

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N :500-06-000808-168

LOU VAILLANCOURT-THIVIERGE

Plaintiff

v.

BANK OF MONTREAL and al.

Defendants

DEFENCE OF THE TORONTO DOMINION BANK

IN RESPONSE TO PLAINTIFF'S MODIFIED ORIGINATING APPLICATION DATED FEBRUARY 22, 2021, THE DEFENDANT, THE TORONTO DOMINION BANK, STATES AS FOLLOWS:

1. With respect to paragraphs 1 to 5 of the Amended Originating Application dated February 22, 2021 (hereinafter the "**Application**"), the Defendant, the Toronto Dominion Bank (hereinafter "**TD Bank**" or the "**Defendant**"), refers this Court to the judgment authorizing a class action in the present matter rendered by the Honourable Justice Michel Yergeau on January 21, 2019 (the "**Authorization Judgment**") and denies anything contrary to its content;
2. With respect to paragraphs 6 and 7, the Defendant admits the allegations concerning TD Bank and otherwise has no knowledge of the allegations concerning the other defendants;
3. The Defendant ignores paragraph 8;
4. The Defendant denies paragraph 9;
5. The Defendant ignores paragraph 10;
6. With respect to paragraphs 11 to 17, the Defendant refers to exhibits P-14 and P-18K, denying anything contrary to their content, and otherwise has no knowledge of the allegations concerning the other defendants;
7. The Defendant denies paragraphs 18 to 21;
8. The Defendant ignores paragraphs 22 to 46 which concern other defendants;
9. The Defendant denies paragraph 47 and refers the Court to exhibit P-14;

10. With respect to paragraphs 48 and 49, the Defendant refers to exhibits P-14 and P - 18 K, denying anything contrary to their content and otherwise has no knowledge of the allegations concerning the other defendants;
11. The Defendant denies paragraph 49-A and refers the Court to exhibits P-14 and P - 18 K. It otherwise has no knowledge of the allegations concerning the other defendants;
12. The Defendant denies paragraphs 49-B, 49-C, 49-D, 50 and 51;
13. With respect to paragraphs 52 to 59, the Defendant refers to exhibits P-14 and P-18K, denying anything contrary to their content, and otherwise has no knowledge of the allegations concerning the other defendants;
14. The Defendant denies paragraphs 60 to 81;
15. The Defendant ignores paragraphs 82 to 89;
16. With respect to paragraph 90, the Defendant refers this Court to the Authorization Judgment and denies anything contrary to its content;

THE DEFENDANT, TD BANK, RE-ESTABLISHES THE FACTS AND PLEADS AS FOLLOWS:

I. CONTEXT

17. On September 12, 2016, Plaintiff filed an Application for authorization to institute a class action against several financial institutions including TD Bank. This application was amended on September 27, 2016, on February 5, 2017 and on June 20, 2017;
18. On January 21, 2019, Justice Yergeau J.C.S. rendered the Authorization Judgment authorizing the Plaintiff to exercise this class action. As noted by Justice Yergeau, the Defendants collectively agreed, without any prejudice or admission, not to oppose the application at the authorization stage and to reserve their contestation for the hearing on the merits;
19. On April 19, 2019, Plaintiff filed an Originating Application instituting this class action against the Defendants;
20. On June 15, 2021, Justice Garry D. D. Morrison J.C.S. granted Plaintiff's motion and allowed the filing of a Modified Originating Application dated February 22, 2021 (the "**Application**") which notably removed one of the two class representatives from the proceedings;
21. The Application is ill-founded in fact and in law;
22. Plaintiff alleges that the service fees charged by TD Bank when a transaction is refused due to insufficient funds in the deposit account is contrary to sections 8, 13 and 230 a) of the *Consumer Protection Act* (the "**C.P.A.**") and to sections 6, 7 and 1437 of the *Civil Code of Québec* (the "**C.C.Q.**")

23. TD Bank contests the Application which is founded on an erroneous interpretation of the relevant contracts and which is contrary to the applicable law;

II. THE PERSONAL DEPOSIT ACCOUNTS OFFERED BY TD BANK

24. TD Bank is a Canadian chartered bank which offers a wide variety of financial products and services. It notably offers personal deposit accounts to individuals residing in the province of Québec;

A. Opening a personal deposit account

25. When opening a personal deposit account with TD Bank, a customer enters into the Financial Services Agreement (hereinafter the “**FSA**”), filed herewith as **Exhibit TD- 1**, and is notably bound by the Financial Services Terms (hereinafter the “**FST**”), filed herewith as **Exhibit TD-2**;
26. TD Bank offers a variety of personal deposit accounts and related services from which customers may choose the one which best suits their needs. These different types of deposit accounts are described in detail in TD Bank’s “About our accounts and related services” documents (hereinafter the “**AOA**”) filed herewith as **Exhibit TD-3**. The precise TD Bank entity which issues each type of personal deposit accounts is specified in the AOA;
27. A customer holding a personal deposit account with TD Bank can make a deposit of money which is received by the bank in the normal course of receiving cash deposits from its clients;
28. TD Bank is a member of the Canadian Deposit Insurance Corporation. As such, a customer’s eligible deposit account is protected (up to an amount of \$100,000) pursuant to the *Canada Deposit Insurance Corporation Act*;

B. Depositing funds

29. TD Bank provides several convenient and easy ways for customers to make a deposit of money to their personal deposit account:

2. Deposits to your accounts - You may deposit funds to your accounts with us personally, by direct deposit, mail, electronic transfer, by sending us digital images or electronic representations of cheques or other Instruments, or in any manner acceptable to us from time to time. (...)

