

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

SUPERIOR COURT  
(Class Action)

No: 500-06-001166-210

KATY HAROCH

and

CLAUDE VAILLANCOURT

Applicants

v.

THE TORONTO-DOMINION BANK ET AL.

Defendants

**AMENDED APPLICATION BY DEFENDANTS  
FOR LEAVE TO ADDUCE RELEVANT EVIDENCE  
(Article 574 CCP)**

**TO THE HONOURABLE JUSTICE CHRISTIAN IMMER OF THE QUEBEC SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, DEFENDANTS RESPECTFULLY SUBMIT THE FOLLOWING:**

**I. INTRODUCTION**

1. The Defendants seek leave to adduce relevant evidence in order to establish facts that are necessary to enable this Court to undertake an informed analysis, in light of the criteria set out in Article 575 of the *Code of Civil Procedure* (“**CCP**”), regarding the authorization to institute class action proceedings sought by the Applicants.
2. The Defendants jointly submit the present application for leave to adduce relevant evidence relating to publicly available information published by the Financial Consumer Agency of Canada (the “**FCAC**”).
3. The present application for leave to adduce evidence is filed in addition to and as a complement to the separate applications that each Defendant may file relating to, *inter alia*, evidence specifically relating to such Defendant.

## II. RELEVANT CONTEXT

4. On May 31, 2018, Applicant Katy Haroch filed, with Avraham Brook, an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs* against multiple defendants, including all of the Defendants to the present proceeding, before the Québec Superior Court bearing file No. 500-06-000930-186 (the “**First Application for Authorization**”).
5. On January 31, 2019, on March 25, 2019, and on April 23, 2019, Applicant Katy Haroch amended her First Application for Authorization.
6. On April 26, 2019, the Honourable Chantale Corriveau, J.S.C. granted in part the defendants’ applications for leave to adduce evidence and permitted the filing of numerous documents, including Exhibits R-1 to R-4 referenced herein.
7. Given the facts and issues in the present proceeding overlap the allegations in the First Application for Authorization, but for the issue of the “constant discount”, all of these documents are relevant to examining whether the Amended Application (defined below) meets the requirements of Article 575 CCP.
8. On July 19, 2019, the First Application for Authorization, as amended, was dismissed by the Honourable Chantale Corriveau, J.S.C. The Québec Court of Appeal dismissed the appeal on October 4, 2021.

## III. THE PROPOSED CLASS ACTION

9. In their Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs dated January 31, 2022 (the “**Amended Application**”), the Applicants seek the authorization to bring a class action against the Defendants on behalf of the following class:

All persons who, since May 31, 2015: (i) paid to any of the Defendants (or to any of their affiliates) a mortgage prepayment charge in an amount that exceeds three months of interest when either entirely or partially paying off a hypothecary loan or a collateral hypothec on a property located in the province of Quebec.

10. The Applicants are seeking the reimbursement, on behalf of the putative class members, of the allegedly illegal, excessive and arbitrary amounts charged to class members by the Defendants in credit agreements (the “**Credit Agreements**”) when making a mortgage prepayment (*paiement anticipé*) on a fixed rate closed mortgage for a property located in the province of Québec.
11. The Applicants allege that the Defendants calculate the prepayment fees by using an interest rate differential (“**IRD**”) formula to which they incorporate the concept of a “constant discount”, by applying the same discount to the posted comparator rate (at the time of prepayment) as to the posted rate (at the time of the loan).

12. The Applicants conclude that this practice enables the Defendants to charge disproportionate prepayment fees that allegedly do not comply with the calculations provided for in Federal Guideline CG-4.
13. The Applicants further allege that the provisions included in the Credit Agreements are incomprehensible and abusive.
14. The Applicants assert the following legal basis and provisions in support of their Application:
  - (i) Federal Guideline CG-4 (Information box examples for the Cost of Borrowing Regulations);
  - (ii) Articles 1436 (illegible and incomprehensible clauses) and 1437 (abusive clauses) of the Civil Code of Quebec (“**CCQ**”);
  - (iii) Sections 6(4) (clear and simple language) and 8(1) (obligation to provide a “disclosure statement”) of the *Cost of Borrowing (Banks) Regulations*, (SOR/2001-101).
15. The Defendants hereby request leave to adduce evidence at the authorization hearing in support of their submissions that the Amended Application fails to meet the threshold authorization conditions set forth at Article 575 CCP.

