warranty, which is usually for one year. Next, the salesperson should tell the consumer about the benefits of the protection plan offered, by describing what is indicated under the title [translation] “Your coverage includes” on page 2 of the pamphlet.[[60]](#footnote-60)
3. The Court accepts from the evidence that it is generally recommended not to emphasize what appears on page 3 of the pamphlet because it is preferable to focus on the protection plan’s positive points rather than the problems that may occur with the product purchased, which is [translation] “less of a selling point”. This information is provided only in response to specific questions from the client on these subjects.
4. This page of the pamphlet reads as follows:[[61]](#footnote-61)

[translation]

**Coverage beyond the manufacturer’s limited warranty**

No one expects a newly purchased appliance to break, let alone to spend considerable amounts of money to restore it to good working condition. After all, there is reason to believe that the appliance brand is reputable and that you should have peace of mind for many years to come.

However, manufacturers do not offer lifetime warranties. Most manufacturers offer an original limited warranty of only 12 months upon purchase. You will therefore have to pay for all parts and labour if your appliance breaks down after that period.

**Avoid costly repairs**

After many years of experience, we know that it is impossible, even for the best technician, to predict when one of your products will break down. However, we can say with certainty that when this happens, it will cost you over $100 an hour for a factory-trained professional technician with the proper equipment to diagnose today’s products. And of course, you will have to add the cost of replacement parts!

**Your best protection**

Your Gold Protection Plan offers the best protection available for your products. Our protection program guarantees that your product will always function according to the manufacturer’s specifications.

**Satisfaction guaranteed\***

If we cannot repair your appliance, we will replace it with the latest comparable model – at no charge!

1. Salespersons are nevertheless encouraged to tell the consumer that the protection plan extends the manufacturer’s warranty for a period of four years.
2. During the discussion with the client, the price of the protection plan is usually mentioned. If the client is interested in purchasing the plan, the salesperson prepares the bill at his or her workstation. The salesperson describes the products purchased, the relevant protection plan, and the price of each of them. The salesperson and the client then go the cash, where the client pays after any credit arrangements have been made.
3. This is when the pamphlet describing the protection plan is given to the client with a copy of the bill inserted. During the training, salespersons are told not to give the client the pamphlet until the transaction has been finalized. Note, however, that in some Brault & Martineau and Ameublements Tanguay stores, the pamphlets are available for clients to consult in a display stand near the sales office.
4. Finally, protection plans are not offered to a client in some cases. The decision is up to the salesperson depending on his or her assessment of the client’s behaviour and level of openness.
5. In short, it is profitable for the merchant to sell protection plans, and salespersons are encouraged to promote them. According to Normand Legault, sales manager for Brault & Martineau and Economax, the goal is to sell protection plans in 55% of the sales of eligible products.
6. This summarizes the training provided to Brault & Martineau and Ameublements Tanguay’s salespersons on the Comerco protection plan. It should be added that the in-store sales managers supervise salespersons, especially new ones, to make sure that they follow the instructions provided during the training.
7. The Court now turns to the testimony of Brault & Martineau and Ameublements Tanguay’s clients who described the representations made to them when they purchased a protection plan.

### *The salespersons’ representations at the time of purchase of a protection plan*

1. None of Brault & Martineau or Ameublements Tanguay’s salespersons testified on the representations made to any of the representative plaintiffs or members who were examined or who testified in these files.
2. Other than the evidence of the protection plan offered by Comerco and the relevant training provided to the salespersons, the Court can rely only on the testimony or the examination transcripts of the representative plaintiffs or a limited number of members to verify how and to what extent the Impugned Representation was used to sell the protection plan. Thus, in the Brault & Martineau file, the evidence is limited to five members (Pamela Osi, Louiselle Aird-Bélanger, Louis Lacoste, Claude Bernier, and Jonathan Bilodeau) in addition to the representative plaintiff, Mr. Touré. In the Ameublements Tanguay file, only one member (Christiane Dechêne) testified in addition to the representative plaintiff, Mr. Cantin.
3. It should be stated at the outset that the words and phraseology used in the Impugned Representation are those of counsel for the plaintiffs after they met with Mr. Touré and heard his account in their steps leading to the filing of the initial application for authorization to institute a class action or its amended version.[[62]](#footnote-62)
4. The Court accepts the following from the testimony.

#### Kerfalla Touré

*His account*

1. On December 19, 2007, Mr. Touré and his spouse went to the Brault & Martineau store on Jean-Talon Street in Saint Léonard (Montreal) to shop for a refrigerator because theirs [translation] “had died”.
2. Their visit lasted approximately 90 minutes. A salesperson named Steve assisted them and provided explanations on the different models shown on the floor. Once they had chosen a stainless-steel refrigerator, Mr. Touré and his spouse then wanted to purchase a kitchen range and hood in a similar finish to ensure that their kitchen appliances were uniform.
3. Once their choices were made, the salesperson told them that these appliances were of good quality and then suggested that they purchase a protection plan for the refrigerator and the range.
4. Mr. Touré cannot recall the exact words used by the salesperson, but he says that the message was essentially the following: [translation] “although they’re of good quality, appliances don’t last as long as they used to, and if they break down after the manufacturer’s warranty expires, I would have to pay the resulting costs if I didn’t have an extended warranty”.[[63]](#footnote-63) He added, [translation] “my impression was that after one year, I was on my own; you’re on your own to get your appliance to work if it breaks down after a year”.[[64]](#footnote-64)
5. He and his spouse therefore decided to purchase a [translation] “gold protection plan” for an additional duration of four years for $289.95.[[65]](#footnote-65)
6. The range had certain defects. In the first year, the manufacturer changed electronic components deemed defective. Subsequently, repairs were made in accordance with the protection plan purchased by Mr. Touré to stop static electricity and fix the detached rubber membrane on the front of the appliance.
7. Last, Mr. Touré acknowledged having previously purchased an extended warranty from a Future Shop for an I-Pod before purchasing the one at issue in this dispute. That purchase was made in the fall of 2007.

 *Comments*

1. Counsel for Brault & Martineau asks the Court to exercise prudence when considering this testimony.
2. He notes that Mr. Touré has been a personal friend of the two lawyers acting for the plaintiffs since university and that he tends to say what they want to hear to win this case.
3. His memory is vague. He remembers little about the details surrounding the purchase of his appliances in December 2007 or the content of the representations made to him about the protection plan.
4. He sometimes refers to the plan as an [translation] “extended warranty” and sometimes as a [translation] “protection plan”. As for the representations, he admits that he does not remember the specific information communicated to him by the salesperson. Rather, he recounts the impression he had.[[66]](#footnote-66)
5. This is problematic, especially in light of the objective test proposed in *Time*.
6. Some of the words used by the salesperson may be more significant or have a broader scope than others. That is the case here. For example, in his pre-trial examination, Mr. Touré made contradictory remarks about the salesperson’s use of the word [translation] “recourse”. First, he reported that the salesperson told him that if he did not have a protection plan and the appliance broke down after the manufacturer’s warranty expired, he would have no [translation] “**recourse** other than to pay the costs himself”.[[67]](#footnote-67) Shortly after, he stated that the salesperson actually said that he would have to pay the costs himself without [translation] “mentioning a **recourse**”.[[68]](#footnote-68) When asked to explain himself at the hearing, Mr. Touré finally admitted that the salesperson never referred to a recourse.
7. From the perspective of the credulous and hurried consumer referred to in *Time*, the use of the word [translation] “recourse” in this context may have a much more significant impact on the general impression formed as a result of the representation and, accordingly, on the purchase of a protection plan.
8. Mr. Touré’s vague memory also extends to other peripheral matters.
9. When he reported having purchased an extended warranty (or maintenance plan) for an iPod, he had difficulty specifying the date but was convinced that it was before his purchase at Brault & Martineau. When it was suggested to him in cross-examination that the model purchased was first sold in the fall of 2007, he acknowledged that he purchased the extended warranty on this device only a few weeks before acquiring the protection plan on his appliances. Again, he has no recollection of any discussion with the Future Shop salesperson regarding the purchase of the extended warranty on his iPod. He even raised the possibility that there was no discussion.
10. In addition, while acknowledging that he had surely purchased other extended warranty plans in his life, he could not specify the details of the plans themselves, the products they covered, or the date when they were purchased. He nevertheless stated that the salespersons’ speech was always the same: if he did not purchase the plan and there was a breakdown after the manufacturer’s warranty expired, he would have to pay the costs of repair. He added that [translation] “this is always how these things are sold: take it, otherwise when it breaks down, you’ll have to pay; that’s pretty much the *modus operandi* for every warranty I’ve purchased”.[[69]](#footnote-69)
11. This retort, which is really an argument, casts doubt on the accuracy of the representations he attributes to Brault & Martineau’s salesperson when he purchased the protection plan in December 2007. It is clearly intended to support the cause he and his counsel defend. And, ultimately, it raises doubts about his credibility.
12. It is understandable that a person may not be able to accurately report what was said 15 years earlier, unless it corresponds to a specific event that has an impact on the imagination. Such is the case, for example, regarding where a person was or what they were doing when the World Trade Centre towers in New York collapsed on September 11, 2001, or, if they are a bit older, when President John F. Kennedy was assassinated on November 22, 1963.
13. There is no such situation here, as the many inaccuracies in his testimony attest.
14. While the Court does not doubt Mr. Touré’s good faith, it questions the probative value of his testimony. His bias seems to compensate for his memory lapses.

#### Luc Cantin

*His account*

1. Shortly before August 9, 2007, after visiting two other stores, Mr. Cantin and his spouse went to the Ameublements Tanguay store on De l’Ormière Boulevard in Québec to purchase a washer and dryer. He was assisted by a salesperson whom he does not remember.
2. As he had previously purchased an extended warranty on two electronic devices, he asked the salesperson about the manufacturer’s warranty covering the appliances he was about to purchase. He recounts their conversation as follows:

[translation]

A. … So, I asked, [translation] “How long is the warranty on this machine?”

* And the salesperson told me, look, it’s twelve (12) months.
* So I said, oh, it’s not … not longer; there’s nothing longer?
* He said … he said, there’s always the legal warranty, but then you have to deal with the … the manufacturer.
* So, considering that, I said, okay, well …”

Then, he kept talking about the … the additional warranty.

Q. Telling you about its benefits?

A. Yes, yes.

Q. Do you remember …

A. So that is …

Q. … anything such as a preventive inspection? Do you remember that?

A. Preventive inspection, no …

Q. No. You don’t remember that.

A. … but, however – not really; maybe I didn’t catch that.

Q. Hmm.

A. Except that, from what was … uh … said as … as wording, it seemed to cover just about everything, even an event of … of – a fortuitous event, electrical, for example a – network reset, with a power surge, okay, well, you know …

…

A. Yes, yes. And then, the man, okay. Well, look, he turned and then, okay, well, he kept talking about the extended warranty, what it includes … included.

Then look, I, considering that, with a machine that … that was a bit unfamiliar, for me … uh … front-loading machine, it was our first experience …

Q. Uh-huh.

A. … and … uh … we said, [translation] “Well, look, for two hundred bucks ($200), two hundred and fifty bucks ($250), it’s worth it”. So, we took the extended warranty.

…

Q. And what did you know about the legal warranty in two thousand and seven (2007)?

A. Well, it’s like the … the salesperson on the floor seemed to be saying, [translation] “As consumers, we’ll have to deal directly with the manufacturer”. …

…

Q. So you understood that you could sue?

A. And without – in … in the …

Q. But with the trouble …

A. … the nature …

Q. … that comes with it?

A. Well, exactly. That’s for sure.

Q. Yes.

A. And in the other, I was … I came out on top, so …

Q. So that’s why …

A. … that’s why it steered me towards purchasing an extended warranty; two hundred and fifty bucks ($250), and I had peace of mind and … uh … that’s … that’s …[[70]](#footnote-70)

1. Mr. Cantin therefore purchased the additional warranty.[[71]](#footnote-71)
2. In 2012, while the warranty was still in effect, the washing machine broke down. After contacting Ameublements Tanguay, a repairperson inspected the machine and concluded that it had to be replaced, which was done at no charge and to his entire satisfaction.
3. He has not spoken to anyone else who purchased an additional warranty on an appliance from Ameublements Tanguay before June 30, 2010.

