



The Marcotte Supreme Court of Canada Trilogy

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Frédéric Paré, Catherine Jenner

On September 19, the Supreme Court of Canada released a trilogy of decisions, namely [*Bank of Montreal v. Marcotte*](#), [*Amex Bank of Canada v. Adams*](#) and [*Marcotte v. Federation des Caisses Desjardins du Quebec*](#) (collectively, the *Marcotte* decisions), which ruled on the application of sections 12 and 272 of the [*Quebec Consumer Protection Act*](#) (CPA) to financial institutions issuing credit cards in Quebec, without ruling on the broader issue of the application of the balance of the CPA to banks. In addition, the Quebec-specific CPA and class action issues addressed by the *Marcotte* decisions may have wide-ranging consequences, as outlined briefly below.

The plaintiffs in this legal battle, which began over 10 years ago, met with divided success. The Supreme Court decided that certain defendants (i) had violated section 12 of the CPA by not disclosing, in the contract, the conversion charges they imposed on credit card transactions made in a foreign currency, and (ii) must reimburse the undisclosed conversion charges and, for some, pay punitive damages. The Supreme Court held that the disclosure of some of the defendants had been adequate.

In brief, the *Marcotte* decisions decided as follows:

- ***Constitutional issue:*** The disclosure obligation and civil remedies set forth in sections 12 and 272 of the CPA, respectively, do not impair any activities that are “vital or essential to banking” (the inter-jurisdictional immunity argument). These provisions can be applied as they are not inconsistent with the *Bank Act* and do not frustrate any federal purpose (the paramountcy argument). However, the Supreme Court left the door open for banks to challenge the application of other CPA provisions, such as those expressly regulating disclosure and calculation of credit charges.
- ***Class actions:*** *Marcotte* effectively ends a jurisprudential debate in Quebec respecting the interpretation of the “sufficient interest” requirement for class action representatives. As long as the class representative is an adequate representative of the class and the actions against each respondent involve “identical, similar or related questions of law or fact”, it is open to a judge to authorize a class action against a number of defendants with whom the class representative has no direct cause of action. Thus, the Supreme Court effectively overruled the 2006 Quebec Court of Appeal decision in [*Agropur*](#). This broad interpretation may lead to more multi-defendant class action lawsuits in the future.
- ***Conversion charges:*** In the Supreme Court’s view, conversion charges are not fees that consumers “must pay” in order to access credit. Rather, they are more appropriately classified as part of net capital than as credit charges. Therefore, the plaintiffs’ arguments about improper disclosure of credit charges under the CPA were irrelevant. However, since section 12 of the CPA requires disclosure in a consumer contract of any “costs” being claimed and some of the financial institutions had failed to disclose the conversion charges at all in

- the credit card contract, these financial institutions were still liable for improper disclosure. Since it has been decided by the Supreme Court that all fees tied to a credit contract are “either net capital or credit charges”, this may lead in the future to a broader interpretation of the notion of “net capital”.
- *Appropriate recourse under the CPA*: Which recourse applies to a breach of the CPA is very important, as section 271 includes a defence of no prejudice while section 272 creates an absolute presumption of prejudice. Section 271 breaches include failure to disclose terms and conditions of payment and the computation and disclosure of credit charges while Section 272 applies to substantive breaches of the CPA. Based on the facts in *Marcotte*, the Supreme Court held that the failure to disclose the conversion charges in breach of section 12 is a “substantive violation that goes against the CPA’s objective of permitting consumers to make informed choices” and therefore section 272 is the appropriate recourse. Under section 272, the commercial competitiveness of the conversion charges used (and thus presumed lack of prejudice) was considered to be irrelevant. The Supreme Court refused to address the issue of whether sections 271 and 272 are mutually exclusive.
 - *Punitive damages*: Applying section 272, which contrary to 271 provides for punitive damages, the Supreme Court reiterated **its position** that punitive damages will be awarded in cases 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 CPA.” It also held that the threshold for awarding punitive damages was not higher in the context of awards for collective recovery, than in cases where there is individual recovery. The Supreme Court restored the punitive damage award granted in first instance of \$25.00 per class member against certain of the defendants.

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