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Do Consumers Really Benefit from the Federal Paramountcy Doctrine? A Critique of Director of Criminal and Penal Prosecutions v Telus Communications Inc.

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Abstract

On June 11, 2020, the Quebec Superior Court released its judgment in DCPP v Telus, *confirming the validity, applicability and — for the most part — operability of many provisions of the Quebec* Consumer Protection Act *applying to wireless service contracts. However, the Court concluded that sections 214.7 and 214.8 of the* Consumer Protection Act, *which set a limit on the early cancellation fees that may be charged to consumers by wireless service providers, were in conflict with the CRTC* Wireless Code *for certain types of contracts and therefore inoperative. The analysis in this comment suggests that the Court's application of the doctrine of federal paramountcy is far from a victory for consumers. This comment begins with an overview of the federal and provincial regulations applying to wireless service providers, and of the framework of division of powers used to determine how these two different sets of rules interact with each other. It then provides a summary of the reasons given by the Court of Quebec and the Quebec Superior Court. Finally, it discusses the Court's analysis and conclusions, focusing on its application of the federal paramountcy doctrine and its impact on the protection afforded to consumers in their contractual relations with telecommunications carriers. It concludes by explaining how the Court's solution to resolving conflicts between the federal* Wireless Code *and the provincial* Consumer Protection Act *actually deprives consumers of specific procedural benefits and more generous remedies.*

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Introduction

The application of provincial consumer protection laws to federal undertakings such as telecommunications companies, banks, and air carriers has been the subject of a long-standing debate.[1] The question keeps being brought back before the courts largely because certain federal companies continue to attempt to circumvent provincial consumer protection rules, which are usually stricter than their federal counterparts. Although consumer protection is generally considered an area of provincial jurisdiction, the federal Parliament can also regulate the relationship between consumers and federal undertakings.[2] As a result, both levels of government can ostensibly enact laws that apply simultaneously to consumer contracts.

Over the past ten years, the federal government has significantly expanded the scope of its intervention to protect consumers in the telecommunications sector. In 2013, the Canadian Radio-television and Telecommunications Commission (CRTC) adopted the *Wireless Code*,[3] which was amended and expanded in 2017.[4] The *Wireless Code* creates obligations regarding the information that must be included in wireless service contracts and imposes limits on the fees that can be charged to consumers — including early cancellation fees. This increased federal intervention in the area of contract law has unsurprisingly caused some overlap with provincial private law, and more specifically with provincial laws designed to protect consumers.

Such interaction between federal regulation and provincial consumer protection law was recently the subject of a much-awaited judgment of the Quebec Superior Court in *Director of Criminal and Penal Prosecutions v Telus Communications Inc.*[5] This decision follows an appeal from two decisions of the Court of Quebec, in which two telecommunications carriers, Telus Communications Inc. and Bell Canada, were accused of violating several provi-

1 This issue was raised with respect to the application of consumer protection laws, mainly in the areas of banking (*Bank of Montreal v Marcotte*, 2014 SCC 55 [*Marcotte*]), telecommunications (*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*]; *Attorney General (Que) v Kellogg's Co of Canada et al*, [1978] 2 SCR 211, 83 DLR (3d) 314 [*Kellogg's*]), and aeronautics (*Unlu v Air Canada*, 2013 BCCA 112 [*Unlu*]).

2 Under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*], provinces may enact consumer protection laws relying on their power over property and civil rights (s 92(13)) and over matters of a merely local or private nature (s 92(16)). Parliament can legislate, *inter alia*, under its jurisdiction over banking (s 91(15)), interprovincial and international transportation (ss 92(10)A and 91(29)), telecommunications (ss 92(10)A and 91(29)) and aeronautics (the opening paragraph of s 91 grants Parliament the power to make laws in relation to "peace, order and good government"). See *Kellogg's*, *supra* note 1 at 220; *Irwin Toy*, *supra* note 1 at 953; *Marcotte*, *supra* note 1 at para 74; and Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (looseleaf updated December 13, 2018) at 21-32.

3 *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, June 3, 2013 [2013 *Code*]. Wireless service providers had to comply with the 2013 *Code* for any contract entered into, amended, renewed, or extended on or after December 2, 2013. All contracts entered into prior to this date were subject to the 2013 *Code* as of June 3, 2015. See the 2013 *Code* at para 369.

4 *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200, June 15, 2017 [*Wireless Code* or *Code*].

5 QCCS 1850 (Qc Sup Ct) [*DCPP v Telus*].

sions of the Quebec *Consumer Protection Act* (*CPA*)[6] with respect to the provision of wireless services.

Before the Court of Quebec, Telus and Bell successfully challenged the constitutionality of these provisions and were acquitted of all charges.[7] On appeal,[8] Corriveau J overturned most of the first judge's conclusions and confirmed the validity, applicability and — for the most part — operability of the impugned provisions of the *CPA*. However, she concluded that sections 214.7 and 214.8 of the *CPA*, which set a limit on the early cancellation fees that may be charged to consumers by wireless service providers, were in conflict with the *Wireless Code* for certain types of contracts and therefore inoperative.[9]

Corriveau J's decision can certainly be seen as a setback for telecommunications carriers who seek to avoid the application of provincial consumer protection regimes. However, the Court's solution to resolving conflicts between federal and provincial standards is far from a victory for consumers. Most worryingly, Corriveau J's conclusions render inoperative provincial standards which at first glance appear to be redundant, but which actually entail remedies and enforcement mechanisms that benefit consumers. The Superior Court's decision highlights the consequences that can result from the increasingly significant intervention of the federal Parliament in contractual relations between businesses and consumers — not only with respect to wireless services, but also in the areas of Internet services, aeronautics and banking.

The purpose of this comment is to identify the repercussions of the Superior Court's analysis and conclusions, both for the scope of the protection offered to consumers and for the provinces' ability to apply consumer protection legislation to federal undertakings. To this end, I will first provide an overview of the federal and provincial regulations applying to wireless service providers before explaining the framework of division of powers used to determine how these two different sets of rules interact with each other. I will then summarize the reasons given by the Court of Quebec and the Quebec Superior Court. Finally, I will discuss Corriveau J's analysis and conclusions, focusing on her application of the federal paramountcy doctrine and its impact on the protection afforded to consumers in their contractual relations with telecommunications carriers.

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6 *Consumer Protection Act*, CQLR, c P-40 [*CPA*].

7 *Director of Criminal and Penal Prosecutions v Telus Communications Inc*, 2019 QCCQ 2143 (Qc CQ (Crim & Pen Div)) [*DCPP v Telus (QCCQ)*], and *Director of Criminal and Penal Prosecutions v Bell Canada*, 2019 QCCQ 2144 (Qc CQ (Crim & Pen Div)) [*DCPP v Bell*].

8 According to s 272 of the *Code of Penal Procedure*, RLRQ, c C-25.1, decisions of the Court of Quebec in penal matters are subject to appeal to the Quebec Superior Court.

9 On September 2, 2020, both Telus and Bell filed an application for leave to appeal to the Quebec Court of Appeal, in which they are asking the Court to overturn the Superior Court's decision and to declare ss 11.2, 11.3, 13, 214.2, 214.7, and 214.8 of the *CPA* invalid, as well as inapplicable and inoperative with respect to them. The hearing for leave to appeal is scheduled on October 14, 2020.