*Comments*

1. It should be noted at the outset that the facts reported by Mr. Cantin are not consistent with the Impugned Representation.
2. Mr. Cantin was intrigued by the technology of a front-loading washer/dryer, which he had never used before. He asked the salesperson many questions and was concerned that it might break down. Accordingly, he paid particular attention to the warranty covering it and the situation after it expired.
3. In this context, the salesperson told him what the manufacturer’s warranty covered, of the existence of the legal warranty after it expired, and of the possibility of acquiring an additional warranty for a period of four (4) years, which also included other benefits.
4. Mr. Cantin finally decided to purchase the protection plan offered to have [translation] “peace of mind”, knowing that without such a plan, he would have to use the legal warranty, which meant taking steps and [translation] “trouble”.
5. In the Court’s view, this testimony does not support the theory of the case proposed in the Ameublements Tanguay file. Not only did the salesperson answer Mr. Cantin’s questions and even inform him of the existence of the legal warranty, but also the representations described by Mr. Cantin contained nothing misleading.

#### Pamela Osi

*Her account*

1. A class member, Pamela Osi, also bought a two-year additional warranty for $40 on a DVD player purchased from Brault & Martineau on February 23, 2002.[[72]](#footnote-72) The salesperson allegedly told her that after the manufacturer’s warranty expires, “you are *on your own*”.
2. She says that she also purchased about 10 extended warranties after that date when buying household appliances for herself and for her son Avalon. These purchases were made from Sears in 2006,[[73]](#footnote-73) Meubles Léon on a date she cannot specify, and Brault & Martineau in 2011[[74]](#footnote-74) and 2019.[[75]](#footnote-75)
3. Ms. Osi repeated that the salespersons’ representations when she purchased these other extended warranties were similar to those made in 2002. She stated, “It’s always the same pitch. If you don't take it and something goes wrong you have to deal with the manufacturer and when your warranty is over … it’s over … you have nothing else and you’re *on your own*”.[[76]](#footnote-76)
4. In response to the question “Everybody tells you the same thing?”, she answered, “Yes, the pitch is always the same, after a year if you don’t get this, you’re left *on your own*”.[[77]](#footnote-77)

*Comments*

1. Once again, counsel for Brault & Martineau asks the Court to exercise prudence.
2. Ms. Osi’s pre-trial examination as a class member in *Sears Canada*[[78]](#footnote-78)sheds a somewhat different light on this merchant’s representations when she purchased an extended warranty at the time of purchasing a washer and dryer in 2006.
3. She says that the salesperson informed her that the manufacturer’s warranty on these products was for one year. He then told her that under the extended warranty plan, an annual inspection of the appliances was conducted for the following two years to make sure they were functioning properly, which reassured her and convinced her to purchase the plan.[[79]](#footnote-79)
4. In short, at the time of this purchase, there was no representation to the effect that “you are *on your own*”, contrary to what she stated at the hearing.
5. The Court also noted another contradiction in Ms. Osi’s testimony.
6. After repeating that she has not purchased another extended warranty since joining the class action in this file in April 2011, she was forced to acknowledge that she purchased two protection plans from Brault & Martineau on July 31, 2011,[[80]](#footnote-80) and March 27, 2019.[[81]](#footnote-81) They were subsequently cancelled at her request.
7. She was unable to describe the content of the salesperson’s representations in relation to these purchases. She limited herself to describing her impression.
8. Last, and this is significant, Ms. Osi’s purchase of the protection plan in question dates back to February 23, 2002, and is therefore outside the period accepted by the plaintiff for the purposes of this class action, that is, from January 1, 2005, to June 30, 2010.
9. In short, Ms. Osi’s testimony cannot be accepted into evidence, and its probative value is questionable.

#### Louiselle Aird-Bélanger

*Her account*

1. Ms. Aird-Bélanger and her spouse, Jean Bélanger, bought a protection plan when they purchased a television on August 29, 2003, and household appliances on February 24, 2008.[[82]](#footnote-82)
2. She stated that in both cases, Brault & Martineau’s salespersons told them that [translation] “if the appliances break down, it will cost you a lot!” and suggested that they purchase a protection plan. She specified that they were given the pamphlet describing the plan at the time they paid their bill.
3. When cross-examined on the statements made by the salespersons, she said that she did not remember the specific words they used. She stated the following:

[translation]

Q. So your memory isn’t too clear on this, correct?

A. I can’t tell you the exact words, but that’s basically what they told us.

Q. Is it possible that they said, [translation] “you should take …”, [translation] “we suggest that you take …” the warranty-insurance, as you call it; do you remember the term that they used?

A. No.

Q. Is it possible that they said, [translation] “we suggest that you take”, it, regardless of what it’s called, [translation] “because if your appliance breaks down, you’ll be protected; we’ll take care of everything”? Is it possible that this is what they said?

A. I can’t tell you sir.

Q. Do you remember, for the 2003 purchase, let’s say; do you remember,18 years later, if the salesperson said, [translation] “we suggest that you take this, so that you’ll be protected if your appliance breaks down”?, [translation] “You’ll be covered if your appliance breaks down”.

A. Yes, that’s basically it.

Q. Okay. So, it’s possible, Ms. Bélanger, that the salesperson did not say [translation] “if it breaks down, it’s going to cost you a lot” but rather [translation] “if it breaks down, you’ll be covered”.

A. Yes, but he told he if, for example … if, let’s say, it breaks down, I would have to pay if I didn’t take the insurance. Okay. So that’s why you want to take it, because you don’t want to pay when the appliances break down, so we … we took the insurance.

Q. But, Ms. Bélanger, you say that you remember that he said that 17 years ago; may I suggest, tell me what you think, may I suggest that he may have said that you should take it, so that you’ll be covered if your appliance breaks down, and that you understood that if your appliance broke down but you didn’t purchase it, then you would have to pay the costs. Is that possible?

A. It’s possible, but as I told you …

Q. It was a long time ago.

A. That's it.

[Emphasis added.]

1. She also said that she had bought extended warranties from Brault & Martineau and Meubles Léon on four occasions and that the last time was in 2022 for the purchase of a refrigerator, a range, and a dishwasher.

*Comments*

1. It is difficult to extract from this testimony what was actually said by the salespersons. The passing of time makes the exercise difficult.
2. Moreover, Ms. Aird-Bélanger acknowledged that she remembered the content of the salespersons’ representations when she purchased the last protection plan in 2022:[[83]](#footnote-83)

[translation]

Q. You say, they always tell us … But, you know … Do you remember the salesperson and the conversation or is it more a very very general memory?

A. Well the last one, what was it …

Q. 2022, that.

A. … that he told me, then we remembered what the others had told us, you know, it was their phrase; it’s as if they learn that phrase by heart.[[84]](#footnote-84)

1. Is this a reconstructed memory based on what she was told in 2022? Like Ms. Osi, does she have a tendency to generalize the content of a message that, while related to the same theme – the sale of a protection plan – may contain significant variations? The Court remains perplexed.
2. Ms. Aird-Bélanger’s memories are just as vague on several related aspects. She does not remember buying a protection plan when she purchased a refrigerator on December 30, 1998, at Brault & Martineau.[[85]](#footnote-85) In fact, she thought she had never purchased anything from this merchant before 2003. She also has difficulty remembering the number of protection plans she has purchased since 2005.
3. In short, this testimony is not conclusive on the Impugned Representation. Not to mention that one of the purchases in question took place outside the period covered by the application.

#### Louis Lacoste

*His account*

1. Another member, Louis Lacoste, reports that he purchased a protection plan twice, on May 13, 2007, and on September 7, 2008.[[86]](#footnote-86)
2. He does not remember the circumstances surrounding these purchases. He remembers, however, that he purchased extended warranties or protection plans – for him, these terms are the same.
3. In both cases, the salesperson told him that after one year, there was no longer a warranty on the appliances. He cannot specify the words used by the salesperson or the meaning of the representations, that is, whether it was the end of the manufacturer’s warranty or that there was no warranty whatsoever after one year.[[87]](#footnote-87)
4. He confirmed that he also did not read the pamphlet describing the protection plan before purchasing it.

*Comments*

1. The transcript of Mr. Lacoste’s pre-trial examination shows how vague his memory is about both the circumstances surrounding the purchase of goods from Brault & Martineau and the salespersons’ representations regarding the protection plan.
2. The Court cannot draw any conclusion on the wording of these representations, especially since his testimony makes no mention of the Impugned Representation, that is, [translation] “that the salesperson said that if he did not purchase an extended warranty and there was a breakdown after the manufacturer’s one-year warranty expired, he would have to pay the costs of repair”.
3. This testimony therefore adds nothing to the evidence of the Impugned Representation.

#### Claude Bernier

*His account*

1. Claude Bernier purchased an extended warranty or protection plan seven times between November 30, 2005, and April 15, 2010, when he purchased electronic devices or household appliances at the Repentigny store.[[88]](#footnote-88)
2. Mr. Bernier has been a client of Brault & Martineau since the early 1990s. His memory is generally good on the circumstances surrounding the purchases of the extended warranties.
3. He stated that although the words used might have differed from one salesperson to another, his understanding was always the same:

[translation]

that is, we were securing the purchase of our appliance for a longer period if it broke down. We would not have to purchase another one … they all just said, [translation] “You will not have to pay the costs of replacement or repair”.[[89]](#footnote-89)

1. The salesperson’s representations on the protection plan were based on the duration of the manufacturer’s warranty and when it expired. Mr. Bernier provided the following answers on this subject:[[90]](#footnote-90)

[translation]

Q. When they told you about it, the extended warranty, were you told, [translation] “At the end of the manufacturer’s warranty, well, the manufacturer no longer guarantees your good, and you will then benefit from an extended warranty”?

A. Yes.

Q. Is that right?

A. Yes.

Q. Were you ever told about the legal warranty?

A. Never.

Q. You were told about the manufacturer’s warranty?

A. Right.

Q. About the fact that it would expire?

A. Yes.

Q. And that if you wanted to be protected the same way after the manufacturer’s warranty, you had to purchase an extended warranty?

A. Precisely.

Q. And you were told this every time?

A. Right.

…

**THE WITNESS:**

Yes, because it could vary from one salesperson to another. The salesperson’s phrasing changed, but the idea was the same, that is, we were securing the purchase of our appliance for a longer period if it broke down. We wouldn’t have to purchase another one.

 [Emphasis added.]

1. He also confirmed that he was given the pamphlet describing the protection plan at the cash after making his payment.

*Comments*

1. It should be noted at the outset that Mr. Bernier’s testimony is more precise than most of the other members who were examined on the Impugned Representation. Its probative value is that much more certain.
2. The representations he reports essentially repeat the definition of “contract of additional warranty” set out in the *CPA*. It reads as follows:

 **1.** In this Act, unless the context requires otherwise,

…

(e.1)“contract of additional warranty” means a contract under which a merchant binds himself toward a consumer to assume directly or indirectly all or part of the costs of repairing or replacing goods or a part thereof in the event that they are defective or malfunction, otherwise than under a basic conventional warranty given gratuitously to every consumer who purchases the goods or has them repaired;

1. The merchant cannot be faulted for informing the consumer about the existence and duration of the manufacturer’s warranty and the characteristics of the additional warranty. Also, as the Court of Appeal stated in *Fortier*, before the *CPA* amendments came into force on June 30, 2010, the merchant had no obligation to inform the consumer of the legal warranty or its scope.
2. Essentially, Mr. Bernier reports that the salesperson told him that to keep the same protection as that provided by the manufacturer’s warranty when it expired, he would have to purchase an additional warranty.

#### Jonathan Bilodeau

*His account*

1. Another class member, Jonathan Bilodeau, reports having made two purchases of household appliances.
2. The first, on September 17, 2005, included a washer, a dryer, and a range, and was accompanied by the purchase of a four-year additional warranty.[[91]](#footnote-91) The second, on April 24, 2008, was for a dishwasher and was also accompanied by a four-year [translation] “gold” protection plan.[[92]](#footnote-92)
3. Mr. Bilodeau has a vague memory of the circumstances surrounding these purchases.
4. Nevertheless, he specified that in both cases, the salesperson explained the options and benefits of the protection plan to him, using the pamphlet. However, he was given this document only at the time of payment.

*Comments*

1. Contrary to what counsel for the plaintiffs assert, the only part of the pamphlet to which the salesperson referred during his discussion with Mr. Bilodeau was the section setting out the benefits of the protection plan. The Court cannot infer from the use of the pamphlet that the discussion also addressed the fact that, in the absence of an additional warranty, Mr. Bilodeau would have to pay the costs of repair or replacement of the goods purchased if there was a breakdown.
2. In fact, during his testimony, Mr. Bilodeau never referred to such a representation being made to him by the salesperson.

