

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN MARKSON

Plaintiff

- and -

MBNA CANADA BANK

Defendant

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

AMENDED THIS June 8, 2004 PURSUANT TO
 MODIFIÉ CE _____ CONFORMÉMENT À
 RULE/LA RÈGLE 26.02 (A)
 THE ORDER OF _____
 L'ORDONNANCE DU _____
 DATED / FAIT LE _____

 REGISTRAR GREFFIER
 SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LEGAL AID OFFICE.

Date 9th September 2003.

Issued by A. Chirba
Local Registrar

Address of
court office: 393 University Ave., 10th Floor
Toronto, Ontario M5G 1E6

TO: MBNA Canada Bank
1600 James Naismith Drive
Suite 800
Ottawa, Ontario
Canada K1B 5N8

CLAIM

1. The Plaintiff claims:

- (a) A declaration that the interest rate charged by the Defendant MBNA Canada Bank ("MBNA") to the Class (defined below) on Cash Advances (defined below) made by MBNA to the Class on MBNA Credit Cards (defined below) violates section 347 of the *Criminal Code* and is illegal and void, and does not have to be paid by the Class;
- (b) An accounting of the interest in excess of an effective annual interest rate of 60% paid by members of the Class to MBNA on Cash Advances and an order that MBNA pay corresponding restitutionary damages forthwith;
- (c) An interim, interlocutory, and permanent injunction restraining MBNA from charging interest in a manner that violates the *Criminal Code*;
- (d) Punitive damages in an amount to be fixed by the court;
- (e) Prejudgment interest in accordance with the *Courts of Justice Act*;
- (f) Postjudgment interest in accordance with the *Courts of Justice Act*; and,
- (g) Costs of this proceeding on a full indemnity basis.

OVERVIEW

2. This is a proposed class proceeding for damages and other relief arising from interest charges applied to Cash Advance transactions on MBNA credit cards. The rate of interest charged by MBNA on Cash Advances, including interest described as a "transaction fee interest charge" and the stated Annual Percentage Rate which accrues daily, contravenes the criminal interest rate provisions of the *Criminal Code*. Consequently, members of the proposed Class are entitled to restitution for illegal interest they have paid and will pay, and other relief.

THE PARTIES

3. 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 describes itself as "the world's largest independent credit card issuer". MBNA issues a

wide variety of credit cards (collectively "MBNA Credit Cards"), including a credit card known as the MBNA Platinum Plus MasterCard.

4. The Plaintiff resides in Toronto, Ontario. He is a customer of MBNA and holds a MBNA Platinum Plus MasterCard. Purchases and cash advances made by the Plaintiff using his MBNA Platinum Plus MasterCard are credited by MBNA to his cardholder account.

THE CLASS

5. The Plaintiff brings this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 on behalf of a class consisting of all persons who (i) hold or have held an MBNA Credit Card and (ii) paid, or have been charged, or will pay, or will be charged interest on Cash Advances on a MBNA Credit Card since MBNA commenced carrying on business in Canada, and the date of judgment in this matter (the "Class").

CASH ADVANCES ON MBNA CREDIT CARDS

6. MBNA enters into a cardholder agreement with each person to whom it issues an MBNA MasterCard. The cardholder agreement sets forth the terms upon which credit is advanced by MBNA to its customers, including Markson and the Class, and the terms upon which the credit is to be repaid. The cardholder agreement is a contract of adhesion. Its terms are fixed by MBNA and are not negotiable.

7. One of the services offered by MBNA through MBNA Credit Cards is the ability of customers to obtain cash advances. An MBNA Credit Card cash advance can be effected in a number of ways (collectively "Cash Advance"), including:

- (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.

INTEREST CHARGES

8. Since it commenced carrying on business in Canada, MBNA has charged and it continues to charge interest on each Cash Advance taken by a cardholder, in accordance with the terms of the cardholder agreements, comprised of two elements (collectively "Interest Charge"):

- (a) interest purportedly charged at the published Annual Percentage Rate ("APR"), accruing daily, until the date that the Cash Advance is completely repaid inclusive of any accrued and unpaid interest; and
- (b) interest purporting to be a "transaction fee" in an amount equivalent to the greater of \$5.00 in 2002, increased to \$7.50 in 2003, and 1.00% of each Cash Advance.

9. Under the terms of the cardholder agreements, MBNA calculates periodic interest and accrues it daily to the cardholder's account in respect of the principal amount of each cash advance taken by the cardholder. It also calculates periodic interest and accrues it daily in respect of the cash advance transaction fees it levies.

10. All cash advances and cash advance transaction fees are due and payable to MBNA immediately after the cardholder takes the cash advance.

11. MBNA requires its customers to make a minimum payment each billing cycle. The billing cycle is no more than 34 days if there is activity on the cardholder's account. The minimum payment is the lesser of \$10.00, or (i) the sum of all periodic rate interest charges, transaction fees and account fees plus \$10.00; or (ii) 2.25% of the new balance total. Hence, MBNA requires payment of the cash advance transaction fee at the end of billing cycle in which the fee is charged.

