

**Missed Opportunity: A Critique of the Supreme Court of
Canada's Characterization of Quebec Consumer Protection
Law in Marcotte**

Chana Shulamit Edelstein

Faculty of Law

McGill University, Montreal

August 2016

**A thesis submitted to McGill University in partial fulfillment of the requirements of
the degree of Master of Laws (LL.M.)**

© 2016 – Chana Edelstein

I. Introduction	- 7 -
II. Analysis	- 9 -
A. Constitutional Analysis	- 9 -
1. Validity of the Impugned Laws	- 10 -
(i) The Heads of Power	- 13 -
(ii) Framing the Question	- 16 -
2. Interjurisdictional Immunity	- 17 -
(i) Development of the Doctrine	- 18 -
(a) Canadian Western Bank v Alberta	- 20 -
(b) British Columbia (AG) v Lafarge Canada Inc.	- 25 -
(c) Quebec (AG) v Canadian Owners and Pilots Association	- 28 -
(ii) The Court's Analysis in Marcotte	- 30 -
(a) Core of Banking	- 32 -
(b) Application to Marcotte	- 38 -
(c) Conclusion on the Interjurisdictional Immunity Doctrine	- 40 -
3. Federal Paramountcy	- 41 -
(i) Description and Development of the Federal Paramountcy Doctrine	- 42 -
(a) Multiple Access v McCutcheon	- 43 -
(b) Bank of Montreal v Hall	- 44 -
(c) Law Society of British Columbia v Mangat	- 46 -
(d) Rothmans, Benson & Hedges v Saskatchewan	- 48 -
(e) Canadian Western Bank v Alberta	- 50 -
(f) Quebec (AG) v Canadian Owners and Pilots Association	- 51 -
(ii) The Court's Analysis in Marcotte	- 51 -
B. Practical Inconsistency: Duplication of Requirements?	- 53 -
1. The Two Schemes	- 55 -
2. Difference in Calculation	- 56 -
(i) Prohibited Fees	- 64 -
(a) Insurance Charges	- 65 -
(b) Standalone Fees	- 66 -
(1) Default Charges	- 67 -
(2) Overdraft Charges	- 69 -
(ii) Other Charges: The Ghost Category	- 70 -
(a) Superior Court	- 71 -
(b) Court of Appeal	- 74 -
(c) Supreme Court of Canada	- 76 -

(iii) Bill 24.....	- 79 -
3. Conclusion on Practical Inconsistency.....	- 83 -
C. Federal Purpose: Equating the Quebec CPA to the CCQ	- 84 -
1. Assumption Regarding Analogy to General Contract Law	- 86 -
(i) Historical and Ideological Foundation of the CCLC	- 87 -
(ii) The Foundation of Consumer Protection Law	- 90 -
(iii) Adoption of the CCQ and Interaction with the Quebec CPA.....	- 95 -
2. Similarities and Differences	- 99 -
(i) Qualitative Difference Between the Two Laws.....	- 100 -
(ii) Scope of Application	- 101 -
(iii) Content of the Laws	- 109 -
(a) Lesion	- 110 -
(b) Limitation of Liability	- 111 -
(c) External Clause	- 111 -
(d) Illegible or Incomprehensible Clauses	- 112 -
(e) Abusive Clauses.....	- 112 -
(f) Arbitration Clauses.....	- 113 -
3. Conclusion on Federal Purpose.....	- 113 -
III. Conclusion	- 115 -
Bibliography	- 118 -

ABSTRACT

The Marcotte trilogy, in which the Supreme Court of Canada determined that certain provisions of the Quebec *Consumer Protection Act* were applicable to the credit card activities of banks operating in the province, was immediately noteworthy for its potentially far-reaching implications for the business of banking across Canada. This thesis examines the Court's constitutional analysis in its principal decision of *Marcotte v Bank of Montreal* and, in particular, this thesis focuses on several statements made by the Court to support its conclusions under the federal paramountcy doctrine. The first of those statements is that the disclosure requirements set out in the Bank Act and those set out in the Quebec *Consumer Protection Act* are merely duplicative. The second is that the Quebec consumer protection legislation, just like the *Civil Code of Quebec*, simply establishes basic norms of contract in the province and therefore cannot frustrate the federal purpose. Ultimately, this thesis critiques the Court's constitutional analysis as providing little practical guidance on the interplay of provincial consumer protection legislation and the banking power. The Court's unsubstantiated conclusions do little to further the constitutional dialogue on this topic. Furthermore, this thesis demonstrates that the Court missed out on an unparalleled opportunity to examine the unique place that the Quebec consumer protection legislation occupies on the Quebec legal landscape and to firmly establish its position on the constitutional plane.

RÉSUMÉ

La trilogie Marcotte, dans laquelle la Cour suprême du Canada a déterminé que certains articles de la *Loi sur la protection du consommateur* du Québec sont applicables aux activités de carte de crédit des banques opérant dans la province, a été immédiatement notable pour ses possibles lourdes conséquences sur les activités bancaires à travers le Canada. Cette thèse examine l'analyse constitutionnelle de la Cour dans sa décision principale *Banque de Montréal c Marcotte* et, plus particulièrement, elle se concentre sur plusieurs affirmations faites par la Cour pour appuyer ses conclusions sous la doctrine de la suprématie fédérale. La première de ces

affirmations est que les exigences de divulgation énoncées dans la *Loi sur les banques* et celles énoncées dans la *Loi sur la protection du consommateur* du Québec sont simplement dédoublées. La deuxième est que la législation en matière de protection des consommateurs au Québec, tout comme le *Code civil du Québec*, établit simplement des normes de base aux contrats dans la province et donc, ne peut pas entraver les fins du fédéral. Finalement, cette thèse critique l'analyse constitutionnelle de la Cour comme fournissant peu d'encadrement pratique sur l'interaction de la législation en matière de protection des consommateurs et le pouvoir des banques. Les conclusions non fondées de la Cour font peu pour faire avancer le dialogue constitutionnel sur ce sujet. En outre, cette thèse démontre que la Cour a raté une occasion unique d'examiner la place unique que la législation en matière de protection des consommateurs au Québec occupe dans le paysage juridique québécois et d'établir clairement sa position sur le plan constitutionnel.

ACKNOWLEDGEMENTS

A special thank you to all those who have encouraged me to get to this point and beyond and my gratitude to those who have helped me along the way.

I would like to express my thanks to my thesis supervisor, Professor Geneviève Saumier, for her assistance and helpful comments on drafts of this thesis.

I wish to acknowledge the support of my employers and colleagues at Blake, Cassels & Graydon LLP, for the hands-on learning opportunities that they have afforded me in the areas of financial services and consumer protection. In particular, I would like to thank my colleague, Annick Demers, who has unstintingly shared her considerable knowledge and experience with me.

Finally, I would also like to express my appreciation for the generous financial support of la Fondation Claude Masse, and my gratitude to Professor Claude Masse, in whose honour the foundation was established and on whose immense contribution to the field of consumer protection law I relied on in writing this thesis.

I. Introduction

The Marcotte trilogy, in which the Supreme Court of Canada (the “Court”) determined that certain provisions of the Quebec *Consumer Protection Act* (the “Quebec CPA”)¹ were applicable to the credit card activities of banks operating in the province, was immediately noteworthy for its potentially far-reaching implications for the business of banking across Canada. The cases arose out of three separate class action lawsuits in which the clients of certain financial institutions alleged that the institutions were charging fees or commissions for the conversion of foreign currency transactions made using Visa, MasterCard and American Express credit cards in contravention of the consumer protection legislation in Quebec. However, the particular attention that the Marcotte trilogy garnered was also due to the many questions that it left unanswered for federally-regulated entities as a result of the Court’s failure to engage in a rigorous examination of the interplay between the federal and provincial cost of credit disclosure requirements and to set out useful guidance for the future activities of banks in the province. In this thesis, I examine some of the weaknesses in the Court’s constitutional analysis, particularly in the *Bank of Montreal v Marcotte* decision (“Marcotte”)². Ultimately, I wish to demonstrate through my analysis that the Court missed out on an unparalleled opportunity to examine the unique place that the Quebec CPA occupies on the Quebec legal landscape and to provide a reasoned basis for its role in consumer protection on the federal plane.

Part A of the following analysis tracks the development of the constitutional tests of validity, interjurisdictional immunity and paramountcy. I examine each one in turn and discuss a sampling of important cases under which each doctrine was developed whose arguments are illuminative of the approach taken by the Court in Marcotte. I briefly consider whether the Court adequately addressed what activities lie at the core of the federal power over banking under the interjurisdictional immunity doctrine, although in light of the tendency in recent caselaw to limit the application of this doctrine to very narrow circumstances, the Court’s reluctance to elaborate on this point is not surprising.

¹ *Consumer Protection Act*, CQLR c P-40.1 [Quebec CPA].

² *Bank of Montreal v Marcotte*, 2014 SCC 55, [2014] 2 SCR 725 [Marcotte].

Given that trend, the outcome of the Court's constitutional inquiry really turned on its analysis of the doctrine of federal paramountcy, and the main focus of my review also centers on the Court's arguments under that branch. In the remaining sections of my thesis, I argue that the Court ultimately dismissed the banks' arguments under this branch of the constitutional analysis based on two statements for which the Court provided no support and that warrant closer examination.

In Part B, I consider the first of these statements, which is that the disclosure requirements set out in the *Bank Act* (Canada) (the "Bank Act")³ and those set out in the Quebec CPA are merely duplicative and therefore no inconsistency exists between the two regimes. As I point out, however, the *Cost of Borrowing Regulations* (the "COB Regulations")⁴ and the Quebec CPA do not set out identical systems for calculating and disclosing charges relating to the extension of credit. For example, the terms used to describe the concepts involved in the extension of credit, the charges that are to be included or excluded from the calculations and the manner in which the information must be set out differ between the two pieces of legislation.

Part C focuses on the Court's second statement that the Quebec CPA, just like the *Civil Code of Quebec* (the "CCQ"),⁵ simply establishes basic norms applicable to consumer contracts in Quebec and therefore does not frustrate the federal scheme. However, an examination of the historical development of these two important statutes indicates that while the CCQ was intended to establish the basic laws of contract generally applicable in the province, the Quebec CPA was and remains a more specific piece of legislation. Instead of being equivalent, the theoretical bases of the Quebec CPA and the CCQ are at odds with one another. In fact, the consumer protection legislation, rather than stemming from and being considered part of the corpus of contract law in Quebec, grew instead out of a cognitive dissonance between the strict principles of autonomy on which the CCQ was based and the social reality of increasing power imbalances. Moreover, an examination of the sequence of development of these two statutes

³ *Bank Act*, SC 1991, c 46.

⁴ *Cost of Borrowing (Banks) Regulations*, SOR/2001-101 [COB Regulations].

⁵ *Civil Code of Québec*, CQLR c C-1991 [CCQ].

demonstrates the Quebec legislature's intention to keep the two distinct, as several opportunities to incorporate the consumer protection legislation into the CCQ were rejected. Instead, separate provisions dealing with the protection of vulnerable parties were introduced into the CCQ, further demonstrating that the Quebec CPA was not intended to be general contract law in the province.

II. Analysis

A. Constitutional Analysis

The Constitution Act, 1867 (the "Constitution Act")⁶ distributes legislative powers between the federal and provincial branches of Canada's federalist system. In particular, section 91 of the Constitution Act sets out the wide powers of the federal government to legislate as well as a number of enumerated powers granted to the federal legislature.⁷ Section 92 of the Constitution Act sets out a list of specific powers that were carved out from the federal powers and assigned to the provincial legislatures.⁸ The validity of a law enacted by a legislature rests on whether it is found to have been enacted under the powers allocated to that legislative body by the Constitution Act or whether it was enacted outside of those powers.⁹ In order to facilitate this constitutional analysis, the courts have developed methods and tests for determining the validity of an impugned law. Although these tests have evolved over the years and continue to be refined and amended, a distinct three-part test has emerged from the caselaw.¹⁰ The initial step requires a court to determine the *prima facie* validity of the law and the second step consists of the dual tests of interjurisdictional immunity

⁶ *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

⁷ See Gérard-A. Beaudoin, *La constitution du Canada*, 3rd ed (Montreal: Wilson & Lafleur, 2004) [Beaudoin] at 332-335.

⁸ See *ibid* at 332.

⁹ See Peter W. Hogg, *Constitutional Law of Canada*, vol 1 (Toronto: Carswell, 2007) (loose-leaf 2014 supplement) [Hogg] at 15-2.

¹⁰ See Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit Constitutionnel*, 6th ed (Cowansville, Que: Yvon Blais, 2014) [Brun] at 462.

and paramountcy to determine whether a valid law is constitutionally inapplicable to, or inoperative in respect of, the particular matter in question.

In this Part, I will examine each of these three tests and discuss their evolution, as well as the Court's current approach to each test as evidenced by recent caselaw. I then discuss how the Court applied these doctrines in *Marcotte*. Although each test is addressed in turn, my focus in this thesis remains on the final step in the constitutional analysis – the paramountcy doctrine – under which step the Court made certain assumptions about the Quebec consumer protection legislation that merit greater analysis.

1. Validity of the Impugned Laws

As mentioned, the first step in a constitutional analysis is determining whether a challenged law is valid, which involves a two-part process of identifying the subject-matter or “matter” of the law and then assigning that matter to one of the classes of competencies set out in the Constitution Act. This dovetailing analysis requires the courts to characterize the impugned law by identifying its matter and then to undertake an interpretative exercise of the distribution of powers in the Constitution Act to determine whether a particular power can encompass the impugned legislation.¹¹ Often this initial step is easily passed, where the simple exercise of identifying the matter of the legislation is immediately determinative of the power under which it falls.

Other times, however, it is less clear how to identify the true matter of the legislation, as it may have aspects that fall into both provincial and federal heads of power.¹² In that case, the court has to determine the “pith and substance” of the law, which is “the dominant or most important characteristic of the challenged law”¹³ and decide whether the other aspects are “merely incidental, irrelevant for constitutional purposes.”¹⁴ Thus, the application of the pith and substance doctrine can have the effect of permitting one legislature to enact law that is within its constitutional competence but that has an

¹¹ See Hogg, *supra* note 9 at 15-5 – 15-7.

¹² See *ibid* at 15-8.

¹³ *Ibid* at 15-7.

¹⁴ *Ibid* at 15-8.

impact on matters that fall outside the strict ambit of its jurisdiction.¹⁵ The extent to which the law impacts a matter falling within a power granted to the other level of government is the subject of the subsequent tests in the constitutional analysis – the interjurisdictional immunity and federal paramountcy doctrines.¹⁶

The exercise of characterizing a law at the stage of determining its validity, that is, determining its pith and substance, is not always straightforward and requires the examining court to determine both the purpose and effect of the law.¹⁷ As one court put it: “In essence, this analysis requires the court to ask ‘[w]hat in fact does the law do and why?’”¹⁸ The court will, of course, consider the direct legal effects of the law, that is, “how the statute changes the rights and liabilities of those who are subject to it.”¹⁹ However, it will also consider the purpose towards which the legislation is directed by “inquir[ing] into the social and economic purposes which the statute was enacted to achieve.”²⁰ Thus, a court will look to various sources, including the history behind the enactment of the particular law, to determine the “mischief” that the statute was intended to address.²¹ Generally, if on its face, the effects of a law seem to be directed at something within the enacting body’s jurisdiction but its purpose really targets a matter outside of that jurisdiction, the law will be considered in pith and substance to be *ultra vires*. Thus, a legislature will not be permitted to do indirectly what it cannot do directly.

It is important to note that if a law does not first pass the pith and substance test, there is no reason to pursue the constitutional analysis.²² The impugned law will simply not be valid. However, as Hogg notes in relation to the later test of federal paramountcy: “[T]his may appear to be labouring the obvious, but there are a startling number of judicial

¹⁵ See Brun, *supra* note 10 at 464-465.

¹⁶ See *ibid* at 465, 473.

¹⁷ See Hogg, *supra* note 9 at 15-14 – 15-19; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 [COPA] at para. 18.

¹⁸ COPA, *supra* note 17.

¹⁹ Hogg, *supra* note 9 at 15-16.

²⁰ *Ibid* at 15-14.

²¹ *Ibid* at 15-14 – 15-15.

²² See Brun, *supra* note 10 at 477.

opinions which confuse the issue of consistency with the antecedent, and entirely different, issue of validity.”²³

Yet in other cases, a subject may be found to have a double-aspect, usually in respect of a subject-matter that was not specifically assigned to either head of power,²⁴ such as is the case with consumer protection law. That is, for one effect and one purpose, it falls within one of the provincial competences listed in section 92 of the Constitution Act and for another effect and another purpose it falls within one of the listed federal powers under section 91 of the Constitution Act.²⁵ Often there is no marked difference between the importance of the first aspect of the law and the second.²⁶ This means that on the application of the pith and substance doctrine, two laws enacted at different levels that address the same subject may be both validly enacted. In some instances, the courts have upheld legislation enacted by both levels of government that regulates the same subject matter. In many other instances, however, since the double-aspect doctrine recognizes “effective concurrency of power over some fields of law, [it] gives rise to the possibility of conflict between a valid federal law and a valid provincial law.”²⁷

It is in response to the effects of the pith and substance doctrine, and its subsidiary double aspect doctrine, that the courts developed the subsequent steps in the constitutional analysis: the interjurisdictional immunity and the federal paramountcy doctrines. Both the interjurisdictional immunity doctrine and the federal paramountcy doctrine presuppose that the impugned law has passed the first step in the constitutional analysis and has been determined to be validly enacted. On that basis, these doctrines are applied as the second stage of the constitutional analysis to resolve those situations where the impugned law that was validly enacted at one level of government affects a core aspect of the other jurisdiction or where two validly enacted statutes conflict.

²³ Hogg, *supra* note 9 at 16-3.

²⁴ See Brun, *supra* note 10 at 466.

²⁵ See Hogg, *supra* note 9 at 15-12.

²⁶ See Brun, *supra* note 10 at 467.

²⁷ Hogg, *supra* note 9 at 15-13.

(i) The Heads of Power

As previously explained, characterizing the pith and substance of the impugned legislation is necessary for a determination of the validity of that law. Thus, determining under which head of power the matter in question falls is a necessary first step in this initial stage of the constitutional analysis. Furthermore, an understanding of each power – of both its core and periphery – is crucial to a robust analysis at the second stage of the constitutional analysis, as will be demonstrated in the sections that follow.

At the federal level, the obvious head of power at play in *Marcotte* is the power listed in section 91(15) of the Constitution Act – Banking, Incorporation of Banks, and the Issue of Paper Money.²⁸ This section has always been considered to apply strictly to “banks” whose original role in the economy was limited and whose activities were principally restricted to deposit taking.²⁹ Therefore, the initial interpretation of the “banking” power or “les opérations bancaires” by the Court was not tied to the nature of specific activities, but was determined widely in relation to the entity that undertook the activities.³⁰ In addition, the Bank Act itself has never definitively defined the business of banking, rather it expressed the business of the bank in both positive and negative terms, listing specific activities in which a bank is permitted to engage and, conversely, specific activities which it is prohibited from doing.³¹ Over time, those lists of activities have expanded and grown in complexity.³² For example, section 409 of the current Bank Act sets out the main business of a bank and stipulates in the first two subsections as follows:

(1) Subject to this Act, a bank shall not engage in or carry on any business other than the business of banking and such business generally as appertains thereto.

(2) For greater certainty, the business of banking includes

²⁸ Other federal powers were considered, for example, section 91(18) - Bills of Exchange and Promissory Notes. However, the discussion of those powers was more limited and goes beyond the scope of this paper.

²⁹ See M.H. Ogilvie, *Bank and Customer Law in Canada*, 2nd ed (Toronto: Irwin Law, 2013) [Ogilvie] at 8-9.

³⁰ See Brun, *supra* note 10 at 499.

³¹ See Ogilvie, *supra* note 29 at 153-155.

³² See *ibid* at 153.

- (a) providing any financial service;
- (b) acting as a financial agent;
- (c) providing investment counselling services and portfolio management services;
and
- (d) issuing payment, credit or charge cards and, in cooperation with others including other financial institutions, operating a payment, credit or charge card plan.

The Court's approach to the constitutional interpretation of the business of banking has shifted over the years. Beginning with the Privy Council's pronouncement in 1894 that "banking is wide enough to embrace every transaction coming within the legitimate business of a banker,"³³ this power was originally interpreted in a large and generous manner and any incursion by the provincial government into its sphere was swiftly repudiated.³⁴ However, the interpretation of the banking power later saw a narrowing in its scope under the jurisdictional immunity doctrine,³⁵ as will be discussed in more detail below, perhaps as a result of the increase in reach and complexity of the business of banking.

Consumer protection, on the other hand, was not assigned exclusively to either level of government and because of its diverse and far-reaching nature, it is impossible to allocate to only one level of government. As one author notes:

Le droit de la consommation est tentaculaire, multidisciplinaire, ce qui peut s'expliquer par le fait [...] qu'il n'est pas réellement une discipline du droit mais plutôt une coupe transversale de celui-ci, un *situ*. On parle donc du droit pénal, du droit administratif voire du droit corporatif de la consommation.³⁶

In order to effectively apply the validity test, "consumer protection must be broken out into smaller, more distinct, concepts, before a consumer protection law can be placed in its correct constitutional slot."³⁷ The federal power to legislate in consumer protection

³³ *Tennant v Union Bank of Canada*, [1894] A.C. 31 [*Tennant*].

³⁴ See Beaudoin, *supra* note 7 at 484.

³⁵ See Brun, *supra* note 10 at 499.

³⁶ Benoît Moore, "Autonomie ou dépendance: réflexions sur les liens unissant le droit contractuel de la consommation au droit commun" in Pierre-Claude Lafond, *Le droit de la consommation sous influences* (Cowansville, Que: Yvon Blais, 2007) 1 [Moore, "Autonomie"] at 2.

³⁷ Hogg, *supra* note 9 at 21-31.

matters stems from a number of its enumerated heads of power, including its power over criminal law found in section 91(27) of the Constitution Act and its power to regulate (interprovincial and international) trade and commerce, set out in section 91(2) of the Constitution Act.³⁸ For example, the Bank Act and the *Interest Act*,³⁹ both enacted under clear federal powers, can be construed, in large part, as consumer protection measures under the federal power over banking and interest, respectively.⁴⁰

The provincial jurisdiction to enact legislation in consumer protection matters rests on several heads of power set out in section 92 of the Constitution Act, in particular, section 92(13) – Property and Civil Rights in the Province, or the catch-all category of section 92(16) – Generally all Matters of a merely local or private Nature in the Province.

The impugned legislation – the Quebec CPA – was already considered by the Court in several constitutional law cases.⁴¹ For example, in *Quebec (AG) v Kellogg's Co of Canada*,⁴² the Attorney General of Quebec sought an injunction against the Kellogg companies to stop advertising products aimed at children over several television stations airing in Quebec. With respect to the validity of the impugned provincial legislation, the Court immediately noted that “[t]he power of the province to enact this provision [regulating advertisements aimed at children] is not questioned” and that the consumer protection legislation clearly falls under section 92(13) and (16) or section 93 of the Constitution Act.⁴³ The Court ultimately found that the Quebec CPA provisions were neither *ultra vires* the provincial legislature nor inoperative since “this regulation does not seek to regulate or interfere with the operation of a broadcasting undertaking” which is subject to federal control.⁴⁴ Rather, the prohibition was aimed at the activities of

³⁸ See Beaudoin, *supra* note 7 at 480; Luc Thibodeau, Louis Charette & Marc Beauchemin, “Champ d’application du droit fédéral” in JurisClasseur Québec, coll. “Droit des affaires”, *Droit de la consommation et de la concurrence*, fasc. 3, looseleaf (Montreal: Lexis Nexis, 2016) [Thibodeau] at 3/3–3/4.

³⁹ RSC 1985, c I-15.

⁴⁰ See Thibodeau, *supra* note 38 at 3/8, 3/10.

⁴¹ See *Quebec (AG) v Kellogg's Co of Canada*, [1978] 2 SCR 211, 83 DLR (3d) 314 [*Kellogg* cited to SCR]; *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR].

⁴² *Kellogg*, *supra* note 41.

⁴³ *Ibid* at 220.

⁴⁴ *Ibid* at 225.

a commercial entity who chose an advertisement medium that happened to be federally regulated. The subject of the prohibition is the advertisement, not the broadcasting activity, and the sole fact that this might “incidentally, affect the revenue of one or more television stations [...] does not change the true nature of the regulation.”⁴⁵ The majority’s finding turned on the fact that the CPA did not seek to regulate a federal undertaking and refused to widen the scope of the analysis. The Court stated: “Whether the regulation could be applied to the television station itself or whether an injunction against Kellogg would bind such station does not arise in this case and I prefer to express no opinion with respect to it.”⁴⁶

This legislation was again considered a decade later in *Irwin Toy Inc v Quebec (AG)* (“Irwin Toy”).⁴⁷ The plaintiff in that case claimed that the sections of the Quebec CPA regulating advertising were a colourable attempt to regulate television advertisement in particular, television broadcasting being a federal undertaking. The Court rejected this argument and stated that the main thrust of the legislation was one “of general application enacted in relation to consumer protection, as in Kellogg’s.”⁴⁸ Therefore the impugned provisions were not only intended to regulate television advertisement but advertisement in general, such other types of advertisement being a more significant means of reaching children than contended by the plaintiff.⁴⁹

(ii) Framing the Question

The reason why a fulsome consideration of the heads of power at play under the initial step in the constitutional analysis is so important is because it is the frame into which the second stage of the constitutional analysis will fit. That is, in determining the validity of the impugned legislation, the courts must determine what aspect(s) or sections of the legislation it considers to be determinative of the constitutional question. This framing of the constitutional analysis is particularly important with respect to such multi-faceted

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Irwin Toy*, *supra* note 41.

⁴⁸ *Ibid* at 953.

⁴⁹ See *ibid.*

and diverse subject matters as consumer protection, which as we have previously described, do not clearly fall into any one head of power and instead must be distilled in each particular case to allow for a meaningful discussion.

In the present case, the Court simply skipped the initial stage of the constitutional analysis and assumed the validity of the legislation in question.⁵⁰ While this conclusion in itself is not wrong, as the legislation in question would surely have passed this initial test, it allowed the Court to gloss over a careful framing of the constitutional question. The results of this avoidance become important at the second stage of the constitutional analysis as will be demonstrated. Instead of considering, for example, how the entire section on contracts of credit interacts with the banking powers over the credit card operations of the banks, the Court limited its analysis to only two provisions – sections 12 and 272 of the Quebec CPA – out of a whole complex and interactive statute.

2. Interjurisdictional Immunity

As discussed, because the pith and substance doctrine in the first step of the constitutional analysis can be applied to uphold legislation that has an incidental effect on matters that fall outside the enacting legislature's power, the courts developed another doctrine to address the situation where the incidental effect of legislation enacted at one level of government affects the essential "core" of a power of the other level of government. In such cases, the infringing law is read to be inapplicable to that matter.⁵¹ In the federal context, "[t]he result of a successful application of the doctrine of interjurisdictional immunity (that is, a finding that the federal matter or undertaking is immune from the impugned provincial law) is that the provincial law in question can never be applicable to that federal matter or undertaking, regardless of whether any federal legislative or executive action has been taken."⁵²

⁵⁰ This issue was not argued before the Court and therefore after determining that the conversion charges are net capital under the *Quebec CPA*, *supra* note 1, the Court jumped directly to a discussion of the interjurisdictional immunity and federal paramountcy doctrines, bypassing the validity stage (see *Marcotte*, *supra* note 2 at paras 48–84). The companion cases in the trilogy do not address the validity of the *Quebec CPA* either.