#### Christiane Dechêne

*Her account*

1. As a class member, Christiane Dechêne was called by the plaintiff to testify on the purchase of an additional warranty on a television purchased from Ameublements Tanguay.
2. Ms. Dechêne reports that on December 26, 2008, she and her spouse went to Ameublements Tanguay to purchase a television. Prior to this visit, she had talked to her colleagues about the characteristics she wanted in the television she intended to buy. When she arrived at the store, she told the salesperson what she was looking for. Once the television was identified, the salesperson told her that it was covered by a one-year manufacturer’s warranty and therefore recommended that she purchase an extended warranty, noting that any repairs after the manufacturer’s warranty expired could be costly. Ms. Dechêne declined this offer because she already considered the cost of purchasing the television to be high for her budget.
3. A few months later, on August 24, 2009, as the manufacturer’s warranty was about to expire, she purchased an additional warranty by telephone covering the television until December 27, 2013.[[93]](#footnote-93) She does not remember whether she made the call herself or whether Ameublements Tanguay contacted her. Ultimately, she considered it prudent to purchase such a warranty, and her budget now allowed her to do so.
4. Finally, she stated that she had never purchased an extended warranty before, except once from Best Buy.

*Comments*

1. The Court cannot ascribe any probative value to Ms. Dechêne’s testimony. Here is why.
2. First, because she has serious memory lapses.
3. When questioned as to whether she had purchased anything else from Ameublements Tanguay in addition to the television, she answered in the affirmative, specifying that she had purchased a washer, a dryer, a refrigerator, and a digital camera. When cross-examined on the subject, she had no memory of thirteen invoices representing the purchase of furniture, household appliances, and electronic equipment from Ameublements Tanguay for the period between 2000 and July 2009 and four others between 2013 and 2021.[[94]](#footnote-94)
4. Similarly, she forgot about the purchase of additional warranties. She stated that she had bought only one from Best Buy, whereas ten of the Ameublements Tanguay bills referred to in the preceding paragraph confirm their purchase.
5. The same is true when she stated that she had never availed herself of the benefits of an extended warranty, except with respect to a stain on an armchair, but she was then confronted with documents indicating four service calls for other furniture and appliances between 2007 and 2009.
6. Second, even though she has no memory of her many purchases of additional warranties from Ameublements Tanguay, she persistently restated that the salespersons, of whom she has no memory, must have repeated to her that if she did not purchase such a warranty and there was a breakdown after the manufacturer’s warranty expired, she would have to pay the costs of the repair or replacement.
7. In other words, Ms. Dechêne seems to have been conditioned to repeat the leitmotif of this action.
8. The Court is not criticizing Ms. Dechêne. Other than the representative plaintiff, she is the only class member in the Ameublements Tanguay file who testified, and she did so in difficult circumstances (shortly after undergoing surgery).
9. The plaintiff Cantin chose not to call other class members to testify on the Impugned Representation and limited himself to filing bills representing the purchase of additional warranties by some of the class members (Réal Fournel, Jean-Marc Gauthier, Nancy Hamel, Serge Laguerre, Diane Maheux, Martine Poirier, Pierre-Paul Tessier, Louise Webster-Denis, Nancy Barrette, Alain Carré, and Denis Dubé) without any details on the circumstances surrounding these purchases or the representations that may have been made by the salespersons.

\*\*\*

1. Last, a word on the objection raised *a posteriori* by counsel for the plaintiffs concerning the purchases made by Ms. Dechêne other than the one discussed in her examination-in-chief (purchase of the television on December 26, 2008, and of the related additional warranty on August 24, 2009).
2. Let us first place this in context.
3. The last witness at the hearing, Ms. Dechêne, was heard on September 27, 2022. No objection was raised when her other purchases at Brault & Martineau were raised during her cross-examination.
4. Next, the Court heard the parties’ arguments from October 3 to 6. In reply, on October 11, counsel for the plaintiffs raised for the first time an objection to the questions posed by counsel for Emblements Tanguay about Ms. Dechêne’s other purchases using information this merchant had about her.
5. This objection is based primarily on the following provisions of the *Act respecting the protection of personal information in the private sector* (the *Act*):[[95]](#footnote-95)

**12.** Once the object of a file has been achieved, no information contained in it may be used otherwise than with the consent of the person concerned, subject to the time limit prescribed by law or by a retention schedule established by government regulation.

**13.** No person may communicate to a third person the personal information contained in a file he holds on another person, or use it for purposes not relevant to the object of the file, unless the person concerned consents thereto or such communication or use is provided for by this Act.

**14.** Consent to the collection, communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested.

Consent given otherwise than in accordance with the first paragraph is without effect.

1. According to counsel for the plaintiffs, in the absence of Ms. Dechêne’s consent to the use of her personal information for the purposes of this dispute, Ameublements Tanguay could not communicate it to its counsel or use it during its cross-examination.
2. Counsel for the plaintiffs add that, in accordance with article 2858 CCQ, the Court must, even of its own motion, reject such evidence, as it violates Ms. Dechêne’s fundamental rights and freedoms and its use would tend to bring the administration of justice into disrepute.
3. With respect, this objection, which was raised rather late, has no merit.
4. First, section 18 of the *Act* sets out exceptions to the rule requiring the consent of the person concerned, in particular in judicial matters:

**18.** A person carrying on an enterprise may, without the consent of the person concerned, communicate personal information contained in a file he holds on that person

(1) to his attorney;

(2) to the Director of Criminal and Penal Prosecutions if the information is required for the purposes of the prosecution of an offence under an Act applicable in Québec;

(3) to a body responsible, by law, for the prevention, detection or repression of crime or statutory offences who requires it in the performance of his duties, if the information is needed for the prosecution of an offence under an Act applicable in Québec;

(4) to a person to whom it is necessary to communicate the information under an Act applicable in Québec or under a collective agreement;

(5) to a public body within the meaning of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A‐2.1) which, through a representative, collects such information in the exercise of its functions or the implementation of a program under its management;

(6) to a person or body having the power to compel communication of the information if he or it requires it in the exercise of his or its duties or functions;

(7) to a person to whom the information must be communicated by reason of the urgency of a situation that threatens the life, health or safety of the person concerned;

(8) to a person who is authorized to use the information for study, research or statistical purposes in accordance with section 21 or a person authorized pursuant to section 21.1;

(9) to a person who is authorized by law to recover debts on behalf of others and who requires it for that purpose in the performance of his duties;

(9.1) to a person if the information is needed for the recovery of a claim of the enterprise;

(10) to a person in accordance with section 22, in the case of a nominative list.

A person carrying on an enterprise must make an entry of every communication made under subparagraphs 6 to 10 of the first paragraph. The entry is part of the file.

The persons referred to in subparagraphs 1, 9 and 9.1 of the first paragraph who receive communication of information may communicate the information to the extent that such communication is necessary, in the performance of their duties, to achieve the purposes for which they received communication of the information.

 [Emphasis added.]

1. The Court of Appeal in *9083-2957 Québec inc. c*. *Caisse Populaire de Rivière-des-Prairies*,[[96]](#footnote-96) confirmed that [translation] “as a general rule, the *Act respecting the protection of personal information in the private sector* does not prohibit the disclosure of documents in the context of a legal proceeding”.[[97]](#footnote-97)
2. Relying in particular on the provisions of section 18 of the *Act*, it added:

[translation]

[21] Our Court has found that these provisions have the effect of removing the restrictions set out in this type of legislation from the courts. Our Court added that if there were confidential aspects to be protected, the judge was perfectly able to issue the appropriate orders to that end. In fact, in *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743, the Supreme Court established an implicit rule of confidentiality for all evidence disclosed during a pre-trial examination.

 [Emphasis added.]

1. Second, a party to a dispute who introduces confidential information or testifies on the content of such information waives the right to invoke secrecy.[[98]](#footnote-98)
2. Ms. Dechêne testified as a class member and, through counsel for the plaintiffs, introduced evidence of the purchase of an extended warranty in August 2009 for the purpose of demonstrating that the salesperson used the Impugned Representation, thus supporting her claim for damages. In so doing, not only did she act as a party to the dispute, but she waived the confidentiality of information related to her purchases from Ameublements Tanguay inasmuch as they are relevant, which is the case here.
3. Article 2858 CCQ, invoked by counsel for the plaintiffs to exclude this evidence, reads as follows:

**2858.** The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute.

The latter criterion is not taken into account in the case of violation of the right of professional secrecy.

1. The conditions in which Ms. Dechêne’s private information on her purchases from Ameublements Tanguay was obtained comply with the requirements of the *Act* and, moreover, Ms. Dechêne waived secrecy by agreeing to testify on some of her purchases at the request of counsel acting on her behalf.
2. In addition, this information is relevant because it is related to the additional warranties bought by Ms. Dechêne when she purchased goods from Ameublements Tanguay, which are at the heart of the debate.
3. Contrary to what counsel for the plaintiffs contend, Ms. Dechêne’s situation is clearly distinguishable from that of Ms. Houle in *Ville de Mascouche*,[[99]](#footnote-99) whose private conversations in her residence had been unlawfully intercepted without her knowledge by a neighbour who then disclosed the content to the mayor of Mascouche, resulting in her dismissal. The Court of Appeal found that there had been a clear violation of Ms. Houle’s right to privacy in a context that in no way justified such an invasion and that the use of such information as evidence was likely to bring the administration of justice into disrepute.
4. The objection raised *a posteriori* related to the questions put to Ms. Dechêne on her other purchases from Ameublements Tanguay is without merit.
5. The same conclusion also applies to the other purchases made by Ms. Osi from Brault & Martineau for which a similar objection was raised *a posteriori* by counsel for the plaintiffs. It should be noted in this regard that she made and paid for the purchases of goods in the name and for the benefit of her son.

\*\*\*

1. In summary, the plaintiffs, who have the burden of proof, have failed to establish on a balance of probabilities that the Impugned Representation was used by the salespersons.
2. The Court cannot make up for the absence of evidence by using the information set out in the warranty plan’s explanatory pamphlet, in particular that set out on page 3, the content of which is described in paragraph 109 of this judgment. The evidence clearly establishes that this pamphlet is given to the client only once the transaction has been finalized and the payment has been made. The decision to purchase the additional warranty precedes this step.
3. In this respect, recall the following comment of the Court of Appeal when it authorized this action:[[100]](#footnote-100)

[translation]

[78] In my view, if the appellants’ application were to be authorized, the class should be better circumscribed to include only persons who purchased an additional warranty before June 30, 2010, based on the representations of one of the respondents that if he or she did not purchase this additional warranty and there was a breakdown after the manufacturer’s one-year warranty expired, he or she would have to pay the costs of repair or replacement. With respect, persons [translation] “who were offered” an additional warranty but did not purchase it suffered no prejudice and should accordingly be excluded from the class.

[Emphasis added.]

1. This position is in fact repeated in the description of the class, which starts with the following words: [translation] “Persons who purchased an additional warranty before June 30, 2010, based on the respondent’s representations …”.
2. In addition, in light of the testimony, the Court cannot conclude that between 2005 and June 30, 2010, the Impugned Representation was used to sell 773,704 additional warranties at Brault & Martineau and 604,617 at Ameublements Tanguay. Not even the slightest probative evidence was adduced of the repetitive and systematic nature of a representation made by the salespersons that could be associated with the content of the Impugned Representation.