THE DEFENDANT CHARGES INTEREST AT A CRIMINAL RATE ON CASH ADVANCES

12. Section 347 of the *Criminal Code* makes it an offence to charge or receive interest at a "criminal rate". "Criminal rate" is defined as "an effective annual rate of interest

calculated in accordance with generally accepted actuarial practices and principles that exceeds 60% on the credit advanced under an agreement or arrangement.”

13. The Interest Charge is “interest” within the meaning of section 347 of the *Criminal Code*.

14. The effective annual rate of interest charged to the Class by way of the Interest Charge vastly exceeds the “criminal rate” of 60%.

15. MBNA has received payments of interest from the Class in payment of the Interest Charge at rates that vastly exceed the “criminal rate” of 60%.

16. On May 27, 2003, the Plaintiff used his MBNA Credit Card at an automated banking machine in Toronto, Ontario to obtain a Cash Advance of \$100.00. An ABM service fee of \$1.50 was charged, for a total Cash Advance of \$101.50. The “transaction fee” Interest Charge of \$7.50 was also applied to the plaintiff’s cardholder account.

17. On June 2, 2003 the Plaintiff made a payment of \$116.56 to repay the Cash Advance, his prior outstanding balance and accrued interest. Subsequently, the Plaintiff received a statement of account from MBNA, entitled “June 2003 Statement”, in respect of his MBNA cardholder account. The statement reflected the Cash Advance transaction and the Interest Charge and stipulated the following in the bottom left-hand corner of the statement:

For this billing period:

Annual percentage rate94.11%

(Includes Periodic Rate and Transaction Fee Interest Charges)

A further \$0.46 Interest Charge was charged by MBNA against the Plaintiff’s cardholder account.

18. Based on MBNA's own calculations and statement of account, the annual rate of interest charged to the Plaintiff greatly exceeded the maximum legal rate of interest permissible under the *Criminal Code*.

19. In fact, the Interest Charge charged by MBNA to the Plaintiff does exceed the maximum legal rate of interest permissible under the *Criminal Code*, and is, therefore illegal and void.

20. The plaintiff is entitled to restitution from MBNA of the Interest Charge paid by him to the defendant in respect of the cash advance.

21. MBNA has received by way of Interest Charges payments of interest at rates in excess of 60% per year from members of the Class since it commenced carrying on business in Canada. The receipt of all such payments contravenes section 347(1)(b) of the *Criminal Code*. All such payments are therefore void, and the Class is entitled to restitution thereof.

UNJUST ENRICHMENT

22. The total amount collected by MBNA as Interest Charges from the Class is not known by the Plaintiff but is known to MBNA. MBNA has been unjustly enriched by the amount in excess of an effective annual rate of interest of 60% that it has charged and received from the Class. There is no juristic reason for MBNA to be permitted to keep the Interest Charges paid to it by the Class to the extent such Interest Charges exceed the maximum interest permitted by law. The Class is therefore entitled to an accounting of all of the Interest Charges they have paid to MBNA and it is entitled to restitution from MBNA of all amounts they have paid in excess of the criminal rate.

BREACH OF CONTRACT

23. Further, or in the alternative, MBNA has breach the terms of its own contract. The cardholder agreement provides, in part: "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." In fact, the Class has been charged and has paid interest in excess of that permitted by law. MBNA has failed or refused to credit the overpayments of Interest Charges to the accounts of the Class, and has thereby breached the cardholder agreement. The Class has suffered a loss equivalent to the amount of the Interest Charges it has paid to MBNA in excess of an effective annual rate of interest of 60%.

GENERAL

24. The conduct of MBNA in charging and receiving interest in excess of the maximum permitted at law, and failing to credit the accounts of the Class with the overpayments of Interest Charges is conduct deserving the sanction of the court by way of an award of punitive damages.

25. The Plaintiff, on behalf of the Class, pleads and relies on the *Class Proceedings Act*, 1992, R.S.O. 1992, c. 6, the *Criminal Code of Canada*, R.S.C. 1985, c. 46 and the *Courts of Justice Act*, R.S.O. 1990, c. 43.

26. The Plaintiff proposes that this action be tried at Toronto, Ontario.

September 9, 2003

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**
250 University Avenue
Suite 501
Toronto, ON M5H 3E5

Ken Rosenberg - LSUC No.: 21102H
Tel: (416) 646-4304
Fax: (416) 646-4305

Martin Doane - LSUC No.: 31819C
Tel: (416) 646-4302
Fax: (416) 646-4303

Odette Soriano - LSUC No.: 37326J
Tel: (416) 646-4306
Fax: (416) 646-4307

KOSKIE MINSKY
20 Queen Street West
Suite 900
Toronto, ON

M5H 3R3

Kirk Baert – LSUC No.: 309420
Tel: 416-977-8343
Fax: 416-204-2889

Solicitors for the Plaintiff 562663_1

STEPHEN MARKSON

v.

MBNA CANADA BANK

Plaintiff

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings Commenced in Toronto

AMENDED STATEMENT OF CLAIM

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Martin Doane - LSUC No.: 31819C
Tel: (416) 646-4302
Fax: (416) 646-4303

KOSKIE MINSKY
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Kirk Baert - LSUC No.: 309420
Tel: 416-977-8353
Fax: 416-204-2889

Solicitors for the Plaintiff
536479_1