

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

HOWARD GREEN AND ANNE BELL

Plaintiffs

-and-

**CANADIAN IMPERIAL BANK OF COMMERCE, GERALD MCCAUGHEY,
TOM WOODS, BRIAN G. SHAW, AND KEN KILGOUR**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF HOWARD GREEN

I, HOWARD GREEN, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am one of the Representative Plaintiffs in this action for the class of persons resident in Canada who purchased Canadian Imperial Bank of Commerce (“**CIBC**”) shares during the period from May 31, 2007 to February 28, 2008 (the “**Class Period**”). As such, and unless otherwise stated, I have personal knowledge of the facts to which I hereinafter depose. Where I have been informed of facts to which I depose, I have stated the source of my information and I hereby confirm that I believe such facts to be true.

2. Nothing in this affidavit is intended to waive, nor should it be understood or interpreted to be a waiver of solicitor-client privilege, litigation privilege, settlement privilege or any other privilege related to any of the information in this affidavit.

3. I have reviewed the settlement agreement dated December 2, 2021 between the parties to this action, (“**Settlement Agreement**”).

4. I swear this affidavit for two related purposes:

(a) In support of the motion for Court approval of the Settlement reached between the Parties; and

(b) In support of the motion for:

(i) approval of a retainer agreement between me and Class Counsel;
and

(ii) approval of Class Counsel Fees to be paid from the Settlement Funds.

Ownership of CIBC Shares

5. I live in the City of Toronto and work as a jeweller and pawnbroker.

6. I have been a long-time investor in bank stocks, including CIBC. I purchased my first share in CIBC in approximately January 1996. I joined the CIBC Dividend Reinvestment Plan after it was first offered to me by CIBC. I believe I joined the Plan

within 2 years after I purchased my first share in 1996. The Dividend Reinvestment Plan was attractive to me because it allowed me to reinvest the dividends from my CIBC shares in additional CIBC common shares, and I viewed CIBC shares as being a safe and secure investment. I could purchase common shares through the Plan without paying brokerage fees or service charges.

7. At the commencement of the Class Period, I held 194.984 shares in CIBC. During the Class Period I made the following purchases of CIBC shares through the Dividend Reinvestment Plan: 1.629 shares on July 27, 2007; 1.732 shares on October 29, 2007; and 2.601 shares on January 28, 2008.

Ongoing Involvement as Representative Plaintiff

8. On May 13, 2008, I entered a formal retainer agreement with Rochon Genova LLP (“**Rochon Genova**”) to prosecute this Action. Now shown to me and marked as **Exhibit “A”**, is the retainer agreement between me and Rochon Genova dated May 13, 2008 (“**Green Retainer Agreement**”).

9. I understand that the other representative plaintiff, Anne Bell, into a similar retainer agreement with Rochon Genova to prosecute this Action on November 10, 2008. (“**Bell Retainer Agreement**”).

10. I have committed myself to the prosecution of this Action.

11. In furtherance of that commitment, I have been in regular contact with Rochon Genova and Himlfarb Proszanski by telephone and by email. I have also met with

members of Rochon Genova and Himlfarb Proszanski from time to time at various stages in the proceeding. As representative plaintiff, I received advice from, and gave instructions to Rochon Genova when called upon to do so.

12. In this Action:

- a) I assembled relevant documents including documents relevant to my purchase of CIBC shares for the purposes of instructing counsel;
- b) I spent many hours reviewing and discussing, at length, the draft pleading with Class Counsel. This effort took me away from my normal work activities. I instructed Class Counsel to issue initial statement of claim in this Action which was issued on July 22, 2008;
- c) I assisted in the drafting of my affidavit of January 15, 2010 in support of the Plaintiffs' motion for leave and certification, and in so doing I ensured that the affidavit accurately represented by knowledge and position;
- d) Prior to swearing the affidavit, I reviewed with Class Counsel several documents including the Second Fresh as Amended Statement of Claim in order to understand the pleaded claims against CIBC;
- e) I prepared for the and attended on my cross-examination on my affidavit by Defendants' counsel on January 13, 2012. This attendance and the requisite preparation occupied many hours, over several days, when I had to take time off work;

- f) I oversaw the assembly of my relevant documents for the purposes of documentary production.