## Is the Impugned Representation inherently false or misleading?

1. Despite the foregoing analysis finding that there is no probative evidence establishing the use of the Impugned Representation, can it nevertheless be characterized as false or misleading?
2. Recall that according to *Time*, the analysis required under section 218 *CPA* must consider the Impugned Representation as a whole, in its context. A single reading of the whole should suffice to assess the general impression formed when viewed through the eyes of a credulous and inexperienced consumer to determine whether it is false or misleading and thus constitutes a prohibited practice.[[101]](#footnote-101)
3. The characterization of “misleading” refers to [translation] “[that which] induce[s] error with respect to facts or intentions by using lies, dissimulation and cunning”.[[102]](#footnote-102)
4. In the Court’s view, the general impression formed as a result of the Impugned Representation made to a credulous and inexperienced consumer is as follows:
5. there is a one-year manufacturer’s warranty on the product purchased;
6. after this warranty expires, the consumer must pay the costs of repair or replacement of the good if there is a breakdown;
7. unless he or she purchases an additional warranty providing longer protection.
8. Is this representation false or misleading in the context in which it was made?
9. The context is important here.
10. The consumer has just acquired a good that is generally of great value. The purchase of the good is no longer at issue. In most of the cases here, the items purchased were household appliances or electronic devices. As the bills adduced into evidence show, the prices were generally over $500 for each appliance or device and often exceeded $1,000 (that is the case, in particular, for the refrigerators and some televisions).
11. Because the manufacturer’s conventional warranty is limited to one year (or to any other period specified), the consumer undoubtedly wondered what would happen in the event of breakdown.
12. As indicated above, at that time, the merchant had no obligation to inform the consumer of the existence or the terms of the legal warranty covering the good. It was only on June 30, 2010, that the *CPA* was amended to require that the consumer specifically be informed in accordance with the terms established in the regulations. In fact, the Court of Appeal recognized this in the judgment authorizing the class action in these files.[[103]](#footnote-103)
13. By indicating that, in the absence of an extended warranty, the consumer would have to pay the costs of repair or replacement if there was a breakdown after the manufacturer’s warranty expires, is the Impugned Representation true to reality?
14. First, if the breakdown is not the result of a defect covered by the legal warranty, the costs are clearly the consumer’s responsibility.
15. Second, what happens if the good is possibly affected by a latent defect covered by the legal warranty?
16. Sections 37 and 38 *CPA* are a specific application of the concept of latent defect.[[104]](#footnote-104) Due to the presumptions conferred by the *CPA*, the consumer must establish (i) that the defect prevents the normal use of the good or that the loss of use is serious, and (ii) that he or she was unaware of the defect at the time of the sale.[[105]](#footnote-105) Each case turns on its own facts.
17. It is therefore up to the consumer to take the necessary steps to assert his or her rights with the merchant or manufacturer.
18. First, the consumer must report the problem and provide explanations so that they can take a position. If, for one reason or another, the merchant and the manufacturer deny all liability, the consumer will then not only have to repair or replace the good at his or her expense, but also, the consumer will often have to call upon an expert if he or she wishes to take steps to obtain compensation.
19. If the merchant or manufacturer continues to deny liability, the consumer will ultimately have to apply to the courts to obtain reimbursement of the expenses incurred to repair or replace the good, provided he or she is successful. To this must be added the resulting delay and inconvenience, as well as the costs that are often incurred in relation to the steps themselves.[[106]](#footnote-106)
20. This situation was in fact recognized by the Office de la protection du consommateur in its online publications during the relevant period. When addressing the legal warranty as opposed to additional warranties, the Office indicated the following:

[translation]

What is being sold is very often a certain peace of mind, because there is no denying that compliance with the legal warranty often requires repeated assertive requests by the consumer, who sometimes must even apply to the Court (generally the Small Claims Division). Unfortunately, this is also sometimes the case for additional warranties, as the interpretation of exclusion clauses is often the subject of dispute before the courts.[[107]](#footnote-107)

When a dispute arises with respect to a consumer good that breaks down, the merchant often asserts that the warranty of the seller or of the manufacturer has expired or that the consumer did not purchase an additional warranty.

Another argument often raised by merchants is that the breakdown is not covered by these warranties. The merchant then asks the consumer to pay the entire cost or to pay for the part or the labour. This can represent a significant amount, for example, in the case of a heat pump compressor.

Do not be fooled by these manoeuvres. If the aspects of the legal warranty discussed above apply, enforce them against the seller or the manufacturer. The *Act* states that they are both liable under the legal warranty. Otherwise, you can bring your case before the Court.

*In summary*

As the examples set out above show, the application of the legal warranty set out in the *Consumer Protection Act* requires a case-by-case analysis. Nevertheless, there is a good chance that it will weigh in your favour if you establish that the problem that has occurred prevents the good from being used normally or for a reasonable length of time considering its price and proper use.[[108]](#footnote-108)

[Emphasis added.]

1. Some of the comments made, in particular by Mr. Cantin during his testimony, echo the explanations provided by the Office de la protection du consommateur on the exercise of the legal warranty.
2. Even if in the clearest of cases, the merchant or manufacturer may agree to repair or replace the good without the consumer having to go before the courts, the evidence is silent as to the percentage of cases where this occurs.
3. Is it any surprise, then, that the consumer finds some comfort in the additional warranty offered by the salesperson, which not only extends the manufacturer’s warranty for a four-year period (depending on the case), but also adds certain benefits described above.[[109]](#footnote-109)
4. That is the view expressed by the Court of Appeal in its judgment authorizing these actions.[[110]](#footnote-110) Dufresne J.A. stated the following on this point:

[translation]

[109] The additional or extended warranty provides the consumer with greater peace of mind. There is no need to invoke the *Act* and its presumptions. In the event of a breakdown or defect, the consumer simply relies on the terms of the additional warranty. The breakdown or defect need not be akin to a latent defect. The consumer need not invoke the presumption that it is a latent defect that occurred prematurely. In fact, if, as the appellants argue, the additional warranties add nothing to the legal warranty, why did the legislature prescribe rules and terms regulating the sale of additional warranties rather than prohibit their sale, unless it is because the legal warranty and the additional warranty are neither identical nor equivalent. The absence of an obligation to establish the presence of a latent defect or to debate whether there is one is also not insignificant. All of these characteristics and distinctions emerge clearly from the record.

[Emphasis added.]

1. The opinion of Chief Justice Duval Hesler C.J.Q., dissenting, while agreeing with the view expressed by Dufresne J.A. on this point, pushes the reasoning a little further by stating the following:

[translation]

[171] Moreover, clarification is required with respect to the representation that must be assumed to be true. Rather than saying that no warranty applies after one year, the essence of the representation is that the costs must be borne by the appellants after that period. In the absence of a conventional extended warranty, the appellants will indeed first have to pay the costs of repair. Only if they discharge their burden of proving a latent defect prior to the sale will the Court order the respondents to reimburse them. Because the outcome of such proceedings are uncertain to say the least, it is understandable that the respondents described as they did the situation that would prevail once the manufacturer’s warranty expires. I see no false representation there.

[Emphasis added.]

1. In the Court’s view, given the context, the Impugned Representation is neither false nor misleading from the perspective of a credulous and inexperienced consumer.
2. When asked by the Court to specify what was false or misleading about the Impugned Representation, counsel for the plaintiffs submitted that the mere suggestion that there is no longer any protection after the manufacturer’s warranty expires ([translation] “you must pay for the repairs”; “you are *on your own*”) is, in itself, a misleading representation. In the Court’s view, however, a credulous and inexperienced consumer would instead understand that, if he or she thinks that the good has a defect, it will be up to him or her to take the necessary steps and to pay the resulting costs and expenses until the defect can be proved and, where applicable, the reimbursement obtained.
3. The same conclusion applies if we were to include Comerco’s pamphlet describing the extended warranty in the Impugned Representation.
4. The pamphlet first describes the additional benefits provided by the protection plan. The evidence confirms Comerco’s compliance with the undertakings in the pamphlet, in particular towards the representative plaintiffs Touré and Cantin, as well as Ms. Dechêne.
5. The text of the pamphlet under the titles [translation] “Coverage beyond the manufacturer’s limited warranty” and [translation] “Avoid costly repairs” also does not seem misleading in light of the foregoing analysis of the consumer’s exercise of the rights conferred under the legal warranty.
6. Finally, the terms and conditions of the protection plan are clear and were not the subject of any real debate on their application.
7. In closing, recall that, in this case, the plaintiffs do not allege any disproportion between the price paid for the additional warranty and its inherent value. Therefore, the Court need not consider this aspect to settle the debate.

\*\*\*

1. It should be noted at the outset that what follows in no way influences the preceding conclusions.
2. However, the Court finds it useful here to share a reflection that was in fact the subject of discussion with counsel for the intervenor, the president of the Office de la protection du consommateur, during the hearing.
3. Inasmuch as the Impugned Representation is inherently a prohibited practice, as the intervenor argues, the Court finds it surprising that penal proceedings under section 277 *CPA* were not instituted against the defendants.
4. The Court does not wish to associate a civil action under section 272 *CPA* with section 277 *CPA*, or submit the exercise of such an action to that provision, but the circumstances surrounding the sale of additional warranties by furniture, appliance, and electronics merchants make it a rather particular case.
5. The *CPA* contains specific rules for additional warranties on automobiles and motorcycles adapted for transportation on public roads. In this specific situation, every merchant who offers or makes such a contract must (i) hold a permit issued by the Office de la protection du consommateur (s. 321(d) *CPA*), (ii) maintain in a trust account a portion equal to not less than 50% of any sum the merchant receives as consideration for such a contract (ss. 260.7 and 260.8 *CPA*), and (iii) use this account only to pay claims arising from contracts of additional warranty (s. 260.11 *CPA*). In short, there is a form of control over the sale of additional warranties for these types of products.
6. The legislature, in its wisdom, chose not to include specific provisions for additional warranties on other goods in the *CPA*.[[111]](#footnote-111)
7. For almost 15 years, additional warranties sold by furniture, appliance, and electronics merchants have been the subject of a number of class actions that have raised the same issues as in this case and other similar cases.
8. In addition to the judgments rendered in this case and in the Related Files, the case law cited by the parties includes the following:
* *Cantin et Routhier c*. *Ameublements Tanguay et al.*;[[112]](#footnote-112) this file includes a series of actions brought against the same companies as those in these proceedings and the Related Files, in addition to other parties, with respect to representations made when additional warranties were sold after June 30, 2010;
* *Tremblay c*. *Centre Hi-Fi Chicoutimi (9246-9352 Québec inc.) et al.*;[[113]](#footnote-113) this file raises the same issues as in the preceding file concerning additional warranties purchased after June 30, 2010;
* *Union des consommateurs c*. *Magasins Best Buy (Future Shop Entrepôt de l’électronique, Future Shop et Best Buy)*;[[114]](#footnote-114)this file concerns the price of additional warranties and the merchant’s obligations during the manufacturer’s warranty;
* *Hébert* *c*. *149667 Canada inc. (Centre Hi-Fi)*;[[115]](#footnote-115) this file also raises the legality of representations made at the time additional warranties were sold.
1. In addition, an application for authorization was recently filed in *Jean-Philippe Gaudreault c*. *Brault & Martineau, Ameublements Tanguay, The Brick Warehouse et AM-CAM Électroménagers*,[[116]](#footnote-116) also concerning the price of additional warranties.
2. In view of the flood of class actions related to additional warranties alleging prohibited practices under the *CPA* over a rather long period, the Court questions the reserve shown by the intervenor, who has merely intervened in the class actions, once authorized, to support the plaintiffs with respect to the issues concerning the interpretation of the *CPA*, which she is of course entitled to do.
3. If the practices challenged by these actions clearly violate the *CPA*, why has the intervenor not exercised the appropriate remedies at her disposal against the offenders to fulfill her mandate of ensuring compliance? Should this not be even more true where the existence of damages is difficult to assess or quantify, as is the case here, as established below?
4. Of course, one of the objectives of class actions is to serve “efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public”.[[117]](#footnote-117) More specifically, the case law recognizes that class actions pursue the twin goals of deterrence and victim compensation.[[118]](#footnote-118)
5. Should we not, however, avoid confusing the class action’s objectives with the state’s role of ensuring compliance with its laws, in particular by taking penal action in the event of an offence?
6. In the specific case of additional warranties for furniture, appliances, and electronics, the impression is that the public authority in a way leaves it up to citizens to ensure compliance with the *Act*. To the extent that the Impugned Representation is inherently unlawful, as the intervenor submits, we would expect her to assume her role of ensuring compliance with the *Act*.
7. The exercise of a class action, which seeks primarily to obtain a civil remedy for harm caused to a group of persons, is no substitute for a penal action, which seeks to ensure compliance with the law.
8. Last, it should be noted that although the exercise of a class action, by its very nature, reduces the number of individual actions arising from the same source and therefore results in judicial economy, the procedure it involves uses many more judicial resources than penal proceedings for an offence under the *Act*.
9. Thus, far from supporting the plaintiffs’ theory in this case, the intervenor’s attitude in the circumstances casts doubt on the existence of a prohibited practice.
10. A broader and more thorough reflection is required on the respective roles of the state and of citizens in the pursuit of compliance with the law.

# PRESCRIPTION

1. Brault & Martineau and Ameublements Tanguay submit that, in the event the Court were to conclude that a prohibited practice was used, the claims of the representative plaintiffs and of several members are prescribed.
2. In view of the conclusions reached above, it no longer seems necessary to decide this issue. However, out of respect for the parties, the Court will explain the results of its analysis.
3. It should be noted at the outset that although the definition of the class in each case specifies the end of the period covered by this action (the purchase of an additional warranty before June 30, 2010), it does not specify the starting date.
4. In their damage calculation hypotheses, counsel for the plaintiffs propose two possible assessment periods:
* from January 1, 2005, to June 30, 2010; or
* from November 15, 2007 (for Brault & Martineau), and from November 24, 2007 (for Ameublements Tanguay), to June 30, 2010; the start of these periods corresponds to three (3) years before the applications for authorization were filed.
1. The end of the period set for June 30, 2010, is clear: it is the date the *CPA* was amended, which the Court of Appeal in fact accepted in its authorization judgment.
2. The starting date of the period going back to three (3) years before the applications for authorization were filed also appears logical. It is the prescription period set out in article 2925 CCQ to assert a personal right.
3. However, no explanation was provided to justify the period starting on January 1, 2005. The Court was not able to understand the underlying reason or rationale for this. Nevertheless, it notes the following comment made in the authorization judgment:[[119]](#footnote-119)

[translation]

[138] The evidence in the files does not reveal circumstances that would have had the effect of suspending the prescription period and placing the appellants in a situation of impossibility to act on their claims. In fact, the appellants do not allege or invoke an impossibility to act. Rather, they submit that the respondents’ fraudulent conduct suspends prescription.

