

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Action)

No. : 500-06-000808-168

LOU VAILLANCOURT-THIVIERGE

Plaintiff

v.

BANQUE DE MONTRÉAL et al.

Defendants

DEFENCE OF MANULIFE BANK OF CANADA
(Art. 170 C.C.P.)

IN DEFENCE TO THE AMENDED ORIGINATING APPLICATION, MANULIFE BANK OF CANADA RESPECTFULLY SUBMITS THE FOLLOWING:

1. With respect to the facts alleged in paragraphs 1 to 5 of the *Demande introductive d'instance modifiée* (the "**Originating Application**"), the Defendant Manulife Bank of Canada ("**Manulife**" or the "**Bank**") refers to the judgment of the Honourable Justice Michel Yergeau rendered on January 21, 2019, authorizing the present class action (the "**Authorization Judgment**"), which speaks for itself.
2. Manulife denies the facts alleged in paragraph 6 of the Originating Application. Manulife is a direct bank and does not operate a branch network in Quebec, or in any other province.
3. With respect to the facts alleged in paragraph 7 of the Originating Application, Manulife admits only that it is a Schedule I Bank incorporated under the *Bank Act*, S.C. 1991, c. 46 and that it does business in Canada, including in Quebec.
4. Manulife has no knowledge of the facts alleged in paragraph 8 of the Originating Application.
5. Manulife denies the facts alleged in paragraphs 9 and 10 of the Originating Application, adding further that these paragraphs deal with issues of law that Manulife does not have to answer at this stage.
6. With respect to the facts alleged in paragraph 11 of the Originating Application, Manulife refers to Exhibits P-7 and P-18D and denies all that is not in conformity therewith, adding that the Manulife One product referred to in part of Exhibit P-7 is not a deposit account.

7. Manulife admits the facts alleged in paragraphs 12 to 15 of the Originating Application, adding further that the only payment instruments subject to this class action are cheques and pre-authorized debits/payments (“PADs”), as appears from the Authorization Judgment.
8. Manulife admits the facts alleged in paragraphs 16 and 17 of the Originating Application, adding further that Manulife does not have the discretion to honour or dishonour payment items in each case but may do so if, for example, the account upon which it is drawn does not contain sufficient funds.
9. Manulife denies the facts alleged in paragraphs 18 to 21 of the Originating Application.
10. Manulife has no knowledge of the facts alleged in paragraphs 22 to 29 and paragraphs 32 to 49 of the Originating Application.
11. Manulife denies the facts alleged in paragraphs 30 and 31 of the Originating Application, adding that accountholders are permitted to put their accounts into overdraft in the absence of any overdraft limits fixed in a client’s account application or in a written notice to the client provided by Manulife.
12. Manulife denies the facts alleged in paragraphs 49A to 81 of the Originating Application, adding that the various fees agreed between Manulife and its deposit accountholders are fair and reasonable in light of the entire range of services provided.
13. Manulife has no knowledge of the facts alleged in paragraphs 82 to 89 of the Originating Application.
14. With respect to the facts alleged in paragraph 90 of the Originating Application, Manulife refers to the Common Issues as defined in the Authorization Judgment, which speaks for itself.

AND FOR FURTHER PLEA TO PLAINTIFF’S ACTION, MANULIFE SUBMITS THE FOLLOWING:

15. Manulife was incorporated in 1993 under Schedule I of the *Bank Act*, S.C. 1991, c. 46. Its headquarters are in Waterloo, Ontario. Since well before the beginning of the Class Period, Manulife has had no branches in the Province of Quebec.
16. Manulife delivers high-quality banking services to its clients, including in the Province of Quebec, through a mobile banking app, online banking, and Interactive Voice Response telephone banking. It also offers a customer support centre, open 365 days a year. Clients of Manulife can also access banking services through Manulife’s network of ATMs across the country.

17. Manulife operates in a highly competitive environment comprised of banks and financial institutions offering similar services to residents of Quebec. With respect to retail banking services, it competes with the defendants named in this case, among others.

