

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Action)

No: 500-06-000870-176

SHAY ABICIDAN

Applicant

v.

BANQUE DE MONTRÉAL
THE TORONTO-DOMINION BANK
JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION
ROYAL BANK OF CANADA
CANADIAN IMPERIAL BANK OF
COMMERCE
THE BANK OF NOVA SCOTIA
LAURENTIAN BANK OF CANADA

Defendants

APPLICATION BY DEFENDANT THE TORONTO-DOMINION BANK FOR LEAVE
TO ADDUCE RELEVANT EVIDENCE

(Article 574 CCP)

TO THE HONOURABLE JUSTICE PIERRE-C. GAGNON, OF THE QUEBEC
SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE
TORONTO-DOMINION BANK RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. Defendant The Toronto-Dominion Bank (“**TD Bank**”) seeks leave to submit 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* (the “**CCP**”), regarding the authorization to institute class action proceedings against the Defendants sought by the Applicant.

II. BACKGROUND

2. On or around June 15, 2020, the Applicant filed a 2nd-Re-Amended Application to authorize the bringing of a class action and to appoint the status of representative plaintiff (the “**Application**”).
3. As appears from paragraph 6 of the Application, Applicant seeks to authorize a class action on behalf of the following group:

Class:

*All consumers who since July 4th, 2013 (the “**Class Period**”), were charged an annual fee for their credit card, which was preceded by a determined period during which the annual fee was either waived (free) or discounted and then automatically renewed for an indeterminate term at the regular price as of July 4th, 2013;*

4. The Application seeks damages allegedly resulting from the breach by Defendants of s. 228 of the *Consumer Protection Act* and of s. 8 (a) of the *Negative Option Billing Regulations*. The Applicant is seeking compensatory and punitive damages from Defendants.
5. The Application also refers to Exhibit P-22A which is entitled “Transcript of a telephone conversation between the Applicant and a representative of TD on January 29, 2020”.
6. Contrary to the conclusions Applicant seeks to reach through the allegations regarding Exhibit P-22A, the transcript reveals nothing more than an inquiry made by, allegedly, Mr. Abicidan to a TD Bank representative regarding the various TD Bank credit card products, although this transcript does not record an actual change of credit card by an existing TD Bank cardholder.
7. TD Bank seeks leave from this Court to submit relevant evidence, which consists of a sworn statement by Dayanna Avila dated July 16, 2020, and the exhibits referred to therein (the “**Sworn Statement**”), as appears from **Exhibit R-1**.

III. THE EVIDENCE IN RESPECT OF WHICH LEAVE IS SOUGHT

8. The content of the Sworn Statement, a copy of which is communicated herewith as Exhibit R-1, is limited to establishing that s. 8 (a) of the *Negative Option Billing Regulations* does not apply in the present instance, and that TD Bank has not breached s. 228 of the *Consumer Protection Act*.
9. As appears from Exhibit R-1, TD Bank credit card products do not consist in and do not contain “optional products”, as an application is prepared whenever a cardholder elects to obtain, change, transfer, “upgrade” or “downgrade” his or her

TD Bank credit card product. In other words, a new card application is prepared in situations where a cardholder elects to change his or her TD Aeroplan Visa Infinite Card or MBNA Rewards World Elite MasterCard to any other product, including a card bearing no annual fees. When there is no request to increase the cardholder's credit limit, no credit verification steps are taken with credit agencies.

10. As such, contrary to Applicant's interpretation of the conversation contained in Exhibit P-22A and to the allegations contained at paragraphs 21.2 to 21.12 of the Application, TD Bank issues a new credit card agreement in cases where a cardholder requests a TD Bank credit card product bearing no annual fees, regardless of whether this cardholder previously held a TD Bank credit card product bearing annual fees.

IV. CRITERIA FOR LEAVE TO SUBMIT RELEVANT EVIDENCE

11. The Defendant recognizes that, at the authorization stage, the allegations contained in the Application must, in principle, be deemed true. However, in accordance with the jurisprudence, it is desirable to allow a Defendant to submit evidence which contradicts allegations contained in the Application, or demonstrates that such allegations are "*invraisemblables, mensongères ou non plausibles*".
12. The Defendant submits that the Application contains allegations of this nature which are contradicted or shown to be totally inaccurate by allowing the Defendant to submit evidence for this purpose, the most significant of which are the allegations to effect that no application is required to "downgrade" credit card product, and the allegations suggesting that the same credit agreement is applicable regardless of the credit card product issued to the cardholder.
13. At paragraph 21.8 of the Application, Applicant alleges that "*Class members do not have to go through a credit application in order to "downgrade" to this credit card with no annual fee*".
14. The evidence that TD Bank wishes to adduce directly contradicts Applicant's erroneous allegation that no credit application is conducted for such a change in credit card products. Exhibit P-22A specifies that there will be no credit check: "*So you won't have a credit check, so no affecting your credit score there.*" However, there is an application for the selected credit card product.
15. Moreover, at paragraph 21.10 of the Application, Applicant alleges that "the "downgrade is for the **same credit card contract** and on the same conditions (and, if (sic) fact, all that the banks are doing is replacing the "wrapping paper" on the physical plastic card – with the *catchy* brand name – for another "wrapping paper" and plastic card that gives access to the **same credit card contract**, only without the options – including insurance – that come with paying the annual fee)"

(emphasis in original). However, the Sworn Statement and the exhibits in support thereof clearly demonstrate that a new and separate credit agreement is provided to the cardholder further to the issuance of a credit card bearing no annual fees.

16. This Court should allow the proposed evidence to be adduced, for the purpose of evaluating whether the Applicant has demonstrated a strong appearance of right and that the proposed class action has a reasonable chance of succeeding, as required by Article 575 (2) CCP.
17. In fact, it has been held that equity and the principles of fundamental justice require, even at the authorization stage, that the Court consider allegations and evidence proffered by both the Applicant and the Defendant in determining if the Applicant has met the requirements of Article 575 CCP.
18. The evidence which the Defendant seeks to adduce will also assist the court in gaining an understanding regarding the products offered by TD Bank which will certainly be of assistance to the Court in assessing whether the conditions set forth in paragraphs (1) and (2) of Article 575 CCP are met.
19. In sum, the evidence which the Defendant seeks to adduce would enable this Court to proceed with an efficient review of the criteria contained at Article 575 CCP, and would result in a more efficient hearing of the Application.
20. This Court should not prevent itself from having the benefit of evidence which could assist it in its analysis of the threshold criteria set forth in Article 575 CCP.
21. By granting leave to submit the evidence described above, this Court would be ensuring that, as required by the jurisprudence, the authorization hearing will not be a simple formality devoid of any real meaning in which the Court would be bound by the allegations and evidence founded solely on editorial choices made to support the sole perspective of the Applicant.

WHEREFORE MAY IT PLEASE THIS COURT TO:

GRANT the present Application for Leave to Adduce Relevant Evidence;

AUTHORIZE Defendant TD Bank to file the sworn statement of Dayanna Avila dated July 16, 2020 and the exhibits referred to therein.

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

Montréal, July 16, 2020

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THE TORONTO-DOMINION BANK FOR LEAVE
TO ADDUCE RELEVANT EVIDENCE
(Article 574 CCP), EXHIBIT R-1 Sworn
statement of Dayanna Avila AND
EXHIBITS DA-1 to DA-3**

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