

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

"Class Action"
SUPERIOR COURT

No. 500-06-000221-040

OPTION CONSOMMATEURS

Petitioner

and

CAROLYNE GRIMARD

and

JEAN AUDET

Designated Members

vs.

BANK OF MONTREAL

and

CITIBANK OF CANADA

Defendants

and

ATTORNEY GENERAL OF QUEBEC

Mis-en-cause

PLEA OF DEFENDANT BANK OF MONTREAL

IN RESPONSE TO THE ALLEGATIONS CONTAINED IN PETITIONER AND DESIGNATED MEMBER CAROLYNE GRIMARD'S PARTICULARIZED AND AMENDED MOTION TO INSTITUTE PROCEEDINGS (THE "PARTICULARIZED MOTION"), DEFENDANT BANK OF MONTREAL ("BMO") STATES AS FOLLOWS:

1. It admits paragraphs 1, 2 and 3 of the Particularized Motion and otherwise refers to the group description as authorized by Justice Gascon in his judgment of November 1, 2006 ("Authorization Judgment");
2. With respect to paragraph 4 of the Particularized Motion, it refers to Exhibit P-1 and denies anything not in conformity therewith;
3. It admits paragraphs 5 and 6 of the Particularized Motion;
4. It admits paragraph 7 of the Particularized Motion insofar as BMO issues MasterCard credit cards;
5. With respect to paragraph 8 of the Particularized Motion, it admits that the Designated member Carolyne Grimard is the holder of a MasterCard issued by BMO;
6. It denies as drafted paragraph 9 of the Particularized Motion;
7. With respect to paragraph 9.1 of the Particularized Motion, it refers to Exhibit P-3A and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
8. With respect to paragraph 9.2 of the Particularized Motion, it refers to Exhibit P-3B and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
9. With respect to paragraph 9.3 of the Particularized Motion, it refers to Exhibit P-3C and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
10. With respect to paragraph 9.4 of the Particularized Motion, it refers to Exhibit P-3D and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
11. With respect to paragraph 9.5 of the Particularized Motion, it refers to Exhibit P-3E and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
12. With respect to paragraph 9.6 of the Particularized Motion, it refers to Exhibit P-3F and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;

13. With respect to paragraph 9.7 of the Particularized Motion, it refers to Exhibit P-3G and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
14. With respect to paragraph 9.8 of the Particularized Motion, it refers to Exhibit P-3H and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
15. With respect to paragraph 9.9 of the Particularized Motion, it refers to Exhibit P-3I and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
16. With respect to paragraph 9.10 of the Particularized Motion, it refers to Exhibit P-3J and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
17. With respect to paragraph 9.11 of the Particularized Motion, it refers to Exhibit P-3K and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
18. With respect to paragraph 9.12 of the Particularized Motion, it refers to Exhibit P-3L and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
19. With respect to paragraph 9.13 of the Particularized Motion, it refers to Exhibit P-3M and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
20. With respect to paragraph 9.14 of the Particularized Motion, it refers to Exhibit P-3N and denies anything not in conformity therewith, adding that the Designated member Carolyne Grimard used the additional credit granted without protest, as more fully detailed hereinafter;
21. It admits paragraph 10 of the Particularized Motion;
22. It denies paragraphs 11, 12 and 13 of the Particularized Motion;
23. It ignores the paragraphs 14, 14.1, 15, 16, 17, 17.1, 18, 19, 20, 21, 22 and 23 of the Particularized Motion which relate to defendant CitiBank;
24. It denies paragraph 24 of the Particularized Motion;

25. It denies paragraphs 25, 26, 27 and 28 of the Particularized Motion insofar as it relates to BMO;
26. It denies paragraphs 29, 29.1, 30 and 31 of the Particularized Motion, adding that these allegations should be directed against the Defendant Citibank only, as appears from the Authorization Judgment;
27. With respect to paragraph 33 of the Particularized Motion, it refers to the Authorization Judgment and denies anything not in conformity therewith, adding that Plaintiff has failed to make the appropriate distinctions between each of the Defendants and the two (2) alleged violations of the *Consumer Protection Act* ("CPA") namely, the unilateral increase in the credit limit which relates only to Defendant BMO and the imposition of an over limit fee which relates only to Defendant Citibank;
28. It denies paragraph 33 (sic) of the Particularized Motion;

