

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

LISA RAM

Plaintiff

- and -

THE TORONTO DOMINION BANK

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

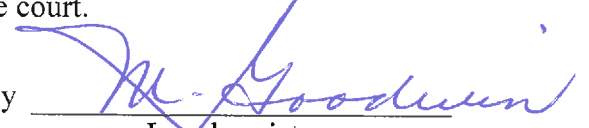


PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 22, 2016

Issued by


Local registrar

Address of 85 Frederick Street
court office Kitchener, ON N2H 0A7

TO: **THE TORONTO DOMINION BANK**
66 Wellington Street West
Toronto, ON M5K 1A2

CLAIM

1. The plaintiff claims on behalf of herself and other members of the proposed Class (as defined in paragraph 3 below):

- (a) Damages or compensation in an amount not exceeding \$25 million (or such other amount as may be specified prior to trial) for losses or damages suffered as a result of:
 - (i) breach of contract;
 - (ii) breach of consumer protection acts;
 - (iii) negligent misrepresentation;
 - (iv) conversion;
 - (v) unjust enrichment; and
 - (vi) waiver of tort;
- (b) Punitive, exemplary and aggravated damages in the amount of \$5 million;
- (c) An equitable rate of interest on all sums found due and owing to the plaintiff and other class members or, in the alternative, pre- and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (d) Such further and other relief as this Honourable Court deems just.

NATURE OF THE ACTION

2. This action arises from the operation of coin counting machines by Toronto Dominion Bank (“**TD Bank**”) in its Canadian branches since 2013. Customers using TD Bank’s coin counting machines expected the machines to operate accurately. However,

based on its extensive experience with operating coin counting machines in its U.S. branches since 2007, TD Bank knew or ought to have known that its coin counting machines were not capable of achieving accuracy for many reasons, resulting in under-counted funds of several percentage points in some cases. TD Bank failed to take any steps to warn customers of these risks, causing them harm.

3. This class action is brought on behalf of a proposed class of persons who used TD Bank's coin changing machines in Canada between January 1, 2013 and May 25, 2016 (the "**Class**").

THE PLAINTIFF AND THE CLASS

4. The plaintiff, Lisa Ram ("**Ram**"), is an individual residing in Kitchener, Ontario.

5. On or about June 23, 2014, Ram used TD Bank's coin counting machine in Kitchener, Ontario to count coin currency. Prior to depositing the coins, Ram counted and sorted them and knew she had a total of \$854.25. After depositing the coins into TD Bank's coin counter, she was not credited for amounts totalling \$159.50. Ram complained to TD Bank, which failed to remedy her losses.

6. TD Bank had over 370 coin changing machines in operation by the end of 2013.

THE DEFENDANT

7. TD Bank is a bank chartered under the *Bank Act*. TD Bank is incorporated and domiciled in Canada with its registered and principal business offices located at 66 Wellington Street West, Toronto, Ontario.

FACTUAL BACKGROUND

Coin Counting Machines

8. The purpose of coin counting machines is to convert coins into paper currency (or electronic credits). Customers use coin counting machines to accomplish this without having to sort, organize and count change in advance.

TD Bank's use of coin counting machines in the U.S.

9. Since at least 2007, TD Bank and its subsidiaries in the United States began operating coin counting machines in its U.S. branch network known as "TD Commerce Bank", later renamed and operated simply as "TD Bank." TD Bank inherited many coin counting machines in its 2007 acquisition of Commerce Bank.

10. TD Bank marketed its coin counting machines in the U.S. with the "Penny Arcade" brand. TD Bank considered its coin counting machines in the U.S. as important marketing tools, helping to engage customers, attract non-customers, and generate store traffic and national media interest.

11. In 2007, TD Bank processed 6.6 million transactions and counted over \$500 million in coins. By 2012, TD Bank's coin counting program in the U.S. had expanded to over 1,000 locations, processing 29 billion coins annually.

12. Over the course of many years of operating "Penny Arcade" coin counting machines, TD Bank learned (including through its wholly-owned subsidiaries in the U.S.) of many accuracy problems with "Penny Arcade" coin counting machines, including:

- (a) amounts would be credited to wrong customers, resulting in the shortchanging of one person to the benefit of another;
- (b) the machines would return inaccurate counts, sometimes frequently so;

- (c) the machines required frequent maintenance, failing which their performance would significantly deteriorate;
- (d) adherence to maintenance schedules was not consistent;
- (e) coin return mechanisms meant to return uncounted coins did not function properly;
- (f) diagnostic tests would have to be re-run for a “pass” result to be returned;
- (g) there were design flaws with the machines; and
- (h) there was a constant pressure between maintaining the machines (resulting in downtime and inconvenience for customers) and keeping them running.

13. Accuracy problems with TD’s coin counting machines were known and reported at the branch level and were reported to senior executives as part of TD Bank’s compliance.

