



SUPREME COURT OF CANADA

CITATION: Amex Bank of Canada v. Adams, 2014 SCC 56

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BETWEEN:

Amex Bank of Canada

Appellant

and

**Sylvan Adams, Attorney General of Quebec and
Président de l'Office de la protection du consommateur**

Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Alberta and Canadian Bankers Association**

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and
Wagner JJ.

JOINT REASONS FOR JUDGMENT: Rothstein and Wagner JJ. (McLachlin C.J. and LeBel,
(paras. 1 to 40) Abella, Cromwell and Moldaver JJ. concurring)

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AMEX BANK OF CANADA v. ADAMS

Amex Bank of Canada

Appellant

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**Sylvan Adams, Attorney General of Quebec and
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Ontario, Attorney General of Alberta and
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2014 SCC 56

File No.: 35033.

2014: February 13; 2014: September 19.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and
Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Consumer Protection — Contracts of credit — Contracts extending variable credit — Credit and charge cards — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Conversion charges imposed by financial institutions on cardholders for transactions in foreign currencies — Class actions — Whether Amex failed to disclose conversion charges to cardholders — Whether reimbursement of conversion charges collected from consumer class members should be ordered — Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 272.

Receipt of a payment not due — Contracts of credit — Credit and charge cards — Payment made in error — Class actions — Whether cardholder agreements imposed obligation to pay conversion charges — Whether Amex owes restitution of conversion charges to non-consumer class members — Whether restitution would have the effect of according adhering parties with undue advantage — Civil Code of Québec, arts. 1491, 1492, 1554, 1699.

Constitutional law — Division of powers — Banking — Interjurisdictional immunity — Federal paramountcy — Quebec's consumer protection legislation regulating disclosure of conversion charges with respect to contracts of credit — Whether provincial legislation constitutionally inapplicable or inoperative in respect of bank-issued credit and charge cards by virtue of doctrine of interjurisdictional immunity or federal paramountcy — Constitution Act, 1867, s. 91(15); Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 272.

Amex's credit and charge cards offer the ability to make purchases in foreign currencies. Such purchases are subject to a conversion charge, whereby a percentage of the converted amount is charged as a fee for the conversion service. Quebec's *Consumer Protection Act* ("CPA") imposes various rules on the content and disclosure of charges and fees in contracts extending variable credit. The conversion charge was not disclosed in Amex's cardholder agreements between 1993 and 2003. A, the representative plaintiff, filed a class action against Amex to seek repayment of the conversion charges imposed by Amex on credit or charge card purchases made in foreign currencies on the basis that the conversion charges violated the CPA and the *Civil Code of Québec* provisions. The class at issue in this action includes both consumer and non-consumer cardholders of both credit and charge cards. Amex argued that the CPA is constitutionally inapplicable to a bank such as Amex and that no repayment of the conversion charges is owed. The Superior Court maintained the class action and condemned Amex to reimburse the conversion charges collected from all cardholders between 1993 and 2003. The Court of Appeal allowed the appeal but only to the extent of overturning the trial judge's decision to award punitive damages.

Held: The appeal should be dismissed.

For the reasons given in the companion case of *Bank of Montreal v. Marcotte*, 2014 SCC 55, the relevant CPA provisions are neither inapplicable nor inoperative under the doctrine of interjurisdictional immunity or federal paramountcy.

The trial judge's finding that the conversion charge was a separate fee rather than a component of the exchange rate was a determination of fact, or at most of mixed fact and law, and should therefore not be disturbed given the lack of any palpable and overriding error. As a result, Amex violated s. 12 of the *CPA* and must, under s. 272(c) of that Act, reimburse the conversion charges collected from the consumer class members between 1993 and 2003 as described by the trial judge.

With respect to the non-consumer class members, the *CPA* does not apply. Amex must instead restore the conversion charges under the *Civil Code of Québec*. The receipt of a payment not due provisions allow someone to recover an amount paid in excess by creating an obligation on the part of the party who received the amount paid without debt, to return that amount. Here, the evidence was clear that from 1993 to 2003 there was no reference in the cardholder agreement to the conversion charge because an "exchange rate determined by Amex" could not be understood as including such a charge, and therefore there was no obligation for cardholders to pay the conversion charge. All payments of the conversion charge by cardholders were therefore made in error and accordingly, Amex owes restitution of the conversion charges to the non-consumer class members. The power to refuse to grant restitution under art. 1699 para. 2 of the *CCQ* if restitution would confer an undue advantage on one party is quite exceptional and must be exercised sparingly. In this case, nothing indicates that the trial judge acted improperly in refusing to exercise his discretion to not grant restitution.

