

## FINANCIAL SERVICES LITIGATION BULLETIN

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### ONTARIO COURT OF APPEAL LOWERS THRESHOLD FOR CLASS ACTION CERTIFICATION IN FINANCIAL SERVICES LITIGATION

#### INTRODUCTION: THE MARKSON CASE

In *Markson v. MBNA Canada Bank*<sup>1</sup> (“*Markson*”), the Ontario Court of Appeal lowered the threshold for class action certification in financial services litigation by allowing an action to proceed as a class action even though the only way to determine the defendant’s actual liability to any member of the class was on an individual basis. In the past, such cases had not been allowed to proceed as class actions on the ground that a class action was not an appropriate procedure if the predominant focus of the proceeding was the resolution of claims on an individual, as opposed to on a class, basis.

In *Markson*, the plaintiff alleged that the interest rate charged by defendant financial institution on credit card cash advances exceeded 60%, in violation of the *Criminal Code*.<sup>2</sup> The violation arose because the defendant bank charged compound interest and a flat transaction fee (which is included in the definition of interest in the *Criminal Code*) on every cash advance. In certain circumstances, where a small amount was borrowed (under \$65), there were no other transactions on the credit card and the amount was repaid within a month, the interest rate charged exceeded 60%. Apparently for the purposes of generating a class action lawsuit, the plaintiff undertook this unusual pattern of borrowing and then brought a class action, complaining that the defendant was charging a criminal rate of interest. It is significant to note that the evidence demonstrated that the defendant was not charging a criminal interest rate on the vast majority of credit card cash advance transactions.

Both levels of court below the Court of Appeal had refused to certify the action as a class action on the ground that the plaintiff’s claim did not raise issues common to all members of the class, a hurdle that must be overcome before an action will be allowed to proceed as a class action. Those courts held that the claim did not raise common issues because in order to determine whether the defendant had charged a criminal interest rate, a manual review of each individual cash advance transaction entered into by each individual cardholder was required. Because the action would involve manually examining millions of individual transactions, as opposed to being concerned with issues relevant to a class, the lower courts held that the action ought not to proceed as class proceeding. The lower courts also held that even if some sort of electronic system could be developed to identify interest paid at criminal rates (to avoid the necessity of looking at millions of individual transactions), the expense of the exercise would far outweigh the benefit to class members, who the plaintiff conceded were each likely to receive only \$7.50.

The Court of Appeal agreed that if millions of transactions had to be examined individually, the claim ought not to proceed as a class action because the time and cost to determine the size of the liability to each member of the class would overwhelm any common issues. However, the Court of Appeal nevertheless agreed to certify the class proceeding, adopting a novel and expanded interpretation of sections 23 and 24 of the Class Proceedings Act (“CPA”).

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<sup>1</sup> 85 O.R. (3d) 321.

<sup>2</sup> Section 347.1(1)(b).

## NEW INTERPRETATION OF THE CLASS PROCEEDINGS ACT

In *Markson*, Ontario's highest court held that, once the plaintiff had established that the defendant administered its cash advances in a way that *could* violate the *Criminal Code*, it would have established *potential* liability on a class-wide basis. Once *potential* liability was established, the Court held that statistical sampling, allowed by section 23 of the *CPA*, could be used to calculate a global damages figure to be paid by the defendant. Statistical sampling would avoid the necessity of investigating millions of individual transactions. Thereafter, section 24, which allows the court to distribute an aggregate damages sum to class members where it would be impractical or inefficient to identify class members entitled to share in the award, could be used to distribute the global damages figure amongst the class. Because of the rough and readiness of section 24 of the *CPA*, the Court acknowledged that members of the class that had not suffered any loss could and would likely receive a share of the global award.

In *Markson*, therefore, the plaintiff was only required to illustrate that the defendant financial institution's practices *could* violate the criminal rate of interest provisions. Once *potential* liability was established, the Court ruled that statistical sampling could be used to determine a global damages figure which would then be distributed to class members without any real identification of who had actually paid a criminal rate of interest and how much they had paid (i.e. who had actually been harmed by the defendant and the extent of the harm).

In *Markson*, the Court of Appeal broke new ground. Class action legislation was only intended to affect the procedural and not the substantive rights of parties, to provide a procedure whereby a representative plaintiff could bring a claim on behalf of a class of plaintiffs. In *Markson*, the Court allowed a class action to proceed against the defendant bank on the basis that a plaintiff need only establish *potential* liability as opposed to actual liability, which goes beyond affecting the defendant bank's procedural rights, to affect its substantive rights. The Appellate Court was prepared to go these lengths to certify the action in *Markson* because of a concern that refusing to certify an action in this case would defeat the goal of class actions - deterring potential wrongdoers from causing widespread, but individually minimal, harm. Refusing to certify cases such as *Markson* would, according to the Court of Appeal, "immunize large institutions from receiving illegal profits from millions of small transactions."

## CONCERN OF THIS DECISION FOR FINANCIAL INSTITUTIONS

There is no question that the *Markson* case makes financial institutions easier targets of class actions. It has given plaintiffs new ammunition (through the use of sections 23 and 24 of the *CPA*) to argue for certification in cases against financial institutions where certification had been denied in the past. *Markson* also suggests that Courts may revisit principles established in earlier class action decisions in order to certify class actions where they believe a widespread wrong may have been committed by a financial institution and where a class action may be the only viable remedy given the amounts in issue.

*Markson* has been appealed to the Supreme Court of Canada. It remains to be seen how the decision will be received by Canada's highest court, and in particular, whether the Supreme Court of Canada will allow *Markson*, clearly a high water mark in class action jurisprudence, to continue the trend of opening new doors to class actions against financial institutions.

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