#### **IV. THE EVIDENCE IN RESPECT OF WHICH LEAVE IS SOUGHT**

16. The facts alleged in the Application and the exhibits submitted are incomplete and require clarification from the Defendants, which will assist the authorization judge in determining whether the criteria of Article 575 CCP are met.
17. Namely, the Applicants allege a breach of Guideline CG-4 but fail to provide up to date information regarding the regulatory framework around this Guideline and the publicly available guidance regarding mortgage prepayments.
18. In particular, the Applicants fail to provide the Court with updated versions of various guidelines issued by the FCAC, a federal agency with the mission to ensure federally regulated financial entities comply with consumer protection measures.
19. Moreover, the Applicants allege that the addition of the concept of a discount in the IRD calculation is somehow contrary to the FCAC Guidelines, but they fail to mention that both FCAC Guideline CG-9 “Mortgage prepayment penalty disclosure”, which completes Guideline CG-4, and the FCAC website itself explicitly mention discounts as being a component of the IRD calculation.

20. Therefore, the Defendants seek leave to adduce as evidence the following documents issued by the FCAC:
- (i) The *Code of Conduct for Federally Regulated Financial Institutions: Mortgage prepayment information* (“**Code of Conduct**”), in English and French versions, updated on June 11, 2019 and January 11, 2017, and a press release by the Department of Finance Canada titled “Harper Government Acts to Further Protect Consumers”, *en liasse*, attached hereto as Exhibit R-1. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-1.a, en liasse.**
  - (ii) The FCAC Guideline “CG-4 Information box examples for the Cost of Borrowing Regulations” updated on February 24, 2022, and the Information Box Example of a Credit Agreement, in English and French versions both updated on 24 February 2022, *en liasse*, attached hereto as Exhibit R-2. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-2.a, en liasse.**
  - (iii) The FCAC Guideline “CG-9 Mortgage prepayment penalty disclosure”, in English and French versions, updated on December 2, 2021 and October 2, 2018, *en liasse*, attached hereto as Exhibit R-3. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-3.a, en liasse.**
  - (iv) An extract of the FCAC website entitled “Prepayment penalties”, in English and French versions, both updated on June 28, 2021, *en liasse*, attached hereto as Exhibit R-4.a. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-4.c, en liasse.**
  - (v) An extract of the FCAC website entitled “Prepayment penalties”, in English and French versions, both updated on September 28, 2017, *en liasse*, attached hereto as Exhibit R-4.b;
  - (vi) An extract of the FCAC website entitled “Choosing a mortgage that is right for you”, in English and French versions, both updated on June 28, 2021, *en liasse*, attached hereto as Exhibit R-5. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-5.a, en liasse.**
  - (vii) An extract of the FCAC website entitled “Interest on mortgages”, in English and French versions, both updated on June 28, 2021, *en liasse*, attached hereto as Exhibit R-6. Most recent versions of these documents printed on November 23, 2022 are communicated as **Exhibit R-6.a, en liasse.**
21. As appears from the Code of Conduct, Exhibits R-1 and R-1.a, their purpose “is to ensure that federally regulated financial institutions provide enhanced information in respect of credit agreements secured by mortgages where a prepayment charge could apply to assist borrowers in making decisions about the prepayment of their mortgage”.

22. Regarding the *Cost of Borrowing Regulations*, the FCAC has issued guidelines to the banking industry setting out the information disclosure requirements as per the *Cost of Borrowing Regulations*, which include suggestions and examples of information boxes which can be included in Defendants' Credit Agreements, the disclosure of the prepayment charges as well as the calculation of the mortgage prepayment fees, as appears from the Guidelines, Exhibits R-2 (...) R-2.a, R-3 and R-3.a.
23. As appears from the extract of the FCAC website entitled "Prepayment penalties", exhibits R-4.a (...) R-4.b and R-4.c, the FCAC explains what a prepayment penalty is and how much it can cost. The explanation provided mentions the concept of a discount.
24. As appears from the extract of the FCAC website entitled "Choosing a mortgage that is right for you", exhibits R-5 and R-5.a, borrowers have various options when it comes to choosing a mortgage, among which is the closed mortgage with a fixed interest rate chosen by the Applicants. Each option has its advantages and disadvantages, notably with respect to prepayment.
25. As appears from the extract of the FCAC website entitled "Interest on mortgages", exhibits R-6 and R-6.a, discounted rates can be offered if borrowers qualify for them.
26. The above-mentioned information issued by the FCAC will complete and correct Applicants' allegations as to the nature of prepayment charges and will give the Court a clear and complete and updated picture of the information publicly available.
27. The Defendants respectfully submit that the above-stated evidence is essential to a proper determination of whether the Applicants' proposed class action should be authorized against the Defendants, more particularly, as to whether the Applicants have exposed an arguable case (Art. 575 (2) CCP) against the Defendants.
28. For these reasons, the Defendants seek leave from this Court to adduce the above stated documents as relevant evidence.
29. The present Application for Leave to Adduce Relevant Evidence is well founded in fact and in law.

