

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT  
O'DRISCOLL, DUNNET AND JENNINGS JJ.

BETWEEN:

STEPHEN MARKSON

Plaintiff  
(Appellant)

- and -

MBNA CANADA BANK

Defendant  
(Respondent)

)  
)  
) *Margaret L. Waddell* and  
) *Linda Rothstein*  
) for the Plaintiff (Appellant)  
)  
)  
)  
)  
) *William G. Horton* and  
) *Jill M. Lawrie*  
) for the Defendant (Respondent)  
)  
)  
) **HEARD:** May 26 and 27, 2005

**DUNNET J.:**

OVERVIEW

[1] The appellant appeals from the decision of the motions court judge refusing certification of a proposed class proceeding seeking restitutionary, declaratory and injunctive relief based on the allegation that the respondent has received interest on cash advances in violation of s.347(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The motions court judge held that the proposed issues relating to the restitutionary claims were not common within the meaning of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, (the Act) and while there were common issues relating to the claims for declaratory and injunctive relief, a class proceeding was not the preferable procedure for resolving these claims.

## THE FACTUAL BACKGROUND

[3] The appellant was a customer of the respondent bank and held an MBNA Platinum Plus MasterCard. He used his credit card to take two cash advances, one in April and one in May 2003. The cash advances were in the total amount of \$201.50 and \$101.50 (including automated bank machine service charges) respectively. He repaid the respondent the advances within a few days on both occasions.

[4] The relationship between the respondent and its customers is governed by a cardholder agreement, which states:

### Interest

You and we confirm and agree that interest, fees, charges, and other amounts payable under this Agreement are not intended to, and shall not exceed the maximum rate or amount permitted by law. Payments, to the extent they exceed such maximum rate or amount, are not required by this Agreement. You agree that payment of any interest charge, transaction fee, Account Fee, or other fee or charge assessed to your account from time to time exceeding such maximum rate or amount arises from your voluntary actions, which are wholly within your control and are not compelled by us or by the occurrence of any determining event set out in this Agreement. You also agree that credit is advanced on each respective transaction date notwithstanding any arrangement permitting later payment under this agreement. You further agree to operate your account in such a manner (including without limitation by maintaining sufficient balances within your credit limit) that interest, fees, charges, and other amounts payable under this Agreement will not exceed any such maximum rate or amount. Calculation in respect of the foregoing shall take into account a period of not less than one year. In the case of any allegation by you that such maximum has been exceeded, a certificate deciding the issue from a Fellow of the Canadian Institute of Actuaries satisfactory to us and retained at your expense, based on generally accepted actuarial practices and principles, shall be conclusive between you and us on the issue.

[5] Section 347(1) of the *Criminal Code* reads, in part:

347.(1) Notwithstanding any Act of Parliament, everyone who

- (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
- (b) receives a payment or partial payment of interest at a criminal rate, is guilty of

- (c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
- (d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

“credit advanced” means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement ...

“criminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement...

“interest” means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced ...

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate...

[6] Actuaries retained by both parties calculated the effective annual interest rate for the payments received by the respondent and found that they were greater than 60%.

[7] There is no dispute that cardholders may repay any amount owing on their cardholder accounts at any time, subject to the contractual obligation to pay the minimum payment in each billing cycle, and subject to the respondent's discretion to require immediate payment in full in limited circumstances. Cardholders have the right to repay their debts promptly and thereby avoid incurring additional interest charges.

[8] The respondent charges a transaction fee for various services, including cash advances obtained using the respondent's credit card. At the applicable time, the transaction fee charged on cash advances of less than \$750.00 was \$7.50.

[9] It is not disputed that any fixed transaction fee charged on a cash advance carries the possibility of exceeding the criminal rate. In addition, there is no flat fee that could be charged, which would guarantee that all cash advances will have an effective annual interest rate at less than 60% if repayment is made on the next day, as permitted under the agreement.

[10] The respondent's actuary found, for example, that if the appellant had repaid his cash advance of \$101.50 according to the minimum amounts required under the agreement rather than in six days, the effective annual interest rate would have been 38.8%.

[11] The respondent contends that where there is both a flat fee and periodic interest, the faster one pays, the greater is the effective annual rate of interest, but the total dollars of interest paid is less.

[12] On behalf of the proposed class, the appellant alleges that the respondent is in breach of the terms of the agreement, as it has received funds that are not payable (ie., all amounts payable in excess of the criminal rate), but it has failed to credit such excess payments to the cardholder accounts. He seeks a refund to the class of all such overpayments.

[13] The appellant also alleges that the respondent has received payments of interest in contravention of s. 347(1)(b) of the *Criminal Code* and has been thereby unjustly enriched. He seeks restitution of that illegal interest for the class.

#### THE DECISION OF THE MOTIONS COURT JUDGE

[14] In his reasons, the motions court judge found that the appellant deliberately set out to create a transaction that resulted in his paying an effective rate of interest in excess of 60%. He determined that by making earlier repayments at an effective annual rate in excess of 60%, the appellant actually paid less to the bank than if he had made only the minimum payments at a rate of less than 60%.

[15] He stated that, with the possible exception of the factual issues relating to the motivation of the appellant and to appropriate actuarial assumptions, it seemed unlikely that there would be facts in dispute in connection with the appellant's claims. He defined the principal issue as follows:

The principal issue relates to the interpretation of section 347 and, in particular, the scope and possible application of the principle in *Nelson v. C.T.C. Mortgage Corp.* (1984), 16 D.L.R. (4th) 139 (B.C.C.A.), affirmed, [1986] 1 S.C.R. 749 that has been said to protect the lender from incurring liability under the section "in circumstances that are beyond its control": *Delgader Construction Co. v. Dancorp Developments Limited*, [1998] 3 S.C.R. 90 ("*Dancorp*"), at page 108; *Garland v. Consumers Gas Company Limited*, [1998] 3 S.C.R. 112.

In holding that that the threshold question was whether payments of excess interest on advances obtained pursuant to the cardholder agreement were necessarily to be considered voluntary, he stated that this is essentially a question of law, as it requires an elucidation of the definition provided in *Nelson*, as analyzed and explained in *Dancorp* and *Garland*.

[16] He then dealt with the requirements for certification as set out in s. 5(1) of the Act, which reads:

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant,
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[17] Applying the requirements of s. 5(1)(a) of the Act, he found that the claim for breach of contract based on the provision regarding interest in the cardholder agreement had been sufficiently pleaded and disclosed in the statement of claim. In his analysis, he noted:

[31] This rather desperate piece of legal drafting in the defendant's standard contract indicated that it was aware of the possibility that payments might be made under the agreement in excess of the maximum amount permitted by law...

[32] ...The meaning, and the implications, of the provision in the agreement could not have been intelligible – let alone comprehensible – to the vast majority of cardholders who, unlike the plaintiff lack the actuarial knowledge required to calculate the criminal rate.

[18] With respect to s. 5(1)(b) of the Act, the motions court judge restated the proposed definition of the class as “all persons in Canada who, at any time before the date [or the last of the dates] on which notice of certification is given pursuant to the order of this Court, hold or have held, an MBNA credit card on which cash advances could be obtained”.

[19] The appellant had proposed 12 common issues under s. 5(1)(c) of the Act, which were stated as follows:

- (a) is the cash advance transaction fee “interest” for the purpose of calculating the effective annual interest under s. 347 of the *Criminal Code*;
- (b) in what circumstances does MBNA charge interest at a rate in excess of an effective annual interest rate of 60%;
- (c) in what circumstances does MBNA receive interest at a rate in excess of an effective annual interest rate of 60%;
- (d) did MBNA receive interest at a rate in excess of 60%, and if so, how much;
- (e) if so, is MBNA required to pay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual interest rate of 60% interest;
- (f) is the cash advance transaction fee incurred voluntarily by the class, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the *Criminal Code of Canada*;
- (g) do the class members pay the cash advance transaction fee voluntarily, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the *Criminal Code of Canada*;
- (h) are the terms of the paragraph headed “Interest” of the cardholder agreement a bar to the class action;
- (i) has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60%, within the meaning of s. 347 of the *Criminal Code*;
- (j) has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60%;
- (k) do provincial statutes of limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the *Criminal Code*; and
- (l) is the class entitled to punitive damages?

[20] The respondent took the position that while there was some relationship between the causes of action pleaded, several of the issues could only be decided on an individual basis. In

addition, because of the nature and difficulty of the factual findings that would remain to be decided individually, a resolution of the others would not significantly advance the proceedings.

[21] The motions court judge did not see why common issues relating to the claims for declaratory and injunctive relief could not be framed in a manner that would not require a consideration of the details of the transactions of each class member and the amounts of excess interest paid by each. He suggested that those common issues might be formulated as follows:

1. Has MBNA received interest in excess of an effective annual rate of 60% on cash advances made under agreements or arrangements with class members?
2. If so, were, and are, class members entitled to withhold payment of such excess interest:
  - (a) because MBNA's receipt of such excess interest would be in violation of s. 347 of the Criminal Code; or
  - (b) pursuant to such agreements or arrangements?
3. Should MBNA be enjoined from charging, or receiving and not crediting, excess interest in the future?
4. Should the class be awarded punitive damages against MBNA?