Cases Cited

Applied: *Bank of Montreal v. Marcotte*, 2014 SCC 55; **referred to:** *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57; *Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), leave to appeal refused, [2007] 1 S.C.R. xi; *International Paper Co. v. Valeurs Trimont Ltée*, [1989] R.J.Q. 1187.

Statutes and Regulations Cited

Bank Act, S.C. 1991, c. 46, s. 452(2)(c).

Civil Code of Québec, arts. 1422, 1491, 1492, 1554, 1699.

Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 219, 271, 272.

Authors Cited

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7^e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Qué.: Yvon Blais, 2013.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 2^e éd. Montréal: Thémis, 2012.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Dalphond and Bich J.J.A.), 2012 QCCA 1394, [2012] R.J.Q. 1512, 353 D.L.R. (4th) 296, [2012] AZ-50881447, [2012] Q.J. No. 7426 (QL), 2012 CarswellQue 7779, setting aside in part a decision of Gascon J., 2009 QCCS 2695, [2009] R.J.Q. 1746,

[2009] AZ-50560798, [2009] Q.J. No. 5769 (QL), 2009 CarswellQue 6873. Appeal dismissed.

Mahmud Jamal, Sylvain Deslauriers, Silvana Conte, Alberto Martinez, W. David Rankin, Anne-Marie Lizotte and Alexandre Fallon, for the appellant.

Peter Kalichman, Catherine McKenzie and Mathieu Bouchard, for the respondent Sylvan Adams.

Jean-François Jobin, Francis Demers and Samuel Chayer, for the respondent the Attorney General of Quebec.

Marc Migneault and Joël Simard, for the respondent Président de l'Office de la protection du consommateur.

Bernard Letarte and Pierre Salois, for the intervener the Attorney General of Canada.

Janet E. Minor and Robert A. Donato, for the intervener the Attorney General of Ontario.

Robert J. Normey, for the intervener the Attorney General of Alberta.

John B. Laskin and *Myriam M. Seers*, for the intervener the Canadian Bankers Association.

The judgment of the Court was delivered by

ROTHSTEIN AND WAGNER JJ. —

I. Introduction

[1] Amex Bank of Canada (“Amex”) is a Schedule II bank under the *Bank Act*, S.C. 1991, c. 46. Its primary function is to issue credit cards and charge cards, which comprise approximately 98 percent of its activities. One service offered through its credit and charge cards is the ability to make purchases in foreign currencies. Such purchases are subject to a conversion charge, whereby a percentage of the converted amount is charged as a fee for the conversion service. Quebec’s *Consumer Protection Act*, CQLR, c. P-40.1 (“CPA”), imposes various rules on the content and disclosure of charges and fees in contracts extending variable credit, such as credit card and charge card contracts. Similar to the companion cases of *Bank of Montreal v. Marcotte*, 2014 SCC 55 (the “BMO Decision”), and *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57 (the “Desjardins Decision”), this appeal raises the issue of whether the manner in which the conversion charge was disclosed and imposed by Amex complied with the CPA.

[2] Most of the issues raised in this appeal are addressed in the BMO Decision. These reasons will apply the principles of law discussed in that case to the Amex cardholder agreements at issue in this appeal.

II. Facts

Amex Cardholder Agreements

[3] An overview of credit cards and conversion charges, and the procedural history of the class actions against the nine banks, Desjardins, and Amex (respectively, the “BMO Action”, the “Desjardins Action” and the “Amex Action”), are provided in the BMO Decision. Charge cards, which are not discussed in the BMO or Desjardins Decisions, are similar to credit cards except that the balance due at the end of the delay provided must be repaid in full; no balance can be carried forward to the next month.

[4] From 1990 to March 1993, Amex cardholder agreements included the following clause:

CHARGES MADE IN FOREIGN COUNTRIES

If you incur a Charge in a foreign currency, it will be converted into Canadian Dollars. The conversion rate used will be at least as favourable to you as the interbank rate, tourist rate or, where required by law, official rate, in effect within 24 hours of the time that the Charge is processed by us or by our authorized agents, plus 1% of the converted amount. Amounts converted by establishments — such as airlines — will be billed at the rates such establishments use. [Emphasis added.]

