SUPREME COURT OF CANADA

CITATION: Bank of Montreal *v.* Marcotte, 2014 SCC 55

DATE: 20140919
DOCKET: 35009

BETWEEN:

Bank of Montreal
Appellant
and
Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur
Respondents

AND BETWEEN:

Citibank Canada
Appellant
and
Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur
Respondents

AND BETWEEN:

Toronto-Dominion Bank
Appellant
and
Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur
Respondents

AND BETWEEN:

National Bank of Canada
Appellant
and
Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur
Respondents

AND BETWEEN:

Réal Marcotte and Bernard Laparé
Appellants
and
Bank of Montreal, Amex Bank of Canada, Royal Bank of Canada, Toronto-Dominion Bank, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, National Bank of Canada, Laurentian Bank of Canada,

Citibank Canada and Attorney General of Canada
Respondents
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Président de l'Office de la protection du consommateur and Canadian Bankers Association
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 117)	Rothstein and Wagner JJ. (McLachlin C.J. and LeBel, Abella, Cromwell and Moldaver JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Bank of Montreal *Appellant*

v.

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur *Respondents*

- and -

Citibank Canada *Appellant*

v.

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur *Respondents*

- and -

Toronto-Dominion Bank *Appellant*

v.

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur *Respondents*

- and -

National Bank of Canada *Appellant*

v.

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and Président de l'Office de la protection du consommateur *Respondents*

- and -

Réal Marcotte and Bernard Laparé *Appellants*

v.

Bank of Montreal, Amex Bank of Canada, Royal Bank of Canada, Toronto-Dominion Bank, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, National Bank of Canada, Laurentian Bank of Canada, Citibank Canada and Attorney General of Canada *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Président de l'Office de la protection du consommateur and Canadian Bankers Association *Interveners*

Indexed as: Bank of Montreal *v.* Marcotte

2014 SCC 55
File No.: 35009.

2014: February 13; 2014: September 19.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Class actions — Standing — Representative plaintiffs initiating class action against credit card issuers on grounds they failed to disclose conversion charges on credit card purchases made in foreign currencies — Representative plaintiffs not having direct cause of action or legal relationship with each defendant — Whether plaintiffs have standing to sue all defendants — Code of Civil Procedure, CQLR, c. C-25, art. 55.

Consumer protection — Contracts of credit — Contracts extending variable credit — Credit cards — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Conversion charges imposed by financial institutions on cardholders for transactions in foreign currencies — Class actions — Whether conversion charges imposed are "credit charges" or "net capital" as defined by the legislation — Whether Banks failed to disclose charges to cardholders — Whether reimbursement of conversion charges collected from *consumer class members should be ordered — Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 68, 69, 70, 272.*

Consumer protection — Recourses — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Whether class members are entitled to punitive damages — Consumer Protection Act, CQLR, c. P-40.1, s. 272.

Constitutional law — Division of powers — Banking — Interjurisdictional immunity — Federal paramountcy — Quebec's consumer protection legislation regulating disclosure of conversion charges with respect to contracts of credit — Whether provincial legislation constitutionally inapplicable or inoperative in respect of bank-issued credit and charge cards by virtue of doctrine of interjurisdictional immunity or federal paramountcy — Constitution Act, 1867, c. 91(15); Bank Act, S.C. 1991, c. 46, ss. 16, 988; Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 272.

A class action was launched by consumers to seek repayment of conversion charges imposed by several credit card issuers (the "Banks") on credit card purchases made in foreign currencies primarily on the basis that the conversion charges violated Quebec's *Consumer Protection Act* ("*CPA*"). The Banks argued that (1) the representative plaintiffs did not have a direct cause of action against each of the Banks and therefore did not have standing to sue all of them, (2) the *CPA* did not apply to them due to the *Constitution Act, 1867*, and (3) no repayment of the conversion charges was owed. The Superior Court maintained the class action and found that the *CPA* applied to the Banks. It determined that the conversion charges were "credit charges" for the purposes of contracts extending variable credit, and ordered all the Banks to reimburse the conversion charges. It further required BMO, NBC, Citibank, TD and Amex (the "Group A Banks") to pay punitive damages for failing to disclose the conversion charges. The Court of Appeal determined that the conversion charges were "net capital" and allowed the appeal of the non-Group A Banks. It maintained the order against the Group A Banks, but overturned the amount awarded against Amex as well as the award of punitive damages against all Group A Banks, with the exception of TD.

Held: The appeals by the Group A Banks should be dismissed. The appeal by the representative plaintiffs should be allowed in part.

The representative plaintiffs have standing to sue all of the Banks. The law permits a collective action where the representative does not have a direct cause of action against, or a legal relationship with, each defendant. Indeed, art. 55 of the *Code of Civil Procedure* ("*CCP*"), which requires plaintiffs to have "sufficient interest" in the action, must be interpreted in harmony with the provisions governing class actions and in accordance with the principle of proportionality found in art. 4.2 of the *CCP*. This approach is consistent with most other Canadian jurisdictions and the *CCP* itself, and it ensures the economy of judicial resources, enhances access to justice and averts the possibility of conflicting judgments on the same question of law or fact. In addition, the analysis of whether the plaintiffs have standing must have the same outcome regardless of whether it is conducted before or after the class action is authorized, because at both stages, the court must look to the authorization criteria of art. 1003 of the *CCP*.

Different obligations flow from whether conversion charges are qualified as credit charges or net capital. If the conversion charges qualify as credit charges, then according to the *CPA* they would have to be disclosed on their own, be included in the disclosed credit rate, and be subject to a grace period. If conversion charges qualify as net capital, they would not be included in the credit rate or be subject to the grace period, but would still have to be disclosed under s. 12 of the *CPA*, the general disclosure provision. In this case, conversion charges constitute sums for which credit is actually extended, within the meaning of s. 68 of the *CPA*, and are best classified as net capital. They do not fall under any of the categories in s. 70 of the *CPA*. Treating conversion charges as administrative charges or commissions pursuant to ss. 70(d) and (f) of the *CPA*, and therefore as credit charges, would not achieve the objectives of the *CPA* either by restoring the balance between merchants and consumers or by improving consumers' abilities to make informed choices. Rather, it would force merchants to either disclose a wide range for the credit rate, which would confuse consumers, or require cardholders to unknowingly subsidize ancillary services that other cardholders choose to use which would only benefit some consumers at the cost of others and reduce the ability of consumers to make informed choices. Because neither option benefits consumers, s. 17 of the *CPA* and art. 1432 of the *Civil Code of Québec* — both of which require contracts to be interpreted so as to favour consumers in cases of doubt or ambiguity — do not require classifying these charges as credit charges. Moreover, conversion charges are not fees that consumers must pay under the contract in order to access credit within the meaning of s. 69 of the *CPA*. Rather, they are additional fees for an optional service that is not necessary for consumers to access the credit.

The doctrine of interjurisdictional immunity does not apply. Sections 12 and 272 of the *CPA*, which deal with the disclosure of charges requirement and the remedies for breach of same, do not impair the federal banking power. While lending, broadly defined, is central to banking, it cannot be said that a disclosure requirement for certain charges ancillary to one type of consumer credit impairs or significantly trammels the manner in which Parliament's legislative jurisdiction over bank lending can be exercised.

Similarly, the doctrine of paramountcy is not engaged. Assuming that a purpose of the *Bank Act* is to provide for exclusive national standards, ss. 12 and 272 of the *CPA* cannot be said to frustrate or undermine that purpose, because they do not provide for standards applicable to banking products and banking services offered by banks. Rather, they articulate a contractual norm analogous to the substantive rules of contract found in the *CCQ*. The basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, and the general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme. In addition, ss. 12 and 272 of the *CPA* are not inconsistent with ss. 16 and 988 of the *Bank Act* and therefore do not frustrate the narrower federal purpose of ensuring that bank contracts are not nullified even if a bank breaches its disclosure obligations. The Plaintiffs seek restitution of the conversion charges and punitive damages, not nullification of their contracts or of the specific clauses at issue.

The Group A Banks breached s. 12 of the *CPA* by failing to disclose the conversion charges. This violation is not related to the terms and conditions of payment or to the computation or indication of the credit charges or the credit rate, which are specifically covered by s. 271 of the *CPA*. It is a substantive violation that goes against the *CPA*'s objective of permitting consumers to make informed choices, and, at the very least, the violation results from ignorant or careless conduct. Section 272 of the *CPA* applies, and the appropriate remedy is a reduction of the cardholders' obligations in the amount of all conversion charges imposed during the period of non-disclosure. As there is an absolute presumption of prejudice for violations that give rise to s. 272 remedies, the commercial competitiveness of the conversion charges imposed is of no consequence.

In addition, the trial judgment with respect to punitive damages should be restored. The threshold for awarding punitive damages is not higher in the context of class actions where the plaintiffs are awarded collective recovery as opposed to individual recovery. The mode of recovery is not a factor set out in the jurisprudence for assessing punitive damages, nor would it be reasonable to include it as one.

Moreover, the amount of punitive damages awarded in this case is rationally connected to the purposes for which the damages are awarded. Indeed, 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. In this case, the Group A Banks breached the *CPA* without any explanation for a period of years, and that negligence overwhelms their unexplained decision to start disclosing a fee they were charging consumers without their knowledge.

Cases Cited

Applied: *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265; **overruled:** *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; **distinguished:** *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; **referred to:** *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57; *Amex Bank of Canada v. Adams*, 2014 SCC 56; *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) v. Comité provincial des malades*, 2007 QCCA 1068, [2007] R.J.Q. 1753; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21; *Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), leave to appeal refused, [2007] 1 S.C.R.

xi; *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 (CanLII); *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168.

Statutes and Regulations Cited

Bank Act, S.C. 1991, c. 46, preamble [ad. 2012, c. 19, s. 525], ss. 16, 452, 988.

Civil Code of Québec, arts. 1422, 1432, 1621.

Code of Civil Procedure, CQLR, c. C-25, arts. 4.2, 55, 59, 67, Book IX, 1003, 1015, 1048, 1051.

Constitution Act, 1867, s. 91(15).

Consumer Protection Act, CQLR, c. P-40.1, Title I, ss. 12, 17, Chapter III, Division III, 68, 69 "credit charges", 70, 72, 126, 127, 271, 272.

Cost of Borrowing (Banks) Regulations, SOR/2001-101.

Financial Consumer Agency of Canada Act, S.C. 2001, c. 9.

Authors Cited

Bulmer, John. "Payment Systems: The Credit Card Market in Canada". Background paper PRB 09-10E, prepared for the Library of Parliament, Parliamentary Information and Research Service, September 24, 2009 (online: http://www.parl.gc.ca/content/lop/researchpublications/prb0910-e.pdf).

