

**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

Defendants

STATEMENT OF DEFENCE

1. Except where expressly admitted herein, the Defendants, The Toronto-Dominion Bank and the Canada Trust Company (together, “**TD**”), deny all the allegations contained in the Statement of Claim.

THE PARTIES

2. The Plaintiff, Tyler Dufault (“**Mr. Dufault**”), is an individual who resides in Trenton, Ontario and who, at all material times, was the holder of an account (“**Account**”) at TD. Mr. Dufault is also the proposed representative plaintiff for a proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“**CLPA**”) on behalf of those individuals within the proposed class (collectively, “**Proposed Class Members**”).

3. The Toronto-Dominion Bank is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46 (“**Bank Act**”), with its head office in Toronto.

4. The Canada Trust Company is a banking and trust corporation that is a subsidiary of The Toronto-Dominion Bank.

THE RELEVANT AGREEMENTS

5. The Account is governed by TD's *Financial Services Terms* and related disclosure, including TD's *About Our Accounts and Related Services* (collectively, "**Agreement**"). The material terms and provisions of the Agreement are reproduced in **Schedule "A"** to this Statement of Defence.

6. At all material times, Mr. Dufault was a user of PayPal and a party to the PayPal user agreement, dated November 6, 2020 ("**PayPal User Agreement**"). The material terms of the PayPal User Agreement are pleaded below.

MR. DUFAULT'S TRANSACTIONS

7. On December 2, 2020, TD received a direction through the Canadian clearing and settlement system to pay PayPal the amount of \$19.49 from the Account ("**December 2nd Transaction**"). In keeping with standard banking practice, and regulatory requirements, this payment direction was assigned a unique identifying number and processed by TD as a unique and standalone transaction.

8. On December 2, 2020, the Account did not contain sufficient funds to cover this transaction. TD initially processed the payment and then returned the payment due to non-sufficient funds ("**NSF**"). In keeping with section 2.9 of the Agreement, TD charged Mr. Dufault a \$48.00 NSF fee on December 3, 2020.

9. On December 7, 2020, a different direction to pay the amount of \$19.49 from the Account to PayPal was received by TD through the Canadian clearing and settlement system ("**December 7th Transaction**"). In keeping with standard banking practice, and regulatory requirements, this payment direction was assigned a unique identifying number and processed by TD as a unique and standalone transaction.

10. On December 7, 2020, the Account again did not contain sufficient funds to complete the December 7th Transaction. TD initially processed the payment and then returned the payment also due to NSF. In keeping with section 2.9 of the Agreement, on December 8, 2020 TD charged an NSF fee in relation to the December 7th Transaction.

11. At paragraph 15 of the Statement of Claim, Mr. Dufault admits that TD was entitled to charge the NSF fee related to the December 2nd Transaction. However, Mr. Dufault contests TD's right to charge the NSF fee related to the December 7th Transaction.

12. Contrary to Mr. Dufault's claim, the two payments are not duplicative but, instead, constitute two separate transactions. These separate transactions may or may not relate to the same underlying debt owed by Mr. Dufault to PayPal. As a matter of fact, and at law, the transactions are:

- a. Two separate and distinct directions and/or authorizations for payment (one on December 2, 2020 and one on December 7, 2020);
- b. Two separate and distinct transactions that required processing by TD;
- c. Two separate and distinct occasions for TD to undertake a verification of the amount of funds in the Account; and
- d. Two separate and distinct determinations by TD to return the transactions as a result of NSF as opposed to the granting of overdraft to cover the payments.

13. On each occasion, TD was authorized to and did charge the NSF fee. The December 2nd Transaction and the December 7th Transaction are not linked, and cannot be linked, to each other as alleged by Mr. Dufault.

14. Mr. Dufault did not communicate with TD between the December 2nd Transaction and the December 7th Transaction to notify it of any error or unauthorized charge or to raise any concern with respect to the transactions.

