

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CANAAN ALEXANDER

Plaintiff

- and -

THE BANK OF NOVA SCOTIA

Defendant



Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

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 \$400.00 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.

Date: June ^{21st} 2022

Issued by 
Local registrar

Address of court office ^{330th} 393 University Avenue 8th Floor
Toronto ON
M5G 1E6
^{1R7th}

TO: **THE BANK OF NOVA SCOTIA**
Scotia Plaza
44 King Street West
Toronto ON M5H 1H1

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 The Bank of Nova Scotia and whose personal deposit account has been charged multiple NSF fees by The Bank of Nova Scotia on a single payment made or cheque issued since January 1, 2012;
- (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) "**Defendant**" means The Bank of Nova Scotia;
- (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) "**Scotiabank**" means The Bank of Nova Scotia.

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 Defendant is liable to the Plaintiff and Class Members for breach of contract;
- (c) a declaration that the Defendant is liable to the Plaintiff and Class Members for unfair practices under the *Consumer Protection Act*;
- (d) a declaration that the Defendant was 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 Defendant 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. Scotiabank 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 Scotiabank's contract with Class Members. As a result of its unlawful practice, Scotiabank 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 Scotiabank 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, Scotiabank 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 Scotiabank's right to reject a transaction and charge a single NSF Fee, but the Defendant's 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 Defendant's sole and undisclosed view, each time Scotiabank unilaterally reprocesses an already rejected payment or cheque it becomes a new, unique transaction that is subject to a fresh NSF Fee. However, Scotiabank's standard form contract does not give the Defendant 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 Defendant is identical for all Class Members.

8. Scotiabank's practice also violates consumer protection legislation in Ontario, where the Plaintiff resides and where Scotiabank is headquartered, and constitutes an

unjust enrichment. The Defendant has been financially enriched, with a corresponding deprivation to the Class Members, for no juristic reason.

THE PLAINTIFF AND CLASS

9. The Plaintiff, Canaan Alexander ("**Canaan**"), is an individual who resides in the City of North Bay, in the Province of Ontario. Canaan is self-employed in the agricultural sector.

10. Canaan maintains a Basic Banking Account (the "**Account**") with Scotiabank. At all material times, Canaan patronized Scotiabank branches located in North Bay, Ontario and conducted his banking online from his home in North Bay, Ontario.

11. On December 29, 2021, an online installment lender FlexMoney.ca ("**FlexMoney**") attempted to draw a \$98.46 pre-authorized debit from Canaan's Account. At that time, the balance in his Account was negative.

12. On December 29, 2021, Scotiabank rejected the transaction due to insufficient funds and charged Canaan a \$48 NSF Fee.

13. Twelve days later, on January 10, 2022, FlexMoney re-presented the same \$98.46 transaction to Scotiabank for payment, unbeknownst to Canaan. Again, Scotiabank rejected the transaction and charged Canaan a second \$48 NSF Fee.

14. In sum, Scotiabank charged Canaan \$96 in fees to process a single payment because he tried to make a transaction while his Account had a negative balance.

15. Canaan took no affirmative action to re-initiate the reprocessing of this transaction. Canaan received no notice from Scotiabank of this reprocessing.

16. Canaan understood that he had made a single "cheque or debit item", as is laid out in Scotiabank's contract, capable of attracting at most a single NSF Fee.

17. 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 The Bank of Nova Scotia and whose personal deposit account has been charged multiple NSF fees by The Bank of Nova Scotia on a single payment made or cheque issued since January 1, 2012.

THE DEFENDANT

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

19. The Defendant's annual report indicates Scotiabank earned \$1,598,000,000 (one billion, five-hundred and ninety-eight million) in banking services fees, including NSF Fees, from Canadian customers in 2021.

20. The Defendant maintains 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 Defendant as a result of the Defendant's practice of charging of multiple NSF Fees on a single payment made or cheque issued.

CAUSES OF ACTION

Breach of Contract

21. The Defendant's "Day-to-Day Banking Companion Booklet" (the "**Terms**") forms the standard form contract between the Defendant 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 Scotiabank regularly charges multiple NSF Fees per transaction.

23. Specifically, the Terms state that Scotiabank will charge depositors a \$48 NSF Fee on a "cheque or other debit item" that is returned as Non-sufficient funds (NSF) in their account:

Cheque or other debit item drawn against your account that is returned as Non-sufficient funds (NSF) in your account	\$48.00
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24. The Terms state "Non-sufficient funds (NSF) means there is not enough money in the account the cheque is drawn from".

25. The Terms clearly state that an NSF Fee will be charged when a **singular** "cheque" or "debit item" is drawn against the depositor's account and returned as NSF by Scotiabank.

26. The Terms do not define the term "debit item", but define the term "debit transaction" to include: "withdrawals from your accounts, including cash withdrawals, cheques drawn on your accounts, transfers to other Scotiabank accounts or financial institutions, bill payments, pre-authorized payments and *Interac* Debit or Visa Debit purchases."

27. Nowhere in the Terms is the counterintuitive result that multiple NSF Fees could be charged on a single debit item or cheque returned NSF authorized or even contemplated.

28. The Terms state under the heading "Pre-authorized payments" that "you must keep enough funds in your account to cover **the payment**". This term, together with the NSF Fee provision, conveys to Class Members that they are responsible for ensuring their account has sufficient funds to cover a single pre-authorized payment drawn against their account, but makes no mention of the possibility that Scotiabank will charge a \$48 NSF Fee if they fail to keep sufficient funds in their account to cover subsequent re-presentments of the same pre-authorized payment.

29. The Class Members are everyday 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 a debit item or a cheque is drawn against their account without sufficient funds to cover it.

30. The Plaintiff and Class deny that the Terms are ambiguous about Scotiabank'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.

31. The Terms are standard form documents drafted by Scotiabank without any input or ability to negotiate the terms by the Class Members. It is and has always been in Scotiabank'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.

32. In sum, Scotiabank represents that one \$48 NSF Fee will be charged when a cheque or debit item is drawn against a depositor's account with insufficient funds in their account. Scotiabank breached, and continues to breach, its contract with Class Members when it charges customers multiple NSF Fees on the same already rejected debit item or cheque.

Consumer Protection Act

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

34. The Defendant's Terms contained false, misleading and/or deceptive representations because, among other things, (1) the Terms failed to state the material fact that the Defendant 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 Defendant 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.

35. While the Plaintiff and Class deny that the Terms are ambiguous regarding the Defendant's 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.

36. The Plaintiff and Class Members entered into their contracts with the Defendant after or while the Defendant 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 Defendant 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.

37. 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.

38. The Defendant's headquarters are located in Toronto, and Scotiabank 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

39. Scotiabank received and continues to receive enormous revenues by charging multiple NSF Fees in the manner described above.

40. The Plaintiff and Class Members suffered and continue to suffer a deprivation that corresponds to the Defendant's benefit.

41. There is no juristic reason for Scotiabank's benefit and Class Members' corresponding deprivation. Scotiabank 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 Defendant's unjust enrichment.

Punitive Damages

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

43. By choosing to charge duplicate NSF Fees, in violation of its contract with Class Members, Scotiabank 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. Its 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. Scotiabank's illegitimate duplicate NSF fees increased significantly during the COVID-19 crisis.

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

PLACE OF TRIAL

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

June 21, 2022

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CANAAN ALEXANDER

Plaintiff and

THE BANK OF NOVA SCOTIA

Defendant

Court File No.:

CV-22-00682993-000P

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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