

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-06-000625-125

SUPERIOR COURT
(Class action)

MARILENA MASELLA, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner

-vs-

TD BANK FINANCIAL GROUP, also operating under the name "TD CANADA TRUST", a legal person duly constituted and having a principal place of business at 500 St-Jacques, Montréal, Québec H2Y 1S1

Respondent

**MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION
AND TO OBTAIN THE STATUS OF REPRESENTATIVE
(Articles 1002 et Seq. C.C.P.)**

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, IN SUPPORT OF
HER MOTION, PETITIONER RESPECTFULLY STATES THE FOLLOWING:**

1. Petitioner wishes to institute a class action on behalf of the persons forming part of the Group hereinafter described and of which Petitioner is also a member, namely:

- 1.1. All persons who signed an agreement for a Home Equity Line of Credit with the TD CANADA TRUST or one of its affiliates and who, since October 2009, were subject to an interest rate increase above and beyond what is commonly referred to as the "Variable Annual Interest Rate" initially agreed upon;

2. The facts that give rise to an individual action on behalf of Petitioner against the Respondent are as follows:

- 2.1. Respondent, TD BANK FINANCIAL GROUP, also operating under the name TD CANADA TRUST (hereinafter referred to as "TD BANK") offers deposit, investment, loan, securities, trust, insurance, and other products and services to the general public, of which a "Home Equity Line of Credit" (hereinafter referred to as a "HELOC") forms a part thereof;
- 2.2. On June 5th 2008, Petitioner and the TD BANK signed an agreement for a HELOC based on a "Variable Annual Interest Rate" (hereinafter referred to as "VAIR"), which in Petitioner's case is quantified as the TD Prime Interest Rate plus or minus zero percent (hereinafter referred to as the "AGREEMENT"), the whole as it appears from a copy of the AGREEMENT produced herewith as **Exhibit P-1**, to form part hereof;
- 2.3. Petitioner has since the signing of the AGREEMENT seen her VAIR decrease several times from 4.75 percent to 2.25 percent, as she expected it would, subsequent to the TD Prime Rate being lowered on various separate occasions by the TD BANK;
- 2.4. On September 10th 2009, Petitioner received a letter from the TD BANK informing her that her VAIR on her HELOC would be increased by one percent above and beyond the TD Prime Rate, effective November 16th 2009, the whole as it appears from a copy of the letter produced herewith as **Exhibit P-2**, to form part hereof;
- 2.5. Subsequently, Petitioner's husband informed the TD BANK of their objection to the increase to the VAIR portion of her HELOC, by sending emails to various individuals of the TD BANK, and requested written assurance that the interest rate increase would not be implemented, the whole as it appears from copies of the emails produced herewith as **Exhibit P-3**, to form a part hereof;
- 2.6. Petitioner's husband received responses from each of the individuals he wrote to, stating that the TD BANK would nonetheless proceed with the increase to the VAIR on her HELOC, the whole as it appears from copies of the emails produced herewith as **Exhibit P-4**, to form part hereof;

- 2.7. On October 8th 2009, Petitioner's husband received a letter from Mr. Andrew Durnford, the Product Head of the *TD Canada Trust Real Estate Secured Lending* Department of the TD BANK, which is the department directly responsible for Petitioner's HELOC, also stating the TD BANK'S refusal to forego the interest rate increase, the whole as it appears from a copy of the letter produced herewith as **Exhibit P-5**, to form part hereof;
- 2.8. On November 16th 2009, the TD BANK increased the VAIR of Petitioner's HELOC, the whole as appears from a copy of Petitioner's Line of credit statement as of November 30th 2009, produced herewith as **Exhibit P-6** to form part hereof;
- 2.9. TD BANK claims it is entitled to increase the VAIR on Petitioner's HELOC in virtue of Article 12 of the AGREEMENT;
- 2.10. The TD BANK'S decision to increase the interest rate on Petitioner's HELOC is in no way related to any change in Petitioner's financial situation, credit worthiness or any other factor for which Petitioner is responsible for having affected;
- 2.11. On the contrary, the Respondent admitted in an email exchange with Petitioner's husband that the same increase in the interest rate also affected all other customers with HELOC accounts, the whole as appears from an email dated September 30th 2009 produced herewith as **Exhibit P-7** and as such was unrelated to the credit risk affecting each member of the Group;
- 2.12. The TD BANK'S decision to increase the interest rate on Petitioner's HELOC is based on a market increase in the TD BANK'S cost of borrowing unrelated to the BANK'S prime rate, the whole as appears from Exhibit P-2;
- 2.13. The AGREEMENT is essentially a contract of adhesion and a consumer contract and as such is subject to article 1437 C.C.Q.;
- 2.14. Article 12 of the AGREEMENT is an abusive clause in that it would allow the TD BANK to unilaterally increase the VAIR portion of Petitioner's HELOC without justification, consequently creating excessive and unreasonable circumstances detrimental to Petitioner;
- 2.15. Consequently, TD BANK'S increase of the VAIR of Petitioner's HELOC is a violation of the AGREEMENT;