**WHEREFORE MAY IT PLEASE THIS COURT TO:**

**GRANT** the present Application for Leave to Adduce Relevant Evidence;

**AUTHORIZE** Defendants to file the following documents into the court record prior to the hearing on the application to authorize the bringing of a class action:

- (i) The *Code of Conduct for Federally Regulated Financial Institutions: Mortgage prepayment information*, in English and French versions, updated on June 11, 2019 and January 11, 2017, and a press release by the Department of Finance Canada titled "Harper Government Acts to Further

Protect Consumers”, *en liasse*, attached hereto as **Exhibit R-1** and the most recent versions as **Exhibit R-1.a**, *en liasse*.

- (ii) The FCAC Guideline “CG-4 Information box examples for the Cost of Borrowing Regulations” updated on February 24, 2022, and the Information Box Example of a Credit Agreement, in English and French versions both updated on 24 February 2022, *en liasse*, attached hereto as **Exhibit R-2** and the most recent versions as **Exhibit R-2.a**, *en liasse*.
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- (v) An extract of the FCAC website entitled “Prepayment penalties”, in English and French versions, both updated on September 28, 2017, *en liasse*, attached hereto as **Exhibit R-4.b**;
- (vi) An extract of the FCAC website entitled “Choosing a mortgage that is right for you”, in English and French versions, both updated on June 28, 2021, *en liasse*, attached hereto as **Exhibit R-5** and the most recent versions as **Exhibit R-5.a**, *en liasse*.
- (vii) An extract of the FCAC website entitled “Interest on mortgages”, in English and French versions, both updated on June 28, 2021, *en liasse*, attached hereto as **Exhibit R-6** and the most recent versions as **Exhibit R-6.a**, *en liasse*.

**THE WHOLE** without costs, save in the event of contestation.

Montreal, November 29, 2022

Montreal, November 29, 2022

*Osler, Hoskin & Harcourt LLP*

*Blake, Cassels & Graydon LLP*

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**Osler, Hoskin & Harcourt LLP**

c/o Me Éric Préfontaine; Me Jessica Harding  
1000 de La Gauchetière Street W., #2100  
Montréal, Québec H3B 4W5  
Tel: (514) 904-8100 / Telec: (514) 904-8101  
[eprefontaine@osler.com](mailto:eprefontaine@osler.com)  
[jharding@osler.com](mailto:jharding@osler.com)

Lawyers for Defendant, HSBC Bank of Canada

---

**Blake, Cassels & Graydon LLP**

c/o Me Francis Rouleau; Me Ariane Bisailon  
1 Place Ville-Marie, #3000  
Montréal, Québec H3B 4N8  
Tel : (514) 982-4000 / Telec : (514) 982-4099  
[francis.rouleau@blakes.com](mailto:francis.rouleau@blakes.com)  
[ariane.bisailon@blakes.com](mailto:ariane.bisailon@blakes.com)

Lawyers for Defendant, Laurentian Bank of Canada

Montreal, November 29, 2022

*McCarthy Tétrault LLP*

---

**McCarthy Tétrault**

c/o Me Samuel Lepage; Me Jean-Simon Castonguay  
1000 de La Gauchetière Street W., #2500  
Montréal, Québec H3B 0A2  
Tel : (514) 397-4100 / Telec : (514) 875-6246  
[slepage@mccarthy.ca](mailto:slepage@mccarthy.ca)  
[jscastonguay@mccarthy.ca](mailto:jscastonguay@mccarthy.ca)

Lawyers for Defendant, Toronto Dominion Bank

Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Guy J. Pratte; Me Mathieu Lévesque;  
Me Patrick Plante  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[gpratte@blg.com](mailto:gpratte@blg.com)  
[malevesque@blg.com](mailto:malevesque@blg.com)  
[pplante@blg.com](mailto:pplante@blg.com)

