The Lack of Credibility on the Web and Its Legal Ramifications Under Quebec's Consumer Protection Act

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Introduction

1. According to a recent survey[1], one out of five Quebecers can be qualified as a "cyberconsumer", meaning that he is a natural person (other than a merchant who obtains goods or services for the purpose of his business)[2] who uses the Internet as a means of getting goods and services. Although these numbers are relatively small compared to national[3] and international results, it remains that a rising number of consumers use the web as a means of shopping for and buying certain products.

2. Unfortunately, these relatively new commercial outlets gave rise to new problems. Today, website owners who mislead consumers, products that never make it to a buyer's door and hidden shipping and handling fees have unfortunately become all too familiar. This problem has consequently forced legislators and legal professionals alike to take a good look at the obligations of websites offering such services resulting, in some cases, in the adoption of new legislations and, in others, in the confirmation of the applicability of existing laws to the Web.

3. Thanks to the growing number of horror stories regarding web shopping, to the information that is being distributed by consumer protection groups and to a heightened sensibility to the legal void sometimes surrounding these types of transactions, consumers are also becoming a little more savvy when it comes to spending their hard-earned money online. In an age where knowledge is power, some consumers are now surfing the web to gather up as much information as possible in order to make an insightful decision before clicking on the "I accept" icon.

4. But what is the value of such information? How can consumers make sure that websites that offer advice on products and services are actually trustworthy? In other words, as is discussed in

a new study published by Consumers International[4], are so-called third party sites[5] credible[6]? This puts forth another problem regarding consumer rights on the web: Can the legislative framework surrounding cyberconsumerism be applied to third party sites and, if so, how can a consumer get redress?

5. These are the questions to which we will seek answers. In the following pages, we will take a closer look at the impact of comparative shopping on the formation of contracts entered into by cyberconsumers (1), the obligations of those giving information and counsel on the Web (2) and the value of clauses limiting liability found on these sites (3).

1. Comparative shopping and it's impact on contracts "entered into between a consumer and a merchant"

[7]

> « Consumers seeking information, whether online or elsewhere, need to be able to place that information in context in order to assess its value to them, and whether they can trust it ».[8]

6. In the tradition of consumer magazines designed to help buyers make an enlightened decision when it comes to getting certain goods, more and more sites offering such services are now popping up on the Web. In order to save time, a cyberconsumer can simply visit such a site and get the lowdown on competing products to find the ones that better suit his needs. But what happens when this information is inaccurate or even misleading?

7. Under Quebec's Consumer Protection Act (C.P.A.), a consumer that bought a certain product following false or misleading representations can ask for a total or partial refund[9]. However, this implies that the information was given by the merchant himself, by the manufacturer of the goods, or by an advertiser[10]. Since third party sites are, by definition, not the merchants or manufacturers of the goods they're reviewing, the only category that remains is that of "advertiser". Are third party sites "advertisers" according to the Consumer Protection Act? The answer to that question resides in the relationship between the merchant or manufacturer and the third party site, whether it be one of agency (1.1), simple interaction (1.2), or that such a relationship simply doesn't exist (1.3).

1.1. When the advertiser is an agent of the manufacturer

8. As is made clear by the Consumers International study, establishing ownership of a website "is important when examining credibility, as it relates to possible conflict of interest and bias. A consumer using a site may want to establish whether that site has links to a parent organisation, or is part of a group of companies, in case that might have a bearing on the nature of the information provided". According to the study, many so-called third party sites supposedly designed to offer insight to consumers are really marketing ploys on behalf of manufacturers to promote their products in a different forum.

9. In such cases, the third party site is no such thing, since it is the property of the manufacturer or merchant and, therefore, any misleading or false information can be attributed to that individual. A sale made according to the information gathered on this website would thus be void, or the original price reduced if the consumer wished it so[11].

10. But how can one establish ownership of a website? According to article 242 of the Consumer Protection Act, merchants must mention their identity, and the fact that they are merchants, in

any form of advertisement. It is our belief that this obligation also applies to the Internet since websites are undoubtedly means of advertising goods and services. Furthermore, as Nicole L'Heureux explains, the role of article 242 of the C.P.A. is to ensure that the consumer won't be misled into thinking that he is dealing with an individual and not a merchant[12]. Such a role is certainly as pertinent online as it is in the "real world". In the same line of thought, the act also requires that merchants and manufacturers not take on false identities[13].

