

**|CANADA**

**PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL**

**N°: 500-06-000808-168**

**SUPERIOR COURT  
(Class Action)**

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**VINCENT DEFRANCE**

-and-

**LOU VAILLANCOURT-THIVIERGE**

Plaintiffs

-VS-

**CANADIAN IMPERIAL BANK OF  
COMMERCE & ALS.**

Defendants

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**DEFENCE OF CANADIAN IMPERIAL BANK OF COMMERCE**

**IN SUPPORT OF ITS DEFENCE, THE DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE RESPECTFULLY SUBMITS THE FOLLOWING:**

1. As to paragraphs 1 to 5 and 90 of the Statement of claim, the judgment authorizing the class action speaks for itself.
2. It admits paragraphs 6, 7, 12 to 17.
3. It has no knowledge of paragraphs 8, 24 to 49 (note: there are two sets of paragraphs numbered 47 to 49, the second one will be renumbered 49A to 49D), 54 to 59, 82 to 89 of the Statement of claim.
4. Paragraphs 9 and 10 deal with issues of law that it does not have to answer at this stage.
5. It denies paragraphs 18, 51, 53, 60-81.
6. As to paragraphs 11, 12, 18, 49A to 49D, 52, 58, 64, 65, it defers to its Agreement (Exhibit P-4) and denies anything not in accordance with it.

**AND IN FURTHER DEFENCE, THE DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE RESPECTFULLY SUBMITS THE FOLLOWING:**

**I- CANADIAN IMPERIAL BANK OF COMMERCE**

7. The Canadian Imperial Bank of Commerce (hereinafter « **CIBC** ») was formed through the June 1, 1961, merger of the Canadian Bank of Commerce (founded 1867) and the Imperial Bank of Canada (founded 1873).
8. CIBC has approximately 45,000 employees working in four strategic business units: Canadian Personal and Small Business Banking, Canadian Commercial Banking and Wealth Management, U.S. Commercial Banking and Wealth Management, and Capital Markets.
9. In Quebec, as in Canada, CIBC operates in a highly competitive environment comprised of banks and financial institutions offering similar services.
10. With respect to retail banking services, it competes with the defendants named in this case.

**II- THE BANKING AGREEMENT**

11. A customer who wishes to open a bank account with CIBC enters into a written agreement with CIBC, a sample of which has already been communicated by the Plaintiffs (Exhibit P-5, *Entente relative à la tenue d'un compte personnel*, hereinafter referred to as the "**Agreement**").
12. The Agreement provides CIBC's customer with access to, among other things, the following services:
  - Opening one or more bank accounts for deposits and withdrawals;
  - The right to make cheques and other payment orders, including related services, such as the establishment or modification of instructions, certification, objections and the processing of NSF items;
  - Transfers between customer's accounts;
  - Payment of invoices;
  - Account maintenance, including access to balances and detailed statements of all transactions on the customer's accounts;
  - A debit card that can be used to make deposits, withdrawals and bill payments at ATMs or for in-store purchases;
  - Access to online banking;
  - Direct deposit services (e.g., depositing payroll directly to the account);
  - Overdraft protection services;
  - Money orders and bank drafts;

- Purchase and sale of foreign currency, conversion, etc.
  - Fraud Alerts and Smart Balance Alerts
13. The debit card gives access to thousands of CIBC ATMs across Canada, allowing customers to make cash withdrawals, check balances, make deposits, transfer funds, make electronic bill payments and print out a list of recent transactions.
  14. Customers can also use their CIBC debit card to withdraw cash or to pay for purchases worldwide, using funds withdrawn directly from the customer's CIBC bank account.
  15. Moreover, by registering for online banking, customers always have secure access to their accounts.
  16. These online services allow the customer to, among other things:
    - Consult the balances and transactions of its accounts;
    - Transfer funds between eligible accounts;
    - Make mortgage payments;
    - Exchange Interac e-Transfers;
    - Pay a bill or schedule payment at a later date;
    - View recent transactions, online statements and credit card account due dates and minimum payment amounts;
    - Order cheques.
  17. The customer can always thereby manage his/her finances quickly and easily.
  18. CIBC's banking Agreement thus gives its customers access to a multitude of services and benefits that are very useful and allow for an active economic life.
  19. In exchange for this multitude of services, customers agree to pay the fees described in the Personal Account Service Fees disclosure (PASF) and in the Agreement, including the NSF fees in dispute. The PASF is provided to clients together with the Agreement and it is also available online at CIBC.COM.
  20. The Plaintiffs want to isolate artificially the NSF fees payable under the Agreement, while all the services and fees form a package.
  21. Indeed, many of the services already mentioned do not have pay-per-use fees, although they provide significant benefits to customers and involve expenses for CIBC.
  22. For instance, for users of everyday banking plans, deposits, ATM or teller withdrawals, account maintenance, debit card payments, Interac e-Transfers, transfers between accounts, cheques (with sufficient funds), cheque image returns, generally carry no per-

use fees for the customer (conditions and fees may vary depending on the plan chosen, as explained in the Agreement).

- 23. This does not mean that these services are free, nor does it mean that there is no cost to CIBC, but simply that their costs are included in the pricing structure for all services.
- 24. The Plaintiffs' position does not take this reality into account.

