



**ONTARIO
SUPERIOR COURT OF JUSTICE**

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Délivré par voie électronique : 02-Feb-2021
Toronto

TYLER DUFAULT

Plaintiff

- and -

THE TORONTO-DOMINION BANK and THE CANADA TRUST COMPANY
Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$» for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding

dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

TO: **THE TORONTO-DOMINION BANK**
P.O. Box 1, Toronto-Dominion Centre
Toronto, Ontario M5K 1A2

AND TO: **THE CANADA TRUST COMPANY**
66 Wellington Street West
TD Tower, 15th Floor
Toronto, Ontario M5K 1A2

CLAIM

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) "**CJA**" means the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- (b) "**Class**" or "**Class Members**" means every person resident in Canada who is or was a personal deposit account holder with TD Bank since January 1, 2010, and whose personal deposit account has been charged multiple NSF fees by TD Bank on a single payment made or cheque issued;
- (c) "**Consumer Protection Act**" means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;
- (d) "**CPA**" means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (e) "**Defendants**" means The Toronto-Dominion Bank and The Canada Trust Company;
- (f) "**Equivalent Consumer Protection Statutes**" means the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2, the *Fair Trading Act*, R.S.A. 2000, c. F-2, the *Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2, the *Business Practices Act*, C.C.S.M., c. B120, the *Consumer Protection Act*, C.Q.L.R., c. P-40.1 and the *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1, as amended;
- (g) "**NSF Fee**" means non-sufficient funds fee; and
- (h) "**TD Bank**" means The Toronto-Dominion Bank and The Canada Trust Company.

RELIEF SOUGHT

2. The Plaintiff claims on his own behalf and on behalf of the other Class Members:
- (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiff as the representative plaintiff for the Class;
 - (b) a declaration that the Defendants are liable to the Plaintiff and Class Members for breach of contract;
 - (c) a declaration that the Defendants are liable to the Plaintiff and Class Members for unfair practices under the *Consumer Protection Act*;
 - (d) a declaration that the Defendants were unjustly enriched by the acts and omissions pleaded herein;
 - (e) damages for breach of contract equivalent to the value of all monies paid by the Plaintiff and Class Members to the Defendants resulting from the charging of multiple NSF Fees on a single cheque issued or payment made;
 - (f) an order for disgorgement of the value of all monies illegally paid by the Class Members;
 - (g) punitive damages in an amount that this Court finds appropriate;
 - (h) an equitable rate of interest on all sums found due and owing to the Plaintiff and Class Members;
 - (i) pre-judgment and post-judgment interest pursuant to the *CJA*;
 - (j) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;

- (k) pursuant to section 26(9) of the *CPA*, the costs of notice and of administration;
- (l) plan of distribution of the recovery in this action plus applicable taxes; and
- (m) such further and other relief as this Honourable Court may deem just.

OVERVIEW

3. TD Bank has a practice of charging multiple NSF Fees on a single rejected payment or bounced cheque. This practice is a violation of the terms of TD Bank's contract with Class Members. As a result of its unlawful practice, TD Bank has profited enormously, accruing tens of millions of dollars per year by charging illegitimate fees to Class Members.

4. The unlawful charges occur when a depositor makes a payment or issues a cheque without sufficient funds in his or her bank account. The first and only lawful charge is applied when the payee attempts to collect and TD Bank rejects the payment, charging an NSF fee (currently \$48) to the depositor's account. However, when subsequent attempts are made by the payee to process the same already rejected payment or cheque, TD Bank charges a duplicative NSF fee each time.

5. The burden of these duplicative NSF Fees falls disproportionately on low-income Canadians, who are more likely to maintain low bank account balances and more likely to use online vendors in lieu of credit cards.

6. The Plaintiff does not dispute TD Bank's right to reject a transaction and charge a single NSF Fee, but the Defendants' practice of charging multiple NSF Fees on each subsequent attempt to reprocess the same already rejected transaction is a breach of its contract with Class Members.

7. In the Defendants' sole and undisclosed view, each time TD Bank unilaterally reprocesses an already rejected payment or cheque it becomes a new, unique transaction that is subject to a fresh NSF Fee. However, TD Bank's standard form contract does not

give the Defendants any authority to engage in this practice, and never even contemplates that this counterintuitive result could be possible. The standard form contract drafted by the Defendants is identical for all Class Members.

8. TD Bank's practice also violates consumer protection legislation in Ontario, where the Plaintiff resides and where TD Bank is headquartered, and constitutes an unjust enrichment. The Defendants have been financially enriched, with a corresponding deprivation to the Class Members, for no juristic reason.

THE PLAINTIFF AND CLASS

9. The Plaintiff, Tyler Dufault ("**Tyler**"), is an individual who resides in the City of Trenton, in the Province of Ontario. Tyler maintains a TD Every Day Savings Account (the "**Account**") with TD Bank. At all material times, Tyler patronized TD Bank branches located in Trenton, Ontario.

