

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No.: 500-06-000221-040

SUPERIOR COURT
(Class Action)

OPTION CONSOMMATEURS

Plaintiff

JEAN AUDET et al.

Designated Members

c.

CITIBANK CANADA et al.

Defendants

ATTORNEY GENERAL OF QUÉBEC

Mis en cause

DEFENCE OF CITIBANK CANADA

FOR DEFENCE TO THE PLAINTIFF'S PARTICULARIZED AND AMENDED 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, 2 and 3 of the Motion and refers to Mr. Justice Gascon's judgment of November 1, 2006, which authorized the institution of a class action in the present matter (the "Authorization Judgment"), as appears from the Court record.
2. It has no knowledge of the allegations contained in paragraph 4 of the Motion.
3. It admits the allegations contained in paragraphs 5 and 6 of the Motion.

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4. It admits the allegations contained in paragraph 7 of the Motion insofar as Citibank issues MasterCard credit cards.
5. It has no knowledge of the allegations contained in paragraphs 8 to 10 of the Motion.
6. With respect to the allegations contained in paragraphs 11 and 12 of the Motion, they consist of legal argumentation which are directed at Defendant Bank of Montreal.
7. It has no knowledge of the allegations contained in paragraph 13 of the Motion.
8. It admits the allegations contained in paragraphs 14 and 14.1 of the Motion.
9. It denies as drafted the allegations contained in paragraph 15 of the Motion, in that it did not increase Jean Audet's credit limit and refers to Exhibit P-5.
10. It denies the allegations contained in paragraph 16 of the Motion.
11. It denies as drafted the allegations contained in paragraph 17 of the Motion and refers to Exhibit P-5.
12. It admits the allegations contained in paragraph 17.1 of the Motion.
13. It denies the allegations contained in paragraphs 18 to 20 of the Motion.
14. With respect to the allegations contained in paragraphs 21, 22 and 23 of the Motion, it refers to Exhibit P-6 and denies anything that is not in strict conformity therewith.
15. It has no knowledge of the allegations contained in paragraph 24 of the Motion.
16. It denies the allegations contained in paragraphs 25, 26, 27 and 28 of the Motion, adding that these allegations should be directed against the Defendant Bank of Montreal only, as appears from the Authorization Judgment.
17. It denies the allegations contained in paragraphs 29 and 29.1 of the Motion and refers to the CPA and the CPA Regulation.
18. It denies the allegations contained in paragraphs 30 and 31 of the Motion.
19. With respect to the allegations contained in paragraph 33 of the Motion, it refers to the Authorization Judgment denies anything that is not in strict conformity therewith adding that the Plaintiff has failed to make the appropriate distinctions between each of the Defendants and the two (2) alleged violations of the CPA

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namely, the unilateral increase in the credit limit which relates only to Defendant Bank of Montreal and the imposition of an over credit limit fee which relates only to Citibank.

20. It denies the allegations contained in paragraph 33(*sic*) of the Motion.

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

I. THE CASE OF DESIGNATED MEMBER JEAN AUDET

21. From February 2003 to October 2007, Jean Audet (Mr. "Audet") was the holder of a Citibank MasterCard credit card.
22. With his Citibank MasterCard credit card, Mr. Audet received the Citibank MasterCard cardholder agreement (the "Agreement"), a copy of which is communicated herewith as Exhibit DCB-1.
23. Mr. Audet first used his Citibank MasterCard credit card to make a purchase on March 5, 2003 (Exhibit P-10) and thereby entered into the Agreement with Citibank.
24. As appears from the Agreement, Exhibit DCB-1, Citibank disclosed the existence of the overlimit fee in clear and comprehensible terms.
25. Moreover, Citibank fully disclosed the overlimit fee charged to Mr. Audet on his monthly account statement (Exhibit P-5).
26. On June 12, 2003 Mr. Audet used his Citibank MasterCard credit card for a transaction (Exhibit P-5) knowing that he would thereby exceed his credit limit and would accordingly, be charged an overlimit fee.
27. Mr. Audet never contested the subject overlimit fee and acquitted same.
28. Moreover, during the entire period that Mr. Audet was a Citibank MasterCard cardholder, his credit limit was \$2,000 and it was never increased.
29. Mr. Audet has no cause of action against Citibank.

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II. CITIBANK AND MASTERCARD

30. 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.
31. The MasterCard Network was established in the United States in 1966 by a group of banks, under the name of Interbank Card Association ("ICA").
32. Credit card issuers began to offer the MasterCard in Canada in 1973.
33. 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.
34. 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.
35. Accordingly, Citibank is an "issuing bank" and "issuer" of MasterCard credit cards.
36. Citibank, on occasion and on a discretionary basis, permits a cardholder to make a transaction which exceeds his/her credit limit, which is useful and practical for a cardholder who can thus avoid an embarrassing decline of a transaction.
37. The overlimit fee does not create excessive indebtedness for Citibank MasterCard cardholders.

