BANK AND BANKING—INTEREST—METHOD OF CALCULATION—INTEREST ACT, R.S.C. 1985, c. I-15, s. 4—DOES THE CONSUMER LOSE OR WIN?: *Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.*

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Section 4 of the Interest Act[1] *and Truth in Lending*

It is impossible to object to the proposition that a lender should disclose fully to the borrower the interest payable on an obligation she has undertaken. Dictates of economics, common sense and common fairness all make disclosure vital. Unfortunately, legislative bodies in Canada have too often mixed this legitimate goal together with a traditional antipathy to lenders, obscurity of language and an unwillingness to keep legislation current in light of changing commercial practice.[2] Such an explosive combination is virtually guaranteed to produce some anomalous results. Nowhere has this been more graphically illustrated than in the decision of the Alberta Court of Queen's Bench in *Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.*[3] which interpreted section 4 of the Interest Act. The more controversial aspect of that case has now been overturned on appeal.[4] However, the inevitable difficulties with the appellate decision reinforce the obvious: legislation in Canada dealing with interest needs to be fundamentally rethought.

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[1] R.S.C. 1985, c. I-15, hereafter the "Interest Act".

[2] While almost any part of the Interest Act could be selected to illustrate this point, two will suffice: recall the difficulties caused in the interpretation of s. 10 of the Interest Act by the switch of lending institutions to short term mortgages (see *Royal Trust Co.* v. *Potash*, [1986] 2 S.C.R. 351, (1986), 31 D.L.R. (4th) 321); and while the Federal government has now repealed ss. 11-14 of the Act (Miscellaneous Statute Law Amendment Act, 1991, Bill C-35), it has not been particularly expeditious in doing so, despite frequent pleas by the Western provinces.

[3] (1990), 105 A.R. 161 (Alta. Q.B.).

[4] *The Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.*, [1992] 1 W.W.R. 577 (Alta. C.A.).

Section 4 of the Interest Act was an effort by an early Canadian parliament to regulate disclosure of interest obligations by lenders in loans not secured by mortgage.[5] It provides as follows:[6]

> Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.

Although the Supreme Court of Canada has characterized this legislation as "consumer protection" legislation,[7] it is clear from the wording of the section that its application is not limited to the consumer lending market.[8]

The section has sporadically been raised in litigation and has been interpreted by a number of courts. The decisions have not always been consistent. The courts of Alberta, for example, have adopted the rule that the section does not apply to interest on overdue accounts, but only to interest payable for the use of money lent or for forbearance.[9] Other jurisdictions have not generally followed those decisions.[10]

Another area of controversy has been the question of what is required if the section applies. Does it merely require the lender to provide the nominal annual rate (for example, 2% per month or 24% per annum) or is the lender required to give the equivalent effective annual rate? These methods of disclosure will be defined and discussed in more detail below. The differences between them and their effects became an integral part

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[5] The section was enacted by the 8th Parliament, 60-61 Victoria, 1897.

[6] The section remains in virtually its original form. The "default" rate was lowered from 6% and mortgages were excluded from its ambit.

[7] *VK Mason Construction* v. *Bank of Nova Scotia*, [1985] 1 S.C.R. 271, (1985), 16 D.L.R. (4th) 598.

[8] See the comments of Watt J. in *Niagara Air Bus Inc.* v. *Camerman* (1989), 69 O.R. (2d) 717, at p. 730 (Ont. H.C.).

[9] *Mitsui & Co. Ltd.* v. *Ocelot Industries Ltd.* (1986), 43 Alta. L.R. (2d) 189, 51 A.R. 98 (Alta. C.A.); *Urichuk* v. *Code Hunter* (1986), 68 A.R. 128 (Alta. C.A.); *Monashee Petroleums Ltd.* v. *Pan Cana Resources Ltd.* (1986), 70 A.R. 277 (Alta. Q.B.), aff'd (1988), 85 A.R. 153 (Alta. C.A.); *Fort McMurray Roman Catholic School District No. 32* v. *Fort McMurray School District No. 2833* (1986), 71 A.R. 396 (Alta. Master).

[10] In British Columbia, see *Horsman Bros. Holdings Ltd.* v. *Dahl* (1981), 125 D.L.R. (3d) 404 (B.C.S.C.); *Harmony Co-ordination Services Ltd.* v. *Wickson* (1986), 22 C.L.R. 113 (B.C.S.C.); *Aluminex Extrusions Limited* v. *Double "D" Glass Ltd.* (1987), 22 B.C.L.R. (2d) 221 (B.C.S.C.). In Ontario, see *Kobi's Cabinets Ltd.* v. *Can. Permanent Trust Co.* (1980), 115 D.L.R. (3d) 256, 29 O.R. (2d) 648 (Ont. C.A.). In Saskatchewan, see *Birkic* v. *Harlos* (1988), 62 Sask. R. 96 (Sask. Q.B.). In Quebec, see *Industries Super-Métal Inc.* v. *La Sécurité Compagnie d'Assurances Générales du Canada* (1988), 14 Q.A.C. 74 (Que. C.A.).

of the controversy surrounding the lower court's decision in *Dunphy Leasing*.[11]

Most commercial contracts disclose the nominal annual rate compounded (or calculated) at the same interval as the payments are made. The lender then computes the interest for each payment period by dividing the nominal rate by the number of payment periods in the year and multiplying the result by the outstanding principal. To provide the effective annual rate one must ask the further question: what interest rate would produce the dollar amount of interest charged by the lender in one year if the rate were compounded only at the end of the year with any payments before the compounding date treated as payments of principal only?[12]

The following examples illustrate the distinction:

Example 1
Suppose A borrows $1,000 from B for one year at a rate disclosed as 12% per annum, nominal rate, calculated and paid monthly. To compute the interest, the nominal rate is divided by the number of payment periods in the year. Each month, A must pay interest of 12%/12 or 1% = $10. Over one year, the cost of the loan to A is $120.

Example 2
Suppose A borrows $1,000 from B for one year at a rate disclosed as an effective annual rate of 12% per annum with payments monthly of $10 per month. The correct method of computing the interest now is to treat each $10 payment made before the interest can be added in the principal sum (at the compounding date or the year end) as a payment reducing the principal outstanding. Interest accumulates on the declining balance. At the end of month 1, interest of $10 has accrued and the principal is reduced to $990. At the end of month 2, a further $9.90 interest has accrued and the principal is reduced to $980 and so on. After month 12, the principal stands at $880 and total accrued interest at $113.40. In this case, A will pay only $113.40 interest on the loan.

To answer the question, "What in Example 1 was the equivalent effective annual rate?" we must determine the rate that would produce, by the method used in Example 2, $120 interest. That rate is approximately 12.68% per annum. The justification for this distinction is found in the time value of money. If, in example 1, A's rate was 12% per annum but

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[11] *Supra*, footnote 3. This point was not settled on appeal, but will be discussed later.

[12] The longhand method of doing this calculation is described by C. Shnier, Calculated Half-Yearly Not in Advance: An Analysis of Canadian Mortgage Interest Practice (1987), 42 R.P.R. 21.

payable only at the end of the year, A would also pay $120.00. However, common sense tells us that A would prefer this arrangement to that in Example 1 because A would have the use of the $120.00 until the end of the year. That preference is reflected in the concept of effective annual rate.

Whether the effective annual rate is more helpful to borrowers in understanding their interest payments is the subject of heated debate.[13] It more accurately represents the time value of the money being paid, but is much more difficult to compute. But whatever the merits of effective annual rate disclosure, if interest in a contract is not fixed, but tied to a floating rate which cannot be known in advance, making such disclosure becomes very complex and, indeed, impossible to do in a meaningful way.[14] Most commercial loans are written with the rate expressed as a floating rate. The rate is usually set at a fixed percentage above a figure that fluctuates. This is most commonly the lender's prime rate, but other standards may also be used. Because of the difficulties in making disclosure of the effective annual rate in these cases, lenders would clearly prefer to avoid their loans falling within the purview of section 4, if any risk exists that the section requires disclosure of the effective annual rate. Until the decision of the Court of Queen's Bench in *Dunphy Leasing*, it appeared a simple matter to avoid section 4 simply by stating interest at the per annum figure only.

In The Court of Queen's Bench

Dunphy Leasing Enterprises was indebted to the Bank of Nova Scotia at a time when the economic climate in Alberta was less than healthy. The bank apparently thought better of its relationship with the company, called its loan and appointed a receiver. At trial, the borrower alleged, among other things, that the bank had not given reasonable time before appointing a receiver. It also argued that the Bank was not entitled to call its loan at all because, under the terms of their agreement, the Bank could not demand payment unless Dunphy Leasing was in default of its obligations.

The contract between Dunphy Leasing and the bank was set out in numerous documents. For purposes of the argument over the interest

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[13] See, for example, the Final Report of the Select Committee of the Ontario Legislature on Consumer Credit, 1965 Sessional Paper (No. 85).

[14] I will later discuss one solution (the "Dunphy clause"). Other possible options include giving a table of rates equivalent to a range of possible floating rates or using this rate each month as the effective annual rate and employing an interest factor to produce the proper monthly equivalent rate. All of these are complex and whether most lenders or borrowers would understand them is dubious.

rate, the relevant passages were found in the commitment letter, several promissory notes and a debenture. The commitment letter stated that:[15]

> Interest will be payable on the outstanding principal amount as well after as before maturity at 3/4% per annum over the Bank's prime lending rate from time to time.... Interest will be payable on the 22nd day of each month as calculated on each such day on the basis of a calendar year for the actual number of days elapsed.

The promissory notes expressed the rate as follows:

> ... with interest at the rate set out below calculated monthly and payable monthly as well after as before demand of payment.
>
> FLOATING RATE—at the rate per annum equal to the prime lending rate of the Bank of Nova Scotia from time to time PLUS 1% per annum (present effective rate 19 1/4% per annum).

The clause in the debenture read:

> ... and interest at the rate of 24% per annum, calculated and payable monthly, both before and after maturity and default, and interest on overdue interest at the rate aforesaid.

By the Bank's calculations, based upon treating the contract interest rate as the nominal annual rate, Dunphy was in default. However, counsel for Dunphy Leasing argued that section 4 of the Canada Interest Act applied to the loans because the interest was payable more frequently than once in the year. Further, section 4 required disclosure of the effective annual rate. Since section 4 applied, the rate of interest expressed in the agreements signed by Dunphy either had to be considered the effective annual rate or the bank would be confined, for violating section 4, to a rate of 5% per annum.[16] If the rate expressed in the contract was the effective annual rate, then Dunphy's obligation to the bank was considerably lower than computed by the Bank. Instead of employing the method of computation set out above in Example 1, which was what the bank had done, treating the rate as the effective annual rate meant that the bank should have followed the procedure in Example 2. Obviously, particularly when dealing with the interest rate Dunphy Leasing was obliged to pay, the difference would be substantial. In fact, using the effective rate method to compute the interest, Dunphy had paid all that was required of it and the bank may

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[15] *Supra*, footnote 4, at p. 611.

