

ONTARIO Court File No. 07-CV-332402CP

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

Sol Fleising

Plaintiff

-and-

The Bank of Nova Scotia

Defendant

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date: May 4, 2007

Issued By:

A. Visculinas

Local Registrar

Address of
court office:

393 University Avenue, 10th Floor
Toronto, Ontario M5E 1G6

TO: The Bank of Nova Scotia
Scotiabank
Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1

CLAIM

1. The Plaintiff claims on its own behalf and on behalf of the Class:
 - a. damages in the amount of \$100,000,000.00 or such other sum as this Honourable Court finds appropriate, arising from Defendant wrongfully withholding Plaintiff's funds and the funds of the Class, by holding Plaintiff's funds and the funds of the Class, after the date that Defendant was paid in respect of a cheque or other non cash deposit made into the account of a depositor, (the date upon which the Defendant was paid in respect of a deposit may be referred to herein as the Payment Date), and refusing to release such funds to Plaintiff and the Class, as applicable, in breach of Defendant's contractual and other common law obligations.
 - b. a declaration that Defendant has breached its fiduciary and/or contractual obligations to Plaintiff and to the Class by such unauthorized retention of Plaintiff's funds and the funds of the Class;
 - c. a declaration that the Defendant has been unjustly enriched at the expense of the Plaintiff and at the expense of the Class by Defendant profiting through investing the funds it wrongfully and unlawfully withheld from Plaintiff and the Class, after the Payment Date.
 - d. a declaration that the Defendant holds the profits earned by Defendant

through investing Plaintiff's funds, and the funds of the Class, rather than releasing such funds to the Plaintiff and to the Class, as applicable, after the applicable Payment Date, in a constructive trust for the Plaintiff and for the Class;

- e. an accounting and disgorgement to the Plaintiff and to the Class of all wrongful profits derived by the Defendant from investing such funds;
- f. a permanent injunction forcing Defendant to release the applicable funds to its depositors upon the Payment Date;
- g. punitive damages in the amount of \$20,000,000.00, or such other amount as this Honourable Court deems fit, arising from the high-handed, arrogant and oppressive manner with which the Defendant has administered Plaintiff's accounts and those of the Class, and withheld their rightful access to their funds in knowing breach of contract, and in breach of their common law and other duties to the Plaintiff and the Class, as the case may be;
- h. certification of this action as a class proceeding pursuant to the Class Proceedings Act, S.O. 1992 c.6, and an order appointing the Plaintiff as representative plaintiff on behalf of the Class as defined herein;

- i. pre-judgment and post-judgment interest on the amount claimed in paragraph 1(a) at the average rate of return collectively earned by Defendant through investing the wrongfully held funds of Plaintiff and of the Class during the Class Period, compounded monthly, or in the alternative, the rate of return that would have been achieved by Plaintiff and by the rest of the Class had they invested in another reasonably prudent alternative investment, or, alternatively the interest rate pursuant to the Courts of Justice Act, R.S.O. 1990, c.43;
- j. costs of this action fixed on a substantial indemnity basis; and
- k. such further and other relief as this Honourable Court may deem just.

The Parties

2. The Plaintiff, Sol Fleising, is the Chief Financial Officer of a Non-Profit Organization in the City of Vaughn, and resides in the City of Vaughn.

3. The Defendant, The Bank of Nova Scotia, is a member of the Scotia Bank Group, had revenue in 2006 of over 11 Billion Dollars, and conducts banking operations all over Canada including Toronto, Ontario.

The Proposed Class

4. Plaintiff brings this action pursuant to the Class Proceedings Act, 1992 on behalf of the proposed class (the "Class"):

All current and former clients of the Defendant resident in Canada who in the Class Period:

- i. held one or more accounts at Defendant's branches; and
- ii. made deposits into such accounts either by wire transfer, cheque, or any other means ("Deposit(s)"), between the dates of May 3, 2001, and May 3, 2007 (the "Class Period"); and
- iii. such funds on deposit were *held* by Defendant ("Held Deposit(s)"); and

- iv. who did not receive access to the Held Deposits simultaneous with, or within a reasonable time after, the Defendant received payment in respect of such Held Deposits from the payor financial institution, or intermediary financial institution utilized by the Defendant or the payor.