⁵¹ See Hogg, *supra* note 9 at 15-28.

⁵² *British Columbia (AG) v Lafarge Canada Inc*, 2007 SCC 23, [2007] 2 SCR 86 [*Lafarge*] at para 96.

In order to evaluate the Court's application of the doctrine in the present case, it is important to understand the Court's development of the doctrine and its evolution over time. In the early cases, the Court's approach to the interjurisdictional immunity doctrine wavered between broader and narrower expressions of federal immunity. However, in 2007, the Court adopted a much more restrictive approach to the interjurisdictional immunity doctrine, such that one can legitimately question whether anything remains of this doctrine to be applied to new cases.⁵³

(i) Development of the Doctrine

The case law expounding this doctrine first emerged in relation to federally incorporated companies, but quickly extended to and then evolved in the context of federally regulated undertakings, that is, entities operating in the spheres of federal legislative competence.⁵⁴ The jurisprudential discussion of the immunity of federally regulated undertakings began with the rhetoric of the "sterilizing" effect of provincial legislation on the federal undertaking. Although the actual sterilizing of federal powers was "unlikely in practice",⁵⁵ this reasoning was the basis of the early decisions that held interprovincial and international transportation or communication undertakings to be immune from the application of provincial laws.⁵⁶

A shift in the rhetoric came about in the 1966 decision by the Court in *Commission du Salaire Minimum v Bell Telephone Co* ("Bell 1966")⁵⁷. This watershed case moved away from sterilization as the determinative factor to what became known as the "vital part" test under which the courts were enjoined to consider whether a provincial law would "affect a vital part of the management and operation of the [federal] undertaking."⁵⁸ This represented a widening of the immunity of federal undertakings from provincial

⁵³ In addition, although previously this was applied as a one-way test to preserve the exclusivity of federal powers, the Court has recently begun to apply this test to restrict federal incursions into provincial powers as well (See Brun, *supra* note 10 at 473-474). See e.g. *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank* cited to SCR] at 35-37.

⁵⁴ See Hogg, *supra* note 9 at 15-29.

⁵⁵ *Ibid* at 15-30.

⁵⁶ See *ibid* at 15-29–15-30.

⁵⁷ *Commission du Salaire Minimum v Bell Telephone Co of Canada*, [1966] SCR 767, 59 DLR (2d) 145.

⁵⁸ Hogg, *supra* note 9 at 15-30.

regulation and was, for that reason, criticized by some commentators as unnecessary or even undesirable in a federation in which many socially important laws are “enacted and enforced at the provincial level.”⁵⁹

Nevertheless, the Court strongly upheld this approach in the 1988 case of *Bell Canada v Commission de la santé et de la sécurité au travail* (“Bell 1988”).⁶⁰ The Court found that the Quebec minimum wage law in force at the time affected the management and operation of the Bell Telephone Company, which was a vital part of that interprovincial undertaking. The Court opined that the power to enact legislation concerning working conditions or labour relations forms part of the “primary, elementary or unassailable jurisdiction” over federal undertakings and is not ancillary or incidental⁶¹ and therefore, the provincial legislature could not encroach in that area.⁶² Thus, although the provincial legislation could not be held to paralyze or impair (i.e. sterilize) the operation of the federally regulated entity, it was sufficient to find that it affected a vital part of that entity in order to render the provincial law constitutionally inapplicable to the federal entity.

In fact, the Court went so far as to reject the possibility of concurrent provincial jurisdiction over matters that fall within a vital part of a federal undertaking:

[T]he exclusivity rule approved by *Bell Canada* 1966 does not apply only to labour relations or to federal undertakings. It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject.⁶³

Thus, in the Court’s view in *Bell 1988*, “‘a basic, minimum and unassailable content’ had to be assigned to each head of federal legislative power, and, since federal legislative power is exclusive, provincial laws could not affect that unassailable core.”⁶⁴

⁵⁹ *Ibid.*

⁶⁰ *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749; 51 DLR (4th) 161 [*Bell 1988* cited to SCR].

⁶¹ *Ibid* at 826.

⁶² See *ibid* at 826.

⁶³ *Ibid* at 833.

⁶⁴ Hogg, *supra* note 9 at 15-31.

Previously mentioned in respect of the test of validity, *Irwin Toy*⁶⁵ was the next case in which the Court had occasion to consider the vital part test. Just a year after the Bell 1988 case, the Court was called on to decide whether the Quebec CPA, which prohibited advertising directed at children, could apply to television advertising, a medium which is otherwise subject to federal regulation. The Court found that advertising was indeed “a vital part of the operation of a television broadcast operation.”⁶⁶ However, the Court also found that where the provincial law did not purport to apply directly to a federal undertaking, but only had an “indirect effect”, it would only be inapplicable if it actually *impaired* a vital part of the undertaking. The Court was unwilling to find such impairment in that case.⁶⁷ Thus, the Court effectively narrowed the vital part test established in the Bell 1966 and Bell 1988 decisions by qualifying that the “vital part test applied only to provincial laws that purported to apply directly to federal undertakings.”⁶⁸

Note that although *Irwin Toy* represented “an important qualification of the vital part test”, Hogg contends that “it made little sense.”⁶⁹ Hogg writes: “If it is the case [...] that any vital part of a federal undertaking is within the unassailable, exclusive core of federal power, then surely that core should be as protected from indirect invasion by provincial law as it is from direct invasion.”⁷⁰ In fact, on the next occasion that the Court had to consider this doctrine in *Canadian Western Bank v Alberta*,⁷¹ it dismissed the approach taken in *Irwin Toy* as a misguided attempt to circumvent the problems created by the approach in Bell 1988.

(a) Canadian Western Bank v Alberta

By 2007, the Court broke from the previous caselaw and confirmed that the vital part test was no longer applicable. The Court in *Canadian Western Bank* began its analysis

⁶⁵ *Irwin Toy*, *supra* note 41.

⁶⁶ *Ibid* at 957.

⁶⁷ See *ibid* at 957-959.

⁶⁸ Hogg, *supra* note 9 at 15-32.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ *Supra* note 53.

by noting that although this doctrine is well-founded and its modern formulation finds its origin in the Bell 1988 case, it is actually of limited application.⁷² It clarified that, going forward, the test for interjurisdictional immunity was rather a question of whether the provincial law would actually *impair* a “core competence” of the federal government or “a vital or essential part of an undertaking it duly constitutes” and not merely affect it.⁷³

In that case, the Court was asked to consider whether provincial insurance law regulating market conduct rules in the promotion of insurance could apply to credit-related insurance offered by banks. The bank in that case argued that creditor’s insurance is so intertwined with the bank’s lending and security-taking activities, which were clearly vital aspects of its functions, that the promotion of insurance should also be held to be a vital part of the undertaking.⁷⁴

The Court opened its analysis by reviewing the history of the development of the interjurisdictional immunity doctrine and noted that the expansion of the doctrine from the protection of federally incorporated companies to the generally immunity of works, undertakings, persons or even activities under federal jurisdiction was unwarranted and carries many dangers, not least of which is that it requires “the attribution to every legislative head of power of a ‘core’ of indeterminate scope,”⁷⁵ which runs counter to the incremental approach necessary to accommodate the legitimate interplay between the two levels of government.⁷⁶ The Court took the position that certain powers simply do not lend themselves well to identifying a “core.”⁷⁷

To that effect, the Court expressed concerns about the use of this doctrine to undermine Canadian federalism in which both levels of government must be equally respected:

In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, it would appear that the jurisprudential

⁷² *Ibid* at 30.

⁷³ Hogg, *supra* note 9 at 15-34.

⁷⁴ *Canadian Western Bank*, *supra* note 53 at 15-16.

⁷⁵ *Ibid* at 36.

⁷⁶ *Ibid* at 35-37.

⁷⁷ Brun, *supra* note 10 at 474-475.

application of the doctrine has produced somewhat “asymmetrical” results. Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of “reading down” the federal enactment or federal power without too much doctrinal discussion [...]. In general, though, the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation [...].⁷⁸

Therefore, the Court advocated for a more restricted use of the interjurisdictional immunity doctrine and emphasized that the “dominant tide” of constitutional thought “finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government.”⁷⁹ Thus, in the absence of conflicting legislation – which would be addressed by the paramountcy doctrine – the approach endorsed by the Court was to interpret the legislation in a manner that allows the statutes to coexist.⁸⁰

To identify those few cases where statutes could not coexist, the Court articulated a new test for interjurisdictional immunity located somewhere between the old test of sterilization and the approach taken in *Bell* 1988 in which it was enough for the provincial legislation to merely “affect” the federal legislation in order for the federal legislation to be considered immune.⁸¹ The new approach was expressed in the following way:

It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “impairing” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.⁸²

In applying the test, the Court indicated that the first step in the analysis of the interjurisdictional immunity doctrine was to consider what exactly is the core of a

⁷⁸ *Canadian Western Bank*, *supra* note 53 at 32.

⁷⁹ *Ibid* at 33.

⁸⁰ *Ibid* at 33.

⁸¹ *Ibid* at 39. Note that in dissent Justice Bastarache repeated the reasoning set out in *Lafarge*, *supra* note 52, in which he clarified that the “effect” in the vital part test must be interpreted as an effect that has a sufficiently severe impact on the federal legislation in order to justify a finding of immunity. This approach, claimed Bastarache, has the advantage of promoting the “incremental development of the doctrine” sought by the Majority but does not have the disadvantage of signifying a distinct break with the previous caselaw as the Majority’s decision required (*Canadian Western Bank*, *supra* note 53 at 67-68).

⁸² *Canadian Western Bank*, *supra* note 53 at 40.

legislative power, what Bell 1988 limited to the “basic, minimum and unassailable content.”⁸³ This step consists of determining what is “vital and essential” to a federal undertaking, which is by its plain definition, “not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation,”⁸⁴ and therefore it constitutes an important limit on the scope of this doctrine.

The Court reconciled this new approach with Bell 1988 (and similar cases decided at the time) by noting that the case should be read as being limited to the conclusion that the management of a federal undertaking is part of the core of what makes the undertaking a federal interest and this finding cannot be extended to just any activity of the undertaking.⁸⁵ In fact, the Court reasoned that the interjurisdictional immunity doctrine, with some rare exceptions, has always been applied with restraint.⁸⁶

The Court then discussed the appropriate order in which to consider the doctrines of interjurisdictional immunity and federal paramountcy after a court has determined that the legislation is valid in its “pith and substance”. In that vein, the Court pursued its approach outlined above that restraint must be used in applying the interjurisdictional immunity doctrine and concluded that when a case can be resolved simply by considering the pith and substance analysis followed by the federal paramountcy test, the analysis should simply end there.⁸⁷

The only instances in which the Court considered it appropriate for a court to apply the interjurisdictional immunity doctrine before applying the test to establish paramountcy are those contexts which have already been addressed by precedents, that is, when the federal legislation touches on:

[F]ederal things, persons or undertakings or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative

⁸³ *Ibid* at 40.

⁸⁴ *Ibid* at 41-42.

⁸⁵ *Ibid* at 48-49.

⁸⁶ *Ibid* at 51.

⁸⁷ *Ibid* at 54. Once again Justice Bastarache dissented from this approach noting that “it is impossible to find a federal law paramount over a provincial law, or to conclude that the provincial one is inoperable, if the provincial law is not even applicable to the federal matter at issue” (*ibid* at 69).

jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.⁸⁸

With respect to the relevant precedents, the Court notes that, banks, as such, are not exempt from provincial law. For example, the Court mentioned that in *Bank of Toronto v Lambe*, (1887), 12 App. Cas. 575, it was held that the bank was subject to a provincial tax aimed at banks and in *Gregory Co. v Imperial Bank of Canada*, [1960] C.S. 204, it was held by the Quebec Superior Court that a bank is subject to provincial securities laws.⁸⁹ Accordingly, the Court concluded that “the mere fact that the banks now participate in the promotion of insurance does not change the essential nature of the insurance activity, which remains a matter generally falling within provincial jurisdiction.”⁹⁰

In reaching this conclusion and relying on precedent in that case, the Court avoided the complicated exercise of defining “banking”, although it recognized the importance of centralized banking to promote security and public confidence and that, as such, “the federal banking power allowed Parliament to confer upon a bank privileges which had ‘the effect of modifying civil rights in the province.’”⁹¹ However, in that respect, the Court distinguished between the scope of the federal power which is wide, and its basic, minimum and unassailable content, which the Court concluded is not coextensive with what bankers are permitted to do.⁹² Ultimately, the sale of optional insurance was considered to be distinct from the granting and securing of loans which goes to the core of banking and is better characterized as an additional commercial opportunity seized by the banks, rather than the business of banking.⁹³ Thus, the interjurisdictional immunity doctrine was not triggered in that case.

⁸⁸ *Ibid* at 54.

⁸⁹ *Ibid* at 55-56.

⁹⁰ *Ibid* at 55.

⁹¹ *Ibid* at 57.

⁹² *Ibid* at 57-58.

⁹³ *Ibid* at 58-62.

(b) British Columbia (AG) v Lafarge Canada Inc

Hogg notes that “[t]he general tenor of the majority opinion in *Canadian Western Bank* was unsympathetic to the doctrine of interjurisdictional immunity.”⁹⁴ Indeed, the implications of that case’s restrictive approach were immediately seen. In *British Columbia (AG) v Lafarge Canada Inc* (“Lafarge”),⁹⁵ a decision handed down at the same time as *Canadian Western Bank*, the Court was called on to decide whether the port of Vancouver should be exclusively regulated by the *Canada Marine Act* or whether it should also be subject to the zoning laws of the various municipalities that intersected with the land occupied by the port.

The Court began by noting that there is no specific head of power over ports, but instead jurisdiction is divided between the federal power over its public property and shipping and navigation and the provincial power over property and civil rights and municipal institutions.⁹⁶ In setting out the test for interjurisdictional immunity, the Court referred back to the vital part test established in the *Bell 1988* case and once again qualified it as follows: “What is ‘vital’ or ‘essential’ is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation.”⁹⁷ In fact, the Court noted that the application of the doctrine is only triggered when the provincial law “bear[s] upon those [federal] subjects in what makes them specifically of federal jurisdiction.”⁹⁸ The Court concluded that the activities in question were not essential enough to the federal powers to warrant immunity.⁹⁹ The Court reached this conclusion despite the fact that the municipal and federal authorities “most closely concerned in the planning exercise [found the project] to be sufficiently integrated in the marine offloading and storage operation to be dealt with through federal rather than municipal procedures.”¹⁰⁰

⁹⁴ Hogg, *supra* note 9 at 15-35.

⁹⁵ *Lafarge*, *supra* note 52.

⁹⁶ *Ibid* at para 36.

⁹⁷ *Ibid* at para 42.

⁹⁸ *Ibid* citing Beetz J. in *Bell 1988*, *supra* note 60.

⁹⁹ *Ibid* at para 72.

¹⁰⁰ *Ibid* at para 88.

The Court was able to achieve this result by narrowly construing the federal activities. For example, it first distinguished between harbours of national importance and those of lesser significance,¹⁰¹ then within the Vancouver port lands itself, the Court focused on the various land classes,¹⁰² and then within the particular land class, it focused in on the type of commercial activity being practiced there.¹⁰³ At the end, the Court myopically chose to focus on the smallest piece of a complex, interactive scheme.

In his comments on Lafarge, Hogg noted that “[i]f ever there was a case for interjurisdictional immunity, this was it.”¹⁰⁴ It seemed clear that requiring any development in the port to comply with “a patchwork of municipal land-use regimes” would be unrealistic.¹⁰⁵ However, in the spirit of *Canadian Western Bank*, the Court spurned the interjurisdictional immunity doctrine and enforced the limited view of the doctrine, despite the uneasy fit in that instance. Hogg, critiquing the result as inappropriate, commented: “[The majority] did not seem to be entirely persuaded by their reasoning, however, [and] they went on to hold on flimsy grounds (that looked very like interjurisdictional-immunity reasoning) that the Vancouver by-law was inoperative by reason of federal paramountcy.”¹⁰⁶

In his concurring opinion, Justice Bastarache found that the appropriate resolution for that case was the application of the interjurisdictional immunity doctrine.¹⁰⁷ Bastarache first addressed the criticisms leveled against the doctrine, and argued that there is a “doctrinal and practical need to conserve the doctrine.”¹⁰⁸ In particular, the interjurisdictional immunity test responds to the situation that the other tests (validity and paramountcy) do not, and without the remedy of reading down the provincial law so that it is inapplicable to the federal matter, the alternative would be to find that the law or provision in question is in pith and substance invalid,¹⁰⁹ which that test was not really

¹⁰¹ *Ibid* at paras 44-46.

¹⁰² *Ibid* at paras 47-65.

¹⁰³ *Ibid* at paras 66-71.

¹⁰⁴ Hogg, *supra* note 9 at 15-36.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*. See also *Lafarge*, *supra* note 52 at paras 80-85.

¹⁰⁷ *Lafarge*, *supra* note 52 at para 93.

¹⁰⁸ *Ibid* at para 101.

¹⁰⁹ *Ibid* at para 103.

designed to do.¹¹⁰ Bastarache further advocated for an approach that takes the middle ground between the sterilization requirement from Bell 1966 and an interpretation of the vital part test as merely requiring that the federal power be affected in order to trigger immunity.¹¹¹

Criticizing the majority's application of the doctrine in that case, Bastarache clarified that the focus of the inquiry must be on how the provincial law affects the federal power and not on the specific activity in question, as this would too restrictively narrow the scope of the doctrine's application. He wrote:

I would disagree with Justices Binnie and LeBel's treatment of the operation of interjurisdictional immunity [...] where they focus on an "activities" based notion of jurisdiction. [...] With respect, this analysis is problematic because the test for immunity should not focus on any specific activity or operation at issue [...]. The immunity doctrine is about jurisdiction; what matters is whether or not a provincial law affects the core of a federal head of legislative power, regardless of whether or how that federal power is exercised or will be exercised, if at all, with respect to a particular project or activity.¹¹²

In fact, the importance of the interjurisdictional immunity doctrine is that it applies regardless of whether the federal government is already acting in that field.¹¹³ What is required is first to determine the "core" of the federal power, next whether the federal legislation or matter falls within that core and finally, whether the provincial law affects that core in a "sufficiently severe and serious" manner.¹¹⁴

While Bastarache warned against "defin[ing] the core too widely, such that the core of the federal sphere of jurisdiction would become as large as its outer boundaries,"¹¹⁵ he did find that "the regulation of the land use planning for such lands in support of port operations" is a core function of the federal power over navigation and shipping.¹¹⁶

¹¹⁰ *Ibid* at para 105.

¹¹¹ *Ibid* at para 108.

¹¹² *Ibid* at para 109.

¹¹³ *Ibid* at para 110.

¹¹⁴ *Ibid* at paras 118, 171.

¹¹⁵ *Ibid* at para 127.

¹¹⁶ *Ibid*.

Bastarache then went on to find that the municipal by-law, which imposed “a zoning regime and an approval process for development proposals” seriously hinders a vital aspect of the federal power.¹¹⁷

(c) Quebec (AG) v Canadian Owners and Pilots Association

The Court’s decision in *Lafarge* is an interesting contrast with the Court’s pronouncements in *Quebec (AG) v Canadian Owners and Pilots Association* (“COPA”)¹¹⁸ just a few years later. In 2010, the Court once again had occasion to consider the application of the interjurisdictional immunity doctrine in a case pitting provincial agricultural zoning law against federal jurisdiction over air travel under the POGG power. COPA was concerned with the treatment of a private aerodrome constructed on land designated for agricultural purposes pursuant to a Quebec law respecting the preservation of such land. The provincial law prohibited use of designated land other than for agriculture; the penalty for contravention being fines and empowering the regulator to order the restoration of the lots to their former condition.¹¹⁹

After determining that the Quebec legislation was *intra vires* the province’s power over property and civil rights and matters of a purely local and private nature,¹²⁰ the Court went on to consider the application of the interjurisdictional immunity doctrine. The Court framed the inquiry as follows: “The first step is to determine whether the provincial law [...] trenches on the protected ‘core’ of a federal competence. If it does, the second step is to determine whether the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.”¹²¹

Referring to the approach taken in *Canadian Western Bank* to limit the characterization of the “core” of the affected legislation to that already identified in precedent,¹²² the

¹¹⁷ *Ibid* at para 140.

¹¹⁸ *COPA*, *supra* note 17.

¹¹⁹ *Ibid* at para 9.

¹²⁰ *Ibid* at paras 15-24.

¹²¹ *Ibid* at para 27.

¹²² *Ibid* at para 26.

Court went on to find that the jurisprudence establishes Parliament's power over aeronautics, including the determination of the location of aerodromes, which lies at the core of that power.¹²³

However, the characterization by the Court of the matter at issue in that case was important, from the standpoint of determining whether it lies at the "core" of the federal power as well as what precedents to consider. The Court qualified the matter widely as the "location of aerodromes"¹²⁴ and in so doing the Court did not seem bothered by the fact that COPA concerned a privately operated aerodrome that arguably exists on the periphery of Parliament's power over aeronautics. On this point, the Court wrote that seeing them as part of the same power "reflects the reality that Canada's airports and aerodromes constitute a network of landing places that together facilitate air transportation and ensure safety."¹²⁵

As to whether the provincial law impairs the federal power, the Court restated the test that was expressed in *Canadian Western Bank* as follows:

"Impairment" is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.¹²⁶

However, in applying this test, the Court considered the impairment as it applied generally to the location of aerodromes and did not construe it narrowly by limiting it to the facts of the case, which, as it only affected a tiny private aerodrome, would have only constituted a minor impairment on the exercise of the federal power. Rather the Court found that although the provincial legislation does not sterilize the federal power (as the paramountcy doctrine would permit the federal legislation to override any provincial restrictions), it still seriously affected it: "Parliament would not be free to introduce broad, permissive legislation, should it so choose (and as it has chosen to

¹²³ *Ibid* at paras 28-40.

¹²⁴ *Ibid* at para 34.

¹²⁵ *Ibid* at para 33.

¹²⁶ *Ibid* at para 45.

do).¹²⁷ In fact, the Court wrote that if the federal power would not be immune from the application of the provincial statute,

[I]t would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.¹²⁸

It is evident from a comparison of Lafarge and COPA that the way in which a court frames the question and the aspect of the federal or provincial power that it encompasses in its analysis has a very important impact on the outcome. This is apparent in Marcotte as well, where, once again, the Court swung back to a very narrow framing of the provisions to be examined under the interjurisdictional immunity test.

(ii) The Court's Analysis in Marcotte

The Court began its analysis of the interjurisdictional immunity doctrine in Marcotte by expressing its support for the approach first adopted in Western Bank:

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* [...] 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.¹²⁹

Having found that no precedent applied the doctrine to the credit card activities of a bank, the Court moved on to apply the limited test in that context:

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,

¹²⁷ *Ibid* at para 53.

¹²⁸ *Ibid* at para 60.

¹²⁹ *Marcotte*, *supra* note 2 at para 63.

flexible federalism”: Quebec (Attorney General) v. Canadian Owners and Pilots [...]. 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?¹³⁰

However, in dismissing the application of the doctrine, the Court declined to delineate the core of the banking power, instead focusing on the second step mentioned above. The Court seems to imply that no matter how broadly one characterizes the core of banking, there can be no impairment of the power in this case. It wrote:

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.¹³¹

Without much discussion of either scheme or how they interact, the Court concluded: “The provisions of the Quebec CPA do not prevent banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers.”¹³²

¹³⁰ *Ibid* at para 64.

¹³¹ *Ibid* at para 66.

¹³² *Ibid* at para 68.

The Court then goes on to bolster its conclusion with an element that should not be considered under the interjurisdictional immunity test. It argued that since the Quebec CPA does not require that the federal legislature enact legislation to countermand it, the immunity argument must fail:

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.¹³³

However, it should be recalled that preventing the federal government from doing something altogether should not be the question here (as this would be to apply the old test of sterilization), but whether the provincial legislation impairs the manner in which the federal power may be exercised. In the section that follows, I discuss the core of the banking power and explain why the Court may have been reluctant to engage in its delineation.

(a) Core of Banking

It might seem obvious that it would be a difficult (if not impossible) exercise to determine whether the core of a power has been impaired if one does not quite know that that “core” is. Yet that is precisely what the Court did in *Marcotte*. As cited above, the Court stated: “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.”¹³⁴ In fact,

¹³³ *Ibid* at para 69.

¹³⁴ *Ibid* at para 66.

the Court never returned to consider that first question. However, the Court's approach in *Marcotte* of avoiding a determination of what the "core" of banking may be in the context of this case is not surprising: the courts have been increasingly unwilling to draw the boundaries of this power, as will be seen from the sampling of decisions discussed below.

Jurisprudence involving the banking power has been accumulating for well over a century. The first important case, *Tennant v Union Bank of Canada*,¹³⁵ was heard by the Privy Council in 1894 and, as previously mentioned in respect of a consideration of the banking head of power, the scope of the power at that time was determined very widely (if vaguely) to any "transaction coming within the legitimate business of a banker."¹³⁶ Almost 100 years after that first case was decided, the Court in *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan*¹³⁷ discussed the distinction between the business of banking and the constitutional scope of the banking power. On that occasion, it wrote: "The concept of banking as a business and the meaning of the word 'banking' in section 91(15), are not necessarily coextensive; the meaning of 'banking' in the section might very well be wider than the concept of banking as a business."¹³⁸ However, an argument that all other institutions carrying on banking activities in the provinces were operating illegally was not conclusively addressed by the court.¹³⁹

As the role of banks in the Canadian economy expanded beyond their traditional pursuits, the courts had to consider an ever-widening array of activities. They began to grapple with how closely tied these activities were to the constitutionally protected business of banking and how they fit into the overall scheme set out in the banking legislation, the contents of which also shifted over time.¹⁴⁰

¹³⁵ *Supra* note 33.

¹³⁶ *Ibid* at 46.

¹³⁷ [1980] 1 SCR 433; [1980] 107 DLR 3d 1 [cited to SCR].

¹³⁸ *Ibid* at 466.

¹³⁹ See Ogilvie, *supra* note 29 at 21.

¹⁴⁰ See *ibid* at 153ff.

In *Bell* 1988, the question of whether provincial employment legislation could be applied to banks was considered, and it was found that labour management was too closely tied to Parliament's power over banks to be encroached upon. The Court in that case quoted Justice Rand, speaking in an earlier case:

Banking, the incorporation of banks and the issue of paper money come under s.91(15). It would be incompatible with that power with its national interest and responsibility that the qualifications, classifications, hours of labour, wages and salaries of employees, related as they are to the earning charges of interest, etc. or the procedure to obtain agreement on them, should not lie within the regulation of Parliament.¹⁴¹

In *Bank of Montreal v Hall* ("Hall"),¹⁴² the Court briefly analyzed the banking power (at the step of determining the validity of the legislation in question) and then discussed at length what type of security interest was created by the provision of the Bank Act in question. The Court delved into the history of the particular provision, as well as its antecedents dating back to 1859, in order to "appreciate the rationale for the creation of this particular security interest."¹⁴³ After explaining the need to make credit facilities available to certain types of customers, such as farmers, by allowing them to provide certain types of security directly to the banks,¹⁴⁴ the Court also noted the following point:

[T]he need to introduce a uniform security interest, applicable nationwide, did not rest solely on the desire to abolish the restrictions of real and personal property. The introduction of a national security interest was also perceived as a means of obviating barriers to the lending of money attributable to the complexity and diversity of lending regimes in the nascent Canadian economy.¹⁴⁵

The Court also mentioned that the provision in question was the means of providing essential services to the Canadian community and were in effect a policy response by Parliament to the needs of borrowers.¹⁴⁶ For all of the above reasons, the Court concluded that the ability to create this security interest, as well as to determine the bank's obligations and rights in its respect, fell "squarely within the limits of the federal

¹⁴¹ *Bell* 1988, *supra* note 60 at 823.