I. Protecting Consumers in the Telecommunications Context: Legislative and Constitutional Background

Both the federal government and the provinces may, under their respective constitutional powers, enact legislation that protects consumers in their contractual relationship with telecommunications service providers. While the federal government has exclusive jurisdiction over the telecommunications industry,[10] the provinces have the power to enact consumer protection laws of general application which can, in principle, apply to federal undertakings.[11]

Acting within their jurisdiction, both the federal government and the Quebec legislator have, in recent years, developed rules governing wireless service contracts and providing rights to Quebec consumers. In this section, I will briefly describe the evolution of these rules and the analytical framework that determines whether such rules are constitutionally valid, applicable and operative.

A) Federal Regulation of the Telecommunications Industry by the CRTC

In 1976, the CRTC was given the authority to regulate the telecommunications industry across Canada.[12] Almost 20 years later, the federal Parliament enacted the *Telecommunications Act*,[13] which centralized the rules governing telecommunications activities and broadened the powers and obligations of the CRTC.[14] In particular, this new piece of legislation gave the CRTC the power to forebear from regulating the conditions of telecommunications services under certain circumstances. Indeed, section 34(1) of the *Telecommunications Act* states that the CRTC *must* refrain from exercising its regulatory power where it finds that the market is sufficiently competitive to protect users' interests.[15] In addition, the CRTC *may* exercise its forbearance power where it finds that doing so is consistent with the Canadian telecommunications policy, which declares *inter alia* that services must be affordable.[16] Acting pursuant to these provisions, the CRTC refrained from regulating most aspects of wireless service contracts until 2013.[17]

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10 See ss 92(10)(a) and 91(29) of the *Constitution Act, 1867*, *supra* note 2; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 42 [*Rogers*]; Hogg, *supra* note 2 at 22-38; Michael H Ryan, "Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority" (2011) 89:3 Can Bar Rev 695 at 699.

11 See ss 92(13) and 92(16) of the *Constitution Act, 1867*, *supra* note 2.

12 *Canadian Radio-television and Telecommunications Commission Act*, SC 1974-1976, c 49. For the evolution of the telecommunications industry in Canada, see John S Tyrhuts, "Monopoly Lost? The Legal and Regulatory Path to Canadian Telecommunications Competition, 1979-2002" (2001-2002) 33 Ottawa L Rev 385.

13 SC 1993, c 38 [*Telecommunications Act*].

14 See Tyrhuts, *supra* note 12 at 390-391.

15 See s 34(1) of the *Telecommunications Act, supra* note 13. A decision to forbear regulating services in a particular market indicates that the CRTC has found that market forces are sufficiently strong to give customers the benefits of competition in terms of price, quality and innovation. In other words, forbearance involves a "transfer of the regulator's policing function to the market itself." See *Morin v Bell Canada*, 2012 QCCS 4191 (Qc Sup Ct) at paras 32-34 [*Morin*]; Bohdan S Romaniuk and Hudson N Janisch, "Competition in Telecommunications: Who Polices the Transition?" (1986) 18 Ottawa L Rev 561 at 652.

16 See s 7(b) of the *Telecommunications Act, supra* note 13. See also *Morin*, *supra* note 15 at para 32.

17 See the 2013 *Code*, *supra* note 3 at paras 23-24.

However, the CRTC found in 2012 that market forces alone could not "be relied upon to ensure that consumers have the information they need to participate effectively in the competitive mobile wireless market."[18] It thus concluded that it was necessary and consistent with the federal telecommunications policy to establish a mandatory code to address the clarity and content of mobile wireless service contracts.[19] This decision led to the adoption of the *Wireless Code* in 2013, which imposed numerous new obligations on wireless services providers. The *Code* was amended in 2017 to clarify previous rules and provide new ones in order to keep up with the evolution of the wireless marketplace. The *Wireless Code* now lists rights and obligations with respect to, *inter alia*, information that must be provided in a wireless service contract, as well as unilateral changes to the contract's terms and conditions. It also imposes limits on early cancellation fees that may be charged to consumers who had received a discount on their cell phone when entering into their contract.[20]

These new rules, which supplement and — in some respects — duplicate already existing consumer protection measures in Quebec, were the source of the conflict between the *Wireless Code* and the *CPA* that was alleged by Telus and Bell.

B) Quebec Consumer Protection Legislation

In Quebec, consumer protection is regulated under the *CPA* by the Office de la protection du consommateur (OPC). However, up until 2006, the Quebec *CPA* did not apply to wireless service contracts. In fact, prior to 1997, telecommunications companies operating in Quebec were regulated by the Régie des services publics[21] and then, as of 1988, by the Régie des télécommunications.[22] At that time, to avoid duplication, telecommunications contracts were specifically excluded from the *CPA* and from the supervisory authority of the OPC.[23]

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18 *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, Telecom Decision CRTC 2012-556, October 11, 2012, at paras 22-28.

19 *Ibid*.

20 While the CRTC also considered banning contracts of more than 24 months, it determined that the fundamental barrier to consumers taking advantage of competitive offers every two years was not the length of the contract, but rather the high early cancellation fees that many consumers must pay if they wish to upgrade devices or change their wireless service providers. The CRTC therefore decided not to limit the length of wireless contracts and to instead only limit to 24 the maximum number of months over which early cancellation fees could be charged. As a result, consumers can enter into a contract exceeding 24 months, but they can cancel it at no cost after two years. See the 2013 *Code*, *supra* note 3 at paras 215-221, 238. However, in August 2019, the CRTC asked all wireless service providers to stop offering device financing plans on terms longer than 24 months until the CRTC had completed a full review of this practice. The CRTC's decision on that question has not yet been released. See CRTC, News Release, "CRTC Will Examine Recent 36 Month Wireless Device Financing Plans" (2019), online: <https://www.canada.ca/en/radio-television-telecommunications/news/2019/08/crtc-will-examine-recent-36-month-wireless-device-financing-plans.html> (accessed August 18, 2020).

21 *Act respecting the Régie des services publics*, RSQ, c R-8.

22 *Act respecting the Régie des télécommunications*, RSQ, c R-8.01, s 71.

23 Quebec adopted two successive consumer protection statutes in 1971 (*Consumer Protection Act*, SQ 1971, c 74) and 1978 (*Consumer Protection Act*, SQ 1978, c 9). Section 5(c) of the 1978 Act stipulated that "contracts of public services made under an authorization of the Régie des services public" were exempt from the application of the title of the *CPA* on contracts regarding goods and services and the title on trust accounts.

In 1989,[24] and again in 1994,[25] the Supreme Court of Canada ruled that telephone companies were within exclusive federal jurisdiction and could therefore not be regulated by provincial entities. Following these two decisions, the Quebec legislator abolished the Régie des télécommunications[26] and, for almost a decade, telecommunications contracts were not subject to any provincial consumer protection legislation.

In response to the growing phenomenon of online shopping and distance contracts, Quebec decided in 2006 to repeal the initial exclusion relating to telecommunications contracts in the *CPA*.[27] Three years later, the Quebec legislator made several amendments to the *CPA*, some of which applied to all consumer contracts and some of which applied only to contracts "involving sequential performance for a service provided at a distance," which included wireless service contracts.[28]

Shortly after these amendments came into force, the main telecommunications undertakings operating in Quebec were investigated by the OPC to determine whether their wireless service contracts were compliant with these new measures.[29] Following this investigation, the Director of Criminal and Penal Prosecutions (DCPP) filed charges against both Bell and Telus for violating many of the new provisions of the *CPA*.[30] The charges were based on the *CPA*'s provisions applying to the unilateral modification (section 11.2) and cancellation (section 11.3) of a consumer contract, and to the payment of costs, penalties or damages in the event of non-performance of the consumer's contractual obligations (section 13). They were also based on the *CPA*'s new rules with respect to the content of contracts involving sequential performance for a service provided at a distance (section 214.2), and to the maximum cancellation fees applicable to such contracts, whether fixed-term (section 214.7) or indeterminate-term (section 214.8). Bell and Telus challenged the validity, applicability and operability of these new provisions, based on the division of powers in the Constitution, to which I will now turn.

