

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No.: 500-06-000372-066

SUPERIOR COURT
(Class Action)

OPTION CONSOMMATEURS

Plaintiff

SERGE LAMOUREUX et al.

Designated Members

c.

CITIBANK CANADA et al.

Defendants

-and-

ATTORNEY GENERAL OF QUÉBEC

Mis en cause

DEFENCE OF CITIBANK CANADA

FOR DEFENCE TO THE PLAINTIFF'S PARTICULARIZED MOTION TO INSTITUTE CLASS ACTION PROCEEDINGS (THE "MOTION"), THE RESPONDENT CITIBANK CANADA ("CITIBANK") RESPECTFULLY SUBMITS THAT:

1. It admits the allegations contained in paragraphs 1 and 2 of the Motion and refers to Mr. Justice Gascon's judgment of October 25, 2007, which authorized the institution of a class action in the present matter (the "Authorization Judgment").
2. It has no knowledge of the allegations contained in paragraph 3 of the Motion.
3. It admits the allegations contained in paragraph 4 of the Motion.

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4. It admits the allegations contained in paragraph 5 of the Motion insofar as Citibank issues MasterCard credit cards.
5. It admits the allegations contained in paragraph 6 of the Motion insofar as they concern the Designated Member, Michel Méthôt ("Mr. Méthôt").
6. It has no knowledge of the allegations contained in paragraphs 7 to 7.6.1 of the Motion.
7. It admits the allegations contained in paragraph 7.7 of the Motion adding that Mr. Méthôt has not been a Citibank MasterCard cardholder since September 2006.
8. With respect to the allegations contained in paragraph 7.8 of the Motion, it refers to Exhibit P-5 and denies anything that is not in strict conformity therewith.
9. It has no knowledge of the allegations contained in paragraphs 7.9 to 7.11 of the Motion.
10. It admits the allegations contained in paragraph 7.12 of the Motion insofar as they concern Mr. Méthôt.
11. It has no knowledge of the allegations contained in paragraphs 7.13 to 8 of the Motion.
12. It denies the allegations contained in paragraphs 9 to 12 of the Motion.
13. It denies the allegations contained in paragraphs 13 to 15 of the Motion although they are not directed at Citibank.
14. It admits the allegations contained in paragraph 16 of the Motion.
15. It denies the allegations contained in paragraph 17 of the Motion.

AND FOR FURTHER DEFENCE TO THE MOTION, CITIBANK STATES THE FOLLOWING:

I. THE CASE OF DESIGNATED MEMBER MICHEL MÉTHÔT

16. From April 2001 to September 2006, Mr. Méthôt was the holder of a Citibank MasterCard credit card.
17. As appears from paragraph 7.8 of Plaintiff's Motion, in November 2002, Mr. Méthôt's credit limit was increased from \$7,000 to \$9,000.

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18. Mr. Méthôt never complained about the foregoing increase of his credit limit, nor did he demand that it be decreased to the original amount.
19. In fact, he testified on discovery that he was pleased with the increase and that greater access to credit was practical and efficient.
20. Moreover, it was only one year later, in November 2003, that Mr. Méthôt used part of the additional credit made available to him.
21. For all intents and purposes, Mr. Méthôt consented to and accepted gladly the increase in his credit limit, used the additional credit granted to him which he needed and suffered no prejudice therefrom.

II. CITIBANK AND MASTERCARD

22. Citibank is a Schedule II Canadian chartered bank, incorporated under the *Bank Act*. Citibank has been operating in Canada since 1960, and offers a range of banking services and products, including granting revolving (variable) credit by issuing MasterCard credit cards.
23. The MasterCard Network was established in the United States in 1966 by a group of banks, under the name of Interbank Card Association ("ICA").
24. Credit card issuers began to offer the MasterCard in Canada in 1973.
25. MasterCard does not issue cards, it does not establish annual fees associated with its cards, it is not responsible for the determination of annual interest rates and, it does not solicit merchants to accept the card. The financial institutions who are members of MasterCard manage the relationships with consumers and merchants.
26. Citibank became a member of MasterCard in July 2000, and began issuing MasterCard credit cards in Canada in April 2001. Prior thereto, Citibank issued Visa credit cards.
27. Accordingly, Citibank is an "issuing bank" and "issuer" of MasterCard credit cards.

III. COMPLIANCE WITH THE CONSUMER PROTECTION ACT

28. Plaintiff's action against Citibank is based on a purported violation of Section 128 of the *Consumer Protection Act*, R.S.Q., c. P-10.1 ("CPA").