The Account Agreement

5. The Plaintiff has held various accounts with Defendant since 1983.
6. All personal accounts held with Defendant are governed by standard form contracts of adhesion (hereinafter the "Account Agreement") which incorporates various terms and conditions contained in the appurtenant Day-to-Day Banking Companion Booklet. From time to time, Defendant updates the terms and conditions governing its accounts, and such terms and conditions apply prospectively to all its account holders.
7. In early 2002, due to concerns raised by various consumer groups, and concerns by the Federal Government that financial institutions were holding the funds of their depositors excessively, the Parliament of Canada passed Regulation SOR 2002-13, mandating that Defendant, and all financial institutions disclose their cheque 'hold funds policy' to their depositors, in order that it be clear and transparent, the duration or maximum duration, if

any, of a hold that the financial institution, such as Defendant, would put on such funds.

8. In accordance with such Federal Regulation, the Account Agreement that governs personal accounts held with Defendant taken together with the Day-to-Day Companion booklet ("Booklet"), contain terms and conditions relating to Defendant's 'hold funds policy'. The relevant clauses in the Booklet relating to the 'hold funds policy' provide in relevant part:

"Cheques presented for cash or deposit to your account may not be cashed right away. A hold may be placed on the funds because we need to know that the cheque will not be returned by the institution on which the cheque is drawn. . ."

9. Accordingly, pursuant to the relevant terms and conditions of Plaintiff's account and the accounts of all applicable Class Members, Defendant is contractually obligated to release the funds to its Personal account-holders upon Defendant having the ability to *verify* that the cheque will be paid, and *a fortiori* upon Defendant *receiving* payment for such Deposit.

The Cheque Clearing and Payment Process

10. The method through which various banks or other financial institutions exchange cheques or other payment items is known as the clearing process (the "Process").
11. The Process starts when cheques are deposited into the bank account of a depositor. Such financial institution into which the cheques are deposited by the depositor is known as the "Collecting Bank".
12. Generally, at the end of every business day, the cheques deposited into accounts of a Collecting Bank are sent by the Collecting Bank to a data centre, where such cheques are processed for transmittal to the data centre of the bank upon which the cheques are drawn (the "Drawee Bank").
13. Generally, the cheques deposited in the Collecting Bank arrive at the data centre for the Drawee Bank, either physically, or via electronic image, between 11pm on the day of deposit, and 1am early the next day.
14. When the data centre for the Drawee Bank receives and processes the cheque from the Collecting Bank's data centre, it debits the account of the payor, and such cheque is cleared.
15. The above described process whereby the cheque is sent from the processing centre, acting for the Collecting Bank, to the processing centre

for the Drawee Bank, (or where applicable, internally processed in the same processing centre on behalf of the Drawee Bank and the Collecting Bank), is termed clearing by all Financial Institutions and the Canadian Payments Association.

16. Barring extraordinary circumstances such as terrorist attacks, extremely inclement weather, or the like, cheques will clear by 11:00 am or even earlier, on the first business day following the day a cheque is deposited by the customer.

17. Generally, in the event that the payor institution does not choose to dishonor a particular cheque, such cheque will be *settled*, or "finally paid" by the payor financial institution within 12-18 hours of the clearing of a particular cheque or even earlier in some cases. Thus, a cheque deposited in a Canadian financial institution that is drawn on a Canadian financial institution will generally be settled within two business days of its deposit in the Collecting Bank.

When Cheques Are Drawn on United States Financial Institutions

18. When cheques, drawn on financial institutions located in the United States, are deposited in financial institutions in Canada, such as Defendant, such cheques are generally given by the Canadian Collecting Bank to a U.S. financial institution (a "Clearing Agent") to act on the Canadian Collecting Bank's behalf, and process the cheque for clearing, that is, send the cheque to the U.S. Drawee Bank.

19. Generally, the cheque or its legally identical image will arrive at the applicable Clearing Agent by the business day following the day the cheque was deposited in the Canadian Collecting Bank.