Lawyers for Defendant, Bank of Montreal

Montreal, November 29, 2022

*Langlois Avocats*

---

**Langlois avocats**

c/o Me Sean Griffin; Me Justine Brien;  
Me Antoine Brylowski  
1250 René-Lévesque Blvd. W., 20th Floor  
Montréal, Québec H3B 4W8  
Tel : (514) 842-9512 / Telec : (514) 845-6573  
[Sean.griffin@langlois.ca](mailto:Sean.griffin@langlois.ca)  
[Antoine.Brylowski@langlois.ca](mailto:Antoine.Brylowski@langlois.ca)  
[justine.brien@langlois.ca](mailto:justine.brien@langlois.ca)

Lawyers for Defendant, National Bank of Canada

Montreal, November 29, 2022

*Gowlings WLG (Canada)*

---

**Gowlings WLG (Canada)**

c/o Me Ronald Audette; Me Paule Hamelin  
1 Place Ville-Marie, #3700  
Montréal, Québec H3B 3P4  
Tel: (514) 878-9641 / Telec: (514) 876-9559  
[Ronald.audette@gowlingwlg.com](mailto:Ronald.audette@gowlingwlg.com)  
[paule.hamelin@gowlingwlg.com](mailto:paule.hamelin@gowlingwlg.com)

Lawyers for Defendant, Royal Bank of Canada

Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Alexander De Zordo / Me Karine Chênevert  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[adezordo@blg.com](mailto:adezordo@blg.com)  
[kchenevert@blg.com](mailto:kchenevert@blg.com)

Lawyers for Defendant, Bank of Nova Scotia

Montreal, November 29, 2022

*LCM Avocats*

---

**LCM avocats**

c/o Me Sébastien C. Caron / Me Lucy-Maude Lachance  
600 de Maisonneuve Blvd. W., #2700  
Montréal, Québec H3A 3J2  
Tel : (514) 375-2665 / Telec : (514) 905-2001  
[scaron@lcm.ca](mailto:scaron@lcm.ca)  
[lmilachance@lcm.ca](mailto:lmilachance@lcm.ca)

Lawyers for Defendant, Caisses Desjardins

**NOTICE OF PRESENTATION**

To: LPC Avocats Inc.  
a/s Me Joey Zukran  
276 Saint-Jacques Street, Suite 801  
Montréal, Québec H2Y 1N3  
Lawyers for Applicants

**TAKE NOTICE** that the *Application by Defendants for Leave to Adduce Relevant Evidence* will be presented for hearing at a time and place to be determined by the Honourable Christian Immer of the Superior Court of Québec, 1 Notre-Dame Street East, Montreal, Québec, given the case management.

Montreal, November 29, 2022

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*Osler, Hoskin & Harcourt LLP*

*Blake, Cassels & Graydon LLP*

---

**Osler, Hoskin & Harcourt LLP**  
c/o Me Éric Préfontaine; Me Jessica Harding  
1000 de La Gauchetière Street W., #2100  
Montréal, Québec H3B 4W5  
Tel: (514) 904-8100 / Telec: (514) 904-8101  
[eprefontaine@osler.com](mailto:eprefontaine@osler.com)  
[jharding@osler.com](mailto:jharding@osler.com)

---

**Blake, Cassels & Graydon LLP**  
c/o Me Francis Rouleau; Me Ariane Bisailon  
1 Place Ville-Marie, #3000  
Montréal, Québec H3B 4N8  
Tel : (514) 982-4000 / Telec : (514) 982-4099  
[francis.rouleau@blakes.com](mailto:francis.rouleau@blakes.com)  
[ariane.bisailon@blakes.com](mailto:ariane.bisailon@blakes.com)

Lawyers for Defendant, HSBC Bank of Canada

Lawyers for Defendant, Laurentian Bank of Canada

Montreal, November 29, 2022

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*McCarthy Tétrault LLP*

*Gowlings WLG (Canada)*

---

**McCarthy Tétrault**  
c/o Me Samuel Lepage; Me Jean-Simon  
Castonguay  
1000 de La Gauchetière Street W., #2500  
Montréal, Québec H3B 0A2  
Tel : (514) 397-4100 / Telec : (514) 875-6246  
[slepage@mccarthy.ca](mailto:slepage@mccarthy.ca)  
[jscastonguay@mccarthy.ca](mailto:jscastonguay@mccarthy.ca)