## Suspension of prescription

1. Indeed, counsel for the plaintiffs submit that prescription is suspended for all the representative plaintiffs and the members because the Impugned Representation arises from the defendants’ fraud in this case and, accordingly, they cannot raise prescription since they are the cause of the error they have suffered.
2. This argument is based on excerpts drawn mainly from two judgments of the Court of Appeal.
3. In the first judgment, *Bouffard c*. *Paul*,[[120]](#footnote-120) the plaintiffs sought the nullity of an agreement by which they acquired shares in a Venezuelan company, as well as damages. Essentially, they alleged that they had been encouraged to enter into a partnership agreement on the basis of the defendant’s misrepresentations and, accordingly, they invoked error as the basis for annulling it.
4. The defendant, relying on certain actions taken by the plaintiffs, argued that their inexcusable error justified the dismissal of their application (article 1400, para. 2 CCQ).
5. Citing *Belisle c*. *Gestion Paradigme inc.*,[[121]](#footnote-121) the Court of Appeal rejected the defendant’s argument and stated that:

[translation]

[54] As I have concluded that the respondent committed fraud, the appellants’ conduct cannot be characterized as inexcusable within the meaning of article 1400, para. 2, CCQ. Indeed, persons who commit fraud cannot be authorized to blame their victims for not discovering their subterfuge.

1. It should be noted that prescription was not an issue in that case. This excerpt merely confirms that in cases where defects of consent are argued by one of the parties to a contract, a person who committed fraud cannot set up inexcusable error against his or her victim who contracted on the basis of his or her fraudulent misrepresentations.
2. In the second judgment, *Imperial Tobacco*,[[122]](#footnote-122) counsel for the plaintiffs refers to the following paragraph:

[translation]

[1071] Under the C.P.A., punitive damages may be awarded when all the criteria of the irrebuttable presumption of harm in section 272 are met and the member has sufficient knowledge, for example, of the fraudulent or misleading nature of the representations or that a material fact has been omitted. A Member’s right of action arising assumes that he or she was aware of the elements comprising the appellants’ liability. It is therefore wrong to claim, as JTM does, that prescription began to run when a member started smoking by purchasing his or her first pack of cigarettes following a false or misleading or incomplete representation. On the contrary, *each* pack of cigarettes purchased by a member as of the coming into force of the C.P.A. constitutes a potential pending cause of action.

[Emphasis added.]

1. In that case, cigarette manufacturers were found liable for misleading advertising to consumers who had purchased their products.
2. The passage cited by the plaintiffs is found in the section on punitive damages. The Court analyzed the applicable prescription period, the criteria for which are different depending on whether the award is made under the *Charter* or the *CPA*.
3. Without in any way questioning the comments set out in that quotation, it should nevertheless be noted that they were made in *obiter dictum* because in that case, the Court of Appeal was content to award the damages under the *Charter*, not the *CPA*.
4. In any event, these comments confirm the state of the law on extinctive prescription: the right of action arises at the moment a reasonable person would have become aware of the constitutive elements of his or her right of action (article 2880, para. 2, CCQ).
5. Article 2904 CCQ is the corollary to this. It specifies that prescription cannot start to run if it is impossible in fact for a person to act.
6. Author Céline Gervais[[123]](#footnote-123) addresses the scope of these principles, in particular when the right of action results from fraud, specifying that:

[translation]

With respect to the suspension of prescription, and more particularly in the case of fraud, prescription will be suspended until the victim discovers the facts, as long as he or she acted diligently. If the opposing party has hidden the facts, that is a genuine impossibility to act, and the plaintiff will not be required to have made inquiries to discover something that which he or she could not suspect existed.

[Emphasis added.]

1. Note that impossibility to act justifying the suspension of prescription must result from the victim’s lack of knowledge of the facts giving rise to his or her claim despite having acted diligently in this respect. Author Gervais adds:[[124]](#footnote-124)

[translation]

It follows that if the plaintiff is not aware of the elements of liability due to his or her own negligence or failure to monitor his or her affairs, in short, if as a result of this lack of vigilance, the plaintiff is not aware of the facts giving rise to his or her claim, prescription will continue to run.

1. There is a distinction between the lack of knowledge of the facts giving rise to an action and the lack of knowledge of the law giving rise to an action.[[125]](#footnote-125) It is well established that ignorance of the law does not constitute an impossibility to act and therefore cannot suspend prescription.[[126]](#footnote-126) If that were the case, the rule that suspension of prescription is exceptional would lose all meaning. Professor Martineau recognized this in the following passage of his treatise on prescription:[[127]](#footnote-127)

[translation]

To accept ignorance as a reason to suspend would be akin, for all practical purposes, to setting aside the principle that prescription runs against everyone. Indeed, the right holder’s inaction is most often the result of ignorance of his or her right. As a general rule, those who are unaware of their rights will neglect to act to protect them. Suspending prescription in their favour would mean that the application of prescription is limited. That seems contrary to the scheme of that institution and to the intention of the legislature, which wanted suspension to be exceptional and that it be interpreted narrowly so that the rules of prescription are given the broadest possible application.

[Emphasis added.]

1. In this case, the alleged ignorance does not concern the facts themselves. Indeed, the members have been aware of the content of the Impugned Representation since the day they purchased the additional warranty. And the situation would not be different if we were to consider the content of the protection plan: they were given the pamphlet at the time of payment.
2. Instead, what is at issue here is ignorance of the existence of the legal warranty. However, ignorance of the law is no excuse.[[128]](#footnote-128) The suspension of prescription cannot depend on the moment a member decides to consult a competent professional:[[129]](#footnote-129)

[translation]

Indeed, anyone who wishes to understand the law or verify its scope of application is free to consult a competent professional. Thus, prescription would run against a vigilant person who consults a professional to verify the accuracy of the interpretation provided by his or her co-contracting party, while a person who did not do so would benefit from the suspension of prescription. The starting point for prescription in this scenario would depend on the goodwill of the person claiming to have been misled with respect to his or her right.

[Emphasis added.]

1. Accordingly, in this case, the starting point of the three-year prescription under article 2925 CCQ corresponds to the day on which the additional warranty was purchased. It should be noted that for contracts signed before December 14, 2006, the *CPA* specifically provided in section 273 that an action based on the *CPA* was prescribed by three years from the making of the contract. This provision was repealed on that date. Since then, the prescription set out in the CCQ applies.

## The date used to calculate prescription

1. As the action of the representative plaintiffs and the members is subject to a three-year prescription period from the date the additional warranty contracts were signed, it is necessary to determine the date on which this calculation must be performed.
2. **Counsel for the plaintiffs submit that the date of the initial application for authorization was filed should be used, that is, November 15, 2007, for the class related to Brault & Martineau and November 24, 2007, for the class related to Ameublements Tanguay.**
3. The date proposed for Brault & Martineau is disputed. Counsel for the defence states that it should instead be April 18, 2008, that is, three years before the judgment authorizing the amendment of the initial application for authorization, incorporating the cause of action at issue in this dispute.
4. Article 2908 is applicable here:

**2908.** An application for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the application.

The suspension lasts until the application for leave is dismissed, the judgment granting the application for leave is set aside or the authorization granted by the judgment is declared lapsed; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the application for leave, a judgment in the course of the proceeding or the judgment on the action ceases to benefit from the suspension of prescription.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

[Emphasis added.]

1. The plaintiffs argue that the initial application for authorization dated November 15, 2007, suspended prescription with respect to all the class members for whose benefit it was made. The amendment authorized on April 18, 2011, did not change that.
2. Brault & Martineau replies that the amendment made on April 18, 2011, added a separate cause of action, which is the one accepted by the Court of Appeal in its judgment authorizing this action, whereas the causes of action of the initial application for authorization were dismissed.
3. In short, at issue here is the interpretation of the words “in favour of all the members of the group for whose benefit it is made” in article 2908 CCQ.
4. In *Traité pratique de l’action collective*,[[130]](#footnote-130) authors Yves Lauzon and Bruce W. Johnston suggest the following interpretation of this terminology:

[translation]

The expression “for whose benefit it is made” means that this suspension affects only the cause or causes of action covered by the application for authorization.

[Emphasis added.]

1. In *Pérès c*. *Québec (Procureur général)*,[[131]](#footnote-131) the Court of Appeal confirmed that article 2908 CCQ [translation] “protects all class members against prescription of the rights arising from the right invoked”.
2. Recall that the initial application for authorization filed on behalf of Mr. Touré was limited to the first two submissions (or causes of action), that is, (i) failing to mention the existence of the legal warranty, and (ii) the uselessness of the additional warranties. The third submission (or cause of action) concerning the Impugned Representation appeared only when the amendment was authorized on April 18, 2011.
3. In the judgment authorizing the class actions at issue here,[[132]](#footnote-132) Dufresne J.A. agreed with the trial judges, who dismissed the applications for authorization concerning the first two submissions, but not the third. He stated the following:

[translation]

[84] In this case, the judges came to the conclusion that the facts alleged in the applications and the other evidence in the record do not appear to justify the conclusions sought. In my view, they are correct with respect to the first two submissions, but not the third, which is a separate cause of action from the first two.

[Emphasis added.]

1. He repeated this language in paragraphs 116 and 125 of the judgment.
2. Because the cause of action based on the Impugned Representation is different from those invoked in the initial application for authorization, the initial application could not suspend prescription for this cause of action.
3. This is in fact, by analogy, the reasoning accepted by the Court of Appeal in *Marineau c*. *Bell Canada*,[[133]](#footnote-133) in which it refused to recognize that an authorization judgment concerning cancellation fees invoiced in the context of a landline telephone contract suspended prescription with respect to the same company’s internet and television services.
4. Counsel for the plaintiffs rely on the judgment rendered by Clément Gascon J.S.C. (as he then was) in *Options Consommateur c*. *Banque de Montréal*[[134]](#footnote-134) and more particularly, on the following passage:

[translation]

[84] In fact, it would be surprising that the legislature wanted members to lose the protection of article 2908 CCQ in a situation where they are clearly covered by the class, but where the action is dismissed because the designated person chosen is not the right person due to his or her lack of a legal relationship.

[85] If that were the case, we would have to seriously question how members included in such a class could protect themselves. Asking the question leads to an insurmountable impasse if we accept the interpretation proposed by the respondents.

1. An important distinction must be made here.
2. In that case, the respondents argued that prescription could not have been suspended because the application for authorization covering the same class in a related file had been dismissed for lack of a legal relationship and sufficient interest.
3. The Court was of the view that the purpose of article 2908 CCQ is to ensure that the rights of a person covered by an action are not affected when that person does not control its exercise[[135]](#footnote-135) and found that the suspension of prescription applies to any application for authorization dismissed for failure to meet any of the conditions set out in article 575 CCP.[[136]](#footnote-136)
4. The cause of action in the related file and in the file before Gascon J. were the same. The members of both classes were therefore the same.
5. In this case, however, it cannot be assumed that the members covered by the initial application for authorization based on the first two causes of action are the same as those covered by the Impugned Representation, which is a different cause of action.
6. Prescription in the Brault & Martineau file therefore applies to the contracts of additional warranty signed before April 18, 2008. With respect to Ameublements Tanguay, prescription applies to the contracts signed before November 24, 2007.

# DAMAGES

1. Like the previous section dealing with prescription, the analysis set out in this section is not necessary in view of the conclusions on the Impugned Representation. It should nevertheless be addressed.
2. The action brought in these files is based on section 272 *CPA*.
3. This provision states that:

**272.** If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

1. the specific performance of the obligation;
2. the authorization to execute it at the merchant’s or manufacturer’s expense;
3. that his obligations be reduced;
4. that the contract be rescinded;
5. that the contract be set aside; or
6. that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

1. In this case, the plaintiffs claim, on behalf of each member, damages equal to the reimbursement of the price of the additional warranty, including taxes.[[137]](#footnote-137)
2. They also claim punitive damages.

## The consumer’s recourse under section 272 CPA

1. The action set out in section 272 *CPA* is independent from the other recourses that a consumer may exercise under the *CPA*.
2. It is based on the premise that any failure to fulfil an obligation imposed by the *Act* may give rise to the application of an absolute presumption of prejudice to the consumer, thus depriving a merchant of the defence of no prejudice to have action dismissed.[[138]](#footnote-138) In this context, the fact that a prohibited practice has been used does not create a presumption that a merchant has committed fraud but in itself constitutes fraud within the meaning of article 1401 CCQ*.*[[139]](#footnote-139)
3. This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the *CPA*. In *Time*,the Supreme Court specified the conditions for the application of this presumption as follows:

[124] … 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.[[140]](#footnote-140) 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.