[16] As has been pointed out, this interpretation could only be accurate if the court found an ambiguity in the compounding period specified in the contract; see J.H. Loosemore and R.D. Walker, Effective Rate of Interest and Lender Liability: *Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.* (1990-91), 6 Banking and Finance L.R. 364, at p. 366. A similar approach was used by the Supreme Court of Canada in interpreting s. 6 of the Interest Act where the contract was silent as to compounding; see *Standard Reliance Mortgage Corporation* v. *Stubbs* (1917), 55 S.C.R. 422, 38 D.L.R. 435.

not have been entitled to demand payment of the loan when it did.[17] The trial court agreed.[18]

The key to the court's reasoning was the argument that the words of section 4 "made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year" required the section to be applied to all loans with interest payment periods shorter than one year. In other words, "for any period less than a year" modified "made payable" rather than "rate or percentage". The result of the decision was that, given general banking practice, most loans, commercial and consumer, were suddenly governed by the act even if the only expression of interest they contained was a per annum rate.[19]

The Aftermath

If most loans were suddenly within the purview of section 4, it could not be said that most loans complied with the second key feature of the Queen's Bench decision: they rarely disclosed the effective annual rate. The major reason for this in commercial loans has already been discussed. In consumer loans, however, the problem was slightly different.

Many loans for consumer purposes are governed by some form of disclosure legislation. If the loan is made by a Bank, the Bank Act[20] contains regulations requiring a particular disclosure;[21] if through a provincial

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[17] One reason for ordering a new trial given by the Court of Appeal was that, since the trial judge accepted the appropriate method of interest calculation put forward by Dunphy's expert witnesses, he did not consider, based on other evidence, whether Dunphy was in default; *supra*, footnote 4, at pp. 9-10.

[18] As Loosemore and Walker note, *loc. cit.*, footnote 16, the later decision of Master Funduk in *T. Eaton Co.* v. *Madden* (1990), 74 Alta. L. R. (2d) 9, was more consistent with the wording of the section. In that case Master Funduk, upon finding s. 4 applicable, simply reduced the interest to 5%. Some question, however, exists as to the correctness of his decision. The case involved interest on overdue accounts which, pursuant to the decisions of the Alberta Court of Appeal cited, *supra*, footnote 9, should not have been within s. 4 at all.

[19] There appears no doubt that in enacting s. 4 the Federal government believed it did not apply where interest was merely payable more than yearly. See the comments of the Solicitor General (Sir Charles Fitzpatrick) in the Official Report of the Debates of the House of Commons 2nd Session, 8th Parliament, 60-61 Victoria, 1897, vol. XLV (S.E. Dawson, Queen's Printer, 1897), p. 4252.

[20] R.S.C. 1985, c. B-1, esp. s. 202.

[21] Cost of Borrowing Disclosure Regulations, SOR/83-103, Canada Gazette, Part II, Vol. 117, No. 3, p. 553.

institution, all provinces have similar legislation in place.[22] Without exception, the legislation requires disclosure of the "annual percentage rate".[23] That rate as defined by the various regulations is the rate used at each payment period to compute the interest for that period multiplied by the number of payments periods in the year. In other words, to disclose and compute the interest in most consumer loans, the lender is required to use the nominal annual rate.

The Queen's Bench decision attracted substantial attention from lenders, lawyers and consumers. Consumer groups such as the Borrowers' Advocate Ltd. began counselling consumers that they could probably require lenders to reduce the interest rate on their loans to 5% because the lenders had not disclosed the effective annual rate.[24] It appeared that there was considerable misunderstanding among the public about the decision with some commentators suggesting that it put an end to lenders' deceptive practices. In fact, of course, the decision was not about deception at all but about a technical slip that appeared to allow borrowers to repudiate obligations into which they had freely entered and obtain a windfall by penalizing the lender for violating a section it could hardly have realized, in light of other legislation, applied to its loan.[25]

Faced with the threat of a plethora of small claims, lenders (and naturally their lawyers) were seriously concerned about the potential for the large commercial claim as well. Some law firms drafted and recommended what came to be called a "Dunphy clause". This clause typically provided the formula for converting a nominal annual rate into an effective annual rate; stipulated that the parties to the loan understood the difference between the two methods; and frequently added the optimistic statement that the parties were capable of understanding and applying the formula.

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[22] The comparable legislation for British Columbia is Consumer Protection Act, R.S.B.C. 1979, c. 65, s. 26 and s. 27; Consumer Protection Act Regulations, B.C. Reg. 62/87. For Ontario, Consumer Protection Act, R.S.O. 1980, c. 87; R.R.O. 1980, Reg. 181. For Alberta, Consumer Credit Transactions Regulation, Alta. Reg. 307/87. The legislation in all provinces is remarkably similar in effect. The major differences lie in the structure of the legislation and in the transactions they govern. Broadly speaking, they are all directed at loans for consumer purposes below a certain maximum amount.

[23] For example, see the Cost of Borrowing Disclosure Regulations, *supra*, footnote 21, definitions and s. 4. The effect of the other acts is the same.

[24] The Borrowers' Advocate and the Canadian Bankers Association both intervened on the appeal in *Dunphy*.

[25] One of the great difficulties with enforcement of provisions under the Interest Act is that the penalties are harsh. Failing to comply with s. 4 reduces the lender's interest to 5%; failing to comply with s. 6 reduces the lender's interest to 0. The windfall to the borrower, possibly out of all proportion to damage, no doubt promotes litigation and restrains the court from giving generous interpretations to the section. See, for example, the case law surrounding s. 6, and in particular *Kilgoran Hotels* v. *Samek*, [1968] S.C.R. 3, (1967), 65 D.L.R. (2d) 534, in which it was held that the interest rate had virtually to be undeterminable for the section to apply.

Not all lenders rushed to defend the barricades. Nor did they need to. By the time *Dunphy Leasing* was heard and decided by the Court of Appeal, four decisions, one in Alberta,[26] and three in Ontario,[27] had refused to apply section 4 so broadly.

The Court of Appeal

The public interest in the decision in *Dunphy Leasing* is illustrated by the proceedings on appeal. Both the Canadian Bankers Association and the Borrowers' Advocate sought and received intervenor status. Argument on appeal took almost two weeks.[28] The court's decision, rendered on November 25, 1991, ordered a new trial on numerous issues, including whether the borrower was in default of the loan obligations; whether if it was a reasonable time had been given before the receiver was appointed; and the proper valuation of damages. The court found that the trial judge had failed to address several issues and that his findings of fact had been unclear and even contradictory on some occasions. Fraser J.A., writing for the court, acknowledged the difficult task that had faced the trial court.[29]

Despite the outcome, the court decisively resolved the issues of whether section 4 applied to all loans with interest payable more frequently than once a year and what was the appropriate method under the Dunphy contract to compute the interest owing. The court refused to consider whether, if section 4 applied, it required disclosure of the effective annual rate.[30] That issue still remains in doubt, at least in Alberta.[31] The British Columbia Court of Appeal has recently decided that section 4 requires only disclosure of the nominal annual rate, that is, the annual rate computed by multiplying the rate for the shorter period by the number of those periods in the year.[32] The Ontario Court of Appeal has come to the opposite conclusion.[33] Combining either of these approaches with the application

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[26] *Royal Bank of Canada* v. *Pace Machinery Ltd.*, [1991] A.J. No. 929, No. 8301-05966 (Alta. Q.B.).

[27] See *Upper Yonge Limited* v. *Canadian Imperial Bank of Commerce* (1990), 75 O.R. (2d) 98 (Ont. H.C.); *McHugh* v. *Forbes* (1991), 4 O.R. (3d) 374 (Ont. C.A.); *Ottawa Mortgage Investment Corporation* v. *Edwards*, unreported, Ontario Gen. Div., Oct. 28, 1991.

[28] *Supra*, footnote 4, at p. 583.

[29] The trial lasted 62 days; Loosemore and Walker, *loc. cit.*, footnote 16, at p. 365.

[30] *Supra*, footnote 4, at p. 630.

[31] The case law in other jurisdictions, with the exception of Ontario and British Columbia, does not directly consider the issue. However, it is clearly consistent with the theory that s. 4 does not apply simply because the interest is payable more than once per year. See *Royal Bank of Canada* v. *Reed and Wakefield Construction Ltd.*, [1983] 2 W.W.R. 419, (1982), 42 B.C.L.R. 256 (B.C.S.C.); *Norwood Construction Ltd.* v. *Post 83 Co-operative Housing Assn.* (1988), 30 C.L.R. 231 (B.C.C.A.).

[32] *Movsesian* v. *Saswan Construction Inc.*, B.C.C.A. unreported, Nov. 13, 1991, CA013464.

[33] *Elcano Acceptance* v. *Richmond* (1991), 3 O.R. (3d) 123 (Ont. C.A.)

of section 4 favoured by the Alberta Court of Appeal produces unsatisfactory results that will be discussed in the next section.

The Court of Appeal turned first to the wording of the various loan documents signed by Dunphy. All these documents—the commitment letter, the promissory notes and the debenture—contained a clear statement that interest would be calculated monthly and payable monthly. Nonetheless, the trial court had found that these terms were capable of being interpreted to allow either the nominal rate method or the effective rate method of computing the interest.[34]

Fraser J.A. looked first to general principles of interest mathematics. Her discussion of those principles, while containing much that is helpful, also contains a possible problem for future litigation. First, her decision quite properly acknowledged the time value of money and the increased value of a loan in which the same dollar amount of interest is paid more frequently. She recognized that, from the perspective of return to the lender and cost to the borrower, payment of interest and compounding of interest have identical effects. From these principles, Fraser J.A. accurately described the use of interest factors (or the "deemed reinvestment principle")[35] as appropriate only when interest was paid at intervals different from the intervals at which compounding is permitted by the contract.[36]

Given these principles, she then had to decide whether the words of this contract required compounding only once in the year or more frequently, at the date of each payment. If the former, then certainly the lender would be required to treat the per annum rate expressed as the effective annual rate; if the latter, the lender would be justified in treating that rate as the nominal annual rate. Here is where the problem arose. The word used by the parties, as described above, was "calculated". Authority exists, not referred to by Fraser J.A., that in Canadian law that word is synonymous with "compounded".[37] Fraser J.A., no doubt to reconcile decisions in which courts appear to have rejected any connection

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[34] For a more thorough discussion of these two methods, see E. Maynes, J. Pincus and C. Robinson, Calculating Periodic Interest (1991), 17 C.B.L.J. 415.

