

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No. 500-06-000372-066

"Class Action"
SUPERIOR COURT

OPTION CONSOMMATEURS

Petitioner

and
SERGE LAMOUREUX
and
VIVIAN MALLAY
and
WENDY LEE SIMPSON
and
MICHEL MÉTHOT
and
YVON DESROSIERS
and
BENOÎT NADEAU
and
MICHELLE GRIFFITH
and
JUSTIN CHAUVETTE
and
MARYLOU CORRIVEAU
and
JEAN AUDET

Designated Members

vs.
BANK OF MONTREAL
and
ROYAL BANK OF CANADA
and
NATIONAL BANK OF CANADA
and
CANADIAN IMPERIAL BANK OF

COMMERCE
and
CITIBANK OF CANADA
and
MBNA CANADA BANK
and
AMEX BANK OF CANADA
and
THE BANK OF NOVA SCOTIA
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 BENOIT NADEAU'S PARTICULARIZED MOTION TO INSTITUTE PROCEEDINGS (THE "PARTICULARIZED MOTION"), DEFENDANT BANK OF MONTREAL ("BMO") STATES AS FOLLOWS:

1. It admits paragraphs 1 and 2 of the Particularized Motion and otherwise refers to the group description as authorized by Justice Gascon in his judgment of October 25, 2007 ("Authorization Judgment");
2. It ignores paragraph 3 of the Particularized Motion;
3. It admits paragraphs 4 and 5 of the Particularized Motion with respect to Designated member Benoit Nadeau and ignores the remainder of same with respect to the other designated members or of the other Defendants;
4. It ignores paragraph 6 of the Particularized Motion but admits that the Designated member Benoit Nadeau is the holder of a credit card issued by BMO;
5. It ignores paragraphs 6.1, 6.2, 6.3, 6.4 and 6.5 of the Particularized Motion;

6. It ignores paragraph 7 of the Particularized Motion but admits that the Designated member Benoît Nadeau received statements of account and/or communications from BMO, as more fully detailed hereinafter;
7. It ignores paragraphs 7.1, 7.2, 7.2.1, 7.2.2, 7.3, 7.4, 7.5, 7.6, 7.6.1, 7.7, 7.8, 7.9, 7.10, 7.10.1, 7.11 and 7.12 of the Particularized Motion;
8. With respect to paragraph 7.13 of the Particularized Motion, BMO admits that Designated member Benoît Nadeau is the holder of a credit card issued by BMO;
9. With respect to paragraph 7.14 of the Particularized Motion, BMO refers to Exhibit P-8 and denies anything not in conformity therewith, adding that Designated member Benoît Nadeau did make a purchase which surpassed his credit limit and which was not refused by BMO, on or about February 4, 2006, as appears from the copy of the statement of account filed as exhibit P-8,
10. BMO further adds that this was not the first time that Designated member Nadeau made purchases that were over his credit limit and that were accepted by BMO;
11. With respect to paragraph 7.15 of the Particularized Motion, BMO admits that a fee of \$20.00 was charged to Designated member Benoît Nadeau when he exceeded his credit limit, as appears from the copy of the statement of account filed as exhibit P-8;
12. With respect to paragraph 7.15.1 of the Particularized Motion, BMO refers to exhibit P-17 and denies anything not in conformity therewith;
13. BMO ignores paragraphs 7.16, 7.17, 7.18, 7.19, 7.20, 7.21, 7.22, 7.23, 7.23, 7.24, 7.25, 7.25.1, 7.26, 7.27, 7.27.1, 7.28, 7.28.1, 7.29, 7.30, and 7.30.1 of the Particularized Motion;
14. BMO ignores paragraph 8 of the Particularized Motion;
15. BMO denies paragraphs 9, 10, 11 and 12 of the Particularized Motion;
16. BMO denies paragraphs 13, 13.1, 14 and 15 of the Particularized Motion;
17. With respect to paragraph 16 of the Particularized Motion, BMO refers to the Authorization Judgment and denies anything not in conformity therewith;
18. BMO denies paragraph 17 of the Particularized Motion;