20. Being that in the U.S., most cheques are cleared electronically, once a cheque is received by a Clearing Agent, it will clear within 24 hours.

21. Thus, barring extraordinary circumstances such as terrorist attacks and the like, a cheque that is drawn on a U.S. financial institution, and is deposited in a Canadian Collecting Bank will clear before the third business day following its deposit in the Canadian Collecting Bank.

22. Accordingly, the Clearing Agent, acting on behalf of the Canadian Collecting Bank, will receive payment for the cheque deposited in the Canadian

Collecting Bank by the fourth business day after the cheque is deposited in the Canadian Collecting Bank.

23. Canadian Collecting Banks may have agreements under which a Canadian Collecting Bank is paid immediately by its Clearing Agent upon the Clearing Agent receiving the cheque from the Canadian Collecting Bank, or alternatively, the Canadian Collecting Bank may receive payment from its Clearing Agent only after the cheque is cleared, and the Clearing Agent has received payment for the cheque from the payor.

24. Thus, barring extraordinary events, a Canadian Collecting Bank or its agent will have received payment in respect of a cheque deposited in a Canadian Collecting Bank drawn on a U.S. financial institution by the fifth business day after the cheque is deposited in Canada at the Canadian Collecting Bank.

25. Accordingly, the entire clearing and payment process for cheques that are deposited in Canadian banks, and that are drawn on U.S. financial institutions, is completed by the fifth business day after a cheque is deposited in a Canadian Collecting Bank.

The Transaction

26. On or about June 26, 2006, the Plaintiff deposited a cheque (the "Cheque") in the amount of \$20,000 drawn on an account held at BMO Nesbitt Burns into his account administered by Defendant. Defendant did not release the deposited funds until July 10, 2006. (the date Defendant releases the Held Deposits to its depositors may be referred to herein as the "Release Date").
27. Plaintiff pleads that the date the Cheque cleared (the date a cheque, deposited with Defendant, clears may be referred to herein as the "Clear Date") was June 27, 2006, 14 days earlier than Defendant released the funds to the Plaintiff.
28. Plaintiff pleads that he was legally entitled to have access to the Held Deposit on the first business day following the Clear Date, upon Defendant or its agent receiving payment for the cheque (the Payment Date).
29. Plaintiff pleads that Defendant wrongfully retained the Held Deposit, in respect of the Cheque, after the Payment Date, in breach of its contractual obligations to the Plaintiff, and that as a result of such breach, Plaintiff suffered damages.

30. Plaintiff pleads for himself and on behalf of the Class that Defendant systemically and intentionally implements standard arbitrary hold periods on depositors' cheques without consideration as to when Defendant actually receives payment on such cheques.

The Excessive Hold Period Administered By Defendant was a Breach of its Contractual Obligations to Plaintiff and the Class (Breach of Contract)

31. Plaintiff incorporates by reference the allegations in paragraphs 1-30 as if they were fully reproduced herein.

32. Plaintiff pleads that Defendant held the Cheque and the cheques of the Class, deposited with Defendant, after the applicable Payment Date of such cheques, and that such holding of Plaintiff's Cheque and the cheques of the Class, after the applicable Payment Date, was a breach of Defendant's contractual obligations to the Plaintiff and the Class under the relevant terms and conditions governing its and/or their accounts with Defendant cited above.

33. Plaintiff pleads that it and the Class have suffered damages as a result of Defendant implementing unlawful, systemic, arbitrary hold periods, and not releasing the funds in respect of cheques deposited with Defendant to Plaintiff, and to the Class, upon Defendant receiving payment for such

cheques, in breach of Defendant's contractual obligations to the Plaintiff, and applicable members of the Class, under the relevant terms and conditions governing the Plaintiff's account, and the accounts of the Class, with Defendant, as the case may be.

34. Plaintiff claims that it and the Class are entitled to damages for breach of contract arising out of Defendant's wrongful holding of the Cheque and the cheques of the Class, after the applicable Payment Date, in the amount that Plaintiff and the Class could have earned by investing such funds in a reasonably prudent alternative for the period between (a) the Payment Date, and (b) the Release Date (the "Impugned Period"), or in the amount the Plaintiff and the Class reasonably suffered during such period by not having access to its and/or their Deposits, as applicable.

