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mcmillan Class Action Bulletin

# The Supreme Court of Canada rules on the issue of "credit charges" pursuant to the *Consumer Protection Act* and the issuance of punitive damages

In the context of class actions originally initiated before the Quebec Superior Court in 2003, the Supreme Court of Canada ("**SCC**") has recently confirmed an award against some of the credit card issuing banks for failure to disclose conversion charges charged to credit card holders for purchases made in foreign currencies. In doing so, the SCC addressed the rules concerning the legal standing of class representatives in class actions initiated in Quebec and clarified the rules concerning definitions of "credit charges" pursuant to the *Quebec Consumer Protection Act*[1] ("CPA").

## Background

Three decisions were rendered concurrently, which rested for the most part on a common analysis held in *Bank of Montreal v. Marcotte*[2] . The class plaintiffs sought the repayment of conversion charges imposed on them following credit card purchases made in foreign currencies. The case divided the defendant banks into two

[1] CQLR c P-40.1.
[2] 2014 SCC 55. Two other cases also accompany this case : *Amex Bank of Canada v. Adams* (2014 SCC 56) and *Marcotte v. Fédération des caisses Desjardins du Québec* (2014 SCC 57). The Class action against *Fédération des caisses Desjardins du Québec* was brought separately after the banks presented constitutional challenges which were not applicable to *Desjardins* which, as a member-owned financial cooperative, is not governed by the same regime as chartered banks. The Class action against Amex was brought by non-consumers on different legal basis (art. 1699 of the *Civil Code of Québec*).

groups which can be described as follows: Group A was composed of banks which had allegedly failed to disclose the conversion fees in their credit card contracts; and Group B was composed of banks which had allegedly disclosed the conversion fee but did not compute said fees as a "credit charges".

The banks raised two constitutional arguments in order to challenge the application of the CPA to their credit card activities. Both arguments were rejected by the SCC, just as they were by the Superior Court of Québec and the Court of Appeal. The constitutional arguments will not be addressed in this bulletin.[3]

## Standing of Class Representatives in Quebec

While the class actions were initiated against several defendant banks, the two class representatives were card holders of cards issued by only three of the defendants. Thus, certain banks argued at trial that the case ought to be dismissed since the class representatives did not have a sufficient "legal interest' to pursue a claim against them. Essentially it was argued that the class representatives ought to have a direct relationship with each bank to satisfy the criteria of "sufficient interest" and/or "common interest" set out at articles 55 and 59 of the *Code of Civil Procedure* (CCP). In a 2006 decision[4] the Quebec Court of Appeal had ruled that the proposed class representative indeed needed to have a sufficient legal interest against each of the proposed defendants in order to qualify as an appropriate class representative. Subsequent rulings by the Court of Appeal had put into question that rule, thus creating some ambiguity concerning the need for the class representative to effectively have a "legal interest" against each putative defendant.

In *Marcotte* the SCC took the opportunity to clarify this ambiguity. It noted that article 1051 of the CCP, which addresses class action

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[3] For those interested in these issues, we refer you to the following McMillan bulletin <http://www.mcmillan.ca/Supreme-Court-of-Canada-Holds-that-Some-Provincial-Consumer-Protection-Legislation-Applies-to-Banks-Bank-of-Montreal-v-Marcotte>.

[4] *Bouchard c. Agropur Cooperative* 2006 QCCA 1342.

proceedings, allows the court to adapt the general rules of procedure in order for these to fulfill the intended objective of class action proceedings. The court noted that there is a distinction to be made between, on the one hand, the ability of the representative to obtain a judgment (presumably on the basis of his/her personal claim), and on the other hand, his/her ability to represent a class.[5] More importantly, The SCC held that "nothing in the nature of class actions or the authorization criteria requires the representatives to have a direct cause of action against, or a legal relationship with each defendant in the class action".[6] Article 1003 of the CCP requires that the representative be an "adequate representative" and also that the action against each defendant involve identical, similar or related questions of law or fact. According to the SCC, allowing a class representative to have standing against multiple defendants is judicially economical, respects the principle of proportionality (article 4.2 of the CCP), and prevents contradictory judgments on similar issues.[7]

## Computation of "Credit Charges"

A substantial issue before the court was to determine whether the conversion fees charged by the banks should be treated as either "net capital" or "credit charges" under the CPA. As per section 69 of the CPA, "credit charges" are fees that consumers, "must pay under the contract" and could be composed of, inter alia, the amount claimed in interest, the premium for insurance, the administration charges, brokerage fees and commission (section 70 of the CPA). The CPA provides that these "charges" must be included in the calculation of the credit rate which must be disclosed to the consumer for the purpose of contracts extending variable credit or contracts involving credit. "Net capital", under the CPA, is defined as "the sum for which credit is actually extended".

