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CONSUMER PROTECTION INITIATIVES ACROSS THE GLOBE

Shirley Chen*

I. INTRODUCTION

Consumers around the world have much to celebrate with recent developments in initiatives to not only provide further measures to prevent abuse against purchasers but also remedies to actively respond to violations. These initiatives span from proactive legislative advancements to judicially determined declarations to uphold and elevate standards for institutions with wielding economic power.

Furthermore, the large body of consumer laws across the globe is in different stages of development, calling for distinct ways to address current weaknesses within the domestic landscape of each individual country. Specifically, in a report conducted by the world federation of consumer rights group, Consumers International, governance of consumer protection varies from country to country primarily based on its economic classification. To demonstrate the variance, this Article illustrates the recent developments in consumer protection initiatives in high-income countries including Canada and the United Kingdom to low-income countries such as Zimbabwe.

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II. HIGH-INCOME COUNTRIES: UNITED KINGDOM AND CANADA

A. Canada

1. The Class-Action Suit and the Supreme Court of Canada's Analysis

On September 19, 2014, the Supreme Court of Canada ("Court") ruled collectively on three cases dealing with class-action suits against five federally regulated banks in the name of consumer protection.¹ In essence, the Court held that the Amex Bank of Canada, Bank of Montreal, Citibank Canada, National Bank of Canada, and Toronto-Dominion Bank (collectively, the "Banks") all violated Canadian provincial laws that required banks to disclose foreign exchange conversion charges on bank-issued credit cards.² Furthermore, the Court restored the trial judge's decision, holding the Banks liable for punitive damages.³

Focusing on the Court's analysis of the principal case, *Bank of Montreal v. Marcotte*, 2014 SCC 55, the Banks contested the application of Quebec's Consumer Protection Act ("CPA") as well as similar provisions of Ottawa provincial law in the companion rulings. For instance, Section 12 and 272 of Quebec's CPA govern the disclosure requirements regarding the calculation of consumer borrowing costs, which includes the transaction and foreign exchange conversion fees for credit cards issuers.⁴ Section 12 requires consumer contracts to indicate any and all contractual changes. As applied here, the Banks cannot claim these conversion costs unless

¹ See *Bank of Montreal v. Marcotte*, 2014 SCC 55 (discussing the principal case). The Court also issued two companion rulings: *Amex Bank of Canada v. Adams*, 2014 SCC 56 and *Marcotte v. Fédération des caisses du Desjardins du Québec*, 2014 SCC 57.

² David Hasselback, *Supreme Court of Canada says provincial consumer protection laws apply to banks*, FIN. POST (Sept. 19, 2014, 4:49PM), <http://business.financialpost.com/2014/09/19/supreme-court-of-canada-says-provincial-consumer-protection-laws-apply-to-banks/>.

³ David Paddon, *Quebec consumer protection law can apply to banks: Supreme Court*, THE CANADIAN PRESS (Sept. 19, 2014), <http://www.thetelegram.com/Business/2014-09-19/article-3875934/Quebec-consumer-protection-law-can-apply-to-banks%3A-Supreme-Court/1>.

⁴ Dominic Dupoy & Andres C. Garin, *Banks and provincial consumer protection laws – the Supreme Court of Canada weighs in*, NORTON ROSE FULBRIGHT (Sept. 2014), <http://documents.lexology.com/47fab3c8-770b-40ec-8f68-0cec28fba459.pdf>.

the contract discloses the amount.⁵ In contrast, Section 272 provides remedies including punitive damages for a merchant's breach of obligations under Quebec's CPA.⁶

The Banks proffered two main theories to argue their contention that the provincial law at issue did not apply to federally regulated entities. First, the Banks claimed that Canadian constitutional law nullified Quebec's CPA's jurisdiction over the Banks' conduct. Under the doctrine of inter-jurisdictional immunity, any one level of government cannot impinge on the powers and "unassailable core" of jurisdiction that are rightfully allocated to another level of government.⁷ The Banks cited Section 91(15) of the Constitution Act, 1867 which grants exclusive powers over banking to the federal Parliament, arguing that inter-jurisdictional immunity protected the core federal banking power from Quebec's CPA.⁸