[35] So called because the interest mathematics work as if the lender invested payments of interest received before the compounding date in a fund bearing interest at the contract rate. The term was probably invented by H. Woodard in his classic text, Canadian Mortgages (1959). The writer prefers to avoid the use of the term, which has created substantial uncertainty. While a useful analogy, it leads to confusion with factual assumptions that are not necessarily accurate, and need not be for the mathematical principles to apply. See M.A. Waldron, *Lynch and Utter* v. *Elford Estates Ltd.*: Re-investment Revisited (1987), 45 The Advocate 893.

[36] This is in accordance with the decision in the Ontario Court of Appeal in *Bunn* v. *Lock* (1987), 61 O.R. (2d) 772, 46 R.P.R. 296 (Ont. C.A.).

[37] See Woodard, *op. cit.*, footnote 35, p. 193; *Re A.J.F. Investments Ltd.* v. *Vellco Investments Ltd.* (1985), 49 O.R. (2d) 628 (Ont. H.C.); *Hemmings Building Centres Ltd.* v. *Richard* (1991), 79 D.L.R. (4th) 766 (N.S. App. Div.).

between compounding and payment,[38] attempted to draw a distinction between the two terms.

The distinction she adopted appears to be that "calculated" describes the effect of payment while "compounded" properly describes the process of adding unpaid interest to the principal and proceeding to compute interest upon that combined sum. For the purposes of this case, she acknowledged that the distinction was meaningless. In fact, she stated that:[39]

> The other sense in which "compounding" is said to occur is, as noted earlier, when the dates of payment of interest are more frequent than the interest calculation periods.

In the same vein, when discussing the reinvestment principle, she also noted:[40]

> Therefore, where the payment dates for interest are more frequent than the calculation dates stipulated in an agreement, a court would be entitled to conclude (in the absence of contrary contractual terms) that a stated rate per annum in a contract was intended by the parties to be an effective annual interest rate and not a nominal annual interest rate. In other words, the reinvestment principle would be properly imported into the contract. Otherwise, the lender, by receiving interest payments before interest was to be calculated, that is before it was due, would be securing a greater return than that contracted for in these circumstances. *Whether one were to treat this as a case of interest being paid in advance of the due date or as a case of the lender compounding interest when not entitled to do so given the contractual terms, the end result would be the same.*

All this is perfectly accurate. But the potential problem of defining the words as Fraser J.A. has done is the question of what happens if, on the date for payment and *calculation* of interest, the borrower does not pay? Is the lender entitled to add the unpaid interest to principal and now, in the terminology of the judgment, compound? Fraser J.A. recognized this issue and decided that the answer would have to be based upon the wording of the document and possibly the custom and usage in the banking industry.[41]

Unfortunately, Canadian law adheres to a presumption that if no provision is made for compounding, only simple interest is payable.[42] The

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[38] For example, and perhaps the most serious example, the Supreme Court of Canada in *Metropolitan Trust* v. *Morenish Land Developments Ltd.*, [1981] 1 S.C.R. 171, at p. 180, (1981), 118 D.L.R. (3d) 385, at p. 392, stated in a contract in which they found payment dates and calculation dates coincided that it "was not concerned with considerations relating to compound interest".

[39] *Supra*, footnote 4, at p. 619.

[40] *Ibid.* (Emphasis added).

[41] *Ibid.*, at p. 613.

[42] The leading case was *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181 (P.C.). In Canada, the following cases have applied the presumption: *Thomson* v. *O'Toole* (1881), 21 N.S.R. 1 (N.S.S.C.); *Eggan* v. *Griffiths*, [1949] 2 D.L.R. 669, [1949] O.W.N. 327 (Ont. C.A.); *MacFarlane* v. *Briggs* (1976), 15 N.B.R. (2d) 153 (N.B.Q.B.); *Park Projects Ltd.* v. *City of Halifax* (1981), 22 L.C.R. 244 (Expropriation Compensation Bd. N.S.).

presumption appears to have even more vitality when the payments in question are in default.[43] Is Fraser J.A., by her reference to custom of the banking industry and by her citation of the decision of the House of Lords in *National Bank of Greece SA* v. *Pinios Shipping Co. No. 1 and another, The Maira*,[44] suggesting that presumption should change?

The Maira illustrates the division of English and Canadian law on this point: in England, as the House of Lords stated, the right of a bank to compound interest in arrears without express provision is a "usage of bankers now well recognized by English law".[45] Moreover, again in contrast to the Canadian situation, it is a usage that extends, again even in the absence of express provision, even after the due date has passed.[46] If Fraser J.A. intended to suggest that Canadian commercial law has outgrown the current presumptions, one can only sympathize. However, in the meantime, it may well come as a shock to lenders to realize that when they state that interest will be "calculated half-yearly, not in advance" they are not providing for the case where the interest is not paid. Many lending agreements currently contain also a separate provision permitting compounding on overdue interest. This provision has now become extremely important.

After deciding that the wording of the document permitted the lender to "calculate" and to receive interest on the same dates, Fraser J.A. naturally concluded that the Bank was entitled to compute interest by using the per annum rate as the nominal annual rate. She then turned to the application of section 4 and, to the surprise of few, held that "for a period less than a year" modified "rate", not "made payable". To hold otherwise, she noted, would be to render the words "at a rate or percentage" meaningless in the section.[47]

Conclusion: Did the Consumer Win or Lose?

No doubt the Canadian Bankers Association retired from the courtroom of the Alberta Court of Appeal on November 25 breathing a distinct sigh of relief. Its commercial loans were safe; it was no longer likely to be

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[43] *Imperial Trusts Co.* v. *New York Security* (1905), 10 O.L.R. 289 (Ont. Div. Ct.); *Pringle* v. *Hutson* (1909), 1 O.W.N. 153, 19 O.L.R. 652 (Ont. C.A.); *Elman* v. *Conto* (1978), 82 D.L.R. (3d) 742, 18 O.R. (2d) 449 (Ont. C.A.); *Re A.J.F. Investments Ltd.*, *supra*, footnote 36. The later cases tend to find the presumption displaced by the language of the contract. However, the presumption is still referred to as good law.

[44] [1990] 1 A.C. 637, [1990] 1 All E.R. 78 (H.L.).

[45] *Ibid.*, at pp. 684 (A.C.), 89 (All E.R.).

[46] *Ibid.*

[47] *Supra*, footnote 4, at p. 627.

plagued with numerous small claims actions in the consumer area;[48] it could go home happy.

If one considers that the consumer lost only the potential windfall discussed above, one may be hard pressed to shed many tears. Whatever the shortcomings of the Canadian lending industry (and no one can deny there are many), the solution is not to punish it for sins it has not committed, but to devise means of detecting and redressing those it has. While the Court of Appeal decision avoids the first, it does nothing to advance the second. It could hardly be expected to, since courts clearly should not be expected to tackle the problem of deciding what disclosure is useful and fair.

But whatever might be useful or fair disclosure, section 4 does assist borrowers in receiving it. The net result of the decisions of the Alberta Court of Appeal and of the Ontario Court of Appeal is anomalous. By virtue of these cases, if a lender making a loan of $1000 for a one year term states that its interest rate is 24% per annum compounded and payable monthly, it may properly use the nominal rate method illustrated above in Example 1 to compute its interest at $20 per month or $240 for the one year term. Section 4 will have no application. If the lender making the same loan states that its interest rate is 2% per month or 24% per annum, the mention of the monthly rate brings the contract within section 4. Since the lender has not stated the effective annual rate, Ontario courts would find the requirements of section 4 violated. In the result, this lender would receive 5% simple interest or $50 for an entire year of the loan. To avoid this result, it would need to add the statement "or 26.8% per annum effective annual rate". Clearly this different treatment of two lenders giving a borrower almost identical information is silly.[49]

While the British Columbia case law would avoid this result, it produces an equally strange conclusion. In British Columbia where it has been held that section 4 does not require disclosure of the effective annual rate,[50] both loan disclosures made above would comply with section 4. Only if the lender disclosed the rate merely as 2% per month without more would its rate be reduced to 5% for violation of the section. It seems astounding that such a penalty would be imposed for failing to multiply by 12—an operation that any grade school graduate could carry out without difficulty.

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[48] *T. Eaton Co. Ltd.* v. *Madden*, *supra*, footnote 18, was the first consumer case in which s. 4 was applied as in *Dunphy*. That decision was reversed on appeal, [1991] A.J. No. 1059, Action No. 8903-01695, Nov. 28 (Q.B., per Côté J.), after the Court of Appeal's decision was released.

[49] The anomaly was recognized by Fraser J.A. in her judgment, *supra*, footnote 4, at pp. 629-630. However, as she stated, correctly in the writer's view, she was concerned with principles of statutory interpretation, not the limitations of the section.

[50] *Supra*, footnote 32.

Further, for all the hysteria over effective annual rate, evidence suggests that this may not be the most useful form of disclosure.[51] The statement "2% per month" is probably the easiest for a consumer to apply to compute the cost of a loan. The point, to put it bluntly, is that section 4 as interpreted by the Court of Appeal is inadequate and useless; as interpreted by the Court of Queen's Bench, it was inadequate and commercially impossible. The only way the consumer, or anyone else, could "win" as a result of the *Dunphy Leasing* decision would be if it prompted the Federal government to rethink the Interest Act.

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CONSTITUTIONAL LAW—CHARTER OF RIGHTS—STRICT LIABILITY OFFENCES—REVERSE ONUS CLAUSES—STANDING OF CORPORATIONS—CHARTER OF RIGHTS AND FREEDOMS, ss. 1, 7, 11(1)(d)—COMPETITION ACT, R.S.C. 1970, c. C-23, ss. 36(1)(a), 37.3(2): *R. v. Wholesale Travel Group Inc.*

Chris Tollefson*

Introduction

State regulators have greeted the Supreme Court of Canada's recent decision in *R.* v. *Wholesale Travel Group Inc.*[1] with considerable relief

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[51] Nominal annual rate is not only mandated by the provincial and federal legislation discussed above, but is also the basic disclosure requirement of the American legislative scheme. That legislation has been the product of much amendment and debate. See The American Simplification Act (Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1990)). A complete review of the literature is beyond the scope of this comment, but the interested reader may be referred to the following for review of some of the aspects of and changes to this complex scheme: D.E. Schmelzer and R.P. Chamness, Truth in Lending Developments in 1987: An Active Year on Several Fronts (1987-88), 43 The Business Lawyer 1041; D.E. Schmeltzer and R.P. Chamness, Truth in Lending Developments in 1988: A Year of Frenetic Activity (1988-89), The Business Lawyer 987; R.P. Chamness and T.P. Meredith, Truth in Lending Developments in 1990: The Intersitial Activity Continues (1990-91), 47 The Business Lawyer 347.

