

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

NO: 500-06-000373-064

SUPERIOR COURT

(Class action)

OPTION CONSOMMATEURS

Plaintiff

-and-

MARYLOU CORRIVEAU, et als.

Designated Persons

v.

AMEX BANK OF CANADA, et als.

Defendants

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**AMEX BANK OF CANADA'S DEFENCE**

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

1. With regard to the allegations contained in paragraphs 1 and 2 of Plaintiff's Particularized Motion to Institute a Class Action [the "Particularized Motion"], Amex refers this Honourable Court to the Judgment authorizing the class action [the "Judgment"] 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. With regard to the allegations contained in paragraph 5 of Plaintiff's Particularized Motion, Amex admits that it issues American Express credit cards and ignores the balance of the said paragraph;
4. Amex ignores the allegations contained in paragraph 6 of Plaintiff's Particularized Motion;
5. Amex admits the allegations contained in sub-paragraphs 6.1 and 6.2 of Plaintiff's Particularized Motion;
6. Amex ignores the allegations contained in sub-paragraphs 6.3, 6.4 and 6.5 of Plaintiff's Particularized Motion;
7. Amex ignores the allegations contained in paragraph 7 of Plaintiff's Particularized Motion;

- 2 -

8. With regard to the allegations contained in sub-paragraphs 7.1 and 7.1.1 of Plaintiff's Particularized Motion, Amex refers this Honourable Court to Exhibit P-2 and denies all that is not in conformity therewith;
9. With regard to the allegations contained in sub-paragraph 7.2 of Plaintiff's Particularized Motion, Amex refers this Honourable Court to Exhibit P-17 and denies all that is not in conformity therewith;
10. Amex ignores the allegations contained in sub-paragraphs 7.2, 7.3, 7.4, 7.5, 7.5.1, 7.6, 7.6.1, 7.7, 7.8, 7.9, 7.9.1, 7.10, 7.10.1, 7.11 and 7.12, of Plaintiff's Particularized Motion;
11. Amex ignores the allegations contained in paragraph 8 of Plaintiff's Particularized Motion;
12. Amex denies the allegations contained in paragraphs 9, 10 and 11 of Plaintiff's Particularized Motion;
13. Amex neither denies nor admits the allegations contained in paragraph 12 of Plaintiff's Particularized Motion;
14. Amex denies the allegations contained in paragraph 13 of Plaintiff's Particularized Motion;

**AND FOR FURTHER PLEA, AMEX SUBMITS THE FOLLOWING:**

**I. INTRODUCTION**

15. 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.
16. American Express Travel Related Services Company, Inc. ["TRS"] is a subsidiary of American Express Company.
17. 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.
18. American Express has done business in Canada since 1853 but Amex has been a Schedule II Bank in Canada since 1990.
19. 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.
20. American Express cards are accepted in over 140 countries worldwide.
21. 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"]

- 3 -

22. 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

23. 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**
24. As appears from the application form and the notice of disclosure, Corriveau, as other Amex credit cardmembers, was aware of the cash advance fee at the time she applied for the Air Miles credit card and when she received her credit card and credit card agreement.
25. Moreover, when Corriveau, and other credit cardmembers, expressly chose to benefit from a cash advance, the monthly statement of account details the cash advance fee. Copies of Corriveau's monthly statements of accounts from December 2002 to April 2006 are communicated herewith as **Exhibit D-2 en liasse**.
26. Amex submits that Corriveau and all Amex credit cardmembers had clear knowledge of the cash advance fee and expressly consented to same each time they sought to benefit from a cash advance.
27. Moreover, Corriveau and Amex credit cardmembers' express requests for cash advances and the subsequent payment of the cash advance fees, is evidence of their lack of

- 4 -

prejudice and, alternatively, illustrates that they renounced to making any claim under the *Consumer Protection Act* [the "CPA"], including relying on sections 66-72, 91, 92 CPA and sections 55 et seq of the Regulations respecting that application of the CPA ["Regulations"].

28. Finally, in August 2006, all cardmembers received a notice of amendment to the card agreement wherein an arbitration clause was inserted, effective October 1, 2006. Amex intends to seek the dismissal of the lawsuit by cardmembers who are bound by the arbitration clause.
29. As such, Plaintiff's claim under the impugned provisions of the CPA is ill-founded in fact and in law and should be dismissed.

### III. CONSTITUTIONAL ARGUMENT

30. 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 fall 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 activities and are therefore constitutionally inapplicable.
31. 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.

32. Therefore the class action should be dismissed on this basis.

### IV. CONCLUSIONS

33. 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.
34. Subsidiarily and without prejudice to the foregoing, Amex submits that 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;

- 5 -

- b. Entered into a credit card agreement with Amex between December 7, 2003 and September 31, 2006 when resident in the province of Quebec;
  - c. Requested a cash advance;
  - d. Incurred a cash advance fee;
  - e. Paid the cash advance fee;
  - f. Incurred a prejudice;
  - g. Did not renounce to a claim under the CPA; and
  - h. Is not bound by an arbitration clause in effect in the Amex card agreements on October 1, 2006.
35. Moreover, the accessory conclusions regarding the restitution of excess variable credit granted since October 4, 2001 are ill-founded in fact and in law and should be dismissed.
36. 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.
37. 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, February 15, 2010

(SGD) Osler, Hoskin &amp; Harcourt LLP

**TRUE COPY**

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