### **III- THE CANADIAN CLEARING SYSTEM**

- 25. The Plaintiffs' claim concerns the fees associated with payment orders made without sufficient funds.
- 26. Every day, Canadian consumers, businesses and governments use a variety of payment instruments to purchase goods and services, make financial investments and transfer funds from one person to another.
- 27. Clearing and settlement systems allow financial institutions to exchange payments with each other, calculate how much they owe each other as a result of their customers' transactions, and transfer funds to settle those balances.
- 28. Payments Canada is the organization that underpins the Canadian financial system and economy by owning and operating Canada's payment clearing and settlement infrastructure, including associated systems, bylaws, rules and standards.
- 29. Payments Canada was formally established as the Canadian Payments Association by an Act of Parliament in 1980. The name "Payments Canada" was adopted in 2016.
- 30. As a regulated public interest organization, part of Payments Canada's mandate is to establish and operate national systems for the clearing and settlement of payments.
- 31. Payments made by Canadian consumers, businesses and governments are processed through the retail system known as the Automated Clearing Settlement System (ACSS).
- 32. It is one of Canada's major payments systems, clearing the vast majority of payments in the country. According to Payments Canada, the ACSS processes 99% of the transaction volume on a daily basis. For example, in 2019, it processed an average of 33 million transactions per business day.
- 33. The retail system is used to clear both paper and electronic payment items, including cheques and pre-authorized debits relevant to the dispute.

### **IV- PAYMENT ORDERS AND FEES**

#### **a) Cheques and pre-authorized debits**

- 34. Under the Agreement between CIBC and its customers, two types of payment orders may be subject to NSF charges: cheques and pre-authorized debits.
- 35. Canadians use close to one billion cheques per year that are processed through the ACSS.

36. Generally, the collecting bank does not wait for the drawee bank to respond before remitting the full amount of the cheque to the customer, which is appreciated by customers but may pose a risk to the collecting bank.
37. Indeed, it is only after receiving confirmation from the drawee bank that the collecting bank can ensure that funds are available and that it will receive the money. Until the bank receives confirmation that the funds are available, the amount it credits to its customer is, in fact, an advance granted to the customer.
38. A bank may also place a hold on funds deposited by cheque to manage the risk of loss in case there are insufficient funds in the account on which the cheque was drawn.
39. A drawee bank that refuses to honour a cheque without sufficient funds must return the item in accordance with the delays and formalities set out in the Payments Canada rules (more specifically rules A-4 and A-10).
40. Debit transactions commonly referred to as pre-authorized debits (or "PADs") are based on contractual agreements between payors and payees that allow the payee to instruct his or her financial institution to recover funds from the deposit account that the payor holds at another financial institution.
41. This is a convenient way to pay bills and automate other payments. Instead of sending a cheque, the customer authorizes a business or financial institution to electronically draw funds from their bank account when the payment is due.
42. Common PAD transactions include mortgage payments, subscription and service bill payments, charitable donations, property taxes, car loans and insurance premium payments.
43. Payments Canada also sets the rules and standards for the processing of these payment items between member institutions (rules F-1, H-1 and Standard 005).
44. A PAD implies that the customer has given written authorization to a third party to withdraw funds from their account at CIBC, which may also cause difficulties if, at the time of the withdrawal, there is an insufficient balance in the account to honour this commitment.

**b) Consequence of an NSF payment order**

45. Issuing a payment order without sufficient funds is not prohibited by CIBC, it is provided for, authorized and governed by the Agreement.
46. This action, however, bears disadvantages for both the customer and the bank.
47. Indeed, a payment order refused for insufficient funds may harm the customer's reputation with its creditors, affect the customer's credit rating and require sometimes embarrassing steps and exchanges with the recipient of the refused payment. In some cases, this may also result in an investigation or in criminal charges under section 362 of the *Criminal Code* (R.S.C., 1985, c. C-46)

48. The drawee bank must make a prompt decision to honor or refuse the payment order. If it fails to comply with the applicable delays and formalities, as per Rule A-4, it may be liable to the collecting bank for the value of the payment order.
49. In the event of a refusal, the drawee bank must ensure the return of the item to the payee bank and they must make the appropriate entries in the accounts of their respective customers.
50. NSF items pose a risk of loss to the banks if the item is not returned within the applicable time limits. They can also sometimes be associated with cases of fraud, kiting, or other undesirable situations, which can lead to very serious problems.
51. It is quite simple for the customer to avoid NSF fees by monitoring the account balance, which is always available online, or at any ATM or banking counter.
52. Moreover, CIBC also offers its clients Smart Balance Alerts that will notify a client of a pending insufficient funds issue and provide an opportunity to deposit funds quickly to avoid NSF fees.
53. CIBC also offers overdraft protection services or a line of credit to address potential cash flow problems. These services better protect the respective interests of the parties, at advantageous prices.
54. A customer who, intentionally or by negligence, issues a payment order without sufficient funds must pay a fee that is clearly disclosed from the outset in the Agreement. This is not abusive, especially since it is easy to provide otherwise.
55. The class action is ill-founded.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**DISMISS** the Plaintiffs' action.

**THE WHOLE** with costs.

MONTREAL, August 16th, 2021

*Stikeman Elliott*

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**BORDEREAU NOTIFICATION PAR COURRIEL**  
**(Art. 134 C.P.C.)**

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**SUPERIOR COURT  
(Class Action)**

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**Nº. 500-06-000808-168**

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BS0350

**File:000700.1923**

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