However, the Court first cautioned against the excessive reliance on the constitutional doctrine of inter-jurisdictional immunity, citing its prior jurisprudence in *Canadian Western Bank v. Alberta*, 2007 SCC 22 that limited the application of the doctrine to issues already covered by the Court's precedent. The Court noted that precedent has not dealt with the doctrine's application to credit card activities of banks.⁹ Furthermore, the Court found that it could only apply the doctrine if Quebec's CPA would "seriously or significantly trammel" the core function of the federal banking power.¹⁰ The Court discussed Quebec's provincial law's disclosure requirements and found that they did not amount to that level of impairment necessary to invoke the doctrine. Instead, the law merely asked banks to disclose more information and did not prevent the Banks from its vital and essential powers to lend money or convert currency.¹¹

Second, the Banks claimed that federal paramountcy likewise permitted the Banks to not comply with provincial laws. Federal paramountcy comes into play when there are two valid laws, one provincial and one federal, and the two laws conflict in a way that

⁵ James H. Archer et al., *Marcotte – the banks and provincial laws*, MCCARTHY TRETRAUULT (Sept. 23, 2014), http://www.mccarthy.ca/article_detail.aspx?id=6892.

⁶ Dupoy, *supra* note 4.

⁷ *Bank of Montreal*, 2014 SCC 55 at para. 62.

⁸ *Id.*

⁹ *Id.* at para. 63.

¹⁰ *Id.* at para 64; Hasselback, *supra* note 2.

¹¹ Hasselback, *supra* note 2; Dupoy & Garin, *supra* note 4.

both cannot simultaneously govern the activities of a citizen or entity.¹² In practice when this occurs, the federal law will prevail over the provincial law to the extent of the conflict, in which the Banks would have to establish that the relevant sections of the provincial law “frustrate the purpose of the federal banking scheme.”¹³ In this case, the Banks argued that Quebec’s CPA frustrated the dual purpose of the federal banking scheme which is (1) establishing the federal banking standards across Canada and (2) preserving bank contracts in circumstances where a bank has breached obligations of disclosure.¹⁴

The Court was not persuaded by this argument. Instead, it found that Sections 12 and 272 of Quebec’s CPA applies to all contracts and are not exclusively banking standards.¹⁵ In essence, the sections are basic substantive rules of Canadian contract law that do not establish any banking law in conflict with federally established banking standards.¹⁶ Furthermore, the Court found that the provincial laws did not “result in an operational conflict or undermine a federal purpose of exclusive national standards” but rather that the standards are the same.¹⁷ Duplication does not rise to frustration, especially when the provincial law merely provides more protection to consumers.¹⁸

The Court ordered the Banks, having failed on these two defenses to noncompliance, to make retribution under Section 272 in the amount of the undisclosed conversion charges.¹⁹ Furthermore,

¹² *Doctrine of Paramountcy*, CENTRE FOR CONSTITUTIONAL STUDIES, <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/cd/509-doctrine-of-paramountcy> (last visited Oct. 3, 2014).

¹³ *Id.*; *Bank of Montreal*, 2014 SCC 55 at para. 70.

¹⁴ Archer, *supra* note 5.

¹⁵ *Bank of Montreal*, 2014 SCC 55 at para. 79; Archer, *supra* note 5.

¹⁶ *Bank of Montreal*, 2014 SCC 55 at para. 79; Dupoy & Garin, *supra* note 4.

¹⁷ *Bank of Montreal*, 2014 SCC 55 at para. 80.

¹⁸ Hasselback, *supra* note 2.

