

**DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CAPITAL ONE BANK (CANADA BRANCH)**

**Plaintiff  
(Appellant)**

**-and-**

**LARRY RICHARD HUSSEY and NANCY LOUISE HUSSEY**

**Defendants  
(Respondents)**

**APPELLANT'S FACTUM**

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**Lawyer for the Plaintiff (Appellant)**

**DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CAPITAL ONE BANK (CANADA BRANCH)**

**Plaintiff**

**-and-**

**(Appellant)**

**LARRY RICHARD HUSSEY and NANCY LOUISE HUSSEY**

**Defendants**

**(Respondents)**

**APPELLANT'S FACTUM**

**I. STATEMENT OF THE APPEAL**

1. This is an appeal by the plaintiff, Capital One Bank (Canada Branch), from the judgment of The Honourable Deputy Judge Raymond G. Selbie dated February 14, 2012 made at the Haliburton Small Claims Court in Minden, Ontario whereby the plaintiff was granted judgment against the defendants for the sum of \$6,664.15, post-judgement interest at the *Courts of Justice Act* rate, and costs.

*Order of Selbie D.J., Appeal Book and Compendium, Tab 2*

## II. OVERVIEW

### Facts

2. The plaintiff's claim was for principal, interest and collection expenses owing by the defendants under a credit card agreement between the parties in the amount of \$10,726.70. The parties signed a consent whereby the defendants consented to the court signing judgment against them for the sum of \$6,664.15, costs of \$335.00 and post judgment interest at the contractual rate of 21.7% per annum. Notwithstanding the consent filed, the learned trial judge granted post-judgment interest at the *Courts of Justice Act* rate.

### Issue

3. It is respectfully submitted that the learned trial judge erred in failing to grant post judgment interest in accordance with the consent of the parties filed with the court.

## III. SUMMARY OF FACTS

4. The Plaintiff's Claim was issued January 25, 2011 for \$10,726.70 due as of January 12, 2011 along with pre-judgment and post-judgment interest at the rate of 21.7 percent per year and costs.

*Plaintiff's Claim, Schedule A, Appeal Book and Compendium, Tab 3*

5. A defence was filed by the defendants' representative, Elizabeth Feltham, dated March 16, 2011. The defendants admitted part of the claim in the amount of \$6,010.69 and proposed monthly payments of \$150.00 per month.

*Defence, page 2, Appeal Book and Compendium, Tab 4*

6. The defendants consented to judgment against them on February 10, 2012 in the

amount of \$6,664.15, costs of \$335.00 and post judgment interest at the contractual rate of 21.7% per annum.

*Consent, Appeal Book and Compendium, Tab 5*

7. Notwithstanding the consent filed, the Honourable Deputy Judge Richard G. Selbie did not grant post judgment interest in accordance with the consent of the parties filed and instead awarded judgment at the rate provided by the Courts of Justice Act, stating, “[t]his court has decided in current economic times int rate of 21.7% not just. Sec. 130 CJA.”

*Order of Selbie, D.J., Appeal Book and Compendium, Tab 2*

#### IV. ISSUES, LAW AND ARGUMENT

The trial judge should have granted judgment in accordance with the consent of the parties

8. The *Small Claims Court Rules* provide that court approval is required for any settlement involving a person under disability. The implication is that court approval is not required for a settlement between parties who are not under disability.

*Rules of the Small Claims Court, O. Reg. 258/98, r. 4.07*

9. Generally speaking, a court granting a consent judgment is concerned with only two things; namely, the capacity of the parties to agree and its jurisdiction to make the order the parties have asked it to make.

*Uppal v. Canada (Minister of Employment & Immigration) 1987*

CarswellNat 56, 2 Imm. L.R. (2d) 143, [1987] 3 F.C. 565, 78 N.R. 152

(obtained March 26, 2012) para. 18.

10. Additionally, as the Federal Court has stated, “[i]n the ordinary course of settlement of issues that are the subject of litigation between private parties, the court called upon to play a role in that settlement by pronouncing a judgment on consent of the parties does not look beyond the terms of judgment agreed upon, provided the relief granted is within the scope of that prayed for in pleadings and might have been granted after trial of the action.”

*Douglas v. R.*, 1992 CarswellNat 156, [1993] 1 F.C. 264, 93 C.L.L.C. 17,004, (sub nom. *Douglas v. Canada*) 98 D.L.R. (4th) 129, 12 C.R.R. (2d) 284, 19 C.H.R.R. D/76, 58 F.T.R. 147, 98 D.L.R. (4th) 129 (obtained March 26, 2012) at para.18.

11. In this case, neither the capacity of the parties nor the jurisdiction of the court to grant the relief sought was raised by Deputy Judge Selbie. His Honour referred only to current economic conditions in his reasons. Both parties were represented and the judgment to which the parties consented was within the jurisdiction of the Small Claims Court.

*Order of Selbie, D.J., Appeal Book and Compendium, Tab 2*

The trial judge should have granted judgment in accordance with the law as set out by superior courts

12. The consent to judgment 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 in *Capital One Bank v. Matovska*, considered the Supreme Court of Canada decision in *Bank of America Canada v. Mutual Trust Co.* and 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.”