C) Relevant Division of Powers Framework

Three main constitutional doctrines apply to determine whether one or more provisions of a provincial statute are valid, applicable and operative: (1) the pith and substance doctrine, (2) the interjurisdictional immunity doctrine, and (3) the federal paramountcy doctrine.

The first step of a division of powers analysis is to determine whether the impugned statute or provision is valid (or *intra vires*). This step is achieved first by characterizing the "pith and substance" or "dominant purpose" of the statute, and then by establishing which level of government has jurisdiction to enact laws in relation to the matter.[31] Consequently, if the pith

24 *Alberta Government Telephones v (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225, 61 DLR (4th) 193.

25 *Téléphone Guèvremont Inc v Québec (Régie des télécommunications)*, [1994] 1 SCR 878, 112 DLR (4th) 127.

26 *An Act to abolish certain bodies*, SQ 1997, c 83, s 25.

27 *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, SQ 2006, c 56. See *DPCC v Telus (QCCQ)*, *supra* note 7 at para 60.

28 *An Act to Amend the Consumer Protection Act and Other Legislative Provisions*, SQ 2009, c 51.

29 See *DPCC v Telus (QCCQ)*, *supra* note 7 at para 81.

30 See *ibid* at para 82.

31 See *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 28-32; *Rogers*, *supra* note 10 at para 34; *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 25-27 [*Canadian Western Bank*].

and substance of a provincial statute does not relate to a matter that falls within provincial jurisdiction, the courts will declare the statute or the relevant provisions thereof *ultra vires*.[32]

The second step is to determine whether the impugned statute is applicable under the doctrine of interjurisdictional immunity. According to this doctrine, the core of exclusive heads of power can be protected from the effects of a law validly enacted by the other level of government.[33] Two conditions must be met for this doctrine to apply to a provincial statute.[34] First, the impugned statute must trench on the "core" of an exclusive federal head of power or on the "vital or essential part" of a federal undertaking.[35] Second, the effect of the provincial statute must be to "impair" the exercise of the protected federal power.[36] If both conditions are met, the statute will remain valid but will be "read down" so as not to apply to the matter or undertaking falling under the core of the federal power.[37]

At the last step, a provincial statute — although valid and applicable — may still be declared inoperative pursuant to the doctrine of federal paramountcy. Under this doctrine, federal law prevails in cases of conflict between federal and provincial legislation.[38] A conflict may arise in one of two situations, which form the two branches of the federal paramountcy test. First, there can be an "operational conflict" when it is impossible to comply with both laws, as they are plainly contradictory: one law says "yes" while the other says "no."[39] Second, even when there is no operational conflict, there can be a "frustration of purpose" when the effects of the provincial law frustrate the objective of the federal legislation.[40]

Consequently, to determine whether the impugned provisions of the *CPA* were valid, applicable and operative, the Court of Quebec and the Superior Court had to proceed in three steps. First, they had to establish whether the pith and substance of the *CPA*'s provisions fell within provincial jurisdiction. Then, they had to decide whether these provisions impaired the core of the federal jurisdiction over telecommunications. Finally, they had to determine whether the impugned provisions came into conflict with the federal rules governing wireless service contracts or frustrated the federal purpose underlying the *Telecommunications Act* and the *Wireless Code*.

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32 See *Canadian Western Bank*, *supra* note 31 at para 26.

33 See *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 90 [*Wärtsilä*].

34 While the doctrine can, in principle, be applied to challenge the applicability of provincial *and* federal statutes, it was only successfully invoked to protect federal heads of power and federally regulated undertakings from provincial encroachment. See *Canadian Western Bank*, *supra* note 31 at para 35.

35 See *Canadian Western Bank*, *supra* note 31 at para 48.

36 See *Wärtsilä*, *supra* note 33 at para 92; *Rogers*, *supra* note 10 at para 59; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 27 [*COPA*].

37 *Wärtsilä*, *supra* note 33 at para 90; *Canadian Western Bank*, *supra* note 31 at para 35; Hogg, *supra* note 2 at 15-28.

38 *Wärtsilä*, *supra* note 33 at para 99; *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 16 [*Moloney*]; *Canadian Western Bank*, *supra* note 31 at para 69.

39 *Moloney*, *supra* note 38 at paras 18-19; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para 11 [*Rothman's*]; *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1, at 119.

40 *Moloney*, *supra* note 38 at paras 25-26; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at paras 20-23 [*Lemare Lake*]; *COPA*, *supra* note 36 at para 66; *Canadian Western Bank*, *supra* note 31 at para 73.

II. Summary of the Decisions

A) Court of Quebec

On April 12, 2019, Poulin J concluded that sections 11.2, 11.3, 13, 214.2, and 214.7 of the *CPA* were inapplicable and inoperative with regard to Telus. This decision was issued concurrently with the companion case *DCPP v Bell*, in which Bell was accused of having violated section 214.8 of the *CPA* when charging cancellation fees to one of its customers. For the same reasons as outlined in *DCPP v Telus*, Poulin J found that section 214.8 of the *CPA* was inapplicable and inoperative with respect to Bell.[41]

Poulin J first established that Telus is a telecommunications carrier subject to the federal *Telecommunications Act*, and thus to the decisions and policies of the CRTC.[42] He went on to state that Part III of the Act gives the CRTC complete jurisdiction over the establishment of conditions for the marketing of communications services.[43] He then looked more specifically at the notion of "forbearance" in section 34 of the Act. Poulin J stressed that, by conferring a forbearance power on the CRTC, Parliament voluntarily and explicitly limited the CRTC's power to regulate the conditions of telecommunications services to situations where the exercise of the power was necessary.[44] After explaining the context in which the *CPA* was amended in 2009,[45] Poulin J outlined the principles guiding a division of powers analysis,[46] which he then applied to the impugned provisions.

In his application of these principles, Poulin J firstly refused to conduct a pith and substance analysis and to rule on the validity of the provisions at issue. He concluded that the Court of Quebec had no jurisdiction to make a declaration of invalidity, and that such a declaration was not necessary in any event, given his findings on the application of the two other constitutional doctrines.[47]

Applying the interjurisdictional immunity doctrine, Poulin J found that the terms and conditions of telecommunications services were a crucial aspect of the exclusive federal power over telecommunications and that the effects of the *CPA* on the exercise of this jurisdiction were significant enough to constitute an "impairment."[48] He therefore concluded that all the impugned provisions were inapplicable to Telus and Bell.[49]

Finally, Poulin J applied the doctrine of federal paramountcy. In his view, the impugned provisions ended up regulating the conditions for the commercialization of telecommunications services without any regard for Parliament's explicit intention — reflected in section 34 of the *Telecommunications Act* — to limit regulation to cases where the CRTC deems it necessary.[50] Accordingly, Poulin J held that the impugned provisions frustrated the federal Parlia-

41 *DCPP v Bell*, *supra* note 7 at para 6.
42 *DCPP v Telus (QCCQ)*, *supra* note 7 at paras 13-17.
43 *Ibid* at para 23.
44 *Ibid* at paras 28-37.
45 *Ibid* at paras 42-80.
46 *Ibid* at paras 97-123.
47 *Ibid* at paras 135-138.
48 *Ibid* at paras 140-146.
49 *Ibid* at para 148. See also *DCPP v Bell*, *supra* note 7 at para 6.
50 *Ibid* at paras 153-154.

