

CANADA

**PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL**

**No. 500-06-000808-168**

**SUPERIOR COURT**

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**LOU VAILLANCOURT-THIVIERGE**

Plaintiff

v.

**BANK OF MONTREAL**

**CANADIAN IMPERIAL BANK OF COMMERCE**

**LAURENTIAN BANK OF CANADA**

**MANULIFE BANK OF CANADA**

**NATIONAL BANK OF CANADA**

**NOVA SCOTIA BANK**

**ROYAL BANK OF CANADA**

**CAISSES DESJARDINS DU QUÉBEC**

**HSBC BANK CANADA**

**TANGERINE BANK**

**TORONTO-DOMINION BANK**

Defendants

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**DEFENCE OF THE ROYAL BANK OF CANADA**

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**FOR DEFENCE TO PLAINTIFF'S MODIFIED ORIGINATING APPLICATION, DEFENDANT ROYAL BANK OF CANADA RESPECTFULLY SUBMITS THE FOLLOWING:**

1. As to paragraphs 1 to 5 and 90 of the Modified Originating Application, the judgment authorizing the class action speaks for itself.
2. It admits the facts alleged in paragraphs 6, 7, 12, 14 and 82 of the Modified Originating Application.
3. With respect to the facts alleged in paragraphs 13 and 15 of the Modified Originating Application, it admits that payment orders are given through payment instruments, but denies that the three types of payment instruments identified by Plaintiff are the « main » types of payment instruments.

4. With respect to the facts alleged in paragraph 83 of the Modified Originating Application, it admits that Plaintiff issued payment orders without sufficient funds but has no knowledge as to whether Plaintiff did so intentionally.
5. It has no knowledge of the facts alleged in paragraphs 8, 22 to 35, 38 to 48, 86 to 89 of the Modified Originating Application.
6. Paragraphs 9 and 10 of the Modified Originating Application pertain to issues of law that it does not have to answer at this stage.
7. It denies the facts alleged in paragraphs 18 to 21, 49A to 49D, 50 to 53, 60 to 81, 84 and 85 of the Modified Originating Application.
8. As to the facts alleged in paragraphs 11, 16, 17, 19, 36, 37, 49 and 54 to 59 of the Modified Originating Application, it defers to the Personal Deposit Accounts Disclosures and Agreements document (Exhibit DRBC-1, as defined below) and denies anything not in accordance therewith.

**AND IN FURTHER DEFENCE, THE DEFENDANT ROYAL BANK OF CANADA RESPECTFULLY SUBMITS THE FOLLOWING:**

**I. THE ROYAL BANK OF CANADA**

9. Royal Bank of Canada (**RBC**) is a federally chartered bank of Canada which carries on business in the banking and financial services industry.
10. RBC has over 86,000 employees worldwide and its retail banking network includes more than 1,200 branches and 4,100 Automated Teller Machines (**ATM**).
11. In Quebec, as in Canada, RBC operates in a highly competitive environment comprised of banks and financial institutions offering similar products and services.
12. With respect to retail banking services, it competes with the defendants named in this case.
13. RBC is supervised and overseen by multiple regulators including, but not limited to, the Office of the Superintendent of Financial Institutions (**OSFI**), the Financial Consumer Agency of Canada (**FCAC**), the Canadian Deposit Insurance Corporation (**CDIC**), Financial Transactions and Reports Analysis Centre of Canada (**FINTRAC**) and the Privacy Commissioner of Canada.
14. RBC is also subject to oversight and regulation by the Bank for International Settlements (**BIS**), the Bank of Canada (**BOC**), the Basel Committee on Banking Supervision (**Basel Committee**), and the Financial Stability Board (**FSB**) of which the BOC, OSFI and the Federal Department of Finance are members. RBC is also subject to the oversight of the Federal Minister of Finance under the Federal *Canadian Payments Act*.

