Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTISCE

B E T W E E N:

DARA FRESCO

Plaintiff

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD OF THE PLAINTIFF (FEE APPROVAL)

February 24, 2023

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TAB 1

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff/Moving Party

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant/Responding Party

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION
(Fee Approval Motion)

The Plaintiff will make a motion to the Honourable Justice Belobaba on March 3, 2023, at 11:00 a.m. or as soon after that time as the motion can be heard by Zoom videoconference.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order approving the Plaintiff's Retainer Agreement with Class Counsel and approving and directing the payment from the Settlement Fund of Class Counsel's fees (including disbursements and taxes) in accordance with the Settlement Agreement;
2. In the alternative, an Order otherwise determining the amount of Class Counsel's fees (including disbursements and taxes) to be paid from the Settlement Fund;
3. an Order approving the levy payable to the Class Proceedings Fund pursuant to Regulation 771/92 to the *Law Society Act*; and,

4. such further declarations, directions and other orders as counsel may advise and this Honourable Court deems just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. Class Counsel and the Representative Plaintiff entered into a retainer agreement dated June 5, 2007;
2. The Retainer Agreement provides two methods of calculating Class Counsel's fees in the event of a successful resolution of the action, either through settlement or a hearing on the merits:

> **Contingency Percentage**
>
> (a) The contingency fee shall be 30% plus G.S.T. of the settlement or judgment proceeds on behalf of class members, net of disbursements; or
>
> **Contingency Multiplier**
>
> (b) the contingency fee shall be 4 x the ordinary hourly rates of counsel.

3. After more than 15 years of litigation, success on the merits on the common issues, , the Plaintiff and the Defendant reached an agreement to settle the action for $153 million;
4. Class Counsel have incurred $16.2 million in time in the course of representing the Plaintiff and the Class in this action;
5. Under the Contingency Percentage fee provision in the Retainer Agreement, Class Counsel are entitled to 30% of the Settlement Fund, net of disbursements;
6. The Representative Plaintiff fully understood the proposed fee before signing the Retainer Agreement;

7. Pursuant to section 32(2) of the *Class Proceedings Act, 1992* ("CPA"), the Retainer Agreement is not enforceable unless it is approved by the Court. The Retainer Agreement conforms to all relevant requirements of the CPA and should be approved;
8. The total disbursements incurred in this action are $6,293,845.81;
9. Class Counsel's disbursement request is reasonable;
10. The fee owing to Class Counsel under the Contingency Percentage fee provision in the Retainer Agreement amounts to $44 million, which represents an effective multiplier of 2.66 times Class Counsel's base fees;
11. Class Counsel's proposed fee is fair and reasonable. The proposed fee reflects, among other things, the results achieved, the work performed and the risks undertaken by Class Counsel in litigating this case on behalf of the Class;
12. The Representative Plaintiff applied for and received funding and a costs indemnity from the Class Proceedings Committee of the Law Foundation of Ontario. Accordingly, pursuant to section 10 of Ontario Regulation 771/92 the Class Proceedings Fund is entitled to a levy equivalent to 10% of the net settlement proceeds from the Settlement Fund;
13. The proposed fee accords with the case law and principles applied by Ontario courts with respect to Class Counsel contingency fees;
14. Sections 5, 12, and 17, 20, 29, 32, 33 and 34 of the CPA and Rules 37 and 39 of the *Rules of Civil Procedure*, RR0 1990, Reg.194;
15. Such other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the affidavit of J. Adam Dewar, sworn February 24, 2023;
2. the affidavit of Jody Brown, affirmed February 23, 2023;

3. the affidavit of Dara Fresco, affirmed February 23, 2023
4. the pleadings and proceedings herein; and,
5. such further and other material as counsel may advise and this Honourable Court may permit.

February 24, 2023

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DARA FRESCO
Plaintiff/Moving Party

- and -

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant/Responding Party

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

NOTICE OF MOTION
(Fee Approval Motion)

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TAB 2

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF J. ADAM DEWAR
– Fee Approval and Honourarium Request –

(Sworn February 24, 2023)

I, J. Adam Dewar, of the City of Toronto, Ontario, **MAKE OATH AND SAY** as follows.

1. I am a partner with the law firm of Roy O'Connor LLP, which together with Sotos LLP and Goldblatt Partners LLP are Class Counsel herein. I have worked at Roy O'Connor LLP and its predecessor firms since 2003, and have been directly involved in this case from its inception to the present. As such, I have first-hand knowledge of this file. In respect of any facts to which I depose that are outside my first-hand experience, I have informed myself by reviewing file correspondence and by speaking with other members of the Class Counsel team, including Steven Barrett from Goldblatt LLP and Louis Sokolov of Sotos LLP. All of the information to which I depose herein I verily believe to be true.