13. Since I entered the Green Retainer Agreement on May 13, 2008, Rochon Genova and Himlfarb Proszanski have kept me informed of the progress of the investigation and once commenced, progress of the Action. More particularly, they have provided updates regarding the status of the Action, steps taken and to be taken and the reasons therefor. In addition, Class Counsel provided key documents, made recommendations and sought my input and instructions in relation to all material matters. We discussed the progress of the action from time to time as part of the major milestones in this Action.

14. I have discussed the progress of this action on numerous occasions with Mr. Rochon and Mr. Proszanski, and have met with Class Counsel in Toronto to discuss the progress of the claim in detail.

15. I knew throughout this period that the case had been extremely hard fought at virtually every stage by counsel for both the Plaintiffs and Defendants. In particular:

- a) I was aware that Class Counsel filed a record of evidence, for a contested leave motion under the Ontario Securities Act (“OSA”) and for certification of this action as a class proceeding. My affidavit of January 15, 2010 was sworn in support of that motion. I was aware that the motion was initially denied in 2012 and then appealed all the way to the Supreme Court of Canada in 2015 after which the case was allowed to proceed.

- b) I took two days off work to review materials, meet with Class Counsel and personally attend the Supreme Court hearing in Ottawa in February 2015.
- c) I was aware that there was an initial mediation in 2012 after the initial denial of the leave and certification motion, but before there was any appeal decision. I was consulted by Rochon Genova before that 2012 mediation and advised that no acceptable settlement proposals were made by CIBC and that the mediation failed. During the course of those discussions with counsel, I provided my own instructions to counsel;
- d) I was advised by Rochon Genova about the Supreme Court of Canada decision in 2015 after which the case proceeded through the production and discovery phases of the litigation. I also know that the Class Counsel obtained many thousands of documents from CIBC and the Defendants and many other documents from their own investigation.
- e) I was advised by Joel Rochon that the Action was scheduled to go to trial over 9 weeks commencing in October, 2021.
- f) I was advised by Joel Rochon in the spring of 2021 that there was a prospect for a mediation. I was consulted about that mediation before Justice O'Connor (retired). I was also briefed about the multi-day Pre-Trial which was to begin towards the end of June 2021 and I gave instructions to Joel Rochon about both the negotiations and the proposed

settlement. No agreement was reached at during the June 2021 Mediation, nor at the Pre-Trial.

- g) I was informed by Joel Rochon of continued discussions in the context of the Pre-Trial before Justice Myers in August and September 2021. I was informed by Joel Rochon of the ultimate agreed settlement amount and instructed him to accept it.
- h) Joel Rochon also reviewed the terms of the formal Settlement Agreement dated December 2, 2021, and I instructed him to sign it on my behalf;
- i) Most recently, I interrupted my family vacation in Aruba to speak with Mr. Rochon and to prepare this affidavit. As part of this effort, at my personal expense, I printed and reviewed a number of documents relevant to the settlement approval motion, in order to conduct a fully informed discussion with Class Counsel.

16. Overall, my knowledge of the issues in the Action and the issues relevant to the Settlement has been informed by my interactions with Rochon Genova, the various documents and correspondence that I have received, reviewed and considered.

17. As such, I believe that I have a very good understanding of the issues in the Action and the issues relevant to the Settlement.

SETTLEMENT APPROVAL

Instructions and Understanding of the Key Terms of the Settlement Agreement

18. As referred to above, in recent times, this settlement was the product of a formal mediation session with the Honourable Dennis O'Connor, Q.C., the former Associate Justice of Ontario, and subsequently, a Pre-Trial before Mr. Justice Fred Myers of the Ontario Superior Court of Justice, in his capacity as Pre-Trial Judge.

19. Prior to the mediation before Mr. O'Connor in June 2021, Joel Rochon explained to me the positions of the parties and provided me with his advice about settlement strategy and recommended a range of possible settlement amounts which should be acceptable. I authorized and instructed Class Counsel to negotiate with counsel for the Defendants to resolve the Action on the best terms subject to a minimum monetary amount being paid for the benefit of the Class.

20. That initial mediation took place on June 2 and 3, 2021. In spite of counsel's best efforts and that of Mr. O'Connor this mediation session ended without settlement having been achieved.