¹⁹ *Bank of Montreal*, 2014 SCC 55 at para. 87, 93; Christopher McKenna, *SCC Weighs-In on Consumer Protection Remedies in Quebec Class Actions*, BENNET JONES THOUGHT NETWORK (Sept. 25, 2014), http://blog.bennettjones.com/2014/09/25/scc-weighs-consumer-protection-remedies-quebec-class-actions/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

Section 272 allows punitive damages, which the Court restored against the Banks (approximately \$25 per affected cardholder).²⁰

2. The Court Decision's Effect on Consumer Protection

The Supreme Court of Canada's decisions in the three class-action suits, in the limited context of the banking industry, provides consumers protection from hidden fees that banks may charge in their foreign exchange conversions. However, more importantly, the Court's ruling has larger implications for federal institutions and undertakings. Federally regulated institutions and entities must be more cautious. Specifically, they cannot assume that provincial and territorial laws concerning consumer protection do not apply to their activities.²¹ Furthermore, the case seems to foreshadow greater potential of provincial legislative oversight of federally regulated entities, so long as federal regulations do not provide the type of operational conflict that may fall under the purview of the paramouncy doctrine.²²

B. The United Kingdom

The United Kingdom is experiencing a new wave of consumer protection law reform, arguably the largest reform since 1979.²³ Most evident is the recently passed Consumer Protection (Amendment) Regulations 2014 ("2014 Amendment"), which amends the Consumer Protection from Unfair Trading Regulations 2008 ("2008 Regulations") by providing direct right of action of civil

²⁰ *Bank of Montreal*, 2014 SCC 55 at para. 96, 113; *Paddon*, *supra* note 3. Note that the original litigation at the trial level involved two groups of banks: Group A, which included the five banks discussed in this article and Group B, which the Court of Appeals found (and Supreme Court affirmed) did not violate Section 12 of the Quebec CPA. *See McKenna*, *supra* note 19 (summarizing the Court's decision to reinstate the trial judge's decision to award punitive damages against the five banks classified as "Group A" banks).

²¹ Dupoy & Garin, *supra* note 4.

²² Archer, *supra* note 5.

²³ George Roberst & Fleur Turrington, *What has been the most important national and European consumer-related legislation in 2014?*, THE LAWYER (Oct. 3, 2014), <http://www.thelawyer.com/briefings/what-has-been-the-most-important-national-and-european-consumer-related-legislation-in-2014/3026767.article>.

recourse for individuals seeking redress for consumer law violations.²⁴

1. 2008 Regulations

Prior to the 2014 Amendment, the 2008 Regulations provided only criminal sanctions for certain unfair practices of traders, which are enforceable by Trading Standards and The Competition and Markets Authority.²⁵ According to the 2008 Regulations, “traders,” often retailers or service providers, are subject to the criminal sanctions. The 2008 Regulations determined what types of actions constituted “misleading and aggressive commercial practices” and made such actions criminal offenses.²⁶ Furthermore, the span of actions creating liability ranges from misleading actions and omissions, as well as aggressive commercial practices to banned practices.²⁷

2. 2014 Amendment

The 2014 Amendment provides a huge expansion of consumer power as the amendment grants an explicit right to directly respond to consumer rights violations and seek damages. Furthermore, consumers may also hold the trader responsible for the aggressive or misleading practices of the producer where “the trader

²⁴ Sakil A. Suleman, *New UK Consumer Protection Law Raises Stakes For Industry*, LAW 360 (Oct. 7, 2014, 11:53 AM), <http://www.law360.com/articles/584606/new-uk-consumer-protection-law-raises-stakes-for-industry>.

²⁵ Roberst & Turrington, *supra* note 23.

²⁶ DEP’T FOR BUS. INNOVATION & SKILLS, MISLEADING AND AGGRESSIVE COMMERCIAL PRACTICES – NEW PRIVATE RIGHTS FOR CONSUMERS: GUIDANCE ON THE CONSUMER PROTECTION (AMENDMENT) REGULATIONS 2014 4 (Aug. 2014) [hereinafter GUIDANCE ON AMENDMENT], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343753/bis-14-1430-misleading-and-aggressive-selling-rights-consumer-protection-amendment-regulations-2014-guidance.pdf. The determination of the standard for misleading and aggressive commercial practices as promulgated by the 2008 Regulations are still necessary to bring a direct cause of action pursuant to the 2014 Amendment. Roberst & Turrington, *supra* note 23; Suleman, *supra* note 24.