[22] With respect to the common issues directed solely at the rights of class members to restitution, the motions court judge determined that they would not advance the proceeding sufficiently in view of the likelihood that it would be necessary to review the transactions of each individual cardholder in order to identify those who paid interest at a criminal rate, the amount of such payments, and the variables that affected the rate in each case.

[23] He stated that, on the record before him, the possibility that an appropriate electronic system could be developed on the basis of the information in MBNA's records, without separate examination of every credit card account, was entirely conjectural.

[24] He questioned whether such a system could identify cases where the interest paid was less than what would have been payable if the cardholder's amounts and timing of repayments had been such that the effective annual rate did not exceed 60%. The question whether the respondent was unjustly enriched in any case could be affected by such a disparity in and by itself. Voluntariness might similarly be relevant to that question and not confined to an application of s. 347(1)(b) of the *Criminal Code*.

[25] He considered the problem of managing efficiently the process of examining several million transactions of a very large number of cardholders and the expense in doing so, in the absence of any evidence that the amounts of excess interest paid by cardholders were likely to be considerable in a significant number of cases. Counsel for the appellant conceded that the amount of excess interest was not likely to exceed \$7.50 (plus periodic interest on that amount) with respect to any one transaction.

[26] Of significance is his finding that the respondent had a potential defence to the appellant's claim that it does not apply to the claims of many, if any, other class members.

[27] The motions court judge ultimately held that the appellant had not discharged the onus of providing a sufficient evidentiary basis for a conclusion that a resolution of common issues relating to the restitutionary claims would advance the determination of those claims significantly.

[28] He found no evidence to suggest that, even if an appropriate electronic system were developed, the benefits to class members would outweigh the costs they would incur in establishing their individual claims. Thus he could not find that access to justice was likely to be improved by certification of the restitutionary claims.

[29] With respect to the preferable procedure requirement under s. 5(1)(d) of the Act, he held that the appellant had failed to establish that a class proceeding was the preferable procedure for resolving the common issues and he would have reached the same conclusion even if there were acceptable common issues relating solely to the restitutionary claims.

[30] Regarding behavioural modification, he found that there was no evidence that the respondent had ceased to receive payments calculated as set out in the statement of claim. Further, there was evidence that other credit card issuers received payments calculated in a similar manner.

[31] The motions court judge noted that if declaratory and injunctive relief were granted, the respondent would be compelled to make changes to its credit practices to eliminate fees of fixed amounts or to establish a minimum amount for advances and restrict the options previously available to cardholders with respect to the amounts and timing of repayments. There was evidence that in cases where the consumer might have chosen to take a smaller cash advance or to repay it more quickly, the effect of such restrictions would be to require customers to pay more in total interest than they would otherwise have paid.

[32] He added that prosecutions under section 347 require the consent of the Attorney-General of Canada and there was no evidence that such consent had been given or contemplated.

[33] With respect to s. 5(1)(e) of the Act, the motions court judge stated that there was evidence in the record from which it could be inferred that the appellant, an experienced professional engineer with a specialty in computer programming and financial analysis, deliberately orchestrated transactions that he knew, and intended, would give rise to criminal rates of interest. However, he was not prepared to make findings on the merits of the appellant's claims on a procedural motion to certify.

[34] Subject to the requirements of a workable litigation plan and the considerations to which he referred in connection with the preferable procedure, he stated that he would find the appellant to be an appropriate representative of the class.

#### STANDARD OF REVIEW

[35] In *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at 247-248, MacPherson J.A., writing for the Court of Appeal, stated that judges assigned to hear certification motions “develop an expertise which should be recognized and respected by appellate courts.”

[36] Our court has recently affirmed the deference owed to a judge’s decision on a certification motion in *Moyes v. Fortune Financial Corp.* (2003), 67 O.R. (3d) 795 (Div. Ct.) at paras. 3 and 4:

[3] This court owes deference to the decision of the motions judge on the following bases:

- (a) that he is an acknowledged expert with vast experience in class action matters, following such cases as *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (C.A.), at p. 677 O.R., and *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, 196 D.L.R. (4th) 344 (C.A.), at p. 248 O.R., reflecting our Court of Appeal’s emphatic direction that an appellate court’s intervention should be restricted to matters of general principle; and
- (b) the broader deference obligation in such cases as *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, 39 C.B.R. (4th) 5 (C.A.), *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 40 M.P.L.R. (2d) 107 (C.A.), and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577.

We follow these principles here.

[4] Whether any member of this panel would likely have dealt with the certification matter in the way in which the motions court judge dealt with it is not the issue. That is not what deference is all about. If it were otherwise, the principle would play no real part in the judgmental and analytical process. In effect, what is complained of here, and what is at the heart of this appeal, is an invitation to second-guess the weight to be assigned to the various and sometimes competing elements of the evidence and to change the court’s opinion over the weight to be assigned to the underlying facts, as those phrases are to be found in *Housen*, at para. 23...

[37] The question on appeal is whether the motions court judge proceeded on a wrong legal basis or abused his discretion in the legal sense of the word or erred on a matter of general principle.

## ANALYSIS

### *(a) Section 347(1)(b) of the Criminal Code*

[38] Section 347(1)(b) of the *Criminal Code* creates an offence for the receipt of interest at a criminal rate, which is an effective rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60% on the credit advance under an agreement or arrangement.

[39] In *Garland*, at para. 58, Major J., referring to *Nelson and Dancorp*, reviewed the general principles governing the interpretation of s. 347(1)(b) of the Act:

- (1) Section 347(1)(b) should be broadly construed. Whether an interest payment violates s. 347(1)(b) is determined as of the time the payment is received. For the purposes of s. 347(1)(b), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding.

...

- (3) There is no violation of s. 347(1)(b) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.

[40] The respondent contends that the voluntariness principle is an integral part of determining whether a violation of s. 347(1)(b) has occurred. The consumer chooses the amount of the cash advance and the terms of repayment. It is the position of the respondent that the appellant did not have a debt that was due and there was no requirement to pay when he did. The payment was voluntary, because the determining event was within his control. Moreover, under the terms of the cardholder agreement, the appellant was not obligated to repay the cash advance when he did. He was only required to make monthly payments based upon a minimum monthly amount defined in the agreement.

[41] The appellant takes the position that the voluntariness principle has no application in circumstances where an agreement allows for the payment and receipt of interest in situations that can give rise to the receipt of interest in excess of 60%. The appellant asserts that it is the respondent who controls the terms of its agreement and therefore bears the risk that payments received in accordance with its terms will result in receipt of interest at a criminal rate.

[42] The evidence is that one of the problems in calculating an interest rate on a cash advance transaction is that the actual repayment is influenced by other transactions on the credit card. While it is possible to isolate a cash advance in theory and determine the effective annual interest rate, to do so would require assumptions about how any other transactions affect the repayment amounts.

[43] In my view, the motions court judge did not err when he determined that the threshold legal question that may determine the outcome of the litigation is whether payments of excess interest on advances obtained pursuant to the cardholder agreement are necessarily to be considered voluntary.

*(b) Do the Restitutionary Claims Raise Common Issues?*

[44] The common issue criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion has been met. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to S.C.C. denied, May 12, 2005, Goudge J.A. stated, at paras. 49 to 51:

[49] ...McLachlin C.J.C. put it this way in *Hollick, supra*, [*Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158] at para. 25: “In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.”

[50] *Hollick* also makes it clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[51] *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question, at para. 18:

A more difficult question is whether “the claims...of the class members raise common issues”, as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres [Western Canadian Shopping Centres Inc. v. Dutton]*, [2001] 2 S.C.R. 534, the underlying question is “whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis”. Thus an issue will be common “only where its resolution is necessary to the resolution of each class member’s claim” (para. 39). Further, an issue will not be “common” in the requisite sense unless the issue is a “substantial...ingredient” of each of the class members’ claims.

[45] The motions court judge considered the proposed common issues in the context of whether resolution would move the litigation forward to a sufficient degree to justify certification; whether it was a substantial ingredient of each class member's claim, and whether resolution of the proposed common issues would significantly advance the litigation.

[46] He found that issues relating to the restitutionary claims were manifestly individual. As a result, the question whether each potential class member's class advance transaction potentially violated the subsection would have to be analyzed individually, involving the accounts of several million cardholders.

[47] More particularly, every cash advance transaction and its surrounding circumstances would have to be reviewed in order to determine whether interest at an effective annual rate in excess of 60% was received by each cardholder, the quantum of such excess in each case, whether that receipt arose as a result of a voluntary act and whether, ultimately, the test for unjust enrichment in each case could be established.

[48] On the record before the court, it was apparent that individual issues would remain to be decided before the liability of the respondent to any class members could be ascertained. In my view, the motions court judge made no palpable and overriding error in his analysis of whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient to those claims.

[49] I find that the appellant failed to demonstrate that a common trial would adjudicate a substantial part of each class member's claims and thus failed to meet the commonality requirement regarding the restitutionary claims.

*(c) Is a Class Proceeding the Preferable Procedure?*

*(i) Restitutionary Claims*

[50] Under s. 5(1)(d) of the Act, it is essential to assess the importance of the common issues in relation to the claim as a whole. The question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action (*Cloud*, at para. 76).