2. I swear this affidavit in support of the motion for approval of Class Counsel fees and disbursements and for approval of the requested honorarium for Ms. Fresco.

3. This affidavit should be read in conjunction with the Settlement Approval Affidavit of Jody Brown, affirmed February 23, 2023, ("**Brown Affidavit**"), which I adopt and rely on, and which sets out the history of this proceeding and the rationale for the settlement in greater detail. It should also be read in conjunction with the Affidavit of Dara Fresco, affirmed February 23, 2023 ("**Fresco Affidavit**"), which details her decision-making process in deciding to act as the representative plaintiff, her risks and concerns in doing so, and her involvement throughout the litigation process.

NATURE OF THE MOTION

4. This motion is for an order approving the fees and disbursements of Class Counsel following successful settlement of this action ("**Settlement**"). Class Counsel seek court approval of the retainer agreement between the Plaintiff Dara Fresco ("**Ms. Fresco**") and Class Counsel, dated June 5, 2007 ("**Retainer Agreement**"), and request the fees and payment of disbursements agreed to therein. Class Counsel also move for an order awarding Ms. Fresco an honorarium in the amount of $30,000, in recognition of her pivotal role in spearheading a class action against her (then) current employer, and her commitment to seeing this proceeding through more than 15 years of litigation, resulting in compensation for tens of thousands of Class Members.

5. Attached hereto and marked as **Exhibit** "**A**" is a true copy of the executed Retainer Agreement.

6. As discussed in detail in the Brown Affidavit, and as summarized below, this was a hard-fought case from its outset to its conclusion. Class Counsel applied skill and dedication in developing

and advancing untested theories of systemic employer liability and damages in Canada with no settled court authority to guide us. Class Counsel have litigated this case for more than 15 years, succeeded on the merits before both this Court and the Court of Appeal, and obtained for the Class the largest employment class action settlement in Canadian history. For the reasons explained in the Brown affidavit, Class Counsel believe that this settlement – both in terms of its total quantum and the simplicity of its processes (i.e. payments to Class Members without requiring them to prove a claim) - is certainly fair and reasonable. When the settlement is compared to the alternative – continuing to litigate damages through the aggregate damages hearing (and inevitable appeal(s)) and an individual issues phase for presumptively time-barred years – it is not only fair and reasonable but an excellent resolution of the potential overtime claims of more than 31,000 Class Members.

7. This was an extremely high risk and difficult case. Unlike many other cases that have resulted in large settlements, there was no US case, no regulatory findings to pave the way on liability, and no pre-determined or agreed path to damages (either in terms of methodology or quantum). At all times, Class Counsel faced a well-resourced and sophisticated corporate defendant that continually defended this action, its policies and systems in a vigorous manner.

8. As detailed below, Class Counsel request that the Court approve the retainer agreement entered into between the parties and a contingency of 30% of the Settlement Fund, plus taxes and disbursements. The fee requested is $44 million[1]**.** Class Counsel appreciate that this is a large fee

[1] The $44 million is calculated on the following basis. The $153 million total settlement payment is reduced by any disbursements that have not been recovered from CIBC in costs awards to date. The disbursements (inclusive of taxes) to date total $6,293,845.81. The total disbursements recouped from costs awards against CIBC total $194,863.32. Accordingly, the value of the net unrecovered disbursements (inclusive of taxes) is $6,098,982.49. The Settlement Amount ($153,000,000) less $6,098,982.49, equals $146,901,017.51. That $146,901,017.51 is multiplied by 30%, for a total fee of $44,070,305.15. That amount is rounded down to $44 million. As discussed in paragraph 83 below,

request that, if awarded, would be at the higher end of fee awards, but far from the highest, granted by Canadian courts. However, this request is well-supported having regard to the exceptional risks incurred by Class Counsel, the exceptional efforts required to successfully prosecute this action, the skill, competence and dedication exercised by Class Counsel throughout, and the excellent results achieved for the Class.

9. These factors, and other relevant factors are discussed below.

RETAINER AGREEMENT

10. The Retainer Agreement provides that Class Counsel's fees and disbursements are only payable in the event that Class Counsel secure a judgment or settlement for the benefit of the Class. In the event of such success, clause 4 of the Retainer Agreement provides that Class Counsel may choose one of the following two methods of fee calculation:

Contingency Percentage

(a) The contingency fee shall be 30% plus G.S.T. of the settlement or judgment proceeds on behalf of class members, net of disbursements; or

Contingency Multiplier

(B) the contingency fee shall be 4 x the ordinary hourly rates of counsel.

