CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: **500-06-000372-066**

SUPERIOR COURT
(Class action)

OPTION CONSOMMATEURS

Plaintiff

-and-

SERGE LAMOUREUX, et als.

Designated Persons

v.

BANQUE DE MONTRÉAL, et als.

Defendants

AMEX BANK OF CANADA'S AMENDED DEFENCE

AMEX BANK OF CANADA ["AMEX"] RESPECTFULLY SUBMITS THE FOLLOWING:

1. With regard to paragraphs 1 and 2 of Plaintiff's Particularized Motion to Institute a Class Action [the "Particularized Motion"], Amex refers this Honourable Court to the Court record and denies all that is not in conformity therewith;

2. Amex ignores the allegations contained in paragraphs 3 and 4 of Plaintiff's Particularized Motion;

3. Amex admits the allegations contained in paragraph 5 of Plaintiff's Particularized Motion;

4. Amex ignores the allegations contained in paragraphs 6 and 7 and sub-paragraphs 7.1, 7.2, 7.2.1, 7.2.2, 7.3, 7.4, 7.5, 7.6, 7.6.1, 7.7, 7.8, 7.9, 7.10, 7.10.1, 7.11, 7.12, 7.13, 7.14, 7.15, 7.15.1, 7.16, 7.17, 7.18, 7.19, 7.20, 7.21, 7.22, 7.23 and 7.24 of Plaintiff's Particularized Motion;

5. Amex admits the allegations contained in sub-paragraphs 7.25 and 7.25.1 of Plaintiff's Particularized Motion;

6. Amex denies the allegations contained in sub-paragraph 7.26 of Plaintiff's Particularized Motion;

7. With regard to the allegations contained in sub-paragraph 7.27 of Plaintiff's Particularized Motion, Amex refers this Honourable Court to Exhibit P-12 and denies all that is not in conformity therewith;

8. With regard to the allegations contained in sub-paragraph 2.27.1 of Plaintiff's Particularized Motion, Amex refers this Honourable Court to Exhibit P-19 and denies all that is not in conformity therewith;

9. Amex ignores the allegations contained in sub-paragraphs 7.28, 7.28.1, 7.29, 7.30, 7.30.1 and 8 of Plaintiff's Particularized Motion;

10. Amex ignores the allegations contained in paragraphs 9, 10, 11 and 12 of Plaintiff's Particularized Motion;

11. Amex denies the allegations contained in paragraphs 13, 13.1, 14 and 15 of Plaintiff's Particularized Motion;

12. With regard to the allegations contained in paragraph 16 and sub-paragraphs 16a), b), c) and d) of Plaintiff's Particularized Motion, Amex refers this Honourable Court to the Court record and denies all that is not in conformity therewith;

13. Amex denies the allegations contained in paragraph 17 of Plaintiff's Particularized Motion.

AND FOR FURTHER PLEA, AMEX SUBMITS THE FOLLOWING:

I. INTRODUCTION

14. The American Express Company is a New York corporation founded in 1850, and it and its subsidiaries form a worldwide financial organization, which, among other things, provides charge and credit cards to its customers.

15. American Express Travel Related Services Company, Inc. ("TRS") is a subsidiary of American Express Company.

16. Amex is a subsidiary of TRS, and is a Schedule II Bank under the *Bank Act* (S.C. 1991, c. 46, as amended) with its head office located in Markham, Ontario.

17. American Express has done business in Canada since 1853 but Amex has been a Schedule II Bank in Canada since 1990.

18. Amex's primary activity is the issuance of American Express Cards in Canada and this represents the bulk of its business or approximately 98% of its banking activities.

19. American Express cards are accepted in over 140 countries worldwide.

20. Amex is currently governed by two federal regulators, the Financial Consumer Agency of Canada ["FCAC"] and the Office of the Superintendent of Financial Institutions ["OSFI"].

21. Amex operates a uniform national business that does not distinguish card products or cardmembers by province or territory given that the underlying regulations of its credit card products is national in nature:

a. Card products and ancillary benefits and rewards;

b. Cardmember promotional and marketing material such as: internet, TV, radio, magazines, newspapers, direct mail, phone calls, co-branding and loyalty/rewards marketing.

c. Cardmember applications, welcome packages, agreements and disclosures

d. Cardmember billing statements, terms and conditions on the billing statements;

e. IT platforms at every level of business from compliance to billing and call centres;

f. Compliance and compliance IT platforms;

g. Legal documents with cardmembers, co-brand partners and loyalty and reward partners;

h. Call centre training, manuals and staff; and

i. Website.

II. MARYLOU CORRIVEAU AND THE AMEX CLASS

22. Amex class representative Marylou Corriveau ["Corriveau"] applied for an American Express Air Miles credit card on October 21, 2002, a copy of her application form, as well as a sample application for the Air Miles Card Agreement, welcome letter, notice of disclosure and August 2002 notice of contractual changes are communicated herewith as **Exhibit D-1** *en liasse*.