[51] The preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification (*Hollick*, at para. 27).

[52] In *Hollick*, at para. 28, McLachlin C.J.C. held that the term “preferable” was meant to be construed broadly and capture two ideas: first, the question of whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim and second, the question of whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and so on.

[53] Further, she endorsed the importance of adopting a practical cost-benefit approach and to consider the impact of a class proceeding on class members, the defendants, and the court.

[54] The appellant attacks the preferability finding and asserts that it is not in accordance with the requirements set out in *Hollick*. The test was aptly put by Winkler J. in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (S.C.J.) at para. 62:

[62] To paraphrase McLachlin C.J., a two-part test is to be applied on a preferable procedure determination. As such, it is not enough for the plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the CPA, judicial economy, access to justice and behavioural modification.

[55] The appellant submits that the motions court judge made a fundamental error in principle when he allowed himself to be drawn into speculation regarding the possible outcome of the litigation and in particular, possible changes to its lending practices if the action was successful, rather than weighing alternative procedures that might be available to prosecute the claim.

[56] The appellant relies on the evidence of its actuary that a workable solution could be created to develop an electronic system to identify members of the proposed class. The affidavit of Alan Stewart, a principal at the forensic accounting firm Kroll Lindquist Avey Co. (Kroll), states that there has not been sufficient disclosure in respect of the respondent's systems to satisfy Kroll as to the accuracy and completeness of the respondent's assertions that it cannot determine, on an automated basis, the effective annual interest rate received for each cash advance transaction.

[57] Stewart maintains that Kroll would need to perform, with the cooperation and assistance of the respondent's staff, various inquiries of the respondent's systems and conduct interviews with of the respondent's staff, in order to satisfy themselves as to the accuracy and completeness of the respondent's assertions.

[58] Stewart opines that "it is likely, if these steps were taken, Kroll would be able to determine if it is possible to identify the potential class members, and if so, to devise a system to do so".

[59] In my view, the motions court judge did not commit a palpable error in his finding that the possibility that an appropriate electronic system could be developed was entirely conjectural. On the evidentiary record proffered in support of the motion, the appellant failed to satisfy the onus that a class proceeding would be fair, efficient and manageable. In addition, he failed to establish that an appropriate electronic system could be developed to efficiently manage the process of examining several million transactions.

[60] In *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) at 56, Feldman J.A. held, in respect of 1.1 million potential plaintiffs, that if individual trials were needed to establish loss and therefore liability, the action would be unmanageable. Given the circumstances surrounding a minimum of 8 million transactions that would need to be reviewed individually, it is equally clear that this action would be unmanageable.

[61] Further, the motions court judge properly recognized the relevance of a practical cost-benefit approach to the issues, citing a passage in the Ontario Law Reform Commission *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), p. 413 as follows:

Where the legal fees and disbursements incurred in the prosecution of a class action are likely to exceed the amount that would be recovered, then, clearly, a question of the utility of the action would arise.

[62] Taking into account that the appellant did not present any evidence of the cost of the substantive review and also conceded that the individual claims were unlikely to exceed \$7.50, the motions court judge concluded:

[57] ...There is no evidence to suggest that, even if an appropriate electronic system were developed, the benefits to class members would outweigh the costs they would incur in establishing their individual claims. In such circumstances, I cannot conclude that access to justice is likely to be improved by certification in respect of the restitutionary claims.

[63] I find that he committed no error in principle in concluding that the appellant had failed to present sufficient evidence to suggest that the benefits to class members would outweigh the costs or that a class action would serve the interests of access to justice. I also find that he did not commit any error in finding that the requirement to assess each potential class member's individual circumstances would not achieve judicial economy.

[64] As Rosenberg J.A. held, in *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) at paras. 52 and 53:

[52] Many of the comments made by the court in *Hollick* are applicable to this case. Although class actions will be allowable even where there

are substantial individual issues, preferability “must take into account the importance of the common issues in relation to the claims as a whole” (*Hollick* at para. 30). Resolution of the proposed common issues would, in my view, have almost no impact on the claims for the reasons set forth above. In terms of judicial economy, as was said in *Hollick* at para. 32 “any common issue here is negligible in relation to the individual issues”. Thus, “[o]nce the common issues is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action”.

[53] It seems to me that the comments of Winkler J. in *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) at 73, apply to this case: “[C]ertification in this case will result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues.”

(ii) *Claims for Declaratory and Injunctive Relief*

[65] Having formulated four common issues relating to the appellant’s claims for declaratory and injunctive relief, the motions court judge considered whether a class proceeding was the preferable method for the resolution of those issues.

[66] It is instructive that in his endorsement on costs, released December 1, 2004, the motions court judge stated that his finding that a class action was not the preferable procedure “was made on the basis that it had not been proven on a balance of probabilities that there was a sufficient commonality of interest between the plaintiff and other class members to justify a conclusion that a class proceeding was an appropriate procedure - that it had not been demonstrated that it was preferable in that sense to an individual action brought by the plaintiff, or by any other member of the class who was similarly motivated”.

[67] In my view, he properly considered the impact of a class proceeding and whether the relief sought was in its nature beneficial to all potential class members, bearing in mind the need for all class members to benefit from the successful prosecution of the class action. “[S]uccess for one class member must mean success for all” (*Western Canadian Shopping Centres*, at 555).

[68] I do not agree with the appellant’s assertion that the motions court judge allowed himself to be drawn into speculation regarding a merits analysis of the possible outcome of the litigation, rather than applying the correct test of weighing the alternative procedures that might be available to prosecute the claim.

[69] He specifically found that, given the declaratory and injunctive nature of the relief sought, the right to opt out would provide “cold comfort” to those who would prefer to pay less interest than to participate as private citizens in the enforcement of the *Criminal Code*. In his reasons, he states:

[66] If, in instituting the proceedings, Mr. Markson had the laudable aim of ensuring that the criminal law of Canada is observed by a large financial institution, I cannot assume that, despite the enquiries received by class counsel, other class members would support achievement of the objective by civil proceedings if they understood that meant that credit available to them will, or may, be more difficult to obtain and its costs may be increased...

[67] It is, of course, ordinarily unnecessary for a plaintiff to show that all putative class members would approve of, and support, the institution, and prosecution of the proceedings although the complete absence of any support from them has been given some weight in decisions in which certification has been withheld...

[70] The appellant submits that the course of conduct of the respondent is speculative and irrelevant and constitutes an impermissible *in terrorem* argument. I do not agree. The motions court judge finds that the appellant is free to pursue his objective in his individual capacity “but that does not mean that the court should subject cardholders in general to proceedings when there are reasons why they might well consider orders for the declaratory and injunctive relief as not in their best interests if they were informed of the likely consequences, and there is no evidence to the contrary”.

[71] In my view, he was entitled to consider the potential negative consequences of a class action to class members when weighing alternative procedures. He did not, as submitted by the appellant, accept that no litigation is preferable. It is clear from his reasons that he was alive to the certification analysis as one that concerns the form of the action in making the justice system accessible.

[72] With respect to access to justice, he found that a sufficient commonality of interest between the appellant and the other class members had not been demonstrated to justify certification. I note that in his endorsement on costs, the motions court judge stated:

The same lack of commonality of interest [that lack of commonality relevant to a finding that a class proceeding was not the preferable procedure in s. 5(1)(d)] was relevant to the analysis of the requirements of section 5(1)(e). In consequence, the weaknesses in the plaintiff’s case for certification were not limited to his failure to discharge the burden of demonstrating that the requirements of section 5(1)(d) were satisfied and that the proposed common issues relating to restitutionary relief were acceptable. Whether the absence on commonality of interest was considered to relate to the requirements of preferability, or of fair and adequate representation of the class, or of each of such requirements, the result – the dismissal of the action – would be the same.

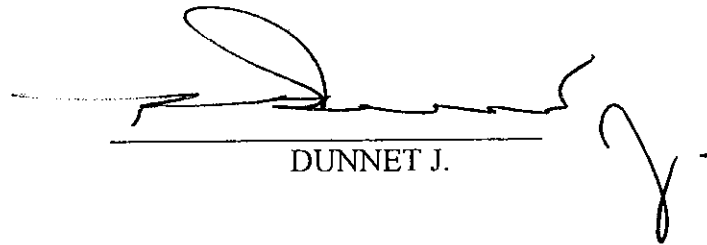
[73] Accordingly, I find no error in his conclusion that the appellant failed to establish that a class proceeding for the resolution of the claims for declaratory and injunctive relief was appropriate.

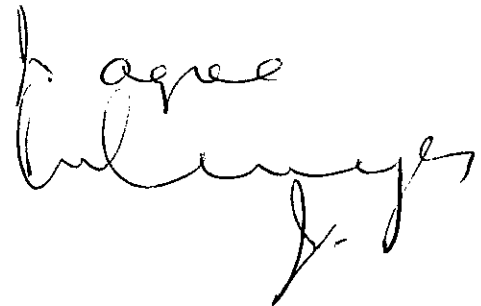
DISPOSITION

[74] The motions court judge carefully reviewed and considered the relevant evidence before him and was entitled, on that evidence, to make the factual findings that he did. He considered and properly applied the requirements set out in s. 5(1) of the Act and committed no error on matters of general principle to justify appellate intervention. Therefore, the appeal is dismissed.