²⁷ GUIDANCE ON AMENDMENT at 5-6.

could reasonably be expected to be aware of the producer's conduct."²⁸

In order for the consumer to bring a direct cause of action against a trader, the consumer must satisfy three conditions. First, the consumer has a contract with the trader for the sale or supply of the product by the trader, the sale of goods to the trader, or the consumer paid for the supply of a product. Second, the trader engaged in the type of misleading or aggressive commercial practice as stipulated by the 2008 Regulations. Last, the prohibited practice played a significant factor in the consumer's choice to contract with, or make payment to, the trader.²⁹

There are several remedies that are available to the consumer with a successful claim. The consumer may completely unwind the contract within 90 days and restore herself to the position she held prior to the contract;³⁰ this could be the full refund of the purchase price. Otherwise, if the consumer partially used the goods or rendered services, the full amount may be discounted proportionately.³¹ Furthermore, the 2014 Amendment provides for preset discounts on the price to which the consumer may be entitled depending on the severity of the trader's misconduct.³² Along with the standard remedies of receiving a return of one's money, depending on the case, the consumer may also bring damages for any detriment caused by the violation of fair practices.

Overall, the 2014 Amendment has greatly improved consumer protection in the United Kingdom by granting powers to the individual consumer to confront and redress the offender directly. Whereas the 2008 Regulations provided safeguards to the group of consumers as a whole from typically rogue traders, the availability of individual direct action creates a higher burden for traders to comply with laws that require providing accurate and honest information to consumers.³³

²⁸ *Id.* at 10; Suleman, *supra* note 24.

²⁹ GUIDANCE ON AMENDMENT at 7; Roberst & Turrington, *supra* note 23.

³⁰ GUIDANCE ON AMENDMENT at 11.

³¹ Suleman, *supra* note 24.

³² GUIDANCE ON AMENDMENT at 14.

³³ Roberst & Turrington, *supra* at note 23.

III. LOW-INCOME COUNTRY: ZIMBABWE

A. Consumer Protection Gaps in Zimbabwe

The Zimbabwean consumer rights movement currently faces severe difficulties as a result of the country's domestic characteristics. In particular, the "highly depressed economy and porous regional border posts" make Zimbabwean consumers especially vulnerable to consumer protection violations that can cause severe, and at times life-threatening, injuries.³⁴ For instance, it is a common practice in Zimbabwe to sell openly products such as dried fish and fresh meat. However, some vendors often are unaware of the dangers of contamination and food poisoning and continue to sell in the open air so long as the business is profitable.³⁵ Furthermore, weak and permeable borders make it difficult for any regulatory oversight to ensure imported foods are properly labeled and monitored for quality.³⁶

Currently, the only entity "overseeing" consumer issues in Zimbabwe is the Consumer Council of Zimbabwe ("CCZ"), a member-driven organization that actively advocates and lobbies for the consumer rights movement.³⁷ Despite its efforts to campaign for food safety and quality, the CCZ's parastatal status greatly limits its efficacy in consumer protection advancements.³⁸ Otherwise, limited pieces of legislations governing consumer rights have been implemented under the purview of ministries.³⁹ These few pieces of legislation protect consumers to a minimal degree and in fact, fall short of covering extensive protection from violations of consumer rights.⁴⁰ Furthermore, the CCZ even stated, "a number of regulatory

³⁴ Tonderayl Matonho, *Zimbabwe consumers short-changed – Experts*, NEWSDAY (June 2, 2014), <https://www.newsday.co.zw/2014/06/02/zimbabwean-consumers-short-changed-experts/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *About the CCZ*, CONSUMER COUNCIL OF ZIMBABWE, <http://www.ccz.org.zw/about/index.php> (last visited October 7, 2014).

