



February 20, 2004

Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario
K1A 1H3

Our Ref: CL007/CS/PL

Dear Sirs,

**Complaint and Request for Enforcement: MBNA PlatinumPlus MasterCard,
MBNA/University of Toronto PlatinumPlus MasterCard**

We have been retained by _____ in regard to the continuing non-compliance of MBNA Canada Bank ("MBNA") with findings made by your office dated July 10, 2003 under file 6100-0280. We wish to file this complaint under Section 11 of the Personal Information Protection and Electronic Documents Act ("the Act") in order to expose the continuing non-compliance of MBNA with two previous Commissioners' findings and to request immediate enforcement action by the Commissioner.

On October 16, 2001, the Public Interest Advocacy Centre (PIAC) filed a complaint under the *PIPED Act* with respect to, among other things, inadequacy of the consent clause contained in MBNA's Mastercard application form. In *PIPED Act Case Summary #83*, issued in October, 2002, Commissioner Radwanski found that MBNA's consent form did not meet the requirements of the Act in a number of respects, including its overbroad and unclear wording.

Meanwhile, on June 17, 2002, _____ filed a complaint under the *PIPED Act*, pointing out that the consent clause in the MBNA Platinum Plus Mastercard application form fails to clearly define or restrict its collection, use and disclosure of personal information. By way of findings dated July 10, 2003, and published as *PIPED Act Case Summary #184*, Commissioner Marleau concluded that _____'s complaint was well-founded and that MBNA continued to violate Principles 4.3, 4.3.2 and 4.3.3 of Schedule 1 to the Act.

Despite these two Commissioner findings, MBNA has failed to revise its credit card application form so as to comply with the law. We enclose copies of credit card application forms received by _____ from MBNA on the 2nd February, 2004. MBNA's practices relating to personal information collection, use and disclosure, as detailed on the application forms, have not substantially changed and continue to contravene Section 5(3) and Principles 4.2.1, 4.3, 4.3.2, 4.3.3, and 4.3.4 of the Act.

We would draw your attention to the following provisions of MBNA's application form, found in the section entitled "Conditions:"

I consent to, and accept this as written notice of, your obtaining, disclosing or exchanging any credit, personal or other information about me (including information contained in my personal information file) at any time, from, to or with any credit bureau, personal information agent, credit grantor or insurer, my employer or other person in connection with any relationships between us or those which you or I may wish to establish. You, your affiliates and service providers may use any of the information relating to me or my Account to maintain and administer my Account, to offer services and enhancements, and for any purpose not prohibited by law. I also consent to the use and disclosure at any time of all such personal and other information: (i) for purposes of offering me any other product of yours or of anyone else (including your affiliates), that you believe may be of interest to me; (ii) to determine which Account benefits, services or enhancements, and/or which other product or service offers may be of interest to me; and (iii) for such other uses as are not prohibited by law.

My consent to use of any personal and other information as provided in (i) through (iii) is optional. If I want to discontinue such use, if I do not want to receive any further marketing materials or future product offers from MBNA, or if I do not want MBNA to share information about me with MBNA's partners or any other third-party acting on MBNA's behalf who will be using this information for secondary marketing purposes, I may write to MBNA at: ... or call MBNA's Customer Service department. Please allow eight weeks for this request to take effect. Exercising this option will limit my ability to receive product and service offers that may provide significant benefits.

The consent clause as detailed above is fundamentally flawed and in clear violation of the Act and the Commissioner's earlier findings, for all the reasons set out below.

Clarity: The language employed by MBNA continues to be unclear, legalistic and impenetrable for the average consumer whose consent is needed under Principle 4.3 of the Act.

Visibility: The specimen forms attached accurately represent the very small print and non-obvious positioning of the paragraphs relating specifically to consent. As noted by previous Commissioners, these two practices make it unlikely that a consumer would appreciate what they are consenting to.

Overbroad Consent: MBNA seeks, in order to supply its credit card, a level of consent for its information practices which is vastly overbroad and devoid of specificity. While customers are permitted to opt-out of some uses, MBNA requires that all customers consent to the use and disclosure of their personal information for an unlimited and unspecified number of purposes, far beyond what is necessary and would be considered appropriate by a reasonable person in the circumstances.