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29. As aforesaid, by his conduct, Mr. Méthôt consented to and gladly accepted the subject credit limit increase and never complained or protested the fact of the increase or asked that his credit limit be reduced to the original amount.
30. Accordingly, Citibank complied with the spirit and purpose of Section 128 of the CPA.

IV. CONSTITUTIONAL QUESTIONS

31. Even if Citibank's increase of Mr. Méthôt's credit limit is found to be contrary to Section 128 of the CPA (which is denied), the Motion is nevertheless unfounded.
32. Citibank respects the federal requirements relating to credit cards, which are defined in the *Bank Act* and its regulations.
33. Citibank submits that, though the CPA is provincial legislation of general application validly enacted under section 92(13) of the *Constitution Act, 1867*, the subject CPA provisions and those of the CPA Regulation:
 - a) are constitutionally inapplicable to Citibank as a federally chartered bank pursuant to the doctrine of interjurisdictional immunity because they impair a vital, essential and integral part of "banking" which are the exclusive legislative jurisdiction of the Parliament of Canada (sections 91(14), 91(15), and 91(19) *Constitution Act, 1867*); or
 - b) in the alternative, are constitutionally inoperative with respect to Citibank pursuant to the doctrine of paramountcy, to the extent of the operational conflict between the valid federal and provincial laws or insofar as the provincial law frustrates Parliament's purpose with respect to the *Bank Act*.

a) *The Doctrine of Interjurisdictional Immunity*

34. Subsection 91(15) of the *Constitution Act, 1867* gives Parliament legislative power over "*banking, incorporation of banks and the issue of paper money*".
35. The modern expression of the retail line of credit, known as the credit card, was specifically enumerated as part of the business of banking in the 1980 revisions to the *Bank Act*, by which Parliament chose to regulate certain of the terms and conditions of these contracts by enacting the *Cost of Borrowing (Banks) Regulations*. Since then, the *Bank Act* and the *Cost of Borrowing (Banks) Regulations* have extensively regulated, and continue to regulate, the granting of revolving credit to individuals.

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36. In addition, Parliament created a complaint-handling process and federal organizations to monitor bank compliance with federal consumer legislation, including the Financial Consumer Agency of Canada ("FCAC") and the Office of the Superintendent of Financial Institutions ("OSFI").
37. Issuance of a credit card is an integral part of most client banking packages, and forms an essential element of the banker-client relationship for retail clients. Credit cards are a form of extending credit, a fact that is recognized not only by the *Bank Act* but also by the CPA.
38. Citibank submits that the impugned sections of the CPA, to the extent that they purport to apply to the revolving (variable) credit agreements between a bank and its clients, impair a vital, essential and integral part of banking activities, a subject of exclusive federal legislative jurisdiction (section 91(15) Constitution Act, 1867).
39. The impugned provisions of the CPA would impair bank activities from both regulatory and operational standpoints in that:
- (i) their application would subject banks to the provincial regulatory regime established by the CPA;
 - (ii) their application would prevent banks from using a uniform national business for the design of their credit card systems and the operation of their credit card activities, and would increase complexity and cost.
40. These provisions are therefore inapplicable to the banks under the constitutional doctrine of interjurisdictional immunity.

b) *The Doctrine of Federal Paramountcy*

41. Citibank submits that the provision of the CPA under consideration are constitutionally inoperable as regards the banks to the extent of the operational conflict with the *Bank Act* and its regulations, and their application to banks would frustrate Parliament's purpose with respect to the *Bank Act* and its regulations.
42. The *Bank Act* and the *Cost of Borrowing (Banks) Regulations* constitute a complete code for the purpose of the regulation of credit cards and credit card plans and the issuance thereof.

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43. The impugned provisions of the CPA, to the extent that they purport to apply to credit card agreements concluded by federally chartered banks, regulate the same banker-client relationships as regulated by the *Bank Act* and the *Cost of Borrowing (Banks) Regulations*.
44. At all times relevant hereto, the *Bank Act* allowed banks to grant to its cardholders unsolicited credit limit increases.
45. There is thus an operational conflict between the impugned provisions of the CPA, on the one hand, and the *Bank Act* and the *Cost of Borrowing (Banks) Regulations*, on the other hand, and the purpose of the federal legislation would be frustrated.
46. The doctrine of federal paramountcy is thus triggered to render the impugned provision of the CPA inoperative to the extent of the aforementioned conflict.