14. TD Bank knew or ought to have known of accuracy problems with Penny Arcade machines as a result of the following reports, among others:

- (a) In 2004, in an article entitled “Testing Whether Coin-Counting Services Add Up,” the *Wall Street Journal* described depositing \$87.26 of coins into a Commerce Bank coin changing machine, which resulted in a total count of \$80.24 (8.04% difference). A second test with depositing \$68.23 resulted in a shortage of \$0.82.;
- (b) In August 2009, an online article described one author’s experience with Penny Arcade machines. Online comments describe many experiences with faulty coin counts involving TD Bank’s Penny Arcade machines.

- (c) In 2012, Asbury Park Press published an online article entitled “Can you trust a coin-counting machine?” The article described a TD customer who deposited \$80 in quarters and the machine only counted \$79.26 and referred to “other people have contacted me that their Penny Arcade results don’t match what they counted themselves.” The article further described efforts made by the Ocean County Division of Weights and Measures to inspect the accuracy of the machines after receiving complaints about their accuracy, which were resisted by TD Bank for jurisdictional reasons. The article contained numerous comments of similar experiences with Penny Arcade, including persons described as former TD Bank employees who stated the machines miscounted “often.”

15. In light of its long-standing experience in the U.S. with coin changing machines, TD Bank knew or ought to have known they did not function with accuracy.

Roll-out of coin changing machines by TD Bank in Canada

16. Despite knowing of the risk of error involved with coin counting machines, TD Bank proceeded with a nation-wide roll-out of coin changing machines across Canada in or about January 2013. By the end of 2013, TD Bank had available 370 coin changing machines in Canada, a far higher number than any other Canadian bank.

17. TD Bank’s coin changing machines were included in the service charge or other consideration paid by its individual account holders. TD Bank’s business customers were charged 3 percent. Non-customers were charged 8 percent of coins deposited.

18. The timing of TD Bank’s rollout of coin counters roughly coincided with the phasing out of the penny by the Royal Canadian Mint. TD Bank announced: “This is the year of the coin counters. Coin counters are a big advantage and service piece we can have in our branches. In our market research with clients, it was one of the top items they said they would appreciate having available.”

19. TD Bank described its coin counting machines as “critical” to attracting and retaining customers, allowing TD Bank to sell further products to them for greater profits.

20. TD Bank engaged in an extensive marketing campaign to promote its coin changing machines, including through social media and other marketing channels. Its coin machines were described as “state-of-the-art.”

21. The terms and conditions of TD Bank’s coin machines described the machine as offering a “convenient service” for counting coins. None of the terms and conditions displayed any warnings or risks whatsoever that the machines could return an incorrect total, despite TD Bank’s knowledge to the contrary.

22. TD Bank explicitly represented, or represented by implication, that its coin machines would accurately count coins and credit its customers with the value of all the coins that they deposit. TD Bank further knew, or ought to have known, that its customers did not count change prior to depositing funds into machines to be counted, precisely because this would defeat the purpose of using the machines. As a result, TD Bank knew its customers were vulnerable to being shortchanged if the machines did not perform with accuracy.

Investigation and subsequent withdrawal of all coin counting machines by TD Bank

23. In April 2016, the Today Show conducted an investigation of TD Bank’s Penny Arcade machines in the U.S. Investigative reporters deposited \$300 of coins into five machines at different branches. In each case, the amounts were under-counted, in one case as much as \$43.10.

24. Shortly after the investigation, on or about April 6, 2016, TD Bank withdrew all coin counting machines from its U.S. branches for evaluation and re-testing. TD Bank stated that the coin counting machines would return to service only after the bank was

satisfied the machine met performance requirements. TD Bank also announced that it was enhancing their routine maintenance program.

25. On or about May 19, 2016, TD Bank announced that it had decided to “retire” all Penny Arcade coin counting machines, citing “recent accounts regarding the performance of our Penny Arcade machines.” TD Bank stated that these accounts led it to “reassess” the machines, concluding “that it is difficult to ensure a consistently great experience for our customers.” TD Bank explained that it would “continue to assess the Penny experience and intend to appropriately address customer impact.”

26. Shortly thereafter, TD Bank pulled all coin counting machines from its Canadian branches also.

CAUSES OF ACTION

Breach of contract

27. Each member of the Class entered into an agreement with TD Bank in connection with their use of the coin machines. It was a term of the agreement that TD Bank’s coin counting machines would count coins deposited with accuracy.

28. In addition, the agreements were subject to the duty of good faith contractual performance and a common law duty to act honestly in the performance of contractual obligations. TD Bank failed to have appropriate regard to the legitimate contractual interests of the Class that its coins would be counted with accuracy. It failed to be honest, candid and forthright with the Class that there was a risk of error. There was a disparity of knowledge and vulnerability as pleaded above in paragraph 22. TD Bank breached its contracts with its customers, including the duty of honest performance.

29. TD Bank breached its contracts with the plaintiff and the Class by failing to candidly advise them there was a risk of error with its coin counting machines. TD Bank further breached its contracts with the Class by shortchanging certain members of the

Class. As a result of TD Bank's breaches, the plaintiff and members of the Class have suffered damages.

Breach of Consumer Protection Acts

30. TD Bank's actions violated the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A ("CPA") and related provincial consumer protection statutes. The plaintiff is a consumer as defined by the CPA.