Principles 4.2.1, 4.2.3, 4.3.2

MBNA fails to specify its purposes to any extent that an individual may fully appreciate the collection, use and disclosure that is supposedly being agreed to. Customers are unable to determine how their personal information may be used by MBNA, to whom it might be disclosed, and for what purposes it might be put. This is clearly contrary to principles 4.2.1, 4.2.3, and 4.3.2 ,

Principle 4.3.3

Those subject to MBNA's terms are unable to opt-out of the exchange of "any credit, personal or other information about me" with "any other person in connection with any relationships between us or those which you or I may wish to establish". Applicants are further unable to opt-out of the use of their personal information by MBNA "for any purpose not prohibited by law". That the virtually unrestricted use and disclosure of highly sensitive personal information should be a necessary part of obtaining a credit card clearly contravenes Principle 4.3.3 of the Act.

Subs.5(3)

MBNA's attempt to allow itself to use the personal information of its customers "for any purpose not prohibited by law" clearly breaches subs.5(3) of the Act insofar as such purposes encompass much that a reasonable person would not consider appropriate in the circumstances.

Inadequate Opt-Out

We note that the Commissioner has established clear guidelines for the acceptable use of an opt-out system for consent: e.g., Commissioner's Findings in *PIPED Act Case Summary #192*, issued July 23, 2003. In this case, the Commissioner "outlined the ... conditions that must be met in order for an organization to justify relying on the opt-out form of consent." MBNA's continuing use of opt-out consent fails to meet the conditions established by the Commissioner in the following respects:

1. *The personal information must be demonstrably non-sensitive in nature and context.*
 - MBNA's relies upon opt-out consent for the use and disclosure of information relating to the applicant's creditworthiness, among other things. Credit information is clearly sensitive personal information, and thus does not fall within the Commissioner's criteria for the justification of opt-out.
2. *The information-sharing situation must be limited and well defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.*
 - MBNA does not limit or define the personal information that its collects, nor does it adequately limit or define the extent of the intended use or disclosure to which it will put the information, once collected.
3. *The organization's purposes must be limited and well-defined, stated in a reasonably clear and understandable manner, and brought to the individual's attention at the time the personal information is collected.*
 - MBNA does not clearly or understandably explain its purposes at the time of collection. The language used by MBNA does not give members of the public a clear picture of the

purposes for which the bank will collect personal information. In addition, the placing and size of the text relating to personal information collection, as evidenced on the attachments, does not adequately bring MBNA's activities to the attention of the customer at the time of collection.

4. *The organization must establish a convenient procedure for easily, inexpensively, and immediately opting out of, or withdrawing consent to, secondary purposes and must notify the individual of the procedure at the time the personal information is collected.*
- MBNA requires customers to write to it or to telephone its customer service centre in order to opt-out. MBNA states that an opt-out request will take eight (8) weeks to take effect. Such a lengthy period for opt-out to take effect does not meet the Commissioner's requirement that opt-out from secondary marketing purposes is immediate. We note with concern that a period of eight weeks post-collection allows for substantial use and disclosure of a customer's sensitive personal information by MBNA, even if the customer states at the earliest opportunity available that such activities are against the customer's wishes.

MBNA has repeatedly and wholly failed to comply with the Act and the Findings and directions of successive Privacy Commissioners. At the present time, as we have shown, MBNA continues to contravene the Act with blatant disregard for those previous Findings and the clear requirements of the law.

We therefore request that the Privacy Commissioner act swiftly, under Section 15 of the Act, to commence a hearing in Federal Court for an order requiring MBNA to immediately change its policies and practices so as to bring them into accordance with the law, and imposing whatever punitive measures are considered appropriate in the circumstances.

We await your investigation, findings and response.

Yours truly,

Christopher Shaw
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University of Ottawa

Philippa Lawson
Barrister & Solicitor
Executive Director, CIPPIC