

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

NO: 500-06-001222-237

(Class Action)
SUPERIOR COURT

GILBERT [REDACTED]

Applicant

v.

B2B BANQUE, legal person having an elected domicile at 600-1360 René-Lévesque Boulevard West, City and District of Montreal, Province of Quebec, H3G 0E5

Defendant

**APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
(ARTICLES 571 AND FOLLOWING C.C.P.)**

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN
AND FOR THE DISTRICT OF MONTREAL, YOUR APPLICANT STATES:**

I. INTRODUCTION

1. The Applicant wishes to institute a class action on behalf of the following class, of which he is a member, namely:

All persons in Canada who have or had a B2B Bank investment loan and whose monthly payment was unilaterally increased by B2B Bank to more than the “monthly payment due” stipulated in the loan agreement;

or any other class to be determined by the Court.

(hereinafter referred to as the “**Class**”)

II. CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION (S. 575 C.C.P.):

A) THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:

2. The Applicant is a consumer and adherent within the meaning of the Civil Code

and the *Consumer Protection Act* (“CPA”) who signed a contract of adhesion with the Defendant B2B Banque (hereinafter “**B2B**”), a copy of which is communicated as **Exhibit P-1**;

3. B2B is registered as a chartered bank owned by the Laurentian Bank of Canada, as it appears from an extract of the enterprise’s information statement from the Quebec enterprise register for B2B communicated as **Exhibit P-2**;
4. B2B does business in Canada, including in the province of Quebec. Its activities are governed by the Civil Code and the CPA, among other legislation;
5. On November 28, 2016, the Applicant and B2B’s authorized representative signed the B2B application form and loan agreement (Exhibit P-1);
6. The purpose of this B2B agreement, and the reason why the Applicant entered into this loan agreement, is to apply for a loan that will be invested in what B2B describes as its “*highly-regarded Distribution Alliance Programs*” (i.e. one of the mutual fund companies such as Fidelity, for example), as it appears from extracts of B2B’s website¹ communicated *en liasse* as **Exhibit P-3**;
7. The Applicant applied for and received a \$200,000 loan from B2B to be invested in their Distribution Alliance Programs;
8. The program is designed for the Applicant to be able to use the \$200,000 loan issued by B2B for the purpose of investing it in a vehicle offered by one of the Distribution Alliance Programs approved by B2B (B2B selects the mutual fund companies they approve for this program, Exhibit P-3);
9. In December of 2016, B2B issued the Applicant’s loan of \$200,000;
10. On December 22, 2016, the \$200,000 loaned to the Applicant was invested in the Fidelity mutual fund (100% of these loaned funds were invested in Fund code: **FID 480**), in order to generate monthly distributions, as it appears from a copy of the Mutual Fund Trade Ticket communicated as **Exhibit P-4**;
11. Fund code FID 480 is T-class mutual fund and its purpose is to distribute capital to the investor (monthly) while keeping the profits in the investment. The annual distribution for this fund is generally 8% (based on the market value of the T-class funds in the client’s account in the fund as of December 31 of each year). The return of 8% could also vary as it depends on the market value of the fund itself;
12. On its website², Fidelity describes the benefits of the T-class mutual fund, including that “*Investors can receive tax-efficient monthly cash flow without having to sell*

¹ <https://b2bbank.com/en/loans/distribution-alliance-programs>; <https://b2bbank.com/en/loans/distribution-alliance-mutual-fund-loans>

² <https://www.fidelity.ca/en/products/taxsmartsolutions/>

investments, meanwhile deferring capital gains”, as it appears from **Exhibit P-5**;

13. These monthly distributions can then be used by the clients to help pay the monthly loan payments stipulated in the contract (Exhibit P-1 at clause 1, on page 3 of 12), which was the case for the Applicant;
14. Clause 9 of the Applicant’s agreement provides the following clause that is in dispute (Exhibit P-1 at page 5-PDF):