10. On December 2, 2020, Tyler attempted to make a one-time payment of \$19.49 via PayPal, an online payments service. At that time, the balance in his Account was \$19.04 – 45 cents short of the purchase price.

11. On December 3, 2020, TD Bank rejected the payment due to insufficient funds and charged Tyler a \$48 NSF Fee.

12. Four days later, on December 7, 2020, the payee resubmitted the same transaction for payment, unbeknownst to Tyler. Again TD Bank rejected the payment and charged Tyler a second \$48 NSF Fee.

13. In sum, TD Bank charged Tyler \$96 in fees to process a single payment because he tried to make a transaction while his Account was 45 cents short of the purchase price.

14. Tyler took no affirmative action to re-initiate the reprocessing of this transaction. Tyler received no notice from TD Bank of this reprocessing.

15. Tyler understood that he had made "a payment", as is laid out in TD Bank's contract, capable of attracting at most a single NSF Fee.

16. The Plaintiff is seeking certification of the following class (collectively referred to as the "Class" or "Class Members"):

Every person resident in Canada who is or was a personal deposit account holder with TD Bank since January 1, 2010, and whose personal deposit account has been charged multiple NSF fees by TD Bank on a single payment made or cheque issued.

THE DEFENDANTS

17. The Toronto-Dominion Bank is a Canadian corporation with its headquarters and principal place of business located in Toronto, Ontario. Among other things, The Toronto-Dominion Bank is engaged in the business of providing retail banking services to consumers, including the Plaintiff and members of the Class. The Toronto-Dominion Bank operates branches, and thus conducts business, throughout the province of Ontario.

18. The Canada Trust Company is a Canadian corporation with its headquarters and principal place of business located in Toronto, Ontario. The Canada Trust Company is a subsidiary of The Toronto-Dominion Bank, and is engaged in the business of providing traditional trust services. The Canada Trust Company also services TD Bank retail banking accounts issued prior to February 1, 2000.

19. The Defendants' annual report indicates TD Bank earned \$2,885,000,000 (two million, eight-hundred eighty-five thousand) in service charges, including NSF Fees, from Canadian customers in 2019.

20. The Defendants maintain customer transaction data containing the information necessary to ascertain the Class Members and calculate the value of monies paid by individual Class Members to the Defendants as a result of the Defendants' practice of charging of multiple NSF Fees on a single payment made or cheque issued.

CAUSES OF ACTION

Breach of Contract

21. The Defendants' "Financial Services Terms", which incorporates its document "About Our Accounts and Related Services" (collectively, the "**Terms**"), form the contract between the Defendants and Class Members.

22. The Terms contain material representations and omissions indicating that an NSF Fees will only be charged once when a depositor makes a payment or issues a cheque without sufficient monies in their account. However, in fact TD Bank regularly charges multiple NSF Fees per transaction.

23. Specifically, the Terms state that when a depositor makes a payment or issues a cheque without sufficient funds in their account, TD Bank will either reject the payment and charge a \$48 NSF Fee or allow the payment and charge a \$5 overdraft fee ("**OD Fee**"):

Non-sufficient funds	Fees
If you have overdraft protection service but you issue a cheque or make a payment over the amount of funds in your account plus your Overdraft Limit.	\$48.00 if TD does not approve the cheque or payment \$5.00 plus interest at 21% a year on the amount you're in overdraft if the cheque or payment is paid. For Quebec accounts, you pay interest at 21% a year on the amount you're in overdraft but not the \$5.00 fee if the cheque or payment is paid
If you do not have overdraft protection service and you issue a cheque or make a payment without sufficient funds in your account.	\$48.00 if TD does not approve the cheque or payment \$5.00 plus interest at 21% a year on the amount you're in overdraft if TD chooses to approve the cheque or payment

24. Returning the payment and charging multiple NSF Fees on the same transaction generates significantly more revenue for TD Bank than allowing the payment and charging a single OD Fee.

25. The Terms clearly state that an NSF Fee may be charged when the depositor makes "**a**" payment or issues "**a**" cheque without sufficient funds, and TD Bank does not approve "**the**" cheque or payment.

26. Nowhere in the Terms is the counterintuitive result that multiple NSF Fees could be charged on a single rejected payment or cheque authorized or even contemplated.

27. The Class Members are every day Canadians. They do not possess specialized knowledge of contract law or the system for processing payments between payees and banks. The Terms convey to Class Members that a single \$48 NSF Fee will be charged when they make a payment or issue a cheque without sufficient funds in their account.

28. The Plaintiff and Class deny that the Terms are ambiguous about TD Bank's practice of charging multiple NSF Fees but, in the alternative they plead and rely on the doctrine of *contra proferentem*, whereby any ambiguity must be interpreted in favour of the Plaintiff and Class.

