

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° 500-06-000249-041

OPTION CONSOMMATEURS

Plaintiff

-and-

MONIQUE DESJARDINS-ÉMOND

Designated member

v.

CANADIAN TIRE BANK

Defendant

-and-

ATTORNEY GENERAL OF QUÉBEC

Mis en cause

DEFENCE OF DEFENDANT CANADIAN TIRE BANK

IN RESPONSE TO THE ALLEGATIONS CONTAINED IN PLAINTIFF'S PARTICULARIZED MOTION TO INSTITUTE CLASS ACTION PROCEEDINGS, ("PARTICULARIZED MOTION"), DEFENDANT CANADIAN TIRE BANK STATES AS FOLLOWS:

1. It admits paragraphs 1 to 8 of the Particularized Motion;
2. With regard to the allegations contained in paragraphs 9 to 12 of the Particularized Motion, it refers to Exhibit P-3, denying anything that is not in conformity therewith;
3. It denies paragraphs 13, 14 and 15 of the Particularized Motion;
4. With regard to paragraph 16 of the Particularized Motion, it admits that it has a policy of charging fees for cash advances requested with Canadian Tire Options MasterCard credit

cards and Canadian Tire Options Visa credit cards in Canada or abroad, but ignores Exhibit P-5 en liasse and all the references taken from Exhibit P-5 en liasse;

5. It admits paragraph 17 of the Particularized Motion;
6. It denies paragraph 18 of the Particularized Motion;

AND FOR FURTHER PLEA, DEFENDANT CANADIAN TIRE ADDS:

I. DEFENDANT CANADIAN TIRE BANK

7. Canadian Tire Bank was constituted as a bank under the *Bank Act* (Canada) in April 2003 and has the rights, powers and obligations provided for by such statute and by the other federal statutes applicable to the activities of banks;
8. Canadian Tire Bank started charging fees to Quebec cardholders for cash advances obtained with the Canadian Tire Options MasterCard credit card in March 2004 and subsequently with its other MasterCard credit cards. Canadian Tire Bank is currently charging fees to cardholders for cash advances obtained with all of its MasterCard credit cards;
9. Canadian Tire Bank also started charging fees for cash advances with the Canadian Tire Options Visa in Quebec in July 2009;
10. Canadian Tire Bank started charging fees to Quebec cardholders for cash advances obtained with the Canadian Tire Retail credit card in March 2004;

II. THE FACTS

A) The case of designated member Monique Desjardins-Émond

11. The fees which are at the basis of designated member Monique Desjardins-Émond's claim were charged by Canadian Tire Bank in relation to cash advances she obtained in August 2004 and September 2004 with her Canadian Tire Options MasterCard credit card, as appears from the monthly statement of designated member Monique Desjardins-Émond dated September 8, 2004 (Exhibit P-3);
12. Designated member does not allege that she has actually paid these fees to Canadian Tire Bank;
13. During her examination after plea, designated member was not able to indicate whether she has actually paid these fees to Canadian Tire Bank and, in fact, such fees were never paid;
14. In addition, designated member Desjardins-Émond filed for bankruptcy on October 4, 2004 and was liberated from all her debts on July 5, 2005, which included any amounts owed to Canadian Tire Bank (erroneously listed as "Canadian Tire Acceptance Ltd."), the whole as appears from the relevant bankruptcy documents communicated in support of the present plea as Exhibit DCTB-1 en liasse;

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15. Accordingly, and as a result of such bankruptcy, the designated member has no legal claim against Canadian Tire Bank;
16. Finally, designated member Desjardins-Émond had already accepted the charging of fees for cash advances and had already renounced to any claim against Canadian Tire Bank regarding such fees when she obtained the cash advances in August 2004 and September 2004, since she had previously obtained cash advances for which a fee had been charged, as appears from a copy of her statement of account dated June 8, 2004, communicated in support of the present plea as Exhibit DCTB-2;

B) The MasterCard system and Canadian Tire Bank

17. The MasterCard credit card network was created in the United States in 1966 and allows MasterCard credit cardholders to use their cards to purchase goods and obtain services from merchants throughout the world, without regard to the issuer of the card or the country where the card was issued;
18. MasterCard administers a payment system, including various card products and travelers' cheques, which are identified by the various MasterCard trade or brand marks;
19. MasterCard does not issue credit cards and does not fix various fees, fees for cash advances or annual interest rates. The financial institutions that are MasterCard members manage the relationships with their customers to whom they issue credit cards;
20. Canadian Tire Bank became a member of MasterCard in November 2003;
21. Canadian Tire Bank is authorized to use the MasterCard payment system and the MasterCard trademark, and to issue MasterCard credit cards to customers of the bank. As such, Canadian Tire Bank is an "Issuer" of MasterCard card products;
22. Canadian Tire Bank issues to its cardholders several different types of credit cards. Different cards have different features, such as fees for cash advances, different annual fees, different interest rates applicable to outstanding balances and different loyalty/reward programs;
23. The most popular MasterCard issued by Canadian Tire Bank is the Canadian Tire Options MasterCard. Canadian Tire Bank also has customers in Quebec to whom the following MasterCard branded cards are issued: Gas Advantage MasterCard, Cash Advantage MasterCard, Vacation Advantage MasterCard, Low Rate Options MasterCard and Gold Options MasterCard;

