



# OVERSEAS DECISIONS BULLETIN

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Decisions from the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa and the Supreme Court of New Zealand.

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## Administrative Law

*Turnbull-Jackson v Hibiscus Coast Municipality and others*

**Constitutional Court of South Africa:** [\[2014\] ZACC 24](#).

**Judgment delivered:** 11 September 2014.

**Coram:** Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J.

**Catchwords:**

Administrative law — Judicial review — Bias — Appellant instituted review of first respondent's approval of building plan — Appellant accused municipal official of bias — Appellant also complained that plans did not meet requirements of relevant law relying on judgment of Constitutional Court in *Walele* — High Court rejected appellant's grounds, preferring to follow judgment of Supreme Court of Appeal in *True Motives* where Supreme Court had declined to follow *Walele* — Whether, in view of principle of judicial precedent Supreme Court of Appeal was entitled to depart from *Walele* — Whether the official exhibited bias.

**Held (11-0):** Appeal dismissed.

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# Arbitration

*Sattva Capital Corp. v Creston Moly Corp.*  
**Supreme Court of Canada:** [2014 SCC 53](#).

**Judgment delivered:** 1 August 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

## Catchwords:

Arbitration — Appeals — Commercial arbitration awards — Arbitration Act, RSBC 1996, c 55, s 31(2) — Parties entered into agreement providing for payment of finder's fee in shares — Parties disagreed as to date on which to price shares for payment of finder's fee and entered into arbitration — Leave to appeal arbitral award sought pursuant to s 31(2) of Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act.

Contract law — Interpretation — Parties entered into agreement providing for payment of finder's fee in shares — Parties disagreed as to date on which to price shares for payment of finder's fee and entered into arbitration — Whether arbitrator reasonably construed contract as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

**Held (7-0):** Appeal allowed.

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# Charities

*Re Greenpeace of New Zealand Incorporated*  
**Supreme Court of New Zealand:** [\[2014\] NZSC 105](#).

**Judgment delivered:** 6 August 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

## Catchwords:

Charities — Registration as "charitable entity" — Charities Act 2005, Pt 2 — Greenpeace of New Zealand Inc sought registration — Charities Commission declined Greenpeace registration on basis that two of its objects were not charitable — Whether purposes that are "political" (including those that advocate particular views) can be charitable.

**Held (3-2):** Appeal allowed.

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## Constitutional Law

See also [Consumer Law](#): *Amex Bank of Canada v Adams* and *Marcotte v Fédération des caisses Desjardins du Québec*.

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See also [Practice and Procedure](#): *Bank of Montreal v Marcotte*.

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*South African Police Service v Solidarity obo Barnard*  
**Constitutional Court of South Africa:** [\[2014\] ZACC 23](#).

**Judgment delivered:** 2 September 2014.

**Coram:** Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J.

### Catchwords:

Constitutional law — Discrimination — Race discrimination — Constitution of South Africa, s 9 — Respondent has been member of South African Police Service (SAPS) since 1989 — Respondent applied for promotion and was recommended as best suited candidate — Respondent was unsuccessful for reason that it would not enhance racial representation at particular salary level — Labour Court found for respondent holding that decision of National Commissioner was not fair and appropriate method of implementing SAPS's Employment Equity Plan — Labour Appeal Court found in favour of appellant holding that implementation of restitutionary measures is not subject to individual's right to equality in terms of s 9(3) of Constitution — Supreme Court of Appeal found respondent had been discriminated against on ground of race and that appellant had failed to rebut presumption of unfairness — Whether decision of National Commissioner not to promote respondent to position of superintendent constitutes unfair discrimination on grounds of race in contravention of s 6.

Employment law — Discrimination — Race discrimination — Employment Equity Act, s 9 — Whether decision of National Commissioner not to promote respondent to position of superintendent constitutes unfair discrimination on grounds of race in contravention of s 6.