Masse, Claude. *Loi sur la protection du consommateur: Analyse et commentaires*. Cowansville, Qué.: Yvon Blais, 1999.

APPEALS from a judgment of the Quebec Court of Appeal (Forget, Dalphond and Bich JJ.A.), 2012 QCCA 1396, [2012] R.J.Q. 1541, [2012] AZ-50881449, [2012] Q.J. No. 7428 (QL), 2012 CarswellQue 14792, setting aside in part a decision of Gascon J., 2009 QCCS 2764 (CanLII), [2009] AZ-50560820, [2009] J.Q. n^{o} 5771 (QL), 2009 CarswellQue 6515. Appeals by the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada dismissed and appeal by Réal Marcotte and Bernard Laparé allowed in part.

Mahmud Jamal, *Sylvain Deslauriers*, *Silvana Conte*, *Alberto Martinez*, *W. David Rankin*, *Anne-Marie Lizotte* and *Alexandre Fallon*, for the appellants/respondents the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada and for the respondents the Amex Bank of Canada, the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the Bank of Nova Scotia and the Laurentian Bank of Canada.

Bruce W. Johnston, *Philippe H. Trudel*, *André Lespérance* and *Andrew E. Cleland*, for the respondents/appellants Réal Marcotte and Bernard Laparé.

Jean-François Jobin, *Francis Demers* and *Samuel Chayer*, for the respondent/intervener the Attorney General of Quebec.

Marc Migneault and *Joël Simard*, for the respondent/intervener Président de l'Office de la protection du consommateur.

Bernard Letarte and *Pierre Salois*, for the respondent/intervener the Attorney General of Canada.

Janet E. Minor and *Robert A. Donato*, for the intervener the Attorney General of Ontario.

Robert J. Normey, for the intervener the Attorney General of Alberta.

John B. Laskin and *Myriam M. Seers*, for the intervener the Canadian Bankers Association.

The judgment of the Court was delivered by

ROTHSTEIN AND WAGNER JJ. —

I. Introduction

[1] Credit cards are so ubiquitous and commonly used that their many conveniences have become easy to overlook. One such convenience is the ability to use a credit card provided by a Canadian issuer to make purchases in foreign currencies. This conversion service presents an alternative to exchanging Canadian currency for foreign currency, purchasing and cashing traveller's cheques, or withdrawing foreign currency using a bank convenience card.

[2] The present case and its companion cases, *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, and *Amex Bank of Canada v. Adams*, 2014 SCC 56, are appeals of decisions on the merits of three class actions. The class actions were launched to seek repayment of the conversion charges imposed by several credit card issuing financial institutions on credit card purchases made in foreign currencies primarily on the basis that the conversion charges violated Quebec's *Consumer Protection Act*, CQLR, c. P-40.1 ("*CPA*"). The financial institutions argue that the *CPA* does not apply to them due to the *Constitution Act, 1867* and that no repayment of the conversion charges is owed, regardless of the manner in which the conversion charge was disclosed in the credit card contracts.

[3] For the reasons below, we conclude that the *CPA* does apply to the credit card issuers. Any conversion charge imposed by an issuer without sufficient disclosure to the cardholder must be repaid.

II. <u>Facts</u>

[4] A list of definitions of all technical terms used in these reasons is set out in the Appendix.

A. *Overview of Credit Cards and Conversion Charges*

[5] A simplified domestic credit card payment involves four parties: the cardholder, the merchant, the card issuer (typically a bank, credit union, or store), and the credit card company (Visa, MasterCard and American Express). The payment proceeds as follows:

1. The cardholder presents his credit card to the merchant.

2. The merchant sends the credit card information to the card issuer for authorization.

3. Once authorized, the merchant charges the purchase to the card.

4. The card issuer pays the merchant the amount charged minus the *interchange fee*, a rate set by the credit card company but retained by the card issuer.

5. The card issuer pays the credit card company a *network access fee* per transaction. The network access fee is less than the interchange fee.

6. The cardholder pays the card issuer.

(J. Bulmer, "Payment Systems: The Credit Card Market in Canada" Library of Parliament, background paper PRB 09-10E, September 24, 2009, (online))

For the sake of simplicity, the role of payment processors, which are corporations that act as middlemen between merchants and card issuers, has been omitted from this description as payment processors are not relevant to these appeals.

[6] A credit card provided by a Canadian card issuer can be used to make purchases in a foreign currency. The conversion is performed by the credit card company and proceeds as follows:

1. The purchase amount is converted from the foreign currency to Canadian dollars according to the *interbank rate*. The conversion occurs either directly or by first converting the purchase amount to U.S. dollars, then converting that amount to Canadian dollars.

2. The *conversion charge* is calculated by applying the conversion charge percentage rate to the amount resulting from the first step.

3. The amount from the first step and the conversion charge are added together and charged to the card. The monthly statement displays the total amount.

B. *Cardholder Agreements*

[7] There are numerous cardholder agreements at issue in the present appeals. Each card issuer provides multiple cards. The cardholder agreements for these cards have changed over the years. However, the cardholder agreements fall into two groups: (1) those that state that an exchange rate or a conversion rate is applied to purchases in foreign currencies and either do not mention the conversion charge or do not provide details about it, and (2) those that describe the conversion charge in addition to the exchange rate. An example of a group 1 provision is found in a Citibank MasterCard cardholder agreement that reads as follows:

> **Charges Made in Foreign Currency:** If you make a purchase or obtain a cash advance (or return a purchase) in a foreign currency, your account will be charged (or credited for a return) in Canadian dollars. We will use a <u>rate of exchange</u> that reflects the cost of foreign funds at the time of the transaction and an <u>administration charge</u> for the transaction handling through the MasterCard International Incorporated network. These costs will be included for both credits and debits to your account. [Emphasis added.]

By contrast, an example of a group 2 provision is found in a Royal Bank of Canada Visa cardholder agreement that reads as follows:

> ***Foreign Currency Fee*:** [The card issuer] will charge a <u>currency conversion fee equal to 1.8% of the amount of any Debt</u> or other transaction not incurred in Canadian dollars. [The card issuer] will convert this Debt or other transaction and fee to Canadian dollars at [its] conversion cost in effect on the day [it] post[s] the converted Debt or other transaction and fee to the Account. [Emphasis added.]

[8] Cardholders receive information about their credit card through the initial application, the cardholder agreement, the "card carrier" used to deliver the card to its holder, monthly statements, and updates and amendments to the cardholder agreement.

C. *Procedural History*

[9] Réal Marcotte was the proposed representative plaintiff in the April 17, 2003 application for authorization (the civil law equivalent of "certification" in common law class actions) to institute a class action against the Bank of Montreal ("BMO"), Amex Bank of Canada ("Amex"), Royal Bank of Canada ("RBC"), Toronto-Dominion Bank ("TD"), Canadian Imperial Bank of Commerce ("CIBC"), Bank of Nova Scotia ("Scotiabank"), National Bank of Canada ("NBC"), Laurentian Bank of Canada ("Laurentian") and Citibank Canada (collectively referred to hereafter as "Banks"), along with the Fédération des caisses Desjardins du Québec ("Desjardins") (the "BMO Action"). Mr. Marcotte is a BMO and Desjardins cardholder. Bernard Laparé, who is an Amex cardholder, was added as a representative plaintiff after Amex made a motion for dismissal on the basis of Mr. Marcotte's lack of standing against it (Mr. Marcotte and Mr. Laparé are collectively

referred to hereafter as the “Plaintiffs”). Amex was the only Bank to make such a motion.

[10] Mr. Marcotte filed a separate class action against Desjardins, a credit union (the “Desjardins Action”), after the Banks indicated that they would make a constitutional argument based on the s. 91(15) federal banking head of power in the *Constitution Act, 1867*. The hearing on the merits for the BMO and Desjardins Actions was held jointly. The Banks agreed not to contest the authorization of the class action in return for having a joint hearing, though they reserved the right to raise the issue of the Plaintiffs’ lack of standing against the Banks with which they did not hold a card.

[11] A year and a half after the Plaintiffs filed suit against the Banks and Desjardins, a second class action was commenced against Amex (the “Amex Action”). Unlike the BMO and Desjardins Actions, the class in the Amex Action included consumer and non-consumer holders of credit and charge cards. The same trial judge, Gascon J., as he then was, heard the BMO, Desjardins and Amex Actions, with the Amex Action hearing on the merits taking place soon after the joint hearing in the BMO and Desjardins Actions. All three trial judgments were rendered on the same day.

III. Judicial History

[12] Although separate trial and appeal judgments were rendered for the BMO, Desjardins and Amex Actions, the judgments refer to each other on many occasions. The summaries below concern the trial and Court of Appeal judgments for the BMO Action but refer to the judgments rendered for the Desjardins and Amex Actions where appropriate.

A. *Quebec Superior Court*, *2009 QCCS 2764 (CanLII)*

[13] Gascon J. refused to dismiss the class action on the basis that the Plaintiffs do not have standing to sue all of the Banks. He held that once a class action has been authorized, it must be viewed from the perspective of the class rather than that of the representative plaintiff. In this case, the legal and factual backgrounds at issue were common to all the Banks. Therefore, requiring a separate class action against each Bank would be a waste of resources, whereas allowing the BMO Action to proceed would result in no identified prejudice to the Banks.

[14] Gascon J. concluded that the conversion charges are "credit charges" within the meaning of s. 69 of the *CPA*. Under the *CPA*, any charge that is not net capital is a credit charge. Gascon J. found that the evidence did not support the theory that the conversion charges are net capital since the foreign merchant never receives the conversion charge and it is not part of the exchange rate. Instead, the evidence demonstrated that the conversion charge is a fee for services related to the credit card and therefore a credit charge. It is the credit card companies, not the credit card

issuers, that perform the actual conversion. Credit charges under the *CPA* include accessory fees in addition to fees directly related to the extension of credit.

[15] Gascon J. made a finding of fact that five of the Banks — BMO, NBC, Citibank, TD and Amex (the "Group A Banks") — failed to disclose the conversion charges. The Plaintiffs did not challenge the disclosure made by the four other banks — RBC, CIBC, Scotiabank and Laurentian (the "Group B Banks"). Gascon J. held that payment of the conversion charges by cardholders does not constitute a waiver of their right of action or of the protection of the *CPA*.

[16] According to Gascon J., the prescription period for cardholders of the Group B Banks who formed their initial contract before April 17, 2000 — three years before the class action was filed — had not run out because a new contract is formed every time a credit card is renewed. Prescription for cardholders of the Group A Banks was suspended until those banks began to disclose the charges.