9. Repayment options	
Upon advancement of the Loan proceeds, although the Loan is repayable on demand, I/we shall, in the manner set out herein, subject to any revised payment schedule and until such time as the Loan is repaid or a demand for repayment is made by the Bank, make monthly payments (the "Installments") of the lesser of (i) the monthly payment due, and (ii) any and all amounts outstanding pursuant to this Agreement (the "Indebtedness").	
The monthly payment due is:	
<input type="checkbox"/> Interest Only Payments	Note: The interest will accrue monthly on the Indebtedness. This interest payment is the amount as of the date of the Loan.
OR	
<input checked="" type="checkbox"/> Principal and Interest Payments	\$1,154.79
Each Installment shall be due on the 5 th day of each calendar month starting on 01/05/2017 (the monthly "Payment Date"). Each Installment shall be applied first against the monthly payment of interest due on the Loan as of that Payment Date (the "Interest Payment") and the balance, if any, shall be applied against the Principal (the "Principal Payment").	
If the Prime Rate increases after the date hereof and the amount of each installment to be paid hereunder is insufficient to satisfy the Interest Payment due as of such Payment Date, the amount of the shortfall shall be added to the outstanding Principal and such additional amounts shall bear interest at the Variable Interest Rate and shall form part of the Indebtedness.	
In the case of Principal and Interest Payment Loans: At this rate of payment, it is expected that the Indebtedness will be repaid in approximately _____ years in approximately equal monthly payments.	

15. This clause clearly stipulates that his “**monthly payment due**” is **\$1,154.79** and that his payment will always be “**the lesser**” of this amount and the Indebtedness;
16. The contract also stipulates that if the Prime Rate increases, the amount of the shortfall will be added to the outstanding balance;
17. The effect of the previous two paragraphs can only mean one thing: the Applicant’s “monthly payment due” will always remain \$1,154.79 and that if the prime rate increases, the excess interest will be added to the balance of his loan, meaning that the **term** of the loan will increase, but not the monthly payments;
18. In the Applicant’s case, he borrowed \$200,000, which he then immediately invested in one of the B2B approved mutual funds. Ideally, the distribution amount was supposed to cover his monthly payments of \$1,154.79 and his investment would essentially be paying itself. For example, \$200,000 x 8% annually = \$1,333.33 monthly distributions. This amount could vary year to year;
19. The perk of B2B’s *Distribution Alliance Programs* is that the Applicant and Class members have the opportunity to pay back the loan using the monthly distributions, and not out of pocket. That said, the Applicant was aware that should the distributions decrease, he would still be responsible for the shortfall up to the agreed upon “monthly payment” of \$1,154.79 – and not more;
20. In short, the agreement with B2B was interesting for the Applicant because the monthly payments were never supposed to change (i.e. always remain at \$1,154.79), only the term of the loan could increase;

21. From the time his loan was issued by the B2B in December of 2016, up until November 2022, everything went smoothly and according to the plan as described above;
22. However, in November 2022, B2B unilaterally increased his monthly payments from \$1,154.79 to **\$1,427.37**. B2B further unilaterally increased his monthly payments again in January 2023 to **\$1,528.59**, the whole as appears from the letter sent by B2B dated September 29, 2022 and the B2B “*Investment Loan Statement*” dated January 1, 2023, communicated *en liasse* as **Exhibit P-6**;
23. The Applicant never accepted that his “monthly payment due” would increase and his contract clearly states that it cannot increase (Exhibit P-1, clause 9);
24. Upon learning of the first payment increase, the Applicant immediately contacted his mutual fund sales representative to contest the increase. His representative reported this contestation to B2B and shortly thereafter informed the Applicant that B2B took the position that it can unilaterally increase the monthly payments despite the wording of clause 9 of the agreement, which the Applicant contests;
25. Since November 2022, the Applicant has therefore had no choice but to pay **\$1,292.76** more than the amount provided for in clause 9 of his B2B contract, as it appears from the table below (data taken from Exhibit P-6). This increase is significant and taking a toll on his ability to maintain the payments on his loan and, consequently, maintain his investment:

Date	Amount Withdrawn	Difference between Amount Withdrawn and \$1,154.79 pursuant to clause 9
November 5, 2022	\$1,427.37	\$272.58
December 5, 2022	\$1,427.37	\$272.58
January 5, 2023	\$1,528.59	\$373.80
February 5, 2023	\$1,528.59	\$373.80
	Total Difference:	\$1,292.76

26. If the Applicant stops making the higher payments, the consequence is that the Applicant will have to terminate his loan and sustain significant losses. He will also have to pay the difference between the investment balance and the loan balance. In the Applicant’s case this loss would be approximately \$15,000 as of this date;
27. The Applicant brings this action against B2B, on his behalf and on behalf of all Class members, in order to:
 - a) Obtain a Court order prohibiting B2B from continuing to demand monthly payments greater than the amount provided for at clause 9 of the contract;
 - b) Obtain a reimbursement of the amounts collectively overpaid by him (\$1,292.76 to date) and the other Class members (conservatively estimated at \$5 million to date) since the changes were implemented by B2B (the

change was implemented systemically towards all Class members around the same time in November 2022); and