[Emphasis added.]

1. Once this presumption is established, the consumer does not have to prove that the merchant intended to mislead, as would be required under the rules of civil law in a fraud case. The fault of the merchant or manufacturer is also proved for the purposes of s. 272 *CPA*, and the court can thus award the consumer damages to compensate for any prejudice resulting from that fault.[[141]](#footnote-141)
2. As the Court of Appeal noted in *Imperial Tobacco*, the consumer must establish the quantum in the case of an application for compensatory damages.[[142]](#footnote-142)

## The application for compensatory damages

1. To obtain compensatory damages, the plaintiffs must not only establish the alleged fault by proving the four (4) conditions set out in *Time*, but they must also establish the personal prejudice suffered by each class member and a causal connection between the alleged fault and that prejudice. The exercise of such a recourse is subject to the general rules of civil law and accordingly, it must be possible to assess or quantify the damages claimed.[[143]](#footnote-143)
2. In this case, in both the Brault & Martineau and the Ameublements Tanguay files, the evidence is silent on the prejudice suffered by the class members that can be assessed, with one exception.
3. The only class member questioned on this subject is the representative plaintiff Cantin during his pre-trial examination on September 28, 2015. The following excerpts from his testimony confirm that he is unable to define it:

[translation]

Q. So, what damage did you suffer because you purchased the warranty ...

A. Well, in my ...

Q. ... I call it [translation] “extended” ...

A. Yes.

Q. ... or [translation] “additional” ...

A. Yes.

Q. ... or [translation] “protection plan”?

 We’re talking about the same thing here.

 What damage did you suffer?

A. Well, me, the damage is not sufficiently informing the consumer, like every citizen should be when purchasing a … a product.

 Essentially, I’m representing causes here that seem to be a generally recognized practice in the … the world of retailers, like Corbeil, Bureau en Gros, and all the others we just listed that ...

Q. No.

 But not in this file.

A. Okay.

 Before ...

Q. In this file ...

A. ... before.

 Yes, sorry.

Q. ... you are suing Ameublements Tanguay ...

A. Sorry.

Q. ... only

A. That’s true.

 So, the damage, it’s, listen: not sufficiently informing the client about the legal warranty and what it can – as you said – the steps to take. …

…

Q. …

 But, the damage, other than the fact that you say, [translation] “They should have told me more than what they told me” ...

A. Well.

Q. ... when they told you, [translation] “Well, you deal with it”.

 And then, you, in your mind, you understood that this meant litigation and things ...

A. Yes, yes.

Q. ... of that sort.

 But, the damage ...

A. Well.

 The damage, listen, it’s ... it’s – in my view, it’s the misleading message given to the consumer, to say, [translation] “Well, look, you have the twelve (12) month option, the normal product warranty”.

 After that, well, there is the vagueness of reasonableness that … that isn’t explained, in my view, sufficiently.

 And, I … I’m putting myself in the shoes of the … the – look, the purchase of appliances of … of anything, televisions; how many are there everyday in Quebec?

 If there’s – it’s astronomical, there’s thousands of sales being made.

 And the consumer, even in two thousand and seven (2007), was not informed about those steps.

 And it could have been, I think, interesting for the citizen, the informed consumer could have, at least, had options other than to say, [translation] “Well, look …”

 You know, in my case, the two hundred and fifty bucks ($250) wasn’t too difficult to pay, but I’m putting myself in the shoes of someone else who couldn’t afford it and who barely had enough to make the purchase, to pay another two hundred and fifty ($250) on top of it; it could have made a difference.

 So, if that person had been informed and … uh … sufficiently, it would have, in my view … uh … reassured – at least, it would have made … all citizens or consumers, informed consumers.

 And, in my view, it’s to achieve fairness and justice, here, in … in the purchase of goods.

 [Emphasis added.]

1. The issue to which Mr. Cantin refers falls more to the legislature, which enacted section 228.1 *CPA* in 2010 due to similar concerns,[[144]](#footnote-144) and to the intervenor, who has the power to enforce the *CPA* (s. 277 *CPA*), based on the mere existence of a prohibited practice rather than on the fact that it may have caused prejudice. Section 272 *CPA* is instead intended to protect the private interests of consumers.[[145]](#footnote-145)
2. In short, there is no evidence that would allow the Court to ascertain a quantifiable prejudice suffered by the members in the event the defendants were found liable, which is not the case.

\*\*\*

1. Despite the foregoing, what is the nature of the damages claimed?
2. The plaintiffs claim compensatory damages equal to the price paid by the members to purchase the additional warranties.
3. It should be noted at the outset that there is nothing in the evidence to support the conclusion that the obligations inherent in the additional warranties were not fulfilled. On the contrary, several of the witnesses heard acknowledged having benefitted from the services provided by this warranty. No testimony reported a refusal to honour it.
4. The application for compensatory damages, which claims the total amount paid by the members for the service plan is, indirectly, tantamount to an application for the annulment of the contract while attempting to avoid the restitution of prestations.[[146]](#footnote-146) Even in such a case, the members could not be reimbursed the price paid because they benefitted from the service plan throughout its duration and cannot therefore restore it to the defendant.[[147]](#footnote-147)
5. Alternatively, the plaintiffs propose two scenarios corresponding to a reduction in the value of the price paid for the additional warranties, taking into account their use by the members. The data used for this purpose comes from the defendants.
6. At the outset, this approach poses a major difficulty.
7. The reduction of obligations is an appropriate remedy when the alleged violation reduces the value of the good purchased.[[148]](#footnote-148) That is not the case here.
8. The plaintiffs have also failed to establish a connection between the alleged use of the Impugned Representation and the price of the protection plans that are broader in scope than the legal warranty. Rather, the evidence confirms that Comerco establishes the price using an actuarial study that takes into account not only protection against the risk of breakdown of the goods but also the additional benefits included.
9. The plaintiffs also cannot contend that if the class members had been informed of the existence of the legal warranty, they would not have purchased an additional warranty or that fewer of them would have purchased an additional warranty, for two reasons.
10. First, such an assertion is too abstract and subjective to form the basis of a proper legal syllogism.[[149]](#footnote-149) On what basis could the Court conclude that the prejudice is common to all the members when, according to the plaintiffs, there are 1,378,321 additional warranties at issue here? The exercise seems entirely random.
11. Second, the evidence does not support this assertion. Two of the members heard, Ms. Osi and Ms. Dechêne, continued to purchase additional warranties after having registered for the class actions, at which time it can be assumed that they were informed of the legal warranty. Moreover, the representative plaintiff Cantin, who was informed of the legal warranty by the salesperson, nevertheless decided to purchase an additional warranty because [translation] “it was worth it”.[[150]](#footnote-150)
12. In short, whether we adopt the theory of damages that correspond to the reimbursement of the total price paid by the members for an additional warranty or that of a partial reimbursement, the evidence – the burden of which rests with the plaintiffs – in no way justifies such awards.[[151]](#footnote-151) The Court cannot compensate for this by using a formula based on non-existent evidence.[[152]](#footnote-152)
13. Last, such so-called “compensatory” damages would actually result in a form of unjust enrichment. The members would receive compensation equal to the price paid for the additional warranty, even though they benefitted from the protection and services it provides. In other words, they would receive amounts to which they would not have been entitled had they asked that the contracts of additional warranty be annulled, because, in such a case, the defendants would have been entitled to the restitution of prestations.

## The application for punitive damages

1. Only two allegations in the amended originating applications refer to punitive damages. They are set out in paragraphs 31 and 46.5 in the Brault & Martineau file and in paragraphs 31 and 47.5 in the Ameublements Tanguay file. They read as follows:

[translation]

31. Considering the nature of the breaches of the obligations set out in sections 219, 227, and 228 of the *CPA*, the Defendant must be condemned to pay the Representative plaintiff punitive damages pursuant to section 272 of the *Act*;

46.5. (47.5.) Considering the nature of the breach and the substantial revenue collected based on false or misleading representations, the Plaintiffs are entitled to claim a lump sum of **$2,500,000** in punitive damages from the Defendant.

1. The plaintiffs’ arguments in this regard may be summarized by the following three propositions:
* the objective of the *CPA* is to better protect consumers by creating equilibrium in their contractual relationships with merchants;
* the message conveyed by the salespersons violates this objective by creating a misleading practice;
* the merchants’ conduct is marked by ignorance and carelessness with respect to their obligations to consumers throughout the period covered by the class action.[[153]](#footnote-153)
1. Noting that the violation of a provision of the *CPA* is not sufficient, in itself, to justify an award of punitive damages,[[154]](#footnote-154) the defendants argue that their conduct in no way justifies the award of such damages.
2. The rules governing the award of punitive damages are set out in article 1621 CCQ:

**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 reparatory damages is wholly or partly assumed by a third person.

1. In this case, section 272 *CPA* provides for the award of punitive damages if the merchant fails to fulfil an obligation imposed on it by the *CPA*.
2. In *Time*, the Supreme Court analyzed the obligations and objectives of the *CPA* in awarding punitive damages.[[155]](#footnote-155) It stated the following:

[175]  In establishing the criteria for awarding punitive damages under s. 272 *C.P.A.*, it must be borne in mind that the *C.P.A.* is a statute of public order. No consumer may waive in advance his or her rights under the Act (s. 262 *C.P.A.*), nor may any merchant or manufacturer derogate from the Act, except to offer more advantageous warranties (s. 261 *C.P.A.*). The provisions on prohibited practices are also of public order (L’Heureux and Lacoursière, at pp. 443 *et seq.*).

[176] The fact that the consumer‑merchant relationship is subject to rules of public order highlights the importance of those rules and the need for the courts to ensure that they are strictly applied. Therefore, merchants and manufacturers cannot be lax, passive or ignorant with respect to consumers’ rights and to their own obligations under the *C.P.A.*  On the contrary, the approach taken by the legislature suggests that they must be highly diligent in fulfilling their obligations. They must therefore make an effort to find out what obligations they have and take reasonable steps to fulfil them.

[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.* Obviously, the recourse in punitive damages provided for in s. 272 *C.P.A.*also applies, for example, to acts that are intentional, malicious or vexatious.

[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 punitive damages in the case before it.

[Emphasis added.]

1. It provided the following framework for the application of these principles:[[156]](#footnote-156)

[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.
1. In *Marcotte*,[[157]](#footnote-157) after reiterating these remarks, the Supreme Court added:

[109]    Therefore, with respect for the Court of Appeal, neither evidence of antisocial behaviour nor reprehensible conduct is *required* to award punitive damages under the *CPA*. Rather, what is necessary is an examination of the overall conduct of the merchant, before, during and after the violation, for behaviour that was “lax, passive or ignorant with respect to consumers’ rights and to their own obligations”, or conduct that displays “ignorance, carelessness or serious negligence”.

[Emphasis added.]