**II. THE BANKING AGREEMENT**

15. The provision and operation of a personal deposit account in Canada are highly regulated. Under section 448.1(1) of the *Bank Act*, and with limited exceptions, a member bank is required to open a retail personal deposit account for an individual who meets prescribed conditions upon his or her request made in person at a prescribed point of service of the member bank.
16. The provision of a retail personal deposit account is regarded as essential because of the central role it plays in an individual's economic life and its importance to ensuring a successful Canadian economy. A personal deposit account is a core banking product.

17. Similarly, section 448.1(2) of the *Bank Act* prohibits a member bank from requiring an individual to make an initial minimum deposit or to maintain a minimum balance in his or her personal deposit account. This means that an individual is entitled to open and maintain a personal deposit account even though no funds are deposited or the balance remains at \$0.
18. A customer who wishes to open a personal deposit account (an **Account**) with RBC will enter into contractual arrangements with RBC. These agreements and their associated disclosures can be found in the Personal Deposit Accounts Disclosures and Agreements document (the **Agreement**), communicated in support herewith as **Exhibit DRBC-1**.
19. This Agreement governs the operation and use of the Account. When a client enrolls in online or mobile banking, the Account may also be governed by terms and conditions contained in other contractual arrangements, including the Electronic Access Agreement, communicated in support herewith as **Exhibit DRBC-2**.
20. A personal deposit account at RBC comes with a bundle of services and features such as:
  - The ability to make deposits and withdrawals for personal purposes;
  - The ability to issue cheques and other payment orders (which includes related services such as purchasing bank drafts, establishing or modifying account or payment order instructions, certifying relevant payment items and initiating a stop payment process);
  - Payment of invoices, including through pre-authorized payments or pre-authorized debits;
  - Account maintenance, including access to balances, detailed statements of all transactions on the accounts, imaged copy retrieval of client transactional documentation, access to information for personal tax purposes, certification of account balance, linking of accounts and non-financial account history;
  - The ability to use a debit card for transactions at ATMs or for point of sale purchases;
  - Access to telephone, online and mobile banking;
  - Direct deposit services (e.g., payroll direct deposit or government credits/warrants); and
  - Overdraft protection services.
21. RBC ATMs across Canada allow RBC customers to make cash withdrawals, check account balances, make deposits, transfer funds, make bill payments and print out a list of recent transactions using their RBC debit card.
22. Customers can use their RBC debit card worldwide, using funds withdrawn directly from the customer's RBC bank account, in a variety of ways (ie. at various ATMs or for point-of-sale purchases).
23. Moreover, by registering for online or mobile banking, RBC customers now have access to the following services via a computer or mobile telephone:
  - Consult the balance, transaction history and statements for their RBC accounts;
  - Transfer money between eligible accounts;
  - Send, edit and receive Interac e-Transfers;

- Set up a direct deposit to their RBC account;
  - Set up RBC Alerts;
  - Pay a bill or pre-arrange future bill payments from their RBC account for a variety of creditors;
  - View credit card account due dates, minimum payment amounts and rewards accumulation;
  - Order and deposit cheques;
  - Review certain investment transactions and accounts (if customer has enabled);
  - Convert currency; and
  - Get notifications about special RBC Offers.
24. RBC offers its customers a free RBC Alerts service, which allows customers to receive the following alerts by text message, secure email or mobile push notification:
- Know when your balance is low;
  - Know when a withdrawal or deposit is made;
  - Reminders to make payments;
  - Know when you are getting close to the credit limit on your RBC credit card.
25. RBC provides its customers with access to services that allow them to efficiently monitor, track and manage their finances.
26. In exchange for the Account and the bundle of services and features it includes, customers agree to pay the fees disclosed in the Agreement (Exhibit DRBC-1), including the NSF fee in dispute. Sections 445 and 446 of the *Bank Act*, and its *Disclosure of Charges (Banks) Regulations*, contemplate that various charges may be associated with a deposit account and requires disclosure of same to the customer upon opening of the account or shortly thereafter and disclosure of the charges to the public.
27. Some of the services or features provided with the Account, for instance, making a deposit, teller-assisted withdrawals, account maintenance services, transfers between accounts and using RBC Alerts generally carry no additional fees for the customer. A transaction may also have a different price depending upon whether the transaction is being performed by the customer (ie. a self-serve transaction) or if the transaction is being performed by the bank (ie. an assisted transaction).
28. Depending upon the type of personal deposit account opened, the customer may also be entitled to a number of free transactions (ie. where a service fee is not charged for the transaction), as explained in the Agreement).
29. Depending upon the customer's specific profile, the customer may also be entitled to rebates or discounts.
30. Each personal deposit account package offered by RBC provides a different value proposition to the public. For example, RBC offers an RBC Student Banking® account with a \$0 monthly fee