¹⁴² [1990] 1 SCR 121, 65 DLR (4th) 361 [*Hall* cited to SCR].

¹⁴³ *Ibid* at 134.

¹⁴⁴ *Ibid* at 134-137.

¹⁴⁵ *Ibid* at 138.

¹⁴⁶ *Ibid* at 139-140.

banking power.”¹⁴⁷ On the policy decision to create a uniform system of security taking, the Court wrote:

It follows that the definition of the precise manner in which a bank is permitted to realize on its s. 178 security interest cannot be viewed as a mere appendage or gloss upon the overall scheme of the Act. Rather, the provisions by which the bank, on assignment of the security interest, effectively acquires legal title to the secured property must be viewed as the very linchpin of the security interest that Parliament, in its wisdom, has created. Far from being incidental, these provisions are integral to, and inseparable from, the legislative scheme. To sunder from the Bank Act the legislative provisions defining realization, and, as a consequence, to purport to oblige the banks to contend with all the idiosyncrasies and variables of the various provincial schemes for realization and enforcement would, in my respectful view, be tantamount to defeating the specific purpose of Parliament in creating the Bank Act security interest.¹⁴⁸

However, as discussed above, the attitude towards the interjurisdictional immunity doctrine shifted in *Canadian Western Bank*. The Court in that case warned that the Bell 1988 test is dangerous, not least of which because it requires “the attribution to every legislative head of power of a ‘core’ of indeterminate scope,” which runs counter to the incremental approach necessary to accommodate the legitimate interplay between the two levels of government.¹⁴⁹

As previously noted, the Court in that case was asked to consider whether provincial insurance law regulating market conduct rules in the promotion of insurance could apply to credit-related insurance offered by banks. That case forced the Court to consider the changing nature of banking activities and how such evolution should impact the constitutional analysis of the separation of powers. In fact, the Court began its decision by recognizing that the federal power over “Banking, Incorporation of Banks, and the Issue of Paper Money” may no longer contemplate the same activities as the framers of the Constitution Act would have had in mind:

The framers of the Constitution Act, 1867 must have thought that the content of the federal power over “Banking, Incorporation of Banks, and the Issue of Paper Money” (s. 91(15)) was tolerably clear. Banking, according to one early authority,

¹⁴⁷ *Ibid* at 140, 146-147.

¹⁴⁸ *Ibid* at 147.

¹⁴⁹ *Canadian Western Bank*, *supra* note 53 at 35-37.

is more or less what “com[es] within the legitimate business of a banker” (Tennant v. Union Bank of Canada, [1894] A.C. 31 (P.C.), at p. 46). Bankers today are not limited in their activities to the activities their predecessors pursued in the nineteenth century. In recent years, they have persuaded Parliament to open the door to lines of business formerly closed to them, such as the promotion (though not underwriting) of certain lines of insurance. Indeed, more generally, there has been a blurring of the traditional “four pillars” of the Canadian financial services industry, which formerly were neatly divided into banks, trust companies, insurance companies, and security dealers, the first under federal regulation and the last three regulated by the provinces.¹⁵⁰

When it comes to the banking power, the Court in *Canadian Western Bank* clarified that:

[I]t does *not* include ‘every transaction coming within the legitimate business of a banker’ because taken literally such a definition would then mean for instance that the borrowing of money or the lending of money, with or without security, which come[s] within the legitimate business of a great many other types of institutions as well as of individuals, would, in every respect, fall under the exclusive legislative competence of Parliament. Such a result was never intended.¹⁵¹

The Court declined to fully engage in the “notoriously difficult task of defining banking.”¹⁵² Instead, the Court concluded that the promotion of this optional insurance was too far removed from those activities that must be considered to be essential or indispensable to the federal nature of the undertaking. It therefore did not form part of the core of banking that merited protection from the incursion of provincial regulation.

It should be noted that the Court’s position in *Canadian Western Bank* was not a maverick opinion. As the business of banking has expanded over the years, it is not clear that Parliament’s exclusive powers over those activities of banking have expanded in tandem. In fact, for as long as the banking power has been enshrined in the Constitution Act, other financial institutions, such as federal and provincial trust companies, credit unions and other non-bank finance companies, have been engaged

¹⁵⁰ *Ibid* at 14-15.

¹⁵¹ *Ibid* at 49-50.

¹⁵² *Ibid* at 85.

across Canada in what might have otherwise been easily characterized as the “core” activities of a bank.¹⁵³

One author writing in 1980 on the phenomenon of increasing activity of provincial corporations in areas that had previously been considered to be exclusively banking activities¹⁵⁴ discussed how the banking power could extend to control such activities:

It has been held that banking activity by provincially incorporated institutions is permissible in the absence of a federal statute to the contrary. While holding that the activity of provincial institutions is not banking from a provincial point of view, so that applicable provincial law is *intra vires*, these decisions also support the view that the federal government could, if it so desired, regulate such activity from a federal point of view under the banking power.¹⁵⁵

He noted how regulation that is incidental to the activities of federally incorporated banks might be upheld in the same vein and then wondered whether this could also extend to “the institutional aspects of these banking-related institutions under the banking power.”¹⁵⁶ He expressed confidence that the “federal government might accomplish [this], however, by using its power over banking-related activities to restrict such activities to federally incorporated banks. This would coerce provincially incorporated institutions into either accepting federal jurisdiction or abandoning bank-like activities.”¹⁵⁷

That may have been true at the time, but in fact, these incursions have been tacitly permitted by Parliament who did not legislate to prevent any other entities from engaging in banking activities.¹⁵⁸ As another author comments:

While the most significant incursion in section 91(15) has been that of the coexistence of the near-banks with the federally chartered banks, numerous other incursions have been tolerated by the federal government and upheld as constitutionally valid by the courts, especially in relation to provincial legislation

¹⁵³ See e.g. Ogilvie, *supra* note 29 at 9, 11-14; Beaudoin, *supra* note 7 at 486 (discussing provincial credit unions); Hogg, *supra* note 9 at 24-7 – 24-8.

¹⁵⁴ See Robert Kerr, “The Scope of Federal Power in Relation to Consumer Protection” (1980) 12 Ottawa LR 119 at 129-132.

¹⁵⁵ *Ibid* at 130.

¹⁵⁶ *Ibid* at 131.

¹⁵⁷ *Ibid*.

¹⁵⁸ See Ogilvie, *supra* note 29 at 14; Hogg, *supra* note 9 at 24-2.

which has affected banking. Such legislation when *intra vires* the provinces effectively cuts down the scope of parliamentary power over banking pursuant to section 91(15), and has affected the regulation of banks in a number of ways.¹⁵⁹

Given that even the activities that seem to be at the “core” of banking are no longer within the exclusive purview of banks, it is not surprising that the courts are declining to protect those activities into which banking has naturally progressed, such as credit card activities, and in which the banks are expressly permitted to engage, but which it shares with many other institutions. At this point, it may be too late for the federal government to turn back and reassign exclusive content to the banking power.

(b) Application to Marcotte

Even if the Court wished to avoid a characterization of the core of banking, it still had to provide reasons for its finding under the second step of the interjurisdictional immunity analysis, that is, that the provincial legislation does not impair the federal power. It did so in this case by narrowly construing the provincial legislation in question.

As noted earlier, the framing of the question is automatically determinative of the issue as it will be much easier to find that an activity lies at the core of a federal power if it is construed widely. In *Lafarge*, the majority defined the federal matter very narrowly. As discussed above, in characterizing the element of federal jurisdiction in question, the Court narrowed it by increasing degrees. For example, it first distinguished between harbours of national importance and those of lesser significance,¹⁶⁰ then within the Vancouver port lands itself, the Court focused on the various land classes,¹⁶¹ and then within the particular land class, it focused in on the type of commercial activity being practiced there.¹⁶²

In *COPA*, the Court declined to take that restrictive approach, although it could have easily done so on the facts of that case (extremely small, private aerodome) and

¹⁵⁹ Ogilvie, *supra* note 9 at 13.

¹⁶⁰ *Lafarge*, *supra* note 52 at paras 44-46.

¹⁶¹ *Ibid* at paras 47-65.

¹⁶² *Ibid* at paras 66-71.

predictably, the opposite decision in respect of the interjurisdictional immunity doctrine was reached.

In *Marcotte*, the Court declined to frame the question at issue in terms of federal power because, as discussed above, the courts are disinclined to delineate the banking power. Instead, the Court framed the interjurisdictional immunity questions by outlining the scope of the impugned provincial legislation and limiting it to just two provisions out of a complex and interactive statute. It stated: “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.”¹⁶³

However, it is only because of the Court’s previous conclusion that conversion fees are net capital that it was able to limit the constitutional analysis to these two sections of the legislation, provisions which do not deal specifically with credit but which are very general in nature. Because the Court notionally separated the analysis of the nature of the charges under the Quebec CPA from the constitutional analysis of the application of that same statute, it seems to go unnoticed that the Court drastically narrowed the scope of its constitutional analysis. However, it must be noted that it is the Court’s conclusion regarding the nature of those fees that underlies the entire constitutional analysis; in fact, the Court’s conclusion that the fees are net capital presupposed that the sections of the Quebec CPA regarding contracts of credit apply, although the particular fees in question were determined not to be credit charges.

Thus, considering only the disclosure of charges under section 12 in this isolated fashion is an extremely narrow way in which to frame the question and can be analogized to the Court’s approach in *Lafarge*. By the Court restricting its analysis to only two provisions of very general application instead of considering the contract of credit related section of the Quebec CPA, it was much easier for the Court to conclude – without looking further – that these provisions, simple as they appear to be, could not impair any manner in which the federal government chooses to regulate the activities of a bank. It thus becomes almost immaterial to consider the activity of the bank in

¹⁶³ *Marcotte*, *supra* note 2 at para 65.

question – the administration of credit cards – which not only has a historical relationship with the business of banking¹⁶⁴ but which is also specifically listed as one of the main activities of a bank in section 409 of the Bank Act. Certainly, if the Court had taken into account the provisions of the Quebec CPA dealing directly with contracts of credit, it would have had to engage more extensively with the scope and core of the credit card business of banks.

(c) Conclusion on the Interjurisdictional Immunity Doctrine

Doctrinal writing has explained *Canadian Western Bank* and the decisions that followed as a tug of war between two competing visions of Canadian federalism. *Canadian Western Bank* is seen as an abrupt departure from a vision of federalism that emphasized the primacy of the central power of the federal government which the Court (and Privy Council) had espoused up to that point.¹⁶⁵ It favoured instead a model of cooperative federalism, in which both levels of government interact on equal footing.¹⁶⁶ As one author presciently noted: “*Canadian Western Bank* is the odd case out in the trajectory of constitutional law in relation to ‘banking,’ and it may hint at a larger provincial role in the future.”¹⁶⁷ The subsequent decisions by the Court, as described above, have inclined in one direction and then another, producing an erratic approach to the doctrine that provides scant guidance to subsequent courts.

Given the Court’s uneasy relationship with the interjurisdictional immunity doctrine in the recent past, and adding to that the particular difficulty of defining the core of banking, it is perhaps not surprising that the Court offered a weak analysis of the interjurisdictional immunity doctrine in the present case. In fact, given the Court’s disinclination since *Canadian Western Bank* to generally delimit the “core” of a federal power, one might question whether there is anything left of the interjurisdictional immunity doctrine in respect of considering incursions of provincial power into federal jurisdiction, setting aside the historical application of this test in precedent.

¹⁶⁴ See Ogilvie, *supra* note 29 at 161-162.

¹⁶⁵ See Brun, *supra* note 10 at 457-458.

¹⁶⁶ See *ibid* at 474.

¹⁶⁷ Ogilvie, *supra* note 29 at 18.

However, the result of the Court's approach to the interjurisdictional immunity doctrine in this case may paradoxically be the one the Court in *Canadian Western Bank* warned against when it talked about the doctrine producing "asymmetrical" results.¹⁶⁸ Although that fear was largely expressed in relation to curtailing provincial powers in favour of federal ones, the opposite effect was recognized by the Court in *Canadian Western Bank* as a possible (although less likely) outcome:

Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of "reading down" the federal enactment or federal power without too much doctrinal discussion.¹⁶⁹

Certainly, to avoid the risk of the pendulum further swinging from one extreme to another, a well-reasoned discussion of the merits of one approach to the interjurisdictional immunity doctrine over the other must be proffered and applied in a reasoned manner in each case. Unfortunately, the Court's discussion of the application of the interjurisdictional immunity doctrine in *Marcotte* was insufficient and therefore unpersuasive. Its analysis of the federal paramountcy doctrine, as will be discussed in the following section, also suffers from several deficiencies.

3. Federal Paramountcy

The Court's discussion of federal paramountcy fails to provide a clear and ordered analysis of the doctrine, resulting in conflation of certain steps of the constitutional analysis and a weak evaluation of others. Furthermore, in addition to its failure to undertake a robust analysis of the doctrine, the Court dismisses the bank's arguments based on a number of unexamined and ultimately unfounded assumptions.

In the section that follows, I will trace the development of the doctrine through a sampling of cases that shed light on the Court's discussion in *Marcotte*. I will also highlight the lacuna in the Court's conclusions in *Marcotte*, which will be explored in greater detail in the subsequent parts of this thesis.

¹⁶⁸ *Canadian Western Bank*, *supra* note 53 at 35.

¹⁶⁹ *Ibid* at 32.

(i) Description and Development of the Federal Paramountcy Doctrine

Hogg describes the federal paramountcy doctrine as follows:

The doctrine of paramountcy stipulates that, where there are inconsistent federal and provincial laws, it is the federal law that prevails; paramountcy renders the provincial law inoperative to the extent of the inconsistency. Thus, paramountcy is a form of attack that is available only against a provincial law, and then only when there is a conflicting federal law in existence.¹⁷⁰

The result of the application of this doctrine is simply to render the impugned provincial law inoperative in respect of the conflict that it creates with a federal law.¹⁷¹ It serves to create a protected space around the application of a valid federal law.

There are two instances in which the doctrine of federal paramountcy will apply. The first, known as the “impossibility of dual compliance” rule, occurs in the presence of one law that directly contradicts another, that is, “when it is impossible for a person to obey both laws” and attempting to comply with one will necessarily invoke the breach of the other.¹⁷² Where there is mere duplication and a person can comply with both laws at the same time, there is no call to apply the paramountcy doctrine and both laws remain operative.¹⁷³ As in other areas, the courts have favoured an approach where laws are interpreted, where possible, so as not to contradict one another, that is, “where two possible interpretations of a law are possible, and one would make the law unconstitutional, the court should normally choose the one that supports the constitutional validity of the law.”¹⁷⁴

However, even where it would be possible to comply with overlapping federal and provincial rules, the courts further recognized that there is sometimes a need to apply the doctrine anyway in the presence of another factor. That is, the second instance in which the doctrine applies is where there is frustration of the purpose of the federal law. In order to apply this aspect of the doctrine, generally referred to as the “frustration of

¹⁷⁰ Hogg, *supra* note 9 at 15-28.

¹⁷¹ See Brun, *supra* note 10 at 478.

¹⁷² Hogg, *supra* note 9 at 16-4.

¹⁷³ See *ibid* at 16-5.

¹⁷⁴ *Ibid*.

federal purpose” rule, “[t]he courts have to interpret the federal law to determine what the federal purpose is, and then they have to decide whether the provincial law would have the effect of frustrating the federal purpose.”¹⁷⁵

The following decisions showcase how the doctrine developed into the two-part inquiry described above.

(a) Multiple Access v McCutcheon

The development of the first aspect of the federal paramountcy doctrine finds its source in the *Multiple Access v McCutcheon* (“McCutcheon”)¹⁷⁶ case, which remains the authority for the modern iteration of the doctrine.

At issue in that case was whether an insider trading provision of the Ontario securities legislation applied to a federally incorporated company that was already subject to almost identical obligations under the federally enacted *Canada Corporations Act*.¹⁷⁷ The Court first considered the validity of the two laws and, under the double aspect doctrine, found that both had been enacted under an appropriate head of power.¹⁷⁸

The majority of the Court cited several cases in support of the assertion that mere duplication of provisions was not enough to found the application of the paramountcy doctrine, since in many instances the two layers of law can operate harmoniously and concurrently and that compliance with one does not result in the breach of the other: “[D]uplication is [...] ‘the ultimate in harmony’. The resulting ‘untidiness’ or ‘diseconomy’ of duplication is the price we pay for a federal system in which economy ‘often has to be subordinated to [...] provincial autonomy.’”¹⁷⁹ The Court opined that it is only if there is actual conflict between the federal and provincial law that the paramountcy doctrine will be triggered to render the otherwise valid provincial law inoperative.¹⁸⁰

¹⁷⁵ *Ibid* at 16-7.

¹⁷⁶ [1982] 2 SCR 161, 138 DLR (3d) 1 [*McCutcheon* cited to SCR].

¹⁷⁷ *Ibid* at 165.

¹⁷⁸ *Ibid* at 176-183.

¹⁷⁹ *Ibid* at 190.

¹⁸⁰ *Ibid* at 187, 190.

In *McCutcheon*, the only difference between the provisions found in the provincial and federal statutes was that they offered different choices of remedies. The Court found that this is not a conclusive factor where the legislation is otherwise harmonious and not contradictory.¹⁸¹ The Court concluded with a clear formulation of the impossibility of dual compliance rule:

[T]here would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance of one is defiance of the other.¹⁸²

Although the Court did not discuss it outright, it also alluded to what would eventually become the second step in the federal paramountcy doctrine when it found that "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"¹⁸³ and that the courts would be a sufficient safeguard against the threat of double recovery posed by different choices of remedies.¹⁸⁴

(b) *Bank of Montreal v Hall*

The next case where the Court had occasion to discuss the doctrine of federal paramountcy is *Hall* (previously discussed in respect of the core of banking, above) in which the Court elaborated on the second prong of the doctrine. In that case, the Court was asked to consider whether a security interest taken by a bank pursuant to provisions under the Bank Act could be subject to the procedures for enforcing a security interest set out in Saskatchewan legislation, in this case, the requirement to serve notice on the debtor before proceeding with a foreclosure.¹⁸⁵

The Court first considered whether the provisions were *intra vires* the respective legislatures. It quickly concluded that the notice requirement fell clearly within

¹⁸¹ *Ibid* at 189.

¹⁸² *Ibid* at 191.

¹⁸³ *Ibid* at 190.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid* at 126.

Saskatchewan's right to regulate property and civil rights in the province.¹⁸⁶ The Court then went on to briefly analyze the banking power and importance of the security interest in the bank's operations. Having found that the provisions in both statutes were validly enacted, the Court turned to the question of whether the doctrine of paramountcy would operate to invalidate the application of the provincial notice obligation in respect of the bank. The Court reviewed the position in *McCutcheon* that required operational conflict and then refined the test by providing that such conflict could occur when the purpose of the federal legislation is subverted by the effect of applying the provincial rule.¹⁸⁷

The Court concluded that the two pieces of legislation were at odds because the intent of the federal legislation was to provide for an immediate and unqualified right to realize on the security upon default of the borrower, whereas the provincial legislation required additional steps to be taken and the consequences of failing to take such steps may be the cancellation of the security.¹⁸⁸ The Court emphasized Parliament's wish to create a uniform system of enforcement by banks with respect to this security interest, where it "wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests."¹⁸⁹ The Court in *Hall* found that in this case, Parliament had enacted a complete code and the security interest and manner of realizing on it must be seen as an indivisible whole provided for by the Bank Act.¹⁹⁰

As the Court explained in a later case, *Hall* "put a gloss [...] on the argument that compliance with both laws was possible by obeying the stricter one," stating that the dual compliance argument was fallacious where the provincial legislation has the effect of frustrating the purpose of the federal legislation.¹⁹¹

¹⁸⁶ *Hall*, *supra* note 142 at 131.

¹⁸⁷ *Ibid* at 150-152.

¹⁸⁸ *Ibid* at 152-153.

¹⁸⁹ *Ibid* at 154.

¹⁹⁰ *Ibid* at 154-155.

¹⁹¹ See *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 [*Mangat*] at 153.

(c) Law Society of British Columbia v Mangat

In *Law Society of British Columbia v Mangat* (“Mangat”),¹⁹² the Court further developed the second prong of the federal paramountcy doctrine. It refined the test for establishing whether there is a conflict between the two statutes by analyzing the purpose behind the federal rule and determining that although the letter of the federal law could be complied with by complying with the stricter provincial law, this would defeat the purpose of the looser, more permissive federal law.

The matter at issue in *Mangat* was whether certain provisions of the British Columbia *Legal Profession Act*, which prohibited anyone who is not a member in good standing of the bar of that province to practice law, conflicted with the Federal *Immigration Act* in a manner that would render the provincial rules inoperative in respect of someone appearing before an immigration tribunal.¹⁹³

Once again, the Court first considered whether the provisions of the two pieces of legislation were *intra vires* their respective enacting legislatures. The Court commenced this analysis by determining the pith and substance of the sections of the *Immigration Act* and classifying it under the appropriate head of power.¹⁹⁴ It found that the pith and substance of the federal provisions were to grant certain administrative rights to a person seeking immigration status, in particular, to be represented by “barristers or solicitors or other counsel for a fee” before the immigration tribunals and to provide certain other restricted services.¹⁹⁵ The Court further found that this fell within Parliament’s right to regulate immigration, which necessarily includes the authority to establish tribunals to decide such matters and provide for the applicable procedures that must be followed in appearing before them.¹⁹⁶ However, the provisions of the *Immigration Act* also touched on legal representation and the practice of law falls squarely within the province’s jurisdiction over professions (property and civil rights) and

¹⁹² *Ibid.*

¹⁹³ *Ibid* at 119, 132.

¹⁹⁴ *Ibid* at 133.

¹⁹⁵ *Ibid* at 136.

¹⁹⁶ *Ibid* at 136-137.

the administration of justice.¹⁹⁷ Thus, the capacity of someone to appear before an immigration tribunal as the representative of a person seeking immigration status is validly governed by both the federal and provincial legislatures.¹⁹⁸ The Court noted that the double aspect doctrine permits such a state of affairs as long as the two statutes do not enter into conflict with one another.¹⁹⁹

Due to the double aspect of the subject-matter of the legislation, the Court determined that the most appropriate doctrine to resolve the issue of conflict between the two sets of provisions in this case was the paramountcy doctrine.²⁰⁰ The Court opined that the application of the interjurisdictional immunity doctrine risked “bifurcation of the regulation and control of the legal profession in Canada.”²⁰¹

In applying the paramountcy doctrine, the Court first had resort to the contextual statutory interpretation of the phrases whose interpretation was disputed in that case in order to determine Parliament’s intention behind its choice of words. The Court found that it was clear that the legislature contemplated a role for non-lawyers in the immigration process,²⁰² as it also did in the legislation establishing many other administrative bodies.²⁰³ In fact, the Court found that the role of non-lawyers before the immigration tribunals is an important one, not least in that it may best serve the ends of informality and expeditiousness aimed at by the legislation.²⁰⁴ Thus, in *Mangat*, the Court found that although technically dual compliance would be possible by simply complying with the stricter rules, in that case, the requirement to be a member in good standing of the British Columbia bar would confound Parliament’s intent to pursue via these provisions its “legitimate objective of establishing an information, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals.”²⁰⁵ Therefore, the Court opined that as a result of this conflict

¹⁹⁷ *Ibid* at 139.

¹⁹⁸ *Ibid* at 140.

¹⁹⁹ *Ibid* at 142-144.

²⁰⁰ *Ibid* at 145.

²⁰¹ *Ibid*.

²⁰² *Ibid* at 146-147.

²⁰³ *Ibid* at 147-149.

²⁰⁴ *Ibid* at 149.

²⁰⁵ *Ibid* at 154.

between the two statutes, the federal legislation must be found to be paramount and the provincial legislation inoperative in its respect.²⁰⁶

(d) Rothmans, Benson & Hedges v Saskatchewan

In the next, very brief, decision from the Court in *Rothmans, Benson & Hedges v Saskatchewan* (“Rothmans”),²⁰⁷ the Court discussed whether provisions of provincial legislation regulating the advertising, display and promotion of tobacco were sufficiently inconsistent with the Federal *Tobacco Act* to trigger the paramountcy doctrine and render the provincial legislation inoperative in respect of the federal requirements.²⁰⁸

The Court first discussed the legislation in question. The federal *Tobacco Act* was enacted in 1997 and clearly set out the goals of the legislation, in particular to protect the health of Canadians.²⁰⁹ *The Tobacco Control Act* enacted by the Saskatchewan legislature only followed in 2002.²¹⁰

The Court reviewed the principle of federal paramountcy as first enunciated in *McCutcheon* and elaborated on in later cases, such as *Hall and Mangat*, and indicated that “impossibility of dual compliance is sufficient but not the only test for inconsistency” as it also applies where there is frustration of the federal purpose.²¹¹ Thus, the Court went on to pursue both lines of inquiry into the doctrine.

Once again, the Court in *Rothmans* began by undertaking a contextual analysis of the federal act to determine the purpose and effect of the provisions in question.²¹² The Court analyzed the interaction between the various provisions in the federal statute and concluded that Parliament intended to exclude the promotion of tobacco products via retail display from the general prohibition against promoting such products.²¹³ These provisions, however, could not be read as providing a retailer with the right to display

²⁰⁶ *Ibid* at 155.

²⁰⁷ 2005 SCC 13, [2005] 1 SCR 188 [*Rothmans*].

²⁰⁸ *Ibid* at 191.

²⁰⁹ *Ibid* at 192.

²¹⁰ *Ibid*.

²¹¹ *Ibid* at 193-195.

²¹² *Ibid* at 195.

²¹³ *Ibid*.

the availability and pricing of the tobacco products since the federal statute was enacted pursuant to Parliament's power over criminal law, which is prohibitory in nature, and does not "ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament."²¹⁴ Furthermore, the Court found that interpreting the provision in question as granting a positive right to retailers to promote tobacco products would not be in keeping with the stated legislative intention for enacting such law. Thus, the Court declined to conclude that Parliament had intended, by excluding the promotion of tobacco products via retail display, to exclusively regulate the retail display of tobacco products.²¹⁵

Given the above, the Court concluded that neither branch of the paramountcy doctrine was triggered: dual compliance with both statutes was possible and there was no frustration of the federal purpose by the effect of the provincial statute since both statutes were pursuing the same purpose and the federal provision was not intended to grant additional rights.²¹⁶

Thus, in contrast with the approach taken in *Mangat*, the Court in *Rothmans* found that there was no frustration of the federal purpose since compliance with the stricter provincial provision did not interfere with the more permissive federal one. The Court based this conclusion on its finding that the federal statute was not intended to grant rights but simply to circumscribe a broader prohibition stated in another provision. However, it is important to note that in determining whether there was frustration of federal purpose, the Court only considered the specific provision in question and does not consider the overall purpose of the statute.

