

Court File No. 07-CV-335151CP

**Ontario
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MADAM JUSTICE LAX BETWEEN:)))))	- <i>Friday</i> 5 th - <i>ju</i> TUESDAY, THE 18th DAY OF SEPTEMBER, 2007 - <i>October</i> ✓ <i>ju</i>
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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***

ORDER

THIS MOTION, made by the Applicant for certification of this application as a class proceeding and for related relief was heard this day in the presence of counsel for the Applicant, and counsel for the Respondents, no-one opposing this motion.

ON READING the Notice of Motion, the Affidavit of Karim Dhanani, sworn September 10, 2007, and the exhibits thereto, the Affidavit of Robert M. Smallhorn, sworn September 7, 2007, and the exhibits thereto, the Affidavit of Stuart J. Galbraith, sworn September 11, 2007, the Affidavit of John D. Jamieson, sworn September 11, 2007, the Affidavit of Edward C. O'Brien, sworn September 11, 2007, and the draft Notice of Certification contained in the Joint Motion Record, and on hearing the submissions of counsel for the Applicant and the Respondents,

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1. **THIS COURT ORDERS** that this motion is properly returnable today, that time for service of the Notice of Motion and Motion Record herein is hereby abridged, and that further service thereof is hereby dispensed with.
2. **THIS COURT ORDERS** that this application is hereby certified as a class proceeding pursuant to the *Class Proceedings Act, 1992 S.O. 1992, c. 6*.
3. **THIS COURT ORDERS** that for the purposes of this class proceeding, the class (the "Class") is defined as:
 - (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;
 - (ii) the surviving spouse of any deceased member or former member of the Plan who was in receipt of a survivor pension from the Plan on or after June 24, 1997, or an individual entitled to a deferred vested benefit or other death benefit on or after June 24, 1997 upon the death of a member or former member of the Plan;
 - (iii) all persons who were members of the Plan on or after June 24, 1997 and who ceased membership on or after that date with no payment owing to them from the Plan; and
 - (iv) where individuals identified in subparagraphs (i), (ii) or (iii) above have died or die after June 24, 1997 and prior to the date on which the Plan is wound up (the "Wind-Up Date"), the person entitled to a survivor pension

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or death benefit on the Wind-Up Date as a result of the death, or where there is no such person, the beneficiary of the deceased individual named under the Plan, or if there is no named beneficiary, the estate of the deceased individual;

4. **THIS COURT ORDERS** Robert M. Smallhorn, Stuart J. Galbraith, John D. Jamieson and Edward O'Brien be appointed as representative respondents of the Class (the "Representative Respondents");.

5. **THIS COURT ORDERS** that the common issues for the Class are:

- (a) Is the Applicant 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 made as of June 21, 2007, between National Trust Company, the National Trust Pension Surplus Member Group Committee, and various members and former members of the Plan (the "Surplus Sharing Agreement"); and
- (b) Is the Applicant 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"), effective prior to Plan termination (the "Wind-Up Date"), in the manner and on the terms set out in the Surplus Sharing Agreement?

6. **THIS COURT ORDERS** that pursuant to section 17 of the *Class Proceedings Act*, notice of certification of this application as a class proceeding shall be substantially in the form of the Notice of Certification of a Class Proceeding which is attached as Schedule "A" to

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this Order (together with the French language version required by paragraph 8 of this Order, the "Notice"), and said form of notice is hereby approved.

7. **THIS COURT ORDERS** that notice pursuant to section 17 of the *Class Proceedings Act* is dispensed with in respect of those individuals who have retained Koskie Minsky LLP to execute the Surplus Sharing Agreement on their behalf.

8. **THIS COURT ORDERS** that the Representative Respondents or their counsel shall arrange to have the Notice translated into the French language and certified by affidavit of the translator, which affidavit is to be filed with the Court.