15. Sections 2.6 and 2.7 of the Agreement required Mr. Dufault to review his online transactions and notify TD of any errors or unauthorized transactions within 30 days. Mr. Dufault had a paperless account and received electronic statements. The Agreement deems that Mr. Dufault received a record of the Account transactions five days after each transaction was posted to the Account.

16. More specifically, Mr. Dufault is deemed to have received notice of the December 7th Transaction by December 15, 2020, at the latest. As a result, Mr. Dufault was legally required to notify TD of any errors or unauthorized transactions by January 15, 2021, at the latest. Mr. Dufault did not contact TD about any errors or unauthorized transactions at all and the first time he raised any issue with this transaction was in the Statement of Claim, which was issued on February 2, 2021.

17. TD has no knowledge of whether Mr. Dufault has made any claims or objections to PayPal related to the transactions in issue. Mr. Dufault clearly authorized PayPal to attempt to process the December 7th Transaction, as the PayPal User Agreement provides:

When you use your bank account as a payment method, you are allowing PayPal to initiate a transfer from your bank account to the recipient. For these transactions, PayPal will make electronic transfers from your bank account in the amount you specify. ***You authorize PayPal to try this transfer again if the initial transfer is rejected by your bank for any reason.*** [Emphasis added.]

MR. DUFAULT'S CLAIMS ARE MISCONCEIVED

18. Mr. Dufault's claim is erroneously based on the theory that TD charged duplicative NSF fees. TD wholly and specifically denies that TD has:

- a. Breached the Agreement;
- b. Breached section 14(1) of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("**CPA**") for false, misleading, or deceptive representations or breached any of the *Equivalent Consumer Protection Statutes* (as defined in paragraph 1(f) of the Statement of Claim);
- c. Been unjustly enriched by the practices and conduct impugned in the Statement of Claim; or
- d. Committed an offence under section 980 of the *Bank Act* for violating the requirements of sections 3 and 4 of the *Disclosure of Charges (Banks) Regulations*, SOR/92-324 ("**Disclosure Regulation**").

19. TD addresses each of these claims in turn below and also sets out the positive defence on which it relies.

NO DUPLICATIVE TRANSACTIONS

20. Mr. Dufault's claim is based on a fundamental misunderstanding. In error, Mr. Dufault characterizes the payments at issue as duplicative and the NSF fees as duplicative. In fact and in law, there are no duplicative transactions.

21. The December 2nd Transaction and the December 7th Transaction were both pre-authorized debits ("**PADs**") that Mr. Dufault authorized and directed pursuant to the PayPal User Agreement. PayPal is not a customer of TD. TD never had any information related to either the December 2nd Transaction or the December 7th Transaction other than the information that TD was required to receive and process pursuant to the mandatory rules and standards of the Canadian Payments Association ("**Payments Canada**"), the entity that operates the national

clearing and settlement system in Canada pursuant to the *Canadian Payments Act*, R.S.C. 1985, c. C-21 (“**Payments Act**”).

22. PADs entered into the national payments system are subject to the mandatory rules and standards of Payments Canada. TD and all other banks in Canada are members of Payments Canada. TD has no way of knowing whether such a PAD payment request is the same or different from a prior one that was already returned. TD cannot know if any PAD payment request it receives through the national payments system is a “re-presentment” of a previously-returned payment. TD’s obligation is to receive and process each individual payment request as an individual transaction with the information associated with the transaction that is mandated by Payments Canada’s rules and standards and the information available to TD regarding the account of its customer, the payor. PayPal is not TD’s customer.

23. Pursuant to the mandatory rules and standard of Payments Canada, each PAD payment request entered into the national payments system is unitized as a distinct transaction with its own unique identifying number. Each transaction has a required set of coded fields to permit the transaction to be processed. There is no coded field for PADs which permits TD to know what the underlying debt relates to. Nor is there any coded field for PADs which permits TD to know if the payment request is a second attempt to process a prior payment request.