[17] Gascon J. rejected the Banks' constitutional argument that the *CPA* does not apply to them due to the doctrine of interjurisdictional immunity, concluding that credit card contracts are not at the core of banking activities and the *CPA* does not interfere with the federal banking regime. He also rejected the similar argument based on the doctrine of paramountcy, concluding that there was no operational conflict or frustration of federal purpose.

[18] Reimbursement of the conversion charges, as provided for in s. 272 of the *CPA*, was ordered as the appropriate sanction. Where possible, Gascon J. ordered collective recovery of all conversion charges imposed during the class periods, meaning each Bank must repay all conversion charges in a lump sum. Individual recovery was ordered where there was insufficient evidence to support collective recovery, meaning each class member would have the right to claim repayment of the conversion charges they paid during the relevant period. This was the case for cardholders of the Group B Banks as a result of the different prescription periods that applied to each cardholder depending on when they first renewed their cards after April 17, 2000. Individual recovery was also ordered against TD, which failed to provide sufficient evidence that would have permitted collective recovery. The five Group A Banks were additionally required to pay $25 per class member as punitive damages for failing to disclose the conversion charge.

B. *Quebec Court of Appeal, 2012 QCCA 1396 (CanLII)*

[19] Dalphond J.A. upheld Gascon J.'s conclusion that the Plaintiffs were adequate representative plaintiffs against all of the Banks. Dalphond J.A. held that permitting such class actions to proceed accorded with the general provisions of the Quebec *Code of Civil Procedure*, CQLR, c. C-25 ("*CCP*"), some of which allow people to sue on behalf of another party, and with the spirit of Book IX of the *CCP*, which governs class actions. What is needed by the representative plaintiff is not a personal legal interest, but *sufficient* interest. The quality of the representative

plaintiff is distinct from the interest of the represented members. As long as there is a real sub-group of members for each defendant, a defendant cannot move to dismiss the action against them on the basis of the authorized representative having insufficient legal interest. Here, the class action was authorized with Mr. Marcotte and Mr. Laparé as its representative plaintiffs. The Banks' argument on this issue attacked the quality of the representative plaintiffs, not whether there was a real sub-group of members for each Bank, and was rightly dismissed at trial.

[20] Dalphond J.A. agreed that neither interjurisdictional immunity nor paramountcy prevent the *CPA* from applying to the Banks. The credit offered through credit cards does not fall under s. 91(15) of the *Constitution Act, 1867*. Paramountcy applies to complaints made to the Office de la protection du consommateur against banks — only the Financial Consumer Agency of Canada ("FCAC") has the authority to receive customer complaints against banks — but in light of the fact that conversion charges constitute net capital, the federal and provincial schemes work together harmoniously. The civil remedies in the *CPA* and the *Civil Code of Québec* ("*CCQ*") remain available.

[21] As explained by Dalphond J.A. in his judgment in the Desjardins Action, the conversion charges constitute net capital under the *CPA* and not credit charges. The *CPA* classifies all fees tied to a contract extending variable credit (such as a credit card contract) as either net capital or credit charges. Credit charges are fees imposed to access credit either in the lead up to obtaining a credit card, such as

membership fees, or subsequent to using the credit, such as interest or insurance premiums. Other fees imposed in the context of a credit card contract, such as fees for a copy of a lost monthly statement or to withdraw money from the ATM of another financial institution, are not credit charges. They, like conversion charges, are fees charged in exchange for a service the cardholder has chosen to use, not to access the credit.

[22] According to Dalphond J.A., classifying conversion charges as credit charges would have consequences contrary to the purpose of the *CPA*. The annual percentage credit rate that the *CPA* requires be disclosed to consumers on the credit card contract would vary between 18% and 900%, information more likely to confuse consumers than inform them. The 21-day grace period would apply to conversion charges so that customers who pay their balance before that time would not have to pay the conversion charge. As a result, card issuers would have to fund the conversion service by raising the membership fee or the general credit rate, resulting in cardholders being charged a hidden fee for a service that only some use. Dalphond J.A. concluded that conversion charges must be classified as net capital as they are [TRANSLATION] “charges invoiced for the use, at the consumer’s choice, of a service that is ancillary to the [credit] card and unconnected to the actual issuance of credit Canadian dollars that is available under the [credit card contract]” (2012 QCCA 1395, [2012] R.J.Q. 1526, at para. 60)

[23] Applying the conclusion in the Desjardins Action to the BMO Action, Dalphond J.A. noted that under the *Bank Act*, S.C. 1991, c. 46, conversion charges are not included in the borrowing costs or borrowing rate defined in the federal scheme. As a result, he allowed the appeals brought by the Group B Banks, who were found at trial to have disclosed the conversion charge to cardholders.

[24] For the reasons given by Dalphond J.A. in the Amex Action, the Group A Banks were held to have breached both the *CPA* and the *CCQ* by not disclosing the conversion charge to cardholders. In the Amex Action, Dalphond J.A. applied the finding at trial that Amex had not disclosed the conversion charges in contravention of the *CPA*, the general principles of law found in the *CCQ*, and s. 452 of the *Bank Act*. Dalphond J.A. agreed with the trial judge that the conversion charge was not a component of the exchange rate but was instead a fee or cost for a service. For a 10-year period, neither the credit card contracts used by Amex nor common usage imposed an obligation to pay the conversion charge on cardholders. As a result, the receipt of a payment not due provisions permitted recovery of the amounts paid. The fact that the conversion charge rate was reasonable and competitive was held to be insufficient cause for refusing to order restitution. Refusing to grant restitution is a discretionary decision of the trial judge, and "Amex has failed to show that the trial judge did not exercise his discretion judiciously" by "showing that there was a palpable and overriding error in his assessment of the situation" (2012 QCCA 1394, [2012] R.J.Q. 1512, at paras. 47 and 50).

[25] As a result, in the Amex Action, Amex was ordered to repay the conversion charges collected during the period of non-disclosure on a collective recovery basis to the defined classes. Similarly, in the BMO Action, BMO, NBC and Citibank were ordered to repay the conversion charges collected during the relevant periods on a collective recovery basis. TD was ordered to repay the conversion charges on an individual recovery basis because it provided insufficient evidence to determine the total amount of conversion charges imposed during the relevant period. The Court of Appeal overturned the amount awarded against Amex in the BMO Action, stating that that amount was entirely covered by the amount awarded against Amex in the Amex Action. Punitive damages were only awarded against TD in light of its failure to provide evidence that would have permitted collective recovery. The punitive damages against the other Group A Banks were overturned because collective recovery already has an important punitive aspect and ordering punitive damages would serve no preventive purpose.

[26] Dalphond J.A. concluded by dismissing waiver, prescription and the absence of prejudice as grounds for refusing to grant restitution against the Group A Banks. The cardholders could not have waived their right to dispute the conversion charges by paying off their accounts because the conversion charges were not disclosed to the cardholders and waivers can only be made with full knowledge. Prescription only began to run when the Group A Banks’ failure to disclose the conversion charges was discovered. The absence of prejudice is irrelevant since the

Group A Banks had no legal right to impose the conversion charges and restitution would not grant an undue advantage to the cardholders.

[27] In the BMO Action, the Group A Banks and the Plaintiffs appeal the decision of the Court of Appeal before this Court. The Banks appeal Dalphond J.A.'s conclusion that interjurisdictional immunity and paramountcy do not apply, that the conversion charges imposed by the Group A Banks should be reimbursed, and that the Plaintiffs had standing against all of the Banks. The Plaintiffs appeal Dalphond J.A.'s conclusion that the conversion charges are net capital and not credit charges. Leave was granted by this Court for both appeals on April 11, 2013, along with the appeals in the Desjardins and Amex Actions.

IV. Issues

[28] This appeal raises the following issues:

> (a) Do the representative plaintiffs have standing to bring a class action against all of the Banks, including those against which they do not have a personal right of action?
>
> (b) Are the conversion charges net capital or credit charges under the *CPA*?

(c) Are ss. 12 and 272 of the *CPA* constitutionally inapplicable in respect of bank-issued credit cards by reason of the doctrine of interjurisdictional immunity?

(d) Are ss. 12 and 272 of the *CPA* constitutionally inoperative in respect of bank-issued credit cards by reason of the doctrine of federal paramountcy?

(e) What remedies, if any, are owed to the class members?

V. <u>Analysis</u>

A. *The Representative Plaintiffs Have Standing*

[29] The five Group A Banks argue that the trial judge and Court of Appeal erred in finding that the Plaintiffs had standing to bring this class action. The Banks argue that the Court of Appeal decision conflicts with arts. 55 and 59 of the *CCP*, which respectively require plaintiffs to have a "sufficient interest" and a "common interest" in the action. The Group A Banks rely on *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349, for the proposition that a representative plaintiff in a class action must have a cause of action against each defendant. They submit that the Court of Appeal's decision has replaced *Agropur*'s clear rule with "an elastic, case-by-case knowledge test" (Banks A.F., at para. 111).

[30] The Plaintiffs, Mr. Marcotte and Mr. Laparé, counter that *Agropur* does not apply for two reasons: first, it was decided at the authorization stage, and second, this case falls into an exception to *Agropur* created by the Court of Appeal in *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) v. Comité provincial des malades*, 2007 QCCA 1068, [2007] R.J.Q. 1753. They further argue that the *CCP* allows a person to act on behalf of others, that the banks have not suffered any prejudice from the current arrangement, that the Court of Appeal's position is shared by most Canadian jurisdictions, and finally, that the Banks' position would lead to a waste of judicial resources.

[31] That the Banks' position would lead to a waste of juridical resources is true, as echoed by the statement of the trial judge: [TRANSLATION] "this would all have been done for nothing, and such a conclusion would have no adverse effect on the members and would not clearly benefit the banks" (para. 200). But the question is not solely whether granting standing is right in terms of judicial economy, or whether to deny it at this stage of the proceedings is pointless. The question is also whether the law permits a collective action where the representative does not have a direct cause of action against, or a legal relationship with, each defendant. In our opinion it does. Article 55 of the *CCP* must be interpreted in harmony with Book IX of the *CCP* in order to achieve the outcome that is best suited to the goals of class actions. However, a few points merit further clarification: how to interpret *Agropur,* and how to apply the principle of proportionality found in art. 4.2 of the *CCP*.

