

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° 500-06-000372-066

OPTION CONSOMMATEURS
Plaintiff

-and-

SERGE LAMOUREUX
-and-
JEAN AUDET ET ALS.
Designated members

v.

THE BANK OF NOVA SCOTIA ET ALS
Defendants

-and-

ATTORNEY GENERAL OF QUÉBEC
Mis en cause

DEFENCE OF DEFENDANT THE BANK OF NOVA SCOTIA

IN RESPONSE TO THE ALLEGATIONS CONTAINED IN PLAINTIFF'S PARTICULARIZED CLASS ACTION (THE "ACTION"), DEFENDANT THE BANK OF NOVA SCOTIA ("SCOTIABANK") STATES AS FOLLOWS :

1. It admits paragraphs 1 to 7 of the Action insofar as they relate to Scotiabank and to Designated Member Jean Audet;
2. It has no knowledge of the allegations contained in paragraphs 7.1 to 7.27.1 of the Action;

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3. It admits paragraph 7.28 of the Action;
4. With respect to the allegations contained in paragraphs 7.28.1 to 7.30.1 of the Action, it refers to Exhibits P-13, P-20 and P-21, denying anything that is not in conformity therewith;
5. It admits the allegations contained in paragraph 8 of the Action only for the case of designated member Jean Audet, having no knowledge of the allegations relating to the other designated members and the class members;
6. It ignores the allegations contained in paragraphs 9 to 12 of the Action;
7. It denies the allegations contained in paragraphs 13 to 15 of the Action;
8. It admits paragraph 16 of the Action insofar as they relate to Scotiabank;
9. It denies paragraph 17 of the Action;

AND FOR FURTHER PLEA, DEFENDANT SCOTIABANK ADDS:

10. Scotiabank is a bank under the *Bank Act* and has the rights, powers and obligations provided by the *Bank Act* and the other federal laws applicable to the activities of banks;

I. THE FACTS

A) The case of designated member Jean Audet

11. On April 12, 2006, Scotiabank charged to designated member Jean Audet an overlimit fee of 20 \$ because the balance of his Scotiabank Visa credit card account (1,089.17\$) exceeded his credit limit of 1,000 \$, as appears from the statement of account dated April 12, 2006 (Exhibit P-13);
12. Designated member Jean Audet exceeded his credit limit as a result of two transactions made by him on March 27 and 28, 2006 (of 43.26 \$ and 41.46 \$) while he was in Rome, Italy, as appears from the statement of account dated April 12, 2006 (Exhibit P-13) and from the transcripts of his examination before plea;
13. By making these transactions, Mr. Audet expressly requested that they be authorized notwithstanding that they would result in his credit limit being exceeded;
14. However, contrary to what is alleged by Plaintiff in paragraphs 7.29 and 7.30 of the Action, there was no increase by Scotiabank of the credit limit of designated member Jean Audet, and Mr. Audet was rather charged an overlimit fee, in accordance with the terms of the variable credit contract for the use of his VISA credit card ("Cardholder Agreement") and the Disclosure statement (Exhibit P-20 en liasse);
15. The overlimit fee has been disclosed in all versions of the Disclosure statement since January 2001, as appears from the copy of all English and French versions of the disclosure statements since March 2000, which are communicated in support of the present defence as Exhibit

DSB-1 en liasse, these statements being either applicable to all Scotiabank VISA credit cards or to some specific Scotiabank VISA credit cards (such as Gold, Classic, Value, etc.);

16. When an application for a Scotiabank VISA credit card has been approved, the cardholder receives from Scotiabank a package that contains: 1) the Cardholder Agreement, 2) the Disclosure statement, and 3) the credit card itself;
17. Designated member Jean Audet paid the overlimit fee of 20 \$ that was charged, as appears from the statement of account dated May 10, 2006 (Exhibit P-21);
18. Designated member Jean Audet requested and obtained from Scotiabank in June 2006 an increase of his credit limit to 2,000 \$, as appears from page 1 of his statement of account dated July 12, 2006, which was provided by the attorneys of designated member Jean Audet to the attorneys of Scotiabank on February 12, 2009 at the examination before plea of the representative of Plaintiff, and which is communicated in support of the present defence as Exhibit DSB-2;

B) The VISA system and Scotiabank

19. The history of Visa International Service Association –now known as Visa Inc.- can be traced back to 1958;
20. 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 so issued;
21. In Canada, the Visa network is administered by Visa Canada Corporation, a subsidiary of Visa Inc.;
22. 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;
23. 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 merchants;
24. Scotiabank is a member of Visa Canada Corporation and is an issuer of Visa credit cards;
25. Scotiabank issues to its cardholders several different types of Visa credit cards which may have different features;

