



**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

DAVID CHALMERS and SARAH LOUISE CAMPBELL

Plaintiffs

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. 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 plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, 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 PLAINTIFFS' CLAIM, and \$400.00 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 plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

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: September 21, 2022

Issued by _____
Local Registrar

Address of court office 393 University Avenue
Toronto ON
M5G 1E6

TO: CANADIAN IMPERIAL
BANK OF COMMERCE
81 Bay Street
CICB Square
Toronto Ontario M5J 0E7

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.

TO: **CANADIAN IMPERIAL BANK OF COMMERCE**
81 Bay Street
CICB Square
Toronto Ontario M5J 0E7

CLAIM

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) "**CJA**" means the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- (b) "**Class**" or "**Class Members**" means every person resident in Canada who is or was a personal deposit account holder Canadian Imperial Bank of Commerce and whose personal deposit account has been charged multiple NSF fees by Canadian Imperial Bank of Commerce on a single payment made or cheque issued since January 1, 2012;
- (c) "**Consumer Protection Act**" means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;
- (d) "**CPA**" means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (e) "**Defendant**" means Canadian Imperial Bank of Commerce;
- (f) "**Equivalent Consumer Protection Statutes**" means the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2, the *Fair Trading Act*, R.S.A. 2000, c. F-2, the *Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2, the *Business Practices Act*, C.C.S.M., c. B120, the *Consumer Protection Act*, C.Q.L.R., c. P-40.1 and the *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1, as amended;
- (g) "**NSF Fee**" means non-sufficient funds fee; and
- (h) "**CIBC**" means Canadian Imperial Bank of Commerce.

RELIEF SOUGHT

2. The Plaintiffs claim on their own behalf and on behalf of the other Class Members:

- (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiffs as the representative plaintiffs for the Class;
- (b) a declaration that the Defendant is liable to the Plaintiffs and Class Members for breach of contract;
- (c) a declaration that the Defendant is liable to the Plaintiffs and Class Members for unfair practices under the *Consumer Protection Act*;
- (d) a declaration that the Defendant was unjustly enriched by the acts and omissions pleaded herein;
- (e) damages for breach of contract equivalent to the value of all monies paid by the Plaintiffs and Class Members to the Defendant resulting from the charging of multiple NSF Fees on a single cheque issued or payment made;
- (f) an order for disgorgement of the value of all monies illegally paid by the Class Members;
- (g) punitive damages in an amount that this Court finds appropriate;
- (h) an equitable rate of interest on all sums found due and owing to the Plaintiffs and Class Members;
- (i) pre-judgment and post-judgment interest pursuant to the *CJA*;
- (j) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;
- (k) pursuant to section 26(9) of the *CPA*, the costs of notice and of administration;
- (l) plan of distribution of the recovery in this action plus applicable taxes; and
- (m) such further and other relief as this Honourable Court may deem just.

OVERVIEW

3. CIBC has a practice of charging multiple NSF Fees on a single rejected payment or bounced cheque. This practice is a violation of the terms of CIBC's contract with Class Members. As a result of its unlawful practice, CIBC has profited enormously, accruing tens of millions of dollars per year by charging illegitimate fees to Class Members.

4. The unlawful charges occur when a depositor makes a payment or issues a cheque without sufficient funds in his or her bank account. The first and only lawful charge is applied when the payee attempts to collect and CIBC rejects the payment, charging an NSF fee (currently \$45) to the depositor's account. However, when subsequent attempts are made by the payee to process the same already rejected payment or cheque, CIBC charges a duplicative NSF fee each time.

5. The burden of these duplicative NSF Fees falls disproportionately on low-income Canadians, who are more likely to maintain low bank account balances and more likely to use online vendors in lieu of credit cards.

6. The Plaintiffs do not dispute CIBC's right to reject a transaction and charge a single NSF Fee, but the Defendant's practice of charging multiple NSF Fees on each subsequent attempt to reprocess the same already rejected transaction is a breach of its contract with Class Members.

7. In the Defendant's sole and undisclosed view, each time CIBC unilaterally reprocesses an already rejected payment or cheque it becomes a new, unique transaction that is subject to a fresh NSF Fee. However, CIBC's standard form contract does not give the Defendant any authority to engage in this practice, and never even contemplates that this counterintuitive result could be possible. The standard form contract drafted by the Defendant is identical for all Class Members.

8. CIBC's practice also violates consumer protection legislation in Ontario, where the Plaintiffs reside and where CIBC is headquartered, and constitutes an unjust enrichment. The Defendant has been financially enriched, with a corresponding deprivation to the Class Members, for no juristic reason.

THE PLAINTIFFS AND CLASS

David Chalmers

9. The plaintiff, David Chalmers ("**David**"), is an individual who resides in the City of Guelph, in the Province of Ontario. David has lived on a disability pension for the past 25 years.