- c) Obtain compensatory and punitive damages as a result of B2B's bad faith, breach of contract and breach of section 16 CPA.
28. The punitive damages claimed pursuant to section 272 CPA is in the aggregate amount \$250.00 per month per Class member, which the Applicant is prepared to waive if B2B immediately reverts to collecting the monthly payment due as provided in clause 9 of the contract;
 29. If it does not, B2B's conduct warrants such a condemnation because it intentionally refuses to honour its own contract and obligations to act in good faith in the performance of its contract;
 30. The Applicant's damages are a direct and proximate result of B2B's misconduct and bad faith and, in these circumstances, the Applicant's claims for an injunction, as well as both compensatory and punitive damages are justified;

B) THE CLAIMS OF THE MEMBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:

31. The questions of fact and law raised and the recourses sought by this Application are identical with respect to each member of the Class, namely:
 - a) Does clause 9 of the agreement prohibit BNB from increasing the amount of the monthly payment due by Class members indicated in that clause?
 - b) Did B2B violate section 16 CPA?
 - c) If either of these questions are answered in the affirmative, are Class members entitled to compensatory or punitive damages and in what amounts?
 - d) Should an injunctive remedy be ordered to prohibit B2B from increasing the monthly payment due and to only collect the amount provided for in clause 9 of the B2B agreement?

C) THE COMPOSITION OF THE CLASS

32. The composition of the Class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
33. The Applicant presumes that B2B has a very important number of customers across Quebec and Canada. While he is unaware of the total number of people who are included in the Class, he already knows of several of them (including of one who sent a formal demand to B2B and who received a response from B2B refusing to revert back to the "monthly payment due" amount stipulated at clause 9 and

stating that they would continue charging the increased amounts). He estimates that the total class size is likely 5000 people in the province of Quebec alone;

34. The names and addresses of all the other consumers included in the Class are not known to the Applicant, however, are all in the possession of B2B;
35. Class members are numerous and are dispersed across the province and country;
36. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Class member to obtain mandates and to join them in one action;
37. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

D) THE CLASS MEMBER REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFF IS IN A POSITION TO PROPERLY REPRESENT THE CLASS

38. The Applicant requests that he be appointed the status of representative plaintiff for the following main reasons:
 - a) He is a member of the Class and has a personal interest in seeking the conclusions that he proposes herein;
 - b) He is competent, in that he has the potential to be the mandatary of the action if it had proceeded under article 91 of the *Code of Civil Procedure*;
 - c) His interests are not antagonistic to those of other Class members;
39. The Applicant participated in the drafting of the present application and has reviewed the exhibits;
40. He is taking this action so that he and all Class members have their monthly payments reinstated to the amount agreed upon in clause 9 of the agreement and so that they can be compensated for the difference of the amounts paid in excess, as well as to hold B2B accountable for breaching the agreement;

III. DAMAGES

41. B2B has breached its own agreement, as well as several obligations imposed on it by legislation in Quebec, notably:
 - a) Section 16 CPA, thereby rendering section 272 applicable;
 - b) Articles 6, 7 and 1375 CCQ.
42. In light of the foregoing, the following damages may be claimed against B2B, subject to adjustments:

- a) compensatory damages in the aggregate of the overcharges (= [amount charged – amount provided for in clause 9] x # of months x # of Class members); and
- b) punitive damages of \$250 per month per Class member for the breach of obligations imposed on B2B pursuant to s. 272 C.P.A.

43. The Applicant estimates that there are roughly 5000 Class members impacted by B2B's unilateral increase in violation of clause 9 of the agreement. Assuming that the average increase is \$250/month per Class member (so \$1000 to date), then the aggregate amount claimed is at approximately \$5 million. This amount increases with every passing month that B2B does not remedy its breach;

IV. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

- 44. The action that the Applicant wishes to institute on behalf of the members of the Class is an action in damages and injunctive relief;
- 45. The conclusions that the Applicant wishes to introduce by way of an originating application are:
 - 1. **GRANT** the Plaintiff's action against B2B Bank;
 - 2. **ORDER** B2B to comply with clause 9 of its agreement with Class members and collect no more than the amount stipulated as "monthly payment due" in that section;
 - 3. **CONDEMN** B2B Bank to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;
 - 4. **CONDEMN** B2B Bank to pay to the members of the Class an amount to be determined in punitive damages, and **ORDER** collective recovery of these sums;
 - 5. **CONDEMN** B2B Bank to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
 - 6. **ORDER** B2B Bank to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;
 - 7. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;
 - 8. **CONDEMN** B2B Bank to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any,

including the costs of experts required to establish the amount of the collective recovery orders;

