

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Action)

No: 500-06-000808-168

LOU VAILLANCOURT-THIVIERGE

Plaintiff

v.

BANQUE DE MONTRÉAL & ALS

Defendants

**DEFENCE OF THE DEFENDANTS THE BANK OF NOVA SCOTIA
AND TANGERINE BANK
(Article 170 C.C.P.)**

**IN DEFENCE TO THE PLAINTIFF'S AMENDED ORIGINATING APPLICATION,
DEFENDANTS, THE BANK OF NOVA SCOTIA AND TANGERINE BANK PLEAD AS
FOLLOWS:**

1. With respect to the allegations contained in paragraph 1 of the Plaintiffs' *Demande introductive d'instance modifiée* dated February 22, 2021, (the "**Originating Application**"), the Defendants, The Bank of Nova Scotia ("**BNS**") and Tangerine Bank ("**Tangerine**", and collectively with BNS, the "**Defendants**"), refer to the authorization judgment of the Honourable Michel Yergeau J.S.C. dated January 21, 2019 (the "**Authorization Judgment**"), and deny all that is not in conformity therewith.
2. With respect to the allegations contained in paragraph 2 of the Originating Application, the Defendants refer to the Authorization Judgment and deny all that is not in conformity therewith.
3. The Defendants deny as drafted the allegations contained in paragraph 3 of the Originating Application.
4. The Defendants deny as drafted the allegations contained in paragraph 4 of the Originating Application, and in particular, they deny having breached sections 8, 13 and 230 (a) of the *Consumer Protection Act*, CQLR c P-40.1 ("**CPA**") and deny that the class members are entitled to punitive damages or a reduction of their obligations.

5. The Defendants deny as drafted the allegations in paragraph 5 of the Originating Application, and in particular, they deny that any fees they have charged to class members are abusive, and deny that any such fees ought to be reduced or annulled based on articles 6, 7, 1437 and 1623 of the *Civil Code of Québec*, CQLR c CCQ-1991 (“**CCQ**”).
6. With respect to the allegations contained in paragraph 6 of the Originating Application, the Defendants admit that they are financial institutions, but otherwise deny as drafted the remainder of the paragraph, adding that although BNS operates a number of establishments in Québec, Tangerine is a digital bank that does not operate any establishment in Québec.
7. With respect to the allegations contained in paragraph 7 of the Originating Application, the Defendants refer to the Exhibits P-2-F to P-2-I, which are the only exhibits concerning BNS and Tangerine respectively, and deny all that is not in conformity therewith. The Defendants otherwise take no position with respect to the allegations that concern other defendants.
8. The Defendants have no knowledge of the allegations contained in paragraph 8 of the Originating Application, which allegations concern other defendants.
9. Paragraphs 9 and 10 pertain to issues of law that the Defendants do not have to answer at this stage.
10. With respect to the allegations contained in paragraph 11 of the Originating Application, the Defendants refer to Exhibits P-9 and P-13, which are the only exhibits concerning BNS and Tangerine respectively, and deny all that is not in conformity therewith, while taking no position with respect to the allegations to the extent that they concern other defendants.
11. With respect to the allegations contained in paragraphs 12, 13, 14, 15, 16 and 17 of the Originating Application, the Defendants refer to Exhibits P-9 and P-13 and deny all that is not in conformity therewith.
12. The Defendants deny the allegations contained in paragraph 18 of the Originating Application.
13. The Defendants deny the allegations contained in paragraphs 19, 20 and 21 of the Originating Application.
14. The Defendants have no knowledge of the allegations contained in paragraphs 22 to 33 of the Originating Application, which allegations concern defendants other than the Defendants.
15. With respect to the allegations contained in paragraph 34 of the Originating Application, the Defendants refer to Exhibit P-9 and deny all that is not in conformity therewith.