10. David maintains a chequing account (the "**Account**") with CIBC. At all material times, David patronized CIBC branches located in Guelph, Ontario and conducted his banking online from his home in Guelph, Ontario.

11. On January 31, 2022, David attempted to make a one-time pre-authorized payment of \$7.90 via PayPal, an online payments service. At that time, the balance in his Account was negative.

12. The same day, CIBC rejected the payment due to insufficient funds and charged David a \$45 NSF Fee.

13. The next day, on February 1, 2022, the payee re-presented the same \$7.90 transaction to CIBC for payment, unbeknownst to David. Again, CIBC rejected the transaction and charged David a second \$45 NSF Fee.

14. In sum, CIBC charged David \$90 in fees to process a single payment because he tried to make a transaction while his Account had a negative balance.

15. David took no affirmative action to re-initiate the reprocessing of this transaction. David received no notice from CIBC of this reprocessing.

16. David understood that he had made a single "cheque or pre-authorized payment", as is laid out in CIBC's contract, capable of attracting at most a single NSF Fee.

Sarah Louise Campbell

17. The plaintiff, Sarah Louise Campbell ("**Sarah**") is an individual who resides in the City of Toronto, in the Province of Ontario.

18. Sarah maintains a chequing account (the "**Account**") with CIBC. At all material times, Sarah patronized CIBC branches located in Toronto, Ontario and conducted her banking online from her home in Toronto, Ontario.

19. On June 9, 2022, Sarah attempted to make a one-time pre-authorized payment of \$115.83 via PayPal, an online payments service. At that time, the balance in her Account was negative.

20. The same day, CIBC rejected the payment due to insufficient funds and charged Sarah a \$45 NSF Fee.

21. On June 15, 2022, the payee re-presented the same \$115.83 transaction to CIBC for payment, unbeknownst to Sarah. Again, CIBC rejected the transaction and charged Sarah a second \$45 NSF Fee.

22. In sum, CIBC charged Sarah \$90 in fees to process a single payment because she tried to make a transaction while her Account had a negative balance.

23. Sarah took no affirmative action to re-initiate the reprocessing of this transaction. Sarah received no notice from CIBC of this reprocessing.

24. Sarah understood that she had made a single "cheque or pre-authorized payment", as is laid out in CIBC's contract, capable of attracting at most a single NSF Fee.

25. The Plaintiffs are seeking certification of the following class (collectively referred to as the "Class" or "Class Members"):

Every person resident in Canada who is or was a personal deposit account holder of Canadian Imperial Bank of Commerce and whose personal deposit account has been charged multiple NSF fees by Canadian Imperial Bank of Commerce on a single payment made or cheque issued since January 1, 2012.

THE DEFENDANT

26. Canadian Imperial Bank of Commerce is a Canadian corporation with its headquarters and principal place of business located in Toronto, Ontario. Among other things, Canadian Imperial Bank of Commerce is engaged in the business of providing retail banking services to consumers, including the Plaintiffs and members of the Class. Canadian Imperial Bank of Commerce operates branches, and thus conducts business, throughout the province of Ontario.

27. The Defendant's annual report indicates CIBC earned \$797,000,000 (seven-hundred and ninety-seven million) in deposit and payment fees, including NSF Fees, from Canadian customers in 2021.

28. The Defendant maintains customer transaction data containing the information necessary to ascertain the Class Members and calculate the value of monies paid by individual Class Members to the Defendant as a result of the Defendant's practice of charging of multiple NSF Fees on a single payment made or cheque issued.

CAUSES OF ACTION

Breach of Contract

29. The Defendant's "Personal Account Agreement", which incorporates its document "Personal Account Service Fees" (collectively, the "**Terms**"), form the contract between the Defendant and Class members.

30. The Terms contain material representations and omissions indicating that an NSF Fee will only be charged once when a depositor makes a payment or issues a cheque without sufficient monies in their account. However, in fact CIBC regularly charges multiple NSF Fees per transaction.

31. Specifically, the Terms state that CIBC may charge a \$45 NSF Fee for "each" dishonoured cheque or pre-authorized payment:

Service	Fee Per Item
Dishonoured (NSF) Cheque or Pre-Authorized Payment	• \$45.00 each ¹

32. The Terms state only that a single NSF Fee will be charged per singular "item".

33. The Terms likewise define "cheque" in the singular: "a cheque or other bill of exchange, promissory note, draft, money order, order for payment, bill payment remittance, bankers' acceptance, coupon, electronic debit or credit, or other payment instrument, whether negotiable or non-negotiable".

34. The Terms do not authorize or even contemplate the counterintuitive result that an electronic transaction reprocessed after an initial return for insufficient funds could become a new, unique "item" for NSF Fee assessment purposes, or that multiple NSF Fees could be charged on a single dishonoured cheque or pre-authorized payment.