C) Benefits of overlimit transactions for Scotiabank VISA cardholders

26. Scotiabank on occasion and on a discretionary basis may allow its cardholders to make transactions over the credit limit, which is very useful and practical for cardholders;

27. The case of designated member Jean Audet is a perfect example of this benefit. He was able to make two transactions which made his balance go over his credit limit while he was abroad in Rome, Italy. Had Scotiabank not allowed him to go over the credit limit, these two transactions would not have been authorized and he would have very disappointed (to say the least) with that result;
28. The overlimit fees do not create an excessive indebtedness for Scotiabank VISA cardholders. On the contrary, the overlimit fees are an incentive not to incur indebtedness in excess of the credit limit;
29. Subsidiarily, if there was excessive indebtedness, which is denied, it cannot be attributed to Scotiabank but rather to the cardholders themselves;

II. THE LAW

30. Plaintiff's claim against Scotiabank is based on sections 71, 91, 91 and 128 of the *Consumer Protection Act*, R.S.Q., c. P-40.1 ("CPA") and sections 55 and following of the regulation respecting its application;
31. The CPA provisions relied on by Plaintiff relate to the disclosure and calculation.
 - A) **The legal nature of the overlimit fee**
 32. The overlimit charge assessed by Scotiabank is not a credit charge within the meaning of the CPA and is rather a charge paid in consideration for the authorization of overlimit transactions;
 - B) **The constitutional questions**
 33. Assuming (but not admitting) that the cash advance fee should be considered as a credit charge, the Action would still be ill-founded;
 34. For the constitutional reasons set out in the following paragraphs, the provisions of the CPA invoked by plaintiff cannot be applied to Scotiabank;
 - 1) **The exclusive power of the Parliament of Canada over banking**
 35. Section 91(15) of the *Constitution Act, 1867* grants to the Parliament of Canada exclusive jurisdiction on banks and banking;
 36. Credit (including revolving credit) constitutes a vital and essential element of banking;
 37. Canadian banks and 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;
 38. Credit cards are a form of extending credit, including revolving credit, and this is recognized not only by the *Bank Act* but also by the CPA;

39. The provisions of the CPA invoked by plaintiff regulate variable (i.e. revolving) credit and their application to banks (including Scotiabank) would impair their activities from a regulatory and operational standpoint:
- (a) their application would result in subjecting the banks (including Scotiabank) to the provincial regulatory regime established by the CPA;
 - (b) their application would prevent the banks (including Scotiabank) 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;
40. These provisions are therefore inapplicable to Scotiabank under the constitutional doctrine of interjurisdictional immunity;
- 2) **Paramountcy of federal legislation**
41. The provisions of the CPA relied on by plaintiff must also be found inoperative as regards banks (including Scotiabank) 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;
42. There is a double operational conflict between the CPA provisions in dispute and Federal Law because:
- (a) these provisions prohibit a credit charge not capable to be expressed as an annual rate whereas Federal Law permits a charge which is not so expressed (as is the case for the overlimit fee if it is a credit charge); and
 - (b) the federal and CPA disclosure requirements for a credit charge other than interest (i.e. a "non-interest credit charge") are incompatible;
43. 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 result in subjecting the banks (including Scotiabank) 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 area of consumer protection in the banking industry;

C) Condition precedent to recourse not being met

44. Should this Court nevertheless conclude that the overlimit fee is a credit charge under the CPA and that the CPA applies to banking activities in the present case, designated member Jean Audet is precluded from challenging the debit made to his account in respect of any such fee, for the following reasons;
45. Each cardholder receives monthly a statement of account which lists all transactions and fees charged in the billing period covered by the statement;
46. If a cardholder is not in agreement with the contents of his/her monthly statement of account, he/she has a delay of 15 days to notify in writing Scotiabank, failing which the statement and the debits thereon are deemed to have been accepted and consented to by the cardholder, the whole as appears from a copy of the cardholder agreements since March 2000, which are communicated in support of the present defence as Exhibit DSB-3 *en liasse*;
47. Prior to the filing of the motion for the authorization of the Action, designated member Jean Audet never notified Scotiabank of any objection to the charge made to his account in respect of the overlimit fee;
48. By not objecting in a timely fashion to the overlimit fee debited to his account, designated member Jean Audet has failed to fulfill a condition precedent to a recourse in contestation of such debit and he is now precluded from exercising such a recourse;