AND FOR FURTHER PLEA TO PETITIONER AND DESIGNATED MEMBER CAROLYNE GRIMARD'S PARTICULARIZED MOTION, DEFENDANT BMO ADDS THE FOLLOWING:

I. SUMMARY OF THE ARGUMENTS

29. The provisions of the CPA and of the Regulation respecting its application ("CPA Regulation") invoked by Petitioner and the Designated member Grimard, and in particular section 128 of the CPA, are constitutionally inapplicable to BMO;
30. The possibility that BMO may grant an increase in credit limit has always been properly disclosed by BMO;
31. Designated member Carolyne Grimard is estopped from making any claim with respect to the increase of her credit limit;
32. Designated member Grimard has renounced her right to make any claim with respect to the increase of her credit limit;
33. Even if the CPA finds application herein, and even if the increase of credit limit was not done in conformity with the CPA, both of which are denied, no damages were suffered as a result of same;
34. There is no legal and factual foundation herein for punitive damages;
35. The claim of any cardholder who has entered into a MasterCard agreement with BMO prior to January 9, 2001 is prescribed;
36. Collective recovery cannot be ordered as it must be determined if the cardholder is a consumer under the CPA, when he/she entered into a MasterCard agreement with BMO, if he/she expressly requested the increase in credit limit,

and if not, if he/she in fact used the increase in credit limit without protest, is estopped and/or has renounced his/her rights with respect to the present claim;

II. THE PARTIES

A) Defendant BMO

37. BMO is a federally chartered bank incorporated according to the provisions of the *Bank Act*, S.C. 1991, as amended, that offers, inter alia, charge card, credit card, and foreign exchange services to its customers;

38. A BMO MasterCard credit card provides cardholders with access to funds anywhere in Canada and abroad, 24 hours a day, seven days a week;

B) Designated member Carolyne Grimard

39. The Designated member Carolyne Grimard has been a BMO MasterCard cardholder since May 2001 and has been allowed to represent the members of the group described in the Authorization Judgment as: (our translation)

"All physical persons who are parties to a variable credit contract (credit card) concluded in Québec with the Bank of Montréal, for a use other than for the operation of a business and who have been granted, since January 9, 2001, an increase in their credit limit without having expressly applied for it."

III. THE FACTS

A) General facts

MasterCard system

40. The MasterCard Network was established in the United States in 1966 by a group of banks, under the name of Interbank Card Association ("ICA"). In 1968, ICA became MasterCard International Inc. ("MCI")

41. Credit card issuers began to offer the MasterCard credit card in Canada in 1973;

42. MCI manages a complete line of programs and payment services through the MasterCard credit cards. BMO's debit cards have the Maestro and Cirrus brands on them so that they may be used to make international debit payments and ATM withdrawals, respectively;;

43. Defendant BMO has been a member of MasterCard since 1973;

44. Defendant BMO entered into a contract with MCI and with MCI affiliates, pursuant to which BMO is authorized to use the payment system and the

MasterCard trademarks, and to issue to its clients credit cards bearing the MasterCard, Maestro and Cirrus logos;

45. Accordingly, Defendant BMO is an "Issuer" of MasterCard credit cards;

B) Contracts extending variable credit with clients of BMO

46. In order to obtain a BMO MasterCard, a customer must complete an Application Form available at BMO branches, on BMO's website, by phone or received through a direct mail campaign;

47. The Application Form is accompanied by documents that detail the options available for each card, in order for the customer to customize the card to his/her needs. An example of an English and French version of this document is communicated in support of the present Plea as **Exhibit D-BMO-1 en liasse**;