21. Following the June 2021 mediation, Class Counsel continued with their preparation for trial.

22. I was advised by Joel Rochon and I agreed that counsel on both sides should continue to attempt to resolve this Action. Mr. Rochon advised me that the Pre-Trial Judge, Mr. Justice Myers agreed to attempt to assist the parties in their efforts at

negotiating a settlement. Counsel met with Mr. Justice Myers on June 29 and 30, 2021 and, once again, in spite of their best efforts, and those of Mr. Justice Myers, settlement was not achieved.

23. Settlement discussions among counsel and Mr. Justice Myers, as Pre-Trial Judge, resumed in September 2021.

24. After a number of days of negotiation, the parties agreed to settle this action for \$125 million, subject to Court approval. Class Counsel were authorized by the representative plaintiffs, including by me, to agree to settlement on these terms. [REDACTED]

[REDACTED]

[REDACTED]

25. After discussions with Class Counsel, I understand that although Class Counsel was confident that the Class has a good case; there was substantial risk to this litigation which had to be considered. These risks were explained to me by Joel Rochon.

26. I understand that, under the Settlement Agreement and subject to the particular wording in it, unless a potential Class Member had excluded him, her or itself from the Action, the claims brought and any other claims that could have been brought in the Action will be released forever on the Effective Date.

27. I understand this to mean that, if the Settlement is approved, no Released Claims can be brought or continued against Releasees at any time after the Agreement becomes effective.

28. Class Counsel reviewed the key monetary and non-monetary terms of the Settlement Agreement with me, and have explained their rationale. I understand that:

- a) the Settlement resolves this Class Action fully and finally;
- b) the total amount of \$125 million will be the sole monetary contribution by the Defendants in the settlement of this Class Action;
- c) the effect and binding nature of the Settlement Agreement;
- d) in order to become effective, the Settlement must be approved by the Court;
- e) if the Settlement becomes effective, the case against the Defendants will be dismissed with prejudice (meaning it cannot be brought again);
- f) if we later discover new facts related to the claims, that discovery will not change the binding effect of the Settlement Agreement and the releases given; and
- g) the Settlement is a compromise having regard to the various risk factors described above, and Class Members are unlikely to be completely restored to the position they were in before they acquired CIBC shares.

29. Given my understanding of the issues in this case and the risks to the continued litigation as explained to me by Joel Rochon, I accept that the Settlement of \$125 million is fair and adequate consideration to be paid in exchange for the Released Claims. I certainly believe that this settlement was in the best interest of the class members.

30. Accordingly, I have instructed Class Counsel to seek this Honourable Court's approval of the Settlement.

Proposed Distribution Protocol

31. I have discussed with Rochon Genova the terms of the proposed Distribution Protocol set out in Schedule "H" to the Settlement Agreement and the basis for those terms.

32. I do not object to the approval of the Distribution Protocol in the form it is proposed.

33. Accordingly, I have instructed Class Counsel to seek this Honourable Court's approval of the Distribution Protocol.

FEE APPROVAL

34. Rochon Genova undertook to prosecute this Action on a contingency basis such that they would not receive payment of their fees or disbursements unless and until a recovery was obtained for the benefit of the Class Members.

35. Class Counsel did not obtain third party funding in this case until December 2016 and thus bore entirely the risk of loss including the value of their own docketed time over

some 8 years of litigation, the disbursements incurred including expert fees, any adverse cost award, and applicable taxes on all of the foregoing from the commencement of this action until December 2016.

36. After the Class Proceedings Fund (the “CPF”) agreed to fund some of Class Counsel’s disbursements (notably expert’s fees), and to indemnify the Representative Plaintiffs against any adverse cost awards, Class Counsel was still bearing entirely the value of their own docketed time for the entire 13 years of this litigation and disbursements and expert fees not funded by the CPF.