[32] We will begin with the Court of Appeal judgment. In our opinion, Dalphond J.A. correctly concluded that art. 55 of the *CCP*, which requires plaintiffs to have "sufficient interest" in the action, must be adapted to the context of class actions in accordance with the principle of proportionality found in art. 4.2 of the *CCP*. We note in particular the effect of art. 1051 of the *CCP* which renders the other provisions of the *CCP*, including art. 55, applicable to class action proceedings, but in a way that respects the spirit of Book IX of the *CCP*. The nature of this "sufficient interest" has to reflect the collective and representative nature of a class action. Justice Dalphond also correctly distinguished between the ability to adequately act as a representative and the ability to obtain a judgment against a defendant. As long as the representative plaintiff is an adequate representative of the class per art. 1003(*d*) of the *CCP* and the actions against each defendant involve identical, similar or related questions of law or fact per art. 1003(*a*), it is open to a judge to authorize the class action. This conclusion ensures the economy of judicial resources, increases access to justice, and averts the possibility of conflicting judgments on the same question of law or fact.

[33] It is an approach that is consistent with most other Canadian jurisdictions. In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21, the British Columbia Court of Appeal held that a cause of action against each defendant could be held by class members rather than by the representative plaintiff (para. 51). Alberta, Manitoba and Saskatchewan followed suit (see Court of Appeal reasons, at paras. 55-57).

[34] It is an approach that is also consistent with the *CCP* itself. As Dalphond J.A. notes in the Court of Appeal reasons, art. 55 requires that interest be direct and personal to be sufficient:

> [TRANSLATION] This interest may result from a contractual relationship between the plaintiff and the named defendant or from an extra-contractual breach by the named person against the plaintiff. <u>This does not mean, however, that the plaintiff must always be the one with the standing</u> (the victim of a fault who sues the wrongdoer, for example). Indeed, <u>Quebec law acknowledges that some people may sue on behalf of an interested person</u> (e.g., the tutor of a minor (article 159 *C.C.Q.*), the ad hoc tutor (article 190 *C.C.Q.*) or the mandatary designated by mandate in anticipation of incapacity (article 2166 *C.C.Q.*)). This acknowledgement of a person's capacity to act on behalf of others arises from explicit statutory authorization (e.g., parents' tutorship of their minor, unemancipated children, article 192 *C.C.Q.*), from appointment (e.g., article 200 *C.C.Q.*), or from a judgment (article 205 *C.C.Q.*). [Emphasis added; para. 61.]

Additionally, art. 1048 of the *CCP* allows a corporate body or association to act as a representative in a class action as long as one of its members is part of the class and that member's interest against the defendant is linked to the objects for which the corporate body or association was constituted. The *CCP* therefore permits an entity or person without a direct and personal interest in the claims against some of the defendants to represent the class in various circumstances.

[35] Moreover, the malleability of the "sufficient interest" criteria is evident in art. 1015, which states that a representative plaintiff "is deemed to have a sufficient interest notwithstanding his acceptance of the defendant's offers respecting his personal claim". In a similar vein, the Quebec Court of Appeal allowed a class action

where the representative's personal claim was prescribed, but the majority of group members' actions were not (*Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), at para. 66, leave to appeal refused, [2007] 1 S.C.R. xi).

[36] The question then becomes how to reconcile *Agropur* and *CHSLD Christ-Roy*.

[37] In *Agropur*, the Quebec Court of Appeal upheld an authorization judgment denying standing to a representative who did not have a personal cause of action against, or a legal relationship with, each defendant (paras. 110 and 112). Pelletier J.A. found that the representative plaintiff had only consumed milk from one of the producers being sued, and held:

> [TRANSLATION] In class actions involving a number of respondents, this Court has implicitly confirmed that the applicant must assert a cause of action against each of them. Moreover, this jurisprudence is consistent with that of the Ontario and U.S. courts. <u>In my opinion, any ambiguity in</u> this regard should be removed by clearly reaffirming the principle that a <u>representative must establish a cause of action in respect of each of the parties against whom the action is to be brought</u>. [Emphasis added; para. 110.]

[38] Although *Agropur* seems to establish a bright-line rule forbidding class actions with multiple defendants where the representative does not have a cause of action against each defendant, later judgments of the Court of Appeal do not appear to have applied such a principle. Indeed, the Court of Appeal allowed such a claim to

proceed in *CHSLD Christ-Roy*. In doing so, the court held that its situation was distinct from that of *Agropur* in two ways: first, *Agropur* contested the authorization itself, whereas in *CHSLD Christ-Roy* the decision was an appeal from the trial decision on the merits; and second, unlike *Agropur*, there was one cause of action common to the class, rather than several.

[39] The court in *CHSLD Christ-Roy* reasoned that art. 1003(*d*) of the *CCP* focuses on the representative character of the plaintiff and his or her capacity to adequately serve as a representative of the group members, and that representative plaintiff's standing was satisfied by his or her being a part of the class that had already been authorized based on a legitimate single cause of action (para. 27). Moreover, the court then found the consequences of denying standing would be contrary to the objectives of the class action mechanism:

> [TRANSLATION] The presence of multiple defendants in this case does not require that there be as many representatives as there are CHSLDs. Indeed, the issue in dispute is common to all the establishments, be they private under agreement or public, that do not offer their users the laundry services to which they argue they are entitled under the *Act*. To proceed as the appellants suggest would result in as many class actions as there are establishments, which would entail significant, maybe even very significant, fees and procedural complexity that would require more resources from the legal system than are required. To impose on the users of long-term treatment facilities the obligation to bring as many class actions as there are establishments [could] dissuade them from asserting their rights before the courts, which would be contrary to the objectives of class action lawsuits. To accept the public establishments' proposal would, in a case such as this one, [tend to] stifle the class action lawsuit and undermine its social objective. [para. 31]

[40] As the law stands, it is unclear in the province of Quebec whether it is possible to bring a class action suit against multiple defendants where the representative does not have a direct cause of action against each of them. The cases since *Agropur* that have allowed such class actions all occurred at the post-authorization stage and used this distinction to allow the class action (see *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 (CanLII), at para. 22; *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66, at paras. 50-51). In fact, in his reasons for this case, Dalphond J.A. similarly wrote that the legal link between each defendant and the members of the relevant sub-group had been established at the authorization stage, thereby ensuring that there was a genuine cause of action on the part of the *class members* towards all of the defendants (para. 71).

[41] We cannot agree that representative plaintiffs for a class action who do not have a direct cause of action against each defendant do not have standing if that issue is raised at the authorization stage, but do have standing if the issue is raised once the class action is already authorized. Both lower courts justified this result by noting that once a class action has been authorized, the analysis must be done from the view of the group rather than the representative plaintiffs because at that point a class with a valid cause of action already exists. The question of whether representative plaintiffs can have standing against defendants with whom they do not have a direct cause of action must have the same answer whether or not it is raised before or after the class action is authorized.

[42] Standing in the context of class actions must be analyzed through the lens of the criteria for authorization of class actions set out in the *CCP*. That analysis must have the same outcome regardless of whether it is conducted before or after the class action is authorized. As stated above, determining whether art. 55 of the *CCP* is satisfied requires interpreting that provision harmoniously with the class action authorization criteria of art. 1003 in order to take into account the collective nature of class actions. The nature of the interest necessary to establish the standing of the representative must be understood from the perspective of the common interest of the proposed class, and not solely from the perspective of the representative plaintiffs. The legal principles that govern a challenge to standing should be the same whether the challenge occurs at the authorization stage or at the merits stage, because, at both stages, the court must look to the authorization criteria of art. 1003 to resolve the issue. The difficulty of concluding otherwise is well illustrated in this case, where, by this reasoning, the entire class action could have been halted at the authorization stage had the Banks contested standing at that time instead of at the merits stage.

[43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. The focus under art. 1003 of the *CCP* is on whether there are identical, similar or related questions of law or fact; whether there is someone who can represent the class adequately; whether there are enough facts to justify the conclusion sought; and whether it is a situation that would be difficult to bring with a simple joinder of actions under art. 67 of the *CCP* or via

mandatary under art. 59 of the *CCP*. As noted in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, this Court has given a broad interpretation and application to the requirements for authorization, and "the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation" (para. 60). Article 1003(*d*) still requires the representative plaintiff to be "in a position to represent the members adequately". Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue.

[44] In addition, reading art. 55 of the *CCP* harmoniously with the requirements of art. 1003 is in line with this Court's jurisprudence on art. 4.2 and proportionality more generally. In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court recently confirmed that the principle of proportionality is an important factor in civil procedure, one that "must be considered in the assessment with respect to each of [the] criteria" found under art. 1003 (para. 66). This principle reinforces the judicial discretion already found in the language of art. 1003 (*Vivendi*, at paras. 33 and 68). The importance of the proportionality requirement of art. 4.2 has been underlined in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, in a passage that seems particularly apt in the context of the function of class actions:

> Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while

> frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. [para. 43]

[45] In other words, the authorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.

[46] The facts of this case demonstrate the importance of granting the representative plaintiffs standing even where they do not have a personal cause of action against each defendant. As in *CHSLD Christ-Roy,* the same legal issues are present in the action of each class member against each Bank. Each Bank faces more or less the same issues regarding the interpretation and application of the *CPA*, and counters with the same arguments about its constitutional applicability. Even more tellingly, when questioned by the trial judge as to whether he should disregard the evidence heard from one Bank in his decision *vis-à-vis* the other Banks, the Banks argued that even if Mr. Marcotte and Mr. Laparé were found to not have standing for all of the Banks, this evidence was pertinent to the questions at issue for all the Banks and should not be disregarded (trial reasons, at para. 197).

[47] We conclude that the trial judge and the Court of Appeal were correct to find that the representative plaintiffs have standing to sue all of the Banks. The class action was authorized under the criteria of art. 1003, and for the aforementioned

reasons, the current challenge to the representative plaintiffs' standing must fail. This Court's flexible approach to authorization in *Infineon* and *Vivendi* supports a proportional approach to class action standing that economizes judicial resources and enhances access to justice. It is inappropriate that different outcomes might result depending on when standing is challenged. For these reasons, we find the portions of *Agropur* pertaining to standing should no longer be followed and that the Plaintiffs in the present appeals have standing to bring a class action against all of the Banks.

B. *The Conversion Charges Are Net Capital Under the CPA*

[48] On appeal, Dalphond J.A. reversed the trial judge's finding that the conversion charges constitute credit charges under the *CPA*. Before this Court, the parties largely reprise their arguments before the lower courts. The Banks and Desjardins argue that characterizing the conversion charges as credit charges would result in absurd outcomes that are counter to the purposes of the *CPA*. The Plaintiffs argue that characterizing the conversion charges as net capital would undermine the standardized disclosure regime of the *CPA* that permits consumers to meaningfully compare credit options.

[49] The *CPA* defines "net capital" and "credit charges" for the purpose of contracts extending variable credit (which include credit card contracts) as follows:

> **68.** The <u>net capital</u> is
>
> . . .