48. If the application is approved, the applicant receives a package containing the following: (i) a BMO MasterCard, (ii) a Card Carrier (iii) a BMO Cardholder Agreement and (iv) a Cardholder Manual;

49. An example of a BMO Card Carrier is communicated, in the English and French version, in support of the present Plea as **Exhibit D-BMO-2 en liasse**;

50. All relevant versions of BMO Cardholder Agreements since October 2001 are communicated, in the English and French versions (when available), in support of the present Plea as **Exhibit D-BMO-3 en liasse**;

51. An example of a BMO Cardholder Manual is communicated, in the English and French version, in support of the present Plea as **Exhibit D-BMO-4 en liasse**;

52. By signing, activating or using the BMO MasterCard or MasterCard account number, the new cardholder agrees to be bound by and accepts all of the terms of the Cardholder Agreement;

53. When a BMO MasterCard expires, is lost or otherwise needs to be replaced, the holder of a BMO MasterCard will be sent a new card in a new Card Carrier, together with the then current Cardholder Agreement;

54. In addition, BMO periodically mails a then current version of the Cardholder Agreement to all existing BMO MasterCard cardholders;

55. In addition to the above-mentioned documents, every individual cardholder receives from BMO a Monthly Statement of Account setting out the amount owed to BMO with respect to the MasterCard transactions, including the credit limit available, except if there has been no activity in the account and nothing is owing by the cardholder in a given month. An example of BMO statement of account (front and reverse side) is communicated, in the English and French version, in support of the present Plea as **Exhibit D-BMO-5 en liasse**;

56. The documents accompanying the credit card provide BMO's cardholders with important information on the terms and conditions surrounding the use of the BMO MasterCard, including on their credit limit;

57. In addition, if and when BMO grants a credit limit increase, the statement of account will clearly indicate it, as more fully appears from the statements of accounts of the Designated member Grimard communicated hereinafter;

C) Designated member Carolyne Grimard's factual situation

58. In March 2001, the Designated member Carolyne Grimard applied for a BMO MasterCard credit card (account number 5191 2300 5816 8239), as more fully appears from a copy of her original BMO MasterCard application dated March 26, 2001, communicated in support of the present Plea as **Exhibit D-BMO-6**;

59. Her original credit limit was 1000\$;

60. In August 2002, she requested an increase in her credit limit from 1000\$ to \$2000, which she obtained in part in August 2002 and in April 2003, as appears from her statements of account (Exhibit D-BMO-6) as well as from a copy of her examination dated August 26, 2009, communicated in support of the present Plea as **Exhibit D-BMO-7**; (see in particular pages 45-50)

61. Further to this first request, BMO periodically reviewed the Designated member Carolyne Grimard's account and offered to her, from time to time, an increase in credit limit, which the Designated member Grimard chose to use, the whole as appears from a copy of her statements of account communicated in support of the present Plea as **Exhibit D-BMO-8 en liasse**;

62. Furthermore, the cardholder agreement entered into by the parties provides for the cardholder to closely review the veracity and accuracy of the entries indicated on his/her statement of account and to contest any discrepancies in writing within thirty (30) of the date of the statement of account, in default of which same will be considered exact and definitive ;

63. During her examination, Mrs. Grimard confirmed that she reviewed her statements of account, the purchases made and amounts, the amount of interest charged, the amount of the payment required, the credit limit available, etc.; (see D-BMO-7, pages 41-44 and 56)

64. Yet, not only did Mrs. Grimard knowingly use the increased credit granted, but she admitted during her examination that at no time prior to the institution of the present Motion, did she ever dispute, contest or object to BMO about the increase of her credit limit and that she never requested that her credit limit be decreased to the original amount; (see D-BMO-7, pages 52)

65. It is clear from the Designated member Grimard's statements of account that she benefited from the increase in her credit limit;