- 2.16. TD BANK'S increase of the VAIR of Petitioner's HELOC is illegal and contravenes public order provisions of the *Quebec Civil Code*, as well as the *Quebec Consumer Protection Act*;
- 2.17. As a result of Respondent's actions, Petitioner has seen her monthly payment on her HELOC increase significantly;
- 2.18. After having researched the issue through various avenues on the internet, Petitioner discovered that several other individuals with HELOCS from the TD BANK experienced the same treatment and are equally outraged;
- 2.19. In light of the preceding, TD BANK is responsible for all damages caused to Petitioner and to the members of the Group, including the extra cost of interest charged since November 16th 2009 and consequential damages, as the case may be, including troubles and inconveniences as well as general and punitive damages for the violation of their rights under the *Quebec Consumer Protection Act*;

3. The facts that give rise to a class action on behalf of all the members of the Group are the following:

- 3.1. All the members of the Group have signed an agreement for a HELOC with the TD BANK and have been subject to an increase in the interest rate applied to it, above and beyond the VAIR agreed upon in their respective agreements with the TD BANK;
- 3.2. All the members of the Group have suffered damages from the increase in the interest rate and additional damages, as outlined hereinabove, including, in all circumstances punitive damages;

4. The composition of the Group makes the application of articles 59 and 67 C.C.P. difficult or impracticable in that:

- 4.1. The class action is for the benefit of all persons who have a HELOC with the TD BANK;
- 4.2. TD BANK has signed thousands, if not tens of thousands of agreements for HELOC'S, all of which have been affected by the interest rate increase;

- 4.3. The number of members affected by the interest rate increase exceeds, in all likelihood, several tens of thousands of people;
- 4.4. It is impossible for Petitioner to contact and obtain mandates from each and every member of the Group;

5. The questions of fact and law which are identical, similar or related that unite each member of the Group are the following:

- 5.1. Is article 12 of the AGREEMENT an abusive clause in virtue of article 1437 of the *Civil Code of Quebec*?
- 5.2. Does article 12 of the AGREEMENT contain a purely potestative condition in virtue of article 1500 of the *Civil Code of Quebec*?
- 5.3. Did the TD BANK violate the nature and/or terms of the AGREEMENT it signed with Petitioner by increasing the VAIR on her HELOC account?
- 5.4. In the event of an affirmative answer to any of the preceding questions, should the TD BANK be held responsible for having increased the VAIR on its HELOC accounts?
- 5.5. In the event of an affirmative answer to any one of the preceding questions, did the members of the Group suffer damages by being subject to an interest rate increase on their HELOC?
- 5.6. What is the nature and extent of the damages for the Group members that were subject to the interest rate increase?
- 5.7. Do the TD BANK'S actions entitle all members of the Group to claim punitive damages?
- 5.8. Should the Respondent be condemned to pay to Petitioner and to the rest of the members of the Group the following damages:
 - 5.8.1. The reimbursement in full of all sums paid as interest above and beyond the amount in interest owed in virtue of the VAIR as per the terms of their agreements with the TD BANK;

5.8.2. An additional amount of \$100.00 for all the troubles and inconveniences suffered by the members that were subject to an interest rate increase;

5.8.3. An additional amount of \$250.00 in punitive damages for all the Class members for having increased the interest rate on its HELOC accounts and for all infringements of the *Quebec Consumer Protection Act*;

5.8.4. Should compensatory damages and/or punitive damages be awarded on a collective basis?

6. The questions of fact and law individual to each member of the Group are the following:

6.1. The amount of the damages not collectively liquidated;

7. It is appropriate to authorize a class action on behalf of the members of the Group for the following reasons:

7.1. Instituting a class action is the only means by which the members of the Group, victims of the faults attributable to the Respondent, will be able to have reasonable access to justice;

7.2. The totality of the questions of fact and law to be resolved by the Court are common to all members of the Group;

7.3. The sheer number of victims could lead to a multitude of individual actions instituted in various different jurisdictions, which could lead to contradictory rulings on questions of fact and law that are for all intents and purposes identical to all the members of the Group;