I. THE CANADIAN CLEARING SYSTEM

18. Manulife is a member of Payments Canada, which owns and operates Canada's payments clearing and settlement infrastructure.
19. This infrastructure includes the Automated Clearing Settlement System ("**ACSS**"), which is the system through which most payment items are cleared between financial institutions in Canada.
20. The ACSS clears both paper-based and electronic payments, including cheques and PADs.
21. Manulife is an indirect clearer and therefore does not maintain its own settlement account or loan facility at the Bank of Canada. The Royal Bank of Canada acts as Manulife's direct clearing agent in the ACSS clearing and settlement process.

II. MANULIFE'S DEPOSIT ACCOUNTS

22. Manulife is a deposit-taking institution offering its customers the opportunity to open deposit accounts for the deposit of money, which accounts also provide access to many other banking services. Deposits of money are insured by the Canada Deposit Insurance Corporation (CDIC), of which Manulife is a member.
23. Any person wishing to hold a deposit account with Manulife must submit an application. A recent example of an account application form for a Manulife Personal Deposit Account (the Advantage Account) is disclosed as **Exhibit DMB-1**.
24. The person completing the account application (DMB-1) acknowledges having received an Account Operating Agreement and the Manulife Bank Services and Fees Guide for Personal Accounts, which set out the charges applicable to the deposit account in exchange for all of the banking services offered with the account. The prospective accountholder agrees to be bound by the terms and conditions governing the services.
25. A recent example of the *Account Operating Agreement* is disclosed in English and French as **Exhibit DMB-2**.
26. Throughout the Class Period, accountholders have had access to the following services, among others:

- Deposits to Manulife Client Accounts:
 - Fund Transfers;
 - Direct Deposits;
 - Automated Banking Machine (ABM) Deposits;
 - Mail-in-Cheques;
 - Interac e-Transfers;
 - Mobile Deposits (since May 2018).
 - Withdrawals from Manulife Client Accounts:
 - Personal cheques;
 - PADs;
 - Official cheques, money orders and bank drafts;
 - Point-of-sale (POS), online and electronic data interchange (EDI) payments.
27. Accountholders may view their account balance and transaction history at any time through Manulife's secure online and mobile banking systems, at an ABM, or by telephone. Manulife also informs accountholders of their account balance and transaction history through bank statements, sent on a monthly, quarterly, or semi-annual basis, as the case may be.
28. Accountholders are therefore able to manage their finances at any time in a quick and convenient manner, with additional support available from Manulife's customer support centre.
29. Many of the above-mentioned services are available to Manulife accountholders without fees based upon usage. Accountholders who maintain a certain minimum balance in their accounts may also be exempt from monthly or other fees.
30. The fees and costs that accountholders agree to are set out in the Manulife Bank Services and Fees Guide which is provided to them at the time they open their account and whenever changes are made (and always available online for consultation). A recent example is disclosed in English and French as **Exhibit DMB-3**.

III. NSF CHEQUES AND PADs

31. Accountholders may conduct a number of transactions through their accounts, including issuing personal cheques and PADs. The *Account Operating Agreement*

(DMB-2) provides that Manulife is authorized to debit the account with every payment instrument of the accountholder that is presented for payment at Manulife, along with all charges and expenses in connection therewith. This includes overdraft and non-sufficient funds charges as set out in the applicable Services and Fees Guide (DMB-3).

32. Accountholders are not required to maintain a certain balance in their account, nor are they required to ensure that they have sufficient funds in their account to cover the cheques they have drawn or PADs they have authorized.
33. Accountholders may therefore issue a cheque or authorize a PAD when they do not have sufficient funds in their account to honour it. An overdraft may occur if sufficient funds are not in their account when the cheque or PAD is presented for payment to Manulife.
34. Manulife's clients draw cheques and authorize PADs from their accounts without first obtaining authorization from Manulife. In this regard, personal cheques and PADs are different than official cheques, POS, EDI and online payment items, money orders and bank drafts.
35. Clause 36 of the *Account Operating Agreement* (DMB-2), entitled "Authorized Overdraft" refers to circumstances in which a client may overdraw their deposit account and the charges related to doing so:

36. Authorized Overdraft

I may overdraw my Account up to the amount stipulated in my Application or the amount that Manulife Bank may stipulate by written notice to me from time to time ("Approved Amount"). **I may overdraw the Account by cheque or pre-authorized payment or in any other way Manulife Bank allows ("debit(s)").** A joint Account may be overdrawn by any person who has signed the Application as owner or co-owner. Manulife Bank reserves the right to overdraw or exceed my overdraft limit in order to process transactions initiated through my Account or to apply Service Charges on my Account. Should my Account become overdrawn, I agree to pay the overdraft interest at a rate set out in the Service Charge Bulletin or in accordance with this Overdraft Agreement whichever is applicable. I also agree to pay all Service Charges in connection with any overdraft in my Account as set out in the Service Charge Bulletin.