16. With respect to the allegations contained in paragraph 35 of the Originating Application, the Defendants refer to Exhibit P-18-F and deny all that is not in conformity therewith.
17. The Defendants have no knowledge of the allegations contained in paragraphs 36 to 44, which allegations concern defendants other than the Defendants.
18. With respect to the allegations contained in paragraph 45 of the Originating Application, the Defendants refer to Exhibit P-13 and deny all that is not in conformity therewith.
19. With respect to the allegations contained in paragraph 46 of the Originating Application, the Defendants refer to Exhibit P-18-J, P-18-J2, and Exhibit BNS-2, and deny all that is not in conformity therewith.
20. The Defendants have no knowledge of the allegations contained in paragraphs 47 and 48 of the Originating Application, which allegations concern defendants other than the Defendants.
21. With respect to the allegations contained in paragraph 49 of the Originating Application, the Defendants refer to Exhibits P-9, P-13, P-18-J and P-18-J2, and deny all that is not in conformity therewith.
22. The Defendants deny the allegations contained in paragraph 49-A of the Originating Application.
23. The Defendants deny the allegations contained in paragraph 49-B of the Originating Application.
24. The Defendants deny the allegations contained in paragraph 49-C of the Originating Application.
25. The Defendants deny the allegations contained in paragraph 49-D of the Originating Application.
26. The Defendants deny the allegations contained in paragraph 50 of the Originating Application.
27. The Defendants deny the allegations contained in paragraph 51 of the Originating Application.
28. The Defendants deny the allegations contained in paragraph 52 of the Originating Application.
29. The Defendants deny as drafted the allegations contained in paragraphs 53 to 59 of the Originating Application.

30. The Defendants deny the allegations contained in paragraphs 60 to 63 of the Originating Application.
31. The Defendants deny as drafted the allegations contained in paragraphs 64 and 65 of the Originating Application.
32. The Defendants deny the allegations contained in paragraphs 66 to 81 of the Originating Application.
33. The Defendants have no knowledge of the allegations contained in paragraphs 82 to 89 of the Originating Application, which allegations concern defendants other than the Defendants.
34. With respect to the allegations contained in paragraph 90 of the Originating Application, the Defendants refer to the Authorization Judgment and deny all that is not in conformity therewith.

AND PLEADING FURTHER, DEFENDANTS BNS AND TANGERINE ADD:

I. INTRODUCTION

35. The Plaintiff is bringing this class action claiming that the fees (known as NSF fees) charged by the Defendants for the handling of “non-sufficient funds” payment orders (referred to as NSF payment orders) are unlawful.
36. On behalf of themselves and the other Bank Class Members (as defined below), the Plaintiff seeks a refund of the NSF fees, as well as punitive damages.
37. The Plaintiff’s main alleged cause of action is that the NSF fees are penalties prohibited by section 13 CPA. This cause of action has no merit.
38. As alternatives to their main alleged cause of action, the Plaintiff asserts several subsidiary causes of action, namely that the NSF fees are:
 - a. Abusive within the meaning of article 1623 CCQ;
 - b. Abusive within the meaning of articles 6, 7 and 1437 CCQ
 - c. Lesionary within the meaning of section 8 CPA;
 - d. Charged for unsolicited services, contrary to section 230 (a) CPA.
39. The Plaintiff’s subsidiary causes of action are equally without merit.
40. The handling of NSF payment orders is but one of many services offered by the Defendants to customers. Likewise, the NSF fees are but one component of the service fees charged by the Defendants for all their services. Considered as a whole, the service fees charged for the Defendants’ services are reasonable and proportional.

41. The payment NSF fees, and their amount are expressly provided for in the agreement between the Defendants and the customers. NSF fees are only charged after a customer has issued an NSF payment order, thereby requesting that the Defendants handle the order in accordance with the terms of the agreement.
42. Accordingly, this class action ought to be dismissed as against the Defendants.

