

THIS DOCUMENT IS A TRANSLATION AND MADE FOR THE SOLE PURPOSE OF SERVING THE PRESENT APPLICATION IN THE ENGLISH LANGUAGE; IN THE EVENT OF ANY DISCREPANCY BETWEEN THIS TRANSLATION AND THE ORIGINAL APPLICATION IN FRENCH, THE LATTER SHALL PREVAIL

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF **MONTREAL**

SUPERIOR COURT
(Class Action)

No: 500-06-000881-173

FRÉDÉRIC SEIGNEUR

Petitioner

v.

NETFLIX INTERNATIONAL B.V., a legal person, duly incorporated, having a principal place of business at Stadhouderskade 55, 1072 AB Amsterdam, The Netherlands

-and-

NETFLIX, INC., a legal person, duly incorporated, having a principal place of business at 100 Winchester Circle, Los Gatos, California, United States of America, 95032

Respondents

APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE (Art. 575 et seq. C.C.P.)

IN SUPPORT OF HIS APPLICATION, PETITIONER RESPECTFULLY SUBMITS THE FOLLOWING:

1. **The petitioner seeks authorization to institute a class action on behalf of the members of the class, of which he is a part, described as follows:**

“All natural persons residing in Quebec who subscribed to services offered by the respondents (identified as Netflix) and whose monthly fees for said services were modified (increased) unilaterally by the defendants after August 11, 2014”

(hereafter the “class”);

2. **The facts giving rise to the personal action of the petitioner are as follows:**

- a) **Introduction**

- 2.1. Article 11.2 of the *Consumer Protection Act*, CQLR, Chap. P-40.1 (hereafter the “CPA”) sets out the following public order rule:

Any stipulation under which a merchant may amend a contract unilaterally is prohibited unless the stipulation also

(a) specifies the elements of the contract that may be amended unilaterally;

(b) provides that the merchant must send to the consumer, at least 30 days before the amendment comes into force, a written notice drawn up clearly and legibly, setting out exclusively the new clause, or the amended clause and the clause as it read formerly, the date of the coming into force of the amendment and the rights of the consumer set forth in subparagraph c; and

(c) provides that the consumer may refuse the amendment and rescind or, in the case of a contract involving sequential performance, cancel the contract without cost, penalty or cancellation indemnity by sending the merchant a notice to that effect no later than 30 days after the amendment comes into force, if the amendment entails an increase in the consumer’s obligations or a reduction in the merchant’s obligations.

However, except in the case of an indeterminate-term service contract, such a stipulation is prohibited if it applies to an essential element of the contract, particularly the nature of the goods or services that are the object of the contract, the price of the goods or services or, if applicable, the term of the contract.

Any amendment of a contract in contravention of this section cannot be invoked against the consumer.

This section does not apply to the amendment of a contract extending variable credit as provided for in section 129.

2009, c. 51, a. 2. ;

(Our emphasis)

- 2.2. The current application for authorization to institute a class action stems from the flagrant violation of this public order rule by the respondents *NETFLIX INTERNATIONAL B.V.* and *NETFLIX, INC.* (hereafter referred to collectively as “**Netflix**”);
- 2.3. Both the Terms of Use imposed by Netflix and the written notices of modification (increase) to monthly fees systematically and voluntarily omit any mention of the monthly fee in effect at the time, mentioning only the new monthly fee, in addition to omitting any mention of the consumer’s right to refuse this increase and to rescind the contract without cost ;

b) The parties

The petitioner

- 2.4. The petitioner is a consumer according to the CPA;
- 2.5. On September 13, 2014, the petitioner entered into a contract of service for an indeterminate term with Netflix, with monthly payments set at \$7.99 (the first month being free), the whole as it appears from an email from Netflix titled “Merci d’être devenu(e) membre de Netflix”, a copy of which is communicated herewith as exhibit R-1;
- 2.6. On November 1, 2014, the petitioner changed his subscription plan which cost \$8.99/month, the whole as it appears from the notice of modification which is communicated herewith as exhibit R-2;
- 2.7. On September 15, 2016, the petitioner received a notice from Netflix to the effect that from October 14, 2016 onward the monthly subscription fee would be \$9.99/month, the whole as it appears from a copy of said notice, communicated herewith as exhibit R-3;

