

07-CV-335151 CP  
Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**NATIONAL TRUST COMPANY**

**Applicant**

- and -

**ROBERT M. SMALLHORN, STUART J. GALBRAITH,  
JOHN D. JAMIESON and EDWARD C. O'BRIEN**

**Respondents**

**PROCEEDING UNDER the *Class Proceedings Act, 1992***

**APPLICATION UNDER Rules 14.05(3)(a), (d) and (g) of the  
*Rules of Civil Procedure***

**NOTICE OF APPLICATION**

**TO THE RESPONDENTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 2007 at 10:00 a.m. or as soon thereafter as it may be heard, at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the rules of court, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: June 21, 2007

Issued by: B. Sadegun.  
Local registrar

393  
~~330~~ University Avenue, 10<sup>th</sup> FL.  
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TO: **ROBERT M. SMALLHORN, STUART J. GALBRAITH,  
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**Solicitors for the Representative Respondents**

## APPLICATION

1. The applicant, National Trust Company (the "Applicant"), makes application for:
  - (a) an order certifying this proceeding as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and appointing Robert M. Smallhorn, Stuart J. Galbraith, John D. Jamieson and Edward C. O'Brien as representative respondents (the "Representatives") for a class comprised of the following individuals:
    - (i) all members and former members of the Scotiabank Pension Plan for Former Employees of National Trust Company (Reg. No. 0315952), as amended (the "Plan") who were entitled to benefits or other payments under the Plan on or after June 24, 1997; and
    - (ii) all persons who were members of the Plan on or after June 24, 1997 and who ceased membership with no payment owing to them from the Plan.  
  
(collectively, the "Members")
  - (b) an order that the Applicant is entitled to receive, out of the pension fund of the Plan, surplus remaining in the Plan after the payment of all accrued benefits ("Surplus"), in the manner and on the terms set out in the Surplus Sharing Agreement (as hereinafter defined);
  - (c) an order that the Applicant is entitled to transfer assets from the Plan on account of active and certain disabled Plan members who will be transferred to the Scotiabank Pension Plan (Reg. No. 0222646) (the "Scotiabank Replacement

Plan”) immediately prior to Plan termination (the “Wind-Up Date”), in the manner and on the terms set out in the Surplus Sharing Agreement; and

- (d) such further relief as counsel may advise and this Honourable Court may permit.

2. The grounds for the application are:

- (a) The Applicant is a trust company incorporated under the laws of Ontario.
- (b) The Plan is a defined benefit pension plan registered with the Financial Services Commission of Ontario (“FSCO”) and the Canada Revenue Agency.
- (c) There are members of the proposed class residing in each of the ten provinces.
- (d) The Plan has, over the years, accumulated a considerable Surplus.
- (e) The Representatives are Members. They form part of an unincorporated association styled “The National Trust Pension Surplus Member Group Committee” (the “Committee”).
- (f) The Representatives’ interest in the Plan arises out of their employment with the Applicant and/or The Bank of Nova Scotia.
- (g) The Committee has, on behalf of the Members, asserted that the Members are entitled to receive some or all of the Surplus. The Committee and the Applicant have been engaged in discussions regarding the respective entitlements of members, former members and the Applicant to the Surplus since in or about 2003.

- (h) The Applicant and the Committee have entered into a Surplus Sharing Agreement made as of June 21, 2007 (the "Surplus Sharing Agreement"). The Surplus Sharing Agreement provides, among other things, that subject to any necessary court and regulatory approval, the Applicant and the Members are entitled to share in the Surplus in the amounts, in the manner and on the terms set out in the Surplus Sharing Agreement.
- (i) The Applicant intends to transfer all Members who are active and certain disabled members of the Plan to the Scotiabank Replacement Plan immediately prior to winding up the Plan. The Applicant also intends to transfer assets from the Plan to the Scotiabank Replacement Plan on account of the present and estimated future service of active and disabled Plan members so transferred.
- (j) Following the transfer of assets to the Scotiabank Replacement Plan, the Applicant intends to terminate the Plan and withdraw the Surplus.
- (k) As long as provision has been made for the payment of all accrued benefits, the Plan permits and provides for the payment of the Surplus to the Applicant, and the Applicant is entitled to receive the Surplus, in the amounts, in the manner and on the terms set out in the Surplus Sharing Agreement.
- (l) The Plan permits the transfer of assets in the manner and on the terms set out in the Surplus Sharing Agreement.
- (m) The *Class Proceedings Act, 1992*, S.O. 1992, c.6.
- (n) Rule 14.05 (3) (a), (d) and (g) of the *Rules of Civil Procedure*.

- (o) Such further and other grounds as counsel may advise and this Honourable Court may consider.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The affidavit of Karim Dhanani, Director, Transitions – Corporate Pensions, The Bank of Nova Scotia, to be sworn;
- (b) The affidavits of Robert M. Smallhorn, Stuart J. Galbraith, John D. Jamieson and Edward C. O'Brien, to be sworn; and
- (c) such further and other documentary evidence as counsel may advise and this Honourable Court may consider.

June 21, 2007

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Solicitors for the Applicant

**NATIONAL TRUST COMPANY**

and

**ROBERT M. SMALLHORN ET AL.**

**Applicant**

**Respondents**

**Court File No:**

07-cv-335151 CP.

*Ontario*  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**NOTICE OF APPLICATION**

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