35. The Class Members are ordinary Canadians – though the class skews heavily to low-income and racialized Canadians. They do not possess specialized knowledge of contract law or the system for processing payments between payees and banks. The Terms convey to Class Members that the same "item" – a pre-authorized payment or a cheque issued without sufficient funds in their account – can only incur a single \$45 NSF Fee.

36. The Plaintiffs and Class deny that the Terms are ambiguous about CIBC's practice of charging multiple NSF Fees but, in the alternative, they plead and rely on the doctrine of *contra proferentem*, whereby any ambiguity must be interpreted in favour of the Plaintiffs and Class.

37. The Terms are standard form documents drafted by CIBC without any input or ability to negotiate the terms by the Class Members. It is and has always been in CIBC's power to draft contract language that would authorize its current practice. Class Members cannot be said to have consented to a practice that is nowhere explained, contemplated or permitted by the Terms.

38. In sum, CIBC represents that one \$45 NSF Fee will be charged when a depositor makes a payment or issues a cheque without sufficient funds in their account. CIBC

breached, and continues to breach, its contract with Class Members when it charges customers multiple NSF Fees on the same already rejected payment or cheque.

Consumer Protection Act

39. The Plaintiffs and Class Members entered into their contracts with CIBC for personal, family and/or household purposes and are consumers for the purposes of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

40. The Defendant's Terms contained false, misleading and/or deceptive representations because, among other things, (1) the Terms failed to state the material fact that the Defendant would charge multiple NSF Fees for a single transaction, and such failure deceived or tended to deceive customers, and (2) the Terms misled as to the material fact that the Defendant would charge multiple NSF Fees for a single transaction, and such use deceived or tended to deceive customers. This constitutes an "unfair practice" pursuant to s. 14 of the *Consumer Protection Act*, or similar provisions in the Equivalent Consumer Protection Statutes.

41. While the Plaintiffs and Class deny that the Terms are ambiguous regarding the Defendant's practice of charging multiple NSF Fees, any ambiguity that allows for more than one reasonable interpretation of a consumer agreement must be interpreted to the benefit of the consumer pursuant to s. 11 of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

42. The Plaintiffs and Class Members entered into their contracts with the Defendant after or while the Defendant engaged in the unfair and deceptive practice described above. Accordingly, the Plaintiffs and Class Members are entitled to rescind their contracts and seek any further remedy that is available in law, including damages equivalent to the value of all monies paid by the Plaintiffs and Class Members to the Defendant resulting from the charging of multiple NSF Fees on a single already rejected transaction, pursuant to s. 18(1) of the *Consumer Protection Act* and/or Equivalent Consumer Protection Statutes.

43. The notice requirement should be waived pursuant to s. 18(5) of the *Consumer Protection Act* in order to facilitate access to justice for Class Members.

44. The Defendant's headquarters are located in Toronto, and CIBC carries on business throughout Ontario. As a result, all Class Members obtain the benefit of the *Consumer Protection Act*. In the alternative, Class Members outside of Ontario obtain the benefit of the Equivalent Consumer Protection Statutes.

Unjust Enrichment

45. CIBC received and continues to receive enormous revenues by charging multiple NSF Fees in the manner described above.

46. The Plaintiffs and Class Members suffered and continue to suffer a deprivation that corresponds to the Defendant's benefit.

47. There is no juristic reason for CIBC's benefit and Class Members' corresponding deprivation. CIBC has breached its contract with Class Members and has engaged in "unfair practices" prohibited under consumer protection legislation by virtue of its false, misleading and deceptive representations. The Class Members are entitled to restitution in order to remedy the Defendant's unjust enrichment.

Punitive Damages

48. The conduct of the Defendant warrants the condemnation of this Honourable Court. CIBC enjoys a prominent position in an oligopolistic industry. Millions of Canadians are dependent on CIBC for their day-to-day banking needs. Even without charging duplicate NSF Fees, CIBC reaps enormous revenues and profits.

49. By choosing to charge duplicate NSF Fees, in violation of its contract with Class Members, CIBC chose to inflate its already colossal profits. It made this choice knowing that the burden imposed by these illegitimate charges would disproportionately fall on low-income, racialized and otherwise marginalized Canadians. Its decision to maximize illegitimate profits at the expense of Canadians least able to afford it was also made knowing that this vulnerable Class was unlikely to enforce their contractual rights. CIBC's illegitimate duplicate NSF fees increased significantly during the COVID-19 crisis.

50. In these circumstances, the Plaintiffs request punitive damages to condemn this high-handed conduct.

PLACE OF TRIAL

51. The Plaintiffs propose that this action be tried in Toronto

September 21, 2022

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Plaintiffs

and

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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