[75] If counsel are not able to agree on costs, they are to provide written submissions within 30 days of the release of this decision.

RELEASED: OCT 27 2005

  
DUNNET J.



ONTARIO  
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'DRISCOLL, DUNNET AND JENNINGS JJ.

B E T W E E N:

STEPHEN MARKSON

Appellant/Plaintiff

- and -

MBNA CANADA BANK

Respondent/Defendant

)  
)  
) *M.L. Waddell, L. Rothstein and K.M. Baert, for the Appellant/Plaintiff*  
)

)  
)  
) *W. G. Horton and J.M. Lawrie for the Respondent/Defendant*  
)

)  
)  
)  
)  
) **HEARD at Toronto: May 26 and 27, 2005**

**O'DRISCOLL J. (Dissenting):**

I. Nature of the Proceedings

[1] The Appellant/Plaintiff appeals to the Divisional Court under s. 30(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (CPA) from the order of Cullity J., dated June 28, 2004, following a three (3) day hearing, refusing to certify this lawsuit as a class proceeding. On

December 1, 2004, Cullity J. released written reasons wherein he exercised his discretion and held: “there should be no order as to costs.”

[2] In his Statement of Claim, the Appellant alleges that the interest charge of the respondent constitutes “interest” within the meaning of s. 347 of the Criminal Code of Canada (Code) and that the interest charge is illegal because it exceeds an annual rate of 60%. The Appellant seeks declaratory and injunctive relief to prohibit MBNA from continuing this practice. The appellant alleges that by leveling the interest charge, the respondent, MBNA, has been and will continue to be unjustly enriched and owes restitutionary damages to the class members. The appellant also pleads that the circumstances pleaded support a claim for punitive damages.

[3] For the reasons which follow, I would allow the appeal, set aside the order in appeal and certify the action under the CPA. I have read the reasons of the majority, written by Dunnet J., with whom Jennings J. agrees, but I do not agree with the result reached by the majority nor with their reasons bringing about the result.

## II. The Parties

[4] The Appellant, the proposed representative plaintiff, Stephen Markson, is an experienced professional engineer, with a specialty in computer programming and financial analysis. Mr. Markson’s curriculum vitae discloses that in 1997 he founded a joint venture, FORENSYS, The Forensic Systems Group, a consulting business which provides customized systems and consulting services for computer and computer related software including data acquisition, management analysis, visualization and presentation in forensic investigative risk management and litigation support services. The joint venture has successfully applied its expertise to a

number of cases including fraud investigations, damages quantifications, insolvencies and related financial analysis. From 1998 to the present, he has been an Associate Member, Association of Certified Fraud Examiners. In his affidavit, sworn November 10, 2003, he deposed:

3. For more than 30 years, I have focused my career on computerized financial analysis and electronic database design, programming and analysis. For the last approximately twenty years I have been designing and applying custom software through my own businesses. Over the years, I have undertaken and successfully completed numerous projects involving financial analysis and data management for various clients including financial institutions and accountants, including forensic accountants. I have also written custom software for projects involving interest calculations including a commercial financial analysis software package for real estate developers, a custom mortgage brokerage management system, and a "lost interest" damages quantification for a financial institution.

.....

24. I have reviewed and approved the Litigation Plan, which is attached as Exhibit A to the affidavit of Ian Roland. In particular, I have reviewed the section entitled "Damages and Distribution of Amounts Recovered", which outlines a process for the distribution of damages to the class members in the event that this proceeding is certified and the common issues are resolved in favour of the Class. I believe my mathematical and computer programming skills will assist in implementing this aspect of the Plan. For example, I believe that, if necessary, I may be able to create a computer program that calculates the interest paid by each individual member of the Class, based on their cash advance transaction details.

[5] The respondent/defendant, MBNA Canada Bank (MBNA), is a Schedule II bank under the *Bank Act*, R.S.C. 1991, c. 46, carrying on business in Ontario and throughout Canada, with its head office in Ottawa, Ontario. MBNA Canada Bank is a subsidiary of MBNA America Bank, N.A., which in turn is owned by MBNA Corporation, which is listed on the New York Stock Exchange. MBNA commenced carrying on business in Canada in about November 1997. MBNA's website describes itself as "the second largest MasterCard issuer in Canada" and

describes its parent company, headquartered in the U.S.A. as “the world’s largest independent credit card issuer” with a market capitalization of approximately U.S. \$20 billion.

[6] As of December 2003, in Canada, MBNA had more than 2.5 million open credit accounts. Of those, approximately 1.2 million were active credit card accounts.

### III. Background

[7] On February 2, 2002, the appellant applied for an MBNA Platinum Plus MasterCard. His application shows he also held other credit cards at that time, namely: (a) Visa, (b) MasterCard, and (c) American Express.

[8] On February 26, 2002, after his application had been approved by the respondent, a card was issued and sent to the appellant. With the card, MBNA sent to the appellant:

- (a) a “Disclosure Statement”,
- (b) a “Portfolio of services – MBNA Platinum Plus”, and
- (c) a Brochure entitled “Platinum Plus MasterCard Guide to Coverage”.

[9] Since October 2002, the terms of the credit card agreement and the Disclosure Statement have been combined into one document, the credit card agreement which is sent to the customer with the card. Before October 2002, the credit card agreement went out 10-15 days after the account was opened.

[10] The credit card agreement between MBNA and its customer is one that MBNA prepares and sends to the customer. By utilizing the credit card, the customer is deemed to have agreed to the card’s terms and conditions which may be changed or varied from time to time at the

instigation of MBNA. There were no negotiations. The terms are fixed by MBNA. It is referred to as a contract of adhesion.

[11] One of the services offered by MBNA's credit card is the ability of the cardholder to obtain cash advances (loans) that are credited to the cardholder's account. A cash advance can be effected by: (a) using an automated banking machine (ABM) to draw upon the cardholder's account; (b) a transaction at a financial institution to draw upon the cardholder's account; (c) an electronic or other transfer of funds from the cardholder's account initiated by MBNA at the cardholder's request; and (d) using a cash advance cheque provided by MBNA to draw upon the cardholder's account.

[12] Since it commenced carrying on business in Canada (November 1997), MBNA has charged and continues to charge interest on each Cash Advance taken by a cardholder, in accordance with the terms and conditions of the cardholder account. The interest is comprised of two (2) elements: (a) interest said to be charged at the published Annual Percentage Rate (APR), accruing daily until the Cash Advance is completely repaid, inclusive of any accrued and unpaid interest; and (b) interest said to be a "transactional fee" (flat fee) an amount equivalent to the greater of \$5.00 in 2002, increased by MBNA to \$7.50 in 2003, and 1% of each Cash Advance.

[13] For the purposes of this motion and appeal, the respondent agrees that the "Cash Advance Transactional Fee" of \$7.50 charged by MBNA is "interest" as defined by s. 347 of the Code.

[14] In footnote 1 of his affidavit, sworn February 4, 2004, Mark Brucker, Chief of Operations of MBNA Canada Bank, deposed:

Over the years, MBNA has charged a 1% fee for cash advances, but the minimum and maximum amounts have been adjusted from time to time. Effective January 1, 1998, the 1% fee was subject to a minimum of \$1.00 and a maximum of \$2.75. Effective May 1, 1999, the 1% fee was subject to a minimum of \$2.75 and a maximum of \$6.00. Effective July 30, 2000, the 1% fee was subject to a minimum of \$5.00 and a maximum of \$10.00. Effective May 1, 2002, the 1% fee was subject to a minimum of \$7.50 and a maximum of \$20.00. Effective September 1, 2002, and continuing to present, the 1% fee was and is subject to a \$7.50 minimum and is not subject to a maximum.

[15] Mr. Brucker deposed earlier in the same affidavit:

9. ...It is my understanding that all but two or three of the twenty Visa, MasterCard or American Express credit card issuers in Canada charge a fixed cash advance fee ranging from \$1.00 and up.

[16] MBNA's Chief of Operations also agreed that the principal amount of each cash advance and the Cash Advance fee are immediately due and owing to MBNA when the cash advance is taken by the cardholder. Periodic interest accrues on both and the interest is compounded daily until the principal and all interest is repaid. The deponent's cross-examination on May 12, 2004 records:

404. Q. But if a transaction fee is charged, MBNA is going to start charging interest on the transaction?

A. It goes to the account, yes.

405. Q. As soon as it is posted, then it starts attracting a nominal interest charge, as well?

A. I am not sure if it is that next day, but, yes, generally speaking, it is part of the balance and if it is a revolving...it is going to happen.