Breach of Common Law Duty

35. Plaintiff incorporates by reference the allegations in paragraphs 1-34 as if they were fully reproduced herein.

36. Plaintiff further pleads that Defendant held its Deposit past the applicable Payment Date in respect of the Cheque, specifically, Defendant was paid by its Clearing Agent, 13 days earlier than the Release Date.

37. Plaintiff pleads that the exact Payment Date is particularly within the knowledge of Defendant or its agent.
38. Plaintiff pleads that Defendant has a common law duty to Plaintiff and the Class to release their Deposits, as applicable, within a “reasonable time period” of the applicable Payment Date.
39. Plaintiff pleads that the next business day after the Payment Date is a “reasonable time period” for Defendant to release the Held Deposits to its depositors. Accordingly, Defendant’s retention of Held Deposits for more than one business day after the Payment Date is a failure by Defendant to release the Held Deposits to the Plaintiff or the Class, as applicable, within a reasonable time period.
40. Plaintiff pleads that Defendant failed to release its Deposit and held the Deposits of the Class for a period that was longer than one business day after the applicable Payment Date.
41. Plaintiff pleads that implementing standard hold periods of up to thirty days on deposits, as applicable, without investigating or inquiring as to the true Payment Date that Defendant or its agent received payment for a Deposit, is a knowing and intentional breach of its common law duty to allow the

Plaintiff and the Class, as applicable, access to their Deposits within a reasonable time after the Payment Date.

42. Plaintiff claims that it and the Class are entitled to damages in the amount that Plaintiff and the Class could have earned by investing the Held Deposits in a reasonably prudent alternative for the Impugned Period, or in the alternative, the amount the Plaintiff and the Class reasonably suffered by not having access to the Held Deposits during such period, whichever is greater, arising out of Defendant's breach of the common law duty it owes to Plaintiff and the Class to allow its depositors access to their Deposits within a "reasonable time period" after the applicable Payment Date.

Conversion

43. Plaintiff incorporates by reference the allegations in paragraphs 1-42 as if they were fully reproduced herein.

44. Plaintiff pleads that Defendant's systematic refusal to release the Held Deposits to the Plaintiff and to the Class, after the applicable Payment Date, amounts to conversion of Plaintiff's Deposit and the Deposits of the Class by Defendant, and further is a breach of Defendant's common law and other duties owed to Plaintiff and to the Class.

45. Plaintiff pleads that Defendant systemically, purposely and unlawfully places standard hold times on Deposits made, by the Plaintiff and the Class, into accounts administered by Defendant, of up to thirty days, without any investigation or inquiry as to whether or not Defendant could verify that funds would be available to pay the cheque, or the relevant Payment Date.

46. Plaintiff pleads that it and the Class are entitled to damages based on Defendant's conversion of Plaintiff's Deposit and the Deposits of the Class, as applicable, in the amount that Plaintiff and the Class could have earned by investing such Deposits in a reasonably prudent alternative for the Impugned Period.

Unjust Enrichment

47. Plaintiff incorporates by reference the allegations in paragraphs 1-46 as if they were fully reproduced herein.

48. Plaintiff pleads that Defendant has intentionally, systematically, and systemically held account-holders' Deposits in excess of the time permitted under its applicable terms and conditions, for the express purpose of earning enormous secret profits therefrom.

49. In the alternative, Plaintiff pleads that the Defendant has purposely, systematically, and systemically held account-holders' Deposits in excess of the time permitted under its applicable common law obligations for the express purpose of earning enormous secret profits therefrom.

50. Plaintiff pleads that Defendant has been unjustly enriched at Plaintiff's expense and at the expense of the Class by its conduct described above, and by investing the Deposits it wrongfully withholds from its depositors and earning profits thereon.

51. Further, Plaintiff pleads that as a result of Defendants conduct, Plaintiff and the Class have suffered a corresponding deprivation.