11. Of course, this brings forth another dilemma. Since only merchants have the obligation to reveal their identity, how can one surfing onto an anonymous site know whether the information is distributed by an impartial individual, or a dishonest merchant? What's more, since article 242 of the Consumer Protection Act does not include manufacturers, does that imply that these individual are not obliged to state their identity on advertisements? Certainly, that cannot be the case.

12. Since there exists no definition of the term "merchant" and what it encompasses within the Consumer Protection Act, we must turn to the general definition granted to the word under Quebec law[14]. According to Nicole l'Heureux, a merchant is recognized by two distinct characteristics: 1) having an activity designed to generate profits and 2) this activity must be permanent[15]. When a manufacturer advertises his products on the Internet in order to lure the consumer onto his site, he is therefore acting as a merchant, not simply as a manufacturer according to the preceding definition.

13. As for the question of the anonymity of the owner of a website, there appears to be no simple answer. If the site has commercial ends (which most of these sites have since they need funds to keep operating), then its owner becomes obliged to reveal his identity on that basis[16]. Otherwise, it becomes difficult to establish the ownership of the site and consumers may be faced with the difficult, if not impossible, task of proving that the goods that they bought should be reimbursed.

14. It is therefore suggested to consumers to steer away from third party sites that do not reveal their origins[17], unless they can find it out through other means[18]. Of course, as we will see in section 2, even knowing the identity of the owner of a website will not guarantee success if his liability cannot be established.

1.2. When the manufacturer is aware of the advertiser's claims regarding his products

15. If the person advertising a product is not, in any way, shape or form, associated with the merchant or manufacturer of the said product, can the consumer ask for a refund if he based his decision to buy on false information taken from that advertisement? As we mentioned before, the answer to this question lies in the definition that is given to the term "advertiser" in the Consumer Protection Act. According to the Act, an advertiser "means a person who prepares, publishes or broadcasts an advertisement or who causes an advertisement to be prepared, published or broadcast"[19]. Taken as such, this definition could be applied to third party sites, but this would cause great prejudice to merchants and manufacturers who have not contributed to the misleading statements and who otherwise respect all dispositions of the C.P.A. This is why it is understood that the advertiser must be an agent of the merchant or manufacturer to allow the application of article 253 of the C.P.A.[20].

16. However, even though the C.P.A. doesn't seem to permit consumers to ask for a refund following the false advertisements of a third party, Quebec's Civil Code can allow for redress in some cases. Article 1401 of the Code states the following:

> "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".

17. According to this article, a consumer can get a refund if he can establish that not only is the merchant aware of the fact that a third party site is giving false information regarding his product, but also that this information is responsible for the purchase.

18. The degree of difficulty related to proving such a situation will, of course, vary according to each site. For example, merchant sites that talk up their products by referring to third party sites or that ask consumers where they heard about their products or services will most definitely facilitate the consumer's burden of proof.

1.3. When the manufacturer is unaware of the advertiser's claims regarding his products

19. As mentioned above, if the consumer cannot establish any connection between the merchant or manufacturer and the third party site, he cannot ask for a refund on the basis that that site misled him. He may be able to ask the owner of the third party site for redress by claiming that he acted as an advertiser as defined in the C.P.A. However, as we stated above, his chances for success are slim to none.

20. The only recourse available to such consumers may therefore be to sue the owner of the third party site on the basis that his actions caused the consumer prejudice, thus that he is liable for damages under articles 1457 through 1481 Of the Civil Code. However, as we will see in the next section, such a claim may stand on very shaky grounds.

2. The fine line between information and counsel: What is the publisher's responsibility?

> Half the sites in our study (51%) made some sort of warning about the appropriate use of their service. Health sites were much more likely to do this (73.5%) than finance sites (50%) or shopping sites (32%)[21].

21. The legal question hiding behind the staggering amount of misinformation on the Web is a very difficult one to answer: Can someone be sued for giving bad advice? As we will see, that question is more easily answered if the individual is a professional (1) than if he isn't since professionals are normally held to a higher standard.

2.1. When he is a professional

22. It is important to mention that the C.P.A. cannot be applied to contracts between a consumer and a professional[22] since the latter is not a merchant according to the courts[23]. Therefore, consumers must turn to the Professional Code[24] to establish their rights against a professional who gave them false information online. However, this fact is of little consequence in regards to a consumer's rights since article 60.2 of the code is almost identical to article 219 of the C.P.A.. Article 60.2 of the Code reads as follows:

> "No professional may, by whatever means, make false, misleading or incomplete representations to a person having recourse to his services […]".