24. Payments Canada's *Automated Clearing and Settlement System Rules and Standards* (“**ACSS Rules**”) prescribe what information can and must be coded for every transaction. The ACSS Rules do not prescribe information related to the underlying debt or information related to a re-presentment to be entered with the transaction. The data which accompanies each transaction or payment request is limited. These limitations are not set by TD but rather by Payments Canada.

25. The information accompanying each transaction is governed by Standard 005 of Payments Canada's *Standards for the Exchange of Financial Data on AFT Files* ("**Payments Standards**"). All transactions submitted through the Canadian clearing and settlement system, including PADs, are subject to this standard.

26. As a result, for such transactions, TD has no way of knowing whether a payment is a "new" payment or a re-presentation of a previously returned payment request.

27. Furthermore, the ACSS Rules also expressly permit merchants and vendors to attempt to process a PAD payment request twice if the first debit transaction is returned for NSF. Rule F1, section 22 states:

A Debit Transaction which has been returned for the reason "Non-Sufficient Funds" (Return Reason Code 901), or "Funds Not Cleared" (Return Reason Code 908), **may be re-presented on a one-time only basis provided that re-presentation occurs within 30 days following the return of the original Debit Transaction...** [Emphasis added.]

THE AGREEMENT CONSTITUTES A FULL DEFENCE TO MR. DUFALT'S CLAIM

28. Section 2.9 of the Agreement authorized the NSF fees charged by TD. Each payment request that is returned for NSF leads to an NSF fee unless TD approves, in its sole discretion, the granting of overdraft to the customer. When a customer authorizes a payment from their deposit account without having adequate funds, they are seeking overdraft from TD. The language of Section 2.9 of the *Financial Services Terms*, and the corresponding disclosure in the *About Our Accounts and Related Services*, make clear that TD has the right to decide, in its sole discretion, whether to approve a request for overdraft in these circumstances and to charge the NSF fee if TD chooses not to provide such overdraft.

29. Additionally, section 2.7 of the Agreement also required Mr. Dufault to notify TD of any errors or unauthorized transactions within 30 days from the date on which he received the record of his online transaction. As set out above, this required Mr. Dufault provide notice to TD by no

later than January 15, 2021, which Mr. Dufault failed to do. As a result, the Agreement prohibits Mr. Dufault from advancing the within claim against TD and constitutes a full defence to, and release by Mr. Dufault of, TD in relation to the conduct impugned in the Statement of Claim.

30. Additionally, section 6.1 of the Agreement includes a limitation of liability clause which precludes TD's responsibility for any damages other than direct damages arising from TD's negligence. TD denies that it acted negligently. At all times, TD acted in accordance with Payments Canada's mandatory rules and standards, including the *ACSS Rules* and the *Payments Standards*. TD, at all times, met the standard of care required to Mr. Dufault. As a result, Section 6.1 of the Agreement constitutes a full defence to TD in relation to the conduct impugned in the Statement of Claim.

31. Additionally, Section 6.1 of the Agreement precludes any liability on the part of TD for loss or damages arising from any circumstance beyond TD's control. This language necessarily precludes liability in respect of the December 7th Transaction, and the resulting NSF fee charged to Mr. Dufault, as these events arose from circumstances beyond TD's control.

NO STATUTORY OR REGULATORY BREACHES

32. No aspect of the Agreement is unclear, misleading, deceptive, or ambiguous, and the Agreement is in all respects compliant with the *CPA*, the *Equivalent Consumer Protection Statutes* and the *Disclosure Regulation*.

33. TD expressly denies that Mr. Dufault has any right under the *CPA* or under any of the *Equivalent Consumer Protection Statutes* to repudiate or rescind the Agreement and recover any funds paid to or charged by TD in respect of NSF fees.

NO UNJUST ENRICHMENT

34. The NSF fee is expressly authorized by the Agreement. TD is not unjustly enriched because the Agreement constitutes a juristic reason for the payment of the \$48.00 NSF fee charged.

35. TD, like all other banks in Canada, is legally required to assign a unique identifying number, and to treat as distinct, every PAD transaction it receives through the clearing and settlement system, whether or not the transaction is a "fresh" payment request or a "re-presentment" of a prior payment request. TD's costs associated with this process are the same regardless of the source of the payment request.