**Held (11-0):** Appeal allowed.

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*R v Mian*

**Supreme Court of Canada:** [2014 SCC 54](#).

**Judgment delivered:** 12 September 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law — Charter of Rights — Right to be informed of reasons for arrest — Right to counsel — Canadian Charter of Rights and Freedoms, ss 10, 24(2) — Accused charged with possession of cocaine and possession of currency obtained by crime — Police delayed advising accused of reasons for arrest and of his rights to retain and instruct counsel — Whether trial judge erred in law by concluding that police infringed accused's right to be informed of reasons for arrest and his right to counsel — Whether trial judge erred in law by excluding evidence.

Criminal law — Appeals — Powers of Court of Appeal — Accused charged with possession of cocaine and possession of currency obtained by crime — Court of Appeal raised new issues on appeal — Whether appeal court erred in ordering new trial on basis of improper cross-examination — Whether appeal court erred in raising new issue on appeal.

**Held (7-0):** Appeal allowed.

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## Consumer Law

See also [Practice and Procedure](#): *Bank of Montreal v Marcotte*.

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*Robertson v Swift*

**Supreme Court of the United Kingdom:** [\[2014\] UKSC 50](#).

**Judgment delivered:** 9 September 2014.

**Coram:** Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Carnwath and Lord Hodge.

**Catchwords:**

Consumer law — Consumer protection — Fair trading — Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (SI 2008/1816), regs 7, 8 — Council Directive 85/577/EEC, arts 4, 5— Contract made in consumer's home — Deposit paid — Trader failed to give statutory written notice of right to cancel — Consumer cancelled contract days later but one day before performance due — Whether consumer entitled to cancel contract and recover deposit.

**Held (5-0):** Appeal allowed.

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*Amex Bank of Canada v Adams*  
**Supreme Court of Canada:** [2014 SCC 56](#).

**Judgment delivered:** 19 September 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

**Catchwords:**

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

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

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

**Held (7-0):** Appeal dismissed.

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*Marcotte v Fédération des caisses Desjardins du Québec*  
**Supreme Court of Canada:** [2014 SCC 57](#).

**Judgment delivered:** 19 September 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

**Catchwords:**

Consumer law — Consumer Protection — Contracts of credit — Contracts extending variable credit — Credit cards — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Prescription — Punitive damages — Consumer Protection Act, CQLR, c P-40.1, ss 12, 272 — Conversion charges imposed by financial institutions on cardholders for transactions in foreign currencies — Class actions — Whether conversion charges were “net capital” or “credit charges” as defined by legislation — Whether Desjardins adequately disclosed conversion charges to cardholders — Whether reimbursement of conversion charges collected from consumer class members should be ordered — Whether class members are entitled to punitive damages.

Constitutional law — Division of powers — Bills of exchange — Inter-jurisdictional immunity — Federal paramountcy — Constitution Act, 1867, s. 91(18) — Consumer Protection Act, CQLR, c P-40.1 — Quebec’s consumer protection legislation regulated credit card contracts — Whether legal characterisation of transaction consisted of payment for good or service in foreign currency by means of credit card of same nature as that of payment by means of bill of exchange over which Parliament has exclusive jurisdiction, such that doctrines of inter-jurisdictional immunity and paramountcy are potentially applicable.

**Held (7-0):** Appeal allowed in part.

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## Contract Law

See also [Arbitration](#): *Sattva Capital Corp. v Creston Moly Corp.*

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See also [Consumer Law](#): *Amex Bank of Canada v Adams*.