V. JURISDICTION

46. The Applicant requests that this class action be exercised before the Superior Court in the district of Montreal, notably because he is a consumer and resides in this district.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

1. **GRANT** the present Application;
2. **AUTHORIZE** the bringing of a class action in the form of an originating application in damages and injunctive relief;
3. **APPOINT** the Applicant the status of representative plaintiff of the persons included in the Class herein described as:

All persons in Canada who have or had a B2B Bank investment loan and whose monthly payment was unilaterally increased by B2B Bank to more than the “monthly payment due” stipulated in the loan agreement;

or any other class to be determined by the Court.

4. **IDENTIFY** the principle questions of fact and law to be treated collectively as the following:
 - a) Does clause 9 of the agreement prohibit BNB from increasing the amount of the monthly payment due by Class members indicated in that section?
 - b) Did B2B violate section 16 CPA?
 - c) If either of these questions are answered in the affirmative, are Class members entitled to compensatory or punitive damages and in what amounts?
 - d) Should an injunctive remedy be ordered to prohibit B2B from increasing the monthly payment due and to only collect the amount provided for in clause 9 of the B2B agreement?
5. **IDENTIFY** the conclusions sought by the class action to be instituted as being the following:
 1. **GRANT** the Plaintiff’s action against B2B Bank;

2. **ORDER** B2B to comply with clause 9 of its agreement with Class members and collect no more than the amount stipulated as “monthly payment due” in that section;
 3. **CONDEMN** B2B Bank to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;
 4. **CONDEMN** B2B Bank to pay to the members of the Class an amount to be determined in punitive damages, and **ORDER** collective recovery of these sums;
 5. **CONDEMN** B2B Bank to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
 6. **ORDER** B2B Bank to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;
 7. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;
 8. **CONDEMN** B2B Bank to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;
6. **DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;
 7. **FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notices to Class members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;
 8. **ORDER** the publication of a notice to the members of the Class in accordance with article 579 C.C.P. within sixty (60) days from the judgement to be rendered herein by e-mail to each Class member, to their last known e-mail address and mailing addressing, with the subject line “Notice of a Class Action”;
 9. **THE WHOLE** with costs including publication fees.

Montreal, February 17, 2023

(s) LPC Avocat Inc.

LPC AVOCAT INC.

Me Joey Zukran

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SUMMONS
(ARTICLES 145 AND FOLLOWING C.C.P)

Filing of a judicial application

Take notice that the Applicant has filed this *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* in the office of the Superior Court in the judicial district of **Montreal**.

Defendant's answer

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at 1 Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6, within 15 days of service of the Application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Applicant's lawyer or, if the Applicant is not represented, to the Applicant.

Failure to answer

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

Content of answer

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the Applicant in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

Change of judicial district

You may ask the court to refer the originating Application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the applicant.

If the application pertains to an employment contract, consumer contract or insurance

contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

Transfer of application to Small Claims Division

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Calling to a case management conference

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

Exhibits supporting the application

In support of the Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff, the Applicant intends to use the following exhibits:

- Exhibit P-1:** Copy of the Applicant's contract and application with B2B dated November 28, 2016;
- Exhibit P-2:** Copy of the enterprise's information statement from the Quebec enterprise register for B2B Banque;
- Exhibit P-3:** *En liasse*, extracts of the B2B website;
- Exhibit P-4:** Copy of the Mutual Fund Trade Ticket dated December 22, 2016;
- Exhibit P-5:** Extract of Fidelity's website concerning its "Fidelity Tax-Smart CashFlow" option;
- Exhibit P-6:** *En liasse*, copies of the B2B letter dated September 29, 2022 and of the "Investment Loan Statement" dated January 1, 2023.

These exhibits are available on request.

Notice of presentation of an application

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, February 17, 2023

(s) LPC Avocat Inc.

LPC AVOCAT INC.

Mtre Joey Zukran

Attorney for the Applicant

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NOTICE OF PRESENTATION
(articles 146 and 574 al. 2 C.C.P.)

TO: B2B BANQUE
600-1360 René-Lévesque Boulevard West
Montreal, Quebec, H3G 0E5

Defendant

TAKE NOTICE that Applicant's *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* will be presented before the Superior Court at **1 Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6**, on the date set by the coordinator of the Class Action chamber.

GOVERN YOURSELVES ACCORDINGLY.

Montreal, February 17, 2023

(s) LPC Avocat Inc.

LPC AVOCAT INC.

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