31. TD Bank engaged in unfair practices and made false, misleading and deceptive representations to consumers by representing to them that the machines would accurately count coins or by failing to warn of the risk of error, contrary to the CPA:

- (a) s. 14(2)1 (representation that services had performance characteristics, benefits and qualities they did not have);
- (b) s. 14(2)3 (representation that services are of a particular standard or quality if they are not) and;
- (c) s. 14(2)14 (representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive).

32. TD Bank's representations were unconscionable because TD Bank knew or ought to have known that consumers were not able to reasonably protect their interests due to the vulnerability pleaded above at paragraph 22, contrary to s. 15(2) of the CPA.

33. The plaintiff provided notice of her claim to TD Bank on or about June 23, 2014. In the alternative, it is in the interests of justice to disregard notice pursuant to s. 18(15) of the CPA.

34. The plaintiff and the Class claim damages pursuant to s. 18(2) of the CPA. The plaintiff and the Class further claim exemplary and punitive damages pursuant to s. 18(11) of the CPA, as pleaded further below.

35. The plaintiff and the Class plead and rely on substantially similar consumer protection legislation in other provinces in which TD Bank operated its coin changing machines, including B.C.'s *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("deceptive acts and practices", "unconscionable acts or practices") and Alberta's *Fair Trading Act*, R.S.A. 2000, c. F-2 ("unfair practices").

Negligent misrepresentation

36. TD Bank owed the plaintiff and the Class a duty of care to exercise reasonable care in making representations about the accuracy of its coin counting machines. There was a special relationship between TD Bank and the Class, based on the facts described above at paragraph 22.

37. Discharging the duty of care required the Class to be given highly relevant information about the risk of error inherent in TD Bank's coin machines. TD Bank failed to provide such information, instead representing to the Class that its coin machines would count coins with accuracy.

38. TD Bank's representations were untrue, inaccurate or misleading. TD Bank acted negligently in making the representations. The Class reasonably relied to their detriment on TD Bank's representations and failures to divulge highly relevant information about the risk of error in its coin counting machines.

39. The plaintiff and the Class suffered damages by failing to be credited with the value of coins deposited to TD Bank's coin machines.

Conversion

40. The plaintiff and the Class were the owners of coin currency. TD Bank wrongfully interfered with coins belonging to the plaintiff totalling \$159.50 and coins belonging to Class members by failing to credit them for coins deposited to TD Bank's coin changing machines.

41. The plaintiff demanded return of her coins from TD Bank, which refused to deliver her coins as demanded.

42. By reason of TD Bank's acts, the plaintiff and the Class have been deprived of their coins and have suffered losses or damage.

Unjust Enrichment

43. TD Bank has been unjustly enriched as a result of the conduct alleged above. The plaintiff and the Class have suffered a corresponding deprivation by failing to be credited coins deposited to TD Bank's coin counting machines. There is no juridical reason justifying TD Bank retaining any part of it.

Waiver of Tort

44. In the alternative to damages, the plaintiff pleads an entitlement to "waive the tort" and claim an accounting, or other such restitutionary remedy, for disgorgement of the revenues generated by TD Bank from its unlawful acts.

45. It would be unconscionable for TD Bank to retain the defendants to retain the amounts that it unlawfully failed to credit to the Class.

Discovery of Losses

46. As described above, TD Bank knew that its customers did not count change prior to depositing funds into machines to be counted. It was not until May 19, 2016 that TD

Bank admitted that “it is difficult to ensure a consistently great experience for our customers.”

47. Based on the facts pleaded above, including paragraph 22, there was a special relationship between TD Bank and the Class. It was unconscionable for TD Bank to deliberately conceal facts showing the risk of error from members of the Class, causing the Class to act to their detriment.

48. The Class did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the claims which are the basis of this action until recently.

REMEDIES

Damages

49. As a direct, foreseeable and proximate result of the defendants’ conduct alleged above, the plaintiff and the Class have suffered damages.

50. Damages suffered by the Class are capable of being quantified on an aggregate basis pursuant to section 24 of the *Class Proceedings Act*, or otherwise.

Punitive, Aggravated and Exemplary Damages

51. TD Bank’s actions warrant an award of punitive, aggravated and exemplary damages.

52. TD Bank’s actions in rolling out coin machines in Canada without warning of the risk of error given its knowledge of the risk of errors with its Penny Arcade machines in the U.S. was highly reprehensible, particularly as TD Bank knew that its customers were vulnerable to being shortchanged. TD Bank knew that its coin counting machines were not regulated by government authorities. TD Bank further knew that its U.S. and Canadian customers had complained of being shortchanged, yet decided only to take

decisive action once problems involving five machines were featured in a national U.S. TV program.

RELEVANT LEGISLATION

53. The plaintiff pleads and relies on the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A (“CPA”) and related provincial consumer protection statutes, and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

June 22, 2016

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-and-

THE TORONTO DOMINION BANK
Defendant

Court File No.: *C-680-16.*

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT KITCHENER

STATEMENT OF CLAIM

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