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*Savvy Vineyards 3552 Limited and another v Kakara Estate Limited and another*

**Supreme Court of New Zealand:** [\[2014\] NZSC 121](#).

**Judgment delivered:** 5 September 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

### Catchwords:

Contract law — Termination — Validity — Respondents entered into contracts to purchase land that was to be developed as vineyards — As part of that transaction, respondents became parties to agreements with Goldridge Estate Ltd for development and management of vineyards and supply of grapes produced — Agreements provided that Goldridge could assign agreements to related companies without consent of respondents — Goldridge executed “deeds of assignment” to transfer agreements to

appellants — Goldridge informed respondents of intent to transfer and forwarded deeds to respondents — Respondents did not execute deeds, nor did they communicate to Goldridge refusal — Respondents did deal with appellant companies — Business relationship deteriorated and respondents purported to terminate agreements on basis that Goldridge had gone into voluntary liquidation — Agreements permitted termination by either party if the other went into liquidation — Court of Appeal held that Goldridge was still party to agreements at time of its liquidation — Whether transfer had effected novation of agreements — Whether terms of novation resulted in Goldridge no longer being party to agreements.

**Held (3-2):** Appeal allowed.

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## Costs

*Marley v Rawlings and Anor*

**Supreme Court of the United Kingdom:** [\[2014\] UKSC 51](#).

**Judgment delivered:** 18 September 2014.

**Coram:** Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath and Lord Hodge.

### Catchwords:

Costs — Order for costs — Contingency fee agreement — Solicitor's mistake in executing will required court to determine validity — Proceedings determined in claimant's favour in Supreme Court — Litigation funded on traditional basis in High Court and Court of Appeal and by contingency fee agreements in Supreme Court — "Success fee" payable under agreements where costs to be paid out of estate — Whether costs to be paid out of estate — Whether costs to be awarded against solicitor's insurers — Whether costs to be paid by insurers to include such "success fee" in respect of unsuccessful defendants in Supreme Court.

**Held (5-0):** Insurers to pay costs of both parties in High Court and Court of Appeal. Insurers to pay appellant's costs, respondents' solicitors' disbursements and respondents' counsels' fees, conditional on respondents' counsel disclaiming any entitlement to their success fees under their conditional fee agreements.

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## Courts

*Worldwide NZ LLC v NZ Venue and Event Management Limited*

**Supreme Court of New Zealand:** [\[2014\] NZSC 108](#).

**Judgment delivered:** 11 August 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

**Catchwords:**

Courts — Discretion — Award of interest — Judicature Act 1908, s 87(1) — Appellant and respondent were parties to joint venture — Appellant held 25 per cent interest (holding “B” units and shares) and respondent and associated company held 75 per cent interest (holding “A” units and shares) — Receiver was appointed to parent company of appellant triggering pre-emptive right of purchase of its “B” units and shares — Purchase exercised by respondent — Trust deed did not set mechanism of fixing price of “B” units and shares and legal proceedings ensued — Trust deed construed as requiring transaction to occur at “fair market value” — High Court ordered payment to be made and also held that interest under s 87(1) was payable from date of purchase to date of payment of fair market value — Whether High Court entitled to award interest on value fixed in respect of “B” units and shares.

**Held (5-0):** Appeal allowed.

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## Criminal Law

See also [Constitutional Law](#): *R v Mian*.

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*LM v The Queen*

**Supreme Court of New Zealand:** [\[2014\] NZSC 110](#).

**Judgment delivered:** 13 August 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

**Catchwords:**

Criminal law — Offences involving children — Crimes Act 1961 (Act), s 144A provides for prosecution of New Zealand citizens or residents for conduct which, had it occurred in New Zealand, would be contrary to provisions of Act involving sexual offending against children — Appellant at time of offending was living in Russia — Appellant had taken photograph of his seven-year-old stepdaughter and another man which, if done in New Zealand, would constitute offence against s 132(3) of Act — Crown alleged appellant was party to offending of man depicted in photograph by virtue of ss 66(1) and 144(1)(a) — Whether s 144A permits prosecution of someone who was party to alleged offending but not principal offender.