30. TD Bank also notably offers a Direct Deposit programs, according to which a no-hold may be placed on the money deposited. In contrast to the usual deposit hold limit, the funds may be credited directly to the customer account and be immediately available. This may apply, for example, to salary payments which the customer receives from his or her employer;

C. Accessing the funds deposited

31. Customers then have several means to consult their deposit account and to verify the current balance. This can notably be done in one of TD's branches, using one of TD's 4000 ATM across Canada and the US, using a third party ATM or through TD's online banking platform, telephone banking service or mobile application. Several of these services are available to customers 24 hours a day, seven days a week;
32. Customers can also access their funds to make transactions (i.e. payments, transfers or withdrawals). As described in the FST, this can notably be done by: issuing a cheque, in-branch withdrawal, automated teller machines, pre-authorized payments, transfer of funds (in-branch, by phone or through the electronic banking services) and payment using TD access card;
33. Various telephone and internet banking services are also offered to TD Bank's customers, with 24/7 access, through EasyWeb[®] Internet Banking, TD EasyLine Telephone Banking and TD app, which include the following services:
 - a) Transfer of money between TD accounts;
 - b) TD Fraud Alerts, which notifies customers of suspicious account activity;
 - c) The ability to pay via smartphone for in-store purchases in Canada using Apple Pay;
 - d) The possibility to transmit money electronically using *Interac e-Transfer*[®], Visa Direct or wire payments;
 - e) Deposit of cheques through smartphone using TD Mobile Deposit;
 - f) Online payment of bills using the TD app;
 - g) QuickView, which facilitates viewing balances in the TD app, online account statements and online access to account details;
 - h) Clari[™], an automated virtual assistant available 24/7 that provides answers to customers common banking questions;
 - i) TD MySpend app, a personal expense management tool;
 - j) TD for Me, that allows user to receive information about TD Canada Trust Branches, local events, offers and tips;
 - k) Certification of cheques, possibility to obtain a bank draft;
 - l) Purchase of foreign currencies;
 - m) Security Guarantee;
34. These services facilitate banking services, allowing customers to use their bank account in the comfort of their home or on the go from any location with an access to the internet or to phone services;

D. Fees associated with a personal deposit account

35. In exchange for the broad range of services described above, a customer holding a personal deposit account agrees to pay certain fees which are set out in the FST and AOA. Depending on the type of account chosen by the customer, this may include monthly fees or transaction fees;
36. The AOA also includes a list of services which a customer may require in relation with a deposit account (the “**TD Service Fee Schedule**”). As indicated, should a customer chose to request one of these services, the account will be charged “*a service fee, in addition to any transaction fees and monthly fees that apply unless the services are included with your account*”;
37. Certain types of personal deposit accounts are offered without any monthly charge and include a number of free transactions per month. Further, many services are offered by TD Bank for free. This notably includes purchases made in Canadian dollars with a TD Access Card or for receiving an Interac e-Transfer®;
38. All of these services are considered as part of the package of accounts and services offered to clients and are paid for through the pricing structure of the accounts and services;

III. PROCESSING PAYMENT ORDERS

39. One of the main benefits of a personal deposit account is that it allows account holders to access their funds in order to make payments to third parties (i.e. by issuing a cheque). The account holder may also authorize the third party to debit amounts directly from the account through pre-authorized debits;
40. When presented with a payment order, the bank must undertake all required steps in order to process this order and complete the payment requested by its customer. This forms part of the services offered by TD Bank to personal deposit account holders;
41. In practice, payment instruments (both paper based and electronic) are settled through the national system for the clearing and settlement of payments (known as the Automated Clearing Settlement System or ACSS);
42. Settlement is the function of identifying and resolving the banks’ reciprocal claims and obligations for payment of the cheques issued by their customers and presented in the system for clearing and settlement each day;
43. In the operation of the clearing system, settlement is made on the basis of a summary of the debts owed by, and owed to, individual banks. This process requires the calculation of the net position of each bank when paired with each other bank, individually; and secondly, the net/net position of each bank with respect to all of the participating banks;
44. The value of payments cleared by Payments Canada’s systems in 2020 was approximately \$107 trillion or \$420 billion every business day. These encompass a wide range of payments made by Canadians, including those made with pre-authorized debits and cheques;