ment's purpose and were therefore inoperative.[51] Given the inapplicability and inoperability of the provisions under which Telus and Bell were charged, both were acquitted on all counts.[52]

B) Quebec Superior Court

In a judgment rendered on June 11, 2020, Corriveau J allowed the appeal in part and overturned most of the conclusions reached by Poulin J. To begin with, according to Corriveau J, the first judge had erred in holding that he did not have jurisdiction to rule on the validity of the impugned provisions, and should have concluded that these provisions were *intra vires*.[53] Indeed, she found that the purpose and effects of the provisions relate mainly to the framework of the legal relationship between the consumer and the seller in the context of new technologies such as mobile and residential telephone contracts, cable television, Internet access, remote monitoring and satellite radio.[54] She concluded that the pith and substance of the provisions was to enact contractual standards that were "more protective" of the consumer — an objective that, according to her, was within the province's powers to legislate on matters of intra-provincial trade (section 92(10) of the *Constitution Act, 1867*), property and civil rights (section 92(13)) and matters of a merely local nature (section 92(16)).[55]

Turning to the application of the doctrine of interjurisdictional immunity, Corriveau J agreed with Poulin J that the provisions at issue concerned the core of the federal jurisdiction over telecommunications.[56] However, she found that the provisions of the *CPA* did not "impair" the activities of telecommunications carriers in a way that would call for the application of the doctrine of interjurisdictional immunity.[57] She therefore concluded that the impugned provisions were applicable to Bell and Telus.[58]

Lastly, Corriveau J applied the doctrine of federal paramountcy, focusing her analysis on two different periods: the period preceding the adoption of the *Wireless Code* in 2013, and the period following its adoption.[59] With regard to the first period, Corriveau J noted that the CRTC had traditionally chosen not to regulate the wireless communications industry, deeming that there was sufficient competition to preserve the interests of wireless users. In this regard, it had acted in accordance with its forbearance power under section 34 of the Act.[60] Such lack of intervention had led Poulin J and the respondents to assert that compliance with provincial law would amount to a failure to respect the CRTC's choice not to regulate the telecommunications industry.[61] But Corriveau J rejected this argument, maintaining that there can be no operational conflict with provincial legislation where no federal regulation exists.[62]

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51 *Ibid* at para 156. See also *DCPP v Bell*, *supra* note 7 at para 6.
52 *DCPP v Telus (QCCQ)*, *supra* note 7 at paras 157-158; *DCPP v Bell*, *supra* note 7 at paras 6-7.
53 *DCPP v Telus*, *supra* note 5 at paras 29-34.
54 *Ibid* at para 67.
55 *Ibid* at para 69.
56 *Ibid* at paras 89-101.
57 *Ibid* at paras 110-124.
58 *Ibid* at para 125.
59 *Ibid* at para 135. Corriveau J explained that she had to proceed this way because the alleged violations of the *CPA* by Telus and Bell had occurred before the adoption of the *Wireless Code* by the CRTC in 2013.
60 *DCPP v Telus*, *supra* note 5 at para 144.
61 *Ibid* at paras 144-145.
62 *Ibid* at paras 146-148.

She also recognized that the provisions of the provincial *CPA* could not interfere with the underlying objective of the *Telecommunications Act*. In her opinion, contrary to what Poulin J had found, the regime provided for in the Act could not be regarded as a "complete code" excluding the application of any other provisions, since Parliament had not clearly indicated its intention to rule out any possibility of provincial intervention in the field of telecommunications.[63] Corriveau J therefore concluded that, in the period prior to the adoption of the *Wireless Code*, there existed no conflict attracting the application of the doctrine of federal paramountcy.[64]

Next, Corriveau J turned to the period following the adoption of the *Code*. She remarked that the federal standards and those set out in sections 11.2, 11.3 and 214.2 of the *CPA* were in fact identical, adding that the overlap between them was not sufficient to engage the federal paramountcy doctrine.[65] Furthermore, she added that section 13 of the *CPA* provided a more restrictive obligation than that set out in the *Wireless Code* and was thus compatible with the latter.[66] There was therefore no operational conflict between the *Code* and sections 11.2, 11.3, 13, and 214.2 of the *CPA*.

However, Corriveau J discerned a conflict between the calculation methods for cancellation fees established in the *Wireless Code* and in the *CPA*, and the *Regulation respecting the application of the Consumer Protection Act* (*CPA Regulation*), when an economic benefit or a rebate had been granted to the consumer at the conclusion of the contract.[67] She pointed out that these methods differed with regard to the duration of the contract chosen for the purposes of the calculation.[68] She noted that, according to section 214.7 of the *CPA*, the cancellation fee for fixed-term contracts must be calculated on a 36-month basis, whereas such fees are calculated on a 24-month basis under the *Wireless Code*.[69] As for indeterminate-term contracts, section 214.8 of the *CPA* provides a calculation based on 48 months, whereas the calculation method for the *Wireless Code* is based on 24 months.[70] Corriveau J observed that if the term of the contract is 24 months or less, the result of both calculations remains the same. According to her, a conflict arises only when the duration of the contract is longer than 24 months.[71]

In such contracts, the cancellation fee to be paid by the consumer is lower under the *Wireless Code* calculation than it would be under the *CPA* and the *CPA Regulation*. The result, in Corriveau J's view, is that the *Code* enacts rules that are "more protective" of the consumer.[72]

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63 *Ibid* at paras 152-154.

64 *Ibid* at para 155.

65 *Ibid* at para 159.

66 *Ibid* at para 160.

67 *Regulation respecting the application of the Consumer Protection Act*, c P-40 r 3 [*CPA Regulation*].

68 *DCPP v Telus*, *supra* note 5 at para 162.

69 *Ibid*. However, this interpretation of s 214.7 is not accurate. Although Corriveau J does not mention it, she seems to be referring here to the example of a 36-month contract given in Addendum #3 of the decision. In fact, the maximum cancellation fees for fixed-term contracts are determined by the calculation method provided for in s 79.10 of the *CPA Regulation*, which is based on the total number of months of the contract. This number can be — *but is not always* — 36 months. It could be 12 or 24 months. It is therefore not correct to say, as Corriveau J suggests, that the cancellation fees for fixed-term contracts are calculated on a 36-month basis under the *CPA*. For the detail of the calculation, see *infra* note 83.

70 *DCPP v Telus*, note 5 at para 162.

71 *Ibid* at paras 163-164.

72 *Ibid* at para 164.