8. The nature of the action that the Petitioner seeks to institute is:

8.1. An action in damages against the Respondent, including punitive damages;

9. The conclusions that Petitioner seeks are the following:

9.1. **GRANT** the Petitioner's Motion;

9.2. **CONDEMN** the Respondent to pay to Petitioner the amount of additional interest charged by Respondent on Petitioner's HELOC

account, that is the amount of \$4,900.00 to be adjusted, which is above and beyond the amount of interest stipulated in the AGREEMENT, plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q., as of November 16th 2009;

- 9.3. **GRANT** Petitioner's Motion to obtain the Status of Representative on behalf of all the members of the Group;
 - 9.4. **ORDER** the collective recovery for all the damages caused to the members of the Group for troubles and inconveniences in the amount of \$100.00 per member;
 - 9.5. **ORDER** the collective recovery of all the punitive damages to be paid to all the members of the Group, in the amount of \$250.00 per member;
 - 9.6. **ENJOIN** the Respondents to cease charging all the members of the Group the extra interest above and beyond the amount agreed upon in their respective agreements with Respondent;
 - 9.7. **CONDEMN** the Respondent to pay to each member of the Group their respective claims plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q. as of November 16th 2009;
 - 9.8. **THE WHOLE** with costs at all levels, including the cost of all exhibits, experts, expertise reports and notices;
- 10. Petitioner is apt to assume an adequate representation of the members of the Group she intends to represent for the following reasons:**
- 10.1. Petitioner is a member of the Group;
 - 10.2. Petitioner is an individual with a profound social conscience, who in an act of consciousness to safeguard her rights and those of others in similar circumstances, tried to remedy the matter with the TD BANK according to the protocol established by the latter;
 - 10.3. Considering Respondent's behaviour, Petitioner personally took it upon herself to further investigate the scope and extent of the issue by becoming informed of Respondent's situation and actions through various news articles, the whole as it appears

from copies of Internet news articles produced herewith as **Exhibit P-8**, to form part hereof;

- 10.4. Petitioner has the time, energy, will and determination to assume all the responsibilities incumbent upon her in order to diligently carry out the action;
- 10.5. Petitioner is determined to do her part in order to put an end to Respondent's behaviour;
- 10.6. Petitioner cooperates and will continue to cooperate fully with her attorneys;

11. Petitioner requests and proposes that the class action be brought before the Superior Court, sitting in the district of Montreal, for the following reasons:

- 11.1. Petitioner is domiciled and resides in Quebec, in a district close to that of Montreal;
- 11.2. The Attorneys for the Petitioner practise in the district of Montreal;
- 11.3. It is likely that the majority of the members of the Group reside in Montreal;

FOR THESE MOTIVES, MAY IT PLEASE THE COURT:

GRANT Petitioner's Motion

AUTHORIZE the class action hereinafter described as:

All persons who signed an agreement for what is commonly referred to as a "Home Equity Line of Credit" with TD CANADA TRUST or one of its affiliates and who, since October 2009, were subject to an interest rate increase above and beyond what is commonly referred to as the "Variable Annual Interest Rate" initially agreed upon;

IDENTIFY as follows the principle questions of fact and law to be determined collectively:

- (a) Is article 12 of the AGREEMENT an abusive clause in virtue of article 1437 of the *Civil Code of Quebec*?

- (b) Does article 12 of the AGREEMENT contain a purely potestative condition in virtue of article 1500 of the *Civil Code of Quebec*?
- (c) Did the TD BANK violate the nature and/or terms of the AGREEMENT it signed with Petitioner by increasing the VAIR on her HELOC account?
- (d) In the event of an affirmative answer to any of the preceding questions, should the TD BANK be held responsible for having increased the VAIR on its HELOC accounts?
- (e) In the event of an affirmative answer to any one of the preceding questions, did the members of the Group suffer damages by being subject to an interest rate increase on their HELOC?
- (f) What is the nature and extent of the damages for the Group members that were subject to the interest rate increase?
- (g) Do the TD BANK'S actions entitle all members of the Group to claim punitive damages?
- (h) Should the Respondent be condemned to pay to Petitioner and to the rest of the members of the Group the following damages:
 - i) The reimbursement in full of all sums paid as interest above and beyond the amount in interest owed in virtue of the VAIR as per the terms of their agreements with the TD BANK;
 - ii) An additional amount of \$100.00 for all the troubles and inconveniences suffered by the members that were subject to an interest rate increase;
 - iii) An additional amount of \$250.00 in punitive damages for all the Class members for having increased the interest rate on its HELOC accounts and for all infringements of the Quebec *Consumer Protection Act*;
- (i) Should compensatory damages and/or punitive damages be awarded on a collective basis?