45. An organization named Payment Canada has the mandate to oversee this national system for the clearing and settlement of payments (further to the *Canadian Payment Act*) including the associated systems, bylaws, rules and standards;
46. In accordance with Payments Canada rules¹, the bank must generally settle each payment order on the same day that the order is presented. This means that, for clearing purposes, the payment instrument is taken at its face value on the day that it is presented for collection. At that point, the bank is therefore advancing the funds necessary to pay the cheque although no determination has been made as to whether the order is valid and whether the drawee bank is obligated to pay an item;
47. Thus, at the time of clearing, the bank does not have the opportunity to verify whether sufficient funds are currently held in the relevant account in order to make the payment. This verification will have to be made and, if the funds are not sufficient, the item will have to be settled through the ACSS on the next business day.²
48. In order to ensure the efficient functioning of the payment system, banks are therefore taking a certain risk between the moment when a payment order is settled (when funds are advanced) and the moment when it has the opportunity to conduct a review of the payment order and require a reimbursement if needed;

IV. THE SERVICES THAT MUST BE OFFERED IN CASE OF AN NSF TRANSACTION

49. The fees at issue in the present class action are the services fees charged by TD Bank and its co-defendants when a payment instrument is subsequently refused due to the fact that the customer who issued the instrument has insufficient funds in his or her deposit account;
50. In light of the significant number of deposits, transactions and payments that a single customer may make, it can reasonably be expected that certain customers will sometimes issue a cheque or pre-authorized debit without having the necessary funds in their account to fulfill this payment (hereinafter an “**NSF Transaction**”). This possibility is expressly recognized at page 8 of the AOA;
51. As indicated above, before having the chance to verify whether or not sufficient funds are available in the account, the bank will have already processed the payment instrument at face value and transferred the amount indicated on the instrument to the receiving bank (through the clearing and settlement system);
52. Once the bank makes the required verifications and is informed that the balance of the account is not sufficient to honour the payment, different outcomes are possible depending on the type of account, the services selected by the customer and the circumstances of each case;

¹ See, notably, the CPA Rules Manual, Introduction, Rights and obligations/ exchange and settlement, section 3.

² The time limit is found in s. 5 of Rule A4 (Automated Clearing Settlement System (ACSS) Rules and Standards).

53. First, if the customer subscribed to TD Bank’s overdraft protection and the amount of the NSF Transaction falls within the overdraft limit, the required amount will be advanced to the customer, in the form of a loan. The payment to the third party will therefore be honored and TD Bank’s customer will be charged interest on the amount in overdraft;
54. If a personal deposit account holder does not have an overdraft protection or if the NSF Transaction exceeds the pre-established overdraft limit, TD Bank may still approve and process the NSF Transaction. This requires a credit decision by the bank which is lending the required amount to the customer in order to honor the payment instrument issued. In such a case, a \$5 service fee will be charged as well as the applicable interest on the amount in overdraft;
55. Finally, if TD Bank decides not to lend the required amount, there will be insufficient funds in the account to complete the payment issued by the customer. In such a scenario, TD Bank will be obliged to provide an additional service to the customer and take the steps required to return the payment instrument to the financial institution of the payee in order to obtain a reimbursement of the amount which it had already paid on behalf of its customer;
56. These type of items where the drawee’s account holds insufficient fund must generally be returned through the clearing and settlement system a day or so later. The bank will have to prepare the required documentation indicating the reason for return and demand a reimbursement from the payee’s bank. The funds will then generally be returned to the presenting bank in the second clearing and settlement when the item is returned;
57. In such a case, TD Bank will charge a \$48 services charge for having to process and then cancel the transactions in question:

Non-sufficient funds	Fees
If you have overdraft protection but you issue a cheque or make a payment over the amount of funds in your account plus your overdraft protection 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
If you do not have overdraft protection 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

(page 8 of the AOA, exhibit TD-3)

58. The \$48 service fees described above (hereinafter “**NSF fees**”) are clearly disclosed to customers from the outset;
59. Customers have multiple ways to avoid NSF Transactions and the resulting NSF fees. In addition to the overdraft protections, they can ask TD Bank to extend the maximum amount that can be overdrawn on given notice, they can stop a payment that has not already been paid, they can speak to a TD advisor to align payment dates with direct deposit/pay days and they are offered easy ways to keep track of their balance at any

time of the day and night in order to ensure they have sufficient funds to pay their checks and pre-authorized debits;

V. CONCLUSION

60. Contrary to Plaintiff's allegation, NSF fees are not imposed as a result of the non-performance of any contractual obligation by the account holder. Rather, NSF fees are services fees which are duly disclosed to customers and permitted under the law;
61. When they open personal deposit accounts with TD Bank, customers are informed of the various services that they can use and of the associated service fees, including NSF fees, as appears from TD Service Fee Schedule;
62. Customers have numerous ways to avoid NSF Transactions, including monitoring of their account which is facilitated by EasyWeb[®] Internet Banking, TD EasyLine Telephone Banking and TD app which allow customers' access to their account at all times;
63. Moreover, a wide variety of services are offered by TD Bank to its customers, some at no cost, which must be taken into account in the review of the parties' respective obligations;
64. For all these reasons, TD Bank's Defence is well founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THIS COURT TO :

GRANT the present Defence;

DISMISS the Plaintiffs' Originating Application against TD Bank;

THE WHOLE WITH COSTS

Montreal, on August 13, 2021



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