

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-06-000870-176

SUPERIOR COURT
(Class Action Chamber)

SHAY ABICIDAN

Applicant

v.

BANK OF MONTRÉAL et al.

Defendants

**APPLICATION OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE
FOR LEAVE TO SUBMIT RELEVANT EVIDENCE AND TO EXAMINE THE
PROPOSED REPRESENTATIVE PLAINTIFF
(Art. 574 CCP)**

TO THE HONOURABLE JUSTICE PIERRE-C. GAGNON, JUDGE OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE (“CIBC”) RESPECTFULLY SUBMITS THE FOLLOWING:

INTRODUCTION

1. Defendant CIBC is seeking leave to submit relevant evidence, necessary to enable this Court to undertake an informed analysis, in light of the criteria set out in article 575 of the *Code of Civil Procedure* (the “**CCP**”), of the 2nd Re-Amended Application to authorize the bringing of a class action (“**2nd Re-Amended Application for Authorization**”) against CIBC and other Defendants by the Applicant Shay Abicidan (hereinafter sometimes referred to as the “**Applicant**”);
2. More specifically, Defendant CIBC seeks leave to submit the affidavits of Jeffrey D. Smith and the exhibits referred to therein, and to examine the Applicant Abicidan;

THE PROPOSED CLASS ACTION

3. As appears from the 2nd Re-Amended Application for Authorization, the Applicants seek authorization to institute a class action on behalf of the following proposed class (the “**Class**”):

All consumers who since July 4, 2013 (the “**Class Period**”), were charged an annual fee for their credit card, which was preceded by a determined period during which the annual fee was either waived (free) or discounted and then automatically renewed for an indeterminate term at the regular price as of July 4th, 2013;

4. In the 2nd Re-Amended Application for Authorization, the Applicant alleges that during the class period, CIBC as well as the other Canadian Banks named as Defendants in this proceeding (together, the “**Bank Defendants**”) issued credit cards to clients with an introductory offer pursuant to which the annual fees were waived for the first year, and then automatically charged for each subsequent year, unless the cardholder cancelled the card;¹
5. Prior to the filing of the 2nd Re-Amended Application for Authorization, the Applicant alleged that CIBC’s practice of offering annual fee rebates for credit cards during the first year of membership violates section 230(c) of the *Consumer Protection Act* (the “**CPA**”). This alleged cause of action has now been discontinued, as appears from the 2nd Re-Amended Application for Authorization filed;
6. The Applicant alleges that the Bank Defendants’ conduct contravenes section 8(2)(a) of the *Negative Option Billing Regulations*, because they did not send the disclosure statements the Applicant alleges are required by the *Negative Option Billing Regulations*;²
7. The Applicant also alleges that not sending the disclosure statements allegedly required by the *Negative Option Billing Regulations* constitutes a violation of section 228 of the CPA;³
8. With respect to CIBC, the Applicant further alleges that CIBC had an obligation to send him the disclosure statement provided for by section 8(2)(a) of the *Negative Option Billing Regulations* because the annual fees charged in respect of his CIBC Aventura Visa Infinite Card were in respect of what is alleged are “optional products or services” associated with that card, rather than being charged in respect of the card itself;⁴
9. In this regard, the Applicant alleges that he could change to a different, no-fee credit card issued by CIBC, which would have none of the “optional products or services” associated with his current card, without submitting a fresh credit card application;

¹ Re-Amended Application for Authorization, at para 11.

² *Ibid* at para 57.7.

³ *Ibid* at para. 57.9.

⁴ *Ibid* at para 57.8.

10. Finally, the Applicant asserts that the alleged violations of section 228 of the CPA and of section 8(2)(a) of the *Negative Options Billing Regulations* entitle the members of the proposed Class to compensatory and punitive damages;

PROCEDURAL HISTORY

11. On or about July 4, 2016, an Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff was commenced by the Applicant Stephanie J. Benabu (the “**Benabu Application for Authorization**”), in Court File No. 500-06-000798-161;
12. The banks were named as defendants in the Benabu Application for Authorization alongside other entities operating in various industries;
13. At the time, the gist of the claim against CIBC and the other banks was that certain of their practices in connection with credit cards were in breach of section 230(c) of the CPA, as appears more fully from the Court file;
14. On December 6, 2016, CIBC filed an Application for leave to submit relevant evidence, which was amended on December 19, 2016, to add a draft affidavit of Jeffrey D. Smith and three exhibits in its support;
15. On July 3, 2017, a fresh Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff was filed by Mr. Philippe Cohen against various defendants including the Bank Defendants in Court File No. 500-06-000870-176 on behalf of the same putative class members and based on the same legal issues related to section 230(c) of the CPA as in Court File No. 500-06-000798-161;
16. Shortly thereafter, the Benabu Application for Authorization was discontinued against the banks, as more fully explained below;