It thus becomes essential to establish what "having recourse to one's services" means. According to Sylvie Poirier, "having recourse to one's services" does not limit the scope of a professional's liability to contractual relationships[25]. As she explains, if a professional gives erroneous information to his client or patient, and that individual then gives the information to a third party, the latter could hold the professional liable for any damage resulting from the legitimate use of that information[26].

23. This brings forth the problem of an individual who gathers information from a professional, and then puts it online for all to see. Technically, if that information is flawed, although identical to that given by the professional, he could be held accountable.

24. To establish the range of the expression "having recourse to one's services", we must draw the line between counsel and simple opinion. In the United States, providing general legal information to the public does not constitute the practice of law[27]. The same is true in Canada, which explains why I was able to write the present article even though, while having a legal background, I am not a member of the Bar. In keeping with this logic, if a non-professional is allowed to publish general legal or medical opinions online without this being considered as giving services (which he cannot do since he isn't a professional), then a consumer cannot claim that he had recourse to the services of a professional acting in that capacity.

25. Therefore, to summarize, a professional can only be held liable under the Professional Code for posting information online if that information is considered counsel by the courts. In other circumstances, he will be treated as any non-professional would, i.e. according to the general conditions of liability gathered in the Civil Code.

2.2. When he isn't a professional

26. As can be established by what was just presented, professionals, which are to be held to a higher standard than laymen, cannot be held responsible for providing false or misleading information to the public, under the Professional Code, if this is done in a general manner. Therefore, it must be ascertained that individuals who are not held to such standards cannot be made liable unless it can be established that they were at fault and directly responsible for the damages suffered by a third party who followed that advice.

27. If one can establish that the false or misleading information was posted in bad faith, or that the author of the information was negligent in not verifying the facts before posting them, then fault can be proven.

28. But fault is not sufficient unless it can also be proven that the author of the false information is directly responsible for the consumer's purchase and subsequent prejudice[28].

29. Some consumers have a tendency of taking information at its face value which could be considered negligent since most reasonable people tend to look before they leap. As Pierre Deschamps puts it, if the victim of a prejudice's fault is greater than that of the author of the prejudice, it becomes possible to state that the victim's careless antics constitutes a novus actus interveniens[29] which would exonerate the accused, or at least make the plaintif partly responsible. Courts exposed to this problem will therefore have to take into consideration the following:

- The ease with which the consumer could have verified the information
- The level of bad faith which the accused exhibits

- Whether the accused has mislead the consumer on his identity
- Etc.

30. The third consideration is a very important one. Since professionals are liable for advice given, even online within the limits stated in the previous section, an individual trying to pass himself off as a professional could cause consumers to accept his counsel without verifying it's validity since they have a legal basis of believing it to be true. Since, according to article 32 of the Professional Code:

> "No person shall claim in any manner to be an advocate, notary, physician, dentist, pharmacist, optometrist, veterinary surgeon, agrologist, architect, engineer, land-surveyor, forest engineer, chemist, chartered accountant, radiology technologist, denturologist, dispensing optician, chiropractor, hearing-aid acoustician, podiatrist, nurse, acupuncturist, bailiff, midwife or geologist, or use one of the above titles or any other title or abbreviation which may lead to the belief that he is one, or initials which may lead to the belief that he is one, or engage in a professional activity reserved to the members of a professional order, claim to have the right to do so or act in such a way as to lead to the belief that he is authorized to do so, unless he holds a valid, appropriate permit and is entered on the roll of the order empowered to issue the permit, unless it is allowed by law",

and since any penal offence can also give rise to civil claims[30], victims could ask for redress in such cases.

3. Disclaimers and warnings: How valuable are they?

> More than half (57%) of sites in our study made some sort of statement about whether or not they took any responsibility for the advice or recommendations they were offering. In the vast majority of cases (85%), these statements disclaimed responsibility[31].

31. More and more site owners are now putting up disclaimers and warnings stating that they are not liable for anything from computer viruses to the validity of the information contained on their sites. However, like Consumers International validly points out in its study, "[d]isclaimers, however extensive, cannot take away consumer rights that are established by law"[32].

32. This being so, it is presently difficult to establish the actual impact of such clauses since it has been ascertained for many years now that an individual cannot limit his civil liability by posting a general notice to one and all, even if he can prove that such a notice is common knowledge[33]. As article 1476 of the Quebec Civil Code states:

> "A person may not by way of a notice exclude or limit his obligation to make reparation in respect of third persons".