(*b*) in the case of a contract involving credit or a contract extending variable credit, <u>the sum for which credit is actually extended</u>.

<u>Every component of the credit charges is excluded from this sum.</u>

69. "<u>Credit charges</u>" means <u>the amount the consumer must pay under the contract in addition to</u>

(*a*) the <u>net capital</u> in the case of a contract for the loan of money or a contract extending variable credit;

. . .

70. The credit charges shall be determined as the sum of their components, <u>particularly the following</u>:

(*a*) the amount claimed as interest;

(*b*) the premium for insurance subscribed for, except any automobile insurance premium;

(*c*) the rebate;

(*d*) administration charges, brokerage fees, appraiser's fees, contract fees and the cost incurred for obtaining a credit report;

(*e*) membership or renewal fees;

(*f*) the commission;

(*g*) the value of the rebate or of the discount to which the consumer is entitled if he pays cash;

(*h*) the duties chargeable, under a federal or provincial Act, on the credit.

The categories of net capital and credit charges are exhaustive: all fees or charges that consumers pay by reason of a credit card contract must be one or the other.

[50] All credit charges other than membership fees and cash rebates are used to calculate the credit rate (s. 72 of the *CPA*). The credit rate is applied to any outstanding amount owed after a 21-day grace period (ss. 126 and 127). If the conversion charge qualifies as a credit charge, then according to the *CPA* it would have to be disclosed on its own, included in the disclosed credit rate, and be subject to the 21-day grace period. If the conversion charge qualifies as net capital, it would not be included in the credit rate or be subject to the 21-day grace period, but would still have to be disclosed under the general s. 12 disclosure provision of the *CPA*.

[51] There are two steps to determine whether a fee is a credit charge or net capital. The first step is to determine whether the fee or charge falls under one of the enumerated credit charge categories in s. 70. If it does, it is a credit charge. If it does not, the second step is to determine whether the fee or charge constitutes a "sum for which credit is actually extended" (s. 68). If it does, it is net capital. If it does not, it is a non-enumerated credit charge (s. 69).

[52] Conversion charges do not fall under any of the s. 70 categories. At trial, they were characterized in the Desjardins Action as either administration charges or commissions, which are enumerated credit charges (s. 70(*d*) and (*f*)). However, the trial judge based this characterization on an assumption that the legislature did not intend for consumers to have to distinguish administration charges or commissions related to services ancillary to the contract from administration charges or commissions related to the actual granting of credit. According to this reasoning,

having to distinguish between ancillary and directly related charges would create ambiguity and uncertainty and would therefore be contrary to the *CPA*'s goals of consumer protection and information.

[53] The result of this reasoning would be that any administration charges or commissions disclosed in the credit card contract, not just those related directly to the granting of credit, would be considered credit charges. The Amex trial judgment notes that the FCAC classifies the conversion charge as "similar to the fee for making copies, the cash advances fee, the over the limit fee, the wire transfer or money orders fees, or the annulled or dishonoured cheques fees" (2009 QCCS 2695, [2009] R.J.Q. 1746, at para. 136). In the Desjardins Court of Appeal decision, Dalphond J.A. similarly pointed out such charges would include the fee for obtaining an extra copy of a monthly statement or an additional card, stopping payment on a cheque drawn on a credit card account, and ATM fees. Similar to conversion charges, these fees are incurred when a cardholder chooses to use a service connected to the use of a credit card.

[54] If all of these fees were credit charges, they would have to be included in the credit rate. Card issuers could do this in one of two ways. They could impose the charges on a transaction basis, in which case they would have to disclose a wide range for the credit rate (in the Desjardins Court of Appeal decision, at para. 55, Dalphond J.A. gave between 18% and 900% as an example of the credit rate that Desjardins would have to disclose to its Visa cardholders if the credit rate included

conversion charges). Charges imposed on a transaction basis would benefit from the 21-day grace period, meaning cardholders who pay the balance of their account before the end of the grace period would not pay any of those charges at all. Alternatively, card issuers could choose not to charge for such services on a transactional basis. The result of this option would inevitably be the cross-subsidization of the cost of these services by cardholders who do not utilize the services. This option would conceal the existence of the costs of these services and their imposition on other cardholders as they would not be disclosed separately.

[55] Neither option achieves the objectives of the *CPA*. As explained recently by this Court, the *CPA*'s objectives are "to restore the balance in the contractual relationship between merchants and consumers" and "to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices" (*Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at paras. 160-61). Neither option for treating conversion charges as credit charges would restore the balance between merchants and consumers or improve consumers' abilities to make informed choices. Disclosing a wide range for the credit rate, the result of imposing such charges on a transactional basis, would confuse consumers. Requiring cardholders to unknowingly subsidize ancillary services that other cardholders choose to use reduces the ability of consumers to make informed choices while only benefitting some consumers at the cost of others. Because neither option benefits consumers, s. 17 of the *CPA* and art. 1432 of the *CCQ* — both of which require contracts to be interpreted so as to favour consumers

in cases of doubt or ambiguity — do not require classifying these charges as credit charges.

[56] Section 69 of the *CPA* defines "credit charges" as fees that consumers "must pay under the contract" other than net capital. Conversion charges are not fees that consumers "<u>must</u> pay" in order to access credit. Rather, they are additional fees for an optional service that is not necessary for consumers to access the credit. In addition, unlike obtaining an additional card or copy of a monthly statement, consumers can choose to obtain conversion services from third parties. The conversion charge is even less connected to gaining access to credit than the other fees for ancillary services listed by the Court of Appeal. For these reasons, it is appropriate to distinguish administration charges or commissions related to services ancillary to the contract from administration charges or commissions related to the actual granting of credit.

[57] In contrast with the problems created by classifying conversion charges as credit charges, classifying them as net capital fits with the text of the *CPA* and is easy to implement. Any purchaser who chooses to buy something in a foreign currency must first convert their Canadian dollars into the foreign currency. Common conversion methods other than that provided through a credit card include exchanging cash, buying traveller's cheques, withdrawing money at a foreign ATM, or using a conversion service provided by the merchant (referred to as "dynamic currency conversion"). Generally, all of these methods involve a conversion charge. It is not

usually possible for ordinary purchasers to convert currency without paying a fee or an exchange rate higher than the interbank rate, the rate used by credit card companies to convert purchases in foreign currencies into the local currency. Only large financial institutions trading in $1 million blocks have direct access to the interbank rate.

[58] Section 68 of the *CPA* defines "net capital" (in the context of credit cards) as "the sum for which credit is actually extended". Claude Masse expands on this definition, stating that it must be [TRANSLATION] "sums or values that benefit the consumer" (*Loi sur la protection du consommateur: Analyse et commentaires* (1999), at p. 418). Whether a sum or value benefits a consumer must be considered from the point of view of the consumer, not the merchant. For this reason, the trial judge erred in holding that conversion charges do not benefit consumers because they are not received by the foreign merchant (Desjardins trial reasons, 2009 QCCS 2743 (CanLII), at para. 246). In the case of conversion charges, consumers benefit from having their currency converted to the foreign currency. If a consumer chooses to use a foreign merchant's dynamic currency conversion and pays by credit card, the conversion charge would clearly be considered net capital. It would make little sense to reclassify conversion charges as credit charges for the sole reason that they are imposed by the card issuer. For that reason, conversion charges constitute sums for which credit is actually extended and are best classified as net capital.

[59] Additional support for classifying conversion charges as net capital comes from considering the fact that instead of imposing a separate conversion charge, card issuers could choose to define the exchange rate as the interbank rate plus some percentage markup. In that case, there would be no doubt that the exchange rate in its entirety constitutes net capital. The result would be identical from the point of view of the cardholder and the card issuer. The only difference would be that the wording of the disclosure of the exchange rate would be slightly different. The trial judge was correct to conclude that the conversion charge at issue in the present appeals cannot be considered part of the exchange rate. However, it would make little sense to classify an exchange rate plus a conversion charge as part credit charge and part net capital, but an exchange rate that includes a percentage markup as purely net capital. Doing so would neither protect nor benefit consumers.

[60] It is irrelevant that the card issuers do not perform the actual conversion of the currency. Card issuers contract with the entity that actually performs the conversion, then in turn contract with the cardholders that benefit from the service. From the point of view of cardholders, they benefit from the conversion service as a result of their contract with the card issuers. It makes no difference to them who actually converts their currency.

[61] To summarize, conversion charges do not fall under any of the enumerated credit charge categories in s. 70 and do qualify as net capital under s. 68. As the Court of Appeal correctly concluded, classifying conversion charges as credit

charges would lead to numerous problems, both practical and conceptual, that would hinder the objectives of the *CPA*. This conclusion is not based on whether classifying conversion charges as net capital is *preferable*, as the Plaintiffs argue it was, but rather on a proper interpretation of the provisions at issue.

C. *The Doctrine of Interjurisdictional Immunity Does Not Apply*

[62] The Banks argue that the doctrine of interjurisdictional immunity renders the *CPA* inapplicable to their credit card activities. Interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the "unassailable core" of jurisdiction reserved for the other level of government. Under s. 91(15) of the *Constitution Act, 1867*, Parliament enjoys exclusive jurisdiction over banking. The Banks submit that the applicability of the relevant provisions of the *CPA* to banks would impair the core federal banking power. We disagree.

[63] While interjurisdictional immunity remains an extant constitutional doctrine, this Court has cautioned against excessive reliance on it. A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government. As such, this Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, held that the doctrine must be applied "with restraint" and "should in general be reserved for situations already covered by precedent" (paras. 67

and 77). We note that there is no precedent for the doctrine's application to the credit card activities of banks.

[64] In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would "impair" the core of a federal power. Impairment occurs where the federal power is "seriously or significantly trammel[ed]", particularly in our "era of cooperative, flexible federalism": *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 ("*COPA*"), at para. 45. Therefore two related questions must be asked: First, does the power to regulate disclosure of conversion charges lie at the core of federal jurisdiction over banking? Second, if so, do the provisions of the *CPA* at issue significantly trammel or impair the manner in which the federal power can be exercised?

[65] To answer these questions, the only provisions that need be considered are ss. 12 and 272 of the *CPA*, which deal with the disclosure of charges requirement and the remedies for breach of same. The overall regulatory regime established by the *CPA*, namely the enforcement role granted to the Office de la protection du consommateur, is not at issue. All that need be considered is whether the provisions that found a civil suit brought directly by consumers are applicable under the interjurisdictional immunity doctrine.