*Capital One Bank v. Matovska*, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368 (obtained March 26, 2012) at

para.13; *Bank of America Canada v. Mutual Trust Co.*, 2002 CarswellOnt 1114, 2002 SCC 43, 211 D.L.R. (4th) 385, [2002] 2 S.C.R. 601 (obtained March 26, 2012).

13. The Small Claims Court is not a court of inherent jurisdiction. Notwithstanding section 25 of the *Courts of Justice Act*, which provides the court "...may make such order as is considered just and agreeable to good conscience" the court must still apply the law. A Small Claims Court cannot ignore the law and cannot base its decision of a belief that the law is unfair.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25; *O'Shanter Development Corp. v. Separi*, 1996 CarswellOnt 1701 (obtained March 26, 2012) at paras. 8-9.

14. As the *Matovska* decision is a binding decision of Deputy Judge Selbie's immediate supervisory appellate court he was bound to follow it, as are all judges of the Small Claims Court.

*Frost Insurance Brokers Ltd. v. McMorrow*, 2005 CarswellOnt 5994, [2005] O.J. No. 1335 (obtained March 26, 2012) at para. 13.

The trial judge should have given an opportunity for the parties to make submissions in awarding judgment that departed from the consent of the parties.

15. The learned trial judge erred in making a finding of fact and substituting his own decision for that agreed on by the parties. The Federal Court of Appeal stated, "[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."

*Uppal v. Canada (Minister of Employment & Immigration) supra* at para. 18.

16. The learned trial judge should have entertained the submissions of the parties if he wished to depart from the consent of the parties. Indeed, it is a basic principle of natural law and procedural fairness that one has the right to be heard before a decision affecting their rights or interests is made.

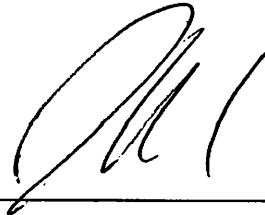
*Kipiniak v. Dubiel*, 2011 CarswellOnt 766, 2011 ONSC 825, 274 O.A.C. 249 (obtained March 26, 2012) at para. 13.

17. In light of the above, the appellant respectfully submits that the learned trial judge erred in failing to grant judgment in accordance with the consent of the parties. Moreover, the learned judge further erred in not following the law as set out by the Supreme Court of Canada in *Bank of America Canada v. Mutual Trust Co.* as applied by the Divisional Court in *Capital One Bank v. Matovska* and not inviting the submissions of the parties in departing from their consent in granting judgment.

#### V. ORDER SOUGHT

18. The plaintiff respectfully requests an order in the following terms:  
“The appeal is allowed. The judgment of Deputy Judge Selbie is varied such that post-judgment interest will accrue at 21.7 percent per annum. At the request of the appellant there is no order as to the costs of this appeal.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Todd R. Christensen, LSUC No. 340780

Lawyer for the appellant, Capital One Bank (Canada Branch)

**DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CAPITAL ONE BANK (CANADA BRANCH)**

**Plaintiff  
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**-and-**

**LARRY RICHARD HUSSEY and NANCY LOUISE HUSSEY**

**Defendants  
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**CERTIFICATE**

**I, Todd R. Christensen, lawyer for the appellant, certify:**

- 1. An order under subrule 61.09 (2) is not required, and**
- 2. I estimate I will require 0.5 hours for oral argument.**



## SCHEDULE A

### List of Authorities

Rules of the Small Claims Court, O. Reg. 258/98, r. 4.07

*Uppal v. Canada (Minister of Employment & Immigration)* (1987), 2 Imm.L.R. (2d) 143 (Fed. C.A.)

*Douglas v. R.*, 1992 CarswellNat 156, [1993] 1 F.C. 264, 93 C.L.L.C. 17,004, (sub nom. *Douglas v. Canada*) 98 D.L.R. (4th) 129, 12 C.R.R. (2d) 284, 19 C.H.R.R. D/76, 58 F.T.R. 147, 98 D.L.R. (4th) 129.

*Capital One Bank v. Matovska*, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368

*Bank of America Canada v. Mutual Trust Co.*, 2002 CarswellOnt 1114, 2002 SCC 43, 211 D.L.R. (4th) 385, [2002] 2 S.C.R. 601.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25;

*O'Shanter Development Corp. v. Separi*, 1996 CarswellOnt 1701

*Frost Insurance Brokers Ltd. v. McMorrow*, 2005 CarswellOnt 5994, [2005] O.J. No. 1335

*Kipiniak v. Dubiel*, 2011 CarswellOnt 766, 2011 ONSC 825, 274 O.A.C. 249

## **SCHEDULE B**

### Text of Relevant Provisions

#### *Small Claims Court Rule 4.07*

**4.07** No settlement of a claim made by or against a person under disability is binding on the person without the approval of the court. O. Reg. 258/98, r. 4.07.

#### *Courts of Justice Act, s. 25*

**25.** The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

Court File No. 31-12

CAPITAL ONE BANK (CANADA BRANCH) v. LARRY RICHARD HUSSEY and NANCY LOUISE HUSSEY

**DIVISIONAL COURT, SUPERIOR  
COURT OF JUSTICE**

Proceedings commenced at Haliburton

**APPELLANT'S FACTUM**

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