66. In fact, since the opening of her BMO MasterCard account, she carried out more than 15 transactions that exceeded her credit limit, demonstrating her need and desire for increased credit limit;
67. Furthermore, as appears from the statement of account dated May 2007, at which time her credit limit was at 8400\$, the Designated member Grimard's account balance was at 38.36\$, which can hardly be considered an excessive indebtedness, as admitted by the Designated member Grimard in her examination (see Exhibit D-BMO-7, page 71)
68. Thus, for all intents and purposes, the Designated member Mrs. Grimard consented to and accepted the increases in her credit limit, used the additional credit granted to her which she needed and suffered no prejudice therefrom;

IV. **MRS GRIMARD AND THE GROUP MEMBERS' ABSENCE OF A RIGHT OF ACTION**

A) **The Constitutional issues**

69. Petitioner and the Designated member Grimard's action against BMO is essentially based on the provisions of the CPA regarding variable credit;
70. In particular, Petitioner and the Designated member Grimard alleged that BMO is in breach of section 128 of the CPA;
71. As aforesaid, by her conduct, the Designated member Grimard consented to and gladly accepted her credit limit increases and never complained or protested the fact of the increase or asked that her credit limit be reduced to the original amount;
72. Accordingly, BMO complied with the spirit and purpose of section 128 of the CPA;
73. Subsidiarily, for the reasons set out in the following paragraphs, the provisions of the CPA invoked by Petitioner and Designated member Grimard, and which relate to variable credit cannot be applied to BMO;
74. BMO respects the federal requirements relating to credit cards including those defined in the *Bank Act* and its regulations;
75. Defendant BMO submits that even though the CPA is a provincial legislation of general application validly enacted under section 92(13) of the *Constitution Act, 1867*, section 128 of the CPA (the "impugned provision of the CPA"):
 - a) is constitutionally inapplicable to the Defendant BMO as a federally chartered bank pursuant to the doctrine of inter-jurisdictional immunity because it impairs a vital, essential, and integral part of "banking" which is

the exclusive legislative jurisdiction of the Parliament of Canada (sections 91(14) and 91(15) *Constitution Act, 1867*); or

- b) in the alternative, is constitutionally inoperative with respect to Defendant BMO pursuant to the doctrine of paramountcy to the extent of the operational conflict between the valid federal and provincial laws or insofar as the provincial law frustrates Parliament's purpose;

a) The Doctrine of Interjurisdictional Immunity

76. Subsection 91(15) of the *Constitution Act, 1867* gives Parliament legislative power over "banking, incorporation of banks and the issue of paper money";
77. The modern expression of the retail line of credit, known as the credit card, was specifically enumerated as part of the business of banking in the 1980 revisions to the *Bank Act*, by which Parliament chose to regulate certain of the terms and conditions of these contracts by enacting the *Cost of Borrowing (Banks) Regulations*. Since then, the *Bank Act* and the *Cost of Borrowing (Banks) Regulations* have extensively regulated, and continue to regulate, the granting of revolving credit to individuals;
78. In addition, Parliament created a complaint-handling process and federal organizations to monitor bank compliance with federal consumer legislation, including the Financial Consumer Agency of Canada ("FCAC") and the Office of the Superintendent of Financial Institutions Canada ("OSFI");
79. Issuance of a credit card is an integral part of most client banking packages, and forms an essential element of the banker-client relationship for retail clients. Credit cards are a form of extending credit, a fact that is recognized not only by the *Bank Act* but also by the CPA;
80. BMO submits that the impugned section of the CPA, to the extent that it purports to apply to the revolving (variable) credit agreements between a bank and its clients, impair a vital, essential and integral part of banking activities, a subject of exclusive federal legislative jurisdiction (section 91(15) *Constitution Act, 1867*);
81. The impugned provision of the CPA would impair bank activities from both regulatory and operational standpoints in that:
- a) its application would subject banks to the provincial regulatory regime established of the CPA;
- b) its application would prevent banks from using a uniform and national business for the design of their credit card systems and the operation of their credit card activities, and would increase complexity and cost;