In fact, Hogg comments on this weakness in the Court's analysis:

The express permission to retailers to display the product was an effort to impose a reasonable limit on the prohibition of commercial speech about a product that retailers were lawfully entitled to sell. By narrowing the federal limit on the prohibition of commercial speech, the provincial law arguable frustrated an important general purpose of the federal Act, which was to comply with the

²¹⁴ *Ibid* at 196.

²¹⁵ *Ibid* at 196-197.

²¹⁶ *Ibid* at 197-198.

Charter of Rights. And, having regard to the impracticality of excluding persons under 18 from supermarkets, convenience stores, news stands, gas stations and other retail outlets where cigarettes are sold, the provincial law surely frustrated the specific purpose of the explicit permission to display.²¹⁷

(e) Canadian Western Bank v Alberta

Two years after the decision in *Rothmans*, the Court in *Canadian Western Bank* clearly set out the modern test for determining incompatibility between provincial and federal legislation, both of which were validly enacted. The first consists of determining whether there is an operational conflict between the two laws, i.e. “where one enactment says ‘yes’ and the other says ‘no’”.²¹⁸ The Court noted that the application of this doctrine according to this test requires more than duplicative legislation, as it will not be triggered when the norms set out in both statutes can coexist and “citizens can comply with either of them without violating the other.”²¹⁹ The second test applies when although the statutes do not directly contradict, the application of the provincial rules would have the effect of frustrating the purpose of the federal law and subverting Parliament’s intent in enacting that law.²²⁰ However, the Court narrowed the application of the second prong by warning that in applying the latter test, care must be taken not to too liberally impute the intention to Parliament to occupy the field to the exclusion of the provincial legislature, absent very clear statutory language to that effect.²²¹

In *Canadian Western Bank*, after rejecting the interjurisdictional immunity argument, as discussed above under that branch of the constitutional analysis, the Court went on to consider the application of the federal paramountcy doctrine and found that there was neither an operational conflict nor a frustration of federal purpose. In particular, when considering the federal purpose, the Court distinguished between permissive rather than exhaustive legislation, the latter being where Parliament expressly indicated its

²¹⁷ Hogg, *supra* note 9 at 16-9. Hogg also notes that the Court’s conclusion in *Rothmans* as to the intention behind the legislation was influenced by the Attorney General’s arguments in that case in support of the compatibility between the provincial and federal legislation in pursuing the goal of promoting the health of Canadians (*ibid* at 16-9 – 16-10 referring to *Rothmans*, *supra* note 207 at 198).

²¹⁸ *Canadian Western Bank*, *supra* note 53 at 52, citing *McCutcheon*, *supra* note 176.

²¹⁹ *Canadian Western Bank*, *supra* note 53 at 52.

²²⁰ *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at 52-53.

²²¹ *Ibid* at 53.

intent for the federal laws to be exhaustive and the former being where it permits the subject of the legislation, for example the banks, to engage in a certain activity.²²²

(f) Quebec (AG) v Canadian Owners and Pilots Association

As previously discussed in relation to the interjurisdictional immunity doctrine, the Court in COPA also dismissed the paramountcy argument, having decided the case based on the interjurisdictional immunity doctrine.²²³ However, the Court still went on to discuss the paramountcy doctrine. It stated: “Unlike interjurisdictional immunity, which is concerned with the scope of the federal power, paramountcy deals with the way in which that power is exercised.”²²⁴ The Court found that there was no operational conflict as it was possible to comply with both schemes at the same time.²²⁵ It then proceeded to discuss the second type of conflict and noted that “[t]he standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission.”²²⁶ What is necessary is to provide proof that the federal government “deliberately adopted minimal requirements” to achieve a certain end.²²⁷ The Court found that that burden of proof had not been met in that case.²²⁸

(ii) The Court’s Analysis in Marcotte

As is evident from the review provided in this section, the previous caselaw sets out a map for analyzing two pieces of legislation – one federal and one provincial – that appear to clash under the federal paramountcy doctrine. For example, in Hall, as discussed above, the Court considered a situation in which the provincial scheme abutted against the requirements of the Bank Act. In order to determine whether a conflict in purpose really existed there, the Court undertook a fulsome review of the

²²² *Ibid* at 63-64.

²²³ *COPA*, *supra* note 18 at paras 4, 63.

²²⁴ *Ibid* at para. 62.

²²⁵ *Ibid* at para 65.

²²⁶ *Ibid* at para 66.

²²⁷ *Ibid* at para 68.

²²⁸ *Ibid* at paras 69-74.

history of the specific provisions in the Bank Act in question and their importance to the overall federal scheme.

In *Marcotte*, however, the Court neither delved into the history of the legislation, nor considered the provisions in question in the context of their overall organization. Instead of adopting the investigative approach to resolving apparent conflict between federal and provincial legislation, the Court avoided a robust analysis of the paramountcy doctrine by making assumptions that it failed to bolster with supporting arguments and that warrant further evaluation. I discuss two important assumptions underlying the Court's conclusion on the paramountcy doctrine in Parts B and C, respectively, set out below.

The first assumption that will be discussed in Part B is that the federal and provincial schemes contain duplicative requirements and therefore no inconsistency lies between them. However, as discussed below, there are many important differences between the federal and provincial legislation in respect of disclosure and calculation requirements.

The second assumption discussed in Part C is that the requirements in the Quebec CPA simply constitute basic contract law in the province, analogous to the general contract rules contained in the CCQ, and therefore they do not interfere with the purpose of the federal scheme. However, I argue that the Quebec CPA was not intended to simply be general contract law in the province, but was intended by the Quebec legislature to remain distinct from the general rules of contract found in the CCQ.

Had the Court delved into the analyses set out below, its conclusion on the paramountcy doctrine may not have differed – although, as I will demonstrate, there is certainly room to question the correctness of its conclusion. However, a consideration of these matters would have allowed the Court to provide a grounded and well-supported decision without which it fails to provide a useful addition to the constitutional discussion on the interaction between provincial consumer protection legislation and the activities of federally regulated banks.

B. Practical Inconsistency: Duplication of Requirements?

Although there are two branches of the federal paramountcy doctrine – practical inconsistency and frustration of federal purpose, as explained in detail above – the Court ostensibly only considered the second branch of the doctrine and the banks only made arguments under that heading. However, underlying the Court’s conclusions in respect of frustration of federal purpose, and offered in support of its findings under that branch, is the assumption that there is no practical inconsistency between the federal and provincial schemes. That the Court is relying on this assumption is evident in how it opens and closes its arguments on frustration of federal purpose.²²⁹

The Court opened the discussion as follows:

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.²³⁰ [Emphasis added]

After concluding that the provincial scheme merely sets out general rules of contract that in no way frustrate the federal purpose of creating national standards, as discussed in detail in Part C, below, the Court reinforced its contention with the following statement:

²²⁹ Note that the Court also summarily dismissed the second argument put forward for frustration of federal purpose based on the disparate remedies available under the federal and provincial schemes respectively (see *Marcotte*, *supra* note 2 at para 85). Although I have chosen not to focus on this aspect of the analysis, since it was offered as a secondary argument under the federal paramountcy doctrine, these arguments merit consideration as there was a real possibility of frustration of the federal purpose, which was arguably to ensure that the remedy for non-compliance with the *COB Regulations*, *supra* note 4, should not result in nullification of the contract. It also created a real possibility that a court would be unable to comply with both provisions, similar to the Court’s finding under *Mangat*, *supra* note 191, discussed above.

²³⁰ *Marcotte*, *supra* note 2 at para 75.

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.²³¹ [Emphasis added]

Thus, this assertion that the two sets of rules dealing with disclosure and computation of credit charges / cost of borrowing charges under the provincial and federal legislation are “consistent” and, in fact, are simply duplicative, was used to strengthen the Court’s conclusion that no frustration of federal purpose existed in this case.

However, this finding is not as evident as the Court suggests. As I will expound upon in this section, the Bank Act and COB Regulations on the one hand, and the Quebec CPA and the *Regulation Respecting the Application of the Consumer Protection Act* (the “CPA Regulation”)²³² on the other, do not set out identical systems for disclosing and calculating charges relating to the extension of credit. The terms used to describe the concepts, the charges that are to be included or excluded from the calculations, and the methods of calculating amounts differ between the two pieces of legislation.

Furthermore, while many of the provinces moved to harmonize with one another and the federal system,²³³ Quebec has not yet opted to undergo this harmonization process, indicating that, at least for the moment, the Quebec legislature wishes for the Quebec scheme to maintain its distinctiveness. In light of these important differences, a more rigorous comparison between the two systems was warranted at the first stage of the federal paramountcy test in order to conclusively determine that no practical inconsistency lies between them.

²³¹ *Ibid* at para 80.

²³² CQLR c P-40.1, r 3 [CPA Regulation].

²³³ Even in those provinces, it is arguable whether they provide for identical disclosure and computation requirements, although that is beyond the scope of this paper.

In the following section, I will undertake such a comparison drawing on the requirements set out in the current legislation as well as relying on insights that can be gleaned from proposed changes to the Quebec legislation.

1. The Two Schemes

Under the Bank Act, the amount that a consumer will pay in respect of a loan is referred to as the “cost of borrowing”.²³⁴ Section 450 of the Bank Act stipulates that a bank shall not make a loan to an individual that is repayable in Canada unless it discloses the cost of borrowing, calculated, in the prescribed manner, on the basis that all obligations of the borrower are duly fulfilled and expressed as a rate per annum (and, in certain circumstances, as an amount in dollars and cents).²³⁵

The Bank Act defines the cost of borrowing as follows:

449. [...] cost of borrowing means, in respect of a loan made by a bank,
- (a) the interest or discount applicable to the loan;
 - (b) any amount charged in connection with the loan that is payable by the borrower to the bank; and
 - (c) any charge prescribed to be included in the cost of borrowing.
- For those purposes, however, cost of borrowing does not include any charge prescribed to be excluded from the cost of borrowing.

The Quebec legislation does not refer to the term “cost of borrowing”. Instead, the Quebec CPA divides the amounts payable in respect of a contract of credit into two categories: net capital and credit charges, as discussed in more detail below.²³⁶ It provides that a merchant must state the credit charges in terms of dollars and cents²³⁷ applicable to a specified term and must also disclose the credit rate as the amount of

²³⁴ In fact, in all of the provinces except Quebec, the term cost of borrowing (or the variation thereof, “cost of credit”) is used to describe the amounts that a borrower must pay in relation to the credit extended to him.

²³⁵ *Bank Act*, *supra* note 3, s 451.

²³⁶ *Quebec CPA*, *supra* note 1, s 67–69.

²³⁷ *Ibid*, s 71.

credit charges expressed as an annual percentage, which must be computed and disclosed as prescribed by the Quebec CPA.²³⁸

On the face of it, the concepts of cost of borrowing and annual percentage rate on the one hand and of credit charges and credit rate on the other seem to be equivalent and to yield identical disclosures. However, the differences in the terms used in the Bank Act and in the Quebec CPA are indicative of conceptual and practical differences that exist between the two systems. I will examine a few of the differences between the calculation and disclosure requirements set out in either scheme in the sections that follow.

Before I proceed with those examples, however, I note that because the Marcotte decision only addressed credit card disclosures, the discussion below will focus on the differences in treatment of open credit under the two legislative schemes, open credit referring to “credit in which the borrower is able to receive multiple advances for amounts which are not specified in the loan agreement,”²³⁹ such as credit cards and lines of credit. However, there are also differences in the treatment of fixed credit under the two schemes – fixed credit being the category of loans for which the amount of the loan is known in advance – and I have mentioned a few of the distinctions applicable to that category of credit when they are interesting to consider for present purposes.

2. Difference in Calculation

The COB Regulations set out the manner of calculating the annual rate for the cost of borrowing. For open credit, the cost of borrowing is equivalent to the annual interest rate.²⁴⁰

²³⁸ *Ibid*, s 72.

²³⁹ Canada, Office of Consumer Affairs, “Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada: Drafting Template”, Consumer Measures Committee, June 1, 1998, online: Innovation, Science and Economic Development Canada < [https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost%20of%20Credit%20Disclosure.pdf/\\$file/Cost%20of%20Credit%20Disclosure.pdf](https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost%20of%20Credit%20Disclosure.pdf/$file/Cost%20of%20Credit%20Disclosure.pdf) > [Drafting Template] at 45.

²⁴⁰ *COB Regulations*, *supra* note 4, s 3(3).

For fixed credit loans, the calculation of the cost of borrowing includes, in addition to interest, non-interest finance charges and is expressed as an annual percentage rate (the “APR”) calculated according to the following formula:²⁴¹

$$\text{APR} = (C/(T \times P)) \times 100$$

where

APR is the annual percentage rate cost of borrowing;

C is an amount that represents the cost of borrowing within the meaning of section 5 (as discussed below) over the term of the loan;

P is the average of the principal of the loan outstanding at the end of each period for the calculation of interest under the credit agreement, before subtracting any payment that is due at that time; and

T is the term of the loan in years, expressed to at least two decimal points of significance.²⁴²

Furthermore, section 5 of the COB Regulations (non-exhaustively) sets out all non-interest charges which are either included or excluded from this cost of borrowing calculation for fixed credit, as illustrated in the chart below:

FEDERAL COST OF BORROWING – NON-INTEREST FINANCE CHARGES	
INCLUDED²⁴³	EXCLUDED²⁴⁴
Administrative charges, including charges for services, transactions or any other activity in relation to the loan	-
Charges for the services, or disbursements, of a lawyer or notary that a bank required the borrower to retain	Charges for the services, or disbursements, of a lawyer or notary, other than those listed in the left-hand column

²⁴¹ Note that there is a distinction between the “total cost of borrowing” and the “annual percentage rate, where the former is “an absolute measure of the cost of credit [and expressed] in dollars and cents” and the latter is “a relative measure of credit costs but also for the amount of credit extended and the period for which the credit, or any given portion of the credit, is outstanding.” (Saskatchewan Justice, Consumer Protection Branch, “Reference Manual for Saskatchewan’s Cost of Credit Disclosure Act, 2002 and Saskatchewan’s Cost of Credit Disclosure Regulations” (Regina: Queen’s Printer, July 2006) [Reference Manual] at 22). However, they both serve as a measure of the cost of credit, “by comparing value received for value given” (*Ibid*). The *COB Regulations*, *supra* note 4, define the annual percentage rate as “the cost of borrowing for a loan under a credit agreement expressed as an annual rate on the principal [...]” (s.1).

²⁴² *COB Regulations*, *supra* note 4, s 3(1).

²⁴³ *Ibid*, s 5(1).

²⁴⁴ *Ibid*, s 5(2).

Insurance charges other than those excluded in the right-hand column	Charges for insurance on the loan if (i) the insurance is optional, or (ii) the borrower is its beneficiary and the amount insured reflects the value of an asset that is security for the loan
	Charges for insurance against defects in title to real or immovable property, if the insurance is paid for directly by the borrower
	Charges for insurance against default on a high-ratio mortgage or hypothec
Charges for a broker, if the broker's fees are included in the amount borrowed and are paid directly by the bank to the broker	-
Charges for appraisal, inspection or surveying services, other than those mentioned in the right-hand column, related to property that is security for a loan, if those services are required by the bank	Charges for appraisal, inspection or surveying services provided directly to the borrower in relation to property that is security for a loan
-	Charges for an overdraft
-	Fees paid to register documents or obtain information from a public registry about security interests related to property given as security
-	Penalty charges for the prepayment of a loan
-	Fees to maintain a tax account that are (i) required for a high ratio mortgage or hypothec, or (ii) optional
-	Any fee to discharge a security interest
-	Default charges

In general, the charges that are included in the cost of borrowing are those “over which the lender has direct control and determines at the time of borrowing.”²⁴⁵ In respect of both open credit and fixed credit, just because a charge is not included in the calculation of the cost of borrowing, it does not mean that such charge cannot be applied to the customer. That is, in respect of fixed credit, charges that are specifically excluded from

²⁴⁵ Drafting Template, *supra* note 239 at 5.

the cost of borrowing, listed in the left-hand column in the chart above, and in respect of open credit, all charges that are not interest, are simply not included or disclosed as part of the cost of borrowing, but are separately disclosed if charged to the client.

In addition, the COB Regulations include a requirement to provide an Information Box to consumers setting out required disclosures adapted to the type of credit being extended.²⁴⁶ In each of these Information Boxes, the legislation provides for an “Other Fees” section in which to list miscellaneous fees charged to the consumer. What exactly fits into this category often remains a judgment call about which charges have enough of a connection to the extension of the loan. However, the Financial Consumer Agency of Canada (the “FCAC”), the regulator charged with overseeing consumer matters in respect of federal regulated financial institutions, has published sample Information Boxes populated with examples of amounts and accompanying texts which provide some clues as to what may be included in this “Other Fees” category. In its “Other Fees” section of the Information Box that must be included as part of every initial disclosure statement in connection with a credit card agreement under the federal scheme, the FCAC lists the following fees: a cash advance, over the credit limit, a balance transfer or a fee for an extra copy of a monthly statement.²⁴⁷

What emerges from the above, is that the Bank Act contemplates three general categories of amounts that must be disclosed to a consumer in respect of a loan:

- (1) advances in respect of open credit or the principal in respect of fixed credit;
- (2) the cost of borrowing, which means interest charges in respect of open credit or interest and included non-interest charges in respect of fixed credit; and

²⁴⁶ See *COB Regulations*, *supra* note 4, Schedules 1-5.

²⁴⁷ Financial Consumer Agency of Canada, “CG-4: Information Box Examples for the Cost of Borrowing Regulations: Credit Agreement for a Credit Card”, Commissioner’s Guidance, online: FCAC <<http://www.fcac-acfc.gc.ca/Eng/forIndustry/publications/commissionerGuidance/Pages/CreditAg-Conventi.aspx>>. Note that the way in which banks treat these charges differs in practice. Some banks may add these fees to the principal (in which case, they can charge interest on the fees), or they may treat them as separate from the principal but amortize them through the period of the loan. Or a bank can simply charge the fees in one lump sum at that time they arise.

(3) other charges that are related to the loan but that do not figure into the calculation of the cost of borrowing.²⁴⁸

In Quebec, the situation is quite different. As mentioned previously, the Quebec CPA divides the amounts that are payable by a consumer in respect of a loan into two categories: net capital and credit charges. The Quebec CPA defines these terms and sets out a number of specific fees that are considered credit charges.

Net capital is defined as:

In the case of a contract for the loan of money, the amount actually received by the consumer or paid into or credited to his account by the merchant

In the case of a contract involving credit or a contract extending variable credit, the sum for which credit is actually extended.

Every component of the credit charges is excluded from this sum.²⁴⁹

Credit charges are defined as: “The amount the consumer must pay under the contract in addition to (a) the net capital in the case of a contract for the loan of money or a contract extending variable credit; (b) the net capital and the down payment in the case of a contract involving credit.”²⁵⁰

In addition, the Quebec CPA provides a non-exhaustive list of credit charges:

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

- (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.

²⁴⁸ Note that the required disclosures are not explicitly divided into only these three categories. However, I contend that all amounts that are charged and disclosed in respect of the extension of credit will fall into one of these three categories (see *COB Regulations*, *supra* note 4, ss 8-12 for disclosure requirements applicable to various types of credit).

²⁴⁹ *Quebec CPA*, *supra* note 1, s 68.

²⁵⁰ *Ibid*, s 69.

Caselaw has indicated that all amounts that are charged in respect of a loan must fall within either of these two categories.²⁵¹ No “other fees” category – that is, fees that must be disclosed but that are not included in the calculation of the credit rate – is contemplated by the legislation as it is under the federal legislation and by the FCAC. As a result, any amount that does not fall within the category of net capital (the principal amount or advances extended as credit) must be treated as a credit charge and included in the credit rate.

The CPA Regulation provides for the calculation of credit charges for fixed credit as follows:

52. The credit charges must be computed at the end of a payment period by multiplying the credit rate applicable under section 83 of the Act²⁵² by the balance of the capital outstanding at the commencement of that payment period and, where applicable, of the credit charges outstanding at the commencement of that period, and by multiplying the product thus obtained by the fraction represented by the payment period in relation to 365.

The CPA Regulation further provides for the calculation of credit charges for open credit as follows:

59. Subject to section 61, the credit charges are computed at the end of each period by applying the credit rate applicable under section 83 of the Act as prescribed in section 60 to the average daily balance²⁵³ of the period.

60. The percentage to be applied at the end of a period to the average daily balance of that period is equal to the credit rate applicable under section 83 of the Act multiplied by the fraction represented by the period in relation to 365 days.

²⁵¹ See e.g. *Bourassa Pontiac Buick c OPC*, [1990] RJQ 1153, EYB 1990-76613 (CS) [*Bourassa*] at 16; *Marcotte*, *supra* note 2 at para 49.

²⁵² Section 83 of the *Quebec CPA*, *supra* note 1, states in a circular manner: “The merchant shall not exact, on a sum owing by the consumer, credit charges computed at a higher credit rate than the lesser of the two following rates: that computed in accordance with this Act and that stated in the contract.”

²⁵³ “Average daily balance” is defined in section 55 of the *CPA Regulation*, *supra* note 232, as follows:

(a) “daily balance” means the amount that, during a period, is determined at the end of each day by adding the value of any transaction debited to the account since the commencement of the period to the aggregate of the balance of net capital at the end of the preceding period and, where applicable, to the credit charges outstanding at the end of the preceding period, and by subtracting the value of any payment received by the merchant since the commencement of the period;

(b) “average daily balance” means the sum obtained by dividing the aggregate of all the daily balances of a period by the number of days in that period.

The actual mathematical formula that the above requirements translate into for the calculation of credit charges is set out below,²⁵⁴ where the Balance of Net Capital is used in respect of fixed credit and the Average Daily Balance is used in respect of open credit:

$$\frac{\sum \text{Daily Balance}}{\text{\# of days in Account Cycle}} \quad \text{OR} \quad \frac{\text{Balance of Net Capital} \times \text{Credit Rate (\%)} \times \text{\# of days in Account Cycle}}{365}$$

Daily Balances = [Aggregate balance of net capital + credit charges at the end of preceding period] + [$\sum$ transaction debited to the account – payments received by bank since the commencement period].

Therefore, in order to calculate the amount of credit charges that may be charged to a borrower under the Quebec scheme, the legislation presumes a fixed known credit rate that can be plugged into the formula in order to determine the credit charges that are payable per payment period.²⁵⁵ Thus, for fixed credit, the above formula will yield the same amount of credit charges for each payment term, and in fact, must do so, except for the final payment, which may be less (leaving aside, for present purposes of simplicity, the possibility of loans with variable credit rates).²⁵⁶ For open credit, depending on how much credit is used, the credit charges may vary by term, but only as a function of changes in the sum of the daily balance, not as a result of changes in the

²⁵⁴ Note that this formula and manner of calculating was endorsed by the Quebec regulator's most senior lawyer during discussions with my colleague, Annick Demers. See also Nicole L'Heureux & Marc Lacoursière, *Droit de la consommation*, 6th ed (Cowansville, Que: Yvon Blais, 2011) [L'Heureux & Lacoursière] at 212, 285; Claude Masse, *Loi sur la protection du consommateur: Analyse et commentaires* (Cowansville, Que: Yvon Blais, 1999) [Masse, *Analyse et commentaires*] at 442-443. However, the Quebec consumer protection legislation is very vague and it is not entirely clear from the wording of the relevant provisions as to how the credit rate is to be calculated.

²⁵⁵ The correlation between the credit rate that is disclosed and plugged into the above formula and the specific dollar amount of credit charges that are disclosed at the start of the loan is determined by actuarial means using a computer. Note that this reverse calculation may also be used in certain instances when calculating the APR, see Reference Manual, *supra* note 241 at 42.

²⁵⁶ *Quebec CPA*, *supra* note 1, s 87. Note that the actual payments made payment period may vary depending on whether an advance payment is made or if the previous payment was in default (see L'Heureux & Lacoursière, *supra* note 254 at 210.)

credit rate. The impact of the prescribed formula is that any amount that is considered to be a credit charge (because it is not net capital) cannot be charged to the consumer upfront or upon the occurrence of a specific event, but must be reflected in the annualized credit rate that is disclosed at the start of the loan and that yields credit charges that are amortized throughout the entire term of the loan.

The combined result of the absence of another category of fees (that do not figure in the calculation of the cost of borrowing / credit rate) and of the prescribed method of calculation in Quebec is a matrix of permitted and prohibited fees that looks very different from the cost of borrowing under the federal scheme. The following chart provides a snapshot of the situation that exists under the Quebec legislation that will be discussed in more detail in the following sections. The first two columns represent the two recognized categories of amounts that may be charged in respect of credit in Quebec: net capital and credit charges. The third column represents those credit charges that are effectively prohibited in Quebec because they cannot be computed as part of the credit rate or charges that are prohibited due to the interpretation by the courts or the regulator of particular provisions in the law. The fourth column is the “ghost” category of charges: as discussed below, it is not clear whether this category exists and if it does, what should be included in it.

QUEBEC			
NET CAPITAL	CREDIT CHARGES	PROHIBITED FEES	OTHER CATEGORY
Principal or advance	Interest	Default charges	Charges for dishonoured payments or dishonoured cheques
Foreign conversion fees	The premium for insurance subscribed for, except any automobile insurance premium	Optional insurance premiums	Cash advance fees
	The rebate	Over-the-credit limit fees	Fees for copies of statements

	Administration charges, brokerage fees, appraiser's fees, contract fees and the cost incurred for obtaining a credit report	Charge for receiving copies of the vouchers for each of the transactions (for variable credit)	Credit used to pay existing debt or for lottery tickets, bets or casino gaming chips
	Membership or renewal fees*		Cheque fee
	The commission		Fee for wire transfer
	The value of the rebate or of the discount to which the consumer is entitled if he pays cash*		Others?
	The duties chargeable, under a federal or provincial Act, on the credit		

* not included in computing credit rate for contracts extending variable credit (open credit)²⁵⁷

(i) Prohibited Fees

There are a number of fees that are permitted to be charged under the federal scheme but that are effectively prohibited in Quebec as a result of the prescribed method of calculating the credit charges or as a result of differences in legislative wording. I discuss a few examples of such fees in this section and although the following discussion is mostly relevant to open credit, some of the comments below apply to both fixed and open credit.

²⁵⁷ *Quebec CPA, supra* note 1, s 72.

(a) Insurance Charges

Under the COB Regulations, all insurance charges are included in the calculation of the cost of borrowing except for charges relating to certain types of insurance,²⁵⁸ including optional insurance.

Under the Quebec CPA, however, section 70 (which sets out the non-exhaustive list of credit charges) specifically includes “the premium for insurance subscribed for, except any automobile insurance premium.” Furthermore, the CPA Regulation also provides that life, health, accident and employment insurance – insurance which is usually optional – must be treated as a credit charge and taken into account in the computation of the credit rate:

54.1. Where life, health, accident or employment insurance in respect of the consumer established for the benefit of the merchant is taken out under a contract of credit, and where credit charges arising from payment of the premium by the merchant are imposed, the merchant must disclose in the contract, as components of the credit charges, both the amount of the premium and the cost of the credit charges related thereto, and shall include both components in the total credit charges, as well as for the purpose of calculating and disclosing the credit rate in accordance with the Act.

Since insurance premiums – even for optional insurance – must be treated as credit charges, a practical difficulty results. That is, since in the context of open credit, credit charges cannot be charged unless the borrower fails to pay his monthly balance within the 21-day grace period stipulated by the legislation,²⁵⁹ insurance premiums, therefore, can only be charged to customers whose payments are in arrears; it would not be possible to charge a regular premium payment to a borrower who pays his balance in full within the permitted time frame.²⁶⁰ Therefore, there is no workable way of charging regular insurance premiums to consumers in compliance with the Quebec legislation.²⁶¹

²⁵⁸ Mostly insurance relating to loans that are secured by real property, which is not relevant to the discussion here (*COB Regulations*, *supra* note 4, s 5(1)(c) and s 5(2)(a),(f),(h)).