[5] Effective March 1993, this clause was changed to the following:

If you incur a Charge in a foreign currency, it will be converted into Canadian dollars at the exchange rate determined by us on the date when the Charge is processed by us or by our authorized agents. This rate may differ from the rate in effect on the date of your Charge. Amounts converted by establishments — such as airlines — will be billed at the rates such establishments charge. [Emphasis added.]

[6] In December 2002, the Financial Consumer Agency of Canada (“FCAC”) held that Amex had failed to comply with s. 452(2)(c) of the *Bank Act*, which requires that all non-interest charges “for which the person becomes responsible by accepting or using the card” be disclosed in accordance with the regulations, with respect to Amex’s disclosure of the conversion charge.

[7] In February 2003, Amex changed the “Charges Made in Foreign Countries” clause to the following:

If you incur a Charge in a foreign currency, it will be converted into Canadian dollars at an exchange rate determined by us on the date processed by us or our authorized agents. This rate may differ from the rate in effect on the date of your Charge. This exchange rate includes a conversion rate adjustment as shown in the Disclosure Statement or as otherwise disclosed by us. Amounts converted by establishments — such as airlines — will be billed at the rates such establishments charge. The conversion rate adjustment is 2.2%. [Emphasis added.]

[8] In September 2003, Amex changed the clause to the following:

CHARGES MADE IN FOREIGN CURRENCIES

If you make a charge in a currency other than Canadian dollars that charge will be converted into Canadian dollars. The conversion will take place on the date the charge is processed by us, which may not be the same date on which you made your charge as it depends on when the charge was submitted to us. If the charge is not in U.S. dollars, the conversion will be made through U.S. dollars, by converting the charge amount into U.S. dollars and then by converting the U.S. dollar amount into Canadian dollars. If the charge is in U.S. dollars, it will be converted directly into Canadian dollars.

Unless a specific rate is required by applicable law, you understand and agree that the American Express treasury system will use conversion rates based on interbank rates that it selects from customary industry sources on the business day prior to the processing date, increased by a single conversion commission as specified on your Disclosure Statement or as otherwise disclosed by us. [Emphasis added.]

[9] The monthly account statements sent to Amex's cardholders only began to include the rate for the conversion charge in December 2003.

[10] Sylvan Adams, the representative plaintiff in the Amex Action, first found out about the conversion charge in 2004 when he was asked to be the class representative. The class at issue in the Amex Action includes both consumer and non-consumer cardholders of both credit and charge cards. The class action was authorized on November 1, 2006, and the hearing on the merits occurred after the hearing for the BMO and Desjardins Actions.

III. Judicial History

[11] As explained in the BMO Decision, although separate trial and appeal judgments were rendered for the BMO, Desjardins and Amex Actions, the judgments

overlap and therefore refer to each other as necessary. The summaries below will focus on the portions of the lower court judgments in the Amex Action that were not summarized in the BMO Decision.

A. *Quebec Superior Court, 2009 QCCS 2695, [2009] R.J.Q. 1746*

[12] Gascon J., as he then was, rejected Amex's argument that Mr. Adams lacked standing to bring the class action. It is irrelevant whether Mr. Adams knew about the conversion charge during the class period or whether a third party — Mr. Adams' company — paid his monthly account. These issues might affect Mr. Adams' chance of succeeding in his personal claim, but they do not affect his legal interest or standing in the matter.

[13] Gascon J. also rejected Amex's argument that conversion charges were part of the "exchange rate" disclosed to and imposed on cardholders. Conversion of foreign purchases occurs in two steps: first, the amount is converted using the daily exchange rate, which is based on the interbank rate; second, the conversion charge is imposed on the converted amount. The cardholder agreements prior to March 1993 and after March 2003 disclosed the conversion charge separately from the exchange rate in recognition of the two-step process. The FCAC also viewed conversion charges as being akin to fees for cash advances, money orders, or annulled/dishonoured cheques and separate from the exchange rate.

