

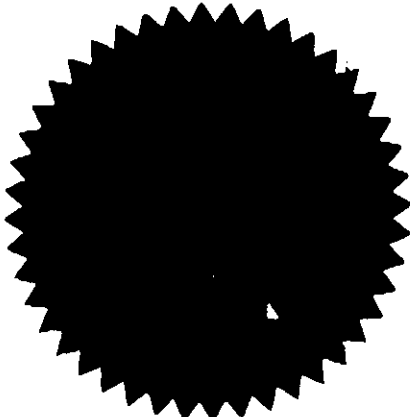
Court File No. C45191

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE)
^{ex}MR. JUSTICE ROSENBERG)
)
 THE HONOURABLE)
^{ex}MR. JUSTICE MacPHERSON)
)
 THE HONOURABLE)
^{ex}MR. JUSTICE ROULEAU)

TUESDAY, THE 2nd
DAY OF MAY, 2007

BETWEEN:



STEPHEN MARKSON

Plaintiff
(Appellant)

- and -

MBNA CANADA BANK

Defendant
(Respondent)

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992

^{ex}AMENDED^{ex}
ORDER

THIS APPEAL, from the order of the Divisional Court dated October 27, 2005, which dismissed an appeal from the order of the Honourable Mr. Justice Cullity dated July 28, 2004, which dismissed the plaintiff's motion for certification of the action as a class proceeding, was heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, on December 7, 2006, judgment having been reserved until this day.

ON READING the pleadings and proceedings herein, and the orders of the Divisional Court dated October 27, 2005 and December 9, 2005 and the reasons given therefor, and the

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order of the Honourable Mr. Justice Cullity dated July 28, 2004 and December 1, 2004, and the reasons given therefor, and for written reasons delivered this day,

1. **THIS COURT ORDERS** that the orders of the Divisional Court dated October 27, 2005 and December 9, 2005 be and hereby are set aside.

2. **THIS COURT ORDERS** that the orders of the Honourable Justice Cullity dated July 28, 2004 and December 1, 2004 be and hereby are set aside.

3. **THIS COURT ORDERS** that this action be and hereby is certified as a class proceeding.

4. **THIS COURT DECLARES** that this action be and hereby is certified on behalf of the following class (collectively "the class"):

All persons in Canada who, at any time before the last of the dates on which notice of certification is given pursuant to the order of the Ontario Superior Court of Justice, hold or have held, an MBNA credit card on which cash advances could be obtained.

5. **THIS COURT ORDERS** that the following issues be and hereby are certified as common issues for the class in the class proceeding:

- (a) Has MBNA Canada Bank ("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?
- (b) If so, were, and are, class members entitled to withhold payment of such excess interest:
 - i. because MBNA's receipt of such excess interest would be in violation of s. 347 of the *Criminal Code*; or
 - ii. pursuant to such agreements or arrangements?

- (c) If 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, 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 per cent interest?
- (d) If MBNA received interest at an effective annual rate in excess of 60 per cent on cash advances made under agreements or arrangements with class members, did payment of interest at that rate arise from voluntary acts of the class members so as to give rise to a "voluntariness defence" thereby precluding a violation of s. 347 of the *Criminal Code of Canada*?
- (e) Are the terms of the paragraph headed "Interest" of the Cardholder Agreement a bar to the class claim?
- (f) Has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60 per cent, within the meaning of section 347 of the *Criminal Code*?
- (g) 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 per cent?
- (h) Can the amount of restitution and damages for breach of contract be determined on an aggregate basis? If so, in what amount?
- (i) Do provincial Statutes of Limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of section 347 of the *Criminal Code*?
- (j) Should MBNA be enjoined from charging, or receiving and not crediting, excess interest in the future?
- (k) Should the class be awarded punitive damages against MBNA?

6. **THIS COURT ORDERS** that this class proceeding be remitted to the supervision of the Regional Senior Justice ^{EA} ~~Winkler~~ ^{EA} or to such judge as he directs to case-manage the class proceeding.

ENTERED AT MONTREAL
 ON/BOOK NO:
 LE/DANS LE REGISTRE NO

SEP 18 2007

PER/PAR: *EL*

Eric Rasmussen
 Registrar

Court File No. C45191

MARKSON v. MBNA CANADA BANK

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

***v.* AMENDED
O R D E R**

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