²⁵⁹ *CPA Regulation*, *supra* note 232, s 61.

²⁶⁰ Note that many credit providers in Quebec do in fact charge optional insurance premiums and presumably charge the premium amount regardless of whether the customer pays their monthly payments on time, although this may be in technical non-compliance with the legislation.

²⁶¹ Note that there is also a practical problem in respect of optional insurance in the context of fixed credit because the merchant who subscribes for the insurance on behalf of the borrower (and pays the

The result of this is that while under the federal scheme insurance charges may be imposed on a borrower, under the Quebec scheme, these premiums can only be charged in periods during which the borrower is in arrears of his regular payments.

(b) Standalone Fees

As previously mentioned, the credit rate that is disclosed to a consumer must include all fees that qualify as credit charges (interest and non-interest charges) and be expressed as an annual percentage. This means that any charge whose amount or frequency cannot be determined in advance, cannot practically be charged, since credit charges have to be included in the credit rate that is disclosed at the start of the loan and amortized throughout the entire term of the loan. I offer two examples of such charges below. Since it is practically impossible to determine in advance if certain fees will be charged and, if so, at what frequency, the effect of these fees on the credit rate, if all possibilities are taken into account, would result in extreme variance in the rate.

Additionally, if these fees are charged under open credit agreements, they cannot be charged uniformly across borrowers – they can only be charged to borrowers who have surpassed the 21-day grace period to pay the amounts owing on their monthly statements. In both of these cases, the calculation of the annual percentage rate would simply be “a very rough estimate of the pattern of payments”²⁶² and would not constitute particularly helpful disclosures for the consumer. This is why under the federal scheme, with respect to credit cards (and other open credit contracts), no charges besides for interest are taken into account in the calculation of the cost of borrowing. In fact, the COB Regulations avoids the result that the Quebec CPA inevitably leads to: instead of prohibiting these fees, the COB Regulations simply excludes certain fees from the cost

premiums up-front) risks losing a portion of the amount that it paid out in the case that the borrower prepays the loan in part or completely. This is because credit charges must be amortized over the period of the loan and cannot be charged to the customer up-front. (Since pre-payment is only relevant to fixed credit, I have not undertaken a more detailed discussion of it here.) See e.g. *Bourassa*, *supra* note 251.

²⁶² Reference Manual, *supra* note 241 at 127.

of borrowing by creating a second category of fees – those that must be disclosed but that do not have to figure in the calculation of the cost of borrowing.

Thus, treating all fees as credit charges in Quebec effectively means that stipulating a standalone dollar amount fee as a credit charge is prohibited, and this is the case in respect of both open and fixed credit.

(1) Default Charges

The best example of such standalone fees are default charges. Under the Quebec scheme, the legislation does not provide for a clearly stated prohibition against default charges. In fact, the introductory section to the Quebec CPA sets out the following provision, which seems to imply that although these fees are generally prohibited, contracts of credit are exempted from this prohibition.

13. Any stipulation requiring the consumer, upon the non-performance of his obligation, to pay a stipulated fixed amount or percentage of charges, penalties or damages, other than the interest accrued, is prohibited.

The prohibition under the first paragraph does not apply to contracts of sale or long-term contracts of lease of automobiles, except with respect to charges and subject to the conditions set out in the regulation.

This section does not apply to a contract of credit.

The approach towards default charges is even further obfuscated by the following article, which suggests that such charges can somehow be computed in the prescribed manner for fixed credit:

92. Credit charges, whether imposed as a penalty, arrears charge, extension charge or otherwise must be computed in the manner provided in section 91, except the components mentioned in subparagraphs a and b of the second paragraph of section 72 in the case of a contract extending variable credit.

A similar provision is provided in respect of open credit contracts:

119. [...] penalties imposed for non-payment at the expiry of the term constitute credit charges.

However, in practice, because penalty, arrears or extension fees must be computed in the manner prescribed by the CPA Regulation described above, this means that any

charge that would be imposed only when a borrower fails to make a payment on time cannot be charged.²⁶³ As Masse writes: “Le retard à effectuer un remboursement à échéance entraîne seulement le paiement des frais de crédit au taux de crédit qui s’applique au contrat, *et rien d’autre*.”²⁶⁴

Under the COB Regulations, on the other hand, penalty fees do not figure in the calculation of open credit (and are one of the listed fees excluded from the calculation of the cost of borrowing for fixed credit²⁶⁵) and the legislation even specifies what types of penalty fees can be charged:

18. If a borrower under a credit agreement fails to make a payment when it becomes due or fails to comply with an obligation in the agreement, in addition to interest, the bank may impose charges for the sole purpose of recovering the costs reasonably incurred

(a) for legal services retained to collect or attempt to collect the payment;

(b) in realizing on any security interest taken under the credit agreement or in protecting such a security interest, including the cost of legal services retained for that purpose; or

(c) in processing a cheque or other payment instrument that the borrower used to make a payment under the loan but that was dishonoured.

Thus, the absence of this other category of fees in the Quebec system has led to a distinct difference in the types of default charges that may be imposed in respect of a loan made pursuant to the Bank Act versus what may be charged to Quebec consumers.

²⁶³ See L’Heureux & Lacoursière, *supra* note 254 at 213.

²⁶⁴ Masse, *Analyse et commentaires*, *supra* note 254 at 446. Note that Lafond disagrees with this position, citing the wording in sections 13 and 92 of the *Quebec CPA*, *supra* note 1, as permitting, in theory, default charges in contracts of credit. He does, however, mention that in practice this would be limited by the method of calculating credit charges (without further describing how such penalty charges would actually be included even in a limited way in the calculation) (Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique* (Montreal: Yvon Blais, 2015) [Lafond, *Théorie et pratique*] at 125, 327). Note that the Quebec Court of Appeal in *Service aux marchands détaillants (Household Finance) c Option Consommateurs*, 2006 QCCA 1319, took a similar position. The court there stated that the legislation does not prohibit default charges and the plaintiffs were in contravention of the legislation only because they omitted to include such charges in the calculation of the credit charges in the manner prescribed by the legislation, without explaining how this would be possible (*ibid* at paras 42, 73).

²⁶⁵ *COB Regulations*, *supra* note 4, s 5(2)(k).

(2) Overdraft Charges

Another type of standalone fee that is treated very differently under the federal and Quebec schemes is the over-the-credit limit charge, which is relevant to open credit only.

The Quebec CPA protects consumers against increases of credit that are not specifically requested by the consumer:

128. Where the merchant has indicated to the consumer the amount up to which variable credit is extended to him, the merchant shall not increase such amount unless the consumer expressly applies therefor.

The Quebec courts have interpreted this provision to mean that accepting and processing an over-the-limit transaction and collecting amounts charged to the account for such transactions is prohibited.²⁶⁶ For example, in *Confédération des Caisses populaires et d'économie Desjardins du Québec c Thélémaque*,²⁶⁷ the court, commenting on this provision, writes :

Ce texte a pour but de protéger le consommateur contre un endettement inconsidéré. On doit donc l'interpréter d'une manière extensive, en sa faveur. Il vise aussi bien l'augmentation expresse de la limite que sa majoration tacite, par la fourniture d'un crédit additionnel. L'une et l'autre exige l'autorisation expresse du consommateur [...].²⁶⁸

While the federal legislation contains a provision similar to section 128 of the Quebec CPA,²⁶⁹ it has not been interpreted in the same way. As previously mentioned, the FCAC also specifically lists over-the-credit-limit fees as an example of fees that may be included in the "Other Fee" section of the information box that must be set out in credit

²⁶⁶ Note that Bill 24, *An Act mainly to combat consumer debt overload and modernize consumer credit rules*, 2nd Sess, 39th Leg, 2011 [Bill 24] would have made this prohibition explicit such that it would be clear that making a transaction that has the effect of passing the credit limit would not constitute an express request by the consumer to increase the credit limit (*ibid*, s 37).

²⁶⁷ [1986] RJQ 2341, EYB 1986-79006 [cited to RJQ].

²⁶⁸ *Ibid* at 11.

²⁶⁹ *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations*, SOR/2009-257, s 6(1): An institution may not increase the credit limit on a borrower's credit card account without first obtaining the borrower's express consent to do so. L'Heureux and Lacoursière mention that this provision adopted in 2009 was inspired by the Quebec legislation (L'Heureux & Lacoursière, *supra* note 254 at 284).

card applications and agreements. The FCAC explains over-the-limit penalties on its website as follows:

Your credit limit is the maximum amount that you are allowed to spend on your credit card. Your credit card issuer decides whether to allow any transactions to go through if you go over your credit limit. If you do go over your credit limit, you may have to pay a penalty, which can vary from one card issuer to another.

The credit card issuer will not inform you if you are about to go over your credit limit when you make a transaction. It is your responsibility to pay attention to your balance and make sure you don't go over your credit limit.²⁷⁰

Thus, it is clear that in respect of this category of fees as well, the approach adopted under the federal scheme is diametrically opposed to the provincial scheme. As the Court in *McCutcheon* phrased it: one statute says yes while the other says no.

(ii) Other Charges: The Ghost Category

As demonstrated, the Quebec legislation does not directly address the treatment of fees that do not clearly fall into either category of net capital or credit charges. This uncertainty was directly at issue under the *Marcotte* decision and the approach of the three levels of court in the *Marcotte* case in characterizing the foreign conversion fees under the Quebec CPA tracks three possible approaches that may be taken in respect of this uncertainty in Quebec. These three approaches can be summarized as follows:

- 1) Lower Court: This first level of court upheld the classic approach to interpreting the Quebec legislation that there are only two categories – net capital and credit charges – which categorization was maintained, at least in theory, by the other levels of court. The Superior Court concluded that the conversion fees are “credit charges” within the meaning of the Quebec CPA since they are clearly not a component of the conversion rate and, as they are not charges imposed at the time the contract extending variable credit is entered into, they cannot be considered “net capital”.²⁷¹ However, the court does not describe how these

²⁷⁰ Understanding Credit Card Fees, 2014-01-28, Financial Consumer Agency of Canada, online: FCAC <<http://www.fcac-acfc.gc.ca/Eng/resources/publications/creditCards/Pages/Understa-Comprend-4.aspx>>.

²⁷¹ *Marcotte c Banque de Montréal*, 2003 CanLII 42553 (QC SC) at para 323.

could effectively be incorporated into the credit rate. Thus, the problem of whether they can be charged at all was not resolved by this level of court.

- 2) Court of Appeal: The Quebec Court of Appeal recognized that foreign conversion charges, as well as a number of other charges, belong to an “other” category of fees that must be disclosed pursuant to section 12 but that are not taken into account in the credit rate. Although the court, at the end of its analysis, makes a brief comment that such fees are net capital, the whole of its discussion really led towards the establishment of an “other” category of fees, similar to the one the federal system recognizes.
- 3) Supreme Court of Canada: The third position assumed by the highest level of court is the most elusive of the three that accounts for why I have labelled the “other” category of fees the “ghost” category. The Court categorized the foreign conversion fees as net capital, thus avoiding the calculation problems attendant with this “other” category of fees. However, although the Court acknowledged that there are a series of other similar charges (listed by the Court of Appeal), it did not clearly categorize those fees as either net capital or credit charges, thus maintaining a shadow category of homeless charges.

The following sections describe the approaches taken by each level of court in more detail.

(a) Superior Court

The lower court began by reviewing the application of the Quebec CPA to contracts extending variable credit (i.e. contracts that regulate credit cards). The Superior Court reviewed the relevant provisions and stated that in respect of such contracts, “any amount that a consumer must pay that is not ‘net capital’ constitutes a ‘credit charge’”. ‘Credit charge’ is, in a way, the residual category which includes anything that is not included elsewhere.”²⁷² On a plain reading the Quebec CPA, only these two categories

²⁷² *Ibid* at para 329.

exist under the categories of loans of money and variable credit.²⁷³ Net capital is, as Professor Masse states, “limited to the sum or value that the consumer actually enjoys and actually derives benefit from.”²⁷⁴ Since the legislator left the list of such charges open and non-exhaustive, credit charges may be any number of charges incidental to the extension of credit, including those “that result from the use of the credit card itself.”²⁷⁵

The Superior Court then went through several reasons why conversion fees cannot be categorized as net capital. First of all, the court noted that the consumer cannot be said to benefit from it because the amount is not remitted to the merchant with whom he is transacting.²⁷⁶ The claim put forward by the banks that the conversion fees are in fact a margin that is a component of the currency conversion rate is similarly dismissed by the court.²⁷⁷ Not only did the banks not use the term “margin” to describe the conversion fee charged by them, they specifically disassociated the description and terminology used in respect of these fees from the margin or credit rate and also disclosed the existence and amount of such fees, which they would not have been required to do under either the Quebec CPA or the Bank Act if the fee were truly an integral component of the conversion rate.²⁷⁸ Second, the Superior Court referred to expert testimony that also distinguished between the conversion rate and margin on the one hand and the conversion fees or commissions on the other, the latter being added on top of the conversion rate in situations where the transactions represent small amounts, and such evaluation was substantiated in respect of the conversion fees in question.²⁷⁹ Finally, the expert mentioned that the disclosure of the margin “is generally ‘unheard of,’” whereas evidence of the disclosure of the conversion fee by the financial institutions was amply provided.²⁸⁰ Instead, the “margin” more accurately describes the amount that

²⁷³ *Ibid.*

²⁷⁴ *Ibid* at para 330.

²⁷⁵ *Ibid* at paras 331-333.

²⁷⁶ *Ibid* at para 346.

²⁷⁷ *Ibid* at para 347-356.

²⁷⁸ *Ibid* at para 349.

²⁷⁹ *Ibid* at paras 360-363.

²⁸⁰ *Ibid* at para 364.

is added to the base conversion rate set by the credit card systems and collected by the banks in providing the conversion services.²⁸¹

The Superior Court concluded that it is clear from all the evidence tendered that there are two steps in the foreign currency transaction conversion: the first undertaken by the credit card systems consists in the conversion itself, the second consists in the addition of a conversion charge by the financial institution for its own benefit.²⁸² Since the banks are not directly involved in the currency conversion, one must conclude that the fees charged by them are really “in consideration of all the services associated with the credit card,” such as “the convenience, security, tracking” etc.²⁸³ Furthermore, the legislator could not have intended for “consumers to have to distinguish between administrative charges or commissions associated with a service that is incidental to the contract extending variable credit and those associated with the actual extension of credit.”²⁸⁴ In fact, the list of credit charges in section 70 of the Quebec CPA “tends to support the interpretation that an incidental service offered in connection with a contract extending variable credit is covered by the concept of ‘credit charges’, although it is not necessarily associated with the credit itself.”²⁸⁵ The Superior Court also dismissed attempts to assimilate such fees with amounts that would be charged if the customer had chosen another method of payment, stating that the Quebec CPA distinguishes and specifically governs transactions made using variable credit.²⁸⁶ That conclusion is not changed by commercial reality or by the reasonableness of these charges. The Superior Court concluded that the banks are permitted to charge this fee; they simply have to comply with the disclosure requirements set out for credit charges in the Quebec CPA.²⁸⁷

²⁸¹ *Ibid* at paras 368-370.

²⁸² *Ibid* at para 383.

²⁸³ *Ibid* at paras 384-387.

²⁸⁴ *Ibid* at para 392.

²⁸⁵ *Ibid* at para 403.

²⁸⁶ *Ibid* at paras 411-414.

²⁸⁷ *Ibid* at paras 413, 419-414.

(b) Court of Appeal

The Court of Appeal discussed the categorization of the conversion fee in its sister decision in *Desjardins*²⁸⁸ and determined that the conversion fees cannot be considered to be credit charges within the meaning of the Quebec CPA and therefore are neither included in the calculation of the credit rate nor do they benefit from the grace period.²⁸⁹

The Court of Appeal recognized that any amounts charged to a borrower under a contract of variable credit either fall within the categories of net capital or of credit charges.²⁹⁰ Reading section 70 of the Quebec CPA, the court divided the listed credit charges into two possible groups:

- (i) charges related to the steps leading up to credit access, such as fees to open files or other administrative charges, fees to obtain a solvency report, membership and renewal fees, and commission, and
- (ii) subsequent charges related to credit use, such as amounts claimed as interest, insurance premiums guaranteeing that the capital will be reimbursed and credit charges paid in the event of invalidity or death, the discount that the consumer using credit will not receive as opposed to the one he would be entitled to if he were paying cash, and the statutory fees due and imposed because of the credit.²⁹¹

The Court of Appeal further explained that any charges not specifically listed in section 70 that fit into either of these two categories must be considered credit charges.²⁹² However, after reiterating this traditional stance, the Court of Appeal diverged from the approach taken by the lower court. It stated: “This does not entail, however, that all the charges invoiced to consumers in the context of a contract of credit necessarily fall under the category of credit charges.”²⁹³ The Court of Appeal gave as examples of such charges a fee to obtain a copy of a lost monthly statement, to stop payment on a

²⁸⁸ *Fédération des caisses Desjardins du Québec c Marcotte*, 2012 QCCA 1395, [2012] RJQ 1526 [Desjardins, CA].

²⁸⁹ *Amex Bank of Canada c Adams*, 2012 QCCA 1394; 353 DLR (4th) 296 [Amex CA].

²⁹⁰ *Desjardins CA*, *supra* note 288 at para 43.

²⁹¹ *Ibid* at para 44.

²⁹² *Ibid*.

²⁹³ *Ibid* at para 46.

cheque, and a fee to obtain an additional card or to use an ATM.²⁹⁴ The court concluded on this point:

[These charges] cannot be considered to be charges leading up to the granting of credit or charges imposed as a result of that credit being granted. Certainly, these are charges related to the existence of the contract of credit, but they have no common denominator with charges invoiced because the credit was used (such as interest) or with charges leading up to the granting of credit.²⁹⁵

The same reasoning was applied to the foreign conversion fee: “[t]hese fees are not charged to access the credit or guarantee its reimbursement,”²⁹⁶ instead, the fee is tied to a service related to the use of the card, a service which the borrower chooses to use.²⁹⁷ In the Court of Appeal’s view, all of these other charges are not specifically prohibited by the Quebec CPA and must simply be disclosed in accordance with section 12 of the Quebec CPA.²⁹⁸

In reaching this conclusion, the Court of Appeal expressly acknowledged the two problems outlined in the discussion above with respect to standalone fees, which simply “do not lend themselves to inclusion in the computation as a percentage of the credit charges.”²⁹⁹ The first is that because it is impossible to tell when these standalone fees will arise and how often, “the credit rate that Desjardins would have to indicate to Visa cardholders prior to any use (sections 72 and 81) would have to be expressed as an annual percentage varying between 18% and 900%.”³⁰⁰ The second is that only a percentage of borrowers, those who did not pay off their balance at the due date would have to pay these charges, the other clients “would thus benefit from a free service.”³⁰¹ This creates a situation that is contrary to the aims of the Quebec CPA: in order for a bank to recoup its costs, it would either have to increase the membership fee, as a hidden cost for all members, or raise the credit rate for everyone, which would mean

²⁹⁴ *Ibid* at paras 46 and 47.

²⁹⁵ *Ibid* at para 46.

²⁹⁶ *Ibid* at para 52.

²⁹⁷ *Ibid* at para 50.

²⁹⁸ *Ibid* at paras 48, 49.

²⁹⁹ *Ibid* at para 55.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid* at para 56.

that those borrowers who default on their payments – the already vulnerable consumers – would bear the costs of those using the foreign currency conversion service.³⁰²

Yet, after this thorough analysis of why these other charges cannot be considered credit charges, the Court of Appeal tacked on a final statement without further discussion that these fees, “are, consequently, included in the net capital for purposes of the Quebec CPA, like any service acquired from a third party and paid with a credit card.”³⁰³ Thus, the court ultimately concluded by conceding the position that the scheme of the Quebec CPA only recognizes two categories and given that this “other” category of fees are certainly not credit charges, they must – by default – be included in the net capital category.

(c) Supreme Court of Canada

While the Court reached the same conclusion as the Court of Appeal, its approach to the question differed in a significant respect. Instead of arguing why conversion charges (and similar charges) are not credit charges, and then categorizing the fees as net capital by default, the Court tried to put forward a reasoned argument as to why the foreign conversion fees are net capital within the meaning of the Quebec CPA.

The Court first set out the test to distinguish between credit charges and net capital as follows:

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).³⁰⁴

³⁰² *Ibid* at paras 57-59.

³⁰³ *Ibid* at para 61.

³⁰⁴ *Marcotte*, supra note 2 at para 51.

The Court found that conversion charges do not qualify as one of the listed fees in section 70 of the Quebec CPA.³⁰⁵ While the lower court characterized them as administration charges or commissions, it did not distinguish between such fees when they relate directly to the granting of credit and when they relate to a service that is ancillary to the contract of credit.³⁰⁶ But this reasoning, as the Court of Appeal pointed out, leads to the inclusion of all sorts of ancillary service fees as credit charges, with the attendant problems that run counter to the goal of protecting consumers that the Quebec CPA aims to achieve.³⁰⁷

Next, the Court looked at the definition of “credit charges” in section 69 of the Quebec CPA “as fees that consumers ‘must pay under the contract’ other than net capital.”³⁰⁸ The foreign conversion charge is not a fee that a consumer must pay – it is a service that it chooses to obtain instead of obtaining it from a third party.³⁰⁹ In fact, the Court noted, this charge is even less tied to the extension of credit than the other fees that the Court of Appeal enumerated, such as “obtaining an additional card or copy of a monthly statement.”³¹⁰

However, instead of implementing the default reasoning that the Court of Appeal used – that is, that all of these “other” fees that cannot be considered credit charges – for “practical and conceptual”³¹¹ reasons, must be categorized as net capital, the Court moved on to the second step that it set out for the determination of whether the foreign conversion fee qualifies as net capital under the legislation. Net capital, the Court remarked, is defined as “the sum for which credit is actually extended”³¹² and as Masse explains, this means “sums or values that benefit the consumer.”³¹³ The Court reasoned that “[i]n the case of conversion charges, consumers benefit from having their currency

³⁰⁵ *Ibid* at para 52.

³⁰⁶ *Ibid*.

³⁰⁷ *Ibid* at para 55.

³⁰⁸ *Ibid* at para 56.

³⁰⁹ *Ibid*.

³¹⁰ *Ibid*.

³¹¹ *Ibid* at para 61.

³¹² *Quebec CPA*, *supra* note 1, s 68.

³¹³ *Marcotte*, *supra* note 2 at para 58.

converted to the foreign currency.”³¹⁴ Therefore, the fee must be classified as net capital.

As a result of the manner in which the Court elected to classify the foreign conversion charges as net capital, it left in the shadows all the other fees discussed by the Court of Appeal. Where do they fit?: they do not seem to fit within the category of credit charges and they do create all the “practical and conceptual” problems the Court alluded to,³¹⁵ but can they, like the foreign conversion fees, be considered to be a sum that is extended for the benefit of the consumer? Thus, although the Court nods to this category of “other fees”, it does not actually place the other listed charges in either category of credit charges or net capital, nor under some other classification.

However, there is even greater indication that this third category hovers behind the Court’s analysis in Marcotte. It is that after the Court categorized the foreign conversion fees as net capital, the provision of the Quebec CPA that the Court chose to focus in its constitutional analysis on as the source of the requirement for the banks to disclose this fee was section 12 of the CPA. Yet, section 12 of the Quebec CPA is not the source of the requirement to disclose net capital. The requirement can be found in respect of fixed credit in section 115 of the Quebec CPA and, in respect of open credit, it can be found in section 125 of the Quebec CPA. Section 12 is simply a catch-all provision requiring the disclosure of any costs charged to a consumer that are not caught by any other specific provision of the Quebec CPA. In fact, one might say that section 12 of the Quebec CPA was precisely designed to deal with an “other” category of fees.

Thus, although the Court did not explicitly acknowledge it, this “ghost” category remains and continues to occupy an uneasy and shifting place on the Quebec legal landscape.³¹⁶

³¹⁴ *Ibid.*

³¹⁵ *Ibid* at para 61.

³¹⁶ Professor Lacoursière acknowledges this problem and suggests that a new category of charges be created by the legislator to deal with these situations (see e.g. Marc Lacoursière, “Quebec Banking Case Law: Recent Developments 2009-2013” (2014) 29 BFLR 411 at 430-431).

In the next section, I consider whether proposed amendments to the Quebec CPA can shed light on how to best to classify those “other” charges in Quebec.

(iii) Bill 24

To a certain extent, the reforms proposed in Bill 24 tried to directly address this problematic “ghost” category. Bill 24 entitled *An Act mainly to combat consumer debt overload and modernize consumer credit rules* (“Bill 24”)³¹⁷ was introduced before the Quebec National Assembly in 2011. As discussed in Part C below, the Quebec CPA underwent a number of reforms. The third phase of reforms, which resulted in Bill 24, targeted the sections of the Quebec CPA dealing with contracts of credit and the Quebec government undertook two public consultations on this topic. The first consultation of this third phase was released on December 15, 2009 (the “2009 Consultation”)³¹⁸ and the second consultation following up on comments made to the first was released on March 5, 2010 (the “2010 Consultation”).³¹⁹

The 2009 and 2010 Consultations both noted that this reform effort was inspired in part by the Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada (“Harmonization Agreement”),³²⁰ as well as reforms to the credit card regime at the federal level and in the United States.³²¹ In the Explanatory Notes prefacing Bill 24, it also noted the following:

Measures contained in the Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada are integrated into the Act, including the compulsory disclosure of certain information, rules applicable when the contract is amended or renewed, the delivery of contractual documents to the consumer and the sending of statements of account in the case of contracts with variable credit.³²²

³¹⁷ Bill 24, *supra* note 266.

³¹⁸ Révision de la Loi sur la protection du consommateur : Phase 3 – Le crédit, Document de consultation, Office de la protection du consommateur, Services juridiques, December 15, 2009 [2009 Consultation].

³¹⁹ Révision de la Loi sur la protection du consommateur : Phase 3 – Le crédit, Document d’orientation de la 2e consultation, Office de la protection du consommateur, Services juridiques, March 5, 2010 [2010 Consultation].

³²⁰ Drafting Template, *supra* note 239.

³²¹ 2009 Consultation, *supra* note 318 at 2.

³²² Bill 24, *supra* note 266 at 2.

While not mentioned in the above description, one of the important developments found in the Harmonization Agreement³²³ is the recognition that certain charges “are beyond the control of the lender [or] would be difficult to determine at the time of borrowing”³²⁴ and therefore it suggests that certain charges be exempted from the cost of borrowing and APR calculations. Bill 24, too, picked up on this trend and introduced several explicit exemptions of certain fees from being categorized as credit charges, as will be discussed briefly below. Unlike the Court’s approach in *Marcotte*, the legislature did not suggested that these fees be treated as net capital: Bill 24 recognized the most effective place for the “ghost” category.

Bill 24 proposed to add the following section, which would have brought Quebec more in line with the federal system and the harmonized provinces by creating this “other” category of credit charges that could be excluded from the credit rate. However, as is evident from reading this section below, the list of excluded charges are not as extensive as that provided in the federal regulation:

72.1. The following credit charge components are not taken into account in calculating the credit rate:

(a) a premium for insurance not required by the merchant as a condition for the contract; and

(b) the fee for registration in the register of personal and movable real rights.