- 2.8. On October 14, 2016, petitioner's fee did increase from \$8.99/month to \$9.99/month;
- 2.9. The petitioner produces, as examples, copies of his bills from September 14 and October 14, 2016, and June 14 and July 14, 2017, attached herewith as exhibit R-4;
- 2.10. The bills from September 14, 2016, October 14, 2015 and June 14, 2017 are from Netflix inc., while the bill from July 14, 2017 is from Netflix International B.V., the whole as it appears from the bills, exhibit R-4;
- 2.11. The Terms of Use in effect in January 2017, imposed by Netflix, state, *inter alia*, the following: "We may change our service plans and the price of our service from time to time; however, any price changes or changes to our service plans will apply to you no earlier than 30 days following notice to you", the whole as it appears from clause 3.4 of the document titled "Netflix Terms of Use", a copy of which (in English and in French) is communicated herewith as exhibit R-5 (the previous Terms of Use are unfortunately unavailable);

The respondents

- 2.12. The respondents are interrelated legal persons. For example, even though the Terms of Use, exhibit R-5, in effect as of January 2017 indicate Netflix International B.V., a limited liability company in The Netherlands, the bills received by the petitioner up to June 2017 are from Netflix Inc. It is only the last bill of July 14, 2017 that is from Netflix International B.V. Moreover, the notices received by the petitioner are from Netflix Inc., and list its US address, as appears from exhibits R-2, R-3, and R-4;
- 2.13. There is consequently a unity of the respondents which, for the purpose of the present application, are referred to as Netflix, as previously indicated;
- 2.14. Netflix is a merchant according to the CPA;
- 2.15. Netflix offers a monthly subscription service that allows class members to access films and television series available on-demand on TVs, computers or other devices connected to the internet, the whole, as described by Netflix in exhibit R-5;

- 2.16. In exchange, Netflix charges class members monthly subscription fees, described in the following terms: “The membership fee for the Netflix service and any other charges you may incur in connection with your use of the service, such as taxes and possible transaction fees, will be charged on a monthly basis to your Payment Method on the calendar day corresponding to the commencement of the paying portion of your membership.”, the whole as it appears from clause 3.1 of exhibit R-5;
- 2.17. In 2014, it was estimated according to a survey that there were more than 5,800,000 subscribers in Canada, the whole as it appears from a copy of a newspaper article, attached herewith as exhibit R-6;
- 2.18. Based on the proportion of Quebecois that make up of the population of Canada as a whole, it is reasonable to estimate the roughly 25% of this number, i.e., 1,450,000, are residents of Quebec, and consequently class members;

c) The facts giving rise to the individual recourse of the petitioner

- 2.19. Clause 3.4 of the Netflix Terms of Use (exhibit R-5) and the notice (exhibit R-3) are illegal in virtue of Section 11.2 CPA;
- 2.20. In regards to clause 3.4 of exhibit R-5, the majority of the conditions stated in Section 11.2 CPA are omitted;
- 2.21. In regards to the notice (exhibit R-3), there is no mention of, *inter alia*, the monthly subscription fee in effect at the time, nor the right of the consumer to refuse the modified fee and rescind the contract without cost;
- 2.22. The petitioner thus saw an increase of his monthly subscription fee of \$1/month through a notice that violated the public order rules stated in Section 11.2 CPA, and this since October 16, 2016;
- 2.23. This modification of the contract, done in violation of Section 11.2 CPA, cannot be invoked against the petitioner, according to the very terms of this provision;
- 2.24. This position was confirmed by the Office de la protection des consommateurs, the whole as appears from a document coming from this organization titled “Modification du contrat”, a copy of which is attached herewith as exhibit R-7;

2.25. As a result, the petitioner is entitled to claim the reimbursement of this illegal increase of the monthly subscription fee since October 2016, which amounts to \$10 as of the present date, *sauf à parfaire*;

2.26. The conduct of Netflix justifies moreover that punitive damages be granted in virtue of the CPA ;

3. The facts giving rise to the individual recourse of each member of the class against Netflix are as follows:

3.1. Each class member received from Netflix an illegal notice of modification of the monthly fee contrary to Section 11.2 CPA in that it omitted to mention, *inter alia*, the rate in effect at the time and the possibility to refuse the increased fee and rescind the contract without cost;

3.2. In so doing, the increased fee mentioned in said notice and charged to class members by Netflix cannot be invoked against them; class members are accordingly entitled to seek reimbursement of those increased fees, in addition to punitive damages provided by the CPA;

3.3. Evaluating the number of class members to be at 1,450,000, *sauf à parfaire*, and considering that all members saw an increase to their monthly fees during the same time as the petitioner, it is reasonable to believe that Netflix illegally billed class members a global sum of \$14,500,000 (1,450,000 x \$10);

3.4. In addition to the collective recovery of this sum, *sauf à parfaire*, class members are entitled to collective recovery of punitive damages, which are evaluated at \$7,500,000;