29. The Terms are standard form documents drafted by TD Bank without any input or ability to negotiate the terms by the Class Members. It is and has always been in TD Bank's power to draft contract language that would authorize its current practice. Class Members cannot be said to have consented to a practice that is nowhere explained, contemplated or permitted by the Terms.

30. In fact, TD Bank is required by law to disclose all charges, and provide advance notice of new charges or increases of existing charges, to all personal deposit account holders under ss. 3-4 of the *Disclosure of Charges (Banks) Regulations*, SOR/92-324. Contravention of the *Disclosure of Charges (Banks) Regulations* without reasonable cause is an offence under s. 980 of the *Bank Act*, S.C. 1991, c. 46. TD Bank is therefore in violation of its regulatory requirements by applying undisclosed charges to Class Members' accounts.

31. In sum, TD Bank represents that one \$48 NSF Fee will be charged when a depositor makes a payment or issues a cheque without sufficient funds in their account. TD Bank breached, and continues to breach, its contract with Class Members when it charges customers multiple NSF Fees on the same already rejected payment or cheque.

Consumer Protection Act

32. The Plaintiff and Class Members entered into their contracts with TD Bank for personal, family and/or household purposes and are consumers for the purposes of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

33. The Defendants' Terms contained false, misleading and/or deceptive representations because, among other things, (1) the Terms failed to state the material fact that the Defendants would charge multiple NSF Fees for a single transaction, and such failure deceived or tended to deceive customers, and (2) the Terms misled as to the material fact that the Defendants would charge multiple NSF Fees for a single transaction, and such use deceived or tended to deceive customers. This constitutes an "unfair practice" pursuant to s. 14 of the *Consumer Protection Act*, or the similar concepts as they are defined in the Equivalent Consumer Protection Statutes.

34. While the Plaintiff and Class deny that the Terms are ambiguous regarding the Defendants' practice of charging multiple NSF Fees, any ambiguity that allows for more than one reasonable interpretation of a consumer agreement must be interpreted to the benefit of the consumer pursuant to s. 11 of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

35. The Plaintiff and Class Members entered into their contracts with the Defendants after or while the Defendants engaged in the unfair and deceptive practice described above. Accordingly, the Plaintiff and Class Members are entitled to rescind their contracts and seek any further remedy that is available in law, including damages equivalent to the value of all monies paid by the Plaintiff and Class Members to the Defendants resulting from the charging of multiple NSF Fees on a single already rejected transaction, pursuant to s. 18(1) of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

36. The notice requirement should be waived pursuant to s. 18(5) of the *Consumer Protection Act* in order to facilitate access to justice for Class Members.

37. The Defendants' headquarters are located in Toronto, and TD Bank carries on business throughout Ontario. As a result, all Class Members obtain the benefit of the *Consumer Protection Act*. In the alternative, Class Members outside of Ontario obtain the benefit of the Equivalent Consumer Protection Statutes.

Unjust Enrichment

38. TD Bank received and continues to receive enormous revenues by charging multiple NSF Fees in the manner described above.

39. The Plaintiff and Class Members suffered and continue to suffer a deprivation that corresponds to the Defendants' benefit.

40. There is no juristic reason for TD Bank's benefit and Class Members' corresponding deprivation. TD Bank has breached its contract with Class Members and has engaged in "unfair practices" prohibited under consumer protection legislation by virtue of its false, misleading and deceptive representations. The Class Members are entitled to restitution in order to remedy the Defendants' unjust enrichment.

Punitive Damages

41. The high-handed and callous conduct of the Defendant warrants the condemnation of this Honourable Court. TD Bank enjoys a prominent position in an oligopolistic industry. Millions of Canadians are dependent on TD Bank for their day-to-day banking needs. Even without charging duplicate NSF Fees, TD Bank reaps enormous revenues and profits.

42. By choosing to charge duplicate NSF Fees, in violation of its contract with Class Members, TD Bank chose to inflate its already colossal profits. It made this choice knowing that the burden imposed by these illegitimate charges would disproportionately fall on low-income, racialized and otherwise marginalized Canadians. This decision to maximize illegitimate profits at the expense of Canadians least able to afford it, was also made knowing that this vulnerable Class was unlikely to enforce their contractual rights. TD Bank's illegitimate duplicate NSF fees increased significantly during the COVID-19 crisis.

43. In these circumstances, the Plaintiff requests punitive damages to condemn and deter this pandemic profiteering and victimization of vulnerable Canadians.

PLACE OF TRIAL

44. The Plaintiff proposes that this action be tried in Toronto

February 2, 2021

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TYLER DUFAULT
Plaintiff and
THE TORONTO-DOMINION BANK and
THE CANADA TRUST COMPANY
Defendants

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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