9. **THIS COURT ORDERS** that:

- (a) the Applicant shall provide the Representative Respondents with a list containing the names and last known addresses of all the members of the Class, their status under the Plan and the province in which they were last employed by the Applicant or one of its affiliates;
- (b) counsel for the Representative Respondents shall, from time to time in response to reasonable requests from the Applicant, provide the Applicant with a list of the "Represented Participants" (as that term is defined in the Surplus Sharing Agreement), a list of those members of the Class who returned retainer forms to them but who are not Represented Participants, as well as information regarding individuals who elect to opt out of the class proceeding as contemplated in paragraphs 13 and 14 below, and information as to the addresses of members of the Class to the extent that information differs from the information provided to the Applicant pursuant to paragraph 9(a) of this Order; and

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- (c) the disclosures required pursuant to paragraphs 9(a) and (b), above, are required to comply with this Order, within the meaning of the *Personal Information Protection And Electronic Documents Act*, S.C. 2000, c. 5, and are relevant to the objects of the respective files containing such information, within the meaning of *An Act Respecting The Protection Of Personal Information In The Private Sector*, R.S.Q., c. P-39.1.

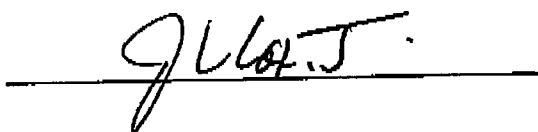
10. **THIS COURT ORDERS** that, where such addresses are available, the Representative Respondents shall send a copy of both the English and French versions of the Notice by first class mail to the last-known address of each Class member (other than those Class members to whom paragraph 7 of this Order applies), as provided to the Representative Respondents by the Applicant in accordance with paragraph 9 of this Order, or to such other address as the Representative Respondents believe, after using best efforts to identify a current address, is accurate.

11. **THIS COURT ORDERS** that the Representative Respondents shall arrange to have the English language version of the Notice published once in a weekend edition of *The Globe and Mail*, and the French language version of the Notice published once in a weekend edition of *La Presse* (Montréal).

12. **THIS COURT ORDERS** that the costs of serving the Notice shall be paid out of the Plan.

13. **THIS COURT ORDERS** that members of the Class may opt out of the class proceeding by delivering written notice by facsimile to Koskie Minsky LLP at (416) 977-3316, or by mail to Koskie Minsky LLP at 20 Queen Street West, Suite 900, Box 52, Toronto, Ontario M5H 3R3.

14. **THIS COURT ORDERS** that any member of the Class who wishes to opt out of this class proceeding may only do so by delivering written notice in accordance with paragraph 13 of this Order no later than 5:00 p.m. on the 30th day following the later of the mailing of the Notice or the publication of the Notice, pursuant to paragraphs 10 and 11 of this Order, after which date Class members shall not be permitted to opt out of this class proceeding.



SCHEDULE "A"**NOTICE OF CERTIFICATION OF A CLASS PROCEEDING**

TO: MEMBERS, FORMER MEMBERS, SPOUSES AND OTHER BENEFICIARIES ENTITLED TO BENEFITS OR OTHER PAYMENTS FROM THE SCOTIABANK PENSION PLAN FOR FORMER EMPLOYEES OF NATIONAL TRUST COMPANY (Reg. No. 0315952), AND TO CERTAIN OTHER ELIGIBLE INDIVIDUALS OR ESTATES (collectively the "Class Members", as defined below)

TAKE NOTICE THAT the Scotiabank Pension Plan for Former Employees of National Trust Company, as amended (the "Plan") will be wound up pursuant to the applicable statutory provisions governing the Plan. As part of the wind-up, and pursuant to all applicable legislation, National Trust Company (the "Applicant") will take the necessary steps, and file the necessary documents with the Financial Services Commission of Ontario (the "Application"), to support its request for permission to distribute the Plan's surplus assets (the "Surplus") to itself and the Class Members as set out below.

Pursuant to a Surplus Sharing Agreement, after securing all promised pension benefits and making any necessary adjustments for applicable expenses and other amounts, 50% of the Surplus will be paid to the Sharing Group (defined below), and 50% will be paid to the Applicant. The Sharing Group consists of:

- (i) all members and former members of the Plan who were entitled to benefits or other payments under the Plan on or after June 24, 1997;
- (ii) the surviving spouse of any deceased member or former member of the Plan who was in receipt of a survivor pension from the Plan on or after June 24, 1997, or an individual entitled to a deferred vested benefit or other death benefit on or after June 24, 1997 upon the death of a member or former member of the Plan;
- (iii) all persons who were members of the Plan on or after June 24, 1997 and who ceased membership on or after that date with no payment owing to them from the Plan; and
- (iv) where individuals identified in subparagraphs (i), (ii) or (iii) above have died or die after June 24, 1997 and prior to the date on which the Plan is wound up (the "Wind-Up Date"), the person entitled to a survivor pension or death benefit on the Wind-Up Date as a result of the death, or where there is no such person, the beneficiary of the deceased individual named under the Plan, or if there is no named beneficiary, the estate of the deceased individual.