37. Class Counsel has informed me that the value of Class Counsel’s docketed time on this file, as at the date of this affidavit, is in excess of \$14,877,409, exclusive of the disbursements, and applicable taxes. I have been further informed that Class Counsel estimates that they will spend time valued at approximately an additional \$150,000 to complete administration of the Settlement. I understand that this additional time will be spent to:

- a) prepare for and attend at the Settlement Approval Hearing;
- b) assist in implementing Part 2 of the Plan of Notice as it relates to the Approved Settlement Notice;
- c) liaise with the Administrator to ensure the fair and efficient administration of the Settlement Agreement and the Distribution Protocol; and
- d) respond to inquiries from Class Members and their lawyers, if applicable, regarding the Settlement Agreement and the Distribution Protocol.

38. Class Counsel have informed me that they have incurred disbursements exceeding \$2.8 million to date, which have not been funded by the CPF or covered by an adverse cost award. I understand that this amount includes expert fees for consultation and expert evidence, fees of the mediation, the costs of investigating this matter, travel, accommodation, communication costs and court filing fees. This amount of disbursements will be sought in addition to the fees being requested in this action.

39. Class Counsel have advised me that they are requesting Class Counsel Fees in the global amount of \$37.5 million plus taxes and reimbursement for disbursements which have not been funded by the CPF. It has been explained to me that this amount (\$37.5 million) is consistent with the Green Retainer Agreement and the Bell Retainer Agreement. This amount is determined on the basis of 30% of the Settlement amount of \$125 million.

40. I am advised that HST on Ontario legal fees is 13%. Therefore, provincial taxes on the requested Settlement amount will be \$4.875 million. Therefore, total requested fees and applicable taxes will be \$42.375 million, plus applicable disbursements in the amount of \$2.860 million.

41. Therefore, I understand that, if Class Counsel's requested fee plus applicable disbursements and taxes in Ontario are approved, the Settlement Funds would be reduced by \$45.235 million before reimbursement to the CPF and before Administration Expenses to distribute the balance to Class Members.

42. I support the requested Class Counsel fee of \$37.5 million plus applicable taxes on fees plus reimbursement for disbursements plus applicable taxes on disbursements.

43. I would also ask that the Court recognize the time and effort I have invested in reviewing relevant documents, having substantive consultations, and providing instructions to Class Counsel. I note in particular the time off work and away from family, including on holidays, which I took over the 13 years of this litigation in order to participate actively and provide meaningful instructions to Class Counsel.

CONCLUSION

44. I appreciate that the Action raises complex factual and legal matters and that it would not be feasible to pursue my claim on an individual basis. Absent the class action mechanism, and Class Counsel willing to pursue this litigation on a contingency fee basis for 13 years, I would not have any remedy against the Defendants.

45. Given these circumstances and for the reasons described above, I believe the Settlement to be fair, reasonable, and in the best interests of the Class. Accordingly, I hereby request that the Settlement and Class Counsel Fees be approved by this Honourable Court.

46. I make this affidavit in support of the Plaintiffs’ motion for an order approving the Settlement Agreement and Class Counsel’s Fees, and for no other purpose.

SWORN BEFORE ME) via videoconference) in Toronto) this 5 th day of January 2022.)	
<p style="text-align: center;"><i>R Podolny</i></p> <hr/> A Commissioner for taking affidavits, etc.	<hr/> Howard Green

RETAINER AGREEMENT

Retainer

I, **Howard Green**, hereby retain and employ the law firm of *Rochon Genova LLP* as my solicitors and hereby authorize them to institute a Class Action pursuant to the *Class Proceedings Act, 1992*, naming me as a representative plaintiff on behalf of a class of persons in Canada who purchased shares and other securities in the Canadian Imperial Bank of Commerce ("CIBC") from May 31, 2007 to December 6, 2007 and to take such actions and conduct such proceedings as they may consider necessary or proper for the conduct of the proceeding.

Commitments

1. I understand that this litigation is to be pursued on a contingency basis such that fees and reasonable disbursements with respect to the common issues will be payable only in the event of success in the class proceeding. Fees, reasonable disbursements and GST will not be charged to me unless the litigation is successful.

2. I understand that according to the *Class Proceedings Act, 1992*, "success in a class proceeding" includes:
 - a) judgment on the common issues in favour of some or all class members; and
 - b) a settlement that benefits one or more class members.