This difference was enough for her to conclude that there was an operational conflict between the *Code* and sections 214.7 and 214.8 of the *CPA* for contracts exceeding 24 months in duration.[73]

Turning to the second branch of the paramountcy doctrine, Corriveau J stated that sections 11.2, 11.3, 13, and 214.2 of the *CPA* shared the same objective as the provisions of the *Wireless Code*, namely consumer protection. There could thus be no incompatibility between these provisions of the *CPA* and the purpose of the *Code*.[74] As for sections 214.7 and 214.8, Corriveau J noted that the presence of an operational conflict necessarily implied a conflict of purpose.[75] She reiterated that the *CPA*'s calculation method yielded a result that was "less protective" of consumer rights. In her view, this frustrated the purpose of the *Wireless Code*.[76]

As a result of the conflict between the *Wireless Code* and the *CPA*, Corriveau J declared that sections 214.7 and 214.8 of the *CPA* were inoperative for fixed-term and indeterminate-term contracts exceeding 24 months when an economic benefit or a rebate had been granted to the consumer.[77] However, Corriveau J also pointed out that, since the *Code* had not yet been adopted at the time of the allegations made against Bell and Telus, the doctrine of federal paramountcy could not be invoked against the impugned provisions in this case. The declaration of inoperability would thus only be valid for the future.[78] Having said that, Corriveau J returned both files to a judge of the Court of Quebec for a hearing on the charges against Bell and Telus under the *CPA*.[79]

III. Telecommunications, Consumer Protection and the Paramountcy Doctrine

Corriveau J's reasoning is open to criticism in a number of respects, but I will focus here on the most concerning aspect, namely her conclusions as to the inoperability of sections 214.7 and 214.8 of the *CPA*.

In my analysis of this aspect of Corriveau J's reasoning, I will begin by explaining why there was no conflict between the *CPA* and the *Wireless Code* in this case. I will then turn to Corriveau J's problematic reasoning with respect to the inoperability of section 214.8 of the *CPA*, and with respect to indeterminate-term contracts having a "term" exceeding 24 months. Finally, I will address the consequences of Corriveau J's conclusions for the remedies available to consumers against wireless service providers.

A) Absence of Conflict Between the *CPA* and the *Wireless Code*

The main problem with Corriveau J's reasoning with respect to sections 214.7 and 214.8 is that there is, in fact, no operational conflict or conflict of purpose between the *Wireless Code* and

73 *Ibid*.
74 *Ibid* at para 166.
75 *Ibid* at para 167.
76 *Ibid* at para 168.
77 *Ibid* at para 173.
78 *Ibid* at para 174.
79 *Ibid* at para 181.

the *CPA*. To explain why, the calculations provided for in the *Wireless Code* and the *CPA* must be explained in greater detail.

Clause G (2) of the *Wireless Code* contains precise rules for the calculation of the fees that may be imposed on consumers in the event of cancellation of a wireless service contract when a subsidized device is provided as part of the contract (as would be the case when a telephone is "purchased" as part of a multi-month wireless service contract).[80] For both fixed-term and indeterminate-term contracts, the early cancellation fee "must be reduced by an equal amount each month" and must amount to $0 after a maximum of 24 months.[81] This calculation method is the only one that can be used by wireless service providers.[82]

The rule provided for in sections 214.7 and 214.8 of the *CPA*, as well as sections 79.10 and 79.11 of the *CPA Regulation*, sets *maximum* cancellation fees for fixed-term and indeterminate-term contracts where the consumer has received a discount on a product essential to the use of the service, such as a cell phone.[83] Indeed, sections 214.7 and 214.8 stipulate that "the

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80 Section G(2) of the *Wireless Code* provides the following:

(i) When a subsidized device is provided as part of the contract,

a) for *fixed-term contracts*: The early cancellation fee must not exceed the value of the device subsidy.

i. The early cancellation fee must be reduced by an equal amount each month, for the lesser of 24 months or the total number of months in the contract term, such that the early cancellation fee is reduced to $0 by the end of the period.

ii. For tab contracts, the early cancellation fee must be reduced by either a minimum amount or percentage amount each month in the contract term, for the lesser of 24 months or the total number of months in the contract term, such that the early cancellation fee is reduced to $0 by no later than the end of the period.

b) for *indeterminate contracts*: The early cancellation fee must not exceed the value of the device subsidy.

i. The early cancellation fee must be reduced by an equal amount each month, over a maximum of 24 months, such that the early cancellation fee is reduced to $0 by the end of the period.

ii. For tab contracts, the early cancellation fee must be reduced by either a minimum amount or percentage amount each month, over a maximum of 24 months such that the early cancellation fee is reduced to $0 by no later than the end of the period.

(ii) When calculating the early cancellation fee,

a. the value of the device subsidy is the retail price of the device minus the amount that the customer paid for the device when the contract was agreed to; and

b. the retail price of the device is the lesser of the manufacturer's suggested retail price or the price set for the device when it is purchased from the service provider without a contract.

81 See ss G(2)(i)a) and G(2)(i)b) of the *Wireless Code*, *supra* note 4.

82 The CRTC wrote in the 2013 *Code* that "[if] a customer cancels a contract before the end of the commitment period, a [wireless service provider] must not charge the customer any fee or penalty other than the early cancellation fee, which *must* be calculated in the manner set out below" (emphasis added). See the 2013 *Code*, *supra* note 3 at para 234.

83 Section 214.7 of the *CPA* and section 79.10 of the *CPA Regulation* detail the method of calculation for cancellation of *fixed-term* contracts:

214.7. If the consumer unilaterally cancels a fixed-term contract in consideration of which one or more economic inducements were given to him by the merchant, the cancellation indemnity may not exceed the value of the economic inducements determined by regulation that were given to him. The indemnity decreases as prescribed by regulation.

When no economic inducement determined by regulation was given to the consumer, the maximum indemnity the merchant may charge is the lesser of $50 and an amount representing not more than 10% of the price of the services provided for in the contract that were not supplied.

cancellation indemnity *may not exceed*" (emphasis added) the amount calculated according to the method provided in the *CPA* and *CPA Regulation*.[84]

The distinction between the two calculation methods can best be demonstrated by an example. Consider the hypothetical case of a consumer who has entered into an indeterminate-term contract and wants to cancel it after 12 months. At the time the contract was agreed to, the consumer acquired a cell phone worth $600 for $100 and thus benefited from a rebate or "subsidy" of $500.

In this example, according to the *Wireless Code*, the wireless service provider can charge an early cancellation fee of $250. This corresponds to the amount of the rebate ($500), minus this amount ($500) multiplied by the number of months elapsed in the contract (12 months), then divided by 24 months.[85] By contrast, in the same scenario, section 214.8 of the *CPA* and section 79.11 of the *CPA Regulation* tell us that the cancellation fee cannot exceed $375. This maximum is determined by a calculation similar to that provided for by the *Wireless Code*, but

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> **79.10.** For the purposes of section 214.7 of the Act, the indemnity that may be required if a consumer unilaterally cancels a fixed-term contract may not exceed the value of the economic inducement less the amount obtained by multiplying the economic inducement by a fraction representing the number of contract months completely elapsed as compared to the total number of contract months. The month started at the time of cancellation is deemed to be a month completely elapsed.
>
> The economic inducement used to calculate the cancellation indemnity is the amount of the rebate granted to the consumer on the sale price charged for goods purchased on the making of the contract that are needed to use the service for which the contract was made.

Section 214.8 of the *CPA* and section 79.11 of the *CPA Regulation* set out the method of calculation for cancellation of *indeterminate-term* contracts:

> **214.8.** If the consumer unilaterally cancels an indeterminate-term contract, no cancellation indemnity may be claimed from the consumer unless the merchant gave the consumer a rebate on all or part of the sales price of the goods purchased in consideration of the service contract and entitlement to the rebate is acquired progressively according to the cost of the services used or the time elapsed. In such a case, the cancellation indemnity may not exceed the amount of the unpaid balance of the sales price of the goods at the time the contract was made. The indemnity decreases as prescribed by regulation.
>
> **79.11.** For the purposes of section 214.8 of the Act, the indemnity that may be required if a consumer unilaterally cancels an indeterminate-term contract may not exceed the unpaid balance of the sales price of the goods at the time the contract was made less the amount obtained by multiplying 1/48 of that balance by the number of contract months entirely elapsed. The month started at the time of cancellation is deemed to be a month completely elapsed.