4. 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:

4.1. The class comprises more than 1,450,000 members;

4.2. The members of the class are situated throughout the province of Quebec and it is impossible for the petitioner to locate them, the respondents being

the only ones to have all their coordinates; even if they were located, they would be too numerous to consolidate the proceedings or obtain mandates;

- 4.3. In any event, as the amounts in issue are relatively modest, it is unlikely that class members would invest the time and money necessary to undertake individual recourses;

5. The questions of fact or law that are identical, similar or related for each class member are:

- 5.1. Are the class members bound by a consumer contract with Netflix that is subject to the CPA?
- 5.2. If yes, does clause 3.4 of exhibit R-5 violate Section 11.2 CPA?
- 5.3. Furthermore, do the notices of modification (increase) to the monthly fee, including exhibit R-3, violate Section 11.2 CPA in that they omit, *inter alia*, to indicate the monthly fee in effect at the time of the modification, in addition to the right of class members to rescind the contract without cost?
- 5.4. If so, can the clause 3.4 of exhibit R-5 and the notices of modification (increase), including exhibit R-3, be invoked against class members?
- 5.5. If they cannot be invoked, are the class members entitled to reimbursement of the sums targeted by these illegal modifications (increases) billed by Netflix to each class member?
- 5.6. Are class members entitled to claim punitive damages in virtue of the CPA, and if so, for what amount?
- 5.7. Are class members entitled to collective recovery of the reimbursement and punitive damages?
- 5.8. Are the respondents, through their business relationships to be considered as one sole entity such that they should be held solidarily liable for the reimbursement and punitive damages claimed?

6. The questions of fact and law that are particular to each member of the class are as follows:

6.1. The only question that is particular to each class member is the amount of compensation to which each is entitled.

7. It is useful that the present application for permission to institute a class action be authorized for the following reasons:

7.1. A class action is the most appropriate procedure to protect the rights of class members in the present matter;

7.2. A class action is the best, and really the only avenue available to obtain justice for a multitude of consumers against Netflix, as pertains to its systematic violation of the CPA;

7.3. Netflix's violation of the class action is identical for each member of the class, the questions of fact and law are accordingly the same, and it is therefore appropriate that these questions be dealt with by one judge in one judgement in order to avoid a multiplicity of legal proceedings and the risk of contradictory judgements;

8. The nature of the action that the petitioner wishes to institute on behalf of class members is the following:

8.1. An action in reimbursement and in punitive damages against Netflix;

9. The conclusions sought by the petitioner are the following:

GRANT the action of the petitioner and of each of the class members that he represents;

DECLARE that the clause 3.4 of exhibit R-2 (*should be R-5 in the French version*) is illegal and cannot be invoked against class members;

DECLARE that the notices of modification (increase) to the monthly fee billed by Netflix are also illegal and cannot be invoked against class members;

CONDEMN the respondents solidarily to reimburse class members the totality of the modifications (increases) to the monthly fee billed to class members by Netflix since August 11, 2014, with interest from the date of service of the present application and the additional indemnity provided by law;

CONDEMN the respondents solidarily to pay to class members punitive damages in the amount of \$7,500,000 with interest from the date of service of the present application and the additional indemnity provided by law;

ORDER collective recovery of the class members' claims, including punitive damages;

THE WHOLE with costs, including expert and notice costs;

10. The petitioner also asks this Honourable Court to grant him the status of representative. In this respect, the petitioner is capable of providing adequate representation of class members in that:

10.1. The petitioner has the capacity and interest to act as representative of the group;

10.2. The petitioner is prepared to manage the present class action in the interests of the members that he intends to represent and he is determined to carry out the present file, to the benefit of all members of the class;

10.3. The petitioner is prepared to devote the necessary time to the present application;

10.4. The petitioner is prepared to work closely with his attorney;

10.5. The petitioner is actively interested in the present matter;

10.6. The petitioner is not linked to the respondents and is acting in good faith and in the interests of class members;

11. The petitioner proposes that the present class action be instituted in the district of Montreal for the following reasons:

11.1. The petitioner is domiciled in the judicial district of Montreal;

11.2. The undersigned attorneys have their office in Montreal;

- 11.3. The class members are situated throughout the province of Quebec, but a large portion of them likely reside in the region of Montreal, where the majority of subscriptions were taken out;

FOR THESE REASONS MAY IT PLEASE THE COURT TO:

GRANT the present application for permission to institute a class action and to obtain the status of representative;