where the deposit earns no interest and RBC offers an RBC High Interest eSavings® account with a per debit transaction monthly fee and where the deposit does earn interest.

31. When offering a personal deposit account, the bank must cautiously and effectively balance the costs and benefits associated with the entire product package, including the bundle of services and features offered.

### III. THE CANADIAN CLEARING SYSTEM

32. Clearing and settlement systems allow financial institutions to exchange payment instruments with each other, calculate how much they owe each other as a result of their customers' transactions, and transfer funds to settle those balances as between each other.
33. Payments Canada is the organization that underpins the Canadian financial system and economy by owning and operating Canada's payment clearing and settlement infrastructure, including associated systems, bylaws, rules and standards. Its members are financial institutions.
34. Payments Canada is subject to Bank of Canada oversight under the Federal *Payment Clearing and Settlement Act*. Part of the mandate of Payments Canada is to establish and operate national systems for the clearing and settlement of payments.
35. Payments Canada bylaws, rules and standards establish the protocol and processes between Payments Canada members when those members use Payments Canada clearing and settlement systems. Canada's clearing and settlement systems have been designed to operate efficiently and safely with controls to help mitigate credit, liquidity, legal (ie. certainty of outcome) and systemic risk to its participants and the clearing house as a whole (ie. where the inability of one participant to fulfil its payment obligation within the delay, causes another participant to be unable to fulfil its payment obligation, and so on).
36. Payments Canada bylaws, rules and standards do not provide rights to a financial institution's customers nor do they address liability between a financial institution and its customer.
37. The Automated Clearing Settlement System (**ACSS**) is owned and operated by Payments Canada. ACSS is a retail system used to clear and settle both paper and small value electronic Canadian currency payment items, including cheques and pre-authorized debits relevant to the dispute.
  - (a) **Clearing** is the process of reconciling payment items and calculating the net clearing balance owed between financial institution participants.
  - (b) **Settlement** is the payment of the clearing balance owed by one financial institution to another. Settlement is conducted once a day through a financial institution's own account held with the Bank of Canada (ie. the risk-free asset all direct clearing members are required to maintain in order to settle positions among themselves and to avoid concerns about the reliability of the payment).