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[1] [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161.

and satisfaction.[2] This reaction is readily understandable. At stake was the constitutionality of the ground rules governing the prosecution of regulatory offences articulated by the court in *R.* v. *Sault Ste. Marie*[3] and codified in countless federal and provincial regulatory statutes. Had the case been decided as the dissenters proposed,[4] the centrepiece of modern regulatory enforcement—the strict liability offence—would have undergone substantial Charter[5] mandated renovation. In particular, the obligation on the defence to establish due diligence on the balance of probabilities, which now arises once the Crown has proved the illegal act or omission alleged, would have been superseded by a new regime under which an accused would be entitled to an acquittal merely upon raising a reasonable doubt as to the due diligence issue.

But while it spares *Sault Ste. Marie*,[6] there remains much in *Wholesale Travel* about which the regulators should be concerned. It should be borne in mind, first of all, just how close *Sault Ste. Marie* came to being constitutionally nullified. Four of the nine judges would have upheld the respondent corporation's Charter challenge. In this respect, the decision is strongly suggestive of the extent to which sympathy and support for the regulatory mission of the state, as exemplified in the court's reasons in *Sault Ste. Marie*, has waned in favour of a more skeptical rights-driven classical liberalism.[7] But regulators should also be troubled by *Wholesale Travel* for more concrete doctrinal reasons. This is due to the virtually unanimous adoption by the court of an approach to corporate Charter standing and remedial entitlement which will unquestionably add force

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[2] Illustrative is this excerpt from a news item on the decision in The Lawyer's Weekly (8/11/91), at p. 1:

> ... As one jubilant Crown put it, "*Sault Ste. Marie* lives, that's the story of the case. ..."

[3] [1978] S.C.R. 1299, (1978), 85 D.L.R. (3d) 161.

[4] On the central issue in the case, the constitutionality of the "due diligence defence", the majority was comprised of Iacobucci, Gonthier, Stevenson, Cory and L'Heureux-Dubé JJ.; in dissent were Lamer C.J.C., La Forest, Sopinka and McLachlin JJ.

[5] Charter of Rights and Freedoms, Constitution Act, 1982, Part I.

[6] In two Ontario cases, heard just five months after *Wholesale Travel* was handed down, the Supreme Court was again asked to overrule *Sault Ste. Marie* on Charter grounds. It declined the invitation, ruling orally that this result was governed by its reasons in *Wholesale Travel*; see, *R.* v. *Martin* (an appeal from reasons reported at (1991), 2 O.R. (3d) 16 (Ont. C.A.)), and *R.* v. *Ellis-Don Ltd.* (an appeal from reasons reported at (1990), 76 D.L.R. (4th) 347, 1 O.R. (3d) 193 (Ont. C.A.)) rendered March 30 and 31, 1992 respectively.

[7] For an extended discussion of these developments, see C. Tollefson, Ideologies Clashing: Corporations, Criminal Law and the Regulatory Offence (1991), 29 Osgoode Hall L.J. (forthcoming).

to a rapidly cresting wave of challenges by business interests to state regulatory activities.[8]

This comment is in two parts. In Part I, I briefly outline and discuss the background to the case and the court's decision. In Part II, I locate *Wholesale Travel* within the court's emerging jurisprudence of corporate constitutional rights, offering some views on its significance and troubling remedial implications.

Part I—An Overview

1. *Proceedings in the Courts Below*

The case arose out of charges brought against the respondent, Wholesale Travel Group Inc. ("Wholesale") under section 36(1)(a) of the Competition Act[9] (the "Act"). The Crown alleged that Wholesale had engaged in false or misleading advertising by purporting to offer its travel packages at "wholesale prices". The matter never made it to trial. By way of pretrial motion, Wholesale argued that certain provisions of the Act contravened the Charter and should be declared to be of no force or effect under section 52(1). Its arguments were twofold.

The first was that provisions in the Act requiring an accused to prove that it had retracted the alleged false advertisement in a timely fashion as a prerequisite to being entitled to exercise a statutory due diligence

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[8] Recent illustrations include: *R.J.R. MacDonald* v. *AG Can.* (1991), 84 D.L.R. (4th) 449 (Que. S.C.), a successful corporate attack under s. 2(b) of the Charter, *supra*, footnote 5, to federal laws restricting tobacco advertising; *R.* v. *Weil's Food Processing Ltd.* (1991), 6 C.E.L.R. (N.S.) 249 (Ont. C.J.), upholding a challenge to provincial environmental laws, requiring the reporting of contaminant discharges, on the ground that this requirement infringed a s. 7 corporate right to remain silent; *R.* v. *Nova Scotia Pharmaceutical Society* (1991), 80 D.L.R. (4th) 206 (N.S.C.A.), a s. 7 challenge to the conspiracy provisions in the Competition Act, presently on reserve at the Supreme Court of Canada; *R.* v. *C.I.P. Inc.* (S.C.C. unreported; April 9, 1992), in which the court ruled that corporations are entitled to invoke the s. 11(b) right to a trial within a reasonable time.

[9] Competition Act, R.S.C. 1979, c. C-23:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever;

(a) make a representation to the public that is false or misleading in a material respect;

. . . .

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

defence (the "retraction provisions"),[10] created what in practical terms amounted to an absolute liability offence. Because the offence so created was punishable by a term of imprisonment, Wholesale contended that this gave rise to a violation of section 7 of the Charter.[11]

The second argument Wholesale advanced was that, leaving aside the retraction provisions, the due diligence defence prescribed in the Act[12] violated the presumption of innocence as guaranteed by section 11(d) of the Charter. The presumption of innocence was infringed, it contended, because, by imposing on the defence an onus of establishing due care, it was possible for an accused to be convicted although the trier of fact might entertain a reasonable doubt as to the accused's guilt.

The provincial court trial judge was persuaded by both submissions and concluded that the challenged provisions should be struck down. On appeal to the Supreme Court of Ontario,[13] the trial judge's decision was overturned and the matter was remitted for trial. Wholesale appealed this latter decision to the Ontario Court of Appeal.[14] There the court unanimously held that the retraction provisions violated section 7[15] and a majority (Tarnopolsky and Lacourciere JJ.A.; Zuber J.A. dissenting), went further and held that the Act's statutory due diligence defence infringed

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[10] The impugned retraction provisions were contained in the Competition Act, *ibid.*, ss. 37.3(2):

37.3(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error;

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

[11] In this regard, Wholesale relied heavily on *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536 and *Vaillancourt* v. *The Queen*, [1987] 2 S.C.R. 636, (1987), 47 D.L.R. (4th) 399.

[12] The statutory due diligence defence was contained in the Competition Act, *supra*, footnote 9, ss. 37.3(2)(a) and (b). These provisions are set out *supra*, footnote 10.

[13] (1988), 23 C.P.R. (2d) 92, 46 C.R.R. 100 (Ont. H.C.).

[14] (1989), 63 D.L.R. (4th) 325, 70 O.R. (2d) 545 (Ont. C.A.).

[15] Charter of Rights and Freedoms, *supra*, footnote 5, s. 7:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

section 11(d).[16] In the result, the Court of Appeal ordered that the retraction provisions and the language of the charging section importing a reverse onus due diligence defence be declared, pursuant to section 52(1),[17] of no force or effect.[18]

2. *The Supreme Court's Decision*

By the time the matter came on for argument in the Supreme Court, eight parties had been granted intervener status, including six Attorneys General.[19] On two matters the court was virtually unanimous.

The first concerned, in broad terms, the capacity of a corporation to invoke Charter protections in the regulatory process. According to the reasons of the Chief Justice,[20] this broad question conceptually presented two related sub-issues: (1) whether a defendant corporation should have standing to impugn the constitutionality of a charging statute on the basis that it infringes the rights of a human individual; and (2) whether a corporation, in such circumstances, should be entitled remedially to benefit from a finding that the impugned statute is unconstitutional.[21]

The Chief Justice resolved both of these issues in the respondent's favour. In his view, once a corporation was charged with an offence, it was not required to demonstrate that its own Charter rights were infringed or jeopardized by the legislation it sought to attack, either for "standing" purposes or to gain remedial relief. The implications of this aspect of the court's decision are highly significant and will be discussed in some detail in Part II.

The second matter on which the court arrived at consensus was that the retraction provisions were unconstitutional and should be struck down. The Chief Justice and Cory J., both of whom addressed this issue in their

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[16] Charter of Rights and Freedoms, *ibid.*, s. 11(d):

> 11. Any person charged with an offence has the right ...
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[17] Charter of Rights and Freedoms, *ibid.*, s. 52(1):

> 52.(1) The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[18] The Ontario Court of Appeal did not decide whether the impugned provisions could be justified under s. 1 of the Charter since the Crown made no attempt to advance such an argument. In the Supreme Court of Canada, however, the s. 1 issue was fully argued and determined.

[19] Attorneys General from the provinces of Ontario, Quebec, New Brunswick, Manitoba, Saskatchewan and Alberta were granted intervener status.

[20] On this issue, the only members of the court not to concur with the Chief Justice's reasons were Cory and L'Heureux-Dubé JJ.

[21] *Supra*, footnote 1, at pp. 178-179 (S.C.R.), 175 (D.L.R.).

reasons, reached this conclusion largely on the basis of principles set out in *Re B.C. Motor Vehicle Act*,[22] where the court had held that the principles of fundamental justice under section 7 of the Charter require that an offence, which is punishable by imprisonment, must afford an accused, at a minimum, a defence of due diligence.[23]

By far the most divisive and controversial issue for the court concerned the constitutionality of the due diligence defence; in particular, whether the statutory version of the defence contained in the Act infringed the presumption of innocence as guaranteed by sections 7 and 11(d) of the Charter. On this issue, the court split in three directions. Two judges (Cory J., with L'Heureux-Dubé J. concurring), held that the due diligence provisions were constitutionally sound; three (Iacobucci J., with Gonthier and Stevenson JJ. concurring), held that the provisions infringed section 11(d) but were sustainable under section 1; while the remaining four judges (Lamer C.J.C., with La Forest, Sopinka and McLachlin JJ. concurring in the result), would have struck down the provisions as unconstitutional under section 11(d) and section 1. In the result, therefore, by a bare margin of five to four, with Iacobucci J. writing the decisive judgment, the court repelled a frontal assault on the strict liability offence which the court itself had introduced into the law in *Sault Ste. Marie*.

In large measure where the majority and the dissenters parted company was over the extent to which the judiciary should be solicitous of state regulatory activity. The majority characterized the modern strict liability offence as an essential means of enforcing public policy without which the state's regulatory capacity would be substantially reduced. For the dissenters, the exigencies of regulatory enforcement were not sufficiently compelling to be determinative of the result. According to the Chief Justice, where the state resorted to imprisonment as a means of enforcing policy objectives, whether in the criminal or in the regulatory realm, the paramount concern of the courts should be to protect the individual right to be presumed innocent.[24]

Although *Wholesale Travel* leaves *Sault Ste. Marie* unscathed, what is more significant about the decision is that it represents a concerted attempt by the court to rationalize its emerging jurisprudence of corporate rights,

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[22] *Supra*, footnote 11.