84 The OPC expressly states that the *CPA* and its regulation set "*maximum* cancellation fees." See the information provided by the OPC regarding cancellation of cellular phone services for fixed-term and indeterminate-term contracts: OPC, "Cancellation fees for fixed-length contracts — Cancellation fees: contracts with a phone discount" (updated November 24, 2017), online: <https://www.opc.gouv.qc.ca/en/consumer/good-service/telephone-television-internet/cellular/ cancellation/fees/discount/> (accessed August 18, 2020); OPC, "Cancellation fees for open-ended contracts" (updated November 24, 2017), online: <https://www.opc.gouv.qc.ca/en/consumer/good-service/telephone-television-internet/cellular/cancellation/open-ended/> (accessed August 18, 2020).

85 This corresponds to the following calculation: Amount of the device subsidy — [1/24 x Amount of the device subsidy x Number of months elapsed on the contract]. In the example, it corresponds to: $500 — (1/24 x $500 x 12). See the Commission for Complaints for Telecom-television Services (CCTS), "CCTS Annotated Guide to the Wireless Code" (last updated September 22, 2016) at 41, online: <http://www.ccts-cprst.ca/wp-content/uploads/2017/06/Annotated-Guide-to-the-Wireless-Code.pdf> (accessed August 18, 2020).

is based on a denominator corresponding to 48 months instead of 24 months.[86] Both denominators (24 months in the *Code* and 48 months in the *CPA*) are, in fact, "fictitious" periods chosen by the CRTC and the Quebec legislator: they do not — and could not — correspond to the term of the contract, since the calculation methods provided for in section 214.8 of the *CPA* and section 79.11 of the *CPA Regulation* apply to *indeterminate-term* contracts which, by definition, do not have a predetermined term.

This hypothetical scenario shows that the maximum early cancellation fee that can be charged to consumers under the *CPA* ($375) is higher than the fee that must be charged according to the *Wireless Code* ($250). Since — as Corriveau J pointed out[87] — the calculation provided for in the *Code* is "more advantageous" to the consumer, it will inevitably be below the maximum amount prescribed by the *CPA* and the *CPA Regulation*. Therefore, it is entirely possible for wireless service providers to comply with both requirements: all they need to do is calculate their cancellation fees in accordance with the *Wireless Code*. To use the example given above, if a wireless service provider applies the calculation method given in the *Code* and charges a cancellation fee of $250, it would necessarily comply with the maximum amount of $375 set by the *CPA* and the *CPA Regulation*.

The general rule, accepted by Corriveau J,[88] is that no conflict arises under the doctrine of federal paramountcy when it is possible to comply with both statutes by respecting the more restrictive of the two.[89] This rule results from the "modern" and "flexible" approach to federalism, which aims to "facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action."[90] According to this approach, also sometimes referred to as "cooperative federalism,"[91] courts should accommodate overlapping jurisdiction and favour harmonious interpretations of federal and provincial legislation over interpretations that result in incompatibility.[92]

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86 This corresponds to the following calculation: Amount of the unpaid portion of the sales price of the telephone when the contract was signed — [1/48 x Amount of the unpaid portion of the sales price of the telephone when the contract was signed x Number of months elapsed on the contract]. In the example, it corresponds to: $500 — (1/48 x $500 x 12). See the explanation of the calculation by the OPC, *supra* note 84.

87 *DCPP v Telus*, *supra* note 5 at para 164.

88 *Ibid* at para 141.

89 See *Lemare Lake*, *supra* note 40 at para 25; *Moloney*, *supra* note 38 at para 26; *COPA*, *supra* note 36 at para 66; *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at para 20 [*HRSD*]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 35.

90 See *Wärtsilä*, *supra* note 33 at paras 4, 86; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18; *Lemare Lake*, *supra* note 40 at para 23; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 17 [*Quebec v Canada*].

91 See *Reference re Genetic Non-Discrimination Act*, *supra* note 31 at para 22; *Reference re Pan-Canadian Securities Regulation*, *supra* note 90 at paras 17-19; *Quebec v Canada*, *supra* note 90 at para 17; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 63; *COPA*, *supra* note 36 at paras 44-45. See also Noura Karazivan, "Cooperative Federalism in Canada and Quebec's Changing Attitudes" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018) 136 at 144-50; Jean-François Gaudreault-Desbiens and Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism" in Peter C Oliver, *et al*, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 39 at 401-02.

92 *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 66; *Moloney*, *supra* note 38 at para 27; *Lemare Lake*, *supra* note 40 at paras 20-22; *Canadian Western Bank*, *supra* note 31 at para 75.

Courts should therefore avoid concluding that there is a conflict when it is possible to comply with both statutes by respecting the stricter one. In fact, in such a case, no conflict arises because respecting the more rigorous standard necessarily results in complying with the less rigorous one.[93] The lower standard is simply redundant rather than inoperative.

However, different standards can lead to a conflict of purposes. If the lower standard is provided for by federal legislation, the application of a more restrictive provincial law could frustrate the federal purpose. This might be the case where the federal legislation provides for a positive entitlement or a freestanding right.[94] In contrast, if the lower standard is imposed by provincial legislation, as in the case of sections 214.7 and 214.8 of the *CPA*, its application will always allow the stricter federal standard to be applied as intended. As a result, lower provincial standards can hardly frustrate the federal intent. This explains why most — if not all — decisions in which the federal paramountcy doctrine was found to apply involved *stricter* provincial standards, and not the other way around. Indeed, this doctrine — which only benefits the federal level of government — is always raised to circumvent provincial legislation; it is of no help to a person or company who wants to get around stricter federal rules.

Based on these principles, Corriveau J could and should have concluded that there existed neither an operational conflict nor a frustration of purpose between the provisions of the *CPA* and the *Wireless Code*, given that the federal rules were stricter than the provincial ones. Both could have continued to apply simultaneously.

B) Inoperability as a Whole of section 248 of the *CPA*

Corriveau J declared that sections 214.7 and 214.8 of the *CPA* were inoperative for contracts exceeding 24 months since, according to her, the calculations of the *CPA* and the *Wireless Code* were inconsistent only in relation to such contracts. For contracts of a shorter period,

93 This was the conclusion reached in *Irwin Toy*, where the Supreme Court had to decide whether ss 248 and 249 of the *CPA* were inoperative because of their concurrent application with the *Telecommunications Act*, and more specifically with the *Broadcast Code for Advertising to Children*. Writing for the majority, Dickson CJ, Lamer and Wilson JJ held that there was no conflict because broadcasters and advertisers could comply with both provincial and federal legislation by complying with the stricter provincial standard: "Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it, no conflict between the standards ever arises. It is only if advertisers seek to comply only with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is no occasion to invoke the doctrine of paramountcy." See *Irwin Toy*, *supra* note 1 at 964. See also *Rothmans*, *supra* note 39 at para 22.

94 See, for example, *HRSD*, *supra* note 89. In this decision, the Court determined that Parliament had, in enacting s 126(4) of the *Employment Insurance Act*, SC 1996, c 23 [*EIA*], chosen to give the Canada Employment Insurance Commission a "freestanding positive right" to require a third party to pay the Receiver General any amount that third party might owe a person liable to make a payment under the *EIA*, on account of that person's liability. According to the Court, the purpose of this measure was to ensure the integrity of the employment insurance system by making it possible to recover amounts owed in a simple and summary fashion, without regard to the provincial rules respecting exemption from seizure. In the Court's view, this federal purpose would be frustrated if the Canada Employment Insurance Commission were to comply with the exemption from seizure provided for in s 144 of the Quebec *Act respecting industrial accidents and occupational diseases*, RSQ, c A-3.001, s 144. The latter provision was therefore declared inoperative under the second branch of the federal paramountcy doctrine.

she found that there was no conflict since both calculations would yield the same result.[95] However, Corriveau J's reasoning is only effective for *fixed-term* contracts covered by section 214.7; for *indeterminate-term* contracts, it does not hold water. More importantly, her conclusion implies that section 214.8 of the *CPA* is inoperative as a whole.

