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SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS DIVISION)

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B E T W E E N :

SEARS CANADA BANK

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Plaintiff

v

CHARLIE RICE
(aka Charlene Rice)

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Defendant

PROCEEDINGS AT TRIAL

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before Deputy Justice G. Bobesich
on the 11th day of January, 2008 at Burlington, Ontario

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A P P E A R A N C E S :

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T. Christensen
A. Cheesoon

Counsel for Sears
Counsel for Ms. Rice

MS. CHEESON: 1-0 - I'm not absolutely certain of the number, Your Honour. I don't have it with me.

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THE COURT: Well, I would suggest that you, until you get known to be known that you start bringing your number with you, yes.

MS. CHEESON: I certainly will.

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THE COURT: Okay. So no movement, eh? I think I heard about this case. This is the multi-million dollar one.

MR. CHRISTENSEN: No, Your Honour.

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THE COURT: Okay, any time you're ready, I'm ready. Oh, I have some bad news again.

Unfortunately, due to some developments, we're going to have to terminate at four o'clock, so let's go.

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MR. CHRISTENSEN: That should be plenty of time, Your Honour. First of all, just by way of background, Hugh Ferguson was the paralegal who was handling this file and he unfortunately had major surgery on Monday and I stepped in at the last minute and I apologize. We would usually....

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THE COURT: Anyway, there's no problem. Tell him the judge wishes him the best and a speedy recovery.

MR. CHRISTENSEN: Thank you, Your Honour. I think what this is about, just in view of....

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THE COURT: Do you have a witness or something?

MR. CHRISTENSEN: No, Your Honour, the evidence has been adduced by way of affidavit under Rule 18.02.



THE COURT: 18.02, okay.

MR. CHRISTENSEN: Yes, Your Honour. In fact, that's - and the witness was not summonsed by the other side.

THE COURT: Okay. Okay, tell me what's this all about.

MR. CHRISTENSEN: I think it's about the credibility of the business records of Sears Canada against, you know, if I may take the liberty of paraphrasing. I'm not saying whether I owe it or not, but I don't remember and I have no proof that I did pay the account, but you have to prove it so you prove it and the defence says that she disputes the full amount of the claim and holds the plaintiff to the strict proof thereof, has raised no issues around these charges are incorrect. I never received the statements, just no explanation at all. Would you like me to refer to the defence directly, Your Honour?

THE COURT: Okay, so okay, so it started off in Kitchener, okay so it's here now. Yes.

MR. CHRISTENSEN: Yes, Your Honour, the plaintiff did agree to move it here. Sears did used to have its office in Kitchener...

THE COURT: All right, anything else?

MR. CHRISTENSEN: ...but we're here today.

THE COURT: Okay, tell me what it's all about. I mean there's....

MR. CHRISTENSEN: Well, that's it, Your Honour. What it boils down to is - would you like me to go into the evidence or do you want me to just to

To p. 15

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the, the plaintiff, in that case, would not be allowed to prove their case by way of affidavit.

THE COURT: Well, I mean, how do you read "a document and a written statement shall be received into evidence"? I mean an affidavit, the attachments, surely to goodness are...

MS. CHEESON: But the rule....

THE COURT: ...written statements and are definitely a document.

TOP-17

MS. CHEESON: But the rules, the two separate rules here, one that deals with affidavits and one that deals with written statements.

THE COURT: Well, there might be but, I mean, obviously it's pretty hard to argue that an affidavit with attachments is not a document or that it's not a written statement, written in the sense that - okay, anything else?

MS. CHEESON: And I would go on to say that if the affidavit is being allowed as the court to be considered evidence in this case I would request that very little weight insofar as the affidavit has not been properly supported by any other documents.

THE COURT: Well, of course, you can ask that appropriate - but, I mean, there is - I don't know what you mean by any other documents.

Obviously, there are multiple exhibits attached to the affidavit, which can only be classified as documents in support. It's not a bold, or bald affidavit, obviously. It basically recites the documentation attached to it. You can't say there's nothing to substantiate the statements.

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are true copies. I mean unless you've got some proof that they're not I don't know where we're going. Anyway, anything else you want to say?

5 MS. CHEESON: There is also not indicated on here a listing of purchasing, of purchases and transactions. There is a statement.

10 THE COURT: Okay, I mean - I mean, first we have the issue whether this should be admitted. Later on in your submissions, or later on you can attempt to attack the affidavit and the various attachments, obviously through your client or through your submissions, but that would be another issue. Now we're only dealing with

15 whether, in fact, this is admissible under Rule 18. Do you have anything else in regards to - I mean, in your submission you can argue that although it's admissible I shouldn't give any weight or very little weight, but that is not an argument as to its admissibility, that's an argument as to the weight. So as far as the admissibility, do you have any other arguments?

20 MS. CHEESON: The only other thing that I, that I want to say is the question of who Ann Chartrand is not....

25 THE COURT: She says she's an employee of J. P. Morgan Chase Bank and she's reviewed the file.

MS. CHEESON: Okay, so....

30 THE COURT: I don't know what else you would want to know. She's got - she's an employee and she has access to, I guess, these privileged files. All right, anything else?

MS. CHEESON: No, I think that's....

TO
P. 18

THE COURT: Okay, I'm prepared to admit this into evidence as Exhibit 1 subject to whatever weight or relevance I'm assigned to it. Okay, that's your case?

To p. 56

EXHIBIT NUMBER ONE: Affidavit of Ms. Chartrand - Produced and Marked.

MR. CHRISTENSEN: Your Honour, the other affidavit I would like also to be admitted.

THE COURT: What other affidavit? I don't have another affidavit. This lady's?

MR. CHRISTENSEN: Ms. Brenda Milner.

THE COURT: I don't have it.

MR. CHRISTENSEN: Well, it's referred to in the affidavit of service along with this one.

THE COURT: I know it's referred to in the affidavit of service but, I mean, I don't know why I keep saying things and people...

MR. CHRISTENSEN: Well, Your Honour, we can....

THE COURT: ...don't seem to hear me or don't seem to understand me. I agree with you. There is an affidavit of service but like I said I've gone through all these papers and I'm prepared, sir, to give you the file and I'm prepared to have you go through it and, but I don't see, see the affidavit of this Brenda Milner anyplace.

MR. CHRISTENSEN: Your Honour, that's not the issue. We both have copies of the affidavit and we can supply it to the court now. I just wanted to clarify that if necessary to use....

THE COURT: Well, do you got an affidavit?

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Reasons for Judgment

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position. One cannot just say I do not owe them money. You have to produce evidence that, in fact, you know, I paid this by these cheques, or here is my statement indicating that I owe zero as a certain date and lo and behold they send me another statement after that date indicating that I owe some \$2,000.

For reasons I have indicated I am prepared to find that the plaintiff has proven the claim and I am prepared to grant judgment for the amount claimed, which is \$2,483.12.

Now, based on the decision from Divisional Court by Justice Mackenzie in the case as presented by the plaintiff, *Matofska, Blackwell and Simple*, it appears that the law states that the contractual rate of interest must be the rate granted. So, I am granting prejudgment interest at 28.8 from June 16, June 16, 2004 to January 11, 2008! Post judgment interest the same amount.

As a matter of costs, were there any written offers to settle or anything to that effect?

MR. CHRISTENSEN: Yes, Your Honour, there is, but I have further submissions as to costs with case law.

THE COURT: Okay, well let me see the offer to settle. Is it in writing?

MR. CHRISTENSEN: It is in writing. It's on a court form. It was faxed.