[14] As a result, Gascon J. concluded that Amex violated the general disclosure requirement imposed by s. 12 of the *CPA*. Amex was also held to have violated s. 219, which forbids the making of “false or misleading representations to a consumer”, because of Amex’s “deliberate and conscientious” removal of any reference to the conversion charge from the cardholder agreements, rendering those agreements misleading to credulous and inexperienced consumers (para. 181). Gascon J. noted that “Amex ended up charging the [conversion charge] with no entitlement in view of its lack of prior disclosure” (para. 197). However, conversion charges imposed after March 2003 were in compliance with ss. 12 and 219, even if the monthly statements did not mention the conversion charge until December 2003, because the existence of the conversion charge was disclosed by Amex in a notice to all cardholders in February 2003.

[15] Repayment of all conversion charges collected from consumer cardholders from March 1, 1993 to March 1, 2003, was ordered by Gascon J. under s. 272 of the *CPA*. In *Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), leave to appeal refused, [2007] 1 S.C.R. xi, the Quebec Court of Appeal held that ss. 271 and 272 are mutually exclusive. While the remedies under s. 271 are for “violations of the rules governing the making or the form of the contract”, s. 272 remedies are for “violations of the general obligations imposed by the *CPA*” (trial reasons, at para. 211). Gascon J. concluded that Amex’s violation of s. 12 of the *CPA* was “more a question of substance than a mere question of form”, meaning s. 272 applies (para. 215). With

respect to s. 219, the Quebec Court of Appeal has previously held that the appropriate sanctions for breaches of business practices provisions such as s. 219 are found in s. 272.

[16] Under s. 272, the lack of prejudice to consumers is not an available defence, in keeping with the general legal principles of restitution of a thing not due.

[17] For the same reasons he gave in the BMO Action, Gascon J. concluded that prescription did not bar the claims of any cardholders. The prescription period was suspended during the period of non-disclosure, and in any case a new contract is formed when cardholders renew their cards.

[18] Referring to his decision in the BMO Action, Gascon J. rejected Amex's constitutional arguments that the *CPA* does not apply to them due to the doctrines of interjurisdictional immunity and paramountcy. He noted that the inapplicability of the two doctrines is even clearer in the Amex Action because (1) the only provisions of the *CPA* at issue are those concerning disclosure, (2) prior to 1993 Amex demonstrated that it was able to comply with those provisions without any impairment of their operations, and (3) because charge cards — which comprise 95 percent of the amounts of the conversion charges at issue in the Amex Action — are more akin to convenience cards issued by private merchants than to credit granted by banks.

[19] Gascon J. also accepted Mr. Adams' argument that all cardholders, both consumers and non-consumers, are owed restitution of the conversion charges imposed during the period of non-disclosure under arts. 1491 and 1554 of the *Civil Code of Québec* ("CCQ"). Because the cardholder agreements made no mention of the conversion charge, and because "exchange rate" cannot be interpreted as imposing an obligation to pay the conversion charge, cardholders had no obligation to pay it and only paid it in error. Gascon J. declined to exercise his discretion to not order restitution under art. 1699 para. 2 of the *CCQ*. Accordingly, restitution in the amount of \$9,561,464 for consumer cardholders and \$3,536,432 for non-consumer cardholders was ordered on a collective basis.

[20] Finally, Gascon J. awarded \$2.5 million in punitive damages to consumer cardholders on a collective basis under s. 272 of the *CPA*. The punitive damages were awarded in light of Amex's "rather blunt disregard of its obligations" and its inability to provide a "legitimate excuse" for its behaviour (paras. 425-26).

B. *Quebec Court of Appeal, 2012 QCCA 1394, [2012] R.J.Q. 1512*

[21] Dalphond J.A. agreed with Gascon J. that the doctrines of interjurisdictional immunity and paramountcy did not apply to render the *CPA* inapplicable or inoperative in the Amex Action, particularly since, unlike in the BMO and Desjardins Actions, Mr. Adams did not argue that the conversion charges were credit charges under the *CPA*.

[22] Dalphond J.A. characterized Gascon J.'s conclusion that the conversion charge was not part of the exchange rate as a finding of fact, or at most a mixed question of law and fact. As Amex failed to demonstrate a palpable and overriding error in this conclusion, Gascon J.'s finding — and thus his order for restitution of a payment not due — must stand as they were based on facts and an accurate reading of the applicable *CCQ* articles. Amex failed to demonstrate that Gascon J. erred in refusing to exercise his discretion to not award restitution; it provided no evidence regarding the cost of providing the conversion service to cardholders, received other benefits from offering the charge and credit card products other than the conversion charge, and did not demonstrate that cardholders would receive an undue advantage as a result of restitution.