[23] In the course of arriving at this conclusion, both Lamer C.J.C. and Cory J. rejected the argument advanced by Wholesale that where there was a prospect of imprisonment, as in the case at bar, the mental state constitutionally mandated by s. 7 ought to be full subjective *mens rea*: see, *ibid.*, at pp. 184-187 (S.C.R.), 180-182 (D.L.R.), per Lamer C.J.C., and at pp. 235-241 (S.C.R.), 217-222 (D.L.R.), per Cory J.

[24] *Ibid.*, at pp. 183, 189 (S.C.R.), 179, 183 (D.L.R.). For a very thorough analysis of the benefits of the strict liability offence from an enforcement perspective, see J. Swaigan, Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations, [1992] 2 J.E.L.P. 149.

particularly with respect to standing and remedial entitlement under section 52(1). It is to this aspect of the decision that I will now turn.

Part II: Corporate Constitutional Rights

1. *The Court's Jurisprudence*

To date, the Supreme Court's jurisprudence in this area has been uneven and contradictory. In several key decisions the court, without adverting to the obvious differences between individuals and corporations relevant to Charter analysis, has accorded the latter highly significant Charter protections. Thus, in *Hunter* v. *Southam*,[25] while stating that the overriding purpose of section 8 of the Charter was to protect the individual "right to be left alone", it implicitly enshrined a corporate right to protection from unreasonable search and seizure. And in *Irwin Toy Ltd.* v. *Quebec (Attorney-General)*,[26] a landmark ruling involving a corporate Charter challenge to provincial legislation regulating advertising directed at children, the court extended constitutional recognition under section 2(b) to corporate commercial expression.

Nonetheless, it would be unfair to suggest that the court has been uniformly guilty of simplistically equating individuals and corporations for the purposes of Charter analysis. Illustrative in this regard is, once again, its decision in *Irwin Toy*. Although there the court was prepared, as I have indicated, to extend Charter protection to corporate speech, it refused to allow the corporate petitioner to invoke section 7 as a means of challenging the impugned advertising restrictions. In its opinion, the only interests which an artificial corporate entity, such as the petitioner, could be said to possess were of a proprietary nature; interests which, according to the court, were not protected by the section. In a similar vein is *R.* v. *Amway Corp.*[27] where the court unequivocally rejected an attempt by a corporate defendant to invoke the privilege against self-incrimination under section 11(c). According to Sopinka J., to extend this protection to an artificial "witness", such as a corporation, would be a wholly unwarranted judicial "metamorphosis" of the spirit of the provision which, in his view, was intended to protect uniquely human interests in privacy and dignity.[28]

The circumstances with which the court was presented in *Wholesale Travel* were well suited to a sustained exegesis on corporate constitutional rights. Both before it and in the court below the respondent corporation was the sole accused. Consequently, the court did not have to grapple with the complexities associated with unravelling the relationship between Charter rights which accrued to the corporate accused and those which

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[25] [1984] 2 S.C.R. 134, (1984), 11 D.L.R. (4th) 641.

[26] [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577.

[27] [1989] 1 S.C.R. 21, (1989), 56 D.L.R. (4th) 309.

[28] *Ibid.*, at pp. 39 (S.C.R.), 322 (D.L.R.).

would have accrued to corporate representatives or officials had they been charged personally as coaccused.[29]

The case also offered an opportunity for the court to spell out the implications of its holding in *Irwin Toy* that corporations were incapable of asserting rights under section 7. Did this principle apply only where the corporation had commenced an action seeking Charter relief or did it apply equally where the corporation was facing regulatory or criminal prosecution? Its reasons in *Irwin Toy* clearly leaned toward the former, narrower interpretation.[30] However there remained a strong argument that corporations should not be permitted to invoke section 7 in any context because of their inherent inability to suffer the deprivations of "life, liberty and security of the person" against which the section provides protection.[31]

2. *The Impact of Wholesale Travel*

For Lamer C.J.C., the court's determination in *Irwin Toy* that "only human beings can enjoy the right to life, liberty and security of the person guaranteed by s. 7" did not preclude Wholesale from relying on the section in the case at bar.[32] This conclusion flowed, in his view, from principles enunciated by the court in *R.* v. *Big M Drug Mart Ltd.*[33] In *Big M Drug Mart*, he suggested, the court had drawn a distinction between instances in which a party had "come to court voluntarily . . . [seeking] . . . a prerogative declaration that a statute is unconstitutional" and instances where, in its defence, an accused alleged the charging statute was unconstitutional.[34] In the former context, the status of the party to bring the action was highly relevant; in the latter context, however, standing was automatic. In this regard he quoted the following passage from the court's reasons in *Big M Drug Mart*:[35]

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[29] Originally Wholesale was charged jointly with a Mr. Colin Chedore. Chedore did not appeal the decision of the Ontario Supreme Court overturning the judgment at trial and was therefore not a party to the further appeals to the Court of Appeal and the Supreme Court of Canada.

[30] In *Irwin Toy*, *supra*, footnote 26, at pp. 1004 (S.C.R.), 633 (D.L.R.), the court specifically distinguished its 1985 decision in *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321, on the basis that this earlier decision involved a Charter claim advanced by a corporation defending itself on a criminal charge.

[31] This uncertainty was reflected in conflicting authority at the appellate level. The Ontario Court of Appeal, *supra*, footnote 14, had interpreted *Irwin Toy* not to preclude a corporation from invoking s. 7 when facing regulatory prosecution, while the B.C. Court of Appeal had held that the decision had application whether the corporation was a petitioner or an accused: see *R.* v. *Quest Vitamin Supplies Ltd.*, [1990] 2 W.W.R. 185, (1989), 73 C.R. (3d) 347.

[32] *Supra*, footnote 1, at pp. 180 (S.C.R.), 176 (D.L.R.).

[33] *Supra*, footnote 30.

[34] *Supra*, footnote 1, at pp. 179 (S.C.R.), 176 (D.L.R.).

[35] *Ibid.*, quoting *R.* v. *Big M Drug Mart Ltd.*, *supra*, footnote 30, at pp. 313-314 (S.C.R.), 336 (D.L.R.).

> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid.

On this basis, he concluded that Wholesale, by virtue of its status as an accused, had standing to challenge the constitutionality of the Act.

The Chief Justice then proceeded to consider whether a corporation accorded standing in these circumstances should be able to benefit remedially from a judicial finding that a provision violated a "human being's Charter rights", even though its own constitutional rights were not impaired in any way.[36] A statutory provision of general application which had this effect was, as he termed it, "over-inclusive".[37] Where a provision was flawed in this manner, the only alternative was to strike it down for all purposes.

To employ a more surgical remedial approach would, in his view, not only be "inconsistent" with the court's holding in *Big M Drug Mart*, but would involve a departure from the court's jurisprudence under section 52(1). In support of this latter conclusion he referred to *R.* v. *Morgentaler*,[38] where the court had upheld a challenge to the constitutionality of Criminal Code[39] abortion provisions brought by an accused doctor which was based not on rights personal to him but rather upon the rights of women in general.

Accordingly, he declined the invitation offered by at least one intervener[40] to interpret the language of section 52(1)[41] as allowing the court to strike down the impugned provisions as they applied to human beings but declare them to remain in force and effect to the extent that they were applicable to corporations.[42]

Wholesale Travel is thus significant, in terms of the court's evolving jurisprudence of corporate constitutional rights, in two respects; both of which tilt in a liberalizing direction. On the one hand, the decision expressly approves a line of authority, commonly said to derive from *Big M Drug Mart*, that for standing purposes it is unnecessary for corporations to

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[36] *Ibid.*, at pp. 180-181 (S.C.R.), 177 (D.L.R.).

[37] *Ibid.*, at pp. 181 (S.C.R.), 178 (D.L.R.).

[38] [1988] 1 S.C.R. 30, (1988), 44 D.L.R. (4th) 385. The Crown in *Morgentaler* did not dispute the doctor's standing or remedial entitlement; the court dealt with these issues perfunctorily, with Dickson C.J.C. noting that standing flowed from the principles established in *Big M Drug Mart*.

[39] R.S.C. 1970, c. C-32, as amended, s. 251.

[40] This was one of the central arguments advanced by the Attorney General of Manitoba: see Factum of AG Manitoba, at pp. 16-17.

[41] The text of s. 52(1) is set out *supra*, footnote 17.

[42] The Chief Justice did, however, suggest, *supra*, footnote 1, at pp. 182 (S.C.R.), 178 (D.L.R.), that had the provisions being impugned specifically been drafted so as to apply solely to corporations "the *Charter* analysis would ... be very different".

demonstrate that their Charter rights are threatened in order to raise the Charter as a shield when they face prosecution in the regulatory context. For standing purposes, their essential nature—as artificial profit driven entities—is deemed irrelevant; a bare allegation that the charging statute is unconstitutional (presumably either in purpose or as it affects an actual or hypothetical individual) is sufficient. On the other hand, it mandatorily directs the courts, upon deciding that a provision impugned by a corporate accused infringes the individual rights of some unascertained human being or beings, to strike down the provision for all purposes, regardless of its actual effect on the complaining corporation.

3. *Corporations, Third Party Rights and the Remedial Possibilities of Section 52(1)*

There are good grounds for being dubious about the theoretical or practical coherence of the distinction fastened on in *Wholesale Travel* between "corporation as petitioner" and "corporation as accused". Perhaps the most troubling aspect of the distinction is its wholly arbitrary nature: the fact that, by having an information sworn out against it, a corporation which would otherwise be wholly incapable of invoking the protections of section 7, is instantly transformed into an entity whose capacity to mount Charter arguments is constrained only by its litigation budget.

Despite the artificial and manipulable nature of this distinction, the court's conclusion with respect to standing is far less problematic than its conclusion with respect to remedial entitlement. It is difficult to quarrel with the basic proposition that a party charged with an offence has a stake or interest in the validity of the charging law sufficient to give rise to standing to allege its unconstitutionality.[43] A much more vexing question concerns the extent to which a party who is properly before the court may raise issues or rely on defences relating to third parties' rights. In particular, what remedial consequences should ensue if an accused established that a law is unconstitutional not as it applies to itself but rather as it applies to a third party? The conclusion reached by the court in *Wholesale Travel* is that in this situation, where the impugned provision is unconstitutionally "over-inclusive", the remedial consequences are the same whether the accused is relying on its own rights or invoking those of a third party: in either event, the provision must be struck down.