23. As appears from the application form as well as the notice of disclosure **(Exhibit D-1)** Amex began charging the $20.00 overlimit fee to personal credit cardmembers effective **November 1, 2002.**

24. Copies of the November 2002 notice of disclosure for the Air Miles credit card are communicated herewith as **Exhibit D-2.**

25. Effective November 1, 2002, when a cardmember, such as Corriveau, is permitted by Amex to exceed her assigned credit limit in excess of 102% (and up to a maximum amount of 105% during the class period), a statement message appears on the monthly

statement of account advising the cardmember of same. Copies of Corriveau's monthly statements of accounts from December 2002 to April 2006 are communicated herewith as **Exhibit D-3** *en liasse*.

26. Moreover, in addition to the statement message, the Amex billing system generates a letter to be sent to the cardmember advising her that no further spending will be allowed unless the outstanding balance is brought below the assigned credit limit. A copy of a September 21, 2004 letter from Amex advising Corriveau she was over her credit limit and her account was blocked is communicated herewith as **Exhibit D-4**. Copies of standard Amex letters for different credit card products are communicated here with as **Exhibit D-5** *en liasse*.

27. Contrary to the allegation in paragraph 7.26 of the Class Action, Corriveau was clearly aware of her obligation to pay the $20.00 overlimit fee from the time she applied for a credit card and each time she expressly chose to exceed her assigned credit limit.

28. Corriveau and all Amex cardmembers may, if permitted by Amex, benefit from the ability to exceed their respective credit limit temporarily at the point of sale when such amount does not exceed 105% of the assigned credit limit. This service is convenient and avoids the embarrassment of a cardmember being denied a purchase of either goods or services in public.

29. Therefore, as Corriveau expressly consented to exceeding her credit limit and benefitted from same and she cannot rely on section 128 of the *Consumer Protection Act* [the "**CPA**"].

30. By extension, all Amex cardmembers had clear knowledge of the overlimit fee and expressly consented to exceeding same each time they knowingly exceeded their limit and cannot rely on any breach of Section 128 CPA.

31. Moreover, Corriveau and Amex cardmembers' repeated payment of the overlimit fee and continued use of the credit card when the assigned credit limit was reached or nearly reached, is evidence of their lack of prejudice or alternatively illustrates that they renounced to making any claim under the CPA, including relying on sections 72, 91, 92 CPA and sections 55 et seq of the Regulations respecting that application of the CPA ["Regulations"].

32. (...)

33. As such, the Plaintiff's claims under the impugned provisions of the CPA are ill founded in fact and in law and should be dismissed.

III. CONSTITUTIONAL ARGUMENT

34. Subsidiarily and without prejudice to the foregoing, the alleged provisions of the CPA and its Regulations which attempt to govern contracts of variable credit, are constitutionally inapplicable to Amex for the following reasons:

a. Amex is a federally chartered bank regulated by the *Bank Act*, S.C. 1991, c. 46;

b. "Banking" falls within the exclusive jurisdiction of the federal Parliament pursuant to s. 91 (15) of the *Constitution Act, 1867*;

c. Amex's credit and charge card services are a core part of the business of banking and therefore under exclusive federal jurisdiction; and

d. The application of the impugned provisions of the CPA to Amex would impair (both factually and legally) a vital or integral part of Amex's banking business and are therefore constitutionally inapplicable.

35. In addition or in the alternative, the impugned provisions of the CPA conflict in operation with and frustrate Parliament's purpose in the *Bank Act* and the regulations thereunder, and are therefore constitutionally inoperative.

36. In conclusion, Plaintiff's claim under the CPA should be dismissed as constitutionally inapplicable or inoperative to Amex.

IV. CONCLUSIONS

37. Amex seeks the dismissal of the class action on the basis that it did not breach the impugned provisions of the CPA and alternatively, that the CPA is not constitutionally applicable or operative to banks.

38. Subsidiarily and without prejudice to the foregoing, Amex submits that the Plaintiff's claim for collective recovery should be denied given the following individual's questions to be determined by the Court regarding whether a card member:

a. Is a consumer within the meaning of the CPA;

b. Entered into a credit card agreement with Amex on or after December 7, 2003 (...) when resident in the province of Quebec;

c. Requested that the assigned credit limit be exceeded;

d. Incurred an overlimit fee;

e. Paid the overlimit fee;

f. Incurred a prejudice; and

g. Did not renounce to a claim under the CPA (...).

h. (...)

39. Moreover, the accessory conclusions regarding the restitution of excess variable credit granted since November 1, 2002 are ill-founded in fact and in law and should be dismissed.

40. Finally, as for the conclusion seeking exemplary damages, there are no factual allegations to support such a conclusion and the conclusion sought is also ill-founded and should be dismissed.

41. This defence is well-founded in fact and in law.

WHEREFORE MAY IT PLEASE THIS COURT TO:

DISMISS Plaintiff's class action against Amex Bank of Canada;

THE WHOLE with costs against Marylou Corriveau, including any expert costs.

Montreal, April 7, 2010

(SGD) Osler, Hoskin & Harcourt LLP

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