IV. Markson's Credit Card Cash Advances

[17] The only activities on the MBNA credit card of Stephen Markson are:

(a) On April 19, 2003, he used his card at an ABM in Toronto, Ontario to obtain a cash advance of \$200. An ABM service fee of \$1.50 was charged bringing the total cash advance to \$201.50. On April 22, 2003, three (3) days later, he repaid this amount. When he received his "May 2003 Statement" from MBNA, it stated that MBNA had charged him a "promotional periodic rate of interest" of 2.99%, in the total amount of \$0.06. The May 2003 Statement also showed that a "transactional fee interest charge" of \$7.50 had been levied. The statement showed that, despite the prompt repayment of \$201.50, there was a balance owing of \$7.56. The bottom left corner of the May 2003 Statement states that:

"For this billing period

Annual percentage rate: 45.02% (includes periodic rate and Transaction Fee Interest Charges)"

(b) On May 27, 2003, Mr. Markson used the same MBNA credit card at an ABM in Toronto, Ontario to obtain a cash advance of \$100. Again, an ABM service fee of \$1.50 was levied for a total cash advance of \$101.50. The appellant was no longer eligible for the "Promotional Periodic Rate of Interest" and MBNA purported to charge him a "Periodic Rate of Interest" of 19.99%. In addition, MBNA immediately charged a "cash advance transaction fee" of \$7.50. On June 2, 2003, Markson made a payment of \$116.56 to repay the cash advance of May 27, 2003, the prior balance and accrued interest. The "June 2003 Statement" received by Markson from MBNA shows the May 27, 2003 cash advance transaction and the total interest charge including the periodic rate of interest and

the “cash advance transaction fee”. The bottom left corner of the June 2003 Statement states:

“For this billing period:  
Annual Percentage Rate....94.11%  
(includes Periodic Rate and Transaction Fee Interest Charges)”

[18] In his affidavit (supra), Mr. Brucker deposes:

24. ....Mr. Markson’s July 2003 statement shows that a low balance adjustment of \$0.46 was made by MBNA to bring Mr. Markson’s account balance to zero as of July 8, 2003, i.e. the \$0.46 was not collected.

V. Relevant Excerpts from s. 347 of the Code, in effect as of April 1, 1981

347. (1) Notwithstanding any Act of Parliament, every one who

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or

(b) receives a payment or partial payment of interest at a criminal rate, is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

“criminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

.....

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

[19] In *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112, 129, Major J., for six of the seven judge court, said:

[25] The ostensible purpose of s. 347 was to aid in the prosecution of loan sharks. See *House of Commons Debates*, 1<sup>st</sup> Sess., 32<sup>nd</sup> Parl., vol. III, July 21, 1980, at p. 3146; *Thomson, supra*, at p. 549. However, it is clear from the language of the statute – e.g., its reference to insurance and overdraft charges, official fees, and property taxes in mortgage transactions – that s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions. Rather, like the case at bar, they are civil actions in which a borrower has asserted the common-law doctrine of illegality in an effort to avoid or recover an interest payment, or to render an agreement unenforceable. .... Nevertheless, it is now well settled that s. 347 applies to a very broad range of commercial and consumer transactions involving the advancement of credit, including secured and unsecured loans, mortgages and commercial financing agreements.

#### VI. MBNA's Provision Concerning "Interest"

The Cardholder Agreement ("Agreement") states:

##### Interest

You and we confirm and agree that interest, fees, charges and other amounts payable under this Agreement are not intended to, and shall not exceed the maximum rate or amount permitted by law. Payments, to the extent they exceed

such maximum rate or amount, are not required by this Agreement. You agree that payment of any interest charge, transaction fee, Account Fee, or other fee or charge assessed to your account from time to time exceeding such maximum rate or amount arises from your voluntary actions, which are wholly within your control and are not compelled by us or by the occurrence of any determining event set out in this Agreement. You also agree that credit is advanced on each respective transaction date notwithstanding any arrangement permitting later payment under this Agreement. You further agree to operate your account in such a manner (including without limitation by maintaining sufficient balances within your credit limit) that interest, fees, charges, and other amounts payable under this Agreement will not exceed any such maximum rate or amount. Calculation in respect of the foregoing shall take into account a period of not less than one year. In the case of any allegation by you that such maximum has been exceeded, a certificate deciding the issue from a Fellow of the Canadian Institute of Actuaries satisfactory to us and retained at your expense, based on generally accepted actuarial practices and principles, shall be conclusive between you and us on the issue.

[20] Cullity J., during his reasons, commented on MBNA's standard interest clause in these words:

[31] This rather desperate piece of legal drafting in the defendant's standard contract indicates that it was aware of the possibility that payments might be made under the agreement in excess of the maximum amount permitted by law. It also indicates an awareness of the legal relevance of voluntariness, the words in which the concept has been defined judicially and, it appears, the potential significance of the level of credit maintained in a card holder's account. It attempts to buttress any defence that the excess payments were voluntary by fixing card holders with their agreement to this effect and placing on them the onus of objecting that a criminal rate of interest had been received. MBNA does not attempt to determine whether this has occurred. The agreement was provided to card holders after their accounts had been opened.

[21] It is difficult to ascertain whether or not the respondent was attempting to secure perpetual immunity for itself with its wording of the interest clause in the agreement.

[22] The respondent's factum contains the following:

24. The variables within the control of the cardholder affect the determination of the calculation of the effective annual interest rate as follows:

- If there is a flat fee for the transaction, the smaller the amount of the advance, the larger the effective annual interest rate will be.
- If there is a flat fee for the transaction, the larger the amount of any payment, the larger the effective annual interest rate will be.
- If there is a flat fee for the transaction, the earlier any payment is made, the larger the effective annual interest rate will be.
- If there are other transactions on the card, the allocation of payments becomes an important factor in the determination of the effective annual interest rate. The credit card agreement permits MBNA to allocate payments to transactions as the bank elects. It is MBNA's policy to allocate payments to transactions that carry the lowest interest rate first and purchase transactions usually carry an interest rate lower than for most cash advances. The cash advance will be paid off faster if the consumer makes no purchases on the credit card. Only if a payment exceeds the total balance of purchases would all or part of a cash advance be paid off. If there is a flat fee for the transaction, the smaller the amount of other transactions on the account, the more likely that the effective annual interest rate will be the same or larger.

Gorham Report, p. 13, Appellant's Compendium, Tab 17, p. 150

Brucker Affidavit, para. 17, Appellant's Compendium, Tab 10, p. 83

[23] Cullity J. stated:

[32] The cardholders agreement, and the monthly statements that, it is pleaded, were provided to the plaintiff contained no explanation, or calculation, of the effective annual rate of interest for the purposes of determining "the maximum amount of interest permitted by law". There was nothing in the statements to indicate whether it had been exceeded. The meaning, and the implications, of the provision in the agreement could not have been intelligible – let alone comprehensible – to the vast majority of card holders who, unlike the plaintiff lack the actuarial knowledge required to calculate the criminal rate. In these circumstances, the likelihood that the defendant would be held to be entitled to enforce this term of a contract of adhesion against card holders in general, seems remote.

[33] I am satisfied that the meaning and the effect of the provision in the agreement can be determined only at the stage of the proceedings when the merits of the plaintiff's claims are in issue. I am not prepared on this motion to exclude the possibility that the defendant would be found to have breached the provision by failing to credit excess payments of interest to its customers. For that reason, the claim of breach of contract has, in my judgment, been sufficiently pleaded, and disclosed in the statement of claim.

VII. Evidence of Actuaries

[24] The actuary retained by the appellant, David Wolgelerenter, deposed that treating both of Mr. Markson's cash advances (April 19, 2003 and May 27, 2003) and interest, as one transaction, the effective annual interest rate for the purpose of s. 347 of the Code is 3,652%. The respondent's actuary, Peter Gorham, calculated effective annual rate separately for each of the two (2) transactions. He found the April 19, 2003 cash advance effective rate of interest to be 9,244.2% and that of the May 27, 2003 cash advance to be 3,042.4%. The rates of interest calculated by the actuaries are light years higher than stated in the May 2003 and June 2003 monthly statements that MBNA sent to the appellant.

[25] Cullity J. held that "MBNA has received interest at an effective annual rate in excess of 60%". Indeed, MBNA continues to receive interest in excess of 60% per annum, contrary to s. 347 of the Code, from some of its cardholders.

[26] Under the agreement, the cardholder has the right to repay his/her debt and do so promptly, thereby avoiding additional interest charges. Under the agreement, repayment on the day after the cash advance, or even on the same day, is permitted. Otherwise, the interest continues to run.

[27] The actuarial expert retained by the respondent, Mr. Peter Gorham, wrote the following at p. 11 of his February 3, 2004 report:

I have assumed that if a person takes a cash advance and then repays the advance immediately, that the repayment would be treated as if it were made on the following day. If the repayment is treated as being repaid on the same day, and the length of the loan measured as a fraction of a day, the effective annual interest rate would approach infinity provided there is a fee of at least 1 cent.

There is no flat fee which could be charged and which would guarantee that all cash advances will have an effective annual rate of interest of less than 60% if repayment on the next day is permitted. If I assume the periodic interest rate is nil, the maximum flat fee to ensure the interest remains below 60% per annum for a \$5.00 advance repaid on the following day is less than one cent. A flat fee of one cent would result in an effective annual rate of interest of 107.4%.

.....

#### Summary

It is clear that whether we isolate the actual cash advance transaction or look at all of the activity on Mr. Markson's account from May 9<sup>th</sup> to July 8<sup>th</sup>, the effective annual rate of interest for the amounts paid by Mr. Markson is greater than 60%.

[28] There is no evidence that the above quotation from Mr. Gorham's report came as a shocking revelation to the respondent's personnel. After all, cash advances on MBNA's credit cards, on MBNA's terms, have been a mainstay of its business in Canada since it opened for business in November 1997, a date some sixteen (16) years after s. 347 of the Code became the law of Canada on April 1, 1981.