THE EVIDENCE FOR WHICH LEAVE IS SOUGHT

a) *Evidence produced in Court File no. 500-06-000798-161:*

17. On July 12, 2017, Justice Stéphane Sansfaçon, J.S.C. (as he then was), rendered a judgment on various Applications for leave to submit relevant evidence in Court File No. 500-06-000798-161. This judgment concluded as follows concerning CIBC’s Amended Application for leave to submit relevant evidence:

*[15] **AUTORISE** la défenderesse CIBC à produire en preuve une déclaration sous serment de Jeffrey D. Smith et les pièces CIBC-1 à CIBC-3 pour les fins de l’audition sur la demande d’autorisation, lesquelles pièces sont décrites comme suit:*

- a. *20,000 Bonus Aventura points/Aeroplan Miles and Annual Fee Rebate Offer (Exhibit CIBC-1, en liasse);*
 - b. *A Credit Card First-Year Annual Fee Rebate Acknowledgment (Exhibit CIBC-2, en liasse);*
 - c. *A Cardholder Agreement (Exhibit CIBC-3, en liasse).*
18. On July 13, 2017, Justice Sansfaçon granted Applicant Benabu's Application for Authorization to Discontinue the Putative Class Action Against the Bank Defendants (the "**Discontinuation Judgment**"). The Discontinuation Judgment contained the following conclusion:
- [13] **TAKES ACT** that Applicant has agreed not to contest the admission into the court record, in the Cohen Action the documents which the Bank Defendants sought leave to produce in the present action, and that the Applicant recognizes that the Bank Defendants have reserved their right to seek leave to produce further evidence and to request permission to conduct an examination of the plaintiff in the Cohen Action;
19. CIBC respectfully submits that this evidence, which was already authorized to be filed in respect of the alleged cause of action based on section 230(c) CPA, is equally necessary to determine whether the alleged cause of action based on section 228 CPA meets the criteria established by article 575 CCP;
20. In light of the foregoing, CIBC respectfully requests that this Honorable Court declare that CIBC is allowed to file into the court record the affidavit of Jeffrey D. Smith and its supporting exhibits CIBC-1 to CIBC-3, more fully identified at paragraph 17 above;
- b) Additional evidence relating to the Negative Option Billing Regulations:**
21. As explicitly permitted by the Discontinuation Judgment, CIBC requests permission to produce additional evidence in connection with the cause of action based on alleged violations by CIBC and the other Bank Defendants of section 8(2)(a) of the *Negative Option Billing Regulations*;
22. In light of the various amendments to this proceeding since the Discontinuation Judgment, CIBC also seeks leave to submit a supplementary affidavit from Jeffrey D. Smith, concerning the following factual elements:
- i) **Exhibit JS-1:** Overview of the various credit cards offered by CIBC, *en liasse*;

- ii) **Exhibit JS-2:** Cardholder Agreement in force when Mr. Abicidan was issued his CIBC Aventura Visa Infinite card in December 2016, *en liasse*;
- iii) **Exhibit JS-3:** CIBC Aventura Visa Infinite card Benefits Guide in force when Mr. Abicidan was issued his credit card in December 2016 and current version of the CIBC Aventura Visa Infinite card Benefits Guide, *en liasse*;

EXAMINATION OF THE APPLICANT

- 23. CIBC also seeks the authorization of the Court to examine the Applicant for a duration not exceeding two hours;
- 24. The examination will focus on the following facts:
 - a) His application for a CIBC Aventura Visa Infinite card in December 2016 and the documents given to him at the time;
 - b) His understanding of the terms applicable to the annual fee rebate in force during his first year of using the CIBC Aventura Visa Infinite card;
 - c) His use of the CIBC Aventura Visa Infinite card and its benefits before and after December 2017;
 - d) The reason(s) why he opted not to cancel his CIBC Aventura Visa Infinite card;
 - e) The facts regarding Applicant Abicidan's ability to properly represent the members of the proposed Class, including, but not limited to, the nature of the steps he took prior to filing the Re-Amended Application for Authorization;
- 25. CIBC proposes that this examination be held out of Court and before the hearing of the 2nd Re-Amended Application for Authorization;

THE CRITERIA FOR LEAVE TO SUBMIT RELEVANT EVIDENCE AND TO EXAMINE THE APPLICANT

- 26. The criteria that the Court must analyze in order to determine if the 2nd Re-Amended Application for Authorization must be granted or dismissed are established in article 575 CCP;
- 27. The facts pleaded in the 2nd Re-Amended Application for Authorization are taken as true by the Court, unless such facts are contradicted by other evidence, including the evidence contained in the exhibits submitted by the Applicant and the evidence submitted by the Defendants, if such evidence is permitted;