II. THE PROCEEDINGS

43. On January 21, 2019, the Plaintiff was authorized to bring a class action against the Defendants and other financial institutions, as appears from the Authorization Judgment.
44. The Plaintiff was allowed to commence a class action on behalf of two distinct classes of consumers, with the Defendants being concerned with only the following of those classes:

Tous les consommateurs résidant au Québec qui détiennent ou qui ont détenu un compte auprès de l'une ou l'autre des banques défenderesses ([...] Banque de Nouvelle-Écosse, [...] Banque Tangerine [...]) duquel ces dernières ont refusé un ordre de paiement (chèques ou débits/paiements préautorisés) et qui ont en conséquence payé des frais pour insuffisance de fonds de type sans provision, depuis le 12 septembre 2013.

(The “**Bank Class**” or the “**Bank Class Members**”.)

45. As appears from the Bank Class definition, the class period is open-ended and begins on September 12, 2013 (the “**Bank Class Period**”).
46. The Authorization Judgment identified the following questions to be treated collectively:
 - a. Are the NSF fees charged by the Defendants damages or penalties stipulated in advance in the contract for the non-performance of a consumer’s obligation?
 - b. If so, have the Defendants breached section 13 CPA?

Subsidiarily

- c. Do articles 1623 and 1437 CCQ apply to the NSF fees charged by the Defendants, and, if so, have the Defendants breached these provisions?

Subsidiarily

- d. Are the NSF fees charged by the Defendants to the Bank Class Members so high, considering the Defendants’ prestations, that they amount to an

exploitation of consumers and an objective lesion, contrary to section 8 CPA?

- e. Are the stipulations providing for the NSF fees abusive in that they are excessively and unreasonably detrimental to the Bank Class Members and are therefore contrary to the requirements of good faith within the meaning of article 1437 CCQ?

Subsidiarily

- f. Have the Defendants, in charging NSF fees, charged an amount for a service that was not solicited by the Bank Class Members?
 - g. If so, have the Defendants breached s. 230 (a) CPA?
 - h. If so, can the Bank Class Members claim from the Defendants a refund of all NSF fees, or, subsidiarily, a substantial reduction of the NSF fees and a refund in the corresponding amount?
 - i. Can the Bank Class Members claim punitive damages from the Defendants in accordance with s. 272 CPA, and, if so, in what amount?
 - j. Are the Bank Class Members entitled to the interests and the additional indemnity on the amounts paid to them by the Defendants, including the punitive damages?
47. On April 23, 2019, the Plaintiff filed the originating application, which was amended on February 22, 2021 (amendments approved on June 15, 2021).

III. THE DEFENDANTS

48. BNS is a financial institution incorporated pursuant to the federal *Bank Act*, SC 1991, c 46 (the "**Bank Act**"), as appears from Exhibit P-2-F.
49. BNS provides a full suite of financial advice and banking solutions to retail, small business, and commercial banking customers, both in Canada and globally.
50. Among others, BNS provides everyday banking services, including debit cards, chequing accounts, credit cards, investments, mortgages, loans, and insurance products to individuals throughout Canada.
51. BNS offers its services to Canadians via approximately 950 branches, more than 3,650 automated banking machines ("**ABMs**"), a website, a mobile application and call centers.
52. Tangerine is a financial institution incorporated pursuant to the *Bank Act*, as appears Exhibit P-2-I.