³⁸ Matonho, *supra* note 34.

³⁹ Conrad Mwanawashe, *Zimbabwe: Consumer Protection Bill to Cover E-Services*, THE HERALD (Oct. 16, 2014) [hereinafter Mwanawashe, *CPB to Cover E-Services*], <http://allafrica.com/stories/201410160202.html>.

⁴⁰ *Id.*

authorities are mandated to provide consumer education, but very little actually takes place.”⁴¹

B. Consumer Protection Bill

Since independence in 1980, there has not been a comprehensive consumer protection act to govern consumer rights in Zimbabwe until recently.⁴² In October, the Zimbabwean government finished drafting the Consumer Protection Bill (“CPB”), which established two governmental entities to serve in the name of consumer protection: a Consumer Court and Consumer Protection Commission (“CPC”).⁴³ The CPC is charged with coordinating and networking consumer activities. By promoting fair business practices, the intent is to shield consumers from “unreasonable, unjust otherwise improper trade practices, deceptive, misleading, unfair and fraudulent conduct” to which consumers have been vulnerable in the past few decades.⁴⁴ In addition, the CPC will be involved in litigation and its actions subject to the Act.⁴⁵

Currently, the CPB is still in its preliminary stages as consultations for the bill are in the works. The CCZ and the Industry and Commerce Minister, Michael Bimha, seek to conduct workshops to serve as a consultative forum.⁴⁶ It is a part of the overall goal to improve consumer awareness and assist in the informed decision making process to better empower and develop the “culture of consumer responsibility.”⁴⁷ With the passage of the CPB, Zimbabwe consumers can, in theory, expect remedies to common practices that present dangers to consumer safety and health.

⁴¹ CONSUMER INTERNATIONAL, THE STATE OF CONSUMER PROTECTION AROUND THE WORLD 20 (Apr. 2014) [hereinafter CI REPORT], available at http://www.consumersinternational.org/media/1139641/english_full_report_april.pdf.

⁴² Mwanawashe, *CPB to Cover E-Services*, *supra* note 39.

⁴³ Conrad Mwanawashe, *Zimbabwe: Govt Drafts Consumer Protection Bill*, THE HERALD (Oct. 13, 2014) [hereinafter Mwanawashe, *Govt Drafts CPB*], <http://allafrica.com/stories/201410132315.html>.

⁴⁴ *Id.*

⁴⁵ *Govt launches Consumer Protection Bill*, NEWSDAY (Oct. 16, 2014), <https://www.newsday.co.zw/2014/10/16/govt-launches-consumer-protection-bill/>.

⁴⁶ Mwanawashe, *CPB to Cover E-Services*, *supra* note 39.

⁴⁷ Mwanawashe, *Govt Drafts CPB*, *supra* note 43.

IV. CONCLUSION

The type of consumer protection advancements made in high-income countries drastically differs from that of low-income countries. In Canada, the analysis regarding the applicability of a provincial consumer protection law involved complex questions of Canada's system of federalism. It also addressed a highly specific issue regarding the disclosure of a single type of transaction fee for foreign exchange conversions on credit cards. Ultimately, the Court addressed the need for consumer protection in this specific area and expanded the potential for further consumer protection despite potential obstacles of constitutional limitations related to federalism. Likewise, in high-income countries such as the United Kingdom, success in consumer initiatives is evident where the government actively revises existing legislation, an area often found difficult for low-income countries.⁴⁸ The right for an individual to directly respond to consumer rights violations empowers the individual consumers and encourages traders to be more proactive in practicing fairness. In contrast, low-income countries such as Zimbabwe remain in their early development of consumer protection legislation. Only time will tell if the CPB will achieve its goals in creating a culture of consumer responsibility that will rise to the level of sophistication of its high-income counterparts.

⁴⁸ CI REPORT at 3.