[Emphasis Added]

36. While this clause refers to an "Approved Amount" of overdraft stipulated in a client's account application or in a written notice to the client provided by Manulife, this feature (approved overdraft limits) was never implemented by Manulife, as appears from the application form (DMB-1) (which does not refer to overdraft limits).

37. In practice, Manulife often authorizes overdrafts (and did so throughout the Class Period) by honouring cheques or PADs drawn on an account that did not have sufficient funds to cover the payment. This is done as a matter of discretion by Manulife for the benefit of its clients.
38. A Manulife All-In Banking Package client may overdraw their deposit account (called the Everyday Banking Account), without being charged a fee, to an amount equivalent to 75% of the total balance of their High-Interest Savings Account (up to a limit of \$5000).
39. Accountholders can also avoid an overdraft by monitoring their account balance through one of the many account-monitoring options available to them, paying bills online, using debit cards or Interac fund transfers instead of cheques or PADs, or initiating a stop payment.
40. Where accountholders overdraw an account by issuing a cheque or PAD without maintaining sufficient funds in their accounts to pay it when presented, the regular process by which Manulife processes the cheque or PAD is interrupted as Manulife must consider whether to honour or dishonour the payment item.
41. Payment items drawn without sufficient funds create a significant disruption in Manulife's activities and require considerable resources to be properly administered. These resources include the time of Manulife employees, the services of the direct clearing agent, the use of software, and post-handling costs.
42. NSF transactions also pose significant risk to Manulife, which must respect the delays and procedures set out by Payments Canada to process NSF transactions lest it be liable to the collecting bank for the full amount of the NSF cheque or PAD.
43. As an indirect clearer, Manulife receives daily files from its direct clearing agent, representing clients' debits and credits cleared through its systems. It must investigate all 'rejected' entries, and entries that create an overdraft, which are either posted to the client's account or returned at the end of the day.
44. Every day, Manulife employees review these entries and ensure that any errors, explanations, stop payment orders or accounts since brought into good standing are cleared.
45. Where overdrafts remain unacceptable, Manulife reviews individual payment items to determine whether the transaction should be cleared or returned. The decision to return or honour payment items depends on various circumstances. Manulife reviews the reports generated through its system as well as clients' circumstances and account history.
46. Where a cheque or PAD is not honoured and is instead returned, the transaction is reversed and the account is credited back the amount of the cheque or PAD. An

NSF fee of \$45 is then charged to the client, as set out in the *Account Operating Agreement* (DMB-2) and the *Services and Fees Guide* (DMB-3).

47. Where a cheque or PAD causes an overdraft but is nevertheless honoured, an overdraft fee of \$5 is charged, plus interest on the amount that is in overdraft, as set out in the *Account Operating Agreement* (DMB-2) and the *Services and Fees Guide* (DMB-3).
48. Manulife offers banking packages that are priced according to a holistic assessment of costs to the Bank of the service offering associated with the deposit account. Individual fees, such as NSF charges, are evaluated as one part of the revenues in relation to the overall offering of services to the Bank's customers.
49. Pricing decisions in relation to each type of fee are made according to a number of factors, including the overall service offering to accountholders, the overall cost of that service offering, and market conditions.
50. Clients are kept informed of pricing changes by way of *Services and Fees Guides* (DMB-3) and other client communications, which are updated from time to time.
51. Manulife's clients are well equipped with a variety of banking services which allow them to know at all times their account balance and pending transactions.
52. NSF fees are fully disclosed to Manulife clients, who are bound by their respective *Account Agreements* and agree to pay relevant fees and charges.
53. These fees are not penalties and they are not abusive.
54. This defence is well founded in fact and law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

DISMISS the Plaintiff's Amended Originating Application;

THE WHOLE with costs, including expert fees.

MONTRÉAL, August 13, 2021

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