Nor are the following credit charge components taken into account

(a) in calculating the credit rate for an open credit contract:

i. the membership or renewal fee;

ii. the value of the rebate or discount to which consumers are entitled if they pay cash;

iii. the fee for an additional copy of statements of account;

iv. the fee for customizing a credit card; and

v. the replacement fee for a lost or stolen credit card;

(b) in calculating the credit rate for a credit contract secured by an immovable hypothec:

³²³ Drafting Template, *supra* note 239.

³²⁴ *Ibid* at 9.

- i. expenses and professional fees paid for the drawing up of the hypothec deed;
- ii. fees paid to access the public registers of rights, to obtain certified statements of registered rights or to register or cancel the registration of rights;
- iii. professional fees paid for the purpose of determining or confirming the value, condition, location or conformity to the law of the hypothecated property, provided the consumer is given a report signed by the professional and is free to give the report to other persons;
- iv. transaction fees paid in respect of a tax account relating to a hypothecated immovable;
- v. the premium for insurance required by the Canada Mortgage and Housing Corporation to secure a hypothecary loan; and
- vi. the additional interest payable on prepayment.

A regulation may be made to determine other credit charge components that are not taken into account in calculating the credit rate for one or more types of credit contracts.³²⁵

Had it been enacted, this section would have represented a loosening of the position taken in the current Quebec CPA towards these “other” charges, as, for example, the complete reversal in the position taken towards optional insurance in subsection (a), above.

In addition, section 16 of Bill 24 clarified Quebec’s position on charging default charges by proposing to add the following provision to the Quebec CPA:³²⁶

92. In addition to credit charges calculated in accordance with section 91, the only default charges the merchant may claim from the consumer are reasonable charges under the circumstances in respect of

(a) legal costs incurred in collecting a payment;

(b) costs incurred in enforcing and realizing the security guaranteeing the performance of the consumer’s obligations or in protecting the secured property; and

(c) costs incurred because a cheque or other payment instrument given by the consumer to the merchant was not accepted by the financial institution, or

³²⁵ Bill 24, *supra* note 266, s 13.

³²⁶ The 2009 Consultation mentions that this revision stems from the Drafting Template, *supra* note 239 (2009 Consultation, *supra* note 318 at 9).

because a transfer of funds from the consumer to the merchant could not be completed through no fault of the merchant.

Reasonable charges for the purposes of this section may be determined by regulation.

A similar amendment would have been introduced in respect of open credit:

29. Section 119 of the Act is amended

(1) by replacing “penalties imposed for non-payment at the expiry of the term” by “charges imposed for non-payment of amounts when due”;

(2) by replacing “constitute” by “, except those mentioned in subparagraphs a, b and c of the first paragraph of section 92, are”.

The above list of permitted default charges would have brought the Quebec scheme directly in line with the Bank Act and harmonized provinces³²⁷ and importantly this section would have removed the requirement that default charges be computed as part of the credit rate, which, as I have previously explained, effectively prohibits the imposition of default charges on borrowers.

It is important to note, however, that Bill 24 did not reproduce wholesale the harmonized cost of credit rules that some of the other provinces adopted. In fact, Quebec chose not to take part in the harmonization process undertaken by the federal government and several provincial governments after the Harmonization Agreement was released.³²⁸ And, as is evident from the 2009 and 2010 Consultations, each proposed amendment was very carefully weighed and considered in light of the overall Quebec scheme.³²⁹

Thus, while the proposed reform incorporated certain aspects of the federal and provincial harmonized systems, Bill 24 still very much preserved the unique flavour of the Quebec CPA. Because in drafting Bill 24, the Quebec legislation had the benefit of consulting the federal COB Regulations as well as the developments in the harmonized

³²⁷ For example, in respect of credit card charges, the only limitation imposed on the fees that may be charged in connection with credit card agreements are that they be reasonable (Reference Manual, *supra* note 241 at 127).

³²⁸ Drafting Template, *supra* note 239.

³²⁹ The 2009 Consultation notes that the inclusion of the proposals is for instructive purposes and the OPC is by no means undertaking to adopt those reforms wholesale (2009 Consultation, *supra* note 318 at 2).

provinces, which had not been in place when the Quebec CPA was first drafted, one is forced to conclude that even had the reform been implemented, the Quebec system would have remained deliberately stricter than the federal scheme and that the Quebec legislation intended that certain fees remain prohibited.

Finally, it is of great note that the third phase of the revisions to the Quebec CPA died on the order of paper and Bill 24 was never accepted as law. Thus, at least for the moment, the inescapable conclusion must be that the Quebec CPA is different – and is intentionally so – from the cost of borrowing scheme found under federal law.

3. Conclusion on Practical Inconsistency

It is clear from the preceding discussion that the requirements under the Bank Act and those under the Quebec CPA are not equivalent. In fact, Quebec is much stricter in terms of what fees can be charged to a consumer under a contract of credit. As a result, the disclosures in a contract of credit under the Quebec scheme will certainly be different from those made under the Bank Act and the calculation of the credit rate / APR for the same loan may vary as well.

In addition, although the Court avoided positioning itself on many of the other fees (besides for foreign conversion fees) – and whether they must be treated as either net capital or credit charges or whether the ghost category actually exists – there remains the real possibility of even more conflict between the two schemes. As a result, the banks and consumers are left with a great degree of uncertainty as to how to treat amounts that do not fall neatly within either category of net capital or credit charges.

In conclusion, the Court's statement that the two legislative systems are duplicative was made without support. The value of the Court's findings under this head of the constitutional analysis would certainly have been greatly enhanced had the Court adopted the approach that the Court dismissed as inapplicable in this case:

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 [...].³³⁰

Under that line of inquiry, although it would remain arguable that it is technically possible to comply with both schemes (by complying with the stricter scheme), a true analysis of whether one scheme was inconsistent with the other so as to engage paramountcy would have been undertaken.

In the next section, I consider the Court's main argument under the second branch of the federal paramountcy doctrine, that is, that the impugned provisions of the Quebec CPA do not frustrate the federal purpose.

C. **Federal Purpose: Equating the Quebec CPA to the CCQ**

The Court in *Marcotte* undertook no real analysis of the federal purpose, which is a precondition for determining whether there is frustration of that purpose. The Court begins its analysis with an inverse finding regarding the purpose of the provincial legislation – that is, that the purpose of the provincial legislation is not to legislate federal undertakings. The Court then dismissed consideration of this whole branch of the paramountcy doctrine by likening the Quebec CPA provisions to the rules of contract of general application under the CCQ.

The Court wrote:

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

³³⁰ *Marcotte*, supra note 2 at para 80.

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.³³¹ [Emphasis Added]

First, it should be noted that whether the provincial legislation creates standards applicable to banks or not is a foregone conclusion at this stage. Certainly, determining whether the provincial legislation is in pith and substance a matter falling under provincial jurisdiction or whether it specifically targets a matter falling within a federal head of power should already have been dealt with at the first stage of the constitutional analysis in determining the validity of the two statutes.

Furthermore, the fact that the impugned legislation is of general application in the province is not determinative at any step in the constitutional analysis. As Hogg explains when discussing the pith and substance test:

While a provincial law of special application to undertakings within federal jurisdiction is not necessarily invalid, it is also true that a provincial law of general application is not necessarily valid as its application to undertakings within federal jurisdiction. Normally, [...] a provincial law of general application which is in relation to a provincial matter may validly affect federal matters as well. But the courts have carved out an important exception to this general rule. If the effect of the provincial law would be to impair the status or essential powers of a federally-incorporated company, or to affect a vital part of a federally-regulated enterprise, then the provincial law, although valid in the generality of its applications, will not apply to the federally-incorporated company or the federally-regulated enterprise.³³²

The question to be asked here – and the purpose of the federal paramountcy doctrine – is to determine, despite the fact that the provincial legislation does not specifically aim to regulate banking and is a law of general application in the province, whether it contradict the purpose of the federal legislation. The Court's treatment of this branch of the constitutional analysis was brief – summed up in the paragraph of the *Marcotte*

³³¹ *Marcotte* at para 79. The Court of Appeal in *Amex CA*, *supra* note 289 at para 33 made a similar statement:

The *CPA* is a comprehensive code applicable to all types of contracts entered into by the consumers of this province. Some of its principles derogate from the general law, as codified in the *CCQ*, but most are complementary when not a mere restatement of the general principles. Clearly, it is not an act directed at regulating contracts entered into by banks but a law of general application in the province that governs all merchants, including banks.

³³² Hogg, *supra* note 9 at 15-11–15-12.

decision reproduced above – and all balanced on the statement that the Quebec CPA merely sets out contract rules of general application in the province, analogous to those found in the CCQ. As will be demonstrated in the following sections, that finding is far from evident and warranted further consideration by the Court. In addition, this facile comparison to the CCQ represented a lost opportunity to consider the unique place that the Quebec consumer legislation occupies on the Quebec legal landscape, as well as on the constitutional plane.

1. Assumption Regarding Analogy to General Contract Law

The analogy that the Court drew between the Quebec CPA and general contract law in Quebec is, at the very least, debatable. It is true that consumer protection legislation arose out of contract law and that contracts are its *sina qua non*.³³³ Its rules and features stem from and apply to the various stages of a contractual relationship: it begins with the setting of an even commercial playing field, orders the first interactions between merchant or manufacturer and consumer, and regulates the negotiation and agreement stages and extends beyond to the execution of obligations.³³⁴ However, the field of consumer protection is varied and vast and the consumer protection rules applicable to contractual relationships in the province are by no means confined to the principles found in the Quebec CPA (nor, it should be noted, can consumer protection rules be confined to contract law). As Masse pointed out: “Les législateurs canadiens et québécois ont en effet adopté plus de 225 lois et plusieurs milliers de textes réglementaires qui visent tous, d’une façon ou d’une autre, à protéger le consommateur.”³³⁵

Are all these various laws and regulations to be considered general contract law in the province and, as such, applicable without further examination to the operations and

³³³ See Claude Masse, *Fondement historique de l’évolution du droit québécois de la consommation*, dans P.-C. Lafond (dir.), *Mélanges Claude Masse – En quête de justice et d’équité* (Cowansville, Éditions Yvon Blais, 2003) 39 [Masse, “Fondement”] at 47.

³³⁴ See *ibid* at 48, 50; Daniel Germain & Jorge Passalacqua, “La protection du consommateur une mission essentielle de l’État québécois” in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec, actes du colloque de 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2005) 25 [Germain] at 26.

³³⁵ Masse, “Fondement”, *supra* note 333 at 46.

structures of federal undertakings? As will be discussed in this Part, the Quebec CPA, at least, cannot be equated to contract laws of general application in the province, such as those laws found in the CCQ.³³⁶ The founding principles and the historical development of the Quebec CPA and that of the CCQ are distinct and, in fact, developed in contra-distinction to one another. Furthermore, the Quebec legislature has several times demonstrated its intent to maintain the distinction between the two, and in particular, to keep the scope of the Quebec CPA circumscribed and specific, and indeed the internal logic and scope of these two statutes bears out their distinctive natures.

In this section, I will examine the historical foundation and evolution of the two statutes, as well as explore the unique scope and application of each one.

(i) Historical and Ideological Foundation of the CCLC

The Civil Code of Lower Canada (the “CCLC”), the precursor to the CCQ, was enacted in 1866 and was born out a time when economic liberalism and industrial capitalism were the dominant ideologies that had emerged from the economic and social developments that characterized the occidental world in the 19th century.³³⁷ The CCLC was also very much inspired by the civilist tradition which emphasized the primacy of liberty of contract, that is, “la liberté pour toute personne dotée de la capacité juridique de s’engager par contrat comme elle l’entend, sans aucune limitation de la part des lois

³³⁶ I would point out that, once again, the Court does not make it clear whether it is only considering very limited sections of the *Quebec CPA*, *supra* note 1, to found its conclusion here (i.e. section 12 and sections 277, 278) and, if so, the Court does not offer any reasoned grounds to divide the *Quebec CPA* in such a way that certain sections are considered general contract law in the provinces but other sections are not. For example, is it only Chapter I of Title I – General Provisions (which includes section 12 on costs) and Chapter III of Title IV – Penal Provisions (which include sections 277 and 278) that are of general application? Or did the Court intend to include all of the *Quebec CPA* in this analogy, with the notable exception of Chapter III of Title I – Provisions Relating to Certain Contracts (which includes the section on contracts of credit)? Furthermore, the *Quebec CPA* already internally specifies certain exceptions in its application (see e.g. sections 5, 5.1, 6 and 6.1 and section 20-22 of the Regulation, to name only a few), which would exempt several types of contracts that would normally be subject to consumer protection law from its purview, including from large sections of the *Quebec CPA* that are of more general application (e.g. Chapter I of Title I – General Provisions and Title II – Business Practices). Thus, while the legislation itself seems to contemplate a restrictive application, the Court has, without offering any reasoned basis or considering these exceptions, expanded its application to all (consumer) contracts.

³³⁷ See Masse, “Fondement”, *supra* note 333 at 54.

ou intervention de la part de l'État, sous forme de contrôle judiciaire ou autrement.”³³⁸ Given the historical context, it is not surprising that the CCLC placed the principle of liberty of contract at its epicenter.

However, the CCLC adopted the principle of liberty of contract in its strictest form and was much more purist than either its social or legal civilist roots. The approach that the CCLC took to contractual obligations was founded in a theoretical belief in the undiluted power of the individual to order his interactions as he chooses. Viewing the individual as simultaneously the only source and only limit to his own obligations, a contract entered into by such individual became necessarily purely representative of the “volonté individuelle”.³³⁹ In this way, the contract is equity and therefore no external law is needed to (re)establish equity between the parties.³⁴⁰ In particular, article 13 of the CCLC implicitly recognized the primacy of liberty of contract when it stated: “On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes mœurs”. In this way, contracts were subjected to no other outside force than the respect of public order and morality,³⁴¹ which principles were so few as to be almost non-existent.³⁴²

Thus, rather than being a faithful reproduction of the French Civil Code of 1804 or even the codification of the juridical evolution that French law had undergone in Quebec after the conquest of that territory by the British, the CCLC was to a greater extent the ideological invention of its authors during a period when Quebec was trying to forge a

³³⁸ *Ibid* at 53.

³³⁹ *Ibid*.

³⁴⁰ See Moore, “Autonomie”, *supra* note 36 at 2.

³⁴¹ See Stéphane Rousseau, ed, *Droit de la consommation et de la concurrence* (Montreal: Lexis Nexis, 2014) at 1/5; Masse, “Fondement”, *supra* note 333 at 53.

³⁴² See Claude Masse, “Le droit de la protection du consommateur et le Code civil du Québec, interdépendance et complémentarités” (2000) REDC 61 [Masse, “Interdépendance et complémentarités”] at 62. In fact, the principles only refer to three articles in the CCLC (see Masse, “Fondement”, *supra* note 333 at 70). These were further reduced through the influence of English law and the industrial boom which brought a massive increase in loss of life and limb as a result of machinery and transportation accidents from which the industrial players wished to escape responsibility (see *ibid* at 82). In fact, it seems that the true goal of article 13 was to protect the State and Church and not one co-contractant from the exploitation of another, as the codifiers had otherwise rejected through article 1012 the principle of lesion between majors (see *ibid* at 104). This disinclination to use the principles of public order/morality to intervene between two-co-contractants was followed and even strengthened by the courts in Quebec (see *ibid* at 104-106).

strong national identity to bolster itself against the powerful influencing forces of the newly formed Union.³⁴³ The Quebec codifiers, being composed of the clergy and other elite members of the francophone society at the time, benefited from the systems of privilege that were being eroded through legislative developments in France.³⁴⁴ In developing their own Code, therefore, they eliminated any whisperings of socialism that they found in the Napoleonic code, and expunged, for example, the notions of guaranties against latent defects and lesion between majors,³⁴⁵ of which the latter concept has already been present in Quebec civil law at the time of codification.³⁴⁶

In addition, the approach adopted in the CCLC was a deliberate choice that stemmed from the transformation of Lower Canada from a population of farmers, artisans and local merchants into a more expansive capitalist and industrial society. Although initially led by the Anglophone mercantile class, industrial development soon became the dominant economic force.³⁴⁷ The contract, framed in a manner which favoured stability over equity,³⁴⁸ was thus employed as a deliberate tool for social change:

Présentée par l'idéologie alors dominante comme le symbole de légalité et le gage de l'expression de la volonté individuelle, la liberté contractuelle absolue a servi de moyen de passage d'une société fondée depuis deux siècles sur un modèle égalitaire, le mode de production des petits producteurs, à un type de société foncièrement inégalitaire basé sur le modèle du capitalisme commercial et industriel.³⁴⁹

The result was that although the CCLC was touted and hailed as a bastion of civilian and nationalist values,

[L]e Code civil de 1866 est d'abord un projet social qui entend asseoir définitivement les bases du capitalisme industriel alors naissant au Québec. [...] En fait, le Code civil de 1866 contient et renforce à lui seul tous les éléments de

³⁴³ See Masse, "Fondement", *supra* note 333 at 57-59.

³⁴⁴ See *ibid* at 56-57.

³⁴⁵ See *ibid* at 61.

³⁴⁶ See *ibid* at 73-74.

³⁴⁷ See *ibid* at 61-67.

³⁴⁸ See *ibid* at 76.

³⁴⁹ *Ibid* at 68.

l'assujettissement économique et social qui marquera l'immense majorité de la population québécoise pendant plus d'un siècle.³⁵⁰

In short time, the ideology underlying the CCLC – which even when it was conceived hid “une structure de domination économique de la majorité par un petit groupe d’individus”³⁵¹ – became further and further removed from reality. Since the CCLC was founded on an unalloyed form of individual liberty, it had an intrinsic inability to address power imbalances and redress its abuses. Furthermore, its drafters had eliminated any attenuating concepts existing at that time (even if they were very limited) which might have led to the natural evolution of consumer protection rules within the law of contract itself. Even the courts applied the founding principles of the CCLC assiduously and proved unwilling to use even the few tools at their disposition to temper the CCLC’s severity with more lenient interpretations.³⁵² Thus, the development of a separate, divergent branch of law that would enable the protection of consumers became a necessity.³⁵³

(ii) The Foundation of Consumer Protection Law

Likened to an illegitimate child by Masse,³⁵⁴ consumer protection law, rather than stemming from and being considered part of the corpus of contract law in Quebec, grew instead out of a cognitive dissonance between the law of contract and the social reality of power disparities that steadily widened during the period of economic development of Quebec in the late 19th-early 20th century.³⁵⁵

However, far from being a phenomenon tied to Quebec society, revolutionary social and economic changes were playing out all over the Western world. Out of the industrial revolution was born the consumer society,³⁵⁶ with all its attendant birth pangs. The

³⁵⁰ *Ibid* at 60.

³⁵¹ *Ibid* at 55, 67.

³⁵² See Benoît Moore, “La réforme du droit de la consommation et l’équité contractuelle” in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec : Actes du colloque des 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2003) 113 [Moore, “La réforme”] at 114.

³⁵³ See Masse, “Fondement”, *supra* note 333 at 107.

³⁵⁴ *Ibid* at 45.

³⁵⁵ See *ibid* at 108-109.

³⁵⁶ See Lafond, *Théorie et pratique*, *supra* note 264 at 6.

urbanization and industrialization, the growth of monopolies, the development of credit and an increasingly dependent consumer society meant the proliferation of contracts of adhesion³⁵⁷ which did not fit within the theoretical framework of contract law of the time (e.g. which contained such fundamental common law principles as caveat emptor, privity of contract, disclaimer clauses, the reasonable man theory, etc.)³⁵⁸ which held the equal exercise of individual will as its core tenet. In contrast, the contract of adhesion, imperative for the efficient and cost-effective operation of commercial enterprises on a large scale,³⁵⁹ is characterized by the predetermined setting of conditions and prices wholly by the stronger party and the transfer of risks to the weaker party, who has no choice but to accept the terms or forego the goods or service completely.³⁶⁰ In a climate of monopolistic proffering of goods and services – many of which are essential³⁶¹ – and the absence of true competition in the market, the ability to exercise even this meager liberty to decline a particular good or service is illusory.³⁶²

Thus it was that consumer protection law, before being introduced into Quebec law, was first a collective international development:

En ce sens le droit de la consommation semble, à bien des égards, être un apatride, une création spontanée et mondialisée d'un droit dérogatoire, sans saveur nationale forte, rendu nécessaire afin de faire face aux différents phénomènes liés à la société de consommation et combler le décalage toujours plus grand entre la théorie classique du contrat et la réalité vivante des contrats.³⁶³

In Canada, the sixties and early seventies saw the strongest consumer movements which resulted in the proliferation of a variety of legislation at the federal level aimed at

³⁵⁷ See Moore, “Autonomie”, *supra* note 36 at 2-3.

³⁵⁸ See Harold Buchwald, “Consumer Protection in the Community: The Canadian Experience – An Overview”, (1976) 2 Can Bus LJ 182 [Buchwald] at 183.

³⁵⁹ See Masse, “Fondement”, *supra* note 333 at 110, 112; Lafond, *Théorie et pratique*, *supra* note 264 at 13.

³⁶⁰ See Masse, “Fondement”, *supra* note 333 at 110.

³⁶¹ See Germain, *supra* note 334 at 32. The authors note that in 2004-5005, the Office de la protection du consommateur dealt with 246 459 requests for information and their website had 777 817 visits, of which a majority of the requests for information concerned goods and services that are essential or that occupy an important place in household budgets.

³⁶² See Masse, “Fondement”, *supra* note 333 at 113-114. Lafond states that in practice 99% of contracts concluded daily are contracts of adhesion (Lafond, *Théorie et pratique*, *supra* note 264 at 12).

³⁶³ Moore, “Autonomie”, *supra* note 36 at 5.

combatting a number of rising problems, such as the regulation of dangerous products, the labelling of textiles and other consumer products, introduction of safety standards for motor vehicles, among other things.³⁶⁴ At the provincial level, many provincial legislatures introduced legislation to address truth in lending, consumer credit practices and various other problematic practices, as well as to regulate real estate brokers, automobile dealers and debt collection agents and also set up ministries to oversee their enforcement.³⁶⁵ In the mid-seventies, several provinces adopted a series of disparate statutes dealing with additional consumer protection matters, such as unconscionable commercial practices, credit files, aid for debtors, collection practices, etc.³⁶⁶ In Quebec, while several measures were introduced prior to the sixties to deal with immediate crises in housing and credit,³⁶⁷ the first consumer protection legislation specifically dealing with consumer contracts was adopted in 1971.³⁶⁸ La *Loi de la protection du consommateur* (the “1971 Act”)³⁶⁹ covered only the areas of consumer credit and sales by itinerant merchants. A replacement statute - la *Loi sur la protection du consommateur* - was adopted in 1978 and came into force in 1980 (the “1978 Act”). This law, which has a much larger scope than the 1971 Act and targeted a larger sector of consumer contracts,³⁷⁰ is the one still in effect today. Over time, modifications were

³⁶⁴ See Buchwald, *supra* note 358; Edward P. Belobaba, “L’évolution du droit de la consommation au Canada de 1945 à 1984” in Y. Bernier et A. Lajoie (dir.), *La protection du consommateur, le droit de l’environnement et le pouvoir des sociétés*, Ottawa, Commission royale sur l’union économique et les perspectives de développement du Canada (vol 50), 1986, 1 [Belobaba] at 5-8. At the federal level, laws concerning health, safety and economic fraud (including anti-competition measures) has been in place since the late 1800s, however, the measures of protection were increased and expanded in the 1960 and 70s and a plethora of new laws were introduced (Buchwald, *supra* note 358 at 187-193). In the early to mid-nineteen hundreds, both the federal and provincial governments adopted a number of measures that dealt with various safety standards and financial matters, including debtors’ relief and regulation of several service providers, such as real estate agents and debt collectors. In fact, by 1939, many of the bases for the current consumer protection law was already in place at both the federal and provincial levels (Belobaba, *supra* note 364 at 4-5).

³⁶⁵ See Buchwald, *supra* note 358 at 194-198; Belobaba, *supra* note 364 at 5-6.

³⁶⁶ See Belobaba, *supra* note 364 at 7-8.

³⁶⁷ See Germain, *supra* note 334 at 28.

³⁶⁸ In fact, there were 4 statutes that were adopted in succession to deal with different consumer matters: the 1971 Act replaced by the 1978 Act, the *Loi sur les agent de voyages* in 1974, the *Loi sur les recouvrement de certaines créances* in 1981 and the *Loi sur les arrangements préalables de services funéraires et de sépulture* in 1988 (see *ibid* at 29).

³⁶⁹ *Consumer Protection Act*, SQ 1971, c 74.

³⁷⁰ Masse, “Interdépendance et complémentarités”, *supra* note 342 at 62.

made to the 1978 Act in reaction to evolving commercial practices.³⁷¹ For example, a section dealing with distance contracts (largely, contracts concluded online) was added to the Quebec CPA in 2006.³⁷² Furthermore, in 2009, amendments were made to address telecommunication service providers.³⁷³ Further amendments to the Quebec CPA were promised (including to the rules on contracts of credit), however, a major reform of its content never came to be.³⁷⁴

It is clear that the Quebec CPA drew its inspiration from American, Canadian common law and French consumer protection law³⁷⁵ and not from the *droit commun* in existence in the province. Already in the 1971 Act, certain concepts mirrored those found in the French consumer protection law and during the reform efforts prior to the adoption of the current Quebec CPA in 1978, the legislators again turned to France to benefit from its developments and teachings in this area and once again alignment with the French measures of the time can be found in the Quebec CPA.³⁷⁶ In addition, many of these concepts were already present in the consumer protection law enacted in other Canadian provinces³⁷⁷ or were later adopted as part of a cross-country harmonization process, such as the distance/remote/internet contract rules which are almost identical across the Canadian consumer protection legislation.³⁷⁸

Thus, while it is important to note that the Quebec CPA is not a direct mirror of international or common law developments in this area but has its own unique flavour

³⁷¹ See Pierre-Claude Lafond, "Plaidoyer pour un code de la consommation du Québec", in Benoît Moore (dir.) *Mélanges Jean Pineau* (Montreal: Éditions Thémis, 2004) 87 [Lafond, "Plaidoyer"] at 95.

³⁷² *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, SQ 2006, c 56, s 5.

³⁷³ *An Act to amend the Consumer Protection Act and other legislative provisions*, SQ 2009, c 51, s 11.

³⁷⁴ See Lafond, "Plaidoyer", *supra* note 371 at 94-95. The third phase of the revisions to the *Quebec CPA* died on the order of paper, and the fourth phase is still at the consultation stage. This waning of enthusiasm for the advancement of consumer protection was experienced across Canada and the United States and may be due to the economic recession that took place in the late 70s early 80s and the consequent lack of confidence in the leading governments (see Belobaba, *supra* note 364 at 8-10).

³⁷⁵ See Lafond, "Plaidoyer", *supra* note 371 at 93; Moore, "Autonomie", *supra* note 36 at 5. For example, in the United States, during President Kennedy's term, consumer protection matters were squarely on the political agenda (see Belobaba, *supra* note 364 at 7).

³⁷⁶ See Lafond, "Plaidoyer", *supra* note 371 at 93-94.

³⁷⁷ See Moore, "Autonomie", *supra* note 36 at 5.