When faced with this same question, courts in the United States have arrived at a strikingly different conclusion. There, in the normal case, a

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[43] See R.A. Sedler, Constitutional Jus Tertii (1982), 70 Cal. L. Rev. 1308, at p. 1315; J. Sopinka, The Charter of Rights and Corporations, in F.E. McArdle (ed.), Cambridge Lectures 1989, pp. 105-107.

party comes to court seeking to have a challenged law declared unconstitutional as it applies to her; in the American terminology, the typical constitutional challenge is that a law is invalid "as applied". In these circumstances, if the litigant shows that her rights are violated by the impugned law, her remedy is a declaration invalidating the law with respect to the extant case but no further. Remedially, broad declarations that a law is invalid in whole, or in other words is "facially invalid", are rare. The standard justification offered for this remedial posture is that case by case invalidation minimizes judicial intrusion on legislative prerogatives and state policy.[44]

The ability of a party to challenge a law or decision on the basis that it unconstitutionally affects third party rights—in the American parlance, to assert constitutional *jus tertii*—is strictly circumscribed.[45] As a general rule, a party with respect to whom a law is valid "as applied" is precluded from invoking third party rights in order to obtain a declaration that the law is facially invalid. The only recognized exception to this principle[46] is where the challenging party is able to demonstrate that it has a "special relationship" with third party or parties, usually of a fiduciary or professional variety, with whom it has sought to associate itself for the purposes of the challenge.

Nowhere in its reasons in *Wholesale Travel* does the court allude to this large body of American constitutional law.[47] This is particularly curious in light of the Chief Justice's reference to *R.* v. *Morgentaler*,[48]

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[44] See, for example, the reasons of Rehnquist J. (in dissent), in *Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), cited in C. Rogerson's insightful piece, The Judicial Search for Appropriate Remedies under the Charter, in R. Sharpe (ed.), Charter Litigation (1986), 233, pp. 254-255. The paradigmatic approach described is also one mandated by Article III of the United States Constitution which limits federal judicial review to concrete "cases or controversies".

[45] Literally translated "jus tertii" means the right of a third party. The term "constitutional jus tertii" has been described by Sedler, *loc. cit.*, footnote 43, at p. 1308, as:

> ... a party's ability successfully to challenge a law or government action on the ground that it violate[s] third parties' constitutional rights.

[46] It is generally acknowledged that the limitations imposed on the assertion of constitutional *jus tertii* are less rigid in cases presenting First Amendment (free speech) issues: see Sedler, *ibid.*

[47] This is not to suggest that the court is unfamiliar with the limitations imposed, within American caselaw, upon parties seeking to assert the constitutional rights of third parties. Indeed, in a highly significant recent case which reaffirms traditional limits on public interest standing, the court relies on this jurisprudence in concluding that the plaintiff church organization should not be granted standing, on behalf of affected refugee claimants, to challenge sweeping amendments to the refugee determination process: see *Canadian Council of Churches* v. *The Queen* (unreported, January 23, 1992).

[48] *Supra*, footnote 38.

which arose in a context (namely, the doctor-patient relationship) which has generated considerable American *jus tertii* jurisprudence.[49]

Of much greater moment, however, is the court's complete failure to grapple with the difficult policy considerations which inform this caselaw. There are many instances in which it is appropriate for the courts to allow one party to rely on another's constitutional rights for standing and remedial purposes. One is where it is considered necessary to promote or maintain a desirable social relationship or grouping. Another, which the public interest standing caselaw recognizes, is where the party actually affected lacks the means of directly asserting the right in question. These policy considerations provide little justification for extending to corporations, save in exceptional circumstances, the right to invoke third party rights in Charter litigation. Yet nowhere in *Wholesale Travel* does the court advert to these considerations or to the incentive for business sponsored anti-regulatory challenges that a failure to erect a limiting *jus tertii* rule would tend to produce.

One likely reason for the court's steadfast refusal to contemplate a more flexible conception of the remedial possibilities of section 52(1) is its intuitive commitment to an approach to constitutional review informed by principles and assumptions of a largely bygone "division of powers" era. Unlike the incrementalist, highly individualized American rights-based model sketched out above, the approach typical of this pre-Charter era tended methodologically to focus not on unconstitutional "effects" but rather on unconstitutional "purposes". Its underlying objective was to characterize and determine the validity of laws, as Rogerson has put it, "on the basis of the purpose informing the entire law rather than on the basis of its effects in particular applications".[50] Thus, employing the American terminology, in this approach the inquiry concerned the "facial" as opposed to the "as applied" validity of legislation.

Very specific remedial implications flow from this model. Since its underlying rationale is to police the boundaries of competing governmental jurisdictions, the typical remedy, where it is determined that a law is jurisdictionally *ultra vires*, is a general declaration of invalidity. Less far-reaching interpretive techniques, such as severance or reading down, play a marginal remedial role. Indeed, within this paradigm, there is a strong

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[49] One of the leading cases in the area is *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), in which a director of a family planning clinic and a clinic doctor who had distributed contraceptives to clinic patients were prosecuted for violating a state law which made it a crime to assist others in the use of birth control devices. In their defence, the accused successfully invoked the constitutional rights of their clients on the rationale that they shared with them a professional relationship. See also *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Singleton* v. *Wulff*, 428 U.S. 106 (1976).

[50] Rogerson in Sharpe, *op. cit.*, footnote 44, p. 245.

skepticism of the appropriateness of employing remedies which seek "to distinguish and separate valid from invalid applications" of an impugned law as this would involve the judiciary in "legislative determinations".[51]

The strong remedial preference of Canadian courts for broad declarations of invalidity in cases of unconstitutionality arising in a division of powers context can be readily justified; but there are compelling grounds for questioning its appropriateness in the Charter context. Its most obvious drawback is its inflexibility. Remedially, it dictates that a law, which serves useful or even essential social purposes but nonetheless infringes the rights of a class of person, which may not even be before the court, must be struck down. Abandoning this preference in favour of a more flexible approach to remedies under section 52(1) offers the promise of rights protection—by utilization of surgical interpretive techniques—without thwarting or undermining broader, valid legislative purposes.

The rationale offered by the court for declining this opportunity was, as I have indicated, that to do otherwise would conflict with its remedial jurisprudence under section 52(1), in particular its decision in *R.* v. *Big M Drug Mart Ltd.*[52] The cogency of this rationale is questionable. Both *Big M Drug Mart* and a successor case—*R.* v. *Edwards Books*[53]—reveal, I would argue, a much more flexible posture with respect to the remedial possibilities of the section than the court in *Wholesale* was seemingly prepared to recognize.

While *Big M Drug Mart* is ordinarily cited, as it is in *Wholesale,* for the proposition that an accused always has standing to challenge the constitutionality of the charging statute, it also contains a second proposition. This latter proposition is that the appropriate remedy under section 52(1) depends on the nature of the constitutional defect being alleged; specifically whether it is the purpose or the effect of the law which is being impugned.

In *Big M Drug Mart* the court was presented with a highly unusual scenario; a situation in which the allegation was that the overt purpose of the statute being impugned—the federal Lord's Day Act[54]—offended the Charter's guarantee of religious freedom[55] by purporting to compel observance of a Christian sabbath. In this context the court held that Big M's capacity as an artificial entity to "... enjoy or exercise freedom of

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[51] *Ibid.*, p. 250.

[52] *Supra,* footnote 30.

[53] [1986] 2 S.C.R. 713, (1986), 35 D.L.R. (4th) 1.

[54] R.S.C. 1970, c. C-24.

[55] Charter of Rights and Freedoms, *supra,* footnote 5, s. 2(a):

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

religion is . . . irrelevant".[56] The court noted, however, that had the allegation been that the impugned law unconstitutionally affected a particular party or individual, different considerations would apply. In this latter scenario, where a party was seeking a remedy exempting it from a law that in other applications was valid, the court suggested that "the status of an accused" might well be relevant.[57]

The court confronted this latter scenario in *R.* v. *Edwards Books*.[58] There the court was called upon to consider the constitutionality, again under section 2(a) of the Charter,[59] of provincial "common pause" legislation, under which various individual and corporate merchants had been prosecuted. The court concluded that while the purpose of the impugned legislation was secular and thus constitutional, it unconstitutionally affected certain merchants who belonged to identifiable religious minority groups. In the result, the court ultimately concluded that these unconstitutional effects could be demonstrably justified under section 1 in light of the broad context and scheme of the Act. However, in *obiter*, Dickson C.J.C. suggested that, where legislation was unconstitutional in its application to an identifiable class and could not be salvaged under section 1, it might be appropriate for the court to fashion a limited remedy under section 52—designed to render the offensive provisions inapplicable to the parties actually affected—as an alternative to a broad declaration of invalidity.[60]

Rather than endorsing complete invalidation as the preferred judicial response in circumstances in which a law is found to violate the Charter, *Big M Drug Mart* and *Edwards Books* suggest that the appropriate remedy under section 52(1) should depend upon whether the constitutional defect is a function of the purpose or effect of the challenged law. Where it is the latter, moreover, both decisions clearly indicate that the status of the party seeking Charter relief is highly relevant.

Wholesale Travel presented the Supreme Court with an opportunity to build upon this foundation, developing a nuanced approach to remedial possibilities inherent in its Charter jurisdiction; an approach responsive to

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[56] *Supra*, footnote 30, at pp. 314 (S.C.R.), 336 (D.L.R.).

[57] *Ibid.*, at pp. 315 (S.C.R.), 337 (D.L.R.).

[58] *Supra*, footnote 53.

[59] *Supra*, footnote 55.

[60] *Supra*, footnote 53, at pp. 784-785 (S.C.R.), 53 (D.L.R.). The court's reluctance to employ remedial measures designed to save legislation from being struck down in its entirety is most recently evidenced by the majority reasons of McLachlin J. in *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, at pp. 627-630, (1991), 83 D.L.R. (4th) 193, at pp. 275-277. In this decision, ultimately concluding that Criminal Code rape shield provisions should be struck down, she expressly declined to apply, as she referred to it, the "doctrine of constitutional exemption". In so doing she observed, with notable caution, that despite *Big M Drug Mart* and *Edwards Books*, the question of whether such a doctrine even exists remains unsettled.

the distinctions between corporate and individual rights claimants which its jurisprudence has tentatively begun to recognize. Its failure to seize this opportunity, and its decision to settle instead upon a more formalistic traditional remedial posture, is regrettable but perhaps not surprising.