52. There is no juristic reason for the enrichment of the Defendant.

53. Accordingly, Plaintiff pleads on the basis of Defendant's unjust enrichment that Plaintiff and the Class are entitled to restitution equal to:

- a. All the profits earned by Defendant arising from Defendant's use of Plaintiff's Deposit and the Deposits of the Class during the Impugned Period; and

- b. A declaration that the profits earned by Defendant investing the Deposits it wrongfully withheld from Plaintiff and the Class during the Impugned Period are held by Defendant in a constructive trust for the benefit of the Plaintiff and the Class.

Negligence

54. Plaintiff incorporates by reference the allegations in paragraphs 1-53 as if they were fully reproduced herein.

55. Defendant owed Plaintiff and the Class a duty to administer their accounts with the skill and diligence of a reasonably prudent person in comparable circumstances.

56. Defendant breached such duty, and its other common law duties to the Plaintiff and the Class by not releasing Plaintiff's Deposit or the Deposits of the Class, as applicable, at the Payment Date, or within a reasonable time thereafter.

57. Defendant was further negligent by instituting a systemic 'hold funds policy' that it knew or should have known was greater than the time permissible for Defendant to hold the Deposits of Plaintiff and of the Class.

58. It was reasonably foreseeable that Plaintiff and the Class would suffer damages as a result of Defendant's conduct.

59. Defendant is liable to Plaintiff and to the Class for the amounts that Plaintiff and the Class would have earned by investing such Held Deposits in a reasonably prudent alternative during the Impugned Period.

Breach of Fiduciary/Agency Relationship

60. Plaintiff incorporates by reference the allegations contained in paragraphs 1-59 as if they were fully reproduced herein.

61. In the alternative, Plaintiff pleads that Defendant acted as an agent, on behalf of Plaintiff and of the Class, to receive payment on Deposits made with Defendant, by Plaintiff and members of the Class, and to deposit the funds collected by Defendant, on behalf of the Plaintiff and members of the Class, in respect of such Deposits into the respective accounts held with Defendant.

62. Plaintiff pleads that it is a breach of such agency relationship for Defendant to invest the Deposits it received while acting as agent for Plaintiff and the Class and earn secret profits therefrom while wrongfully withholding such Deposits from its depositor/principals.

63. Plaintiff pleads that Defendant's relationship with Plaintiff and the Class obligates Defendant to act in good faith with regard to the payments received by Defendant in respect of Deposits, while acting as collecting agent for Plaintiff and the Class.

64. Plaintiff pleads that Defendant's refusal to release such Held Deposits, after the applicable Payment Date, or in the alternative the first business day following the Payment Date, to the Plaintiff and to the Class, is a breach of such duty.

65. Plaintiff pleads that as a result of such breach, Plaintiff and the Class have suffered damages, and that Defendant is liable for the relief claimed herein.

Defendant is Liable for Punitive Damages

66. Plaintiff incorporates by reference the allegations contained in paragraphs 1-65 herein.

67. Plaintiff pleads that Defendant was aware that implementing systemic hold periods beyond the applicable Payment Date, as applicable, was in breach of its terms and conditions and its common law obligations to its account-holders, however, it continued its oppressive, high handed and arrogant

behaviour in order to earn enormous secret profits by investing such wrongfully withheld Deposits during the Class Period.

68. Defendant was aware of the effect that its excessive hold periods had on its depositors. Specifically, consumer advocacy groups and the Federal Government have notified Defendant and other financial institutions of such effect. Despite these indications to Defendant of the effect of its excessive holds on its depositors, Defendant continued holding the Deposits of its depositors in breach of its relevant account agreements, personal and business, as applicable, and knowingly breached its common law duties in order to earn secret profits at the expense of the Plaintiff and the expense of the Class. Such conduct offends the Court's sense of decency and is deserving of an award of punitive damages of \$20,000,000.00 or such other amount the Court deems appropriate.

Conclusion

69. Accordingly, for the reasons stated above, and on the basis of the facts alleged herein, Plaintiff requests that the court grant it and the Class Members the relief sought herein.

Respectfully Submitted,

May 4, 2007

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Plaintiff Defendant

Court File No: 07-cv-332402 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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