28. At the authorization stage, the Court may permit the Defendants to adduce evidence if that evidence will allow the Court to have a better understanding of the facts, in order to better determine whether the criteria of article 575 CCP are met;
29. The evidence CIBC seeks leave to submit, as well as the examination of the Applicant on the topics identified at paragraph 24 above, will permit the Court to verify if the criteria established by article 575(2) and (4) CCP are met (whether the facts alleged against CIBC appear to justify the conclusions sought and whether the proposed representative Applicant is in a position to represent the class members);
30. More specifically, the evidence CIBC seeks to produce:
 - a) explains its procedure when cardholders change from a card with an annual fee to a card with no annual fee;
 - b) establishes the contractual relationship and respective obligations of the parties; and
 - c) provides the Court with useful and contextual clarification allowing it to better understand the facts of the case;
31. The examination of the Applicant will allow the Court to assess whether he is an adequate representative Plaintiff and in particular, whether he has a personal cause of action against CIBC;
32. Without this evidence, the Court will not have adequate information required to properly evaluate the allegations brought against CIBC and assess whether the criteria of article 575 CCP have been met;

CONCLUSION

33. CIBC respectfully submits that it would be contrary to the interests of justice to refuse the evidence in respect of which leave is sought, which evidence is directly relevant to the analysis of the proposed class action authorization criteria;
34. CIBC submits that it is essential for this Court to have the benefit of the evidence it seeks to produce;
35. CIBC further submits that its evidence is proportional to the nature and the magnitude of the proposed class action, and necessary for this Court to make an informed decision at the authorization stage concerning the proposed class action against CIBC;
36. The present Application is well-founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Application;

DECLARE that Defendant CIBC is authorized to submit an affidavit from CIBC's representative Jeffrey D. Smith, concerning relevant evidence regarding the annual fee rebates offered from time to time with respect to the CIBC Aerogold Visa Infinite Card during the proposed Class Period, including the following documents:

- i) **Exhibit CIBC-1:** 20,000 Bonus Aventura points/Aeroplan Miles and Annual Fee Rebate Offer, *en liasse*;
- ii) **Exhibit CIBC-2:** Credit Card First-Year Annual Fee Rebate Acknowledgement, *en liasse*;
- iii) **Exhibit CIBC-3:** Cardholder Agreement, *en liasse*;

AUTHORIZE Defendant CIBC to submit an affidavit from CIBC's representative Jeffrey D. Smith concerning relevant evidence regarding the features and benefits of Mr. Abicidan's credit card, including the following documents:

- i) **Exhibit JS-1:** Overview of the various credit cards offered by CIBC, *en liasse*;
- ii) **Exhibit JS-2:** Cardholder Agreement in force when Mr. Abicidan was issued his CIBC Aventura Visa Infinite card in December 2016, *en liasse*;
- iii) **Exhibit JS-3:** CIBC Aventura Visa Infinite card Benefits Guide in force when Mr. Abicidan was issued his credit card in December 2016 and current version of the CIBC Aventura Visa Infinite card Benefits Guide, *en liasse*;

AUTHORIZE Defendant CIBC to examine the Applicant Shay Abicidan out of Court before the hearing of the 2nd Re-Amended Application for Authorization regarding the following subjects:

- a) His application for a CIBC Aventura Visa Infinite card in December 2016 and the documents given to him at the time;
- b) His knowledge of the terms applicable to the annual fees rebate in force during his first year of using the CIBC Aventura Visa Infinite card;
- c) His use of the CIBC Aventura Visa Infinite card and its benefits before and after December 2017;
- d) The reason(s) why he did not cancel his CIBC Aventura Visa Infinite card;

- e) The facts regarding Mr. Abicidan's ability to properly represent the members of the proposed Class, including, but not limited to, the nature of the steps he took prior to filing the Re-Amended Application for Authorization.

ISSUE any other order that may facilitate the conduct of the examination of Applicant Shay Abicidan in the present file;

THE WHOLE, without costs, except in case of contestation.

MONTREAL, July 17, 2020

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NOTICE OF PRESENTATION

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TAKE NOTICE that the *Application of Defendant Canadian Imperial Bank of Commerce for Leave to Submit Relevant Evidence and to Examine the Proposed Representative Plaintiff* will be presentable before one of the Honourable Judges of the Superior Court, sitting in and for the District of Montréal, as case management judge, on the date and time to be determined by the Court, at the Montréal Courthouse, situated at 1 Notre-Dame Street East, Montréal, Québec H2Y 1B6.

GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, July 17, 2020

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