[29] As Mr. Brucker stated in his answer to Q. 257 on his cross-examination, and as the motions judge found: "as the amount of the cash advance gets smaller, the rate of increase in the effective annual interest rate gets larger."

VIII. The Issues in Appeal

[30] Section 5(1) of the CPA requires the court/judge to certify an action as a class proceeding if all five (5) requirements of s. 5(1) have been fulfilled.

[31] In this case, Cullity J. held that the following subsections of s. 5(1) had been satisfied:

(a) Section 5(1)(a) – the motions judge held that the statement of claim disclosed causes of action for:

(i) declaratory and injunctive relief flowing from the alleged breaches of s. 347(1)(b) of the Code by the respondent,

(ii) breach of contract by the respondent of the cardholder agreement, and

(iii) restitution based upon the respondent's unjust enrichment flowing from its breach of the Code and/or the cardholder agreement.

(b) Section 5(1)(b) – Cullity J. held that there is a class whose definition was restated by him as follows:

“All persons in Canada who, at any time before the date [or the last of the dates] on which notice of certification is given pursuant to the order of this Court, hold or have held, an MBNA credit card on which cash advances could be taken”.

[32] On his cross-examination on November 10, 2003, on his affidavit of even date, the appellant was asked these questions and gave these answers.

156. Q. When would you say was the first time you did a calculation of the type we are talking about using the MBNA cash advance fee of \$7.50?

A. I don't know that date.

157. Q. Would it have been before you did the first cash advance?

A. Yes.

158. Q. Would it have been days or weeks before?

A. Probably weeks.

[33] On June 4, 2004, as undertaken at Mr. Markson's cross-examination on November 10, 2003, counsel for the appellant sent to counsel for the respondent all Mr. Markson's calculations.

The motions court judge said in his reasons:

[77] ...Having deliberately orchestrated transactions that he knew, and intended, would give rise to criminal rates of interest, Mr. Markson is, arguably, not in a position to complain – let alone seek equitable relief.

[34] With respect, it should not be forgotten that the appellant is a cardholder. He is on the wrong end of a contract of adhesion. He is not the bank. He has no say in how MBNA runs its business nor how it sets its interest rates. His "crime" is that he exposed what has been going on since November 1997. In a "clean hands" competition between these parties, in my view, the appellant would win in a walk.

(d) s. 5(1)(c) – the motions judge found that the common issues relating to declaratory and injunctive relief were certifiable and he reformulated the issues as follows:

1. Has MBNA received interest in excess of an effective annual rate of 60 per cent on cash advances made under agreements or arrangements with class members?

2. If so, were, and are, class members entitled to withhold payments of such excess interest:

a. because MBNA's receipt of such interest would be in violation of section 347 of the *Criminal Code*; or

b. pursuant to such agreements or arrangements?

3. Should MBNA be enjoined from charging, or receiving and not crediting excess interest in the future? and,

4. Should the class be awarded punitive damages against MBNA?

[35] However, Cullity J. held that the proposed common issues with respect to restitution and breach of contract, although arguably based upon the same facts and requiring the same legal analysis, should not be certified because they would not significantly advance the proceedings. This is an issue in appeal.

[36] Counsel for the appellant submits that this formulation is too narrow and too limited and should be expanded, as proposed in the Notice of Appeal and Schedule C of the appellant's factum, to read:

#### Schedule C

The common issues proposed by the Plaintiff on the motion for certification were:

a. is the cash advance transaction fee "interest" for the purpose of calculating effective annual interest under s. 347 of the *Criminal Code*;

b. in what circumstances does MBNA charge interest at a rate in excess of an effective annual interest rate of 60%;

c. in what circumstances does MBNA receive interest at a rate in excess of an effective annual interest rate of 60%;

d. did MBNA receive interest at a rate in excess of 60%, and if so, how much;

e. if so, is MBNA required to repay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual rate of 60% interest;

f. is the cash advance transaction fee incurred voluntarily by the class, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;

g. do the class members pay the cash advance transaction fee voluntarily, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;

h. are the terms of the paragraph headed “Interest” of the Cardholder Agreement a bar to the class’ claim;

i. has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60%, within the meaning of s. 347 of the Criminal Code;

j. has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60%;

k. do provincial Statutes of Limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the *Criminal Code*; and

l. is the class entitled to punitive damages?

(d) s. 5(1)(d) – Cullity J. found that a class action was not the preferable procedure for the resolution of the common issues that he had reframed. This is the other issue in appeal.

#### IX. Issue One – Refusal to Certify Claims of Breach of Contract and Restitution

[37] In refusing to certify the action’s restitutionary claims and claim of breach of contract, Cullity J. said:

[53] I believe the objections to the proposed common issues made by defendant's counsel are valid to the extent that issues directed solely at the rights of class members to restitution would not advance the proceeding sufficiently in view of the likelihood that it will be necessary to review the transactions of each card holder in order to identify those who paid interest at a criminal rate, the amount of such payments and the variables that affected the rate in each case. The possibility that an appropriate electronic system can be developed, on the basis of the information in MBNA's records, without separate examination of every credit card account, is at present entirely conjectural.

[54] There is, also, the question whether such a system could identify cases where the interest paid was less than would have been payable if the card holders' amounts, and timing, of repayments had been such that the effective annual rate did not exceed 60 per cent. As counsel for the defendant submitted, the question whether the defendant was unjustly enriched in any case could be affected by such a disparity in and by itself. Voluntariness might similarly be relevant to that question and not confined to an application of section 347.

[55] There is, in my judgment, insufficient evidence of the likelihood that an appropriate electronic system can be developed – and of the cost of doing this – to justify certification of the restitutionary issues.

[56] The problem of managing efficiently the process of examining several million transactions of a very large number of card holders is not the only obstacle to certification in respect of the restitutionary claims. There is, also, the expense that is likely to be incurred in doing so – and in processing, verifying and resolving disputes with respect to the claims of each – and the absence of any evidence that the amounts of excess interest paid by card holders are likely to be considerable in a significant number of cases. In this connection, the analysis overlaps with that required in determining whether a class proceeding would be the preferable procedure for resolving the claims of class members.

[57] Counsel for the plaintiff conceded that the amounts of excess interest were not likely to exceed \$7.50 (plus periodic interest on that amount) with respect to any transaction. In these circumstances, I am satisfied that the cost of investigating, and analyzing, the details of each cardholder's transactions with MBNA – 8 million since 2000 – and processing the claims of those who are found to have paid interest at a criminal rate, might well be quite disproportionate in relation to the amounts recoverable. There is no evidence to suggest that, even if an appropriate electronic system were developed, the benefits to class members would outweigh the costs they would incur in establishing their individual claims.

In such circumstances, I cannot conclude that access to justice is likely to be improved by certification in respect of the restitutionary claims.

[58] The relevance of a practical cost-benefit approach to the issues that arise under section 5(1)(d) was recognized by McLachlin C.J. in *Hollick* (at paragraph 29) and I believe the same approach is implicit in other cases such as *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.). As the Ontario Law Reform Commission stated in its Report (at page 413):

Where the legal fees and disbursements incurred in the prosecution of a class action are likely to exceed the amount that would be recovered, then, clearly, a question of the utility of the action would arise.

[59] The plaintiff has not, in my judgment, discharged the onus of providing a sufficient evidentiary basis for a conclusion that a resolution of common issues relating solely to the restitutionary claims would advance the determination of those claims significantly and, for that reason, I do not intend to certify the proceedings in respect of those issues.

[38] In my view, Cullity J.'s ruling is somewhat akin to the situation in *Carom et al. v. Bre-X Minerals Ltd. et al.* (2000), 196 D.L.R. (4<sup>th</sup>) 344, 51 O.R. (3d) 236 (Ont. C.A.); leave to appeal refused: [2000] S.C.C.A. No. 660. The Court of Appeal for Ontario said:

[33] The motions judge certified 15 common issues for the class action. He explicitly held that these common issues are relevant to three of the legal claims advanced by the plaintiffs – conspiracy, fraudulent misrepresentation and breach of the *Competition Act*.

[34] However, the motions judge further held that the 15 common issues did not relate to the plaintiffs' claim of negligent misrepresentation.

.....

[36] ...As expressed by Carthy J.A. in *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 677, 175 D.L.R. (4<sup>th</sup>) 409 (C.A.):

...I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The *Act* provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.

[37] Bearing in mind this admonishment, I have reached the reluctant conclusion that the Divisional Court and the motions judge have erred on a matter of general principle. I do not agree that there is a sufficient difference between the plaintiffs' claims in fraudulent misrepresentation and negligent misrepresentation to justify certification of the former and non-certification of the latter. In my view, the creation of such a dichotomy in this litigation is an error in logic, in principle and in policy.

.....

[40] The observation I would make about this definition [s. 8(1) of CPA] is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives of the *CPA*, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.

[41] Second, the courts have also been wary of setting the bar too high on the common issues factor. In many cases, the Ontario courts have stated explicitly that certification should be ordered if the resolution of the common issues would advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of particular legal claims in the action, is not required.

.....