IDENTIFY as follows the conclusions sought in relation thereof:

- (a) **GRANT** the Petitioner's Motion;
- (b) **CONDEMN** the Respondent to pay to Petitioner the amount of additional interest charged by Respondent on Petitioner's HELOC account, that is the amount of \$4,900.00, to be adjusted, which is above and beyond the amount of interest stipulated in the AGREEMENT, plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q., as of November 16th 2009;
- (c) **GRANT** Petitioner's Motion to obtain the Status of Representative on behalf of all the members of the Group;
- (d) **ORDER** the collective recovery for all the damages caused to the members of the Group for troubles and inconveniences in the amount of \$100.00 per member;
- (e) **ORDER** the collective recovery of all the punitive damages to be paid to all the members of the Group, in the amount of \$250.00 per member;
- (f) **ENJOIN** the Respondents to cease charging all the members of the Group the extra interest above and beyond the amount agreed upon in their respective agreements with Respondent;
- (g) **CONDEMN** the Respondent to pay to each member of the Group their respective claims plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q. as of November 16th 2009;
- (h) **THE WHOLE** with costs at all levels, including the cost of all exhibits, experts, expertise reports and notices;

DECLARE that, unless excluded, the members of the Group will be bound by all judgments to be rendered with respect to the class action in accordance with the law;

FIX the delay for exclusion from the Group at sixty (60) days from the date of the notice to the members, after which those members which did not avail themselves of their option to be excluded shall be bound by all judgments to be rendered with respect to the class action.

ORDER the publication of a summary notice (in accordance with article 1046 C.C.P.) to the members of the Group according to the

terms to be determined by the Court and by the methods described hereafter:

One posting in the following daily newspapers:

The Gazette, La Presse, and Le Journal de Montréal

REFER the present file to the Chief Justice for determination of the district in which the class action should be brought and to designate the Judge who shall preside the hearing;

ORDER the clerk of this Honourable Court, in the event that her action should be brought in a different district, to transfer the file to the district in which the Chief Justice so rules the action should be brought;

THE WHOLE with costs at all levels, including the cost of all exhibits, experts, expertise reports and notices.

Montréal, October 9, 2012

LAUZON BÉLANGER LESPÉRANCE INC.
Attorneys for the Petitioner

NOTICE OF PRESENTATION

To : TD BANK FINANCIAL GROUP
TD CANADA TRUST
500 St-Jacques St.
Montréal (Québec) H2Y 1S1

TAKE NOTICE that the foregoing Motion for authorization to institute a class action and to obtain the status of representative will be presented for adjudication before one of the Honourable judges of the Superior Court, sitting in and for the district of Montréal, at Montreal Courthouse at 1 Notre-Dame Street East, Montreal (Quebec) H2Y 1B6 on **November 19, 2012**, in room 2.16 at 9:00 a.m. or as soon thereafter as counsel may be heard.

Do govern yourselves accordingly.

Montréal, October 9, 2012

LAUZON BÉLANGER LESPÉRANCE INC.
Attorneys for the Petitioner

CANADA

(Class Action)

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
NO:

S U P E R I O R C O U R T

MARILENA MASELLA

Petitioner

-vs-

TD BANK FINANCIAL GROUP, also
operating under the name "TD CANADA
TRUST"

Respondent

LIST OF EXHIBITS

- P-1** Agreement for a HELOC signed on June 5th 2008;
- P-2** Letter dated September 10th 2009 from the TD BANK addressed to Petitioner;
- P-3** Copies of emails from Petitioner's husband to the TD BANK;
- P-4** Copies of responses from each of the individuals from the TD BANK Petitioner's husband wrote to;
- P-5** Copy of a letter dated October 8th 2009 from Mr. Andrew Durnford, the Product Head of the *TD Canada Trust Real Estate Secured Lending* Department of the TD BANK;
- P-6** Copy of Petitioner's Line of credit statement as of November 30th 2009;
- P-7** Email dated September 30th 2009 addressed to Petitioner's husband;
- P-8** Copies of Internet news articles;

Montréal, October 9, 2012

LAUZON BÉLANGER LESPÉRANCE INC.
Attorneys for the Petitioner