³⁷⁸ This harmonization effort stemmed from Canada, Office of Consumer Affairs, "Internet Sales Contract Harmonization Template", May 25, 2011, online: Innovation, Science and Economic Development Canada <[https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Sales_Template.pdf/\\$file/Sales_Template.pdf](https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Sales_Template.pdf/$file/Sales_Template.pdf)>.

and is quite distinct from the consumer protection legislation found in the other provinces and territories of Canada, it is also important to recognize that its founding principles rest on international and common law developments and did not draw upon, nor build upon, the *droit commun* already in existence in the province.³⁷⁹ In fact, rather than drawing on the Quebec civil law principles, it frequently challenged the concepts found in the CCQ. As one author notes:

Mais c'est surtout le droit civil qui est interpellé en voyant mutilés plusieurs de ses principes fondateurs, dont la force obligatoire des contrats, l'effet relatif des contrats ou encore la limitation de la compensation financière aux seuls dommages compensatoires – par l'admission des dommages-intérêts punitifs.³⁸⁰

To take one important example of such divergence, the 1978 CPA is understood to have incorporated the concept of lesion between majors in article 8 of the Quebec CPA, however, the article never uses that term:

En réalité, celle-ci reprend, à quelques détails près, les termes utilisés en 1964 à l'article 1040c C.c.B.C. portant sur le prêt d'argent, lesquels étaient empruntés à des lois des provinces anglo-saxonnes portant sur "l'unconscionability" dans les contrats de crédit. La version anglaise de l'article 1040c est d'ailleurs identique aux dispositions ontariennes. L'article 2-302 du *Uniform Code of Commerce* américain, lequel, depuis 1952, donne le pouvoir aux tribunaux de sanctionner une clause ou un contrat jugé abusif, constitue également une source d'inspiration. Ces liens entre les textes législatifs ont permis à une certaine doctrine de soutenir que le législateur québécois entendait, tant par l'article 1040c que plus tard par l'article 8 L.p.c., "adopter [...] le modèle de l'*unconscionability* de la common law."³⁸¹

Thus, although, the civil law concept of lesion was attached to this article, as the Quebec Court of Appeal later interpreted it as setting out the rules for objective and subjective lesion, respectively,³⁸² it remains that the civil law term was not used but

³⁷⁹ In addition, one might note that the trend necessitated by the increasing cross-border markets is harmonization of consumer protection rules across countries in order to ensure a sufficient level of protection for consumers while ensuring that the laws of a particular country are not seen as a barrier to trade (Germain, *supra* note 334 at 33).

³⁸⁰ Moore, "Autonomie", *supra* note 36 at 4.

³⁸¹ *Ibid* at 10.

³⁸² See Masse, "Interdépendance et complémentarités", *supra* note 342 at 67-68. Although this may not be the pure civil law concept of "lésion" as explained in Moore, "Autonomie", *supra* note 36 at 13.

instead the language that was universal to consumer law was borrowed, setting it apart from the “droit commun” of contracts in Quebec.³⁸³

Underscoring its distinctiveness from general contract law in Quebec, Masse explains that consumer protection legislation neither grew out of, nor has it become part of, the droit commun in Quebec:

[L]e droit de la consommation est le résultat du vécu social du droit des contrats dans notre société, de ses contradictions et, dans une certaine mesure, de ses échecs. Il s'est constitué peu à peu, par la force des choses et des pressions sociales, sans plan d'organisation général, sans jamais avoir été accepté et inclus dans la théorie générale des obligations du droit québécois.³⁸⁴

(iii) Adoption of the CCQ and Interaction with the Quebec CPA

Reforms to the CCLC were percolating since 1955 and its replacement, the CCQ, was finally adopted in 1991 and came into force in January of 1994.³⁸⁵ The new code was enacted in the post-consumer protection era and, leading up to its adoption, the role of consumer protection law in the Quebec legal scheme was given close consideration.

In fact, as early as 1986, arguments for the inclusion of the consumer protection rules within the new code began to be advanced.³⁸⁶ Initially, this idea was greeted with enthusiasm and the *Avant-projet de loi portant réforme au Code civil du Québec* (presented before the National Assembly in 1987) actually consecrated an entire section of the new CCQ to consumer protection matters.³⁸⁷

Many arguments were advanced for the inclusion of consumer protection law within the CCQ,³⁸⁸ and some of the benefits put forward were the increased recognition of this

³⁸³ See Moore, “Autonomie”, *supra* note 36 at 11.

³⁸⁴ Masse, “Fondement”, *supra* note 333 at 45.

³⁸⁵ See Masse, “Interdépendance et complémentarités”, *supra* note 342 at 63.

³⁸⁶ See *ibid* at 81.

³⁸⁷ *L'avant projet de Loi portant réforme au Code civil du droit des obligations*, 1st Sess, 33rd Leg, 1987.

³⁸⁸ See e.g. Moore, “Autonomie”, *supra* note 36 at 24; Nicole L'Heureux, “La protection du consommateur” (1988) 29 *Cahiers de droit* 1083 [L'Heureux] at 1086-1087.

important area of law, uniformity in recourses upon non-execution of obligations and greater accessibility by consumers to consumer protection law.³⁸⁹

However, many more potent arguments were advanced against the inclusion of the consumer protection laws in the CCQ, including some of the principle arguments set out below:

- 1) The Quebec CPA is a law of exception as it applies only to contractual relationships between merchant and consumer and does not apply generally, as the CCQ does, to all contractual relationships.³⁹⁰
- 2) Many of the fundamental principles underlying the Quebec CPA are contrary to those found in the CCQ, even taking into account the new approach adopted in the new code (discussed below).³⁹¹
- 3) In addition to civil sanctions, the Quebec CPA contemplates a number of penal sanctions, remedies that are often available simultaneously upon the contravention of a given provision. However, the CCQ does not generally provide for penal sanctions. Thus, relocating a large number of the Quebec CPA provisions into the CCQ would engender the loss of penal sanctions or would have forced, once again, the adoption of parallel legislation to preserve this option.³⁹²
- 4) Unlike the CCQ, particularly the Book on Obligations, the Quebec CPA requires and received numerous amendments to keep up with rapidly changing

³⁸⁹ See L'Heureux & Lacoursière, *supra* note 254 at 15.

³⁹⁰ See Masse, "Interdépendance et complémentarités", *supra* note 342 at 83. However, as the author notes, this argument is not particularly strong, as a section dedicated to these specific types of contracts could certainly have been contemplated in the structure of the CCQ, *supra* note 5.

³⁹¹ See Masse, "Interdépendance et complémentarités", *supra* note 342 at 83; Pierre-Claude Lafond, "Pour un code québécois de la consommation", in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec : Actes du colloque des 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2003) 169 [Lafond, "Code québécois"] at 170.

³⁹² See Masse, "Interdépendance et complémentarités", *supra* note 342 at 83. Note that while the Court in *Marcotte*, *supra* note 2 at paras 82-84, does not seem concerned about the incoherence between the sanctions provided in the *Quebec CPA*, *supra* note 1, and the CCQ, *supra* note 5, at the time of adoption of the CCQ, this proved to be one of the deciding arguments against inclusion of the consumer protection provisions in the CCQ (*ibid* at 83).

commercial practices. In fact, the Quebec CPA was modified approximately 40 times between 1980 and 1998. This rhythm is unsuitable for a legislative tool like the CCQ which is characterized by its stability. Therefore, the isolation of consumer protection law is necessary to allow it to be more readily modified to increase the degree of protection it affords to consumers.³⁹³

- 5) The impact and accessibility of consumer protection law would be better preserved by having a separate statute dealing specifically with consumer matters. Integrating it into a wider law would risk having it be overshadowed and receiving more narrow interpretations.³⁹⁴

The motivation behind the movement opposing the inclusion of a consumer protection section in the CCQ could be summed up as follows:

Le Code se veut une législation pérenne, constituée de règles intemporelles, posant des principes porteurs et souples. Ces caractéristiques sont à des lieues de ce qui caractérise le droit de la consommation, droit particularisé, technique, détaillé et sujet à de fréquentes modifications. De plus, le Code ne peut et ne doit aspirer à intégrer en lui l'ensemble du droit privé, surtout lorsque ces règles s'opposent de manière trop importante aux principes du droit commun, comme il en va pour le droit de la consommation.³⁹⁵

Decisively, many influential players in the legal world, including the Barreau du Québec and the Chambre des notaires, publicly ranged themselves in the anti-inclusion camp.³⁹⁶ Perhaps not surprisingly, the arguments against the inclusion finally prevailed and in 1991, the Quebec legislator decided to preserve the status quo and maintain the distinction between the Quebec CPA and the CCQ. Instead of integrating the two, the legislator opted to draft a few new provisions for inclusion in the CCQ that would speak to a modified approach to contractual relationships and ensure the protection of vulnerable parties.³⁹⁷ In this way, the CCQ was certainly influenced by developments in

³⁹³ See *ibid* at 83.

³⁹⁴ See Moore, "Autonomie", *supra* note 36 at 23-34.

³⁹⁵ *Ibid* at 23.

³⁹⁶ See Lafond, "Code québécois", *supra* note 391 at 170.

³⁹⁷ See *ibid*.

the consumer protection world³⁹⁸ and it moved away from the unidimensional approach to liberty of contract characteristic of the CCLC:

L'esprit en est tout à fait différent et il a fait une grande place à une approche beaucoup plus équilibrée du droit des contrats. Ce code est clairement marqué par une volonté très bien affirmée de protéger les parties contractantes les plus faibles contre les abus de la force économique.³⁹⁹

In fact, this new philosophy called “la nouvelle moralité contractuelle”, based largely on the concept of good faith,⁴⁰⁰ signified a transformation of the law of contract to the extent that one may even argue that these changes to the CCQ provided evidence that the will of the parties is no longer the sole basis of contract, but that it rests instead in law⁴⁰¹ or even more fundamentally, in principles such as cooperation, decency, proportionality and notably as set out in article 1375 CCQ – in good faith.⁴⁰² Thus, the concept of “contract” itself changed, as it moved away from the classical theory of contracts found in the CCLC and moved towards a philosophy that made room for the protection of vulnerable parties. The courts as well proved willing to amend their previously rigid view of contract to incorporate concepts of equity.⁴⁰³ Of these new rules, certainly, we can talk of a consumer protection law of general application in the province.

However, despite the fact that the CCQ is now tempered by certain principles of morality and equity, one cannot forget that no wholesale re-imagination of the law of contract took place and the CCQ still remains rooted in its founding principles of contractual liberty and economic liberalism.⁴⁰⁴ And even though in most consumer (or adhesion) contracts, the exercise of a free and enlightened will is illusory, the CCQ did not abolish the will of the parties as the central force of contract.⁴⁰⁵ In fact, since the legislature unmistakably rejected the integration of the Quebec CPA provisions into the

³⁹⁸ See L'Heureux & Lacoursière, *supra* note 254 at 12.

³⁹⁹ Masse, “Interdépendance et complémentarités”, *supra* note 342 at 63.

⁴⁰⁰ Moore, “Autonomie”, *supra* note 36 at 21.

⁴⁰¹ See *ibid* at 20.

⁴⁰² See Moore, “La réforme”, *supra* note 352 at 116. Masse provides a good overview of the changes in Masse, “Interdépendance et complémentarités”, *supra* note 342 at 63-64.

⁴⁰³ See Moore, “La réforme”, *supra* note 352 at 115.

⁴⁰⁴ See Lafond, *Théorie et pratique*, *supra* note 264 at 14.

⁴⁰⁵ See *ibid* at 17.

CCQ, it is clear that the concepts of consumer protection that were finally included in the CCQ were not intended to duplicate those in the Quebec CPA.⁴⁰⁶ In fact, the provisions dealing with consumer contracts number only nine.

As one author summed up this situation:

Fruit d'un compromis entre le protectionnisme et la liberté contractuelle, les neuf articles applicables nommément et spécifiquement au contrat de consommation n'ont pas l'heur de satisfaire les attentes des consommateurs et n'auront jamais le mérite d'élever le droit de la consommation au rang du droit commun. L'écartèlement du droit de la consommation subsiste donc encore aujourd'hui entre la pièce maitresse du droit privé et cette loi particulière si chère aux consommateurs qui, contrairement à la situation française, ne reçoit pas encore l'appellation de 'Code de la consommation'.⁴⁰⁷

And, in fact, many authors note that since the inclusion of specific provisions in the CCQ dealing with consumer protection, the consumer protection law which is by now outdated risks being overtaken by the more progressive notions found in the CCQ.⁴⁰⁸

2. Similarities and Differences

Now that the CCQ has adopted the spirit of protection for vulnerable parties, there are many similarities between the CCQ and the Quebec CPA. However, important differences remain – and I will briefly examine the differences in quality and scope of the two laws – which lead one to the conclusion that these statutes still cannot be equated. One statute sets out general contract laws in the province. The other sets out, no less importantly, but distinctly and more restrictively, certain laws applicable to consumers in the province.

⁴⁰⁶ See Moore, "Autonomie", *supra* note 36 at 24. In fact, even the advisory committee who made the decision not to integrate the two laws raised the concern about having two distinctive definitions of a consumer contract (at 24-25). And even when such integration was being contemplated, some authors questioned how the divergent principles within the same statute could be reconciled (see L'Heureux, *supra* note 388 at 1087).

⁴⁰⁷ Pierre-Claude Lafond, "Contours et ramifications de la « nouvelle » définition du contrat de consommation du Code civil du Québec" (1996) 56:1 *La revue du Barreau* 569 [Lafond, "Contours"] at 607.

⁴⁰⁸ See e.g. Moore, "La réforme", *supra* note 352 at 116.

(i) Qualitative Difference Between the Two Laws

The contract laws found in the CCQ – and its predecessor the CCLC – were intended to be a supplementary source of rules governing the contractual relationship between two parties. Thus, once capacity to contract is established, the parties are free to determine the content of their agreement with very few obligatory constraints. Under the CCLC, the parties could choose the governing law of their contract that suited their ends, even if the agreement was executed in the province, and the contract could even derogate from the majority of rules outlined in the code, most of which were not of public order.⁴⁰⁹ The same applies under the CCQ. Article 9 of the CCQ clearly states this position that applies generally to the rules found in the CCQ:

9. In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

On the other hand, the Quebec CPA provisions were conceived as rules of public order – their primary function being to re-establish equilibrium between the parties by forcing the stronger party to comply with certain requirements that cannot be waived by the more vulnerable party.⁴¹⁰

In addition, the contracts in the CCQ are marked by the absence of formality – there are very few articles that dictate the particular form or wording of a particular contract.⁴¹¹ This is in stark contrast with the approach taken in the Quebec CPA, which very

⁴⁰⁹ See Masse, “Fondement”, *supra* note 333 at 69-70.

⁴¹⁰ See Lafond, *Théorie et pratique*, *supra* note 264 at 31. The departure from the traditional approach to contract law and the imposition of rules in this context makes sense. Consider that Masse even questions whether consumer contracts or contracts of adhesion, which make up the majority of contracts in today's day, should even be considered contracts since there is no real exercise of will by the weaker party. In current market conditions, even the take-it-or-leave-it option is illusory because there is no true difference between the terms offered by the various enterprises and, in addition, many of the goods and services are essential (see Masse, “Fondement”, *supra* note 333 at 113-116).

⁴¹¹ See Masse, “Fondement”, *supra* note 333 at 70-71. As Masse points out, even when there are requirements of form, these are usually instituted to protect third parties and not the parties to the contract itself (*ibid* at 71).

specifically regulates the form and content of disclosures and even dictates the font size and spacing used in those contracts.⁴¹²

Finally, as noted earlier, the sanctions for violating the rules found in either statute are qualitatively different (although the importance of this was summarily dismissed by the Court in *Marcotte*⁴¹³):

L'ensemble des sanctions édictées par la L.P.C. déroge largement au droit commun : recours civils, dommages-intérêts punitifs, injonction, publicité corrective, publication du jugement, recours administratifs, sanctions pénales, engagement volontaire, etc. La Loi emprunte au droit pénal et au droit administratif. Le législateur a compris que les sanctions civiles classiques sont inefficaces en matière d'infractions économiques.⁴¹⁴

One important example that demonstrates the different approach taken by each statute is the availability of punitive damages. Under the CCQ, punitive damages are really an exceptional remedy and are therefore difficult to claim. However, under the Quebec CPA, punitive damages is just one of the remedies that are available under equal footing under section 272 and does not require that the claimant prove bad faith.⁴¹⁵

I turn next to a consideration of the difference in scope of the two statutes.

(ii) Scope of Application

The four corners of the Quebec CPA rest on the interactions between the (1) consumer and (2) the merchant for the provision of (3) goods and (4) services.

In the Quebec CPA, a consumer is defined in section 1, the definition section, as “a natural person, except a merchant who obtains goods or services for the purposes of his business” and a merchant is defined as follows: “In this Act, the word ‘merchant’ includes any person doing business or extending credit in the course of his business.” The definition of “goods” is also included in the definition section and means “any

⁴¹² See Lafond, *Théorie et pratique*, *supra* note 264 at 29-30.

⁴¹³ *Marcotte*, *supra* note 2 at paras 82-84.

⁴¹⁴ Lafond, *Théorie et pratique*, *supra* note 264 at 30.

⁴¹⁵ See Masse, “Interdépendance et complémentarités”, *supra* note 342 at 79.

movable property and, to the extent required for the application of section 6.1, any immovable property”, however, the term “services” is not defined.

The CCQ did not reproduce these terms or concepts when it established its own consumer protection measures. Instead, the legislature introduced two new notions: that of the “consumer contract” and that of an “enterprise”. It also sets out the object of the consumer contract in a much wordier fashion. The relevant provision reads as follows:

1384. A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.

The term “enterprise” itself is not defined (which is not surprising since terms used in Quebec legislation are not often defined), however, in the context of the solidarity of debtors, the “carrying on of an enterprise” is defined as follows:

1525. [...] The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the operation of an enterprise.

Do the different formulations between these two statutes mean that they have different scopes of application? As will be discussed in this section, to a large extent the practical answer seems to be “no” since the Quebec CPA and the CCQ will apply simultaneously to the same types of contracts. However, their stated scope of application is by no means identical and there are some important differences. In addition, as discussed briefly in the following section, the content of the rules applicable to each type of contract is certainly not identical.

In examining the scope of the consumer related matters in the CCQ as compared to the Quebec CPA, it is first interesting to point out the reference that article 1384 of the CCQ makes to existing consumer protection legislation, that is, the article states that a consumer contract is “a contract whose field of application is delimited by legislation respecting consumer protection.” This statement is certainly vague – how and to what

extent did the legislature intend to incorporate other consumer protection legislation into the consumer protection provisions of the CCQ? The Minister's comments shed some light on the legislature's intentions, as the Minister commented during discussions leading up to its enactment that: "Cette définition dépasse le cadre de la Loi sur la protection du consommateur et rejoint les définitions d'autres lois relatives à la protection du consommateur, telles la *Loi sur les arrangements préalables de services funéraires et de sépulture* et la *Loi sur les agents de voyages*."⁴¹⁶

However, this provides little assistance since, as we have seen earlier, the range and breadth of consumer protection legislation is extremely wide, and much of it does not define the limits of its application, nor even refer to a consumer per se, and the application of the different statutes intersect at some points and mutually exclude at others.⁴¹⁷ Perhaps even more damaging to the coherence of this reference to external consumer protection law, is the fact that article 1384 goes on to specifically define the consumer contract for purposes of the CCQ, by describing in detail the parties to the contract and the scope of its object. As is pointed out by the doctrine, the reference to legislation respecting consumer protection is thus emptied of meaning.⁴¹⁸ Therefore, to determine their respective scopes, one really has to look at the terms used in each statute.

For example, while the Quebec CPA uses the term "consumer" as its linchpin, the CCQ refers more generally to a "consumer contract". This distinction led to concerns that the CCQ would create a more objective standard for identifying consumer contracts and move away from the process which seeks to qualify a consumer contract by considering the quality of the person who entered into the contract.⁴¹⁹ However, both concepts maintain the requirement that the consumer be a physical person (excluding other entities, such as small businesses or not-for-profit organizations although these may also require protection).⁴²⁰ Both also maintain an additional requirement relating to the

⁴¹⁶ *Code civil du Québec annoté*, Tome 2, 18th ed (Montreal: Wilson & Lafleur, 2015) at 1760.

⁴¹⁷ See Lafond, "Contours", *supra* note 407 at 585-587.

⁴¹⁸ See *ibid* at 590.

⁴¹⁹ See *ibid* at 571-572.

⁴²⁰ See *ibid* at 574-575.

purpose of the individual's activities – and while the CCQ circumscribes the activities in a positive way (i.e. the activities must be undertaken for a personal, family or domestic purposes⁴²¹), the Quebec CPA circumscribes it in a negative way (i.e. excluding “a merchant who obtains goods or services for the purposes of his business”), there seems to be no practical difference in the way they are interpreted.⁴²²

The counterparty of the consumer in the Quebec CPA is the “merchant”, whereas in the CCQ, it is the “enterprise” which includes professionals, such as lawyers, dentists and accountants, as well as other classes traditionally excluded from the notion of merchant, such as artisans, farmers.⁴²³ In fact, as one author writes: “La notion se veut tellement large qu'elle englobe pratiquement toute personne qui exerce une activité économique organisée, sauf un salarié.”⁴²⁴ In respect of this important difference, it was proposed that the scope of application of the Quebec CPA (which has not been amended since 1972) should be updated to match the more expansive concept of “enterprise” in the CCQ, but this was subsequently rejected by the legislature.⁴²⁵

Finally, while the Quebec CPA applies generally to any type of contract for goods or services, the CCQ enumerates various types of possible contracts for property or services. The intended scope of the two may be similar; however, it is important to note that “property” in the CCQ is defined to include both movable and immovable property, whereas the term “goods” used in the Quebec CPA is generally limited to movable property.⁴²⁶ In this respect, the CCQ represents a significant widening in scope over the Quebec CPA (note that amendments to the Quebec CPA to incorporate contracts regarding immovable property were promised but never materialized).⁴²⁷ In addition,

⁴²¹ Which wording, I would note, is more in line with the definition of consumer contracts found in the consumer protection legislation in the other Canadian jurisdictions and was one of the changes suggested in the consultation process leading up to Bill 24, *supra* note 266 (2009 Consultation, *supra* note 318 at 3) but which was not ultimately adopted by Bill 24.

⁴²² See Lafond, “Contours”, *supra* note 407 at 575-579.

⁴²³ See *ibid* at 580.

⁴²⁴ *Ibid* at 580-581.

⁴²⁵ See Lafond, “Code québécois”, *supra* note 391 at 176. Lafond posits that this refusal was the result of the powerful lobby of professional orders that did not want to be subject to the *Quebec CPA* (see Lafond, “Contours”, *supra* note 407 at 611).

⁴²⁶ See Lafond, “Contours”, *supra* note 407 at 592-595.

⁴²⁷ See *ibid* at 593-594.

while the term “service” is neither defined in the Quebec CPA nor the CCQ, the Quebec CPA partially excludes certain types of contracts of service, for example, insurance contracts,⁴²⁸ contracts for the services of real estate brokers or agents⁴²⁹ and certain types of public services,⁴³⁰ whereas the scope of application of the CCQ is not so limited.⁴³¹ It should be noted that even the section of the Quebec CPA setting out general provisions applicable to all consumer contracts (which section is unique in the consumer protection legislation across Canada) is designed to be of limited application, the Quebec CPA having internally limited its scope. That is, section 12, the provision that the Court focused on in *Marcotte* does not apply to any of the exempted contracts mentioned above, as well as being inapplicable to contracts of credit that are secured by first ranking-immovable hypothecs or hypothecs on an immovable that contains more than 4 living units; or is used mainly for commercial, industrial or professional purposes.⁴³²

Perhaps even more importantly, the CCQ introduces the new notion of a “contract of adhesion” that is not specifically tied to a consumer relationship:

1379. A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.

Any contract that is not a contract of adhesion is a contract by mutual agreement.

The scope of this provision is much broader than the consumer context and may represent the more sophisticated and more relevant concept relating to power imbalances⁴³³ – which are not restricted to consumer-merchant or consumer-enterprise

⁴²⁸ *Quebec CPA*, *supra* note 1, s 5(a).

⁴²⁹ *Ibid*, s 6.1.

⁴³⁰ *Ibid*, s 5(b).

⁴³¹ See *Bolduc c Wawanesa*, 2004 CanLII 16770, (2004) SOQUIJ AZ-50257348 (CS) at para 15, in which the court found that an insurance contract is a consumer contract; *Association des courtiers et agents immobiliers du Québec v Proprio Direct*, 2008 SCC 32, [2008] 2 SCR 195, where the Court found that a contract entered into with a real estate broker is a consumer contract. See also Lafond, “Contours”, *supra* note 407 at 595-597.

⁴³² *CPA Regulation*, *supra* note 232, ss 20-21.

⁴³³ See Lafond, “Contours”, *supra* note 407 at 602.

interactions, but extend even to legal persons, a reality that the Quebec CPA does not currently address.⁴³⁴

In the majority of cases, since consumer contracts will also be contracts of adhesion, this results in a “double classification” of most contracts.⁴³⁵ In fact, consumer contracts are actually recognized in the CCQ as a special type of contract that likely can fall within any or several of the general, often mutually exclusive, categories of contract provided by the CCQ:

1378. [...] Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.

Nevertheless, while the current formulation of the CCQ maintains the distinction, all of the protections provided in the CCQ for one type of contract apply simultaneously for the other and therefore the treatment of the two could easily be consolidated.

Another important difference to highlight between the two statutes is that in respect of the pre-contractual realm, the scope of the Quebec CPA exceeds that of the CCQ. The Quebec CPA offers protections to a consumer who interacts with a merchant regardless of whether a contract materializes, whereas the protections under the CCQ seem to be restricted to an individual who contracts.⁴³⁶

And finally, the rights and remedies applicable to consumer contracts under the Quebec CPA are in addition to the rules applicable to contracts – or even consumer contracts – that are governed generally by the CCQ. As the Court of Appeal stated in *Banque Canadienne Impériale de Commerce c Charbonneau*: “Les dispositions impératives de la Loi, une loi d’ordre public, constituent un mode d’exécution, et d’extinction, des

⁴³⁴ Note, however, that the 2010 Consultation suggested the opposite, and expressed the concern that if the CCQ notion of enterprise replaced that of merchant, “plusieurs personnes perdraient la protection que leur offre actuellement la LPC, notamment, les artisans en devenant entrepreneurs. Vu la tendance européenne, il faudrait peut-être adapter la définition du Code civil à la LPC. Ceci serait d’ailleurs plus conforme à l’article 1384 CcQ qui réfère aux lois sur la consommation pour régir le contrat de consommation” (2010 Consultation, *supra* note 319 at 3).

⁴³⁵ Lafond, “Contours”, *supra* note 407 at 602.

⁴³⁶ See *ibid* at 584.

obligations contractuelles du consommateur; ces dispositions ajoutent parfois même aux modes d'extinction des obligations prévus au Code civil [...].”⁴³⁷

Thus, the scopes of application of the two statutes can be seen as overlapping spheres as illustrated in the figure below, with the overlapping portion representing all consumer contracts that fall within the purview of the Quebec CPA as these are also consumer contracts within the meaning of the CCQ. The wing that extends beyond the overlapping space on the left includes those consumer contracts that are excluded from the scope of application of the Quebec CPA. The wing of the Quebec CPA's scope that extends to the right of the overlapping space represents consumer interactions that are not contractual and are therefore not governed by the CCQ. The third sphere in the center of the larger CCQ sphere that also takes up the majority of the overlapping space represents contracts of adhesion, which most consumer contracts are (whether those falling under both the Quebec CPA and the CCQ or only the CCQ). (Note that the scope of contracts of adhesion goes well beyond the consumer context, however since is not strictly relevant to our discussion here, I have not represented that fact in the figure below.