36. TD's costs in this regard include those related to the settling of transactions that are later returned for NSF. Under Payments Canada's rules and standards, TD is generally required to settle each payment direction on the same day that the direction is received through the national clearing and settlement system. This means that, for clearing purposes, the payment direction is generally taken at face value on the day that it is presented. At that point, the bank is advancing the funds necessary to pay the payment direction although no final determination has yet been made as to whether there are sufficient funds in the applicable accounts. If TD ultimately learns that an account has insufficient funds to satisfy the payment direction, it will need to "return" the payment that it made (and be reimbursed) through the national payments system on the next business day. This delay between advancing funds and receiving reimbursements leads to costs, and exposure, for TD.

NO BASIS FOR DAMAGES

37. TD expressly denies that there is any NSF fee, charge or refund owed by it to Mr. Dufault, including any error or unauthorized transaction for which Mr. Dufault is entitled to any compensation.

38. If Mr. Dufault sustained damages, these are the result of his own actions. Mr. Dufault failed:

- a. To ensure that sufficient funds were in the Account in order to permit the December 7th Transaction to be processed;
- b. To monitor his banking records and transactions and to provide notice to TD of alleged errors or unauthorized transactions, as provided under the Agreement; and
- c. If the December 2nd Transition and/or the December 7th Transaction were no longer authorized by him, to attempt to issue a Stop Payment, *i.e.*, to contact TD to try to stop one or both of the transactions from being paid from his Account.

39. TD expressly denies that Mr. Dufault is entitled to punitive or exemplary damages on the basis of the claims pleaded.

THE CLAIMS OF THE PROPOSED CLASS MEMBERS

40. Mr. Dufault is put forward as a proposed representative plaintiff for a class proceeding based on the class definition set out at paragraph 16 of the Statement of Claim. At the time of filing this Statement of Defence, no motion for certification in respect of the proposed common issues has been filed and no order for certification has been made.

41. The claim of each Proposed Class Member will have to be assessed on its own merits with regard to:

- a. The specific transactions identified by the Proposed Class Member as being duplicative;
- b. The mode and timing of each request for payment;

- c. Other associated contracts entered into by the Proposed Class Member, such as or analogous to the PayPal User Agreement entered into by Mr. Dufault;
- d. What steps, if any, the Proposed Class Member took to verify his or her banking statements and to provide notice to TD regarding any allegedly erroneous or unauthorized transactions;
- e. Whether the Proposed Class Member entered a Stop Payment request; and
- f. Whether TD sought to resolve the issue directly with the customer in response to a concern raised.

42. The claim advanced on behalf of each Proposed Class Member also suffers from the same fatal flaw as Mr. Dufault's claim and therefore must be dismissed. There are no duplicative NSF fees, just fees charged in respect of each individual transaction.

43. Many, if not all, of the claims advanced on behalf of the Proposed Class Members will also be barred by the proper application of the verification and limitation of liability clauses in section 2.7 and section 6.1 of the Agreement, as pleaded above.

44. Many of the claims advanced on behalf of the Proposed Class Members are also statute-barred. For members of the proposed class who reside in Ontario, TD pleads and relies upon the default limitation period set out in section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B ("**Ontario Limitations Act**"), and pleads that these Proposed Class Members discovered their claims more than two years prior to the issuance of the Statement of Claim. For members of the proposed class who reside in other provinces or territories, TD pleads and relies upon the statutes of limitation in force in the respective province or territory in which each Proposed Class Member resided at the time of the impugned NSF charges, including the provisions of those statutes of limitation that are most analogous and/or parallel to section 4 of the *Ontario Limitations Act*, and

