November 16, 2007

VIA FAX ONLY TO 416 326 3570

The Honourable Madame Justice Pamela A. Thomson
Ontario Superior Court of Justice
47 Sheppard Avenue East
Toronto, ON M2N 5X5

Dear Justice Thomson

RE: CAPITAL ONE BANK V. AHMAD ET AL., COURT FILE SC-07-051851-00
MOTION HEARD SEPTEMBER 13, 2007

Thank you for your letter and order of November 2, 2007. I was delighted when I read Your Honour's letter (thank you for the compliment), then deflated when I read the order. The conditions Your Honour included in the order take away what the order ostensibly gives. I hope this was inadvertent. I believe this must be the case because I believe Your Honour would have invited my submissions on the conditions if you thought I would have had any concerns.

I hope that after Your Honour considers my submissions below you will be willing to vary paragraph 2 of the order to give effect to paragraph 1.

Enclosed is a copy of *Lamond v. Smith* (2004), 72 O.R. (3d) 590, authority for the proposition that Your Honour may vary your own order on the court's own motion. If you are willing to entertain doing so, please read the submissions below. I suggest two other options should these submissions be inadequate to persuade Your Honour to vary the order as requested in this letter but Your Honour is still open to doing so after continuing the dialogue you invited at the original hearing: (1) I could attend at Your Honour's chambers to pick up the appeal materials submitted and we could continue the dialogue in that informal setting, or (2) if you prefer the dialogue to continue in court, at Your Honour's invitation the plaintiff could bring a formal motion pursuant to Small Claims Court rule 1.03 and rule 37.14(4)(a) of the Rules of Civil Procedure by analogy for you to vary your own order.

If I am mistaken and the conditions' effects were not inadvertent, I would be grateful if Your Honour would promptly advise me that you are unwilling to vary your order regardless of any further submissions.

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Submissions re Conditions in Order

No issue with (b), (c), or (d)
I have no issue with conditions "(b) Legible Final or last Statement", "(c) Calculation of interest," or "(d) Accounts for 'expenses' including legal fees." We include (b) and (d) as a matter of course with the claim and (c) is set out in the default judgment form. My concerns are the following:

Condition (a) Signed agreement (legible)
First, the rules do not require the production of a signed agreement for the plaintiff to qualify for default judgment. Rule 7.01(2)2. states, "If the plaintiff's claim is based in whole or in part on a document, a copy of the document shall be attached to each copy of the claim, unless it is unavailable, in which case the claim shall state the reason why the document is not attached."

Second, the plaintff's claim is not based on a signed credit application or agreement, but rather on the cardholder agreement which has no place for a signature and is sent to the defendant after the account is opened. In a large number of cases, there will be no signed credit application. The person may have applied over the internet or by telephone and no physical signature exists yet the plaintiff will still be able to prove its claim at trial based on the provisions of the cardholder agreement and the statutory provisions listed below.

1. The cardholder agreement, sent along with the credit card, states: "**1. Confirming your Agreement with us** When your account is accessed for the first time, it confirms the account was opened at your request, that you accept the terms of this Agreement . . .." The credit card itself is inscribed above the signature line with the words, "By accepting, signing or using this card, you agree to Capital One's present and future rules and regulations." Thus, by operation of the agreement, the defendant is deemed to have accepted it by conduct upon first using the account.

2. Section 68 (1) of the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sch. A, codifies into statute the same acceptance by conduct. It states, "Despite section 13, a consumer who applies for a credit card without signing an application form or who receives a credit card from a credit card issuer without applying for it shall be deemed to have entered into a credit agreement with the issuer with respect to the card on first using the card."

3. The *Electronic Commerce Act*, 2000, S.O. 2000, c. 17, ss. 1(1), 3, 11 and 19(1)(b)(ii), also supports the contractual provision for acceptance by conduct by deeming the first use of the account or the act of submitting an internet or telephone application as being the legal equivalent of signing the cardholder agreement.

Thus Your Honour can see that requiring a signed agreement as a condition precedent to obtaining default judgment sets a higher standard to obtain default judgment than both that set by the Small Claims Court Rules and the one the plaintiff would have to meet to prove its claim at trial. I therefore respectfully suggest that Your Honour amend this condition to read "(a) Cardholder agreement (legible)."

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Pre-judgment interest conditional on proving payment of the expenses by the Plaintiff

If Your Honour will refer to Tab 2 of the Appeal Book and Compendium in *Blackwell* which is in your possession, you will find the order of Deputy Judge Kidd and a transcription thereof that was considered by the Divisional Court. In it, Deputy Judge Kidd states:

> The plaintiff also claims as a part of this Judgment a debt of $1,385.05 for legal fees from Todd Christensen. I have disallowed this part of the claim because the Customer Agreement s. 11 between Plantiff and Defendants says Plaintiff can claim as a debt due it "any expense we incur to collect your debt". The key words are "we incur". The Plaintiff has a contingent fee retainer with Christensen. It provides a fee of 22% "contingent upon success". Nothing has yet been recovered so no fee is due to Christensen so no expense has yet been incurred which could possibly be claimed as a debt of the Plaintiff. The Plaintiff shall be able, without prejudice, to apply for a contingent fee expense incurred, if ever, upon actually paying such a fee to Mr. Christensen. Mr. Christensen's account in support of this assessment hearing is not appropriate and is premature.

The Divisional Court rejected Deputy Judge Kidd's argument that the defendant was not liable for a contingent liability and allowed the plaintiff's appeal in full, granting present judgment for the contingent liability incurred by Capital One for the contingency fee and granting pre-judgment interest thereon at the contractual rate as claimed: *Capital One Bank v. Matovska*, 2007 CanLII 37015 (ON S.C.D.C.). The Divisional Court made clear by citing and following *Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 (S.C.C.) that a trial judge does not have discretion to interfere with the contractual rate of interest outside of "exceptional circumstances." As *Matovska* and *Blackwell* were cases with circumstances identical to this proceeding and he granted pre-judgment interest at the contractual rate therein, Justice MacKenzie's ruling is binding that Your Honour has no discretion to interfere with pre-judgment interest.

If Your Honour is to be consistent with paragraph 1 of your order that you are bound by the result in *Matovska* (which includes *Blackwell*), I respectfully suggest that Your Honour would need to vary your order to delete the condition that the plaintiff prove the contingency fee was paid in order to qualify for pre-judgment interest.

Conclusion

The plaintiff respectfully requests that Your Honour vary paragraph 2 of your order to read as follows:

(2) The Clerk of the Court shall sign default judgment in this and all similar matters provided the pleadings are specific, and the attachments to the Claim include the following:

(a) ~~Signed~~ Cardholder agreement (legible),
(b) Legible Final or last Statement,
(c) Calculation of Interest,
(d) Accounts for "expenses" including legal fees.

~~Unless there is proof of payment of the expenses by the Plaintiff, there will be no pre-judgment interest.~~

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I would be most grateful for a prompt reply.

Sincerely

CHRISTENSEN LAW FIRM

Per: 
Todd R. Christensen

Enclosure (4 pages; transmission 8 pages total)

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