III. CONSTITUTIONAL QUESTIONS

38. Plaintiff's action against Citibank is based on a purported violation of Sections 72, 91, 92 and 128 of the *Consumer Protection Act*, R.S.Q., c. P-10.1 ("CPA"), and s. 55 and following of the CPA Regulation, which relate to the disclosure and calculation of credit charges.
39. Even if the subject overlimit fee is found to be contrary to the CPA and the CPA Regulation (which is denied), the Motion is nevertheless unfounded.

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40. Citibank respects the federal requirements relating to credit cards including, *inter alia*, the imposition, calculation and disclosure of credit charges and fees which are defined in the *Bank Act* and its regulations.
41. 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***

42. Subsection 91(15) of the *Constitution Act, 1867* gives Parliament legislative power over "*banking, incorporation of banks and the issue of paper money*".
43. 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.
44. 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").
45. 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.

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46. 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).
47. 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 and national business for the design of their credit card systems and the operation of their credit card activities, and would increase complexity and cost.
48. These provisions are therefore inapplicable to the banks under the constitutional doctrine of interjurisdictional immunity.

b) *The Doctrine of Federal Paramountcy*

49. 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.
50. 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.
51. 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*.
52. 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.
53. The doctrine of federal paramountcy is thus triggered to render the impugned provision of the CPA inoperative to the extent of the aforementioned conflict.

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IV. MR. AUDET'S ABSENCE OF A RIGHT OF ACTION**a) *Failure to Fulfill Condition Precedent***

54. If this Court nevertheless concludes that Citibank has breached the CPA and the CPA Regulation by charging Mr. Audet an overlimit fee and that the CPA applies to the banking activities in the present case (which is denied), Mr. Audet is still precluded from claiming the reimbursement of the charge made in respect of such fee.
55. On a monthly basis, Mr. Audet (and all Citibank cardholders) received account statements which listed all transactions and fees charged during the period of the statement.
56. 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 Agreement (Exhibit DCB-1) and on the reverse side of the monthly account statements, a copy of one of Mr. Audet's account statements is communicated herewith as Exhibit DCB-2.
57. Mr. Audet never notified Citibank of any objection or error in respect of any charge made to his account including the subject over credit limit fee.
58. By neglecting to protest the subject overlimit fee within the appropriate delay, Mr. Audet (and any putative class member in the same situation) has failed to satisfy an essential condition precedent for the exercise of his recourse.

b) *Acceptance/Ratification of the Overlimit Fee*

59. The overlimit fee is disclosed in clear and comprehensible terms in the Agreement, Exhibit DCB-1.
60. On June 12, 2003 Mr. Audet used his Citibank MasterCard credit card for a purchase (P-5) knowing that he would thereby exceed his credit limit and would accordingly, be charged an over credit limit fee.
61. Furthermore, by paying the amounts due on his account statements without protest or complaint, Mr. Audet consented to and accepted the charges indicated thereon, including the subject over credit limit fee.

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62. Accordingly, Mr. Audet cannot now seek reimbursement of the subject over credit limit fee voluntarily paid, without protest, objection or complaint.

V. DAMAGES

63. The Plaintiff can only claim from Citibank the reimbursement of the over credit limit fees charged to and collected after January 9, 2001 from its cardholders who concluded a cardholder agreement with Citibank in the Province of Québec on/or after January 9, 2001.
64. Moreover, the Plaintiff claims \$200 per class member in punitive damages.
65. Plaintiff's aforesaid claims are unfounded.

a) *Restitution of Credit Charges*

66. Mr. Audet did not suffer any prejudice owing to the alleged violation of the CPA by Citibank. The mere imposition of an overlimit fee is not a prejudice, *per se*. In fact, Mr. Audet benefited from the fact that the transaction that he wanted make was not refused.
67. Given the absence of prejudice, Mr. Audet's claim for restitution of the overlimit fee should be dismissed.

b) *Punitive Damages*

68. The Plaintiffs' claim for the reimbursement of the overlimit fee can only be grounded in Section 271 CPA (and not Section 272 CPA).
69. Therefore, Mr. Audet and the class members are not entitled to claim punitive damages from Citibank pursuant to the CPA.
70. 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. Audet 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.

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

VI. PRESCRIPTION

72. Subsidiarily, the alleged claims of all members of the class who concluded their cardholder agreements with Citibank prior to January 9, 2001 are prescribed and must be rejected.

VII. COLLECTIVE RECOVERY

73. 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.

VIII. CONCLUSION

74. The Motion is unfounded in fact and in law.
75. The present Defence is well-founded in fact and in law.


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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Attorneys for Defendant
CITIBANK CANADA