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

I. SUMMARY OF THE ARGUMENTS

19. The impugned provisions of the CPA and of the Regulation respecting its application ("CPA Regulation") are constitutionally inapplicable to BMO;
20. Over limit fees have always been properly disclosed by BMO;
21. Designated member Benoît Nadeau is estopped from making any claim with respect to over limit fees;
22. Designated member Nadeau has renounced his right to make any claim with respect to over limit fees;
23. Even if the CPA finds application herein, and even if over limit fees were not charged in conformity with the CPA, both of which are denied, no damages were suffered as a result of how over limit fees were and are calculated;
24. There is no legal and factual foundation herein for punitive damages;
25. The claim of any cardholder who has entered into a MasterCard agreement with BMO prior to December 7, 2003 is prescribed;
26. Collective recovery cannot be ordered as it must be determined if the cardholder is a consumer under the CPA and if he/she has in fact assumed the payment of the over limit fee;

II. THE PARTIES

A) Defendant BMO

27. 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;
28. 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 Benoît Nadeau

29. The Designated member Benoît Nadeau has been a BMO MasterCard cardholder since June 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 following Defendants, that is (...) Bank of Montréal, (...) for a use other than for the operation of a business and who have been

imposed, since January 12, 2001, fees which they have paid after having exceeded their credit limit."

III. THE FACTS

A) General facts

MasterCard system

30. 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");
31. Credit card issuers began to offer the MasterCard credit card in Canada in 1973;
32. 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;
33. Defendant BMO has been a member of MasterCard since 1973;
34. Defendant BMO entered into a contract with MCI and 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;
35. Accordingly, Defendant BMO is an "Issuer" of MasterCard credit cards;

B) Contracts extending variable credit with clients of BMO

36. 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;
37. 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**;
38. 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;
39. All relevant versions of BMO Card Carriers since October 2001 are communicated, in the English and French versions (when available), in support of the present Plea as **Exhibit D-BMO-2 en liasse**;

40. 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**;
 41. An example of a BMO Cardholder Manual are communicated, in the English and French version, in support of the present Plea as **Exhibit D-BMO-4 en liasse**;
 42. 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;
 43. 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;
 44. In addition, BMO periodically mails a then current version of the Cardholder Agreement to all existing BMO MasterCard cardholders;
 45. 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, 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 an English and French version, in support of the present Plea as **Exhibit D-BMO-5 en liasse**;
 46. 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 the fees that will be debited if the cardholder makes purchases over his/her credit limit;
- C) **Over limit transaction is an additional benefit provided to a BMO MasterCard cardholder**
47. Using a BMO MasterCard provides significant advantages to cardholders;
 48. Amongst them, BMO may, in certain circumstances allow its cardholders to exceed their credit limit in order to allow them to complete purchase transactions that they are in the process of carrying out;
 49. In addition to allowing the transaction to take place, this service also avoids any embarrassment of having the transaction denied;
- D) **Designated member Benoît Nadeau's factual situation**
50. In June 2001, Designated member Benoît Nadeau applied for a BMO MasterCard credit card (account number 5191 2300 5935 7096), as more fully

appears from a copy of his original BMO MasterCard application dated June 2001, communicated in support of the present Plea as **Exhibit D-BMO-6**;

51. In addition, in July 2001, Designated member Benoît Nadeau also applied, jointly with his mother, for another BMO MasterCard credit card (account number 5191 2300 5968 3509), as more fully appears from a copy of Designated member Benoît Nadeau's original BMO MasterCard Application dated June 2001, communicated in support of the present Plea as **Exhibit D-BMO-7**;
52. As is more fully detailed hereinafter, the BMO MasterCard Cardholder Agreement and other accompanying contractual documentation, and in particular the Card Carrier, clearly disclose the over limit fees throughout the class period;
53. However, during the Designated member Benoît Nadeau's examinations on January 27, 2009 and August 27, 2009, he admitted that he does not remember having read anything specific with respect to fees being charged if and when he carries out transactions that go over his credit limit, as more fully appears from a copy of Mr. Nadeau's examinations dated January 27 and August 27, 2009, communicated in support of the present Plea as **Exhibits D-BMO-8 and D-BMO-9** respectively (see in particular Exhibit D-BMO-8, pages 25-26);
54. According to paragraphs 7.14, 7.15 and 7.16 of the Particularized Motion dated July 28, 2008, the Designated member Benoît Nadeau, after having made a purchase over his credit limit, was charged, in February 2006, an over limit fee of \$20.00, which he paid without protest;
55. During the Designated member Benoît Nadeau's examination on January 27, 2009, he admitted that even though he did not remember the exact date when he first realized that there was a fee debited for having made purchases over his credit limit, he became aware that such fees existed before February 2006 (see Exhibit D-BMO-8, pages 32-33);
56. Moreover, during his examination held on January 27, 2009, the Designated member Benoît Nadeau admitted having made purchases over his credit limit with his BMO MasterCard, as well as on the one he co-owns with his mother, Murielle Nadeau, while knowing of the existence of over limit fees (see Exhibit D-BMO-8, pages 42-43);
57. 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 ;
58. During his examination, Mr. Nadeau confirmed that he reviewed his statements of accounts, the purchases made, the amounts, the amount of interest charged, the amount of the payment required, etc.; (see D-BMO-8, pages 22)