pleads that each class member is out of time. Without limiting the generality of the foregoing, TD pleads and relies upon: the *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(a) (for Proposed Class Members in Alberta); the *Limitation Act*, S.B.C. 2012, c. 13, s. 6(1) (for Proposed Class Members in British Columbia); the *Limitation of Actions Act*, C.C.S.M., c. L150, s. 2(1) (for Proposed Class Members in Manitoba); the *Limitations Act*, S.S. 2004, c. L-16.1, s. 5 (for Proposed Class Members in Saskatchewan); the *Limitations of Actions Act*, S.N.B. 2009, c. L-8.5, s. 5(1)(a) (for Proposed Class Members in New Brunswick); the *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 5-6(1) (for Proposed Class Members in Newfoundland and Labrador); the *Limitation of Actions Act*, S.N.S. 2014, c. 35, s. 8(1)(a) (for Proposed Class Members in Nova Scotia); the *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 2(1) (for Proposed Class Members in P.E.I.); the *Civil Code of Quebec*, art. 2925 (for Proposed Class Members in Quebec); the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, s. 2(1) (for Proposed Class Members in the Northwest Territories and Nunavut); and *Limitation of Actions Act*, R.S.Y. 2002, c. 139, s. 2(1) (for Proposed Class Members in Yukon) (collectively, with the *Ontario Limitations Act*, “**Provincial and Territorial Statutes of Limitation**”).

45. In respect of the Proposed Class Members, no aspect of the Agreement is unclear, misleading, deceptive, or ambiguous, and the Agreement is in all respects compliant with the *CPA*, the *Equivalent Consumer Protection Statutes* and the *Disclosure Regulation*. TD expressly denies that any member of the proposed class has any right under the *CPA* or under any of the *Equivalent Consumer Protection Statutes* to repudiate or rescind the Agreement and recover any funds paid to or charged by TD in respect of NSF fees.

46. In addition, the proposed class action would require the manual analysis of millions of individual transactions per year on the basis of evidence provided exclusively by individual Proposed Class Members. As a result of the *Payments Standards*, there is no material information related to the underlying debt that is included with these PAD transactions and there

is no way in which TD's transactional data for such PAD transactions can determine if a transaction is a "re-presentment" of a prior transaction. Therefore, the claims of Proposed Class Members, in addition to being without merit, would require individual inquiry into the circumstances related to each Proposed Class Member on the basis of evidence to be provided exclusively by those individuals.

47. Further, PADs are the only payment instrument for which the allegations in the Statement of Claim have any potential relevance or application. All other payment instruments, such as cheques and point-of-sale debit transactions, fall outside the scope of the Statement of Claim as they are not subject to re-presentment by the merchant or vendor.

CONCLUSION

48. Based on the foregoing, TD requests that the claims against it be dismissed, with costs.

49. TD pleads and relies on the following statutes, regulations and standards, each as amended throughout the class period:

- a. The *ACSS Rules*;
- b. The *Bank Act*;
- c. The *CLPA*;
- d. The *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- e. The *CPA*;
- f. The *Disclosure Regulation*;
- g. The *Equivalent Consumer Protection Statutes*;
- h. The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

- i. The *Payments Act*,
 - j. The *Payments Standards*; and
 - k. The *Provincial and Territorial Statutes of Limitation*.
50. TD agrees that this action should be tried in Toronto.

August 3, 2021

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SCHEDULE "A"

The material provisions of the Agreement are as follows:

1. Section 2.6 of the Agreement includes the following statements:

Protecting Your Payment Instruments

You are responsible for the care and control of your Payment Instruments at all times. As the Account holder, you are in the best position to identify a forged, unauthorized, or altered Payment Instrument. All transactions using Payment Instruments will reflect on your Account, even if you did not perform or authorize them.

You agree that you will:

- Maintain your Payment Instruments safely at all times.
- Notify us as soon as you become aware that:
 - Any Payment Instrument is lost or stolen.
 - You did not receive the Payment Instrument that you ordered from us.
 - Someone forged or altered any of your Payment Instruments.