33. The problem therefore becomes one of qualifying the relationship between the individual who visits a website and the website owner. If that relationship can be assimilated to the one between a consumer and a shopping mall, then the relationship is extracontractual (see Eaton v. Moore, [1951] R.C.S. 470), and such clauses are void of any meaning. However, if this relationship is closer to that of a parking lot (see Garage Touchette ltée v. Metropole Parking Inc., [1963] C.S. 231), then it is based on a contract and disclaimers become legitimate if they are written within the context of the law. This last position is endorsed by those who claim that visiting a website creates an implicit contractual bond[34].

34. Nowhere in the Code is it clearly stated that it is illegal to contractually limit one's liability if both parties consent to this stipulation in a free and enlightened manner[35]. Therefore, any website that wishes to post a disclaimer is entitled to do so. However, for such a disclaimer to be viable, it must be established that the consumer was aware of the existence of the disclaimer and its content when the contract was formed[36]. To follow the logic of those who claim that entering a website creates an implicit contractual bond, such a bond would be created the second the consumer enters any website. But this does not take into account the reality of the Internet. Except for those offering adult or contentious content, very few websites actually visibly state their terms on their homepage, before one can actually go into the site. A simple link situated at the bottom of each page is usually the norm when it comes to disclaimers. The question then becomes one of knowing whether clauses limiting site liability are valid even when they are not part of the actual contract[37].

35. Since the contract has been formed before the consumer has had access to these clauses, they can't be considered valid[38]. This can be deduced from the fact that, according to article 1435 of the Civil Code:

> "In a consumer contract […] an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer […], unless the other party proves that the consumer or adhering party otherwise knew of it".

36. Whether one considers that visiting a website constitutes a contractual relationship or not, however, remains purely academic when consumers are involved. As stated by article 10 of the C.P.A., "any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representatives is prohibited". This implies that, disclaimers, even when contractually binding, cannot be opposed to consumers if they limit the site owner's liability.

37. As far as professionals go, Katy Ellen Deady points out the basic flaw in recognising any validity to web site disclaimers:

> "The basis for the skepticism is that if disclaimers were allowed in the Internet context, there is no reason to tell "real-world" professionals that they cannot present an incoming patient or client with a disclaimer of liability as well. Courts have long held that professionals cannot contract out of their professional obligations and it would defy that logic to allow cyberprofessionals separate consideration"[39].

Conclusion

38. Regardless of the legal foundation on which a consumer bases himself to claim damages from a website that gave misleading information about another party's products, one insurmountable obstacle still lies in the path of consumers: money.

39. Right now, the average customer purchases less that 500 dollars worth of goods online per year. Even if he can establish that the site is 100 per cent responsible for the damages since its owner was either negligent or of bad faith, it remains that less that such a small amount if often not worth the hassle of going to small claims court, especially with the international aspect of the Internet constantly dangling over consumers' heads like Damocles' sword.

40. The best advice for consumers therefore remains to follow the guidelines established by the Consumers International study on Website credibility and to always verify the veracity of any "fact" found online. As the study states:

- Don’t believe everything you read;
- Don’t rely on just one site;
- Check the site’s background;
- Check how reliable the information is; and
- Check what risks you might be taking by using the site.

41. Doing this will not only limit disappointment, it will also prevent consumers from having to take legal recourse…

Notes

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[1] “Rethinking the Information Highway”, a study conducted by Ekos <http://www.ekos.com> in February and March of 2001.

[2] Art. 1. e) of the Consumer Protection Act, L.R.Q., c. C-40.1

[3] 31%

[4] This study entitled “Credibility on the Web” can be found in this issue on the following page: http://www.lex-electronica.org/articles/v8-1/survey.htm.

[5] By “third party sites”, we are referring to all websites that offer information on products and services without actually marketing them. This is the case of sites who compare goods produced by competing manufacturers, or that dispense finance or health related advice.

[6] The study defines website credibility as follows: “a ‘credible’ site is a site that provides information that is sufficiently clear and accessible to allow consumers to make an informed decision about the value of the information provided by the site”.

[7] Art 2 of the C.P.A.

[8] CONSUMERS INTERNATIONAL, Credibility on the Web, 2002 p. 5.

[9] Art. 219 and 253 of the C.P.A.

[10] Art. 219 of the C.P.A.

[11] Art. 253 of the C.P.A.

[12] Nicole L’HEUREUX, Droit de la consommation, 5e éd., Cowansville, Yvons Blais, 2000, p. 300.