[23] However, Dalphond J.A. overturned the award of punitive damages because the trial judgment failed to consider the punitive aspect inherent in collective recovery, the fact that Amex had long since corrected its violation meaning there was no preventive purpose to be served, the lack of evidence that Amex behaved in an antisocial or reprehensible manner, and the fact that with restitution of the conversion charges, cardholders will have received 10-years' worth of a valuable service for free.

IV. Issues

[24] This appeal raises the following issues:

(a) Are ss. 12, 219 and 272 of the *CPA* constitutionally inapplicable or inoperative in respect of bank-issued credit and charge cards by reason of the doctrine of interjurisdictional immunity or federal paramountcy?

(b) Did Amex disclose the conversion charges to its cardholders and if not, what is the appropriate remedy?

V. Analysis

A. *The Doctrines of Interjurisdictional Immunity and Federal Paramountcy Do Not Apply*

[25] For the reasons given in the BMO Decision, the relevant *CPA* provisions are neither inapplicable nor inoperative under the doctrine of interjurisdictional immunity or federal paramountcy.

B. *Amex Must Reimburse the Conversion Charges Collected During the Class Period*

(1) Amex Failed to Disclose the Conversion Charge

[26] At trial, Gascon J. concluded that the conversion charge was not disclosed in cardholder agreements between 1993 and 2003. As a result, under the *CPA* it should not have been charged to its consumer cardholders, and under the *CCQ* it should not have been charged to its non-consumer cardholders. The Court of

Appeal held that his finding that the conversion charge was a separate fee rather than a component of the exchange rate was a determination of fact, or at most of mixed fact and law, and should therefore not be disturbed given the lack of any palpable and overriding error (para. 34). We agree with this conclusion.

[27] As a result, for the same reasons given in the BMO Decision, Amex violated s. 12 of the *CPA* and must, under s. 272(c) of that Act, reimburse the conversion charges collected from the consumer class members between 1993 and 2003 as described by the trial judge (paras. 494-95). However, unlike the BMO Decision, Amex does not owe punitive damages as a result of its breach of s. 12. This is because Mr. Adams has not cross-appealed in this case, meaning the issue of punitive damages in this action is not before the Court. With respect to the non-consumer class members, the *CPA* does not apply. We must instead consider whether Amex must restore the conversion charges under the *CCQ*.

(2) Amex Must Restore the Conversion Charges Imposed on Non-Consumer Cardholders Under the *CCQ*

[28] Because Amex failed to disclose the conversion charges in its cardholder agreements, those contracts imposed no obligation to pay the conversion charges. All payments of the conversion charge by cardholders were therefore made in error per art. 1491 para. 1 of the *CCQ*:

1491. A person who receives a payment made in error, or merely to avoid injury to the person making it while protesting that he owes nothing, is obliged to restore it.

[29] The receipt of a payment not due provisions (arts. 1491, 1492 and 1554 para. 1) codify the principle that [TRANSLATION] “[a]ny person is required to pay only what he or she owes, and owes only what he or she has an obligation to pay” (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at p. 725). Receipt of a payment not due allows someone to recover an amount paid in excess by creating an obligation on the part of the party who received the amount paid without debt, to return that amount.

[30] In the contractual context, the absence of an obligation or debt can be general or specific. It is general when all the prestations received or executed are invalid, for example if a court nullifies an agreement because a formation requirement is missing (art. 1422 *CCQ*). It is specific when only part of the prestations received or executed are invalid, for example if a clause of a contract is nullified or, as pleaded here, certain prestations of the contract were demanded from a party who did not actually owe them (art. 1554 *CCQ*).

[31] Once the payer proves that no debt exists, the payee must prove that the payment was not made in error, i.e. that it resulted from a “liberal intention” (Lluelles and Moore, at pp. 734-35; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at p. 624). Liberal intention is not presumed. If

the payee cannot prove this, the payment will be deemed undue and the debt inexistent.