53. In November 2012, Tangerine became a wholly-owned subsidiary of BNS.
54. Tangerine's first name was ING Bank of Canada, and until it adopted its current name, in 2014, Tangerine was known ING Direct.
55. Tangerine offers alternative digital and self-directed banking solutions, including chequing and saving accounts, credit cards, investments, mortgages, and loans.
56. As a digital bank, Tangerine offers its services mainly via its website and mobile application, as well as through its call centers.
57. Both of the Defendants are members in good standing of Payments Canada.
58. Payments Canada is the organization that owns and operates Canada's payment clearing and settlement infrastructure, including the Automated Clearing Settlement System ("**ACSS**"), which is used to process the vast majority of paper-based and electronic payment items made by Canadians.
59. Payments Canada sets out the bylaws, rules and standards that govern the clearing and settlement of electronic payment orders and paper-based payment orders through ACSS.
60. Paper-based payment items processed through ACSS include cheques, paper remittances and government items, such as government cheques, redeemed bonds, treasury bills and coupons.
61. Electronic payment items processed through ACSS include debit transfers, pre-authorized debits, direct deposits, electronic data interchange, electronic remittances, imaged paper items, and shared ABM Networks.
62. In 2019, ACSS processed 8.3 billion payment items worth 7.3 trillion dollars, representing an average of 32.9 million payment items worth 28.9 billion dollars every day.

IV. THE BANKING AGREEMENTS

A. The Agreements Between the Defendants and the Bank Class Members

63. When Bank Class Members opened one or more accounts with either of the Defendants, they agreed to the terms of the Defendants' agreements.
64. With regards to BNS, a document entitled *Day-to-Day Banking – Companion Booklet* (the "**BNS Agreement**") sets out the express terms and conditions generally applicable to deposit accounts opened by Bank Class Members during the Bank Class Period.

65. The BNS Agreement was updated and reissued more or less once every year during the Bank Class Period, as appears from the various iterations of the BNS Agreement disclosed in support hereof as **Exhibit BNS-1**, *en liasse*.
66. The BNS Agreement provides the following:
- Your continued use of the Account, the Automated Banking Services or any other service with us, acknowledges that you agree to and accept the new terms and conditions of the ScotiaCard Cardholder Agreement and all agreements related to the Account or the service as amended, modified or replaced. Scotiabank has the right to send you a new ScotiaCard with new features without prior notice.
- (Exhibit BNS-1L – BNS Agreement dated September 2018, at p. 51-52)
67. Throughout its various editions, the BNS Agreement remained substantively the same as far as the provisions relevant to this class action are concerned, and unless specified otherwise, all references herein to the BNS Agreement refer to all the iterations of the BNS Agreement indistinctively.
68. With respect to Tangerine, a document entitled *Account Terms* (the “**Tangerine Agreement**”, and collectively with the BNS Agreement, the “**Agreements**”) sets out the express terms and conditions generally applicable to deposit accounts opened by Bank Class Members during the Bank Class Period.
69. The Tangerine Agreement was updated during the Bank Class Period, as appears from the various iterations of the Tangerine Agreement disclosed in support hereof as **Exhibit BNS-2**, *en liasse*.
70. The Tangerine Agreement provides the following:
- We may change these Account Terms at any time, and any changes communicated to you at least 30 days before they take effect. Notice of changes to the Account Terms may be distributed through our statements, letters and/or posted on the Tangerine website. If you access or have funds on deposit in any Account at Tangerine after the effective date of the change, you automatically accept the change.
- (Exhibit BNS-2H – Tangerine Agreement dated February 3, 2020, at s. A “Changes to this Agreement”)
71. Throughout its various editions, the Tangerine Agreement remained substantively the same as far as the provisions relevant to this class action are concerned, and unless specified otherwise, all references herein to the Tangerine Agreement refer to all the iterations of the Tangerine Agreement indistinctively.

B. Overview of the Services Offered by the Defendants

72. The relationship between Bank Class Members and the Defendants takes on the characteristics of various types of contract depending on the services at issue (e.g. contract for services, loan, mandate).
73. In connection with the customers' account, the Defendants offer numerous services, including:
 - a. providing customers access to numerous self-banking solutions via websites, mobile applications, and automated banking machines (ABMs);
 - b. processing the customers' self-directed or teller-assisted debit transactions (e.g. cash withdrawals, cheques drawn on the account, transfers to other accounts or financial institutions, bill payments, pre-authorized payments, Interac purchases, stop-payment of cheques or pre-authorized payments);
 - c. processing the customers' self-directed or teller-assisted credit transactions (e.g. cheque deposits, direct deposits for paycheques and other payments, wire-transfers);
 - d. processing the customers' stop-payments of cheques or pre-authorized debits;
 - e. supplying personalized cheques, travellers' cheques, and bank drafts;
 - f. providing recordkeeping-related services, such as providing electronic or paper account statements; and
 - g. processing transactions involving foreign currencies.