⁴³⁷ [1997] RJQ 343; SOQUIJ AZ-97011129.

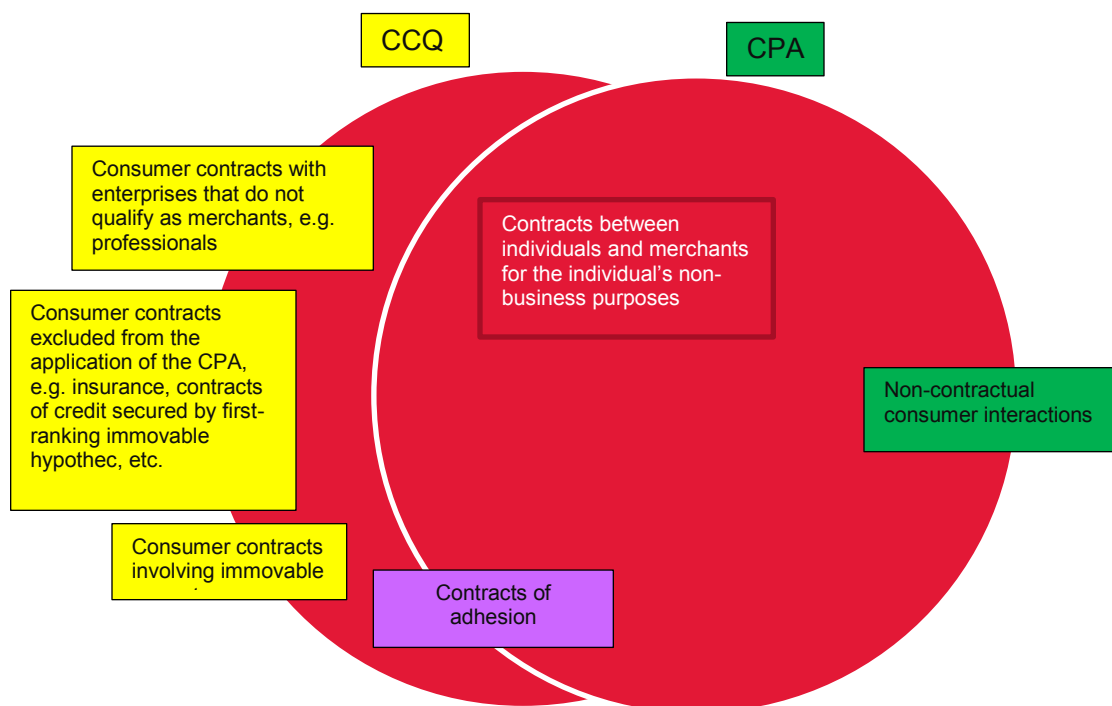


Figure 1. Scope of CCQ and Quebec CPA in relation to consumer matters.

The overlapping scope of the two statutes can be summed up as follows:

Le résultat en est qu'aujourd'hui la définition du contrat de consommation du Code civil propose une portée plus inclusive que celle qu'on peut déduire de la *Loi sur la protection du consommateur* et la dépasse au point de vue de la précision rédactionnelle, sans pourtant offrir aux consommateurs le même degré de protection.⁴³⁸

However, it should be noted that while the differences in scope are real, in most cases they prove largely academic, first because of the significant overlap between the two spheres and second (and correlatively with the first point) because the courts have generally interpreted the notion of consumer contracts found in the CCQ as being the same as that referred to in the Quebec CPA. For example, in *eBay Canada c Mofo Moko*,⁴³⁹ the Quebec Court of Appeal had to consider whether a contract entered into

⁴³⁸ Lafond, "Contours", *supra* note 407 at 612.

⁴³⁹ 2013 QCCA 1912, AZ-51017384.

by an individual for profit was still considered to be a consumer contract for purposes of article 1384 of the CCQ. In interpreting this article, which refers to “a contract whose field of application is delimited by legislation respecting consumer protection” the court turned to the definition of consumer in the Quebec CPA as well as the jurisprudence associated with this provision.⁴⁴⁰ The court concluded that the concept of consumer found in both statutes was to be read in the same manner as were the concepts of “business” and “enterprise” found respectively in the Quebec CPA and CCQ when describing the consumer’s counterparty.⁴⁴¹

In the following section, I consider whether there are differences in the substantive protections set out in each statute.

(iii) Content of the Laws

In the space where the application of the CCQ and the Quebec CPA overlap, these two laws can mostly be seen to complement and complete one another. This approach is implicitly recognized in the preliminary statement in the CCQ, which reads as follows:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

It is also recognized by the Quebec CPA in section 270, which states: “The provisions of this Act are in addition to any provision of another Act granting a right or a recourse to a consumer.”

Furthermore, in respect of those additions to the CCQ, the Quebec CPA and the CCQ have not been harmonized and therefore the possibility of conflict is present. The differences between the treatment of consumer contracts in the CCQ and the treatment of those same contracts in the Quebec CPA has led to some fracturing of consumer

⁴⁴⁰ *Ibid* at para 29.

⁴⁴¹ *Ibid* at paras 36-38.

protection concepts which has opened the door to the development of two interpretative, perhaps even contradictory, strands of consumer protection⁴⁴² – from both a legislative and jurisprudential development point of view.

Several examples of this fracturing are already in evidence, although I will briefly examine only a few of those here.

(a) Lesion

Although they do approximate one another,⁴⁴³ there are several differences between the concept of lesion present in the CCQ and that provided in the Quebec CPA. Under article 1405 of the CCQ and the second paragraph of article 1406, the concept of lesion is only recognized in respect of a minor or protected adult (with three exceptions found in articles 424, 472 and 2332), whereas sections 8 and 9 of the Quebec CPA extend to every consumer contract entered into by a consumer, adult or minor, competent or not.⁴⁴⁴ Furthermore, while the first paragraph of article 1406 applies generally, it requires proof of an internal disequilibrium in the contract (evaluated objectively) as well as vitiated consent, which Quebec authors have qualified as requiring a mixed objective-subjective evaluation.⁴⁴⁵ Articles 8 and 9 of the Quebec CPA, in contrast, provide for a purely subjective evaluation.⁴⁴⁶ And finally, while the presumption in the CPA is absolute, the presumption in the CCQ is rebuttable.⁴⁴⁷ Lluelles and Moore explain this difference as follows:

Cette différence entre les deux droits s'explique assez bien si l'on considère que chacun est porteur d'une philosophie fondamentalement différente : libéralisme en droit commun, dirigisme protecteur en droit de la consommation; le caractère absolu de la présomption de l'article 8 L.p.c. n'a, par ailleurs, rien d'étonnant, étant donné que le degré exigé de disproportion est plus élevé en droit de la consommation que dans le cadre du droit commun.⁴⁴⁸

⁴⁴² See Moore, "Autonomie", *supra* note 36 at 24.

⁴⁴³ See Olivier Lluelles & Benoît Moore, *Droit des obligations*, 2nd ed (Montreal: Thémis, 2012) [Lluelles & Moore] at para 791.

⁴⁴⁴ See *ibid* at paras 856-858.

⁴⁴⁵ See *ibid* at para. 786.

⁴⁴⁶ See *ibid* at para 857.

⁴⁴⁷ See Moore, "Autonomie", *supra* note 36 at 18.

⁴⁴⁸ Lluelles & Moore, *supra* note 443 at para 865.

As one author sums up the situation that these differences create: “[O]n ne peut s’empêcher de constater une certaine schizophrénie du droit en matière de lésion; refus catégorique du droit commun, acceptation d’une lésion hypertrophiée en matière de droit de la consommation.”⁴⁴⁹

(b) Limitation of Liability

Article 10 of the Quebec CPA sets out a prohibition against limitation of liability clauses: “Any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative is prohibited.” This goes much further than the CCQ, which also prohibits limitation of liability clauses but only in respect of bodily or moral damages.⁴⁵⁰ The absence of an equivalent clause under the CCQ presents a significant reduction in protection, which was evident in *Union canadienne c Marina St-Mathias-sur-le-Richelieu*.⁴⁵¹ In that case, the Cour du Québec declined to analyze a limitation of liability clause found in a consumer contract in light of article 1437 of the CCQ (prohibiting abusive clauses) and opted instead to apply article 10 of the Quebec CPA given that the Quebec CPA is a law of public order and deals directly with such clauses.

(c) External Clause

Article 1435 of the CCQ sets out a protection that was previously not available under the Quebec CPA:⁴⁵²

1435. An external clause referred to in a contract is binding on the parties.

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

The Quebec CPA has since been harmonized with this provision of the CCQ as reference to this new protection was incorporated in the Quebec CPA in 2010. Section 25.9 of the CPA Regulation reads as follows: “A stipulation making an external clause

⁴⁴⁹ Moore, “La réforme”, *supra* note 352 at 121.

⁴⁵⁰ Masse, “Interdépendance et complémentarités”, *supra* note 342 at 69.

⁴⁵¹ 2006 QCCQ 16113.

⁴⁵² See Masse, “Interdépendance et complémentarités”, *supra* note 342 at 86.

binding on a consumer despite the fact that such a clause cannot be set up against the consumer by reason of article 1435 of the Civil Code is prohibited.”

(d) Illegible or Incomprehensible Clauses

Article 1436 provides for a protection against illegible or incomprehensible clauses, which is not strictly provided under the Quebec CPA:

1436. In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party.

While the Quebec consumer protection legislation does deal with clarity (in section 25 of the Quebec CPA) as well as the size and font of texts (in sections 26 to 28.1 of the CPA Regulation), these really only apply to specific types of contracts and in any case do not address the situation of any “pièges” utilisés par le commerçant afin de passer sous silence une stipulation du contract... [p]ar exemple, une clause noyée parmi bien d’autres touchant des sujets divers, une clause incluse sous un titre qui ne correspond pas à son contenu.”⁴⁵³

(e) Abusive Clauses

Article 1437 of the CCQ provides for a protection against abusive clauses:

1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

There is no equivalent general provision in the Quebec CPA.⁴⁵⁴ Instead, the Quebec CPA prohibits specific clauses that may be abusive in all contracts, such as those

⁴⁵³ Moore, “La réforme”, *supra* note 352 at 125.

⁴⁵⁴ See *ibid* at 128.

mentioned in sections 10, 11, 12, etc., and prohibits other clauses in specific types of contracts (e.g. in a warranty). Although the specific types of abusive behaviour listed in the Quebec CPA may in fact cover most situations of abuse, the protection afforded by article 1437 has been applied many times by Quebec courts, and often in contexts in which the protection provided by the Quebec CPA would not have extended.⁴⁵⁵

(f) Arbitration Clauses

Section 11.1 in the Quebec CPA prohibits arbitration clauses in consumer contracts. However, as the CCQ does not have an equivalent provision, these clauses are still permitted under consumer contracts as understood by the CCQ (e.g. insurance contracts).⁴⁵⁶

Finally, it must be understood that, the protections provided by the CCQ are extremely limited and do not come close to the protections provided by the Quebec CPA. As noted earlier, there are 9 provisions that deal with the protection of vulnerable parties in the CCQ, while there are hundreds under the Quebec CPA. Furthermore, while there are some similarities and overlap between the rules provided in the CCQ and those provided in the Quebec CPA, the requirement to indicate costs charged to consumers (section 12 of the Quebec CPA) – which the Court specifically indicated as being general contract law in the province – is not one of them.

3. Conclusion on Federal Purpose

The Court put forward two possibilities in respect of its main analysis of frustration of federal purpose. The first is that the impugned rules create a standard directly applicable to banking products, which would clearly be prohibited, and which, moreover, would have disqualified the legislation at the validity stage of the constitutional analysis. The second dismissed the possibility of a conflict by stating that provisions in the Quebec CPA are simply general contract law in the province. In fact, however, there is much to consider between these two extremes.

⁴⁵⁵ See Masse, “Interdépendance et complémentarités”, *supra* note 342 at 88.

⁴⁵⁶ See Moore, “Autonomie”, *supra* note 36 at 25.

As I have demonstrated in this section, the crystallization of the corpus of contract law in the CCQ took a very different route from the development of the Quebec CPA. The ideological foundations and the historical evolution of the two statutes suggest that while the CCQ was intended to establish the basic laws of contract generally applicable in the province, the Quebec CPA was developed in contradistinction of these principles. The specific aims and scope of the Quebec CPA was purposefully different from the more general application of the CCQ. In addition, the Quebec legislature demonstrated its intention to keep the two distinct, as several opportunities to incorporate the consumer protection legislation into the CCQ were rejected. As further evidence of the legislature's intention to maintain this distinction, separate provisions dealing with the protection of vulnerable parties were introduced into the CCQ. The differences in actual wording and content of the two statutes in respect of consumer matters lends more credence to the argument that the CPA was not intended to be general contract law in the province.

Given the historical evolution of the Quebec CPA, and its current place in the Quebec legal landscape, the Court should have provided a strong and reasoned argument before concluding that the Quebec CPA is general contract law in the province (especially if only certain sections of that legislation, such as section 12 and 272, are to be considered general contract law and not others). As Hogg noted: "This was an implausible characterization of the complex disclosure provisions of the CPA, but it was enough for the Court to hold that the duplicative requirements of the CPA 'cannot be said to frustrate or undermine a goal of exclusive national standards.'"⁴⁵⁷ It is clear that without this perfunctory and unsupported statement, the Court would have been forced to undertake a robust analysis of the overall scheme of the Bank Act, how the COB Regulations fit within that scheme and the intention of Parliament in enacting that legislation in order to determine whether the provisions in the Quebec CPA do in fact frustrate the purpose of the federal scheme.

⁴⁵⁷ Hogg, *supra* note 9 at 16-18.

III. Conclusion

The stakes were particularly high in *Marcotte* since this case represents the confluence between two very important interests in Canada, the interplay of which is only going to increase in the coming years. The first interest is banking, a power that was clearly assigned to the federal legislature under the Constitution Act in 1867 and which now plays a pivotal role in this country's economy. The second is consumer protection, which was not assigned to either level of government in the Constitution Act, but in respect of which both the federal and provincial governments have been increasingly active. Indeed, the complexity of protecting consumers in a world of escalating consumerism is certainly taken seriously by both the provincial and federal levels of government as well as by the courts. As one author notes:

Au Canada, où onze législatures exercent une compétence en matière de protection du consommateur, les problèmes de planification, de coordination, d'uniformité, de chevauchement et de dédoublement, de conflit entre les lois et d'inefficacité de la réglementation abondent. Les mesures concertées du gouvernement fédéral et des provinces ainsi que la coordination des efforts des provinces peuvent alléger ou diminuer certaines de ces difficultés. Cependant, une grande partie des frais qu'elles entraînent est inhérente au concept fédéraliste et représentent le prix que doit verser tout système fédéral pour obtenir des avantages qu'il juge précieux dans une union politique de ce genre.⁴⁵⁸

Marcotte provided an unparalleled opportunity to consider the role that consumer protection law plays within the constitutional sphere, especially as it interacts with other established federal powers. Which level of government should be responsible for consumers? Which level of government should be responsible for consumers acting within a particular sphere? If both levels of government are to be responsible for consumers, how should they interact? The Court only partially responded to these questions – and its conclusions, bare in reasoning, simply left more questions and uncertainty in its wake.

In this thesis, I have examined these gaps in the Court's constitutional analysis in *Marcotte*. My analysis began with the Court's determination of validity of the Quebec

⁴⁵⁸ Belobaba, *supra* note 364 at 58.

CPA under the first stage of the constitutional analysis and provided an overview of the heads of power at play in *Marcotte*. It then outlined the development of the interjurisdictional immunity doctrine and considered whether the Court adequately addressed the extent to which the Quebec CPA affects the core of the federal power over banking. It concluded that in light of the current tendency in recent caselaw to limit the application of this doctrine to very narrow circumstances, the Court's dismissal of this step in the constitutional analysis was not surprising. Given that trend, the outcome of the Court's constitutional inquiry turned on its analysis of the doctrine of federal paramountcy, and the main focus of this review therefore also centered on the Court's arguments under that branch. Thus, the remaining sections of the thesis argued that the Court ultimately dismissed the banks' arguments based on two statements for which the Court provided no support and that warrant closer examination.

The first of these statements is that the disclosure requirements set out in the Bank Act and those set out in the Quebec CPA are merely duplicative. As is demonstrated, however, the Cost of Borrowing Regulations and the Quebec CPA do not set out identical systems for calculating or disclosing charges relating to the extension of credit. The terms used to describe the concepts involved in the extension of credit, the charges that are to be included or excluded from the calculations and the manner in which the information must be set out differ. Therefore, the Court's finding that no practical inconsistency exists between the two regimes is unconvincing.

The Court's second statement is that the Quebec CPA, just like the CCQ, simply establishes basic norms applicable to consumer contracts in Quebec and therefore they cannot interfere with the federal purpose. However, an examination of the historical development of these two important statutes indicates that while the CCQ was intended to establish the basic laws of contract generally applicable in the province, the Quebec CPA was and remains a more specific piece of legislation. Moreover, an examination of the sequence of development of these two statutes demonstrates the legislature's intention to keep the two distinct, as several opportunities to incorporate the consumer protection legislation into the CCQ were rejected. Instead, separate provisions dealing with the protection of vulnerable parties were introduced into the CCQ, further

demonstrating that the Quebec CPA was not intended to be general contract law in the province. Therefore, the Court's argument that there can be no frustration of federal purpose is inadequate.

Thus, as I have demonstrated, the Marcotte decision fails to provide a reasoned analysis for the application of the Quebec consumer protection legislation to the activities of banks and is therefore of limited precedential value at a constitutional level. In addition, it fails to provide adequate guidance in respect of the compliance measures banks must take in future cases with respect to the classification of fees as net capital or credit charges and the applicable disclosure requirements, and more generally regarding the extent to which those federally regulated institutions are subject to provincial legislation. Finally, it represents a missed opportunity to truly recognize and valorize the unique place that consumer protection legislation occupies in Quebec and to firmly establish its position on the constitutional plane. Although the Court's conclusion seems to reinforce the strength of the provincial legislature to legislate in consumer protection matters, a decision that is not fully reasoned and is based on unverified assumptions will ultimately result in undermining a cooperative federalism, in which each level of government can confidently and robustly act to protect consumers.

Bibliography

LEGISLATION

An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts, SQ 2006, c 56.

An Act to amend the Consumer Protection Act and other legislative provisions, SQ 2009, c 51.

Bank Act, SC 1991, c 46.

Bill 24, *An Act mainly to combat consumer debt overload and modernize consumer credit rules*, 2nd Sess, 39th Leg, 2011.

Civil Code of Québec, CQLR c C-1991.

Consumer Protection Act, CQLR c P-40.1.

Consumer Protection Act, SQ 1971, c 74.

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

Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations, SOR/2009-257.

Interest Act, RSC 1985, c I-15.

L'avant projet de Loi portant réforme au Code civil du droit des obligations, 1st Sess, 33rd Leg, 1987.

Regulation Respecting the Application of the Consumer Protection Act, CQLR c P-40.1, r 3.

The Constitution Act, 1867, 30 & 31 Vict, c 3.

JURISPRUDENCE

Amex Bank of Canada c Adams, 2012 QCCA 1394; 353 DLR (4th) 296.

Association des courtiers et agents immobiliers du Québec v Proprio Direct, 2008 SCC 32, [2008] 2 SCR 195.

Bank of Montreal v Hall, [1990] 1 SCR 121, 65 DLR (4th) 361.

Bank of Montreal v Marcotte, 2014 SCC 55, [2014] 2 SCR 725.

Banque Canadienne Impériale de Commerce c Charbonneau, [1997] RJQ 343; SOQUIJ AZ-97011129.

Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 SCR 749; 51 DLR (4th) 161.

Bolduc c Wawanesa, 2004 CanLII 16770, (2004) SOQUIJ AZ-50257348 (CS).

Bourassa Pontiac Buick c OPC, [1990] RJQ 1153, EYB 1990-76613 (CS).

British Columbia (AG) v Lafarge Canada Inc, 2007 SCC 23, [2007] 2 SCR 86.

Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan, [1980] 1 SCR 433; [1980] 107 DLR 3d 1.

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3.

Commission du Salaire Minimum v Bell Telephone Co of Canada, [1966] SCR 767, 59 DLR (2d) 145.

Confédération des Caisses populaires et d'économie Desjardins du Québec c Thélémaque, [1986] RJQ 2341, EYB 1986-79006.

eBay Canada c Mofo Moko, 2013 QCCA 1912, AZ-51017384.

Fédération des caisses Desjardins du Québec c Marcotte, 2012 QCCA 1395, [2012] RJQ 1526.

Irwin Toy Ltd v Quebec (AG), [1989] 1 SCR 927, 58 DLR (4th) 577.

Law Society of British Columbia v Mangat, 2001 SCC 67, [2001] 3 SCR 113.

Marcotte c Banque de Montréal, 2003 CanLII 42553 (QC CS).

Multiple Access v McCutcheon, [1982] 2 SCR 161, 138 DLR (3d) 1.

Quebec (AG) v Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 SCR 536.

Quebec (AG) v Kellogg's Co of Canada, [1978] 2 SCR 211, 83 DLR (3d) 314.

Rothmans, Benson & Hedges v Saskatchewan, 2005 SCC 13, [2005] 1 SCR 188.

Service aux marchands détaillants (Household Finance) c Option Consommateurs, 2006 QCCA 1319.

Tennant v Union Bank of Canada, [1894] A.C. 31.

Union canadienne c Marina St-Mathias-sur-le-Richelieu, 2006 QCCQ 16113.

SECONDARY MATERIAL: MONOGRAPHS

Beaudoin, Gérard-A., *La constitution du Canada*, 3rd ed (Montreal: Wilson & Lafleur, 2004).

Brun, Henri, Guy Tremblay & Eugénie Brouillet. *Droit Constitutionnel*, 6th ed (Cowansville, Que: Yvon Blais, 2014).

Code civil du Québec annoté, Tome 2, 18th ed (Montreal: Wilson & Lafleur, 2015).

Hogg, Peter W. *Constitutional Law of Canada*, vol 1 (Toronto: Carswell, 2007) (loose-leaf 2014 supplement).

Lafond, Pierre-Claude. *Droit de la protection du consommateur: Théorie et pratique* (Montreal: Yvon Blais, 2015).

L'Heureux, Nicole & Marc Lacoursière. *Droit de la consommation*, 6th ed (Cowansville, Que: Yvon Blais, 2011).

Lluelles, Olivier & Benoît Moore. *Droit des obligations*, 2nd ed (Montreal: Thémis, 2012).

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

Ogilvie, M.H. *Bank and Customer Law in Canada*, 2nd ed (Toronto: Irwin Law, 2013).

Rousseau, Stéphane. ed, *Droit de la consommation et de la concurrence* (Montreal: Lexis Nexis, 2014).

SECONDARY MATERIAL: ARTICLES

Belobaba, Edward P. "L'évolution du droit de la consommation au Canada de 1945 à 1984" in Y. Bernier et A. Lajoie (dir.), *La protection du consommateurs, le droit de l'environnement et le pouvoir des sociétés*, Ottawa, Commission royale sur l'union économique et les perspectives de développement du Canada (vol 50), 1986, 1.

Buchwald, Harold. "Consumer Protection in the Community: The Canadian Experience – An Overview", (1976) 2 Can Bus LJ 182.

Germain, Daniel & Jorge Passalacqua. "La protection du consommateur une mission essentielle de l'État québécois" in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec, actes du colloque de 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2005) 25.

Kerr, Robert. "The Scope of Federal Power in Relation to Consumer Protection" (1980) 12 Ottawa LR 119.

Lacoursière, Marc. "Quebec Banking Case Law: Recent Developments 2009-2013" (2014) 29 BFLR 411.

Lafond, Pierre-Claude. "Contours et ramifications de la « nouvelle » définition du contrat de consommation du Code civil du Québec" (1996) 56:1 La revue du Barreau 569.

_____. "Plaidoyer pour un code de la consommation du Québec", in Benoît Moore (dir.) *Mélanges Jean Pineau* (Montreal: Éditions Thémis, 2004) 87.

_____. "Pour un code québécois de la consommation", in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec : Actes du colloque des 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2003) 169.

L'Heureux, Nicole. "La protection du consommateur" (1988) 29 Cahiers de droit 1083.

Masse, Claude. "Fondement historique de l'évolution du droit québécois de la consommation" in P.-C. Lafond (dir.), *Mélanges Claude Masse – En quête de justice et d'équité* (Cowansville, Que: Yvon Blais, 2003) 39.

_____. "Le droit de la protection du consommateur et le Code civil du Québec, interdépendance et complémentarités" (2000) REDC 61.

Moore, Benoît. “Autonomie ou dépendance: réflexions sur les liens unissant le droit contractuel de la consommation au droit commun” in Pierre-Claude Lafond, *Le droit de la consommation sous influences* (Cowansville, Que: Yvon Blais, 2007) 1.

_____. “La réforme du droit de la consommation et l’équité contractuelle” in Françoise Maniet (dir.), *Pour une réforme du droit de la consommation au Québec : Actes du colloque des 14 et 15 mars 2005* (Cowansville, Que: Yvon Blais, 2003) 113.

Thibodeau, Luc, Louis Charette & Marc Beauchemin. “Champ d’application du droit fédéral” in JurisClasseur Québec, coll. “Droit des affaires”, *Droit de la consommation et de la concurrence*, fasc. 3, looseleaf (Montreal: Lexis Nexis, 2016).

SECONDARY MATERIALS: GOVERNMENT DOCUMENTS

Canada, Office of Consumer Affairs, “Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada: Drafting Template”, Consumer Measures Committee, June 1, 1998, online: Innovation, Science and Economic Development Canada < [https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost%20of%20Credit%20Disclosure.pdf/\\$file/Cost%20of%20Credit%20Disclosure.pdf](https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost%20of%20Credit%20Disclosure.pdf/$file/Cost%20of%20Credit%20Disclosure.pdf) >.

Canada, Office of Consumer Affairs, “Internet Sales Contract Harmonization Template”, May 25, 2011, online: Innovation, Science and Economic Development Canada <[https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Sales_Template.pdf/\\$file/Sales_Template.pdf](https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Sales_Template.pdf/$file/Sales_Template.pdf)>.

Financial Consumer Agency of Canada, “CG-4: Information Box Examples for the Cost of Borrowing Regulations: Credit Agreement for a Credit Card”, Commissioner’s Guidance, online: FCAC <<http://www.fcac-acfc.gc.ca/Eng/forIndustry/publications/commissionerGuidance/Pages/CreditAg-Conventi.aspx>>.

Quebec, Consumer Protection Office, “Révision de la Loi sur la protection du consommateur : Phase 3 – Le crédit, Document de consultation”, Services juridiques, December 15, 2009.

Quebec, Consumer Protection Office, “Révision de la Loi sur la protection du consommateur : Phase 3 – Le crédit, Document d’orientation de la 2e consultation”, Services juridiques, March 5, 2010.

Saskatchewan Justice, Consumer Protection Branch, “Reference Manual for Saskatchewan’s Cost of Credit Disclosure Act, 2002 and Saskatchewan’s Cost of Credit Disclosure Regulations” (Regina: Queen’s Printer, July 2006).

Understanding Credit Card Fees, 2014-01-28, Financial Consumer Agency of Canada, online: FCAC <<http://www.fcac-acfc.gc.ca/Eng/resources/publications/creditCards/Pages/Understa-Comprend-4.aspx>>.