**Held (5-0):** Appeal dismissed.

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*Paki Hoani Taiatini v The Queen*

**Supreme Court of New Zealand:** [\[2014\] NZSC 122](#).

**Judgment delivered:** 5 September 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

**Catchwords:**

Criminal law — Prejudicial evidence — Appellant found guilty on six counts of indecent assault and three counts of sexual violation by unlawful sexual connection — On three occasions at trial, Crown witnesses gave evidence which was inadmissible — Trial Judge did not address inadmissible evidence in summing up — Court of Appeal upheld conviction on basis that evidence and absence of direction did not give rise to material risk of miscarriage of justice — Whether admission of evidence constituted miscarriage of justice.

**Held (3-2):** Appeal dismissed.

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*R v Mack*

**Supreme Court of Canada:** [2014 SCC 58](#).

**Judgment delivered:** 26 September 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Criminal Law — Evidence — Admissibility — Confessions — “Mr Big” confessions — Charge to jury — Canadian Charter of Rights and Freedoms, s 24(2) — Accused confessed to murdering his roommate during Mr Big operation — Whether accused’s confessions should be excluded under s 24(2) of Charter — If not, whether trial judge’s jury charge adequate on evidentiary concerns of Mr Big confessions — Whether trial judge’s jury charge also adequate on reliability of Crown witness’ testimony.

**Held (7-0):** Appeal dismissed.

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## Employment Law

See also [Constitutional Law](#): *South African Police Service v Solidarity obo Barnard*.

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## Housing

*Malan v City of Cape Town*

**Constitutional Court of South Africa:** [\[2014\] ZACC 25](#).

**Judgment delivered:** 18 September 2014.

**Coram:** Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J.

**Catchwords:**

Housing — Lease agreement — Cancellation of agreement — Appellant's late husband concluded lease agreement with respondent — After her husband's death, appellant took over lease and still lives on property — In October 2008 respondent sent appellant letter stating intention to cancel lease on grounds that she was in arrears and South African Police had reported illegal activities on property — Appellant did not vacate — Respondent sent another letter in January 2009 confirming lease cancellation and intention to evict — In October 2009 respondent launched eviction proceedings in High Court — High Court held that lease agreement had been properly cancelled and ordered appellant be evicted — Whether cancellation invalid on grounds that it violated constitutional rights to equality, dignity and housing — Whether clauses in lease agreement allowing for cancellation were against public policy — Whether lessee must be afforded opportunity to rectify breach both in respect of arrear rental and illegal activities.

**Held (7-4):** Appeal dismissed.

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## Insurance

*Ridgecrest NZ Limited v IAG New Zealand Limited*

**Supreme Court of New Zealand:** [\[2014\] NZSC 117](#).

**Judgment delivered:** 27 August 2014.

**Coram:** McGrath, William Young, Glazebrook, Blanchard and Tipping JJ.

**Catchwords:**

Insurance — Construction of policy — Appellant owned building insured with respondent — Under policy, appellant was insured for loss or damage as well as replacement cover — Policy also contained maximum liability limit for each "happening" — During policy period, building was affected by four earthquakes — As result of either third or fourth earthquake, building was damaged beyond repair — Respondent accepted liability to maximum limit in respect of final earthquake but maintained its liability in relation to earlier earthquakes was limited to cost of repairs actually undertaken — Whether appellant entitled to be paid for damage resulting from each happening up to limit in each case — Whether losses resulting from earlier

earthquakes should be treated as merged or subsumed in the loss caused by final earthquake — Whether appellant's claim precluded by indemnity principle under which insurance policies are construed to avoid insured recovering more than amount of loss.