If you fail to notify us of any of the issues set forth above or are unable to prove that you took reasonable steps to protect your Payment Instruments, then we are not responsible for any of the following:

- Unauthorized activities
- Unauthorized withdrawals
- Other losses

If you request a replacement Payment Instrument, we may require an indemnity. In some cases, we may require a form of security that we consider appropriate, including a surety bond. You agree to provide us with these items if requested to do so.

Stopping Payments

You can contact us to try to stop a cheque or Pre-Authorized Debit payment from being paid from your Account. When you do, we will attempt to take steps to stop the payment. However, we are not responsible for processing the stop payment if any of the following occurs:

- You gave us incorrect information.

- You did not provide us with the information we requested.
- The payment was final, and we could not reverse it.
- We could not reverse it for other reasons outside of our control.

2. Section 2.7 of the Agreement includes the following statements:

Reviewing Records and Reporting Account Errors

You must promptly review your Records to verify all Account transactions. We will deem that you have received your Records:

- Five days from the date of your statement if you receive Account statements, or
- Five days from date the transaction is posted to your Account if you do not receive Account statements (paperless or passbook).

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. You can contact us using the information found in *Section 7: How To Contact Us*.

If you do not notify us within the 30 days, then we have no obligation to make any corrections to your Account. This includes any refund of fees or charges to your Account related to any errors, omissions, or unauthorized transactions. Not notifying us within the 30 days will mean that:

- You have reviewed your Records and accept them as valid and correct.
- All Record entries and Account balances are correct.
- All amounts are properly chargeable to you.
- We are not required to reverse any transactions.
- We are not required to credit you with any amount that does not appear in your Records.
- We are not liable for any loss suffered by you that relates to your Account or any Services, and you release us from any claims you could make that relate to your Account or any Services.

We are not liable even if:

- Your Records are delayed.

- A transaction appears in your Records after the day you complete the transaction.
- You do not receive your Records (including when you cannot access a particular banking channel).
- You do not review your Records.¹

3. Section 2.9 of the Agreement includes the following statements:

We may allow you to overdraw your Account if you do not have an overdraft protection service ("ODP"), but we are not required to do so. If your Account is overdrawn, we will charge you, and you must promptly repay, any overdrawn amount, plus any applicable fees and interest at the annual rate that we establish from time to time. You can find this rate, along with any applicable fees, in the *About Our Accounts And Related Services* document.

We will calculate interest on any outstanding balance daily and charge it to your Account at the end of each month. This means you may pay interest on the interest amount added to the outstanding balance. During a leap year, we charge an extra day of interest using the overdraft interest rate. This means we charge more interest in a leap year.²

4. TD's *About Our Accounts and Related Services* includes the following table and statements in respect of NSF fees that it charges to accountholders:

Non-sufficient funds	Fees
If you have overdraft protection service but <i>you issue a cheque or make a payment</i> over the amount of funds in your account plus your Overdraft Limit.	\$48.00 if TD <i>does not approve</i> 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. For Quebec account, you pay interest at 21% a year on the amount you're in overdraft but not the \$5.00 fee if the cheque or payment is paid
If you do not have overdraft protection service and you issue a cheque or make a payment without sufficient funds in your account.	\$48.00 if TD <i>does not approve</i> the cheque or payment \$5.00 plus interest at 21% a year on the amount you're in overdraft <i>if TD chooses to approve</i> the cheque or payment

5. Section 6.1 of the Agreement includes the following statements:

¹ Emphasis in original.

² Emphasis in original.

We are not liable to you for any loss or damages incurred by you except for direct damages suffered where we or our agents were negligent. This limitation on our liability to direct damages applies even if we have been advised of the possibility that you may suffer other types of loss or damages.

In no event are we liable for any loss or damages resulting from the following:

- Any failure, error, malfunction, misuse, delay, or inaccessibility of any Machine, system, equipment or Service caused by a third party or other circumstances beyond our control. [...]
- Any other failure, error, or delay by any third party or other circumstances beyond our control[.]

TYLER DUFAULT
Plaintiff

v.

THE TORONTO-DOMINION BANK et al
Defendants

Court File No. CV-21-00656203-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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