[66] Setting aside the first question for the moment, whether either of these provisions touches on the core of the federal banking power, the answer to the second

question is clear: neither provision can be said to impair that federal power. Even if the provisions are characterized broadly as regulating bank lending or foreign currency conversion, they still fail to satisfy the impairment step of the *COPA* test. While lending, broadly defined, is central to banking and has been recognized as such by this Court in previous decisions, it cannot plausibly be said that a disclosure requirement for certain charges ancillary to one type of consumer credit "impairs" or "significantly trammels" the manner in which Parliament's legislative jurisdiction over bank lending can be exercised. Although the s. 12 disclosure obligation and the s. 272 civil remedies relate to bank lending, these provisions do not in any way impair any activities that are "vital or essential to banking" such that Parliament might be forced to specifically legislate to override the provincial law (*Canadian Western Bank*, at para. 86). Requiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks' abilities to dictate the terms of that relationship or otherwise limit their activities. Similarly, even if foreign currency conversion is accepted as being part of the core of the federal banking power, imposing a broad disclosure requirement for charges relating to currency conversion in no way impairs that power. As such, the *CPA* does not impair the federal banking power and the doctrine of interjurisdictional immunity is not engaged.

[67] This conclusion fits with prior decisions of this Court that have dealt with interjurisdictional immunity in the context of the federal banking power. The following comments of this Court in *Canadian Western Bank* are particularly

applicable to the principle that s. 91(15) of the *Constitution Act, 1867* does not give Parliament exclusive jurisdiction over all aspects of lending or currency conversion by banks:

> However, it must be repeated that just because Parliament *can* create innovative forms for financing does not mean that s. 91(15) grants Parliament *exclusive* authority to regulate their promotion. . . . The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities. [Emphasis in original; para. 89.]

[68] The Banks argue for exactly the type of amorphous, sweeping immunity that was rejected in *Canadian Western Bank*. Banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion. Provincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense, and will at times have a significant impact on banks' operations. However, as this Court concluded in *Canadian Western Bank*, this is not enough to trigger interjurisdictional immunity. The provisions of the *CPA* do not prevent banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers.

[69] The present appeals are distinguishable from *COPA*. In addition to the directly relevant precedent on the federal aeronautics power, *COPA* also involved provincial statutory provisions that amounted to a blanket ban, under certain conditions, on an activity that fell within the core of the federal aeronautics power. As the Court pointed out, applying these provincial provisions would force Parliament to

pass legislation to countermand the provincial rules, failing which the activity could not occur at all. The same is not true for the *CPA* provisions at issue here. The disclosure and remedy provisions do affect how banks carry out a certain aspect of their activities, but as discussed above that effect does not amount to impairment. It is hard to imagine how these provisions would force Parliament to pass legislation to countermand them, failing which it would be impaired in its ability to achieve the purpose for which exclusive jurisdiction over banking was conferred. For these reasons, we conclude that the Court of Appeal was correct in holding that interjurisdictional immunity is not engaged.

D. *The Doctrine of Paramountcy Does Not Apply*

[70] The Banks additionally argue that ss. 12 and 272 of the *CPA* are inoperative with respect to banks as a result of the doctrine of federal paramountcy. Paramountcy is engaged where there is a conflict between valid provincial and federal law. In such cases, the federal law prevails, and the provincial law is rendered inoperative to the extent of the conflict. Conflict can be established by impossibility of dual compliance or by frustration of a federal purpose: *Canadian Western Bank*, at para. 73. The Banks argue that the provisions of the *CPA* frustrate the purpose of the federal banking scheme.

[71] Even where it is possible to simultaneously comply with both federal and provincial laws, situations will arise where requiring compliance with a provincial law will frustrate the purpose of a federal law. An example of this is *Law Society of*

British Columbia v. Mangat, 2001 SCC 67, [2001] 3 S.C.R. 113. *Mangat* dealt with a federal scheme that empowered non-lawyers to appear for a fee before immigration tribunals for the purpose of promoting informal, accessible and expeditious hearings. By contrast, a provincial law prohibited such paid appearances by non-lawyers. Even though forced compliance with the provincial law would not result in a *breach* of the federal law (as appearances by non-lawyers were not *mandatory* under the federal scheme), it would nonetheless clearly frustrate the federal purpose.

[72] In *Mangat*, it was clear that the provincial law frustrated the purpose of the federal law as it precluded people from ever using the federal scheme for paid non-lawyers. However, care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose. The mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area, as stated by this Court in *Canadian Western Bank*, at para. 74:

> The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*" (*Rothmans*, at para. 21).

[73] As the party seeking to invoke paramountcy, the Banks bear the burden of proof and "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose": *COPA*, at

para. 66. The Banks allege frustration of two federal purposes. The broader federal purpose, they say, is to provide for exclusive federal banking standards. The second, narrower, purpose is to ensure that bank contracts are not nullified even if a bank breaches its disclosure obligations.

[74] Before dealing substantively with the arguments, it is worth providing a brief overview of the relevant federal and provincial regimes. Consumer banking products are federally regulated under the *Bank Act*, the *Cost of Borrowing (Banks) Regulations*, SOR/2001-101, and the *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, the latter creating the FCAC, the federal regulator. Consumer protection is provincially regulated in Quebec under the *CPA* by the Office de la protection du consommateur. The *CPA* sets out general rules governing all consumer contracts, but also sets out rules relating to contracts of credit specifically in Division III of Chapter III of Title I of the Act ("Division III").

[75] Both Division III of the *CPA*, and the federal *Bank Act* and *Cost of Borrowing (Banks) Regulations*, provide detailed rules relating to the manner in which credit card charges must be computed, claimed, and disclosed. The two sets of rules are consistent with one another. Both regimes provide that "credit charges" (or "cost of borrowing" under the federal scheme) must be disclosed as part of the "credit rate" (or "interest rate" under the federal scheme). The FCAC has held that conversion charges are "non-interest charges" under the federal scheme which is consistent with their being "net capital" for the purposes of the *CPA*. The provisions

regulating the grace period and the date on which interest begins to accrue are likewise consistent.

[76] In light of our conclusion above that the conversion charge is net capital, none of these specific provisions in Division III of the *CPA* need be considered in the context of the paramountcy issue. The Group B Banks complied with both the provincial requirements found in the *CPA* and the federal requirements. The Group A Banks complied with the disclosure requirements of Division III of the *CPA*, but, as will be discussed below, failed to disclose the conversion charges at all in breach of s. 12, the *CPA*'s general disclosure provision that applies to all consumer contracts. The consumers claim redress against the Group A Banks under s. 272 of the *CPA* for their breach of s. 12. Both rules are applicable to consumer contracts generally. Under s. 12, "[n]o costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract." Section 272 provides consumers with various civil remedies for breaches of the Act, including specific performance, reduction of the consumer's obligation and rescission or annulment of the contract, as well as for punitive damages.

[77] We now consider the two federal purposes put forward by the Banks.

[78] First, the Banks say that a purpose of the federal scheme is to provide for "clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks", citing the preamble to the *Bank Act*. The preamble was enacted in 2012 (S.C. 2012, c. 19, s. 525), shortly before the Court of

Appeal rendered its decision in this matter, meaning the proposition that it can be used retroactively as an interpretive aid is dubious (see e.g. *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at paras. 45-46). However, even if we assume that a purpose of the *Bank Act* is to provide for exclusive national standards, such a purpose would still not be frustrated by ss. 12 and 272.

[79] Sections 12 and 272 do not provide for "standards applicable to banking products and banking services offered by banks", but rather articulate a contractual norm in Quebec. Merchants must bring costs to the attention of consumers and, failing to do so, cannot claim them. This requirement does not amount to setting a standard applicable to banking products. Rather, it is analogous to the substantive rules of contract found in the *CCQ*, the operation of which the Banks do not dispute. If the Banks' argument amounts to claiming that the federal scheme was intended to be a complete code to which no other rules at all can be applied, that argument must also fail as the federal scheme is dependent on fundamental provincial rules such as the basic rules of contract. Just as the basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, if indeed such purpose exists, so too do general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme.

[80] It is arguable that a provincial requirement that conversion charges be calculated or disclosed in a different manner than that required by federal law would engage paramountcy. If the province provided for a different grace period, or a

different method of interest computation or disclosure, it could perhaps be said to either result in an operational conflict or undermine a federal purpose of exclusive national standards (assuming, without deciding, that such a purpose could be made out). Currently, however, the federal and provincial standards are the same. Duplication is not, on its own, enough to trigger paramountcy. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, La Forest J., at p. 151, quoted with approval the following passage from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 190, written by Dickson J. (as he then was) on the concurrent application of duplicative federal and provincial legislation:

> . . . there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

[81] For these reasons, even if a purpose of exclusive federal standards could be made out, it cannot be said to be frustrated in this case. Sections 12 and 272 cannot be said to frustrate or undermine a goal of exclusive national standards. This conclusion finds additional support in the conclusion reached in the companion case *Amex* regarding non-consumer cardholders, whereby those cardholders were awarded restitution under the receipt of a payment not due provisions found in the *CCQ*.

[82] The Banks also assert a second, narrower, purpose of the *Bank Act*: to ensure that bank contracts are not nullified even if a bank breaches its disclosure obligations. Sections 16 and 988 of the *Bank Act* provide that a contract is not invalid

solely by reason of being contrary to a provision of the Act. The *Bank Act* instead provides for criminal sanctions against banks that breach their disclosure obligations. This, say the Banks, evinces a federal intention to preserve banks' contracts and to provide for criminal sanctions *instead of* civil remedies such as punitive damages against banks that breach their disclosure obligations. This argument must also fail.

[83] With respect to ss. 16 and 988, it is enough to note that the remedy sought by the Plaintiffs is a reduction of how much they paid to the Banks, not the nullification of their contracts or even of the specific clauses at issue in these appeals. A clause or contract that is nullified is deemed to have never existed, requiring both parties to restore to the other any prestations received (art. 1422 of the *CCQ*). However, in the case of the Group A Banks, the conversion charge was never disclosed in their contracts, meaning it was not imposed pursuant to any clause in those contracts. As a result, reimbursement of the conversion charges cannot be said to result from or be indicative of nullification. Rather, it was chosen by the trial judge as an appropriate remedy for the Banks' breach of the *CPA*. In other cases, paramountcy might indeed render s. 272 inoperative to the extent it is applied to nullify a contract on the basis of a breach of a *CPA* provision that is similar to a provision of the *Bank Act*. However, that is not the issue before the Court. At this time, we need only consider whether paramountcy prevents s. 272 from being applied so as to order restitution of the conversion charges and punitive damages.