D) Renunciation

49. Scotiabank cardholders who pay their balances that include fees also accept by that fact the charging of these fees and renounce to any claim regarding these fees, and designated member Jean Audet paid without protest the balances that included the overlimit fee;

E) Lack of prejudice

50. In addition, plaintiff does not allege the suffering of any prejudice by any class member as a result of overlimit fees and does even not allege any fact which would support an allegation of prejudice, as appears from the Court record and from the transcripts of examination before plea of designated member Jean Audet;
51. The mere fact that designated member Jean Audet and other class members were charged a fee for overlimit transactions does not constitute a prejudice *per se*;
52. On the contrary, Mr. Audet and the other class members benefited from the fact that Scotiabank did authorize their overlimit transactions, and they did not want these transactions being declined;
53. Given the absence of prejudice, plaintiff's action and designated member Jean Audet's action under the CPA should be dismissed;

F) Collective recovery and prescription

54. The prescription period has expired in respect of all Scotiabank cardholders whose contracts were formed more than three years before the filing of the motion for authorization to institute the Action, namely before December 6, 2003 (the motion having been filed on December 6, 2006);

55. Collective recovery is therefore not possible or practicable as it would be necessary to determine on a case by case basis the date when each cardholder's agreement was concluded;

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

56. Plaintiff's Action for the reimbursement of fees and for damages is based on section 271 CPA - not on section 272 CPA;

57. Sections 271 and 272 CPA are mutually exclusive;

58. As plaintiff's claim is based on section 271 CPA and as designated member Jean Audet and the other class members did not suffer any prejudice, plaintiff and designated member Jean Audet are not entitled to claim punitive damages under the CPA;

59. Subsidiarily, even if a claim for punitive damages under section 272 CPA were not barred, such damages should not be awarded for the following reasons :

(a) Neither designated member Jean Audet 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 Scotiabank or of any wilful disrespect by Scotiabank of applicable law;

60. Plaintiff's and designated member Jean Audet's claim for punitive damages is unfounded and not supported by any factual allegation or evidence;

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

FOR THESE REASONS, THIS COURT SHOULD:

MAINTAIN the present Defence;

DISMISS the Class Action of Plaintiff Option Consommateurs instituted against Defendant The Bank of Nova Scotia;

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DISMISS the action of designated member Jean Audet against Defendant The Bank of Nova Scotia;

THE WHOLE, with costs.

Montreal, February 12, 2010

(Sgd) McCarthy Tétrault LLP

McCARTHY TÉTRAULT LLP
Attorneys for Defendant
THE BANK OF NOVA SCOTIA

True Copy

McCarthy Tétrault LLP
McCARTHY TÉTRAULT LLP
Attorneys for Defendant
THE BANK OF NOVA SCOTIA

SUPERIOR COURT
(Class Action)

CANADA
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LIST OF EXHIBITS OF THE BANK OF NOVA SCOTIA IN SUPPORT OF ITS DEFENCE

- DSB-1:** En liasse, disclosure statements for Scotiabank Visa products (all versions available since March 2000). English and French versions;
- DSB-2:** Page 1 of the July 12, 2006 monthly statement of accounts of designated member Jean Audet;

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DSB-3

En liasse, cardholder agreements for Scotiabank Visa products (all versions available since March 2000), English and French versions.

Montreal, February 12, 2010

(Sgd) *McCarthy Tétrault LLP*

McCARTHY TETRAULT LLP

Attorneys for Defendant

THE BANK OF NOVA SCOTIA

True Copy

McCarthy Tétrault LLP

McCARTHY TETRAULT LLP

Attorneys for Defendant

THE BANK OF NOVA SCOTIA

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Defendants

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Mis en cause

**DEFENCE OF DEFENDANT THE BANK OF NOVA
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CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL
N° : 500-06-000377-066

OPTION CONSOMMATEURS

Demanderesse

c.

Personnes désignées

et

LA BIENNE D'UNION DU QUÉBEC ET LA BANQUE DE MONTRÉAL ET C

Détenderesses

et

PROFESSEUR GÉNÉRAL DU QUÉBEC

Mis-en-cause

BOURCIER DE TELECOMMUNICATIONS PAR TÉLÉPHONE PAR TÉLÉTYPE
(Act. 146.0.2 Cap. 6 et 6.0.2.1)

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Personnes désignées

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BANQUE NATIONALE DU CANADA ET LA BANQUE DE NOUVELLE-ÉCOSSE ET AL.

Défenderesses

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Mis-en-cause

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