To begin with, indeterminate-term contracts, as their name indicates, do not have a fixed term. A 36-month indeterminate-term contract, given as an example by Corriveau J,[96] cannot possibly exist, nor can there be indeterminate-term contracts with a "term" exceeding 24 months.[97] In such a context, it is difficult to understand how Corriveau J's conclusion that section 214.8 of the *CPA* is inoperative for indeterminate-term contracts exceeding 24 months can be applied in practice.

In fact, the outcome of Corriveau J's conclusions is that section 214.8 of the *CPA* is inoperative for *any* indeterminate-term contract cancelled during the 48 months following the conclusion of the contract. Indeed, while Corriveau J held that section 214.8 of the *CPA* must be declared inoperative for contracts exceeding 24 months,[98] she declared in the conclusions of the judgment that "[translation] section 214.8 of the *CPA* is unenforceable against Bell … where the cancellation fee, outlined in section 79.11 of the Regulations, exceeds the amount given in Clause G 2(i)b)i. of the [*Wireless Code*]."[99] The problem is that the maximum fee that can be charged under section 214. 8 of *CPA* will *always* exceed, for the first 48 months of the contract, the cancellation fee that wireless service providers can charge under the *Wireless Code*.

To illustrate this problem, we must turn once again to specific calculations. Consider the earlier example of an indeterminate-term contract with the acquisition of a cell phone worth $600 for $100. For a cancellation after 12 months, the cancellation fee would amount to $250 under the *Wireless Code* ($500 — ($500 x 12/24 months)), while the maximum fee would be $375 under the *CPA* ($500 — ($500 x 12/48 months)). If cancellation occurred after 36 months instead, the cancellation fee would be $0 under the *Code* ($500 — ($500 x 36/24 months)) and the maximum fee would be $125 under the *CPA* ($500 — ($500 x 36/48 months)). The only variable that changes here is *when* the contract is terminated.

As a result, unless the contract is cancelled after 48 months (in which case the cancellation fee would be $0 both under the *Code* and the *CPA*), the maximum cancellation fee that can

95 *DCPP v Telus*, *supra* note 5 at para 163.

96 See Addendum #3 at the end of Corriveau J's decision. See also *supra* note 69.

97 While indeterminate-term contracts do not have a term, there is generally a period which corresponds — to use the words of s 214.8 — to the period during which the "entitlement to the rebate" granted to the consumer is progressively "acquired." Thus, when consumers enter into an indeterminate-term contract, they can benefit from a discount on their cell phone but will only be able to take full advantage of the discount after a certain period of time. If they cancel their contract before the end of that period, their cancellation fees will correspond to a "reimbursement" of a portion of the rebate they benefited from when they entered into the contract. However, this period is *not* taken into account in the calculation provided in s 214.8 of the *CPA* or in the *Wireless Code*. As previously mentioned, both measures provide for a calculation that is based on a "fictitious" period, i.e. 24 months for the *Wireless Code* and 48 months for the *CPA*. The period — whether 12, 24, or 36 months — during which the entitlement to the rebate is acquired by the consumer has no impact on the calculation methods of the *CPA* and the *Wireless Code*.

98 *DPCC v Telus*, *supra* note 5 at para 173.

99 *Ibid* at para 186.

be charged under section 214.8 of the *CPA* will inevitably exceed the amount resulting from the calculation under the *Code*. This is due to the fact that the fictitious denominator in the CRTC's calculation method (24) is smaller than that of the *CPA* (48). As a result, Corriveau J's declaration of inoperability regarding section 214.8 of the *CPA* is not limited to indeterminate-term contracts "exceeding 24 months" — rather, section 214.8 is inoperative as a whole when the contract is cancelled within 48 months following its conclusion.

C) Consequences for Consumers: Loss of Remedies

All of this seems, at first glance, quite technical. However, Corriveau J's reasoning, understood in a broader context, entails that provinces cannot choose to adopt less stringent thresholds or standards than those provided for by the federal legislator. This considerably reduces the provinces' latitude in terms of the measures they can adopt to protect consumers, both in the area of telecommunications and in other areas of federal jurisdiction. Most importantly, Corriveau J's conclusions do not — as she suggested — confer greater protection on the consumer.

Indeed, the declaration of inoperability of sections 214.7 and 214.8 of the *CPA* deprives consumers of remedies against wireless service providers. This flows from the consequences of the application of the doctrine of federal paramountcy. When a provincial law is declared inoperative, it is read down so as not to conflict with federal law for as long as the conflict exists;[100] in other words, the portion of the law that is declared inoperative is deprived of any effect. Here, a declaration of inoperability entails that sections 214.7 and 214.8 of the *CPA* will be inoperative as long as the *Wireless Code* provides the same method of calculation for early cancellation fees. Consequently, it will be impossible to rely on those provisions to challenge — in a civil or criminal action — any penalty imposed by Telus upon cancellation of a fixed-term contract exceeding 24 months, or by Bell upon cancellation of an indeterminate-term contract within 48 months following the conclusion of the contract.

In contrast, had the Court found that there was no conflict because it was possible to simultaneously comply with the requirements of the *CPA* and the CRTC, sections 214.7 and 214.8 would have continued to apply to wireless service contracts. On the one hand, neither provision would have any effect if wireless service providers complied with the method of calculation provided for by the *Wireless Code*. On the other hand, a consumer could, alone or in a class action, proceed against a wireless service provider whose cancellation fee exceeds the maximum set by the *CPA* (and the *Code* by extension). In that context, provincial procedures would be available, even though the calculation method would be that provided for in the federal *Code*. Consumers could also benefit from the remedies provided for in section 272 of the *CPA*, which include compensatory and punitive damages.

However, given Corriveau J's declaration of inoperability, such options are no longer available to consumers who enter into a fixed-term contract exceeding 24 months, or into an indeterminate-term contract. The only recourse offered to them is to file a complaint with the Commissioner for Complaints for Telecommunications Services (CCTS), after having attempted to resolve their problem with the service provider.[101] If the CCTS finds that the lat-

100 *Moloney*, *supra* note 38 at para 29.

101 CCTS, "Procedural Code" (September 1, 2017) s 6.6, online: <https://www.ccts-cprst.ca/wp-content/uploads/2018/01/CCTS-Procedural-Code-Sep-2017.html> (accessed on August 18, 2020).

ter has failed to comply with its obligations under the *Wireless Code*, it can decide to do one or more of the following: (1) require the service provider to give an explanation or apology to the customer, (2) take or cease taking certain actions with respect to the customer, or (3) pay the customer financial compensation up to $5,000 per complaint.[102] However, the CCTS may not award punitive damages.[103]

Consumers are therefore deprived of their right to seek a civil remedy alone or in a class action under the *CPA* against wireless service providers charging more than the maximum provided for by sections 214.7 and 214.8 of the *CPA*. A civil remedy would not be available under the *Telecommunications Act* either. While the latter does allow for the recovery of damages arising from breaches of the Act or of a CRTC decision or regulation, it specifically excludes "any action for breach of a contract to provide telecommunications services or any action for damages in relation to a rate charged by a Canadian carrier."[104] This means that disputes involving telecommunications service contracts must be resolved by the CRTC and not by the courts.[105] Therefore, the *Telecommunications Act* precludes any civil remedy to recover cancellation fees charged by wireless service providers that go beyond what is provided for in the *Wireless Code*.