[84] With respect to the Banks' broader argument that provinces cannot provide for additional sanctions on top of federal sanctions, in our view this argument is similar to their argument respecting interjurisdictional immunity, whereby they seek a sweeping immunity for banks from provincial laws of general application. There are many provincial laws providing for a variety of civil causes of action that can potentially be raised against banks. The silence of the *Bank Act* on civil remedies cannot be taken to mean that civil remedies are inconsistent with the *Bank Act*, absent a conflict with ss. 16 and 988. In the present appeals there is no such conflict as the Plaintiffs are not seeking to invalidate their contracts. As this Court stated in *Canadian Western Bank*, at para. 24: ". . . constitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'". We conclude that ss. 12 and 272 of the *CPA* are not inconsistent with ss. 16 and 988 of the *Bank Act* and do not frustrate any federal purpose. As such, paramountcy is not engaged.

E. *The Group A Banks Must Reimburse the Conversion Charges and Pay Punitive Damages*

(1) <u>Reimbursement of the Conversion Charges</u>

(a) *The Group A Banks Failed to Disclose the Conversion Charge*

[85] Gascon J. made detailed findings of fact that the Group A Banks had failed to disclose the conversion charge in their cardholder agreements. He examined cardholder agreements for each Bank, concluding that the "conversion rate",

"exchange rate" or "administration charge" disclosed in their cardholder agreements could not be read as including the conversion charge or were not sufficiently precise for the requirements of s. 12 of the *CPA*.

[86] The Banks have demonstrated no palpable and overriding error for Gascon J.'s conclusions of fact that the Group A Banks breached s. 12 of the *CPA* by failing to disclose the conversion charge. His finding must therefore stand.

(b) *The Appropriate Remedy Is Reimbursement Under Section 272*

[87] At trial, reimbursement of the conversion charges to the cardholders was ordered under s. 272(*c*) of the *CPA*. Section 272 provides for the following civil remedies:

> **272**. <u>If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act</u>, 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, <u>subject to the other recourses provided by this Act</u>,
>
> (*a*) the specific performance of the obligation;
>
> (*b*) the authorization to execute it at the merchant's or manufacturer's expense;
>
> (*c*) <u>that his obligations be reduced</u>;
>
> (*d*) that the contract be rescinded;
>
> (*e*) that the contract be set aside; or
>
> (*f*) that the contract be annulled,

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

[88] The Banks argue that s. 271 of the *CPA*, not s. 272, should apply to their breach of s. 12 of the *CPA*. Section 271 provides the additional civil remedies of nullity of contract or the restoration of improperly imposed credit charges. These remedies are available if the merchant fails to conform to certain of the Act's rules, unless the merchant can prove that the consumer suffered no prejudice as a result of its failure:

> **271.** If any rule provided in sections 25 to 28 governing the making of contracts is not observed or if a contract does not conform to the requirements of this Act or the regulations, the consumer may demand the nullity of the contract.
>
> In the case of a contract of credit, if any of the terms and conditions of payment, or the computation or any indication of the credit charges or the credit rate does not conform to this Act or the regulations, the consumer may at his option demand the nullity of the contract or demand that the credit charges be cancelled and that any part of them already paid be restored.
>
> The court shall grant the demand of the consumer unless the merchant shows that the consumer suffered no prejudice from the fact that one of the above mentioned rules or requirements was not respected.

[89] In *Household Finance*, the Quebec Court of Appeal had held that ss. 271 and 272 are mutually exclusive. If we were to accept the Banks' argument that s. 271 applies to their breach of s. 12, then punitive damages are not available and the Banks would have the chance to prove that reimbursement is not warranted because the cardholders suffered no prejudice.

[90] This Court discussed the scope of ss. 271 and 272 in *Richard*. It noted that "[s]ection 271 *C.P.A.* sanctions the violation of certain rules governing the formation of consumer contracts, whereas the purpose of s. 272 *C.P.A.* is not simply to sanction violations of formal requirements of the Act, but to sanction all violations that are prejudicial to the consumer" (para. 112). Section 271 applies only when the merchant fails to conform to the rules regarding the formal requirements of the formation of consumer contracts, including the terms and conditions of payment and the computation and disclosure of credit charges and the credit rate. In contrast, s. 272 applies to substantial breaches of the Act that result in prejudice to consumers.

[91] The Court laid out guidelines in *Richard.* for determining which violations of the *CPA* can give rise to s. 272 remedies. In the context of awarding punitive damages, the Court stated that "violations by merchants on manufacturers that are <u>intentional, malicious or vexatious</u>, and conduct on their part in which they display <u>ignorance, carelessness or serious negligence</u> with respect to their obligations and consumers' rights under the *C.P.A.* may result in awards of punitive damages [under s. 272]" (para. 180 (emphasis added)). Consumers do not "have to prove that the merchant intended to mislead" for s. 272 to apply (para. 128).

[92] The violation at issue in the present appeals is the failure by the Group A Banks to disclose the conversion charge in breach of s. 12 of the *CPA*. It is a substantive violation that goes against the Act's objective of permitting consumers to make informed choices. The violation is unrelated to the formation of the consumer

contract at issue. In this case, the breach of s. 12 surpasses a violation of the formal requirements of the *CPA*. It is not related to the terms and conditions of payment or the computation or indication of the credit charges or the credit rate, which are specifically covered by s. 271. At the very least, this violation results from ignorant or careless conduct as required by the test in *Richard*. As a result, s. 272 and not s. 271 applies.

[93] In light of the complete failure by the Group A Banks to disclose the conversion charge in the cardholder agreements, the appropriate remedy under s. 272 is a reduction of the cardholders' obligations in the amount of all conversion charges imposed during the non-disclosing periods. As there is an "absolute presumption of prejudice" for violations that give rise to s. 272 remedies (*Richard*, at para. 112), the commercial competitiveness of the conversion charges imposed by the Group A Banks is of no consequence.

[94] Because only s. 272 applies to the breach of the *CPA* at issue in these appeals, the issue of whether ss. 271 and 272 are mutually exclusive need not be addressed.

(2) Punitive Damages Are Owed by the Group A Banks

[95] The parties did not make extensive arguments on the issue of punitive damages. The Banks briefly supported the Court of Appeal overturning the punitive damages awarded at trial against BMO, NBC, Citibank and Amex, and argued the

punitive damages awarded against TD should be overturned because there was no finding that TD's conduct was "reprehensible, malicious, or vexatious" (Banks A.F., at para. 105). The Plaintiffs' arguments do not address the issue of punitive damages directly. However, as the Plaintiffs have asked this Court to reinstate the trial judgment, the issue of the punitive damages awarded against all Group A Banks at trial must be addressed.

[96] At trial, Gascon J. awarded punitive damages on an individual recovery basis in light of the failure of the Group A Banks to disclose the conversion charge. His conclusion was not based on the conversion charges being credit charges. Gascon J. concluded that their failure to disclose the conversion charge was serious and contrary to a fundamental objective of the *CPA*: permitting consumers to make informed choices. He noted that there was no legitimate basis for failing to disclose the conversion charge. As a result, he characterized the Group A Banks' behaviour as [TRANSLATION] "reprehensible and unacceptable", justifying punitive damages (para. 1260). Similarly, in the Amex Action, Gascon J. awarded punitive damages in light of Amex's "blunt disregard of its obligations" and its failure to provide a "reasonable explanation or legitimate excuse", which supports the conclusion that "Amex may well have chosen to wilfully hide the [conversion charge] within the exchange rate" (paras. 425 and 427).

[97] The Court of Appeal overturned the punitive damages imposed on all of the Group A Banks other than TD on the basis that no additional damages need be

awarded to fulfil a preventive purpose (para. 124; see also Amex Court of Appeal reasons, at para. 61). It noted the punitive aspect of collective recovery, the fact that the Group A Banks had corrected their violation of s. 12 and the lack of evidence of "antisocial or reprehensible conduct . . . requiring some form of punishment in addition to an award of restitution of all the fees collected" (*ibid.*, at para. 59).

[98] In *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, this Court confirmed that there are only two grounds for an appellate court to interfere with a trial court's assessment of punitive damages:

> (1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation . . . . [para. 134]

[99] In our opinion neither of the criteria were met in this case. Furthermore, there are identifiable errors in the Court of Appeal's analysis. Given the law on punitive damages in the *CCQ* and the criteria set out by this Court we conclude that with regards to punitive damages, the trial judgment should be restored.

(a) *Error of Law*

[100] Article 1621 of the *CCQ* governs awards of punitive damages under Quebec law, and only permits courts to award punitive damages if they are "provided for by law", in which case they "may not exceed what is sufficient to fulfil their

preventive purpose”. The only basis for awarding punitive damages in the present appeals is s. 272 of the *CPA*, which states that consumers “may also claim punitive damages” if the merchant “fails to fulfil an obligation imposed on him by [the *CPA*]”.

[101] This Court dealt with punitive damages awards under s. 272 of the *CPA* in *Richard*. It concluded that such damages must have a preventive objective, meaning their purpose must be “to discourage the repetition of undesirable conduct” (para. 180). They may only be awarded in light of “intentional, malicious or vexatious” violations of the *CPA* or conduct that displays “ignorance, carelessness or serious negligence with respect to consumers’ rights and to the obligations they have to consumers under the *C.P.A.*”, assessed in light of “not only the merchant’s conduct prior to the violation, but also how (if at all) the merchant’s attitude toward the consumer . . . changed after the violation” (*ibid.*, at paras. 177-78).

[102] As discussed above, s. 272 imposes an absolute presumption of prejudice to the consumer. The Court in *Richard* set out the analytical approach to claims for punitive damages under s. 272 of the *CPA* as follows:

> The punitive damages provided for in s. 272 *C.P.A.* must be awarded in accordance with <u>art. 1621 *C.C.Q.*</u> and must have a <u>preventive objective</u>, that is, to <u>discourage the repetition of undesirable conduct</u>;
>
> 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. [Emphasis added; para. 180.]

[103] While the trial judge did not have the benefit of this Court's decision in *Richard*, we do not find that he made an error in law. The focus in *Richard* is the preventive function of punitive damages per art. 1621 of the *CCQ* and the need to consider the objectives of the legislation authorizing the punitive damages (paras. 155-56). The trial judge uses this standard at paras. 1231 and 1234 of the trial judgment. While the law was expanded and clarified — in particular with regards to the objectives of the *CPA* relevant to the assessment of punitive damages and the need to consider the merchant's conduct after the violation — we conclude that the trial judge used the appropriate guidelines.