3. I understand that *Rochon Genova LLP* shall be entitled to a legal fee which is a percentage of the total value of any settlement or judgment to the class, over and above any award of court costs, or claim for reasonable disbursements incurred by *Rochon Genova LLP*. I agree that the above percentage will be calculated on a 30% fee of the total value of the amount recovered, or on the basis of a 4 times multiplier of the time spent prosecuting the claim, whichever is higher. I agree that in addition to any legal fee, *Rochon Genova LLP* shall be entitled to recover from any settlement or judgment all reasonable disbursements incurred along with interest which has accrued on such disbursements, and GST.

4. I understand that the total legal fee will vary according to the total value of any settlement or judgment which may result from this litigation. I understand that any such settlement or judgment could vary greatly depending on several factors, including the total number of injured persons in Canada, additional information which comes to light during the course of the litigation, and the nature of any settlement or judgment. By way of illustration only, I understand that in the event a judgment of \$30 million was awarded and upheld following any and all appeals, the total legal fee payable to *Rochon Genova LLP* (under the percentage model) would be \$7.5 million. I understand that the legal fee could be significantly lower than this amount, or significantly higher than this amount, depending upon the size of the damages to the class. In terms of reasonable disbursements, by way of illustration only, I understand that if the reasonable disbursements are \$1 million, then \$1 million is payable to *Rochon Genova LLP* from any settlement or judgment in addition to legal fees. I understand that in the event no judgment or settlement results, no legal fees or reasonable disbursements will be payable.
5. I understand that this Retainer Agreement, and any fees awarded pursuant to the Retainer Agreement, shall be subject to approval of the Court, which must be satisfied that the overall fees awarded are fair and reasonable having regard to a number of factors, including the risk of taking the case on a contingency basis, the complexity of the case and the results achieved. I further understand that, in the event the Court awards fees on the basis of a multiplier, the Court has the discretion to fix the base fee and the appropriate multiplier. With respect to the base fee, the *Class Proceedings Act* specifies that the Court shall allow only a reasonable fee in determining a solicitor's base fee.
6. Notwithstanding the foregoing, if I terminate, at my initiative, this Retainer Agreement and/or retain a different solicitor in this class proceeding, I hereby acknowledge that *Rochon Genova LLP* will then render an account for hours worked to date, reasonable disbursements and GST, which account will be paid forthwith by

me, or alternatively, will be the subject of protection of my new counsel, said protection to be satisfactory to *Rochon Genova LLP*. In the event the account is not paid forthwith and is instead protected by my new counsel, it shall be a first charge on any judgment or settlement funds pursuant to s. 32 (3) of the *Class Proceedings Act* and shall rank ahead of any fees and reasonable disbursements chargeable by my new counsel. I shall not be personally liable to pay any account rendered by *Rochon Genova LLP* in the event that I retain new counsel and my new counsel:

- a) agrees to protect *Rochon Genova LLP's* account as a first charge on any proceeds; and
- b) pursues the matter to judgment, regardless of the outcome.

7. I understand that *Rochon Genova LLP and* will conduct meaningful consultations with the representative plaintiff(s) before accepting any settlement or pursuing an appeal of the trial verdict.
8. I further understand that *Rochon Genova LLP* agree to indemnify and hold me harmless in relation to any costs exposure which may arise by reason of my participation in this class action.
9. I understand that in the event that I, as a representative plaintiff, should die prior to the completion of this matter, it is proposed that my estate continue in my place. In the event that the estate is unable or unwilling to continue as a representative plaintiff, arrangements could be made to substitute another individual or individuals to act as representative plaintiff(s). In the event that the estate is unwilling to continue, then the estate will be liable for the account as detailed in paragraph. If, however, the action is unable to proceed due to the unavailability of a substitute representative plaintiff as described in s. 2(1) and s. 2(2) of the *Class Proceedings Act*, then I will not be liable for an account as detailed in paragraph 6, or any other costs.

Termination of Retainer

10. I further acknowledge and understand that if I terminate, at my initiative, this retainer Agreement and/or retain a different solicitor to pursue my action, that *Rochon Genova LLP* shall retain the class members as clients and remain as solicitors of record for the Class and shall have the right to amend the pleadings to replace me as class representative.

11. This Retainer Agreement replaces any previous Retainer Agreement which I may have executed.

Dated at Thornhill, Ontario this 13th day of May, 2008.



Witness STEVEN SIEGER



HOWARD GREEN