1. It should be noted at the outset that the plaintiffs’ first two submissions pose no difficulty: the description and objective of the *CPA* is admitted by the defendants, and the hypothesis of a misleading practice, although vigorously contested by the defendants and rejected by the Court, is used here solely for the purposes of the analysis concerning punitive damages.
2. The Court notes, however, that the evidence is rather scant on the third submission that the defendants’ conduct was marked by ignorance and carelessness. In fact, the plaintiffs’ plan of argument is limited to stating the three elements without referring to any evidence.
3. The defendants submit that in the hypothesis the Impugned Representation is considered a prohibited practice, the application for punitive damages should be dismissed, in particular on the grounds set out in their plan of argument.[[158]](#footnote-158) The Court will return to this.
4. What is the case here?
5. It should be noted at the outset that the plaintiffs do not specify the basis used to calculate punitive damages. The amount claimed is the same is both files, that is, $2,500,000, whereas for the period covered by the application, from January 1, 2005, to June 30, 2010, Brault & Martineau allegedly sold 773,704 additional warranties for the total price of $126,633,663 and Ameublements Tanguay allegedly sold 604,617 for the total price of $75,132,937. Thus, even though Ameublements Tanguay sold 22% fewer additional warranties worth 41% less in value, it would be condemned to pay the same punitive damages as Brault & Martineau. The plaintiffs provide no explanation to validate this inconsistency. The calculation is arbitrary.
6. Turning to the analysis of the defendants’ conduct in the hypothesis that the Court were to find that the Impugned Representation constitutes a prohibited practice because it suggests to the consumer that after the manufacturer’s warranty expires, there is no longer any protection and that accordingly, the consumer will have to pay the costs of repair or replacement of the good purchased should it break down.
7. In other words, what is the degree of seriousness of the defendants’ conduct, which the plaintiffs characterize as [translation] “ignorance and carelessness with respect to their obligations to consumers under the *CPA*”?[[159]](#footnote-159) The Supreme Court directs us to analyze their conduct as a whole.
8. The arguments submitted by the defendants in this respect cannot be disregarded. They refer to proven facts that shed useful light on the assessment of their conduct. An overview follows.
9. First, offering an additional warranty is not prohibited by the *CPA* and, during the period covered by the application, such offer was not subject to any particular condition.
10. Second, as the Court of Appeal decided in *Fortier*, merchants had no obligation at the time to inform consumers of the existence of the legal warranty set out in sections 37 and 38 *CPA* or to define its scope. This obligation, the content of which is quite limited, was incorporated into the *CPA* by the enactment of section 228.1, in force since June 30, 2010, which corresponds to the end of the period covered by the application.
11. Third, the protection plan offers not only an extended warranty but also benefits that go beyond what the legal warranty covers, and in this sense, it is advantageous to the consumer who acquires it.[[160]](#footnote-160) Several of the members covered by the applications have taken advantage of the services and benefits provided by the protection plan, and the evidence confirms that there was never any refusal to honour it or any complaints from consumers about it.
12. Fourth, shortly after the application for authorization was filed, the defendants asked Comerco to remove the representations set out on the third page of the protection plan’s explanatory pamphlet that form part of the allegations made against the plaintiffs. The evidence confirms that Comerco did so quickly for all the pamphlets it uses across Canada.
13. Fifth, the essence of the controversy in this case remains a legitimate, serious interpretive debate, as reflected in the judgments rendered on the applications for authorization both at trial and on appeal in these files and in the Related Files. In this regard, it is useful to recall that two of the three submissions put forward by the plaintiffs in support of a prohibited practice related to the Impugned Representation were dismissed by the Court of Appeal. It should also be noted that the submission that was accepted, on which these applications are based, was introduced by the plaintiffs by amendment to the application only in April 2011, almost a year after the amendment to the *CPA* came into force and approximately five years after the applications for authorization to institute a class action were filed.
14. Last, it should be noted that the plaintiffs’ conduct falls within the context assumed by the Supreme Court in *Time*, where it stated:

[168] It is true that consumers should be encouraged to enforce their rights under the *C.P.A.* This does not necessarily mean that court proceedings must always be instituted for this purpose or that informal methods of dispute resolution cannot be considered first. It seems to us that the commencement of proceedings implies the failure of attempts by a consumer and a merchant or manufacturer to resolve their disagreement informally. The rule advocated by Duval Hesler J.A.[[161]](#footnote-161) would make an informal resolution less appealing and would encourage the indiscriminate judicialization of disputes that might have been resolved differently.  Punitive damages would then be awarded in circumstances in which doing so would serve none of the objectives of the *C.P.A.* or of punitive damages generally.

[Emphasis added.]

1. The plaintiffs did not give the defendants any formal notice before instituting proceedings and, moreover, the application based on the Impugned Representation was filed only several months after proceedings were instituted, following the hearing before Bélanger J. on two of the applications for authorization.
2. In light of all the circumstances, in the hypothesis analyzed here, without minimizing the fact that the defendants allegedly engaged in a prohibited practice by infringing section 219 *CPA*, their conduct cannot be characterized as careless or ignorant, nor can their behaviour be characterized as derogatory or reprehensible towards consumers.
3. Therefore, the plaintiffs have not established on a balance of probabilities that it is necessary to award punitive damages to deter the repetition of the defendants’ misbehaviour.

# FOR THESE REASONS, THE COURT:

1. **DISMISSES** the class actions against the defendants;
2. **WITH LEGAL COSTS.**

|  |  |
| --- | --- |
|  |  |
|  | **ANDRÉ PRÉVOST, J.S.C.** |
|  |
| Mtre David Bourgoin*BGA Inc*  |
| Mtre Benoît Gamache*Cabinet BG Avocat inc.* |
| Counsel for the plaintiff |
|  |
| Mtre Jean-Philippe GroleauMtre Gabriel Lavery LepageMtre Guillaume Xavier Charlebois*Davies Ward Phillips & Vineberg LLP* |
| Counsel for the defendant |
|  |
| Mtre Marc MigneaultMtre Geneviève DuchesneMtre Léa Denicourt-Fauvel*Allard, Simard, avocats* |
| Counsel for the intervenor |
|  |
| Dates of hearing: September 12, 13, 15, 20, 21, 26, and 27, and October 3, 4, 5, 6, and 11, 2022. |
|  |  |