Information about this proposed surplus sharing arrangement has already been conveyed in an information package mailed to individuals in the Sharing Group in August 2005, in a more detailed information package mailed to Sharing Group members in November 2006, and during a series of information sessions for the Sharing Group held in various cities across Canada in November/December of 2006 (written notice of which was provided to members of the Sharing

Group in November 2006). Information packages and information session invitations were sent to all members of the Sharing Group, where mailing addresses were available.

ALSO TAKE NOTICE THAT in connection with the Application, the Applicant has commenced an application in the Superior Court of Justice (the "Court Application") for, among other things, a determination that (i) the Applicant is entitled to a share of the Surplus, (ii) the Applicant is entitled to transfer assets from the Plan to a replacement plan on account of active and certain disabled members, and (iii) the Surplus Sharing Agreement is valid and binding on all Class Members. The outcome of the Court Application may affect whether you receive a distribution of any Surplus.

The Court Application was certified as a class proceeding by the Honourable Madam Justice Lax on ● under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. The Court named Messrs. Robert M. Smallhorn, Stuart J. Galbraith, John D. Jamieson and Edward O'Brien as representative respondents for the Class Members (i.e., all members of the Sharing Group).

The representative respondents have retained the law firm of Koskie Minsky LLP, which firm has been appointed counsel to the Class Members with respect to the Court Application ("Class Counsel"). Pursuant to the Surplus Sharing Agreement, the legal fees of Koskie Minsky LLP will be paid out of the Surplus in the Plan. As such, there is no direct cost to you to participate in this class proceeding if you retain Koskie Minsky LLP as your counsel.

ANY JUDGMENT THAT IS OBTAINED IN THIS CLASS PROCEEDING, WHETHER FAVOURABLE OR NOT, WILL BIND ALL CLASS MEMBERS UNLESS INDIVIDUAL CLASS MEMBERS OPT OUT OF THE CLASS PROCEEDING IN ACCORDANCE WITH THE PROCEDURE OUTLINED HEREIN. IF YOU WISH TO OPT OUT OF THE CLASS PROCEEDING, YOU MUST DELIVER BY FIRST CLASS MAIL OR BY FAX TO 416-977-3316 A WRITTEN NOTICE OF INTENTION TO OPT-OUT TO KOSKIE MINSKY LLP ON OR BEFORE 5:00 P.M. ON ●, AT THE FOLLOWING ADDRESS:

**KOSKIE MINSKY LLP
BARRISTERS AND SOLICITORS
20 QUEEN STREET WEST
SUITE 900, BOX 52
TORONTO, ONTARIO M5H 3R3**

ATTENTION: ●

IF YOU DO NOT OPT OUT ON OR BEFORE ●, YOU WILL BE DEEMED TO BE A CLASS MEMBER AND WILL NOT BE PERMITTED TO OPT OUT OF THE CLASS AT A LATER DATE.

Please consult http://www.koskieminsky.com/client_links/●/home.aspx for detailed information on the surplus sharing arrangement.

THE PARTIES WILL BE SEEKING JUDGMENT, INCLUDING APPROVAL OF THE SETTLEMENT OF THE APPLICATION ON THE TERMS OF THE SURPLUS

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SHARING AGREEMENT, ON ● AT 10:00 A.M. AT THE COURT HOUSE AT 361 UNIVERSITY AVENUE, TORONTO.

Any Class Member is entitled to participate in this class proceeding, subject to the approval of the Court. Such participation shall be in whatever manner and on whatever terms the Court considers appropriate.

If you have any inquiries regarding the class proceeding, please contact Class Counsel at the address provided above, by telephone at 1-888-723-4305, or by email at:

● @koskieminsky.com

Class Members may also review copies of materials filed with the Court in respect of the Court Application at the offices of Class Counsel in Toronto. To arrange a time to view these documents, please contact Class Counsel by mail, telephone, or email per the contact information noted above.

NATIONAL TRUST COMPANY
Applicant and Respondents

ROBERT M. SMALLHORN, et al.

Court File No: 07-CV-335151CP

Ontario
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

ORDER

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