C. Overview of the Service Fees Charged by the Defendants

74. Each of the Defendants charges its own fees to ensure that it receives fair compensation for the services it offers.
75. The fees charged by the Defendants for their services are made of fixed monthly fees (if any) – the amount of which depends on the nature of the customer's account (e.g. chequing account, savings account, foreign currency account) and service package – and discrete fees (if any) for additional services that are not included in the customer's account and service package (see for instance Exhibit BNS-1L – BNS Agreement dated September 2018, at p. 14 and 24-35; Exhibit BNS-2H – Tangerine Agreement dated February 3, 2020, at s. I.8 "Charges" and accompanying Fee Schedule).
76. Under the Agreements, Bank Class Members have agreed that the Defendants would deduct from the account all applicable service fees, even if such a deduction causes the account to be overdrawn or increases an existing overdraft.

In return for our opening this personal deposit account, you agree to pay (and we can deduct) from this account any monthly fee and additional service charges for the account.

[...]

The above-described deductions may create or increase an overdraft. You promise to pay us on request, the amount of any overdraft along with all applicable interest and your overdraft charges.

(Exhibit BNS-1L – BNS Agreement dated September 2018, at p. 83; see also Exhibit BNS-1M – BNS Agreement dated June 2019, at p. 36-37, at p. 101. Emphasis added.)

We reserve the right to use all of the money in your Account(s) to pay any debts or other obligations (including any contingent obligations) you owe us whether in the same or other currency. (That is what's known as a "Set-Off"). You agree to allow us to use some or all of the money in your Account to buy any currencies that may be necessary to pay debts that you owe us. In the case of a joint Account, all Account holders consent to our using all money, up to the full amount on deposit, as payment for any debt or obligations you owe us, regardless of each individual joint Account holder's contribution to the Account.

(Exhibit BNS-2H – Tangerine Agreement dated February 3, 2020, at s. A "Right of Set Off". Emphasis added.)

There is no monthly fee for your Tangerine Chequing Account. For certain transactions and circumstances, a fee may apply. These fees are outlined in the Fee Schedule available at tangerine.ca/feeschedule, and is also available in print if requested. Tangerine will debit your Chequing Account when fees are applicable. Tangerine will provide you with 30 days advance notice of any changes to the charges applicable to your Chequing Account or any new charges applicable to your Chequing Account.

(Exhibit BNS-2H – Tangerine Agreement dated February 3, 2020, at s. 1.8. Emphasis added.)

77. Importantly for the purposes of this class action, both Defendants offer, as an optional service, overdraft protection.

D. Optional Overdraft Protection

78. The Defendants provide alternative services to NSF Fees, including overdraft protection, to compensate for a potential lack of liquidity.
79. Through the optional overdraft protection, the Defendants may from time to time honour the customer's NSF payment orders, up to a pre-authorized limit.

80. In exchange for the Defendants overdraft protection, the customer agrees to pay a certain amount every month during which the account is overdrawn (see Exhibit BNS-1M – BNS Agreement dated June 2019, at p. 36-37; Exhibit BNS-1L – BNS Agreement dated September 2018, at p. 27; Exhibit BNS-2 – Tangerine Agreements, at s. I.16 and I.17).

FOR THESE REASONS, PRAY THE COURT:

ALLOW the present Defence;

DISMISS Plaintiff's Originating Application against the Defendants The Bank of Nova Scotia and Tangerine Bank;

THE WHOLE with costs.