C) The Visa system and Canadian Tire Bank

24. The history of Visa International Service Association - now known as Visa Inc. - can be traced back to 1958;

25. Visa Inc. oversees the Visa International network and this network allows Visa cardholders to use their Visa cards around the world, regardless of which financial institution issued the card or in what country it was issued;
 26. In Canada, the Visa network is administered by Visa Canada Corporation, a subsidiary of Visa Inc.;
 27. Visa Canada Corporation administers a payment system, including various card products and travelers' cheques, which are identified by the various Visa trade or brand marks;
 28. Visa Inc. and Visa Canada Corporation do not issue credit cards, do not establish the applicable credit limits, and do not determine fees or interest rates. The financial institutions which are Visa members manage the relationships with cardholders and establish the terms on which the relevant cards are issued;
 29. Canadian Tire Bank received permission from Visa to issue Visa branded credit cards in July 2008. However, issuance did not begin until July 2009;
 30. Canadian Tire Bank issues only one type of Visa credit card, the Canadian Tire Options Visa;
- D) Canadian Tire Retail credit card**
31. Canadian Tire Bank also issues the Canadian Tire Retail credit card in Quebec. This credit card can only be used at Canadian Tire stores and gas bars;
 32. Cash advances may be obtained in Quebec at Canadian Tire stores and have been available since March 2004 with the Canadian Tire Retail credit card;
- E) The cash advance fees**
33. A cash advance fee as assessed by Canadian Tire Bank is a charge for the right to obtain a cash advance using the MasterCard or Visa network or to obtain cash advances in the Canadian Tire stores;
 34. The Initial Disclosure Statements which accompany variable credit contracts of Canadian Tire Bank disclose that a fee for cash advances obtained through the Canadian Tire Bank MasterCard credit cards is charged and the amount of this fee, whether the advance is obtained in Canada or abroad, as appears from all versions of the contracts and the Initial Disclosure Statements of the Canadian Tire Options MasterCard since March 2004 and which are representative of all variable credit card contracts and Initial Disclosure Statements of all MasterCard credit cards issued by Canadian Tire Bank, communicated in support of the present plea as Exhibit DCTB-3 en liasse;
 35. The Initial Disclosure Statements which accompany variable credit contracts of Canadian Tire Bank and are sent to cardholders disclose that a fee for cash advances obtained through the use of Canadian Tire Options Visa credit cards is charged and the amount of this fee, whether the advance is obtained in Canada or abroad, as appears from all versions of the

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contracts and the Initial Disclosure Statements since July 2009, communicated in support of the present plea as **Exhibit DCTB-4 en liasse**;

36. The Initial Disclosure Statements which accompany variable credit contracts of Canadian Tire Bank and are sent to cardholders disclose that a fee for cash advances obtained through the use of Canadian Tire Retail credit card is charged and the amount of this fee;
 37. The monthly statements of account sent by Canadian Tire Bank to its MasterCard cardholders who obtain cash advances during the relevant billing period also specify the applicable fees, as appears from the statement of account of June 2004 of designated member Desjardins-Émond (**Exhibit DCTB-2**);
 38. The monthly statements of account sent by Canadian Tire Bank to its Visa cardholders who obtain cash advances during the relevant billing period also specify the applicable fees, as appears from a sample of an actual Visa cardholder' statement of account of December 2009 (the name and the account number having been redacted), communicated in support of the present plea as **Exhibit DCTB-5**;
 39. The monthly statements of account sent by Canadian Tire Bank to its Canadian Tire Retail credit card cardholders who obtain cash advances during the relevant billing period also specify the applicable fees,
- F) Benefits for Canadian Tire Options MasterCard, Canadian Tire Options Visa cardholders and Canadian Tire Retail credit card cardholders**
40. The Canadian Tire Options MasterCard credit cards, the Canadian Tire Options Visa credit cards and the Canadian Tire Retail credit cards allow cardholders to obtain cash advances in Canada and abroad;
 41. A cash advance allows cardholders to obtain cash immediately in a very convenient manner, in Canada and abroad, as was the case for designated member Desjardins-Émond;
 42. During her examination before plea, designated member Desjardins-Émond testified that, besides going to her bank to obtain cash, she had no other means of obtaining cash in August 2004 and September 2004 when she obtained the cash advances that appear on her monthly statement dated September 8, 2004 (**Exhibit P-3**) and for which fees were charged by Canadian Tire Bank;
 43. Designated member Desjardins-Émond's MasterCard credit card provided her with a very convenient method of borrowing money for a short time period;
 44. Obtaining an advance with a credit card is simpler and faster than borrowing money through traditional channels;