[32] The question to be determined is if a payment, in whole or in part, is without basis — whether an obligation to pay ever existed. The Court here is limited to determining if the conversion charges are the object of a civil obligation binding the cardholders. According to the principles applicable to receipt of a payment not due, the basis for restitution is not the commission of a wrongful act, and the potential remedy is not damages. Rather, the basis for restitution is that there never existed an obligation to perform the prestations, and the remedy is a return of any prestations made without obligation (arts. 1492 and 1699 para. 1). Neither fault, nor statutory violations — here, for example, of the *Bank Act*'s disclosure requirements — nor the notion of compensation play any role in determining whether the receipt of a payment not due provisions apply. As a result, the absence of prejudice to the class action plaintiffs cannot be pleaded, and any rules regarding disclosure in the *Bank Act* are irrelevant. Amex's argument that the *Bank Act* does not contain any civil remedies for violations of its provisions has no bearing on whether the receipt of a payment not due provisions apply.

[33] In short, the Court need only consider whether or not the adhering parties — here, the non-consumer cardholders — were obliged to pay the conversion charge. In this case, the trial judge concluded that the evidence was clear that from 1993 to 2003 there was no reference in the cardholder agreement to the conversion charge

because an “exchange rate determined by Amex” could not be understood as including such a charge, and therefore there was no obligation for cardholders to pay the conversion charge (para. 357; see also paras. 123-24 and 358-59). This conclusion, which was based on an attentive and meticulous examination of the evidence and which was confirmed on appeal, has not been shown to rest on a palpable and overriding error. We therefore conclude that there was no obligation on the part of Amex cardholders to pay the conversion charge and the receipt of a payment not due provisions apply. Accordingly, under art. 1699 of the *CCQ* Amex owes restitution of the conversion charges to the non-consumer class members.

[34] Amex presents a number of counter-arguments to the trial judge’s order of restitution under the *CCQ*. Amex argues that *quantum meruit* should apply, and in the alternative argues that even if this Court finds that the cardholder obligation to pay a conversion fee is unenforceable because there was no disclosure, that the Court should order restitution in both directions. Finally, Amex argues that the Court of Appeal erred in suggesting that Amex had failed to satisfy its burden of showing that restitution in favour of consumers would “have the effect of according an undue advantage to one party” and thus the trial judge should have applied art. 1699 para. 2 of the *CCQ* and refused to order restitution (A.F., at para. 52).

[35] In our opinion none of these defences are compelling.

[36] *Quantum meruit* only permits a judge to fix the price of an obligation that was already contracted. It cannot serve as the source of a new obligation (*International Paper Co. v. Valeurs Trimont Ltée*, [1989] R.J.Q. 1187 (C.A.)).

[37] Mutual restitution is also not applicable in these circumstances. This argument confuses restitution pursuant to nullification of a synallagmatic contract, which requires mutual restitution (Luelles and Moore, at pp. 657-58), with restitution pursuant to receipt of a payment not due, which is based on an absence of debt (art. 1491 para. 1 *CCQ*). In other words, the contract was not nullified, its effects since its creation are valid, and the only basis for restitution is showing that the contract did not establish an obligation — explicit or implicit — to pay the reclaimed sums. In this case, Amex was obliged to provide the conversion service to its clients; it simply omitted a corresponding obligation on cardholders to pay a separate sum for that service.

[38] Finally, the power to refuse to grant restitution under art. 1699 para. 2 if restitution would confer an undue advantage on one party is [TRANSLATION] “quite exceptional” (Luelles and Moore, at p. 663) and must be exercised sparingly and on the basis of full proof, the burden of which falls to the debtor of the restitution. As Professors Jobin and Vézina write, [TRANSLATION] “[h]owever broad this power might be, it remains exceptional and must be exercised carefully” (p. 1139).

[39] Nothing indicates that the trial judge acted improperly in refusing to exercise his discretion to not grant restitution. In fact, Gascon J. concluded that

Amex received other benefits through the use of its charge and credit cards by the class members and there is no evidence that class members would receive any undue advantage from restitution (paras. 380-81). In this context, Amex has not proven that restitution would have the effect of according the adhering parties with an undue advantage. There is no basis for this Court to overturn the conclusions of the trial judge.

VI. Conclusion

[40] Sections 12, 219 and 272 of the *CPA* are constitutionally applicable and operative. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Montréal and Toronto; Deslauriers & Cie, Montréal.

Solicitors for the respondent Sylvan Adams: Irving Mitchell Kalichman, Montréal.

Solicitors for the respondent the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the respondent Président de l'Office de la protection du consommateur: Allard, Renaud et Associés, Trois-Rivières; Office de la protection du consommateur, Trois-Rivières.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Bankers Association: Torys, Toronto.