MONTREAL, August 16, 2021



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PROVINCE OF QUÉBEC
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**SUPERIOR COURT
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**LIST OF EXHIBITS OF THE DEFENDANTS
THE BANK OF NOVA SCOTIA AND TANGERINE BANK**

Exhibit BNS-1A	Scotiabank Day-to-Day Banking – Companion Booklet dated August 2013
Exhibit BNS-1B	Scotiabank Day-to-Day Banking – Companion Booklet dated January 2014
Exhibit BNS-1C	Scotiabank Day-to-Day Banking – Companion Booklet dated January 2015
Exhibit BNS-1D	Scotiabank Day-to-Day Banking – Companion Booklet dated August 2015
Exhibit BNS-1E	Scotiabank Day-to-Day Banking – Companion Booklet dated November 2015
Exhibit BNS-1F	Scotiabank Day-to-Day Banking – Companion Booklet dated July 2016
Exhibit BNS-1G	Scotiabank Day-to-Day Banking – Companion Booklet dated March 2017
Exhibit BNS-1H	Scotiabank Day-to-Day Banking – Companion Booklet dated July 2017
Exhibit BNS-1I	Scotiabank Day-to-Day Banking – Companion Booklet dated September 2017
Exhibit BNS-1J	Scotiabank Supplement to the Day-to-Day Banking Companion Booklet dated September 2017

Exhibit BNS-1K	Scotiabank Day-to-Day Banking – Companion Booklet dated December 2017
Exhibit BNS-1L	Scotiabank Day-to-Day Banking – Companion Booklet dated September 2018
Exhibit BNS-1M	Scotiabank Day-to-Day Banking – Companion Booklet dated June 2019
Exhibit BNS-1N	Scotiabank Day-to-Day Banking – Companion Booklet dated September 2019
Exhibit BNS-1O	Scotiabank Day-to-Day Banking – Companion Booklet dated May 2020
Exhibit BNS-2A	Tangerine Account Terms dated April 7, 2014
Exhibit BNS-2B	Tangerine Account Terms dated January 1, 2016
Exhibit BNS-2C	Tangerine Account Terms dated January 12, 2018
Exhibit BNS-2D	Tangerine Account Terms dated April 30, 2018
Exhibit BNS-2E	Tangerine Account Terms dated August 17, 2018
Exhibit BNS-2F	Tangerine Account Terms dated August 20, 2019
Exhibit BNS-2G	Tangerine Account Terms dated August 26, 2019
Exhibit BNS-2H	Tangerine Account Terms dated February 3, 2020
Exhibit BNS-2I	Tangerine Account Terms dated May 4, 2021
Exhibit BNS-2J	Tangerine Fair Fees Schedule dated August 15, 2015
Exhibit BNS-2K	Tangerine Fair Fees Schedule dated January 1, 2016
Exhibit BNS-2L	Tangerine Fair Fees Schedule dated September 22, 2017
Exhibit BNS-2M	Tangerine Fair Fees Schedule dated December 12, 2017
Exhibit BNS-2N	Tangerine Fair Fees Schedule dated July 30, 2018

Exhibit BNS-2O Tangerine Fair Fees Schedule dated May 16, 2018

Exhibit BNS-2P Tangerine Fair Fees Schedule dated November 29, 2018

Exhibit BNS-2Q Tangerine Fair Fees Schedule dated September 27, 2019

Exhibit BNS-2R Tangerine Fair Fees Schedule dated November 29, 2019

Exhibit BNS-2S Tangerine Fair Fees Schedule dated January 1, 2020

Exhibit BNS-2T Tangerine Fair Fees Schedule dated July 20, 2020

Exhibit BNS-2U Tangerine Fair Fees Schedule dated September 21, 2020

MONTREAL, August 16, 2021



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**DEFENCE
(Article 170 C.C.P.)**

ORIGINAL

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