1. Several passages of this judgment are reproduced in those deciding the related files considering the similarity of several of the issues in dispute. [↑](#footnote-ref-1)
2. *Fortier c*. *Meubles Léon ltée*, 2014 QCCA 195 [*Fortier*]. [↑](#footnote-ref-2)
3. 2015 QCCS 1325. [↑](#footnote-ref-3)
4. The two other files that complete this one and the Related Files are: *Maxime Fortier c*. *Meubles Léon ltée* (200-06-000129-109) and *Michel Blondin c*. *Distribution Stéréo Plus inc.* (500-06-000548-103). [↑](#footnote-ref-4)
5. *Fortier*, *supra* note 2 at para. 20. [↑](#footnote-ref-5)
6. CQLR, c. P-40.1. [↑](#footnote-ref-6)
7. *Fortier*, *supra* note 2 at para. 21. [↑](#footnote-ref-7)
8. *Ibid*. at paras. 92–93. [↑](#footnote-ref-8)
9. *Ibid*. at para. 94. [↑](#footnote-ref-9)
10. *Ibid*. at para. 100. [↑](#footnote-ref-10)
11. *Ibid*. at para. 101. [↑](#footnote-ref-11)
12. *Ibid*. at para. 108. [↑](#footnote-ref-12)
13. *Ibid*. at paras. 109–110. [↑](#footnote-ref-13)
14. In *Ameublements Tanguay*, the application for authorization also alleged that the representation was made in the additional warranty’s explanatory pamphlet: *Fortier*, *supra* note 2 at para. 22. [↑](#footnote-ref-14)
15. *Fortier, ibid.* at para. 121. [↑](#footnote-ref-15)
16. *Ibid*. at para. 166. [↑](#footnote-ref-16)
17. 2015 QCCS 40. [↑](#footnote-ref-17)
18. 2015 QCCS 1325. [↑](#footnote-ref-18)
19. File 500-06-000706-149, minutes of July 13, 2015. [↑](#footnote-ref-19)
20. 2016 QCCA 31 [*Mazda*]. [↑](#footnote-ref-20)
21. 2016 QCCS 2437. [↑](#footnote-ref-21)
22. 2016 QCCA 1597. [↑](#footnote-ref-22)
23. DCHF-1 and DCHF-2 at C-1370 and C-1371 (the page numbers refer to the digital file). [↑](#footnote-ref-23)
24. Plaintiffs’ plan of argument at paras. 2, 3, 7, and 8. [↑](#footnote-ref-24)
25. *Ibid*. at paras. 323–325. [↑](#footnote-ref-25)
26. CQLR, c. P-40.1, r. 3. [↑](#footnote-ref-26)
27. *Gareau Auto inc. c*. *Banque Canadienne Impériale de Commerce*, 1989 CanLII 594 (QC CA) at 5. [↑](#footnote-ref-27)
28. [2012] 1 S.C.R. 265, 2012 SCC 8 [*Time*]. [↑](#footnote-ref-28)
29. *Supra* note 20 at paras. 60–70. [↑](#footnote-ref-29)
30. *Time*, *supra* note 28 at para. 114. The provisions of Title II of the *CPA* also apply when a contract is entered into with the consumer: *Dion c*. *Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333 at paras. 45–50. [↑](#footnote-ref-30)
31. *Time*, *ibid*. [↑](#footnote-ref-31)
32. *Ibid*. at para. 43. [↑](#footnote-ref-32)
33. Nicole L’Heureux & Marc Lacoursière, *Droit de la consommation*, 6th ed. (Cowansville, QC: Yvon Blais, 2011) at para. 485. [↑](#footnote-ref-33)
34. Section 216 *CPA*. See also *Imperial Tobacco Canada ltée c*. *Conseil Québécois sur le tabac et la santé*, 2019 QCCA 358 at para. 889 [*Imperial Tobacco*]. [↑](#footnote-ref-34)
35. Claude Masse, *Loi sur la protection du consommateur, analyse et commentaires* (Cowansville, QC: Yvon Blais, 1999) at 862; cited with approval in *Mazda*, *supra* note 20 at para. 138. [↑](#footnote-ref-35)
36. *Supra* note 28 at paras. 4–10 and 83–86. [↑](#footnote-ref-36)
37. *Ibid*. at para. 46. [↑](#footnote-ref-37)
38. *Ibid*. at para. 47. [↑](#footnote-ref-38)
39. *Ibid*. at para. 49. [↑](#footnote-ref-39)
40. *Ibid*. at para. 78. [↑](#footnote-ref-40)
41. *Ibid*. at para. 67. [↑](#footnote-ref-41)
42. *Ibid*. at para. 71. [↑](#footnote-ref-42)
43. *Ibid*. at para. 72. [↑](#footnote-ref-43)
44. *Ibid*. at para. 78. [↑](#footnote-ref-44)
45. *Ibid*.See also *Imperial Tobacco*, *supra* note 34 at para. 864. [↑](#footnote-ref-45)
46. Section 219 *CPA*; *Imperial Tobacco*, *ibid.* at paras. 883–886. [↑](#footnote-ref-46)
47. *Imperial Tobacco*, *ibid.* at para. 887. [↑](#footnote-ref-47)
48. This provision is also applicable under the *CPA*; see Luc Thibodeau, *Guide pratique de la société de consommation, tome 2. Les garanties* (Montreal: Yvon Blais, 2018) at paras. 824 and 1263. [↑](#footnote-ref-48)
49. *Time*, *supra* note 28 at para. 49. [↑](#footnote-ref-49)
50. *Ibid*. at para. 57. [↑](#footnote-ref-50)
51. See e.g., *Dion c*. *Compagnie de services de financement automobile Primus Canada*, *supra* note 30 at para. 58. [↑](#footnote-ref-51)
52. Claude Masse, *supra* note 35 at 828 (comment section 218 *CPA*): [translation] “The merchant, manufacturer, and advertiser are therefore bound by the content of the message actually conveyed to consumers”. [Emphasis added.] [↑](#footnote-ref-52)
53. [2011] 1 S.C.R. 214, 2011 SCC 9. [↑](#footnote-ref-53)
54. These qualifiers are defined in more detail in *Hinse v*. *Canada (Attorney General)*, [2015] 2 S.C.R. 621, 2015 SCC 35 at para. 71. [↑](#footnote-ref-54)
55. At paragraph 148 of their plan of argument and in the related footnote, counsel for Groupe BMTC and Ameublements Tanguay describe the results of their research. [↑](#footnote-ref-55)
56. *Fortier*, *supra* note 2 at paras. 95–99. [↑](#footnote-ref-56)
57. The explanatory pamphlet is filed as PAT-2 at AT-709–718, and PBM-3 at BM-275 and BM-276. In its digital format, the copy of the pamphlet is somewhat confusing. Physically, the pamphlet is a piece of cardboard folded in the middle that measures approximately 4.5" by 7"; the text appears on four pages. The front page is made up of the right side of page BM-276. The second page, on the left side when opening the pamphlet, shows the text appearing on the left side of page BM-275. The third page, on the right when the pamphlet is open, contains the text of the right side of page BM-275. Note that this page has a pocket at the bottom where the bill of sale can be inserted. Finally, the fourth page, the back of the pamphlet, contains the text of the terms and conditions found on the left side of page BM-276. [↑](#footnote-ref-57)
58. *Ibid.* at AT-712. These additional services or benefits also appear in the pocket document intended for salespersons that also includes the protection plan prices according to the type of product and the amount paid: PBM-9 at BM-325–329; PAT-5 at AT-737–740. [↑](#footnote-ref-58)
59. DBM-8 at BM-2895–2912 (documents used until 2005); DBM-9 at BM-2913–2963 (documents used as of 2006). [↑](#footnote-ref-59)
60. The benefits described in paragraph 104 of this judgment. [↑](#footnote-ref-60)
61. According to witness Sylvain Lavergne, Comerco’s major accounts manager from 2005 to 2010, shortly after the applications for authorization to institute a class action were filed in this case and in the Related Files, Comerco removed all of these paragraphs from the pamphlet, except the last paragraph, entitled [translation] “Satisfaction guaranteed”. [↑](#footnote-ref-61)
62. Pre-trial examination of Kerfalla Touré on September 23, 2015, at 59–64, BM-424–425. The application in the Brault & Martineau case was the first to be filed at the court office on November 15, 2010. The application to amend to include the Impugned Representation was authorized on April 18, 2011. [↑](#footnote-ref-62)
63. *Ibid.* at 36 (BM-418) and 47 (BM-421). [↑](#footnote-ref-63)
64. *Ibid.* at 32 (BM-417). [↑](#footnote-ref-64)
65. Bill dated December 19, 2007, PBM-1 at BM-261. [↑](#footnote-ref-65)
66. *Ibid.* at 31–32, BM-417. [↑](#footnote-ref-66)
67. *Ibid.* at 47, BM-421. [↑](#footnote-ref-67)
68. *Ibid.* at 67, BM-426. [↑](#footnote-ref-68)
69. Cross-examination of Kerfalla Touré, hearing of September 12, 2022. [↑](#footnote-ref-69)
70. Pre-trial examination of Luc Cantin on September 28, 2015, at 36–39, AT-923 to 926, and 65–66, AT-952–953. [↑](#footnote-ref-70)
71. PAT-1 at AT-704. [↑](#footnote-ref-71)
72. PBM-7 at BM-306. [↑](#footnote-ref-72)
73. Pre-trial examination of Pamela Osi in *Lise Ostiguy* *c*. *Sears Canada inc.*, DBM-5 at 12–13 (BM-2857–2858). [↑](#footnote-ref-73)
74. DBM-7. [↑](#footnote-ref-74)
75. DBM-6. [↑](#footnote-ref-75)
76. Testimony of Ms. Osi, hearing of September 12, 2022. [↑](#footnote-ref-76)
77. *Ibid*. [↑](#footnote-ref-77)
78. *Supra* note 73. [↑](#footnote-ref-78)
79. *Ibid.* at 20, BM-2864; 28–29, BM-2873–2874. [↑](#footnote-ref-79)
80. DBM-7 at BM-2889–2894. Ms. Osi paid for her son Avalon’s purchases. [↑](#footnote-ref-80)
81. DBM-6 at BM-2888. [↑](#footnote-ref-81)
82. PBM-12 at BM-363 and 369. [↑](#footnote-ref-82)
83. DBM-10 at BM-2964. [↑](#footnote-ref-83)
84. Testimony of Louiselle Aird-Bélanger, hearing of September 13, 2022. [↑](#footnote-ref-84)
85. DBM-10 at BM-2966. [↑](#footnote-ref-85)
86. PBM-6 at BM-304 and 305. In the first scenario, the plan covered the purchase of a refrigerator, a range, and a dishwasher. In the second, it covered a washer and dryer. [↑](#footnote-ref-86)
87. Pre-trial examination of Louis Lacoste on February 1, 2017, at 30, BM-497. [↑](#footnote-ref-87)
88. PBM-4 at BM-277–301. [↑](#footnote-ref-88)
89. Pre-trial examination of Claude Bernier on May 9, 2021, at 27–28 (BM-534–535). [↑](#footnote-ref-89)
90. *Ibid.* at 26–27, BM-533–534. [↑](#footnote-ref-90)
91. PBM-5 at BM-302. [↑](#footnote-ref-91)
92. *Ibid.* at BM-303. [↑](#footnote-ref-92)
93. PAT-8.1 at AT-855.1. [↑](#footnote-ref-93)
94. DAT-5. [↑](#footnote-ref-94)
95. CQLR, c. P-39.1. [↑](#footnote-ref-95)
96. 2004 CanLII 32390 (QC CA). [↑](#footnote-ref-96)
97. *Ibid*. at para. 18. [↑](#footnote-ref-97)
98. Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed. (Cowansville, QC: Yvon Blais, 2008) at para. 1221. [↑](#footnote-ref-98)
99. *Ville de Mascouche c*. *Houle*, 1999 CanLII 13256 (QC CA). [↑](#footnote-ref-99)
100. *Fortier*, *supra* note 2. [↑](#footnote-ref-100)
101. *Time*, *supra* note 28 at paras. 56–57. [↑](#footnote-ref-101)
102. *Imperial Tobacco*, *supra* note 34 at para. 887. [↑](#footnote-ref-102)
103. *Fortier*, *supra* note 2 at paras. 98–99. [↑](#footnote-ref-103)
104. *Mazda*, *supra* note 20 at para. 58. [↑](#footnote-ref-104)
105. *Ibid*. at paras. 70. [↑](#footnote-ref-105)
106. See also Duval Hesler J.C.Q.’s comments in *Fortier* (at para. 171). [↑](#footnote-ref-106)
107. DBM-3 at BM-380; DAT-3 at AT-864. [↑](#footnote-ref-107)
108. DBM-4 at BM-383–384; DAT-4 at AT-867–868. [↑](#footnote-ref-108)
109. See para. 104 of this judgment. [↑](#footnote-ref-109)
110. *Fortier*, *supra* note 2. [↑](#footnote-ref-110)
111. The *Regulation respecting the application of the Consumer Protection Act* (*supra* note 26) provides in sections 91.9 to 91.13 a notice concerning the legal warranty that the merchant must provide to the consumer when proposing a contract that includes an additional warranty. These provisions, which have been in force since June 30, 2010, are the only ones that specifically concern additional warranties sold by furniture, appliance, and electronics merchants. [↑](#footnote-ref-111)
112. 2016 QCCS 4546 (under appeal, 2017 QCCA 671). [↑](#footnote-ref-112)
113. 2019 QCCS 1800 (under appeal, 2021 QCCA 546). The Brick Warehouse LP and Bureau en Gros are also named as defendants. [↑](#footnote-ref-113)
114. 2016 QCCS 3294 (under appeal, 2018 QCCA 445). [↑](#footnote-ref-114)
115. 2019 QCCS 3675. [↑](#footnote-ref-115)
116. 500-06-001208-228. [↑](#footnote-ref-116)
117. *Western Canadian Shopping Centres v*. *Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at para. 29. [↑](#footnote-ref-117)
118. *Infineon Technologies AG v*. *Option Consommateurs*, [2013] 3 S.C.R. 600, 2013 SCC 59 at para. 60. [↑](#footnote-ref-118)
119. *Fortier*, *supra* note 2. [↑](#footnote-ref-119)
120. 2021 QCCA 695. [↑](#footnote-ref-120)
121. 2014 QCCA 857 at paras. 21–22. [↑](#footnote-ref-121)
122. *Supra* note 34. [↑](#footnote-ref-122)
123. Céline Gervais, *La prescription* (Cowansville, QC: Yvon Blais, 2009) EYB2009PRE10 at 3. [↑](#footnote-ref-123)
124. *Ibid*. [↑](#footnote-ref-124)
125. *9103-4421 Québec inc. c*. *Hôpital du Sacré-Cœur de Montréal*, 2016 QCCA 15 at para. 29 [*Hôpital du Sacré-Cœur*]. [↑](#footnote-ref-125)
126. *Ibid*. at para. 30. [↑](#footnote-ref-126)
127. Pierre Martineau, *La prescription*, *coll. Traité élémentaire de droit civil* (Montreal: Les Presses de l’Université de Montréal, 1977) at 220; cited with approval in *Hôpital du Sacré-Cœur*, *ibid.* at para. 30. [↑](#footnote-ref-127)
128. *Interpretation Act*, CQLR, c. I‑16, s. 39. [↑](#footnote-ref-128)
129. *Hôpital du Sacré-Cœur*, supra note 125 at para. 35. See also *Segalovich c*. *CST Consultants inc.*, 2019 QCCA 2144 at para. 14, leave to appeal refused, 39054 (28 May 2020), 2020 CanLII 36064 (SCC). [↑](#footnote-ref-129)
130. Yves Lauzon & Bruce W. Johnston, *Traité pratique de l’action collective* (Montreal: Yvon Blais, 2021), EYB2021TPA12, section 2.2.2.2.2 at 6. [↑](#footnote-ref-130)
131. 2007 QCCA 568 at para. 79. [↑](#footnote-ref-131)
132. *Fortier*, *supra* note 2. [↑](#footnote-ref-132)
133. 2015 QCCA 1519. [↑](#footnote-ref-133)
134. 2007 QCCS 6026. [↑](#footnote-ref-134)
135. *Ibid*. at para. 60. [↑](#footnote-ref-135)
136. *Ibid*. at para. 72. The reference to art. 1003 CCP in that paragraph corresponds today to art. 575 CCP. [↑](#footnote-ref-136)
137. This application corresponds to what is claimed in the originating application. In their plan of argument, counsel for the plaintiffs sometimes describe their action as being for a [translation] “reduction of the obligation equal to the full reimbursement of the extended warranty purchased” (para. 17), and sometimes as being for [translation] “damages equal to the reimbursement of the price of the extended warranty purchased by each member” (para. 329). This terminological confusion refers to applications described separately in section 272 *CPA*. For the purposes of this judgment, the Court uses the wording in the originating application. [↑](#footnote-ref-137)
138. *Time*, *supra* note 28 at para. 112. See also *Imperial Tobacco*, *supra* note 34 at para. 941. [↑](#footnote-ref-138)
139. *Ibid*. at para. 123. [↑](#footnote-ref-139)
140. This notion must be distinguished from causation under the ordinary law. In *Imperial Tobacco*, the Court of Appeal specified that the demonstration of the second, third and fourth criteria replaces the evidence of what has been characterized as [translation] “conduct causation” and allows the consumer to obtain remedial measures: *supra* note 34 at para. 942. [↑](#footnote-ref-140)
141. *Time*, *supra* note 28 at para. 128. [↑](#footnote-ref-141)
142. *Imperial Tobacco*, *supra* note 34 at para. 942. [↑](#footnote-ref-142)
143. *Time*, *supra* note 28 at para. 126. See also *Brault & Martineau c*. *Riendeau*, 2010 QCCA 366 at para. 42; *Vidéotron c*. *Union des consommateurs*, 2017 QCCA 738 at para. 58; *Meubles Léon ltée c*. *Option consommateurs*, 2020 QCCA 44 at para. 116. [↑](#footnote-ref-143)
144. Section 228.1 *CPA* prescribes the disclosure of information on the legal warranty set out in sections 37 and 38 CPA. [↑](#footnote-ref-144)
145. *Time*, *supra* note 28 at para. 139. [↑](#footnote-ref-145)
146. Art. 1699 CCQ. [↑](#footnote-ref-146)
147. *Murray c*. *Prestige Gabriel Ouest*, 2021 QCCA 1394 at para. 49. See also *Karras c*. *Société des loteries du Québec*, 2017 QCCS 4862 at para. 113, aff’d 2019 QCCA 813. [↑](#footnote-ref-147)
148. *Abadie c*. *Subaru Canada inc.*, 2021 QCCA 1598. [↑](#footnote-ref-148)
149. *Karras c*. *Société des loteries du Québec*, 2019 QCCA 813 at paras. 44–46. [↑](#footnote-ref-149)
150. Pre-trial examination of Luc Cantin on September 28, 2015, at 90 (AT-977). [↑](#footnote-ref-150)
151. *Mazda*, *supra* note 20 at paras. 11, 12, and 16; *Meyerco Enterprises Ltd. c*. *Kinmont Canada inc.*, 2016 QCCA 89 at paras. 30, 31, 33, 37, and 48. [↑](#footnote-ref-151)
152. *Meyerco Enterprises Ltd. c*. *Kinmont Canada inc.*, *ibid.* at paras. 44–47. [↑](#footnote-ref-152)
153. Plaintiffs’ plan of argument at paras. 354–359. [↑](#footnote-ref-153)
154. *Time*, *supra* note 28 at para. 178. See also *Mazda*, *supra* note 20 at para. 150. [↑](#footnote-ref-154)
155. *Time*, *ibid*. These obligations and objectives were repeated in *Bank of Montreal v*. *Marcotte*, 2014 SCC 55 at para.108 [*Marcotte*]. [↑](#footnote-ref-155)
156. *Time*, *ibid*. [↑](#footnote-ref-156)
157. *Marcotte*, *supra* note 155. [↑](#footnote-ref-157)
158. Plan of argument of the defendants Brault & Martineau and Ameublements Tanguay at paras. 450–455. [↑](#footnote-ref-158)
159. Plaintiffs’ plan of argument at para. 358. [↑](#footnote-ref-159)
160. *Marcotte c*. *Banque de Montréal*, 2009 QCCS 2764 at paras. 1243–1247. [↑](#footnote-ref-160)
161. The rule advocated by Duval-Hesler J.A. to which this paragraph refers is set out in para. 45 of *Riendeau c*. *Brault & Martineau* (2010 QCCA 366), where she stated that [translation] “the existence of an unlawful business practice, such as advertising that does not meet the requirements of the *CPA*, in itself justifies an award of punitive damages”. [↑](#footnote-ref-161)