[13] Art. 238 (c) of the C.P.A.

[14] As Pierre-André Côté explains, the legislator is supposed to maintain a certain logic as the terms he uses in laws that concern the same subject. Pierre-André CÔTÉ, Interprétation de Lois, 3rd ed., Montreal, Thémis, 1999, p. 434.

[15] Nicole L’HEUREUX, op. cit. note 12, p. 30.

[16] As stated earlier, article 242 of the C.P.A. makes it mandatory for merchants to clearly state their identity in all form of advertising.

[17] This is also one of the suggestions put forth by the Credibility on the Web study.

[18] For example, a consumer could simply verify ownership of a site’s URL through an ICANN certified agent.

[19] Art. 1 (m) of the C.P.A.

[20] As Nicole l'Heureux puts it, the advertiser and merchant are considered accomplices in the publication of misleading content, which therefore implies that a certain relationship exists between the parties. Nicole L'HEUREUX, op. cit. note 12, p. 418.

[21] CONSUMERS INTERNATIONAL, op. cit., note 8, p. 24.

[22] In this article, the term professional is used as defined in the Professional Code, L.R.Q., c. C-26 and therefore represents "any person who holds a permit issued by an order and who is entered on the roll of the latter".

[23] Bastien c. Les Provisions Métropolitaines, [1978] C.P. 407.

[24] L.R.Q., c. C-26.

[25] Sylvie POIRIER, La discipline professionnelle au Québec, Cowansville, Yvon Blais, 1998, p. 36.

[26] Id.

[27] S.C. Bar Ethics Adv. Comm., Formal Op. 4 (1991), and Formal Op. 27 (1994)

[28] See Jean-Louis BAUDOUIN and Patrice DESLAURIERS, La responsabilité civile, 5th ed., Cowansville, Yvon Blais, 1998, p. 57.

[29] Pierre DESCHAMPS, "Les conditions générales de la responsabilité civile du fait personnel", in Josée PAYETTE and al., Responsabilité, Collection de droit vol. 4, Cowansville, Yvon Blais, 2002, p. 22.

[30] Jean-Louis BAUDOUIN and Patrice DESLAURIERS, op. cit., note 28, p. 97.

[31] CONSUMERS INTERNATIONAL, op. cit., note 8, p. 23.

[32] Id.

[33] J. PERREAULT, Des stipulations de non-responsabilité, Montréal, Imprimerie modèle limitée, 1939, p. 149.

[34] Pierre TRUDEL and al., Droit du cyberespace, Montreal, Thémis, 1997, p. 5-63.

[35] Jean-Louis BAUDOUIN and Patrice DESLAURIERS, op. cit., note 28, p. 117. As mentionned in Garage Touchette ltée v. Metropole Parking Inc. ([1963] C.S. 231) at page 231: "Une stipulation de non-responsabilité, dans un contrat du genre de celui qui intervient entre l'exploitant d'un terrain de stationnement pour automobiles et son client est parfaitement légale et n'est pas contraire à l'ordre public, mais, pour qu'une telle situation lie celui contre lequel elle est invoquée, il est essentiel qu'il y ait acquiescement soit expressément, soit tacitement."

[36] Jean-Louis BAUDOUIN, Les Obligations, 4th ed., Cowansville, Yvon Blais, 1993, p. 460

[37] TRUDEL and al. op. cit., note 34, p. 5-63.

[38] BAUDOUIN, op. cit., note 36, p. 459

[39] Katy Ellen DEADY, op. cit. note, p. 900. Although this text has been written in an American context, the same logic applies to Quebec professionals. See Caisse Populaire de Charlesbourg v. Michaud, [1990] R.R.A. 531 (C.A.) Where Juge Baudouin explains: "Pour le profane, ceci signifie une fois la rhétorique décodée et l'exégèse des textes faite à peu près le message suivant: Nous, les vérificateurs, avons examiné le relevé de l'actif et du passif; nous avons fait des sondages, examiné des documents comptables et des preuves jugées nécessaires dans les circonstances; nous avons donc agi en professionnel et en expert. Par contre, bien évidemment tout ceci peut être faux, inexact, incomplet et donc ne représente pas, à notre jugement, la vérité! On peut alors se demander ce que peut bien signifier un tel rapport et ce que vaut à son bas la signature d'un comptable professionnel. Cette ambiguïté pour un rapport qui se veut "non vérifié" m'apparaît une faute".