[42] Against the backdrop of the low bar set by the legislature and judiciary for common issues, I turn to my third, and most important, reason for thinking that the courts below erred. Given the accepted definitions of the torts of fraudulent misrepresentation and negligent misrepresentation, I can see no logical or principled basis for treating them differently on the question of certification. I could understand an order certifying, or refusing to certify, both claims. I do not, however, understand why opposite orders were considered appropriate for the two claims.

.....

[45] Fourth, in my view there is a substantial overlap of *factual* issues common to both torts. There are two core issues in this litigation: first, was there gold in mineable quantities in the Busang; and second, if there was not, what was the various defendants' knowledge of the true state of affairs?

[39] Here, the basic issues are entwined;

(1) has the respondent received from the members of the defined class interest in an amount that is in violation of s. 347 of the Code?

(2) Has the respondent thereby breached the credit card agreement/contract?

(3) If the answer to those questions is "yes", are the members of the class entitled to restitution. If "yes", how much?

[40] In *Bre-X*, at para. [47], it was said that there was no principled basis for treating the claims of fraudulent misrepresentation and negligent misrepresentation differently. Here, unless there is a finding that the respondent has received interest from the members of the class in violation of s. 347 of the Code, there will be no restitution.

[41] At para. [49] of *Bre-X*, the court said:

[49] ... One of the potential benefits of a class action with certified common issues relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin.

[42] In *Hollick v. City of Toronto* (2001), 2005 D.L.R. (4<sup>th</sup>) 19, 28 (S.C.C.), McLachlin C.J.C. (for a seven (7) judge court) said:

[15] The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. ... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

[16] It is particularly important to keep this principle in mind at the certification stage. ... Thus the certification stage is decidedly not meant to be a test of the merits of the action: ... Rather the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: .....

[43] Far from being unrelated and disparate claims, in my view, the claim grounded in an alleged breach of s. 347 of the Code and the claim grounded in breach of contract and calling for restitution all revolve around whether the respondent received interest exceeding the rate allowed in s. 347 of the Code from the appellant and other members of the class when the cardholders obtained cash advances on their individual cards.

[44] Section 1 of the CPA states: “common issues” means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[45] With respect, in my view, it was error on the part of the motions judge to separate these issues. They naturally belong together like the horse and carriage. The claims for breach of contract and the remedy of restitution grow out of a breach of s. 347 of the Code.

[46] In my view, the Appellant/Plaintiff has discharged the onus of providing a sufficient evidentiary basis to conclude that a resolution of common issues relating to breach of the agreement and restitutionary claims would, in a significant way, advance those claims.

[47] Having reached that conclusion, I also conclude that a number of the common issues proposed by the appellant will necessarily be answered in the course of determining the common issues approved by Cullity J. This is so because many of the common issues proposed by the appellant and rejected by Cullity J., involve the same fact or legal analysis as those approved. As submitted by counsel for the appellant, the appellant's proposed common issues are necessarily subsumed into the issues approved by Cullity J.

[48] In my view, this submission of the appellant is correct. Therefore, I would reformulate the approved common issues as set out in "Schedule C" – p. 37 of the Appellant's Factum and para. [36], above.

X. Issue Two – Cullity J.'s Finding that a Class Proceeding was not the Preferable Procedure for Resolving the Common Issues

[49] The CPA states:

5. (1) The court shall certify a class proceeding on a motion...if

(d) a class proceeding would be the preferable procedure for the resolution of the common issues.

.....

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[50] The motions court judge said:

[61] Certification on the basis of the list of common issues would entitle each class member to the injunctive and declaratory remedies if those remedies are found to be appropriate. This would appear, *prima facie*, to serve the objective of access to justice that the CPA is intended to achieve. As Lord Macnaghten stated in *Duke of Bedford v. Ellis*, [1901] A.C. 1 (H.L.), at page 8 – where a declaration was sought under the former procedure for representative actions:

Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[62] Behavioural modification is also relevant here as there is no evidence that MBNA has ceased to receive payments calculated as set out in the statement of claim. There is evidence that other credit card issuers receive payments calculated in a similar manner.

[63] Notwithstanding these considerations, I am not prepared to find that a class proceeding is the preferable method for the resolution of the common issues

and the claims asserted by the plaintiff. On the basis of the evidence, I believe it is probable that, if the declaratory and injunctive relief is granted, MBNA would be compelled to make changes to its credit practices to eliminate fees of fixed amounts or to establish a minimum amount for advances and restrict the options previously available to card holders with respect to the amount and timing of repayments. The evidence was that fixed fees are very commonly charged by financial institutions on credit card cash advances and there is no evidence to suggest that the former solution would be considered to be economically, or otherwise, acceptable to MBNA. The latter would not only be less convenient for card holders in general, it would be likely to increase the amounts of interest they would pay.

[64] In an affidavit delivered on behalf of MBNA, one of its executives stated:

MBNA could, theoretically, preclude customers from drawing less than certain amount or from repaying cash advances more quickly than by a specified date. This would eliminate the possibility of the effective annual rates of interest as calculated under the *Criminal Code* exceeding 60%. However, in those cases in which consumers might have chosen to take a smaller cash advance or repay it more quickly, the effect of such restrictions would be to require customers to pay more in total interest charges than they would otherwise...have paid. In other words, if you calculate interest as the *Criminal Code* requires, any fixed fee creates a situation in which the higher the effective rate of interest the lower the total paid by the consumer.

[65] Similarly, in his report, Mr. Gorham stated:

Note that as the time to repay lengthens, the interest rate declines and the total dollars of interest paid increases.

[66] If, in instituting the proceedings, Mr. Markson had the laudable aim of ensuring that the criminal law of Canada is observed by a large financial institution, I cannot assume that, despite the enquiries received by class counsel, other class members would support achievement of the objective by civil proceedings if they understood that meant that credit available to them will, or may, be more difficult to obtain and its cost may be increased. An assumption that credit card holders will attribute more significance to the results of the esoteric and artificial actuarial calculations presupposed by the *Criminal Code* would be to defy commonsense.

[67] It is, of course, ordinarily unnecessary for a plaintiff to show that all putative class members would approve of, and support, the institution, and prosecution of the proceedings although the complete absence of any support from them has been given some weight in decisions in which certification has been withheld. The right to opt out of the proceedings is, as a general rule, considered to be sufficient to protect the right of class members who do not regard the litigation as desirable or, for other reasons, do not wish to be associated with it. Given the declaratory and injunctive nature of the relief sought by the plaintiff, the right to opt out would provide cold comfort to class members who would prefer to pay less interest than to participate, as private citizens, in the enforcement of section 347 of the Criminal Code. Prosecutions under the section require the consent of the Attorney-General of Canada. There is no evidence that such consent has been given, or contemplated, on facts similar to these.

[68] Mr. Markson is free to pursue his objective in his individual capacity but that does not mean that the court should subject card holders in general to the proceedings when there are reasons why they might well consider orders for the declaratory and injunctive relief as not in their best interests if they were informed of the likely consequences, and there is no evidence to the contrary.

[69] In these circumstances, I am not prepared to find that the plaintiff has established that a class proceeding is the preferable procedure for resolving the common issues and the claims to which they relate. I would incline to the same conclusion if, contrary to my opinion, there were acceptable common issues relating solely to the restitutionary claims.

[70] I note, also, that my concerns with respect to the preferable procedure could not be remedied by disqualifying Mr. Markson as a representative plaintiff and appointing a substitute.

[51] As quoted earlier, in *Hollick (supra)*, at para. [15] and [16], the court said that the CPA recognizes the important advantages that the class action offers as a procedural tool to deal with complicated cases in the modern era. The Chief Justice of Canada said:

[28] The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the

sense of preferable to other procedures such as joinder, test cases, consolidation, and so on”: *Report of the Attorney General’s Advisory Committee on Class Action Reform, supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a “fair, efficient and manageable method of advancing the claim” without looking at the common issues in their context.

[29] The Act itself, of course, requires only that a class action be the preferable procedure for “the resolution of the *common issues*” (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members’ claims.

.....

[30] The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s.5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues “predominate” over the individual issues.

[52] In *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057, Nordheimer J. spoke to the issue of “preferable procedure” this way:

[91] ...Put another way, the question to be answered is whether the ultimate determination of the issues raised by each member’s claim would be better accomplished through the class proceeding or would they be better accomplished through other mechanisms such as joinder, test cases or simply by allowing each claim to proceed individually?

[53] In *Wilson v. Servier Canada Inc. et al.* (2000), 50 O.R. (3d) 219, 250, Cumming J. said:

[124] ...But for a class proceeding, the defendants (if responsible) would in all probability be effectively isolated from the individual claims.

[125] Judicial economy and efficiency will be achieved if the common issues are resolved in a single proceeding. It is only by spreading and sharing the cost

through the scale efficiencies of a class action that members will have an opportunity to resolve their claims. ....