III. THE LAW

45. Plaintiff's claim against Canadian Tire Bank is based on ss. 69 to 72 and 91 and 92 of the *Consumer Protection Act*, R.S.Q., c. P-40.1 ("CPA") and s. 55 and ff. of the regulations respecting its application;
46. The provisions of the CPA relied on by plaintiff relate to the disclosure and calculation of credit charges;
- A) **Legal nature of the cash advance fee**
47. The cash advance fee as assessed by Canadian Tire Bank is a charge which is payable for the use of the MasterCard and Visa networks and of the Canadian Tire stores network to obtain an advance, and not in consideration of an extension of credit. Cash advance fees are similar to service charges for a withdrawal made at an ATM from a bank account through a debit card;
48. The provisions of the CPA raised by plaintiff do not apply to cash advance fees;
49. The Motion to Institute Class Action Proceedings is therefore ill-founded and should be dismissed;
- B) **The Constitutional questions**
50. Assuming (but not admitting) that a cash advance fee should be considered as a credit charge (which is denied), the Motion to Institute Class Action Proceedings would still be ill-founded;
51. For the constitutional reasons set out in the following paragraphs, the provisions of the CPA invoked by plaintiff cannot apply to Canadian Tire Bank;
- 1) **The exclusive power of the Parliament of Canada over banking**
52. Section 91(15) of the *Constitution Act, 1867* grants to the Parliament exclusive jurisdiction over banks and banking;
53. Credit (including revolving credit) constitutes a vital and essential element of banking;
54. Canadian banks have been engaged in providing credit (including revolving credit) since 1867 (and even before) and credit-granting has always been at the core of their activities;
55. Credit cards are a form of extending credit, and this is recognized not only by the *Bank Act* but also by the CPA;
56. The provisions of the CPA invoked by plaintiff regulate variable (i.e. revolving) credit and the application of such provisions to banks (including Canadian Tire Bank) would impair their activities from a regulatory and operational standpoint;

- (a) their application would result in subjecting the banks (including Canadian Tire Bank) to the provincial regulatory regime established by the CPA;
 - (b) their application would prevent the banks (including Canadian Tire Bank) from operating their credit card activities on a national basis and from designing their systems under uniform business models across Canada, with the resulting complexities and costs that would result from regional operations;
57. These provisions are therefore inapplicable to Canadian Tire Bank under the constitutional doctrine of interjurisdictional immunity;
- 2) **Paramountcy of federal legislation**
58. The provisions of the CPA relied on by plaintiff must be found inoperative as regards banks (including Canadian Tire Bank) under the constitutional doctrine of paramountcy as their effect is incompatible with federal legislation and regulations over banks and banking (the "Federal Law"), including Federal Law on the disclosure and calculation of bank charges;
59. There is a double operational conflict between the CPA provisions in dispute and Federal Law because:
- (a) the provisions of the CPA prohibit a non-interest credit charge not capable to be expressed as an annual rate whereas Federal Law permits a non-interest charge which is not so expressed or not capable to be so expressed (as is the case for the cash advance fees if it is a credit charge); and
 - (b) the federal and CPA disclosure requirement for a credit charge other than interest (i.e. a "non-interest credit charge") are incompatible;
60. The application of the relevant CPA provisions would also frustrate the purpose of the Federal Law in that:
- (a) Parliament intended the Federal Law on consumer protection in credit matters to be exhaustive and applying provincial consumer protection legislation on these matters would defeat Parliament's intent;
 - (b) applying the CPA would subject the banks (including Canadian Tire Bank) to the regulatory power of the Office de la protection du consommateur and its president, which would be contrary to the intent of the Federal Law to establish the Financial Consumer Agency of Canada as the sole regulator in the matter of protection of consumers in the banking industry;
- C) **Estoppel ("Fin de non-recevoir")**
61. Should this Court nevertheless conclude that a cash advance fee is a credit charge under the CPA and that the CPA applies to banking activities in the present case (which is denied),

designated member Desjardins-Émond is precluded from challenging the debits made to her account in respect of any such fee, for the following reasons;