### IV. PAYMENT ORDERS AND FEES

#### A. Cheques and Pre-Authorized Debits

38. The class action was authorized in relation to cheques and pre-authorized debits.
  - (i) Cheques

39. Generally, in Canada, the bank whose customer deposited the cheque for payment into her account (respectively, the **Collecting Bank** and the **Payee**) does not wait for the bank upon which the cheque is drawn (the **Drawee Bank**) to clear and settle the cheque before remitting the full amount of the cheque to its depositing customer. This provisional credit of funds in the amount of the cheque may pose a risk to the Collecting Bank should the cheque subsequently be dishonoured and not paid by the Drawee Bank.
40. Indeed, it is only after receiving confirmation from the Drawee Bank that the Collecting Bank can ensure that funds are available and that it will receive the money. Until the bank receives confirmation that the funds are available, the amount it provisionally credits to its customer is, in fact, an advance granted to the customer.
41. The *Access to Funds Regulation* under the *Bank Act* actually requires that the bank make the first \$100 of any cheque deposited into a bank account immediately available to its customer and Section 458.1(1) of the *Bank Act* requires the bank to immediately pay out on Government cheques or other Government instruments to all persons who meet the conditions for payment and regardless of whether they are a customer of the bank.
42. In certain circumstances, a cheque may also be paid by the Drawee Bank to the Collecting Bank, but then be subsequently returned through clearing resulting in the Collecting Bank having to return funds (in the full amount of the cheque) back to the Drawee Bank and, if permitted by its contractual arrangements with the Payee, reverse the deposit transaction from its own customer's account.
43. A Drawee Bank that refuses to honour (or pay out on) a cheque due to its customer (the **Payor**) having insufficient funds to pay the cheque is required to return the item in accordance with the delays and formalities set out in the Payments Canada rules (more specifically rules A-4 and A-10).

(ii) Pre-Authorized Debits

44. A pre-authorized debit (**PAD**) is an electronic withdrawal of funds from an account that the customer has previously authorized. A PAD implies that the Payor has given authorization to the Payee (usually a creditor) to withdraw funds from her account at RBC. The Payor-customer enters into a contract with the Payee for the payment of the PAD and advises its own bank that the PAD has been authorized. A PAD can be a one-time payment or a recurring payment.
45. Common recurring PAD transactions include mortgage payments, subscription and service bill payments, charitable donations, property taxes, car loans, investment contributions and insurance premium payments.
46. Payments Canada also sets the rules and standards for the processing of these payment items between member institutions (rules F-1, H-1 and Standard 005).

**B. Consequence of an NSF Payment Order**

47. Issuing a payment order without sufficient funds is not prohibited by RBC, it is provided for and governed by the Agreement.
48. However, issuing a payment order without sufficient funds bears disadvantages for both the customer and the bank.
49. It disrupts the clearing and settlement process. But the most obvious consequence is that it creates a risk of non-payment to one or more of the parties in the chain of transactions.

50. Indeed, a payment order refused for insufficient funds may harm the customer's reputation with its creditors, affect the customer's credit rating and require sometimes embarrassing steps and exchanges with the recipient of the refused payment. In some cases, this may also result in criminal charges or an investigation to determine whether such an offence was committed.
51. The Drawee Bank must make a prompt decision to honour or refuse the payment order. If it fails to comply with the applicable delays and formalities, as per Rule A-4, it will be required to pay the value of the payment order to the Collecting Bank under the Payments Canada infrastructure.
52. In the event of a refusal, the Drawee Bank must ensure prompt return of the item to the Collecting Bank and make the appropriate entries in the account of its customer.
53. NSF items pose a risk of loss to the banks if the item is not returned within the applicable time limits. They can also sometimes be associated with cases of fraud, kiting, or other undesirable situations, which can lead to very serious problems.
54. RBC provides alternative services to NSF fees, including overdraft protection, linking of accounts, or a line of credit to compensate for a potential lack of liquidity.
55. Moreover, customers can also avoid NSF fees by monitoring their account balance, initiating a stop payment, post-dating cheques or using the RBC Alerts services.
56. A customer who, intentionally or by negligence, issues a payment order without sufficient funds must pay a fee that is clearly disclosed from the outset in the Agreement.
57. The class action is ill-founded.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**DISMISS** the Plaintiff's claim;

**THE WHOLE** with costs.

Montréal, August 16, 2021

*Norton Rose Fulbright  
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*\*Les pièces DRBC-1 et DRBC-2 suivront ultérieurement par Kiteworks. Exhibits DRBC-1 and DRBC-2 will be sent by Kiteworks.*

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DISTRICT OF MONTREAL**

**LOU VAILLANCOURT-THIVIERGE**

Plaintiff

v.

**BANK OF MONTREAL AND AL.**

Defendants

**DEFENCE OF THE ROYAL BANK OF CANADA**

**ORIGINAL**

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