



## Criminal bank service charges? Appeals court certifies class action against MBNA Canada Bank

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Do high service charges exacted by MBNA for credit card cash advances constitute a criminal rate of interest? This is among the issues certified as a class action by the Ontario Court of Appeal in *Markson v. MBNA Canada Bank*.<sup>1</sup> The court held that the bank could not rely on its failure to keep data to escape certification.

Markson, the representative plaintiff, is seeking declaratory and injunctive relief, damages for breach of contract, and restitution on behalf of MBNA customers who took cash advances for small amounts from their MasterCards. Some customers who took cash advances of less than \$62.30 may have been charged an effective interest rate of more than 60%, which is contrary to the *Criminal Code*,<sup>2</sup> because of the bank's service charge and regular interest rate, Markson alleges. MBNA charges a flat fee of \$7.50 for cash advances, which is considered interest by the *Criminal Code*.

### Many individual cases, says motion judge

On the original certification motion<sup>3</sup>, Mr. Justice Cullity, of the Ontario Superior Court of Justice, refused to certify the class proceedings because the restitution and breach of contract claims did not raise common issues and because a class proceeding was not the preferable procedure, both of which are requirements under the *Class Proceedings Act*.<sup>4</sup>

<sup>1</sup> 2007 ONCA 334 [available online at: <http://www.ontariocourts.on.ca/decisions/2007/may/2007ONCA0334.htm>].

<sup>2</sup> Criminal Code, R.S.C. 1985, chap. C-46, s. 347(1)(b).

<sup>3</sup> (2004), 71 O.R. (3d) 741 (S.C.J.).

<sup>4</sup> Class Proceedings Act, 1992, S.O. 1992, chap. 6.

Cullity J. agreed with MBNA's position that its liability turned on individually assessing whether or not its clients had paid criminal rates of interest. This would require individually investigating cash advance transactions. Aggravating this was the fact that MBNA had not preserved electronic data for the period before January 2000. Between 2000 and 2003, there were 8 million cash advances; 17% of these were for amounts less than \$62.00 and thus, potentially involved criminal rates of interest. MBNA claimed that determining the effective annual interest rate that it received for each transaction (and thus, its liability) would have to be done manually at high cost. The motion judge found that there were not common issues in respect of the restitution claim since it was unlikely that an electronic system could be developed to identify transactions on which interest exceeding 60% was paid. Even if some kind of system could be developed, the motion judge continued, the expense of the exercise would far exceed the benefit to the individual class members.

The motion judge also held that a class proceeding was not the preferable procedure even though he found that there were common issues in relation to the claims for declaratory and injunctive relief. If MBNA was required to comply with the law, its customers would end up with fewer options and would be required to pay greater amounts of interest. He did find, however, that individual actions were still a possibility.

On the initial appeal<sup>5</sup>, a majority of the Divisional Court panel upheld the decision of the motion judge. Dissenting was O'Driscoll J., who was particularly unimpressed with the argument that

<sup>5</sup> (2005), 78 O.R. (3d) 39 (Div. Ct.).

Markson was not a suitable representative plaintiff. He held, “[i]n a ‘clean hands’ competition between the parties, in my view, the appellant [Markson] would win in a walk”.

## New arguments lead Court of Appeal to certify class action

Markson appealed to the Ontario Court of Appeal where he was allowed to make new and additional arguments that were not considered previously, arguments that ultimately turned the case in his favour.

The original certification motion was denied in large part because manually determining liability and/or damages would have far outweighed any benefit to class members. Although the court agreed with the motion judge that if the millions of transactions would have to be examined individually, that those claims are not suitable for certification because the time and cost to determine the size of liability in relation to each member of the class would overwhelm the common issues, Markson could nevertheless now rely on other provisions of the *Class Proceedings Act*<sup>6</sup> to get past this problem.

### *Determining liability*

If the plaintiff can establish that MBNA administered its cash advances in a manner that violated the *Criminal Code* or breached its contract with its customers at trial, it will have established potential liability on a class-wide basis and each member of the class would be entitled to declaratory and injunctive relief, the court held. The next step would be to determine each class member’s entitlement to monetary relief.

### *Calculating damages*

Markson argued sections 23 and 24 of the *CPA* for the first time on appeal to get around the time and cost problems cited by the motion judge in his reasons. Section 23 allows a court to use statistical information in determining the amount or distribution of a monetary award. This would put to rest the problem of having to calculate the monetary award on a case-by-case basis. This provision cannot, however, be used to determine a defendant’s liability; it is only applicable once liability has been established, the court held.

<sup>6</sup> *Ibid.*, ss. 23 and 24.

Section 24 provides for the distribution of monetary relief in cases where potential liability can be established on a class-wide basis, but the distribution of that relief may depend on individual assessments. It does so by allowing aggregate monetary awards where it would be impractical or inefficient to identify the class members entitled to share in the award<sup>7</sup>, a problem identified in this case. Like section 23, this provision cannot be used to determine liability, but provides a method to assess the quantum of damages on a global basis, but not the fact of damage<sup>8</sup>.

The court held that if the common issues relating to declaratory and injunctive relief are determined in the plaintiff’s favour, (in other words, that MBNA violated the *Criminal Code*’s usury provisions and/or breached its contract with its customers) section 23 can be used to calculate the global damages figure and section 24 can be used to find a way to distribute the aggregate sum to class members and millions of transactions would not have to be examined individually.

### *Voluntariness?*

MBNA also argued that its clients voluntarily paid the alleged criminal rates of interest and that it could raise the so-called “voluntariness” defence. The court held that the defence could not stand in the way of certification, rather, it could be accepted as a common issue for trial. While some customers of MBNA would rather pay criminal rates of interest in order to be able to take certain cash advances, and denying them such a facility may be unfair, Rosenberg J.A. remarked, “[i]n an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in accordance with the law”. The court also rejected the motion judge’s holding that because consumers would have fewer credit options if MBNA was forced to comply with the *Criminal Code*’s usury provisions, a class proceeding was not the preferable procedure. Rosenberg J.A. noted that the motion judge contradicted himself by asserting that individual

<sup>7</sup> An example of such an award is found in *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (S.C.J.).

<sup>8</sup> Citing *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) at para. 49, leave to appeal refused [2003] S.C.C.A. No. 106.

claims could still be brought for declaratory and injunctive relief to prevent MBNA from charging criminal rates of interest on one hand; the effect of individual claims on MBNA would be the same as the effect of a class action.

Interest rates can be a minefield for businesses – even banks do not always get it right – yet most commercial contracts and invoices include provisions for interest. For guidance in complying with interest rate legislation, see [Getting Interest Rates Right](#).

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