82. This provision is therefore inapplicable to the banks under the constitutional doctrine of interjurisdictional immunity;

b) The Doctrine of Federal Paramountcy

83. BMO submits that the provision of the CPA under consideration is constitutionally inoperable as regards the banks to the extent of the operational conflict with the *Bank Act* and its regulations, and its application to banks would frustrate Parliament's purpose with respect to the *Bank Act* and its regulations;
84. The *Bank Act* and the *Cost of Borrowing (Banks) Regulations* constitute a complete code for the purpose of the regulation of credit cards and credit card plans and the issuance thereof;
85. The impugned provision of the CPA, to the extent that it purports to apply to credit card agreements concluded by federally chartered banks, regulates the same banker-client relationships as regulated by the *Bank Act* and the *Cost of Borrowing (Banks) Regulations*;
86. There is thus an operational conflict between the impugned provision of the CPA, on the one hand, and the *Bank Act* and the *Cost of Borrowing (Banks) Regulations*, on the other hand, and the purpose of the federal legislation would be frustrated;
87. The doctrine of federal paramountcy is thus triggered to render the impugned provision of the CPA inoperative to the extent of the aforementioned conflict;

B) Reimbursement of all the credit granted over the original limit

88. Plaintiff's claim for reimbursement of all the credit granted over the original limit has no basis in fact or in law, is not contemplated by the common questions and is inconsistent with the definition of the group as authorised by the Court in the Authorisation Judgment;

C) Estoppel

89. Should this Court conclude that the CPA applies to increases of credit limit, BMO submits that the Designated member Carolyn Grimard cannot validly obtain for herself and for the members of the group, the reimbursement of the credit fees imposed following the increase of their credit limit and all the fees imposed since the implementation of this policy whereby BMO offers its MasterCard cardholders the possibility of seeing their credit limit increased for the following reasons;
90. As appears from the variable credit contract for the use of a BMO MasterCard and the monthly statements of account, not only was the possibility that BMO may grant an increase in credit limit properly disclosed, but BMO's cardholders who saw their credit limit increased were properly advised of same at the time of

the increase and had the choice to refuse the increase or to use the increased credit so granted;

91. As provided for in the Cardholder Agreement, since at least October 4th, 2001, if a cardholder disagrees with the content of his/her statement of account, including with respect to the credit limit indicated, he/she must advise BMO in writing within thirty (30) days of the date of his/her statement of account, in default of which the information on the account is considered accepted by the cardholder;
92. As previously mentioned, the Designated member Grimard never raised any objection to BMO with respect to the increase of her credit limit and in fact admits having used the credit limit so increased;
93. By not objecting to the increase of credit limit and by using the credit limit so increased, Designated member Grimard, as well as most of the class members, are in default of a preliminary condition of the exercise of their recourse and are now estopped from so doing;

D) Renunciation

94. Having been fully informed of the increase in credit limit as described above, many BMO MasterCard cardholders, including the Designated member Carolyne Grimard, made the decision to use their increased credit limit;
95. By using her increased credit limit, the Designated member Carolyne Grimard, and the members of the group that she has been authorized to represent, have in effect renounced the right now asserted in their Particularized Motion;
96. In addition, by paying in part or in full the outstanding monthly amounts on their accounts, in excess of the original credit limit, BMO's cardholders further confirmed their acceptance of the increased limit, which amount appeared on each monthly statements of account;
97. Accordingly, the Designated member Grimard cannot seek reimbursement of the credit charges voluntarily paid, without protest, objection or complaint;

E) Absence of damages

98. The mere fact that an increase of credit limit was granted by BMO to Designated member Grimard does not constitute a prejudice *per se*;
99. Petitioner and the Designated member Grimard allege that same can create excessive indebtedness but does not provide any evidence to support such an allegation, nor with respect to any prejudice suffered by Designated member Grimard or by the members of the group;
100. On the contrary, the evidence provided shows that the Designated Grimard did not suffer from any excessive indebtedness;