59. Yet, not only did Mr. Nadeau knowingly pay the over limit fees debited from his accounts, he also admitted during his examination that at no time prior to the institution of the present Motion, did he ever dispute, contest or object to BMO about these fees; (see D-BMO-8, page 42)
60. In fact, according to Mr. Nadeau's statements of accounts, communicated in support of the present Plea as **Exhibit D-BMO-10 en liasse**, he made purchases over his credit limit 16 times with his BMO MasterCards, and for all of them an amount was debited on either of the accounts he used as an over limit fee;
61. Moreover, out of the 16 times that the Designated member Benoît Nadeau made purchases over his credit limit between July 2001 and May 2008, two were completed after the service and filing of the Motion for Authorization to Institute a Class Action into the present Court Record, at a time when the Designated member Benoît Nadeau is deemed to have been fully cognizant of the over limit fees charged which forms the basis of his cause of action in the present instance;
62. Thus, from the evidence, it is clear that the existence and knowledge of the over limit fees had no impact on Mr. Nadeau's decision to continue to make purchases over his credit limit with his BMO MasterCards;
63. In fact, during the continuation of Mr. Nadeau's examination, held on August 27, 2009, he further mentioned that having the flexibility to make purchases over his credit limit was useful in cases of necessity and that he would continue to use this possibility despite the fact that an over limit fee would be debited from his accounts, as more fully appears from a copy of Mr. Nadeau's examination dated August 27, 2009, already communicated in support of the present Plea as Exhibit D-BMO-9; (see pages 9-10);

IV. MR. NADEAU AND THE GROUP MEMBERS' ABSENCE OF A RIGHT OF ACTION

A) The Constitutional issues

64. Petitioner and the Designated member Benoît Nadeau claim, *inter alia*, that Defendant BMO has charged a fee for purchases made over the credit limit using the BMO credit card, which fee is charged in breach of the provisions of the CPA and of the CPA Regulation;
65. For the reasons set out in the next paragraphs, the impugned provisions of the CPA invoked by Petitioner and Designated member Nadeau, do not govern variable credit offered by BMO to its cardholders;
66. BMO respects the federal requirements relating to credit cards including, *inter alia*, the imposition, calculation and disclosure of credit charges and fees which are defined in the *Bank Act* and its regulations;

67. 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*, sections 66, 67, 68, 69, 70, 71, 72, 91 et 92 of the CPA, and sections 55 and following of the CPA Regulation (the "impugned provisions of the CPA"):
- a) are constitutionally inapplicable to the Defendant BMO as a federally chartered bank pursuant to the doctrine of inter-jurisdictional immunity because they impair a vital, essential, and integral part of "banking" which are the exclusive legislative jurisdiction of the Parliament of Canada (sections 91(14) and 91(15) *Constitution Act, 1867*); or
 - b) in the alternative, are 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

68. Subsection 91(15) of the *Constitution Act, 1867* gives Parliament legislative power over "banking, incorporation of banks and the issue of paper money";
69. 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;
70. 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");
71. 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;
72. BMO submits that the impugned sections of the CPA, to the extent that they purport 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*);
73. The impugned provisions of the CPA would impair bank activities from both regulatory and operational standpoints in that:

- a) their application would subject banks to the provincial regulatory regime established by the CPA;
- b) their 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;

74. These provisions are therefore inapplicable to the banks under the constitutional doctrine of inter-jurisdictional immunity;

b) The Doctrine of Federal Paramountcy

75. BMO submits that the provisions of the CPA under consideration are constitutionally inoperable as regards the banks to the extent of the operational conflict with the Bank Act and its regulations, and their application to banks would frustrate Parliament's purpose with respect to the *Bank Act* and its regulations;

76. 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;