V. MR. MÉTHÔT'S ABSENCE OF A RIGHT OF ACTION

a) *Failure to Fulfill Condition Precedent*

47. If this Court nevertheless concludes that Citibank has breached Section 128 of the CPA by increasing Mr. Méthôt's credit limit and that the CPA applies to the banking activities in the present case (which is denied), Mr. Méthôt is still precluded from claiming the reimbursement of various credit charges.
48. On a monthly basis, Mr. Méthôt (and all Citibank cardholders) received account statements which clearly disclosed, *inter alia*, the amount of his credit limit.
49. If a Citibank cardholder is not in agreement with the contents of his/her account statements, he/she has 30 days to notify Citibank in writing, failing which the statement is deemed to have been accepted by the cardholder, as stipulated in the Citibank MasterCard cardholder agreement and on the reverse side of the monthly account statements. A copy of Mr. Méthôt's Citibank MasterCard cardholder agreement and one of his account statements, are communicated herewith as Exhibit DCB-1.
50. Mr. Méthôt never notified Citibank of any objection or error in respect of the increase of his credit limit. This is easily explained by the fact that he was pleased with the increase.

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51. By neglecting to protest the increase to his credit limit within the appropriate delay, Mr. Méthôt (and any putative class member in the same situation) has failed to satisfy an essential condition for the exercise of his recourse.

b) Acceptance/Ratification of the Credit Limit Increase

52. Mr. Méthôt used the additional credit granted to him by Citibank without protest, complaint or demand that Citibank restore his credit limit to the original amount (i.e. \$7,000). In fact, Mr. Méthôt only used the additional credit one year after it was granted to him.
53. Furthermore, by paying the amounts due on his account statements without protest or complaint, Mr. Méthôt consented to and accepted the credit charges indicated thereon, including any credit charges relating to the additional credit.
54. Accordingly, Mr. Méthôt cannot now seek reimbursement of the credit charges voluntarily paid, without protest, objection or complaint.

VI. DAMAGES

55. The Plaintiff claims the reimbursement of certain credit charges.
56. Moreover, the Plaintiff claims \$200 per class member in punitive damages.
57. Plaintiff's aforesaid claims are unfounded.

a) Restitution of Credit Charges

58. Mr. Méthôt did not suffer any prejudice (nor did any other putative class member) owing to the alleged violation of the CPA by Citibank. The mere increase of Mr. Méthôt's credit limit is not a prejudice, *per se*.
59. On the contrary, as mentioned hereinabove, Mr. Méthôt appreciated and accepted the credit limit increase. He eventually used this additional credit to pay for expenses he needed to incur such as travel expenses, car-related expenses and food for his horses.
60. Mr. Méthôt was well aware and he accepted the fact that he could incur credit charges in connection with the additional credit.

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61. In light of the foregoing, Mr. Méthôt suffered no prejudice whatsoever from Citibank's decision to increase his credit limit and his the claim for restitution of the credit charges imposed on the increased credit should be dismissed.

b) Punitive Damages

62. The Plaintiffs' claim for the reimbursement of certain credit charges can only be grounded in Section 271 CPA (and not Section 272 CPA).

63. Therefore, Mr. Méthôt and the class members are not entitled to claim punitive damages from Citibank pursuant to the CPA.

64. Subsidiarily, even if a claim for punitive damages contemplated in section 272 CPA could be brought (which is denied), such damages should not be awarded to Mr. Méthôt and to other class members because:

a) Having suffered no prejudice, they are not entitled to compensatory damages which is an essential condition of a claim for punitive damages;

b) Citibank has not acted in bad faith, shown wilful disrespect of the CPA or been careless as to the consequences of its actions.

65. Mr. Méthôt's claim for punitive damages, both on a personal basis and on behalf of the class, is unfounded.

VII. PRESCRIPTION

66. Subsidiarily, the alleged claims of all members of the class who concluded their cardholder agreements with Citibank prior to three (3) years before the institution of these proceedings are prescribed and must be rejected.

VIII. COLLECTIVE RECOVERY

67. Subsidiarily, given the number of issues that are individual to each class member (i.e. waiver, ratification and prescription), collective recovery should not be ordered.

IX. CONCLUSION

68. The Motion is unfounded in fact and in law.

69. The present Defence is well-founded in fact and in law.

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WHEREFORE, MAY IT PLEASE THIS COURT TO:

MAINTAIN the present Defence;

DISMISS the present Class Action against Citibank Canada;

THE WHOLE with costs including the cost of experts both before and at trial.

Montréal, February 15, 2010

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CITIBANK CANADA

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