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[5] Par. 32.
[6] Par. 43.
[7] Par. 32.

The SCC held that classifying the conversion fee as "credit charge" would have impractical and confusing consequences for consumers. Currency conversion is used only by some consumers. Therefore, the credit rate would need to be calculated on an individual basis and based on the use made by each credit card holder every month. Such a spectrum of possible credit rate would not be useful as a point of reference to evaluate the overall cost of using credit through a credit card. Alternatively, if a bank decided to advertise and offer a blended rate, averaging all the users' credit rates, it would force those who do not use the conversion services to subsidize those who do. The most absurd consequence of including the currency conversion fee within the credit charge is the fact that it would be waived if paid within the 21-day grace period. This grace period is the same that applies to interest charges. Thus the SCC ruled that the conversion fee should not be considered a "credit charge" under the CPA.

## Failure to Disclose Conversion Fees

The SCC confirmed the Quebec Court of Appeal decision that currency conversion fees constitute "net capital" under the CPA. As such, the conversion fee does not need to be expressed in annual percentage as part of the credit rate, but the fee should have been disclosed to the consumer. The obligation to disclose the conversion charge follows from the general disclosure obligation of section 12 of the CPA. As a result the Group B banks which had disclosed the conversion fee but not computed as a credit charge had not breached the CPA. On the other hand, the Group A banks, which had failed to disclose the conversion fee, had breach breached the CPA. The failure to disclose such fees gives rise to the wide array of recourses pursuant to section 272 of the CPA, including an award in punitive damages. The SCC held that the banks which had breached their obligation to disclose the conversion fee had to restitute the fees they had collected, and they were also subject to punitive damages.

The Court of Appeal had overturned the lower court's decision to impose punitive damages to the banks who had failed to disclose the conversion fees on the basis that the conduct of the concerned banks

was not necessarily "*reprehensible or antisocial*". The SCC reinstated the award in punitive damages against these banks, thus confirming that evidence of antisocial or reprehensible behavior is not required to award punitive damages. Rather, the SCC held that when adjudicating on punitive damages for a breach of the CPA, a court must determine if the merchants (i.e. the banks) displayed a "*lax, passive or ignorant attitude*" towards the consumer. In this case, the trial judge had found that the Group A banks had not provided any reasonable explanation as to why the conversion fee was not disclosed for several years to their customers. The SCC also disagreed with the Québec Court of Appeal Court of Appeal's reasoning that the mode of recovery (collective or individual) should have an impact on the attribution of punitive damages. The Court of Appeal had held that an award of collective recovery (in this case the restitution of the conversion fee) accomplishes similar goals as an award for punitive damages. The SCC categorically rejects this proposition, and held that the fact that a defendant is ultimately condemned to pay damages on a collective basis rather than an individual basis should have no bearing on the issue of awarding punitive damages. Accordingly, the SCC rules that the Court of Appeal should not have interfered with the first instance judge's decision on this point and restored the award for $25 per class member in punitive damages, for failure to disclose the conversion fees.

## TAKE AWAYS

Considering there are numerous obligations born by merchants in the disclosure and computation of these charges, this SCC decision is a welcome clarification as to what constitutes a "credit charge" under the CPA and will serve as additional guidance for those drafting and entering into contracts which include an offer for credit, a common occurrence in consumer contracts.

This case reminds us that merchants ought to ensure that their consumer contacts comply with the CPA at the risk of being exposed to punitive damages. The criteria for awarding punitive damages has once again been confirmed and the purported misconduct which

could trigger such an award does not need to be as "reprehensible" as it was once thought to be.[8]

It is too early to tell what overall impact this decision will have with regards to class action in general. It would appear as though purported class representatives are no longer restricted to initiating claims against the party that he/she contracted with or otherwise have a legal relationship with. As a result of this decision, class actions which target entire industries or industry practices may become more common in Quebec.

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a cautionary note



[8] See *Richard v. Time Inc.*, 2012 SCC 8.