101. As for the other members of the group, evidence of excessive indebtedness would need to be provided on an individual basis;
102. Thus, even if this Court were to conclude that BMO committed a fault, which is vigorously denied, given the absence of prejudice, Petitioner and the Designated member Grimard's claims under the CPA should be dismissed;
103. And, in the event that this Court were to conclude that BMO committed a fault and that the Designated member Grimard or any other members of the group have sustained damage, both of which are vigorously denied, no causality has been established between any alleged fault and any alleged damage allegedly sustained by the Designated member Grimard and other members of the group;
104. Moreover, for the Court to be in a position to conclude that BMO's alleged fault caused damage to any of the member of the group, the Court would have to individually review the level of indebtedness of each member of the group in order to determine if same could be considered excessive, and in the affirmative, determine if this excessive indebtedness is the result of BMO's increase of the credit limit of that member of the group;

F) Lack of legal and factual grounds with respect to the claim for punitive damages

105. Petitioner and the Designated member Grimard's CPA claims on behalf of all the members of the group seek the reimbursement of all credit fees charged after the credit limit was increased unilaterally, as well as of all the credit granted and used over the original credit limit and damages, which can only be based on section 271 CPA. ;
106. Sections 271 and 272 CPA are mutually exclusive;
107. As Petitioner and the Designated member Grimard's action can only be based on section 271 CPA, they are not entitled to claim punitive damages under the CPA;
108. Subsidiarily, even if Petitioner and the Designated member Grimard could make a claim for punitive damages as provided in section 272 CPA, which is vigorously denied, such damages should not be granted for the following reasons:
 - Neither the Designated member Grimard nor the other members of the group suffered any prejudice for which they could be granted compensatory damages. Section 272 CPA does not permit the award of punitive damages where no compensatory damages were granted;
 - In any event the criteria to award punitive damages are not met in the present case: BMO's conduct, the description of its practice and of the MasterCard system confirm that there is no bad faith, or wilful disrespect of the CPA provisions, nor is there any wanton disregard with respect to the consequences of its actions;

G) Limitation of the class, Prescription and no collective recovery

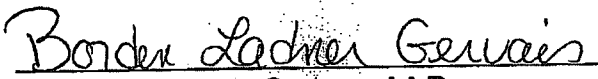
109. Many cardholders who use BMO MasterCard credit cards do so in the course of their employment, in circumstances where they are reimbursed for their expenditures by either an employer or a client. Such cardholders are not consumers in accordance with the CPA and therefore cannot benefit from the present litigation;
110. Insofar as the Court is to analyze the recourse under the CPA, the class must be limited to those persons that can be qualified as consumers under the CPA, and who have assumed the payment of the credit granted;
111. Also, as some cardholders expressly requested the increase of credit limit, the Court will need to hear evidence showing that a cardholder is in fact a member of the group authorized;
112. Furthermore, for the Court to be in a position to conclude that BMO's alleged fault caused damage to any of the members of the group, the Court would have to individually review the level of indebtedness of each member of the group in order to determine if same could be considered excessive, and in the affirmative, determine if this excessive indebtedness is the result of BMO's increase of the credit limit of that member of the group;
113. Moreover, the recourse of many members of the group is prescribed, namely, all those who had entered into their Cardholder Agreement with BMO more than three years prior to the institution of the present class action, namely prior to January 9, 2001, which includes the Designated member Grimard;
114. In view of all of the above, the Court will not be in a position to determine with sufficient precision any amount which may be owed to class members, rendering collective recovery impossible in the present file;
115. The present Plea is well-founded in fact and in law;

WHEREFORE MAY IT PLEASE THE COURT:

DISMISS the Particularized Motion to Institute Proceedings of Petitioner and of the Designated member Carolyne Grimard against Defendant Bank of Montreal;

THE WHOLE with costs including those related to experts.

Montreal, February 15, 2010


BORDEN LADNER GERVAIS LLP
Attorneys for Defendant
Bank of Montreal