Moreover, if sections 214.7 and 214.8 of the *CPA* are inoperative, the OPC and the DCPP lose their jurisdiction to seek penal sanctions against telecommunications carriers which, *ex hypothesi*, would impose cancellation fees in excess of the threshold provided in the *CPA* (and simultaneously the *Code*). In Bell and Telus's case, the alleged facts took place before the adoption of the *Wireless Code*, and they thus run the risk of being found guilty of the offences with which they were charged in the new trial ordered by the Superior Court. However, for cases taking place after 2013, Corriveau J's reasoning implies that the OPC and the DCPP have lost jurisdiction over the fees that can be charged upon cancellation of fixed-term wireless contracts of more than 24 months, as well as indeterminate-term contracts, both of which are, as from now, exclusively governed by the CRTC.

If the objective of the *Wireless Code* is, as Corriveau J suggests,[106] to allow consumers to benefit from the most advantageous legislation, the analysis of what truly is most advantageous to consumers should consider all advantages provided by the applicable legislative regime. This should include the remedies available to consumers, as well as the oversight of an administrative body such as the OPC, whose primary mission is consumer protection.

In the words of Colin Scott, who has studied the different forms of enforcement of consumer protection laws, "agency and private enforcement may be complementary to one another in providing variety in the forum through which consumer policy objectives may be achieved."[107] According to Scott, the balancing of strengths and weaknesses of different forms

102 *Ibid* at s 14.1.

103 The CCTS Procedural Code explicitly excludes the power to award punitive damages. See *ibid* at s 14.2(b).

104 See s 72(3) of the *Telecommunications Act*, *supra* note 13.

105 *Wilson v Telus Communications Inc*, 2019 FC 276 at paras 21-24; *B & W Entertainment Inc v Telus Communications Inc* (November 3, 2004), 2004 OJ No 4564, (Ont. SCJ) at para 17.

106 *DCPP v Telus*, *supra* note 5 at para 165.

107 Colin Scott, "Enforcing Consumer Protection Laws" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, eds, *Handbook of Research on International Consumer Law*, 2nd ed (Cheltenham, UK and Northampton, USA: Edward Elgar Publishing, 2018) 466 at 468.

of enforcement can lead to "optimal enforcement of law."[108] In the situation analyzed here, Corriveau J sought a solution most protective of consumer rights, but the one she ultimately opted for has the opposite effect in practice. The optimal result from the consumer's point of view would have been to preserve the operability of sections 214.7 and 214.8, so that the imposition of cancellation fees by wireless providers for any type of contract would have been governed by both the CRTC and the *CPA*. In the case at bar, this would mean that the federal calculations would have been applied without depriving the provincial law of its effects and, more importantly, without excluding specific procedural benefits and more generous remedies for the consumer.

Finally, Corriveau J's conclusion on the inoperability of the *CPA*'s provisions appears to go against a more general trend in the interpretation of the division of powers, a trend that facilitates the simultaneous application of federal and provincial legislation designed to protect consumers. On three occasions — namely in *Kellogg's*, *Irwin Toy*, and more recently *Marcotte* — the Supreme Court confirmed that the rules of the *CPA* were valid even when they had an impact on the activities of federally regulated businesses such as banks and telecommunications companies.[109] In all three cases, the Court also found that the *CPA* was applicable and operative with respect to such undertakings. More broadly, the application of additional protection at the provincial level is generally considered to be consistent with Parliament's intention to protect the consumer. Courts indeed seem reluctant to conclude that the federal legislator may have the implicit intention of setting aside provincial consumer protection regimes.[110] In this context, one may wonder if Corriveau J should have been rather more hesitant to strip the CPA's provisions of their effect.

Conclusion

The *Wireless Code* is intended — and expected — to increase consumer protection. In fact, following the adoption of the *Code*, Ontario and Nova Scotia repealed the provisions of their consumer protection legislation relating to wireless service contracts.[111] Both provinces justified the repeal of these measures on the grounds that the *Wireless Code* was more beneficial to consumers.[112] The same reasoning is evident in the decision of the Quebec Superior Court, which assumes that the *Code* is more advantageous to consumers than the *CPA*.

However, one may wonder about the consequences of increasing federal intervention in the telecommunications sector for the protection of consumers' interests in connection with

108 *Ibid.*

109 See *Kellogg's*, *supra* note 1; *Irwin Toy*, *supra* note 1; *Marcotte*, *supra* note 1.

110 See *Marcotte*, *supra* note 1 at paras 78-79; *Rothmans*, *supra* note 39 at para 20; *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*, 2014 BCCA 36 at para 39, leave to appeal denied [2014] CSCR no 125.

111 The Ontario *Wireless Services Agreements Act*, 2013, SO 2013, c 8 was repealed on October 3, 2019. Nova Scotia passed *An Act* to *Amend Chapter 92 of the Revised Statutes*, *1989*, *the Consumer Protection Act*, *to Ensure Fairness in Cellular Telephone Contracts*, SNS 2012, c 1, but repealed the measures it had put in place with respect to cell phone contracts on June 3, 2015.

112 See "Bill 66, An Act to Restore Ontario's Competitiveness by Amending or Repealing certain Acts," 2nd reading, *Ontario Legislative Assembly Debates*, 42 -1, No 66 (February 19, 2019) at 1630 (Michael Parsa), and "Bill No. 52, an Act to Amend Chapter 92 of the Revised Statutes of 1989, the Consumer Protection Act, and Chapter 6 of the Acts of 2006, the Safer Communities and Neighbourhoods Act," 2nd reading, *House of Assembly of Nova Scotia Debates and Proceedings*, 62-2 (October 24, 2014) at 1493 (Mark Furey).

wireless service contracts. Certainly, the CRTC has developed new rules that go beyond most provincial ones and are of greater benefit to consumers across Canada. There are also some advantages to the consumer in having a central regulatory body ensuring that the obligations under the *Wireless Code* are met. But what happens if a wireless service provider does not comply with the *Code*'s obligations? Although consumers can file a complaint with the CCTS, they cannot rely on the remedies available to them under provincial legislation such as the *CPA*. With that in mind, can we conclude, as Corriveau J did, that the consumer is really in a "more advantageous" position?

At the constitutional level, Corriveau J's decision runs counter to the Supreme Court's approach, which tends to favour the application of provincial consumer protection laws to federal undertakings, while posing a risk to the autonomy of the provinces when it comes to their ability to regulate contractual relationships and intra-provincial trade in goods and services. Yet the modern approach to federalism should allow consumer protection legislation enacted by the provinces to complement the regulatory regimes imposed by the CRTC. With increasing federal intervention in contractual relationships between the consumer and telecommunications carriers, overlap with provincial legislation is bound to increase. Accordingly, courts should exercise caution before finding that consumer protection statutes are inoperative — especially when it is possible, as it was in the case discussed here, to avoid concluding that there is a conflict between federal and provincial rules. The way courts apply the paramountcy doctrine to address the interaction between provincial and federal consumer protection measures in the future will prove decisive both for the overall federal equilibrium and to ensure that consumers effectively gain from rules adopted for their benefit.