---

**Gowlings WLG (Canada)**  
c/o Me Ronald Audette; Me Paule Hamelin  
1 Place Ville-Marie, #3700  
Montréal, Québec H3B 3P4  
Tel: (514) 878-9641 / Telec: (514) 876-9559  
[Ronald.audette@gowlingwlg.com](mailto:Ronald.audette@gowlingwlg.com)  
[paule.hamelin@gowlingwlg.com](mailto:paule.hamelin@gowlingwlg.com)

Lawyers for Defendant, Toronto Dominion Bank

Lawyers for Defendant, Royal Bank of Canada



Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Guy J. Pratte; Me Mathieu Lévesque;  
Me Patrick Plante  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[gpratte@blg.com](mailto:gpratte@blg.com)  
[malevesque@blg.com](mailto:malevesque@blg.com)  
[pplante@blg.com](mailto:pplante@blg.com)

Lawyers for Defendant, Bank of Montreal

Montreal, November 29, 2022

*Langlois Avocats*

---

**Langlois avocats**

c/o Me Sean Griffin; Me Justine Brien;  
Me Antoine Brylowski  
1250 René-Lévesque Blvd. W., 20th Floor  
Montréal, Québec H3B 4W8  
Tel : (514) 842-9512 / Telec : (514) 845-6573  
[Sean.griffin@langlois.ca](mailto:Sean.griffin@langlois.ca)  
[Antoine.Brylowski@langlois.ca](mailto:Antoine.Brylowski@langlois.ca)  
[justine.brien@langlois.ca](mailto:justine.brien@langlois.ca)

Lawyers for Defendant, National Bank of  
Canada

Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Alexander De Zordo / Me Karine  
Chênevert  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[adezordo@blg.com](mailto:adezordo@blg.com)  
[kchenevert@blg.com](mailto:kchenevert@blg.com)

Lawyers for Defendant, Bank of Nova Scotia

Montreal, November 29, 2022

*LCM Avocats*

---

**LCM avocats**

c/o Me Sébastien C. Caron / Me Lucy-Maude  
Lachance  
600 de Maisonneuve Blvd. W., #2700  
Montréal, Québec H3A 3J2  
Tel : (514) 375-2665 / Telec : (514) 905-2001  
[scaron@lcm.ca](mailto:scaron@lcm.ca)  
[lmachance@lcm.ca](mailto:lmachance@lcm.ca)

Lawyers for Defendant, Caisses Desjardins

CANADA  
PROVINCE OF QUÉBEC  
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KATY HAROCH

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**AMENDED LIST OF EXHIBITS**

**EXHIBIT R-1:** Code of Conduct for Federally Regulated Financial Institutions: Mortgage prepayment information, in English and French versions, updated on June 11, 2019 and January 11, 2017, and a press release by the Department of Finance Canada titled “Harper Government Acts to Further Protect Consumers”, *en liasse*;

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- EXHIBIT R-4.c:** Most recent versions printed on November 23, 2022 of the extract of the FCAC website entitled “Prepayment penalties”, in English and French versions, *en liasse*;
- EXHIBIT R-5:** Extract of the FCAC website entitled “Choosing a mortgage that is right for you”, in English and French versions, both updated on June 28, 2021, *en liasse*;
- EXHIBIT R-5.a:** Most recent versions printed on November 23, 2022 of the extract of the FCAC website entitled “Choosing a mortgage that is right for you”, in English and French versions, *en liasse*;
- EXHIBIT R-6:** Extract of the FCAC website entitled “Interest on mortgages”, in English and French versions, both updated on June 28, 2021, *en liasse*;
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Montreal, November 29, 2022

*Osler, Hoskin & Harcourt LLP*

---

**Osler, Hoskin & Harcourt LLP**

c/o Me Éric Préfontaine; Me Jessica Harding  
1000 de La Gauchetière Street W., #2100  
Montréal, Québec H3B 4W5  
Tel: (514) 904-8100 / Telec: (514) 904-8101  
[eprefontaine@osler.com](mailto:eprefontaine@osler.com)  
[jharding@osler.com](mailto:jharding@osler.com)

Lawyers for Defendant, HSBC Bank of Canada

Montreal, November 29, 2022

*McCarthy Tétrault LLP*

---

**McCarthy Tétrault**

c/o Me Samuel Lepage; Me Jean-Simon  
Castonguay  
1000 de La Gauchetière Street W., #2500  
Montréal, Québec H3B 0A2  
Tel : (514) 397-4100 / Telec : (514) 875-6246  
[slepage@mccarthy.ca](mailto:slepage@mccarthy.ca)  
[jscastonguay@mccarthy.ca](mailto:jscastonguay@mccarthy.ca)