ORDER the respondents to provide the undersigned attorneys, in electronic format, the list of (i) the names and coordinates of all members of the class, (ii) the dates of the modifications (increases) to the monthly fee imposed by the respondents on each member of the class since August 11, 2014, and (iii) the total amount of the increases billed to each class member by the respondents pursuant to the modifications (increases) of the monthly fee of each class member since August 11, 2014;

GRANT the status of representative to the petitioner in order to exercise the present class action on behalf of the group of persons, of which he is member, described as:

“All natural persons residing in Quebec who subscribed to services offered by the respondents (identified as Netflix) and whose monthly fees for said services were modified (increased) unilaterally by the defendants after August 11, 2014”

IDENTIFY as follows the principal questions of fact or law that will be treated collectively:

- a. Are the class members bound by a consumer contract with Netflix that is subject to the CPA?
- b. If yes, does clause 3.4 of exhibit R-5 violate Section 11.2 CPA?
- c. Furthermore, do the notices of modification (increase) to the monthly fee, including exhibit R-3, violate Section 11.2 CPA in that they omit, *inter alia*, to indicate the monthly fee in effect at the time of the

modification, in addition to the right of class members to rescind the contract without cost?

- d. If so, can the clause 3.4 of exhibit R-5 and the notices of modification (increase), including exhibit R-3, be invoked against class members?
- e. If they cannot be invoked, are the class members entitled to reimbursement of the sums targeted by these illegal modifications (increases) billed by Netflix to each class member?
- f. Are class members entitled to claim punitive damages in virtue of the CPA, and if so, in what amount?
- g. Are class members entitled to collective recovery of the reimbursement and punitive damages?
- h. Are the respondents, through their business relationships to be considered as one sole entity such that they should be held solidarily liable for the reimbursement and punitive damages claimed?

IDENTIFY the following conclusions sought by the petitioner:

- a. **GRANT** the action of the petitioner and of each of the class members that he represents;
- b. **DECLARE** that the clause 3.4 of exhibit R-5 is illegal and cannot be invoked against class members;
- c. **DECLARE** that the notices of modification (increase) to the monthly fee billed by Netflix are also illegal and cannot be invoked against class members;
- d. **CONDEMN** the respondents solidarily to reimburse class members the totality of the modifications (increases) to the monthly fee billed to class members by Netflix since August 11, 2014, with interest from the date of service of the present application and the additional indemnity provided by law;
- e. **CONDEMN** the respondents solidarily to pay to class members punitive damages in the amount of \$7,500,000 with interest from the date of service of the present application and the additional indemnity provided by law;

- f. **ORDER** collective recovery of the class members claims, including punitive damages;
- g. **THE WHOLE** with costs, including expert and notice costs;

DECLARE that unless excluded, the class members will be bound by all intervening judgements on the class action in the manner provided by law;

ESTABLISH the deadline for exclusion at thirty (30) days after the date of notice to the members, date after which all members who did not exclude themselves will be bound by all intervening judgements;

ORDER the publication of a notice to members in the terms that will be determined by the Court and by the means indicated below, at the cost of the respondents:

- (1) One publication in the following daily newspapers: La Presse, the Gazette, Le Journal de Montréal ;
- (2) Notice sent by mail by the respondents to the class members at their last known address;
- (3) Notice sent by email by the respondents to the class members to their last known email address;
- (4) By publication of a link to the notice to members on the homepage (French and English) of the Netflix website at: www.netflix.com, for the complete duration of the present class action or until subsequent decision by this Court allows its removal.

TRANSFER the file to the chief justice to determine the district in which the class action will be exercised and to assign therein a judge to the case;

ORDER the registrar of this Court to transfer the file to the registrar in another district upon decision of the chief justice, if it so ordered by the chief justice that the class action be exercised in another district;

WITH COSTS against the respondents, including costs of publication of the notices to class members.

Montréal, August 11, 2017

(s.) Kugler Kandestin LLP

TRUE COPY

KUGLER KANDESTIN LLP

Attorneys for the petitioner

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TRANSLATION

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NOTICE OF PRESENTATION

TO: **NETFLIX INTERNATIONAL B.V.**
Stadhouderskade 55
1072 AB Amsterdam
The Netherlands

AND: **NETFLIX, INC.**
100 Winchester Circle
Los Gatos, California
United States of America, 95032

TAKE NOTICE that the present application for authorization to institute a class action and to obtain the status of representative shall be presented for adjudication before this Honourable Court at the Montreal Courthouse, 1 Notre-Dame East, Montréal, Québec, Canada, the 29th of September 2017 in room 2.16 at 9 am or as soon as counsel may be heard.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, August 11, 2017

(s.) Kugler Kandestin LLP

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