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Quebec Court of Appeal Decision in Credit Card Currency Conversion Fee Class Action

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Credit card network rules and contracts between issuers and cardholders charge cardholders a fee each time a credit card is used outside of the country where the card is issued to purchase goods or services or to make cash withdrawals. The fee is a percentage (in a range of 1.5 to 2.5% evolving over the years) of the amount of the purchase price or withdrawal and is rolled into the currency conversion rate reported in the monthly statements issued to the cardholder.

For many years the existence of this fee and the fact that it was rolled into the reported conversion rate was not disclosed at all. One by one beginning in the early 2000's, however, the issuers modified their contracts with the cardholders to disclose the fee and its method of calculation.

The imposition and disclosure of conversion fees in credit card agreements have been challenged in class actions and other proceedings in North America for the past 12 years or so. Trailer class actions were filed in Quebec in 2004 (known as the Adams and Marcotte cases).

The Superior Court of Quebec decided in 2009 that each of the non disclosure of the conversion fees on the credit card agreements and the subsequent disclosure of such fees failed to comply with the requirements of Quebec's consumer protection legislation ("QCPA"). The Court awarded the restitution of all fees collected as far back as applicable limitation periods allowed, as well as punitive damages, in an aggregate upwards of \$200 million against issuers

of credit cards in Quebec. This result was particularly shocking to the extent that the disclosure of the fee by the issuers was widely understood and actually found to comply with the requirements of the Federal Bank Act by the Financial Consumer Agency of Canada in 2002. In addition, based on constitutional rules of resolution of conflicts of laws, the Court found that where the compliance requirements of the QCPA differed from those of the Bank Act, credit card issuers in Quebec had to comply with both.

The QCPA was innovative at the time of its inception in 1976. Over the years notwithstanding harmonization efforts by the other provinces and the federal government the QCPA has set out a singular framework for the disclosure of charges associated with the extension of credit. In Quebec, all amounts which the consumer must pay other than the sum for which credit is actually extended are known as credit charges and must be disclosed as a fixed annual rate in the credit agreement and in periodic statements of account. For charges such as fixed interest rates this requirement is easily satisfied but for other charges (including charges the precise amount of which is undetermined at the outset of a given period) compliance with the QCPA has challenged providers of credit for many years. As the credit card conversion rate cases illustrate, a consumer does not know at the outset of any year how much he or she will spend abroad using his or her credit card. It is accordingly impossible to express such charges as part of the fixed rate representing all credit charges other than on the basis of hypotheses of such generality which render the information of no use to the consumer. The best one can do with such charges is simply disclose their method of calculation (as required under the Bank Act and the other provincial consumer protection legislation), but this form of disclosure, while of optimal value in the perspective of informing the consumer, was found by the Superior Court and generally understood by practitioners and commentators as offending the black-letter requirements of the QCPA.

On August 2, 2012, the Court of Appeal allowed in part the appeals the credit card issuers and reversed the lower court's conclusion with respect to the compliance of the disclosure of the conversion fees with the QCPA as well as the imposition of punitive damages (except in the case of one issuer found to have misled consumers in the language used for disclosure and another found to have failed to cooperate with requests for information necessary to quantify the claim against it). However the judgments against the issuers for having failed to disclose the fees for a period of time were maintained, as such failure was found to offend the requirements of each of the Bank Act and QCPA.

The Court of Appeal adopted a novel interpretation of the notion of credit charges under the QCPA. It found that the conversion fees were not charged to permit the extension or reimbursement of credit and thus were not required to be included in the computation of the credit rate. In reaching this conclusion the Court noted that the literal interpretation of the QCPA advocated by the cardholders led to absurd results. It found however that such fees however were subject to a general requirement of disclosure under the QCPA, which was similar to the requirement under the Bank Act and which the disclosure by the credit card issuers met in the circumstances of the cases. This interpretation resulted in a judicial harmonization of the requirements under the Bank Act and the QCPA, removing any necessity to resort to constitutional resolution rules.

Moreover, the Court of Appeal also ruled that even if the currency conversion fee had had been qualified as a credit charge subject to disclosure as a credit rate, then the remedy for non disclosure would have been governed by a provision of the QCPA which permits merchants to invoke a defence of absence of consumer prejudice. In so doing, the Court of Appeal

reaffirmed its prior Contat¹ decision and noted that the credit card issuers had established at trial that Quebec credit card holders would not have had access to more advantageous charges for the conversion of foreign currencies than the amounts charged by the issuers.

Quebec's consumer protection legislation is in the process of being amended in a number of respects including the removal from the definition of credit fees of a number of contentious charges that had been challenged before the courts. It will be interesting to see whether the Government of Quebec further modifies this definition to bring it more in line with the Court of Appeal's interpretation.

Another noteworthy aspect of the Court of Appeal's decision concerns a petitioner's required standing to sue in multi defendant class proceedings. In the Marcotte case the representative also sued banks with which he did not contract. The Court of Appeal tiptoed around its own recent precedents in Agropur² and Novapharm³ and held that once class actions were authorized against multiple defendants the class representative is not required to justify a personal cause of action against each of them. In other words, class Plaintiffs can rely on the standing of class members whom they represent.

Given the importance of these cases and the national interest of some of the legal issues which they raise it would not be surprising to see the parties attempt to seek leave to appeal the Court of Appeal's decision in the Adams and Marcotte cases to the Supreme Court of Canada.

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¹ *Contat v. General Motors of Canada Ltd.*, 2009 QCCA 1699

² *Bouchard v. Agropur*, 2006 QCCA 1342

³ *Option Consommateur v. Novapharm Ltd.*, 2008 QCCA 949