Lawyers for Defendant, Toronto Dominion Bank

Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Guy J. Pratte; Me Mathieu Lévesque;  
Me Patrick Plante  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[gpratte@blg.com](mailto:gpratte@blg.com)  
[malevesque@blg.com](mailto:malevesque@blg.com)  
[pplante@blg.com](mailto:pplante@blg.com)

Lawyers for Defendant, Bank of Montreal

Montreal, November 29, 2022

*Blake, Cassels & Graydon LLP*

---

**Blake, Cassels & Graydon LLP**

c/o Me Francis Rouleau; Me Ariane Bisailon  
1 Place Ville-Marie, #3000  
Montréal, Québec H3B 4N8  
Tel : (514) 982-4000 / Telec : (514) 982-4099  
[francis.rouleau@blakes.com](mailto:francis.rouleau@blakes.com)  
[ariane.bisailon@blakes.com](mailto:ariane.bisailon@blakes.com)

Lawyers for Defendant, Laurentian Bank of  
Canada

Montreal, November 29, 2022

*Gowlings WLG (Canada)*

---

**Gowlings WLG (Canada)**

c/o Me Ronald Audette; Me Paule Hamelin  
1 Place Ville-Marie, #3700  
Montréal, Québec H3B 3P4  
Tel: (514) 878-9641 / Telec: (514) 876-9559  
[Ronald.audette@gowlingwlg.com](mailto:Ronald.audette@gowlingwlg.com)  
[paule.hamelin@gowlingwlg.com](mailto:paule.hamelin@gowlingwlg.com)

Lawyers for Defendant, Royal Bank of Canada

Montreal, November 29, 2022

*Borden Ladner Gervais LLP*

---

**Borden Ladner Gervais**

c/o Me Alexander De Zordo / Me Karine  
Chênevert  
1000 de La Gauchetière Street W., #900  
Montréal, Québec H3B 5H4  
Tel : (514) 879-1212 / Telec : (514) 954-1905  
[adezordo@blg.com](mailto:adezordo@blg.com)  
[kchenevert@blg.com](mailto:kchenevert@blg.com)

Lawyers for Defendant, Bank of Nova Scotia

Montreal, November 29, 2022

*Langlois Avocats*

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**Langlois avocats**

c/o Me Sean Griffin; Me Justine Brien;  
Me Antoine Brylowski  
1250 René-Lévesque Blvd. W., 20th Floor  
Montréal, Québec H3B 4W8  
Tel : (514) 842-9512 / Telec : (514) 845-6573  
[Sean.griffin@langlois.ca](mailto:Sean.griffin@langlois.ca)  
[Antoine.Brylowski@langlois.ca](mailto:Antoine.Brylowski@langlois.ca)  
[justine.brien@langlois.ca](mailto:justine.brien@langlois.ca)

Lawyers for Defendant, National Bank of  
Canada

Montreal, November 29, 2022

*LCM Avocats*

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**LCM avocats**

c/o Me Sébastien C. Caron / Me Lucy-Maude  
Lachance  
600 de Maisonneuve Blvd. W., #2700  
Montréal, Québec H3A 3J2  
Tel : (514) 375-2665 / Telec : (514) 905-2001  
[scaron@lcm.ca](mailto:scaron@lcm.ca)  
[lmachance@lcm.ca](mailto:lmachance@lcm.ca)

Lawyers for Defendant, Caisses Desjardins

No: 500-06-001166-210

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**SUPERIOR COURT**  
(Class Action)  
**PROVINCE OF QUÉBEC**  
**DISTRICT OF MONTRÉAL**

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**KATY HAROCH**

and

**CLAUDE VAILLANCOURT**

Applicants

v.

**THE TORONTO-DOMINION BANK *ET AL.***

Defendants

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**AMENDED APPLICATION BY DEFENDANTS  
FOR LEAVE TO ADDUCE RELEVANT  
EVIDENCE**

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ORIGINAL

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**Osler, Hoskin & Harcourt LLP**

(M<sup>e</sup> Éric Préfontaine / M<sup>e</sup> Jessica Harding)

1000 de La Gauchetière Street West, Suite 2100

Montréal, Québec H3B 4W5

Tél: 514.904.8100 Téléc.: 514.904.8101

[eprefontaine@osler.com](mailto:eprefontaine@osler.com) / [jharding@osler.com](mailto:jharding@osler.com)

[notificationosler@osler.com](mailto:notificationosler@osler.com)

Code : BO 0323

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