[126] ....The *CPA's* goal has been described as inhibiting "misconduct by those who might ignore their obligations to the public": see *Abdool, supra*, at p. 472. [(1995), 21 O.R. (3d) 453]

### Admissions of MBNA

- That it has received and continues to receive interest at a rate in excess of the 60% limit set out in s. 347 of the Code.
- That it is MBNA's decision to charge a flat rate transaction fee (\$7.50), admitted to be interest, in addition to periodic interest on the cash advances, that causes MBNA to receive interest greater than that permitted by s. 347 of the Code. Moreover, any cash advance of less than \$62.30 will generate an effective rate of interest more than 60% annually, if the advance is repaid in accordance with or more promptly than required (and there are no other transactions in the account).
- That for the January 2000 – December 2003 period, MBNA processed approximately 1.36 million cash advances for payments less than \$62.00.
- That MBNA has never tried to calculate any interest on the "transactional". Nor has it made any inquiries of its computer programmers to determine if this could be done.
- That MBNA made no attempt to identify the number of potential class members from the data it had available to it.

[54] On cross-examination on his affidavit (*supra*), Mr. Brucker deposed:

340. Q. What you can tell me is that MBNA has never tried to implement a system that calculated for its customers whether or not the interest they were paying violated the Criminal Code?

A. We never tried to calculate any interest at the transaction level, no.

341. Q. And that includes the interest calculation required under the Criminal Code?

A. I believe so, yes.

342. Q. I take it MBNA has computer systems specialist, in-house; is that correct? Or do you outsource the programming work and computer systems?

A. Can you be more specific? MBNA Canada or MBNA America, MBNA Corporation?

343. Q. Let's start with MBNA Canada.

A. We don't have people who program our mainframe systems, no.

344. Q. Does the parent have people who program the mainframe systems?

A. Yes.

345. Q. And those people are located in Wilmington, Delaware?

A. Specifically, I couldn't tell you the folks that did the mainframe. My guess would be that the majority of them are in Dallas, Texas.

346. Q. And those are the people that programmed the mainframe system to calculate Regulation Z?

A. I would believe they were the ones that did that, yes.

347. Q. And I take it that prior to drafting this affidavit, you or anybody else at MBNA did not consult with your mainframe programmers and find out what was and what was not possible to program the system to do; correct?

A. On this specific issue?

348. Q. Yes.

A. Calculating, no.

.....

131. Q. So if people, in fact, have paid in excess of the Criminal Code rate, they have paid more than is required under the agreement; right?

MS. LAWRIE: Don't answer that question. You are looking for a legal conclusion.

132. MR. DOANE: No, it is a factual conclusion and it is your affidavit and your company's agreement.

MS. LAWRIE: Do you have another question, Mr. Doane?

133. MR. DOANE: I have lots more questions, but I want to [sic] an answer to this one.

MS. LAWRIE: It has been refused.

.....

134. Q. Mr. Brucker, does MBNA have systems in place that indicate to it when payments are made that exceed the maximum allowable rate under the Criminal Code?

A. No.

135. Q. Why not?

MS. LAWRIE: Don't answer that.

[55] MBNA claims that it does not track the occasions when interest in excess of 60% per annum is received. MBNA admits that it does not credit the cardholder when that occurs. It simply keeps the overpayments. It remains to be determined whether this is vincible or invincible ignorance. It remains to be seen whether MBNA gambled that no one would figure it out and, if they did, no one would start a lawsuit for \$7.50. MBNA painted a picture of “systems constraints” leaving the impression that only a hand count of millions of cardholders’ records could answer the question of who, what and when regarding s. 347 of the Code. Computers and computer systems put astronauts on the moon and make the world go round. There is no reason to conclude that, given the opportunity to interview the respondents’ computer personnel and examine the respondents’ computer, the experts retained by the appellant would be unable to solve the mysteries of MBNA’s computer and the information it could produce if the right questions were asked. Mr. Alan Stewart, retained by the appellant, is a chartered accountant and a designated specialist in Investigative and Forensic Accounting (CAIFA). He deposed, in his affidavit, sworn April 30, 2004, that he and his colleagues at Kroll Linquist Avey Co. (Kroll) have been involved in seven (7) major class action assignments that have required the identification and quantification of alleged inappropriate or miscalculated fees and/or interest charged to cardholder/customer accounts in respect of credit cards, mortgage accounts and other related customer account arrangements. On those assignments, Kroll was retained by counsel for the financial institutions and other companies who were the defendants or potential defendants in the class action proceedings.

Conclusions Regarding s. 5(1)(d) and this case

- The restitution that will be claimed by class members is said to be \$5.00 - \$7.50 per cash advance plus accrued interest. It would be cost prohibitive and totally unrealistic to prosecute these claims on an individual basis. The respondent has not suggested that there is any other procedure, other than a class proceeding, available to resolve the common issues.
- There is no undertaking from MBNA that it will modify its behaviour to comply with s. 347 of the Code in the absence of a class action and a court order. MBNA admits it receives interest in excess of the 60% limitation imposed by s. 347 of the Code and does nothing to stop the practice. Worse still, MBNA claims that its cardholders are at fault for paying back their loans “ahead of time” to prevent interest from accruing and that it is the actions of cardholders that causes the interest to go over 60% per annum. In the absence of certification, this conduct of MBNA will continue unabated.
- With respect, in my view, it was error for the motions judge to consider as relevant the in terrorem arguments of MBNA as to what sanctions MBNA might impose on its cardholders if a court finds MBNA has been violating s. 347 of the Code. Even if such were to happen, surely that is not a consideration for the court but a matter for Parliament and the marketplace. On a certification application, the only focus is on s. 5(1) and s. 6 of the CPA in deciding whether a class proceeding would be a fair, efficient and manageable method of advancing the resolution of the common issues.

In *Degelder Construction Co. Ltd. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90, 108, Major J., for an unanimous seven (7) judge court, said:

[30] ...A lender who enters into an agreement to receive interest under ambiguous terms bears the risk that the agreement, in its operation, may in fact give rise to a violation of s. 347. The principle in *Nelson* protects the lender from incurring such liability in circumstances that are beyond its control. As previously noted, to tailor subs. (1)(b) to the form, rather than the substance, of a credit transaction could invite manipulation by lenders and would defeat the basic purpose of s. 347.

[56] In his costs endorsement of December 1, 2004, Cullity J. said:

...this is not a case like *Transport North American Express Inc. v. New Solutions Financial Corporation*, [2004] 1 S.C.R. 249 in which the defendant was oblivious to the existence, and a possible breach, of section 347. In my opinion, it is not unreasonable to infer that a party, that knowingly takes the risk that it is acting illegally, has also accepted a risk that it will become involved with proceedings instituted by persons affected by its conduct.

[57] In *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, Iacobucci J. (for an unanimous seven (7) judge court), said:

[57] Finally, the overriding public policy consideration in this case is the fact that the LPPs [late payment penalties] were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; [page 656] *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LLPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

[58] It cannot be forgotten that s. 347(3) of the Code has a "deeming clause":

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

[59] Appellant's counsel submits in their factum:

105. This is a classic case for certification as a class proceeding. A class proceeding provides the appropriate venue to fairly and efficiently determine the common issues. The defendant is ...receiving interest at a criminal rate. The damages each Class member has suffered are small. Absent a class proceeding, they will be denied access to justice. Absent a class proceeding, MBNA will continue to flout its legal obligations. Absent a class proceeding, there will be no remedy reasonably available to the class. Absent a class proceeding, [it] will be permitted to keep the proceeds of its crime.

[60] In my view, this case fits perfectly into the mould designed for class proceedings.

XI. Result

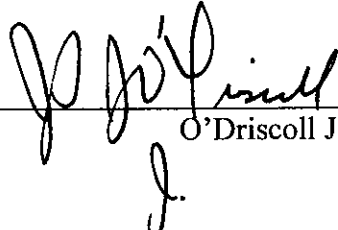
[61] The appeal is allowed, the order in appeal, dated July 28, 2004 is set aside and the motion for certification is granted.

XII. Costs

[62] If counsel are unable to agree on costs, counsel for the appellant shall file, within twenty (20) days of the release of these reasons, a draft bill of costs and brief written submissions as to costs. Within twenty (20) days thereafter, counsel for the respondent, if so advised, may file brief responding submissions. Within a further ten (10) days, if so advised, counsel for the appellant may file very brief reply submissions. Thereafter, costs to be fixed.

OCT 27 2005

Released:

  
\_\_\_\_\_  
O'Driscoll J.

**COURT FILE NO.:** 481/04

**DATE:** 20051027

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**O'DRISCOLL, DUNNET AND JENNINGS JJ.**

**B E T W E E N:**

**STEPHEN MARKSON**

Appellant/Plaintiff

- and -

**MBNA CANADA BANK**

Respondent/Defendant

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**REASONS FOR JUDGMENT**

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**Dunnet and Jennings JJ.  
O'Driscoll J. Dissenting**

**Released:** October 27, 2005

Court File No.:

STEPHEN MARKSON v. MBNA CANADA BANK

Plaintiff (Appellant) Defendant (Respondent)

Heard at Toronto: May 26 & 27/05  
O'Driscoll, Dunnet and Jennings J.J.

In the written reasons of even date given for the majority by Dunnet J., with whom Jennings J. agrees, the written appeal is dismissed. The separate written reasons of even date, O'Driscoll J. would have allowed the appeal, set aside the order of Callity J., dated July 28/04, certifies the action under the CPA.

Costs: If counsel are unable to agree or to certify, they are to provide written submissions within 30 days of the date of these dates.

Oct. 27/05

J.J. Driscoll

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)

Proceedings Commenced in Toronto

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