[104] The Court of Appeal, on the other hand, found that the trial judge erred in failing to consider the fact that collective recovery "often comprises an important punitive aspect as compared to individual recovery" (Amex Court of Appeal reasons, at para. 57; the Court of Appeal's reasons in the Amex Action were said to apply to punitive damages for the Group A Banks in the BMO Action as well (see BMO Court of Appeal reasons, at para. 124)). We respectfully disagree that this was a factor that the trial judge should have considered. There is no case law to support using collective recovery as a basis for not awarding punitive damages. The Court of Appeal supports its argument by citing a treatise on class actions by Lafond that highlights the corrective, preventive and deterrent aspects inherent to collective recovery. While there may be some truth to the idea that the aims and effects of

collective recovery overlap with those of punitive damages, this overlap cannot be a factor in the legal test for the determination of punitive damages. By the Court of Appeal's reasoning, the threshold for awarding punitive damages would be higher in a class action where the plaintiffs were awarded collective recovery as opposed to individual recovery. We see no valid reason to so conclude. After all, collective recovery is nothing more than the full extent of a defendant's obligation if the plaintiffs make their case. The mode of recovery is not a factor set out by this Court's jurisprudence for assessing punitive damages under the *CCQ* nor would it be reasonable to include it as one.

(b) *The Amount Is Rationally Connected to the Purposes for Which the Damages Are Awarded*

[105] The trial judge made findings of fact relevant to the award of punitive damages in both the BMO and Amex Actions. In the BMO Action, the trial judge discussed the breach of s. of the 12 *CPA* by the Group A Banks:

> [TRANSLATION] This violation is a serious one that disregards a fundamental objective of protection of the *CPA*, namely that consumers must be clearly informed of all the conditions of their contracts so that they can make considered choices knowing exactly what they are agreeing to.
>
> But none of the five banks in question have provided explanations or justifications for the failure to disclose these conversion fees. This is surprising. Unlike for the violations of sections 72, 83, 91 and 92 *CPA* discussed above, it is impossible to identify a legitimate basis for the practice whether from a business point of view or otherwise.
>
> Under this head, the impugned conduct of the five banks remains reprehensible and unacceptable. Their want of concern for consumers is

> serious. The additional sanction of punitive damages is justified to this extent. [paras. 1258-60]

[106] The trial judge discussed Amex's lack of disclosure in similarly strong terms:

> While it is true that under the circumstances, the conduct of Amex can hardly be qualified as antisocial or particularly reprehensible or intolerable, it still remains that for an interval of 10 years, it clearly disregarded its obligations under the *CPA*.
>
> At the very least, it showed a rather blunt disregard of its obligations. To the extent that of the various chartered banks operating in Canada in 2002, the FCAC found that Amex was the only one then failing to disclose the [conversion charge].
>
> Moreover, no legitimate excuse for Amex's behaviour has been offered or given. One can indeed hardly understand why Amex elected to disclose the [conversion charge] up to 1993 and yet stopped doing so for 10 years, until the FCAC advised it that this was improper.
>
> In the absence of any reasonable explanation or legitimate excuse, a logical inference remains. Amex may well have chosen to wilfully hide the [conversion charge] within the exchange rate, leaving the consumer unable to ascertain its existence, let alone its extent. This would be quite disturbing. [paras. 424-27]

[107] The Court of Appeal found that "in June 2009 there was no need to impose punitive damages to discourage a practice that had been discontinued six years earlier by Amex and even before that by other banks" (Amex Court of Appeal reasons, at para. 58). Furthermore, the Court of Appeal found that the plaintiff did not discharge his burden "to adduce evidence of antisocial or reprehensible conduct" (*ibid.*, at para. 59).

[108] With respect, based on the findings of fact by the trial judge, we arrive at a different conclusion. The *CPA* is a statute of public order whose obligations and objectives will inform any order of punitive damages stemming from a breach of the Act. These obligations and objectives were discussed at length in *Richard*:

> 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.*).
>
> 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.
>
> 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.
>
> 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. [paras. 175-78]

[109] Therefore, with respect to 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".

[110] In the BMO Action, the trial judge found that the Group A Banks' breach was serious and even contemptuous of a fundamental objective of the *CPA* — that the consumer have knowledge of the conditions of her or his contract. The trial judge found those Banks' failure to explain this breach showed a serious lack of concern or care towards the consumers that was reprehensible and unacceptable. In the Amex Action, the trial judge found that the bank disregarded its obligations under the *CPA*, and inferred that in removing references to the rate available to the consumer, Amex may have wilfully hidden its conversion rate for 10 years.

[111] There is no palpable or overriding error in these findings of fact, or in the trial judge's use of them to support an order of punitive damages. It was open to the trial judge to conclude that the conduct of the Banks amounted to ignorance, carelessness or both. In the case of the Group A Banks, there was noncompliance with the *CPA* without any explanation for a period of years. What prompted each

bank to start disclosing the conversion charge is unclear. Their cooperation with this lawsuit — namely, providing the information to permit collective recovery — is not enough to amount to evidence of diligence in solving the problem caused to the consumers or of a positive attitude towards consumers in general. Their negligence during the period of non-disclosure overwhelms their unexplained decision to start disclosing a fee they were charging consumers without their knowledge. The facts are worse for Amex, who in disclosing the fee until 1993, and then hiding it for 10 years until the FCAC decision, exhibited the opposite of diligence and demonstrated an undesirable attitude towards the consumers.

[112] As noted in *Richard*, the *CPA* has two main objectives: restoring the balance between merchants and consumers in their contractual relationships, and eliminating unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices (paras. 160-61). Both of these objectives are important in this context where consumers are often powerless in the face of changes to their credit card contracts, particularly when refusing payment can result in additional costs in the form of interest. In our opinion it was open to the trial judge to conclude that the Group A Banks breached their responsibilities in contravention of the *CPA* and its objectives. The clarifications made in *Richard* do not change the fact that there is a rational connection between the amount of punitive damages and the purpose for which they were awarded. The trial judge did not make a palpable and overriding error in awarding punitive damages as a

preventive measure, not only to deter the Banks, but all merchants, from this kind of careless behaviour.

[113] The trial judge's award of punitive damages is rationally connected to the purposes of the punitive damages. The trial judgment with regards to punitive damages should be restored for all the Group A Banks.

(3) The Case of Amex

[114] The above conclusions apply to all Group A Banks, including Amex in its position as a defendant in the BMO Action. Contrary to the conclusion of the Court of Appeal in the BMO Action, the classes in the BMO and Amex Actions were carefully described so as not to overlap. As noted by Gascon J. in his judgment in the Amex Action, in 2007 the Amex Action class description was modified "to avoid duplication between the group descriptions of the [BMO Action] and those of this file" (para. 7, fn. 6). Indeed, the class in the BMO Action covered conversion charges imposed on consumer credit card holders from April 17, 2000 onward, while the class in the Amex Action only covered conversion charges imposed on consumer credit card holders prior to April 17, 2000. The trial orders in the BMO and Amex Actions did not overlap.

[115] This issue was not argued before our Court. However, the Plaintiffs have asked this Court to reinstate the trial judgment. Further, the Plaintiffs applied to the Court of Appeal to correct its order on the basis that the classes in the BMO and

Amex Actions do not overlap. The Banks did not dispute that the classes in the two actions do not overlap, arguing only that there was no evidence in the record of the conversion charges charged by Amex for the month of January 2003 and, therefore, that collective recovery for that month should be denied. The Court of Appeal denied the application without giving reasons.

[116] We are of the opinion that the award at trial against Amex in the BMO Action should be restored to the extent that it accords with our conclusion that the conversion charges are net capital. Amex must repay all conversion charges imposed between April 17, 2000 and January 31, 2003, which is when it began disclosing the conversion charge. For the period of April 17, 2000 to December 31, 2002, Gascon J.'s order of individual recovery is restored. For January 2003, consistent with how the Court of Appeal calculated collective recovery for the other Group A Banks, an award of $87,078.33 is ordered (1/12 of $1,044,940, the total amount of conversion charges imposed by Amex in 2003 reduced by Amex's average rate of bad debts). Punitive damages awarded against Amex are also restored.

VI. Conclusion

[117] All relevant provisions of the *CPA* are constitutionally applicable and operative and the Plaintiffs have standing to bring this class action. The conversion charges are net capital in the sense of the *CPA* and were properly disclosed by the Group B Banks. The Group A Banks failed to disclose the conversion charges and must therefore refund the collected conversion charges to their cardholders. They are

additionally liable for punitive damages. For these reasons, the appeals by the Banks are dismissed with costs before our Court. The appeal by the Plaintiffs is allowed in part without costs before our Court in light of the divided success. Costs for the courts below remain as ordered by Dalphond J.A. at paras. 151-54 of his judgment in the BMO Action, except in the case of Amex, against which the costs award made by the trial judge should be restored.

APPENDIX

Glossary of Terms

Card issuer: the institution, typically a bank, credit union, or store, that issues the credit card to the cardholder; collects the interchange fee; pays the network access fee to the credit card company in return for using their card.

Cardholder: party to the cardholder agreement with the card issuer; uses the credit card to make payments to merchants, repays the card issuer at a later date.

Cardholder agreement: the contract between cardholders and card issuers for the use of the credit card.

Conversion charge: percentage added to purchases made in foreign currencies after the original amount is converted to Canadian dollars.

CPA: *Consumer Protection Act*, CQLR, c. P-40.1.

Credit card company: Visa, MasterCard and American Express; charges the network access fee and sets the rate for the interchange fee collected by Card Issuers.

Credit charge (*CPA*): one of two types of charges permitted by the *CPA* under cardholder agreements; all amounts owed under the agreement other than net capital.

Credit rate (*CPA*): all credit charges owed under a cardholder agreement, with certain exceptions, expressed as an annual percentage.

Interbank rate: an exchange rate only available to large financial institutions trading in $1 million blocks.

Interchange fee: a rate set by credit card companies but collected by card issuers.

Merchant: provides goods or services to cardholders in exchange for payment through the credit card.

Net capital (*CPA*): the sum of money for which credit is actually extended to cardholders through their credit card other than sums specifically categorized as credit charges.

Network access fee: fee set and collected by credit card companies from card issuers.

Appeals by the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada dismissed and appeal by Réal Marcotte and Bernard Laparé allowed in part.

Solicitors for the appellants/respondents the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada and for the respondents the Amex Bank of Canada, the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the Bank of Nova Scotia and the Laurentian Bank of Canada: Osler, Hoskin & Harcourt, Montréal and Toronto; Deslauriers & Cie, Montréal.

Solicitors for the respondents/appellants Réal Marcotte and Bernard Laparé: Trudel & Johnston, Montréal; Lauzon Bélanger Lespérance inc., Montréal.

Solicitors for the respondent/intervener the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the respondent/intervener Président de l'Office de la protection du consommateur: Allard, Renaud et Associés, Trois-Rivières; Office de la protection du consommateur, Trois-Rivières.

Solicitor for the respondent/intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Bankers Association: Torys, Toronto.