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DROIT BANCAIRE—PRÉLÈVEMENT AUTOMATIQUE PRÉAUTORISÉ DES PRIMES D'ASSURANCE—DEVOIR DE L'ASSURÉ: *New York Life Ins. Co.* c. *Langelier-Côté.*

Nicole L'Heureux*

Introduction

Jusqu'à maintenant les tribunaux ne se sont prononcés qu'à quelques reprises sur les modalités nouvelles de paiement qu'offre le transfert électronique de fonds et qui s'exécutent par virements de comptes à comptes sans émission d'effets de commerce.[1] Le transfert électronique de fonds, qui comprend le dépôt direct, les prélèvements automatiques et le paiement par carte de débit, est de plus en plus employé pour le paiement de divers contrats et il commence à soulever des interrogations quant à ses effets sur les obligations des parties. Un récent jugement de la Cour d'appel du Québec, *New York Life Insurance Co.* c. *Langelier-Côté*,[2] met en cause principalement le retrait automatique préautorisé.

Les faits sont simples. Un assureur, par les soins de son agent, assure la vie de Côté. Il a été convenu, à cette occasion, entre les parties que le paiement mensuel des primes s'effectuerait automatiquement par retraits sur le compte bancaire de l'assuré. À dix-huit reprises consécutives les retraits ont été effectués sans difficultés, jusqu'au moment où les transferts ont été refusés par la banque de l'assuré au motif que le numéro de compte indiqué sur l'ordre de transfert était inconnu, inexistant ou fermé. De la

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[1] *Mutuelle d'Omaha, Cie d'Assurances* c. *Tremblay*, [1986] R.J.Q. 1639 (C.A.); *Provost-Cooper* c. *Compagnie d'Assurance-Vie Crown*, [1988] R.J.Q. 1359 (C.S.); *Produits généraux de construction (1980) Ltée* c. *J. Raymond Dupuis Inc.*, JE 88-905 (C.A.); *Banque Royale* c. *Nettoyeur Terrebonne (1985) Inc.*, JE 88-61 (C.S.); *El-Zayed* c. *Bank of N.S.* (1988), 87 N.S.R. (2d) 171 (N.S.S.C.), en appel (1989), 91 N.S.R. (2d) 349 (N.S. App. Div.); *McVety* c. *Banque Toronto-Dominion*, [1986] R.R.A. 447 (C.P.).

[2] [1992] R.R.A. 135 (C.A. Qué.).

sorte, les retraits subséquents ne purent s'effectuer malgré le fait que l'assuré disposait en tout temps dans son compte de fonds suffisants pour le paiement des primes. Subséquemment, l'assuré étant décédé, l'assureur fut poursuivi pour le paiement de l'assurance. En première instance, le tribunal attribua à la faute de l'assureur les difficultés relatives à l'exécution du retrait préautorisé des primes et le condamna à verser l'indemnité stipulée. La Cour d'appel a infirmé la décision au motif que l'assuré avait une obligation de bonne foi et de coopération avec l'assureur pour résoudre les difficultés techniques qui s'étaient produites. Se fondant sur le principe que les obligations doivent s'exécuter de bonne foi et sur la théorie de l'abus de droit qu'ont mis en lumière deux décisions de la Cour suprême,[3] la Cour d'appel a mis à la charge de l'assuré une obligation de bonne volonté à l'endroit de son cocontractant: "... si le créancier est aux prises avec des difficultés techniques—même dues à sa faute—qui en empêchent l'exécution, le débiteur ne pourra s'en remettre à la disponibilité des fonds pour refuser toute contribution à la solution du problème et se prétendre libéré sans avoir payé sa dette."[4] Il faut mentionner que l'assureur, à la suite de l'impossibilité d'exécuter les retraits préautorisés, avait communiqué avec l'assuré pour lui demander le paiement des primes par chèque. Ce dernier avait refusé au motif qu'il avait suffisamment de fonds dans son compte et que l'assureur n'avait qu'à s'en prendre à lui-même pour son erreur.

Le paiement par retraits automatiques préautorisés, malgré sa nouveauté et l'incertitude juridique qu'il soulève, est devenu ces dernières années une modalité de paiement utilisée très fréquemment pour les paiements répétitifs comme les primes d'assurances ou les remboursements hypothécaires. La présente décision nous amène à nous interroger sur (1) la nature juridique du virement bancaire, (2) le moment du paiement effectif et l'applicabilité par analogie de la *Loi sur les lettres de change*[5] et enfin (3) sur l'aggravation des obligations du débiteur.

1. *La nature juridique du virement bancaire*[6]

Le transfert électronique permet le virement de fonds directement entre comptes bancaires sans qu'il y ait transfert de documents-papier, le support de chèques ou autres effets de commerce. Il exige que chaque partie soit titulaire d'un compte bancaire. Le transfert donne lieu au retrait du compte

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[3] *Banque nationale du Canada* c. *Soucisse*, [1981] 2 R.C.S. 339, à la p. 345; *Houle* c. *Banque nationale du Canada*, [1990] 3 R.C.S. 122.

[4] *Supra*, note 2, à la p. 136.

[5] S.R.C. 1985, ch. B-4.

[6] Voir N. L'Heureux, Le droit bancaire, Revue de droit de l'Université de Sherbrooke, no 3.34, à la p. 347.

du débiteur vers le compte du créancier. C'est pourquoi on parle de transfert de crédit et non de transfert de débit, comme c'est le cas pour le chèque pour lequel le montant est d'abord crédité (crédit provisoire) au compte du bénéficiaire pour ensuite donner lieu à un débit dans le compte du débiteur.

Le procédé lui-même du virement n'est pas nouveau. Il existe sous une forme élémentaire lorsqu'un client, par lettre personnelle, donne l'instruction à sa banque de verser une somme d'argent déterminée au crédit d'un tiers désigné. Le principe de ce mécanisme repose sur un jeu d'écritures grâce auquel se réalise le mouvement de fonds. Il y a transfert électronique lorsque les opérations pour réaliser le virement sont effectuées par l'électronique en tout ou en partie.

Tandis que le chèque répond à la réglementation applicable aux effets de commerce et à des pratiques établies, le transfert électronique fait appel à des règles nouvelles et imprécises. L'ordre de virement qui met en marche l'opération de virement consiste en des instructions adressées à une banque l'enjoignant de verser au compte du bénéficiaire un montant d'argent déterminé. L'ordre de virement n'est pas un effet de commerce. On l'analyse plutôt comme un mandat.

L'ordre de virement n'est pas un effet de commerce parce qu'il ne satisfait pas les exigences de la *Loi sur les lettres de change*.[7] La signature, qui apparaît comme un élément essentiel pour la validité du chèque, fait défaut dans le virement effectué par l'électronique. L'ordre de virement n'est pas un écrit dans le sens d'un document sous seing privé susceptible d'être négocié d'une personne à une autre.[8] Il n'est pas payable à une date déterminée ou à une époque future déterminable. Aucune date n'étant spécifiée, on pourrait croire qu'il est à demande. Toutefois il n'en est rien car le bénéficiaire n'a pas la possibilité de réclamer le paiement. La formule ne comporte pas les mots qui peuvent être interprétés comme un ordre formel de payer. Il s'agit plutôt d'une autorisation ou d'instructions de paiement. Enfin, l'ordre de virement n'est pas fait pour être négocié et pour circuler comme un effet de commerce.

Le virement est un mandat. Que ce soit en common law ou en droit civil, la majorité de la doctrine et de la jurisprudence analyse le virement

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[7] *Supra*, note 5, art. 16, 165.

[8] Jérôme Huet, Les modifications du droit sous l'influence de l'électronique: aspects de droit privé (1983), J.C.P. Doct. 3095; E.P. Ellinger, The Giro System and the Electronic Transfers of Funds, [1987] Lloyd's Maritime & C.L.Q. 178, à la p. 196. Voir également Howard Eddy, Effets de l'automatisation sur le système canadien de paiement, Document préliminaire (1973); Nicole L'Heureux, Le transfert électronique de fonds en regard du contrat bancaire (1986), 65 R. du B. can. 147, à la p. 157; L'Heureux, *loc. cit.*, note 6, à la p. 349.

comme un mandat qui est donné à la banque d'effectuer le transfert des fonds par un jeu d'écritures.[9]

Le prélèvement automatique est une technique permettant au créancier d'obtenir un transfert périodique de fonds du compte de son débiteur vers son propre compte bancaire. La banque du créancier exige de ce dernier une garantie contre toute perte qui pourrait résulter d'un retrait non autorisé, erroné ou frauduleux. Une autorisation préalable par écrit doit être donnée au créancier par le débiteur. L'Association canadienne des paiements a élaboré des normes et des formules types pour recueillir cette autorisation qui remplace celle qui serait nécessaire pour chaque retrait à intervenir. Elle doit donc être précise quant au montant et à la périodicité des retraits. Malgré le fait que généralement la formule autorise le créancier à exécuter l'obligation du débiteur par cette technique, les tribunaux considèrent qu'il y a un engagement de procéder ainsi. Dans une affaire récente,[10] il avait été stipulé entre les parties que le paiement de la première prime d'une assurance-vie devait s'effectuer par retrait automatique préautorisé. Il a été décidé que, lorsqu'un assureur convient que le paiement des primes s'effectuera selon un plan de retrait préautorisé et qu'il se met en position d'obtenir le paiement des primes de cette façon, il renonce à l'avance à l'exigence du paiement direct de la prime prévue. L'assureur qui ne procède pas au retrait automatique ne peut reprocher à l'assuré le non-paiement de la prime et les difficultés techniques pour la mise en marche du plan de retrait ne sont pas opposables à l'assuré. Selon le tribunal, parce que l'assureur avait été en mesure de retirer la première prime par la modalité de paiement stipulée, avant le changement dans l'assurabilité du risque, il ne pouvait prétendre que la police n'était jamais entrée en vigueur. L'assureur a donc été tenu responsable parce qu'il avait manqué à ses obligations. Dans un autre jugement,[11] la banque avait stipulé le remboursement des versements hypothécaires par retraits préautorisés. Pour une raison inconnue, la banque n'avait pas procédé de cette façon de telle sorte que, la dette de son débiteur devenant impayée, elle a tenté de réaliser sa garantie. La Cour supérieure lui a refusé son recours en indiquant que, lorsqu'il y a une convention sur une modalité de paiement, le créancier ne peut changer la modalité sans en aviser son client.

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[9] Pour les États-Unis, l'art. 4A du *Uniform Commercial Code* adopte cette qualification. Voir, en droit français, M. Vasseur, Le paiement électronique: Aspects juridiques (1986), J.C.P. C.I. 146641; J.-L. Rives-Lange et H. Cabrillac, Encyclopédie Dalloz, volume virement; D. Desjardins, Le banquier et les ventes internationales (1982), Meredith Memorial Lectures 131, à la p. 134. Voir N. L'Heureux, L'harmonisation du droit dans les transferts de fonds internationaux par télécommunications interbancaires (1991), 32 C. de D. 937, à la p. 957; L'Heureux, *loc. cit.*, note 6, à la p. 349; N. L'Heureux, Le paiement par virement bancaire, dans Développements récents en droit bancaire (1991), p. 155.