**Held (5-0):** Appeal allowed.

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## Land Rights

*Florence v Government of the Republic of South Africa*

**Constitutional Court of South Africa:** [\[2014\] ZACC 22](#).

**Judgment delivered:** 26 August 2014.

**Coram:** Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

### **Catchwords:**

Land rights — Restitution — Remedial discretion of courts — Restitution of Land Rights Act 1994 (Act) — Appellant instituted claim relating to home from which her family was forced under apartheid legislation — Land Claims Court held that appellant met requirements for restitution and determined amount of compensation by escalating value of loss in 1970 to present-day using Consumer Price Index (CPI) — Land Claims Court found it lacked jurisdiction to decide on question of memorial plaque — Supreme Court of Appeal affirmed decision to use CPI but held Land Claims Court had wide remedial discretion under Act to order State to pay for plaque — Whether appropriate to use CPI to convert past loss of land into present-day monetary terms for calculation of financial compensation — Whether Land Claims Court's power to grant "alternative relief" under s 35 of Act extends to order relating to cost of plaque directed by Supreme Court of Appeal.

**Held (7-4):** Appeal dismissed. Cross-appeal upheld.

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*John Hanita Paki and others v The Attorney-General*

**Supreme Court of New Zealand:** [\[2014\] NZSC 118](#).

**Judgment delivered:** 29 August 2014.

**Coram:** Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ.

### **Catchwords:**

Land rights — Appellants are descendants of members of hapu who were awarded interests in land subdivided from Pouakani block by Native Land Court in 19th century — Appellants contended that land included river bed to mid-point through operation of presumption at common law — Crown

later acquired land — Appellants claimed that acquisition of riverbed was in breach of fiduciary and equitable duties owed by Crown to Maori vendors of riparian lands because it was not explained that their interest in riverbed would be lost — Whether Crown acquired title through application of presumption of riparian ownership to mid-point of river by reason of its acquisition of riparian lands — Whether mid-point presumption accorded with Pouakani custom.

**Held (5-0):** Appeal dismissed on first of the approved grounds of appeal. The Court did not find it necessary to determine the further issues raised by the appeal.

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## Practice and Procedure

*Bank of Montreal v Marcotte*

**Supreme Court of Canada:** [2014 SCC 55](#).

**Judgment delivered:** 19 September 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

### Catchwords:

Practice and procedure — Civil procedure — Class actions — Standing — Code of Civil Procedure, CQLR, c. C-25, art. 55 — Representative plaintiffs initiated class action against credit card issuers on grounds they failed to disclose conversion charges on credit card purchases made in foreign currencies — Representative plaintiffs did not have direct cause of action or legal relationship with each defendant — Whether plaintiffs had standing to sue all defendants.

Consumer law — Consumer protection — Contracts of credit — Contracts extending variable credit — Credit cards — Obligation to disclose costs in contract — Consumer Protection Act, CQLR, c P-40.1, ss 12, 68, 69, 70, 272 — Appropriate remedy for failure to disclose — Conversion charges imposed by financial institutions on cardholders for transactions in foreign currencies — Class actions — Whether conversion charges imposed are “credit charges” or “net capital” as defined by legislation — Whether Banks failed to disclose charges to cardholders — Whether reimbursement of conversion charges collected from consumer class members should be ordered.

Consumer law — Consumer protection — Recourses — Obligation to disclose costs in contract — Consumer Protection Act, CQLR, c P-40.1, s 272 — Appropriate remedy for failing to disclose — Whether class members are entitled to punitive damages.

Constitutional law — Division of powers — Banking — Inter-jurisdictional immunity — Federal paramountcy — Constitution Act, 1867, c 91(15); Bank Act, SC 1991, c. 46, ss 16, 988; Consumer Protection Act CQLR, c P-40.1, ss 12, 272 — Quebec’s consumer protection legislation regulated disclosure of conversion charges with respect to contracts of credit — Whether provincial legislation constitutionally inapplicable or inoperative in respect of bank-issued credit and charge cards by virtue of doctrine of inter-jurisdictional immunity or federal paramountcy.

**Held (7-0):** Appeals by Group A Banks dismissed. Appeal by representative plaintiffs allowed in part.

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## Water Law

See also [Land Rights](#): *John Hanita Paki and others v The Attorney-General*.

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