

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**TYLER DUFAULT**

Plaintiff

- and -

**THE TORONTO-DOMINION BANK and THE CANADA TRUST COMPANY**

Defendant

**REPLY**

1. Unless otherwise indicated, the defined terms set out in the Statement of Claim shall have the same meaning herein.
2. The Plaintiff repeats and relies on the facts set out in the Statement of Claim.
3. The Plaintiff denies the allegations in the Statement of Defence except as expressly admitted hereinafter.
4. With respect to the allegations contained in paragraph 28 of the Statement of Defence, the Plaintiff maintains that section 2.9 of the *Financial Services Terms*, and the corresponding disclosure in the *About Our Accounts and Related Services*, did not authorize the duplicative NSF Fees charged by TD Bank. Section 2.9 unambiguously conveyed to Class Members that a single rejected payment or cheque was capable of at most attracting a single NSF Fee (if TD Bank returned it) or OD Fee (if TD Bank paid it).
5. In the alternative, the Plaintiff pleads and relies on the doctrine of *contra proferentem*, whereby any contractual ambiguity must be interpreted in favour of the Plaintiff and Class.

6. With respect to the allegations contained in paragraphs 29-31 of the Statement of Defence, the Plaintiff maintains that section 2.7 of the Terms (the "**Verification Clause**") does not apply to duplicative NSF Fees.

7. The Verification Clause states:

You are responsible for reviewing your Records. You must report to us **Account errors and unauthorized transactions** within 30 days from when you are deemed to have received your Records... [Emphasis added.]

8. The Verification Clause does not refer to duplicative NSF Fees. Further, the terms "Account errors" and "unauthorized transactions" are not defined in the Verification Clause or elsewhere in the Terms. Nor does a plain reading make it clear that they include duplicative fees.

9. TD Bank, as the sole drafter of the Verification Clause, which formed part of its standard form contract with the Plaintiff and Class, was free to include a specific definition, elaboration, or other clarification of these terms in the Verification Clause if it wished to do so. TD Bank also could have included "fees" along with error and transactions, but did not do so.

10. It is not self-evident that duplicative NSF Fees fall within the ordinary meaning of the term "Account errors" or "unauthorized transactions". The Plaintiff understood that PayPal's resubmission for payment on December 7, 2020 of his initial payment attempt on December 2, 2020 (the "**December 7<sup>th</sup> Transaction**") was a transaction authorized pursuant to the terms of his contract with PayPal, and that the duplicative NSF Fee he incurred on the December 7<sup>th</sup> Transaction was a fee – which was separate, though associated with PayPal's authorized transaction.

11. As drafted, the Verification Clause is at most ambiguous as to whether it applies to duplicative NSF Fees and therefore must be construed strictly against TD Bank in accordance with doctrine of *contra proferentem*.

12. Additionally, and in the alternative, the Plaintiff pleads and relies on the doctrine of unconscionability, whereby the Court may decline to enforce improvident bargains formed in situations of inequality of bargaining power.

13. At all material times, there existed a self-evident inequality of bargaining power between TD Bank (a large retail banking institution) and Mr. Dufault (an underemployed graphic artist). The Plaintiff and Class were powerless to negotiate the Terms, which were part of a standard form contract of adhesion with an institution operating within a state-sanctioned oligopoly over necessary services.

14. No reasonable person who had understood and appreciated the Defendant's proposed interpretations of sections 2.7 and 6.1 of the Terms would have agreed to them, and it would be unconscionable to allow TD Bank collect fees in direct violation of the Terms and then be entitled to keep those fees simply because the Plaintiff did not request a refund within an arbitrarily set timeline.

15. The Plaintiff pleads that if the Defendant's interpretation of sections 2.7 and 6.1 of the Terms is correct, those provisions should be set aside and rendered unenforceable.

16. In reply to paragraphs 20-26 of the Statement of Defence, the Plaintiff denies that TD Bank does not possess the data necessary to enable it to determine whether a payment is a "new" payment or a re-presentation of a previously returned payment request.

17. In the alternative, the Plaintiff denies that TD Bank is unable to acquire the data necessary to distinguish between multiple attempts by a payee to process the same payment. Similar retail banks, such as JPMorgan Chase Bank, have policies and/or practices of not charging multiple NSF Fees on a re-presented payment and possess the payments data required to distinguish between multiple attempts by a payee to process the same payment.

18. In the further alternative, the Plaintiff pleads that TD Bank ought to maintain the data necessary to enable it to determine whether a payment is a "new" payment or a re-presentation of a previously returned payment request. Payments Canada's ACSS Rules and Payments Standards merely prescribe the minimum standards for what data can and

must be coded for every transaction. Beyond what is prescribed by regulation, TD Bank ought to maintain any and all additional data – including such data that would enable it to know whether a payment request is the same or different from a prior one that was already returned – required to fulfil its contractual obligations with its depositors pursuant to the Terms.

October 5, 2021

Koskie Minsky LLP  
20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

Celeste Poltak LS#: 46207A  
**[cpoltak@kmlaw.ca](mailto:cpoltak@kmlaw.ca)**  
Tel: 416-595-2701  
Fax: 416-204-2909

Adam Tanel LS#: 61715D  
**[atanel@kmlaw.ca](mailto:atanel@kmlaw.ca)**  
Tel: 416-595-2072  
Fax: 416-204-4922

**Lawyers for the Plaintiff**

TO: **MCCARTHY TETRAULT LLP**  
Suite 5300, P.O. Box 48  
Toronto Dominion Tower  
Toronto, ON M5K 1E6

**Christine Lonsdale** LSO #44787S  
**[clonsdale@mccarthy.ca](mailto:clonsdale@mccarthy.ca)**  
Tel: 416-601-8019

**Adam Ship** LSO #55973P  
**[aship@mccarthy.ca](mailto:aship@mccarthy.ca)**  
Tel: 416-601-7731

**Adriana Forest** LSO #77307W  
**[aforest@mccarthy.ca](mailto:aforest@mccarthy.ca)**  
Tel: 416-601-868-0673  
Fax: 416-868-0673

**Lawyers for the Defendants**