77. The impugned provisions of the CPA, to the extent that they purport to apply to credit card agreements concluded by federally chartered banks, regulate the same banker-client relationships as regulated by the *Bank Act* and the *Cost of Borrowing (Banks) Regulations*;

78. There is thus an operational conflict between the impugned provisions 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;

79. 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) Estoppel

80. Furthermore, BMO submits that the Designated member Benoît Nadeau cannot validly obtain for himself and for the members of the group, the reimbursement of the over limit fees for the following reasons;

81. As appears from the variable credit contract for the use of a BMO MasterCard and the monthly statements of account, not only were over limit fees properly disclosed but BMO's clients consented to fees being debited if they made purchases over their credit limit;

82. 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, 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 amounts debited on the account are considered accepted by the cardholder;

83. As previously mentioned, the Designated member Nadeau has never raised any objection to BMO with respect to over limit fees;
84. By not objecting to the fees debited, Designated member Nadeau, 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;
85. In addition, by paying the balance of their accounts, BMO's clients agreed that the over limit fees appearing on the statements of account disclosed were proper and accurate;

C) Renunciation

86. Having been fully informed of the fees debited for having made purchases over the credit limit as described above, many BMO MasterCard cardholders, including the Designated member Benoît Nadeau, still made and make the decision to use their cards for purchases that they knew would be over their credit limit;
87. Specific evidence of the latter can be found in the conduct of the Designated member Benoît Nadeau who admitted, during the examination before plea more fully detailed above, that he kept using his BMO MasterCard for purchases made over his credit limit after having allegedly learned of the over limit fees debited by BMO for same;
88. It also bears repeating that out of the 16 times that Designated member Benoît Nadeau made purchases over his credit limit between July 2001 and May 2008, two were completed after the service and filing of the Motion for Authorization to Institute a Class Action into the present Court Record, at a time when the Designated member Benoît Nadeau is deemed to have been fully cognizant of the over limit fees charged which form the basis of his cause of action in the present instance;
89. By paying the balance of their statements of account, in full knowledge of the existence of the over limit fees, the Designated member Benoît Nadeau, and the members of the group that he has been authorized to represent, have in effect renounced their right now asserted in their Particularized Motion;

D) Absence of damages

90. The mere fact that an over limit fee was debited from Designated member Nadeau's account does not constitute a prejudice *per se*, and Petitioner and the Designated member Nadeau do not allege evidence with respect to any prejudice suffered by Designated member Nadeau or by the members of the group;

91. The fact of the matter is that the Designated member Benoît Nadeau, and the members of the group, knowingly paid for a service that was rendered at a price they were aware of and consented to;
92. In fact, from the evidence, it is clear that the existence of the fee debited from the Designated member Nadeau's account at the time of an over limit transaction and the knowledge of the existence of this fee did not cause Mr. Nadeau any prejudice, as he made the decision to continue to carry out over limit transactions with his MasterCard card;
93. 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 Nadeau's claims under the CPA should be dismissed;
94. And, in the event that this Court were to conclude that BMO committed a fault and that the Designated member Nadeau or any other member of the group have sustained a damage, both of which are vigorously denied, no causality has been established between any alleged fault and any alleged damage supposedly sustained by the Designated member Nadeau and other members of the group;

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

95. Petitioner and the Designated member Nadeau's CPA claims on behalf of all the members of the group seek the reimbursement of the over limit fees and damages, which can only be based on section 271 CPA. ;
96. Sections 271 and 272 CPA are mutually exclusive;
97. As Petitioner and the Designated member Nadeau's action can only be based on section 271 CPA, they are not entitled to claim punitive damages under the CPA;
98. Subsidiarily, even if Petitioner and the Designated member Nadeau 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 Nadeau 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;

F) Limitation of the class, prescription and no collective recovery

99. Many cardholders who use BMO MasterCard credit cards for purchases 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 will not actually have ultimately paid any over limit fees which are at issue in this litigation;
100. Insofar as the Court is to analyze the recourse under the CPA, the class must be limited to those who can be qualified as consumers under the CPA, and who have assumed the payment of the over limit fee;
101. 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 December 6, 2003, which includes the Designated member Nadeau;
102. In view of all of the above, collective recovery is not possible in the present file;
103. 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 Benoît Nadeau against Defendant Bank of Montreal;

THE WHOLE with costs including those related to experts.

Montreal, February 15, 2010

Borden Ladner Gervais

BORDEN LADNER GERVAIS LLP
Attorneys for Defendant
Bank of Montreal