[10] *Provost-Cooper* c. *Compagnie d'Assurance-Vie Crown*, *supra*, note 1.

[11] *Banque Royale* c. *Nettoyeur Terrebonne (1985) Inc.*, *ibid.*

Par ailleurs, la banque qui reçoit un ordre de virement ou de paiement préautorisé est contractuellement responsable envers son client de la bonne exécution de ses obligations. En France, on a reconnu la responsabilité de la banque qui n'exécute pas un prélèvement préautorisé.[12] Il s'agissait d'un client qui avait opté pour le paiement préautorisé de ses primes d'assurance. La défaillance de la banque ayant entraîné la résiliation de la police, la conduite de l'établissement fut sanctionnée sévèrement. Selon la doctrine et la jurisprudence la banque ayant accepté de procéder au règlement des primes, et le client ayant opté en pleine confiance pour ce mode de règlement, il y a eu manquement caractérisé au mandat assumé par la banque pour lequel elle ne pouvait invoquer une clause exonératoire de responsabilité.[13] Par ailleurs, la banque doit vérifier que l'ordre de débit est autorisé par son client et qu'il ne comporte aucune anomalie; par exemple elle doit s'assurer de l'exactitude du numéro de compte et de la concordance du nom du titulaire avec celui du numéro de compte;[14] que les fonds sont disponibles et que les instructions sont suffisamment précises. Un refus injustifié d'exécuter l'ordre de retrait automatique entraînerait une responsabilité de sa part. Dans le cas qui nous occupe, les instructions étant erronées, la banque du débiteur a eu raison de refuser le retrait.

2. *Le moment du paiement effectif et l'analogie avec le chèque*

Le transfert préautorisé réalise une opération par laquelle les fonds sont virés du compte du payeur vers le compte du bénéficiaire. Il y a une analogie avec le chèque, comme le souligne le tribunal,[15] dans la mesure où l'émission de l'ordre de virement, comme l'émission d'un chèque, n'a pas pour effet de libérer le débiteur de sa dette. Il n'a aucun effet libératoire ni novatoire sur la créance qu'il est destiné à éteindre. Comme le chèque, il ne peut équivaloir à un paiement si ce n'est lorsque le transfert de fonds est effectué par les écritures réciproques de débit et de crédit, c'est-à-dire lorsque le bénéficiaire aura la disposition des fonds par suite de l'inscription d'un crédit dans son compte ou lorsque la banque du bénéficiaire aura avisé ce dernier qu'elle détient les fonds pour lui. Le projet de la Commission des Nations Unies pour le droit commercial international[16] consacre la même règle. Il prévoit que l'obligation du débiteur est acquittée lorsque la banque du bénéficiaire accepte l'ordre de paiement à la condition que l'ordre de

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[12] Com. 4 Jan. 1979, D. 1979 I.R. 357, obs. Vasseur.

[13] Voir H. Cabrillac et J.L. Rivest-Lange (1979), Rev. Trim. Dr. Com. 794, à la p. 795.

[14] Voir C. Gavalda et Jean Stoufflet, Droit de la banque (P.U.F. 1974), no 614, p. 832.

[15] *Supra*, note 2, à la p. 136.

[16] Commission des Nations Unies pour le droit commercial international, Commentaires sur le Projet de loi type sur les virements internationaux, A/CN.9/WG.1V/WP.49, 8 octobre 1990.

paiement soit adressé au compte auquel il est destiné. C'est à ce moment que naît une créance du bénéficiaire contre sa banque.

Dans une affaire,[17] l'entente stipulait qu'un paiement devait être "acheminé" par virement le 16. Or l'ordre de virement a été donné le 16 mais les fonds ont été effectivement inscrits dans le compte du créancier le 17. Il a été décidé que les fonds avaient été acheminés à temps. Sans doute les termes utilisés par les parties auraient bénéficié de plus de précision, car l'ordre de virement en lui-même n'a aucun pouvoir libératoire. Dans l'affaire *New York Life* que nous examinons, l'ordre de retrait n'avait pu être acheminé; il ne pouvait donc y avoir libération du débiteur.

3. *L'aggravation des obligations du débiteur*

Les transferts électroniques de fonds s'exécutent dans le cadre du contrat bancaire qui prend naissance à l'ouverture du compte bancaire. Ce contrat, s'il est conclu au Québec, est régi par le Code civil. Sauf à l'égard des comptes commerciaux, il n'est généralement pas conclu par écrit. Les tribunaux ont précisé plusieurs obligations implicites des parties. Ainsi il a déjà été établi que le titulaire du compte avait le devoir d'agir de bonne foi pour ne pas faciliter l'altération de ses chèques et pour prévenir la banque s'il savait qu'une fraude était sur le point d'être commise.[18] Quant à savoir s'il y a d'autres obligations implicites, la Cour suprême[19] a eu à répondre à cette question récemment relativement à la conduite du titulaire du compte dans l'examen du relevé périodique. Elle a refusé de reconnaître l'existence d'une obligation implicite de vérification du relevé. La cour, se fondant sur une décision de la Chambre des lords,[20] énonce le principe qui doit guider les tribunaux:[21]

> ... il ne suffit pas que le tribunal dise que le terme proposé est raisonnable et que sa présence améliorerait le contrat ou le rendrait plus équitable; il faut en outre que le tribunal puisse affirmer d'une part que l'introduction du terme est nécessaire pour conférer au contrat de "l'efficacité commerciale", comme on dit, et d'autre part que, si son absence avait été signalée lors de la signature de ce contrat, les deux parties, à supposer qu'elles soient des personnes raisonnables, auraient consenti à son introduction.

Il n'y a donc d'obligations implicites que celles que le contrat lui-même exige implicitement, selon un critère de nécessité. Par ailleurs, les modalités du transfert électronique de fonds sont généralement l'objet

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[17] *Produits généraux de construction (1980) Ltée* c. J. *Raymond Dupuis Inc.*, *supra*, note 1.

[18] L'Heureux, *loc. cit.*, note 6, no 1.8, à la p. 35.

[19] *Société hôtelière Canadien Pacifique Ltée* c. *Banque de Montréal*, [1987] 1 R.C.S. 711.

[20] *Liverpool C.C.* c. *Irwin*, [1977] A.C. 239 (H.L.).

[21] Voir l'opinion du Juge LeDain, *supra*, note 19, à la p. 766, citant Lord Cross dans *Liverpool C.C.* c. *Irwin*, *ibid.*, à la p. 258.

d'ententes écrites spécifiques qui ajoutent au contrat bancaire, accroissant les obligations des usagers envers la banque. D'ailleurs, il en est ainsi en matière de carte de débit, à propos de l'obligation de sécurité et de confidentialité qui est imposée au titulaire de la carte relativement au numéro d'identification personnel et qui accroît le devoir de bonne foi du client.[22] À l'égard du prélèvement préautorisé, il ne semble pas y avoir de stipulation qui oblige le titulaire du compte à fournir autre chose que son identité bancaire.

L'obligation de coopération et de bonne volonté que la Cour d'appel fait supporter à l'assuré dans l'affaire *New York Life Ins.* ajoute-t-elle aux obligations implicites dans l'opération de transfert préautorisé? Comme elle se situe au niveau du contrat entre l'assureur et l'assuré, il faut plutôt rattacher cette obligation à l'exécution contractuelle et y voir une application de l'article 1024 C.C. Dans *New York Life Ins.*, ce ne sont pas les obligations du titulaire du compte envers la banque qui sont en cause, mais les obligations du débiteur envers son créancier. La Cour d'appel applique le principe que les obligations doivent s'exécuter de bonne foi en se fondant sur deux décisions de la Cour suprême.[23] Dans les circonstances, l'assureur n'ayant pu, que ce soit par sa faute ou non (les circonstances ne sont pas très claires), effectuer le retrait bancaire selon la méthode prévue, il se devait d'aviser le débiteur de l'impossibilité d'agir. À la suite de cet avis et des démarches effectuées auprès de l'assuré, ce dernier devait coopérer avec son créancier, soit pour renouveler les informations relatives à son identité bancaire soit pour l'acheminement des paiements. Il ne pouvait pas se comporter avec nonchalance et se reposer sur le fait qu'il disposait de fonds suffisants dans son compte. Sa dette n'ayant pas été acquittée, pour bénéficier du contrat il se devait d'agir de façon à ce que son paiement soit acheminé à temps, sous une forme ou sous une autre.

Sous un autre aspect, la décision dans *New York Life Ins.* ne contredit-elle pas les deux décisions de la Cour supérieure mentionnées précédemment?[24] Dans ces décisions la Cour a décidé que le créancier qui a convenu de faire le prélèvement automatique de la dette du débiteur, mode de paiement que d'ailleurs, généralement, il sollicite activement, renonce par le fait même au paiement direct et qu'il ne peut reprocher à son cocontractant son défaut d'exécuter son obligation selon un autre mode. Ces décisions doivent être distinguées de l'affaire *New York Life Ins.*, car dans les premières le créancier avait procédé au changement dans le mode de paiement sans en aviser son débiteur. Ce dernier avait donc toutes les raisons de croire que sa dette était acquittée. Par ailleurs, dans l'affaire *New York Life Ins.*,

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[22] N. L'Heureux et L. Langevin, Les cartes de paiement, aspects juridiques (1991), p. 33.

[23] *Supra*, note 3.

[24] *Provost-Cooper* c. *Compagnie d'Assurance-Vie Crown*, *supra*, note 1; *Banque Royale du Canada* c. *Nettoyeur Terrebonne (1985) Inc.*, *ibid.*

l'assureur, ayant été incapable de continuer à effectuer le prélèvement automatique, en avait avisé son cocontractant en lui indiquant les conséquences du défaut de paiement. C'est à partir de ce moment que l'obligation de bonne foi et de coopération obligeait l'assuré à fournir les renseignements demandés ou à exécuter son obligation par un autre moyen de paiement.

La Cour d'appel dans *New York Life Ins.* n'a donc pas ajouté d'obligation implicite au contrat bancaire ni elaboré une telle obligation relativement au paiement préautorisé. Elle n'a pas non plus modifié la jurisprudence antérieure quant à l'obligation du créancier, qui a stipulé le prélèvement automatique des paiements de son débiteur, de procéder de cette façon. Elle a plutôt précisé la limite de cette obligation dans le cas où le créancier devient incapable de procéder ainsi. Elle n'a fait qu'appliquer à la convention d'assurance liant le créancier et le débiteur l'obligation d'exécuter un contrat de bonne foi en regard de l'article 1024 C.C. La stipulation du prélèvement automatique des paiements ne peut affecter ce devoir de bonne foi.

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