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February 15, 2012

VIA FAX ONLY TO 705 645 7901

The Honourable Deputy Judge Raymond G. Selbie
Haliburton Small Claims Court
12 Newcastle Street
Minden, ON K0M 2K0

Dear Deputy Judge Selbie

RE: CAPITAL ONE BANK (CANADA BRANCH) v. LARRY RICHARD HUSSEY and NANCY LOUISE HUSSEY
COURT FILE NO. SC-11-00900007-0000
ORDER DATE: FEBRUARY 14, 2012

We received a copy of Your Honour's Order of February 14, 2012 in the above-captioned matter. This letter is being sent with the prior knowledge and consent of the defendant's agent . . . and is being copied to her.

We note that notwithstanding the Consent filed with the court by which the defendants consented to judgment for $6,664.75, costs of $335.00 and post judgment interest at the contractual rate of 21.7 percent per annum, Your Honour ordered post-judgment interest at the *Courts of Justice Act* rate stating, "This has been decided in current economic time. Int rate of 21.7% not just. Sec 130 CJA." As we did not have an opportunity to make submissions, we would like Your Honour to consider the following:

The Federal Court has stated,

> Generally speaking, a Court granting a consent judgment is concerned with only two things: the capacity of the parties to agree and its jurisdiction to make the order they have agreed to ask it to make. A consent judgment reflects neither findings of fact nor a considered application of the law to the facts by the Court. It is an exercise in a different fashion of the Court's basic function to resolve disputes: by giving effect to a settlement agreed to by legally competent persons rather than by reaching a concluded opinion itself (see *Uppal v. Canada (Minister of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 143 (Fed. C.A.) at para. 18. Cited in *Gillen v. College of Physicians & Surgeons (Ontario)*, 2010 CarswellOnt 10690.

Indeed, s. 4.07 of the *Small Claims Court Rules* provides, "No settlement of a claim made by or against a person under disability is binding on the person without the approval of the court." The clear implication is that court approval is not required of a settlement between parties who are not under disability. The defendants in this case were represented by a duly licensed and experienced paralegal. Their capacity is not in question. The order sought is clearly within the court's jurisdiction and we submit, therefore, that the court should give effect to the intention of the parties.

The Federal Court has also stipulated it did not have a duty to question a consent judgment when the relief granted is within the scope of that sought in the pleadings and might have been granted after the trial (see *Douglas v. R.* (1992), [1993] 1 F.C. 264 (Fed. T.D.)).

The settlement reflects a considered view of the award the plaintiff would be entitled to at trial. The Divisional Court, in an appeal from the Small Claims Court, *Capital One Bank v. Matovska,* ruled "unless the terms respecting interest rates in the credit card agreement are vague or unclear or unless the interest rate derived from the written agreement infringes a statutory provision such as the *Interest Act*, effect should be given to the contractual rate for the determination of both pre- and post-judgment interest (see *Capital One Bank v. Matovska*, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368, para.13).

The Divisional Court also reiterated the Supreme Court of Canada's decision on the common misapprehension that s. 130 of the *Courts of Justice Act* grants the court discretion in varying a contractual rate of interest. That section empowers the court to vary only interest awarded under sections 128 and 129 of the *Court of Justice Act*. The Supreme Court of Canada considered these sections (specifically, ss. 128(4)(g) and 129(5)) and found that interest claimed under a contract is "a right other than under this section", and thus not subject to the discretion to vary the interest under section 130 (see *Capital One Bank v. Matovska*, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368, paragraphs 8 -11).

We respectfully submit that this case is a binding decision by Your Honour's immediate supervisory appellate court. With respect to the application of *stare decisis* in this instance and that the Small Claims Court is a court of law that must follow the law we refer you respectively to *Frost Insurance Brokers Ltd. v. McMorrow* at para. 13 and *Jenica Holdings Inc. v. Larromana* at para. 8. (see *Frost Insurance Brokers Ltd. v. McMorrow*, 2005 CarswellOnt 5994, [2005] O.J. No. 1335 (Ont. S.C.J.,Jan 28, 2005) and *Jenica Holdings Inc. v. Larromana*, [1998] O.J. No. 1212).

In light of the above, we kindly ask Your Honour to modify your Order pursuant to rule 1.03(2) of the *Small Claims Court Rules* and rule 59.06(2) of the *Rules of Civil Procedure*, to change the post judgment interest rate from "@ CJA" to "21.7 percent". Enclosed is a copy of *Lamond v. Smith* (2004), 72 O.R. (3d) 119, authority for the proposition that Your Honour may vary your own Order on the Court's own motion.

We also respectfully request that Your Honour advise both parties of your decision no later than February 24, 2012 so that in the event Your Honour chooses not to follow the Divisional Court's decision in *Matovska* the plaintiff will have sufficient time to deliver and file a Notice of Appeal.

I may be reached directly at 519 721 3223 should Your Honour wish to have any questions answered or require additional submissions to assist in making your decision.

Sincerely

CHRISTENSEN LAW FIRM

Per:

Menachem M. Fellig

Enclosure (*Lamond v. Smith*, 3 pages; *Capital One Bank v. Matovska*, 4 pages; total transmission 9 pages total)

cc. . . . [Defendant's legal reprentative]