62. Each cardholder receives a monthly statement of account which lists all transactions and fees charged in the billing the period covered by the statement;
 63. If a Canadian Tire Options Visa cardholder is not in agreement with the contents of his/her monthly statement of account, he/she has 90 days to notify in writing Canadian Tire Bank, failing which the statement and the debits thereon are deemed to have been accepted and consented to by the cardholder, as provided by the variable credit card contract for Canadian Tire Options Visa (see credit card contracts, Exhibit DCTB-4 en liasse) and on the back of the statements of accounts, communicated in support of the present plea as Exhibit DCTB-6.
 64. If a Canadian Tire Bank MasterCard cardholder is not in agreement with the contents of his/her monthly statement of account, he/she has 90 days to notify in writing Canadian Tire Bank, failing which the statement and the debits thereon are deemed to have been accepted and consented to by the cardholder, as provided on the back of the statements of accounts since March 2004, communicated in support of the present plea as Exhibit DCTB-7, and also by the variable credit card contracts for Canadian Tire Bank MasterCard since November 2008 (Exhibit DCTB-3 en liasse);
 65. If a Canadian Tire Retail card cardholder is not in agreement with the contents of his/her monthly statement of account, he/she has 90 days to notify in writing Canadian Tire Bank, failing which the statement and the debits thereon are deemed to have been accepted and consented to by the cardholder, as provided on the back of the statements of accounts, a sample of which is communicated in support of the present plea as Exhibit DCTB-8,
 66. Until the filing of the Motion for Authorization to Institute a Class Action in the present file, designated member Desjardins-Émond has never notified Canadian Tire Bank of any objection to the charges made to her account in respect of cash advance fees;
 67. By not challenging in a timely fashion the cash advance fees debited to her account, designated member Desjardins-Émond has failed to fulfill a condition precedent to a recourse in contestation of such debits and she is now precluded from exercising such a recourse;
 68. In addition, she has not paid the fee, has been declared bankrupt and as a result of such bankruptcy has no claim against Defendant;
- D) Renunciation**
69. Canadian Tire Bank cardholders who pay their balances that include fees for cash advances also accept by that fact the charging of these fees and, by this fact, renounce to any claim regarding these fees;

E) Lack of prejudice

70. In addition, plaintiff does not allege the suffering of any prejudice by any class member as a result of the cash advance fees and does not even allege any fact which would support an allegation of prejudice, the whole as appears from the Court record and from the transcripts of examination before plea of designated member Desjardins-Émond;
71. The mere fact that designated member Desjardins-Émond and other class members were charged fees for cash advances does not constitute a prejudice *per se*;
72. Given the absence of prejudice, plaintiff's action and designated member Desjardins-Émond's action under the CPA should be dismissed;

F) Collective recovery

73. There can be no order of collective recovery of compensatory damages (fees for cash advance), since the issue of renunciation of rights under the CPA is individual to every class member;
74. Collective recovery is therefore not possible or practicable;

G) Lack of legal and factual grounds with respect to the claim for punitive damages

75. Plaintiff's claim for the reimbursement of fees for cash advance and damages is based on section 271 CPA - not on section 272 CPA;
76. The recourses of sections 271 and 272 CPA are mutually exclusive;
77. As plaintiff's claim is based on section 271 CPA and as designated member Desjardins-Émond and the other class members did not suffer any prejudice, plaintiff and designated members are not entitled to claim punitive damages from Canadian Tire Bank under the CPA;
78. Subsidiarily, even if a claim for punitive damages contemplated in section 272 CPA were not barred, such damages should not be awarded for the following reasons :
- (a) Neither designated member Desjardins-Émond nor the other class members suffered any prejudice for which compensatory damages could be awarded and section 272 CPA does not permit the award of punitive damages where there is no ground to order compensatory damages;
 - (b) In any event, there is no ground in the present case to award punitive damages because there is no allegation of bad faith on the part of Canadian Tire Bank or of any wilful disrespect by Canadian Tire Bank of applicable law;
79. Plaintiff's and designated member Desjardins-Émond's claim for punitive damages is unfounded and not supported by any factual allegation or evidence;

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80. Subsidiarily, there can be no order of collective recovery for punitive damages, since the claim for compensatory damages which would base any award of punitive damages cannot give rise to a collective recovery order, as explained above.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Defence;

DISMISS the *Particularized Motion to Institute Class Action Proceedings* of Plaintiff Option Consommateurs and designated member Monique Desjardins-Émond instituted against Defendant Canadian Tire Bank;

DISMISS the Class Action of plaintiff Option Consommateurs against Defendant Canadian Tire Bank;

DISMISS the action of designated member Monique Desjardins-Émond against Defendant Canadian Tire Bank;

THE WHOLE, with costs.

Montreal, February 12, 2010

(Sgd) McCarthy Tétrault LLP

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