A multiplier of 4 was agreed to because Class Counsel recognized from the outset that the challenges and risks of this case would be multiple, daunting and prolonged.

---

we will reduce the fees approved by the Court by the $652,666.18 that we have effectively already recovered from CIBC in costs awards.

11. Rather than requesting a 4 times multiplier on $16.52 million in total fees incurredto date, Class Counsel are requesting payment pursuant to the contingency percentage. The contingency percentage provided under the Retainer Agreement would translate into a multiplier of approximately 2.66 times our actual time. As set out further below, this would be approximately the same multiplier awarded in the *Fulawka* proceeding (2.75 times).

FACTUAL AND LEGAL COMPLEXITY OF THIS CASE

12. The history of this case, from investigation to settlement, is described in detail in the Brown Affidavit. For the purposes of this motion, it is important to emphasize that this case raised a host of complex issues of fact and law, each of which represented a significant hurdle to certification and/or success on the merits. This case broke new ground regarding how to certify, and then address and succeed on the merits in a systemic liability employment claim. Had no settlement been reached, the next step in this proceeding would also have covered new ground – a contested proceeding on a proposed aggregate damages methodology using electronic time-stamp data as a proxy for hours of work as a basis to calculate and award damages to the Class.

13. This case was the lead case of three ground-breaking class action proceedings involving Class Counsel that sought to advance claims for unpaid overtime. The two other cases, in order of commencement, were *Fulawka v. Bank of Nova Scotia* (another "off the clock" case) and *McCracken v. Canadian National Railway* (a "misclassification" case). As Justice Perell commented in his 2010 certification decision in *McCracken*, "[C]lass counsel have been on a mission to make overtime pay claims under the *Canada Labour Code* an appropriate subject for class proceedings."[2] We eventually succeeded in that mission in two of the three cases – first

[2] *McCracken v. Canadian National Railway*, 2010 ONSC 6026 (S.C.) at para. 16.

Fulawka and now this case. However, *McCracken*, although certified at first instance, was reversed on appeal in 2012, with the loss of millions in invested time.

14. This case was the first contested class action of its kind: a national class action for unpaid overtime against a defendant who operated in all 10 provinces and three territories and had more than 1,000 retail bank branches. When the action was commenced, the systemic approach that we advanced had never been advanced in an employment class action in Canada, let alone been certified or decided on the merits. Indeed, there was no Canadian case law regarding the certifiability of a contested unpaid overtime class action. Likewise, there was no settled court authority interpreting the overtime compensation and record-keeping provisions of the *Canada Labour Code* ("***Code***"), foundational to the claim, setting out the statutory entitlement to overtime compensation and employers' obligations to create and maintain an accurate record of hours worked. Nor was there case law to support the Plaintiff's related theory that CIBC owed a duty to prevent hours of work that it did not want worked. Moreover, there was great uncertainty as to how damages could be assessed in a practical and efficient way and whether aggregate damages could be awarded for a claim of this kind.

15. While Class Counsel believed, as a result of our investigation, that there was factual merit to this case, and that many Class Members likely worked uncompensated overtime, there was no settled or clear legal path to certify their claims as a class action, nor to establish liability or an aggregate award of damages on their behalf.

16. To the contrary, achieving success in this case meant overcoming a series of formidable barriers to success, any one of which could scuttle the entire case. To succeed in this action, we needed to, at minimum: (a) identify common acts or omissions that operated across the more than

1,000 branches and persuade the Court that the case could properly be adjudicated on a common issues and collective basis; (b) persuade the Court that uncompensated overtime could even be caused by systemic factors; (c) against the backdrop of conflicting labour arbitration jurisprudence, persuade the Court to adopt our interpretation of the *Code's* overtime and record-keeping provisions; (d) persuade the Court to find that CIBC had a duty to prevent hours that it did not intend to compensate; (e) prove that CIBC had in fact put in place systemic policies and practices that caused Class Members to work uncompensated overtime; and (f) uncover some basis and develop some methodology for an aggregate assessment of damages, in the absence of reliable records of hours work – or failing that, accept the risk that damages would only be recoverable after individual assessments, that could number in the thousands. In short, to move this case beyond the starting gate, let alone to take it to the finish line, we would require meeting and overcoming a host of daunting challenges on certification, the merits and damages.

17. These challenges quickly became manifest after the claim was launched. CIBC retained two highly-skilled law firms with extensive expertise defending class actions and employment cases. As expected, CIBC vigorously and skilfully defended the case and sought to show that the case was uncertifiable. CIBC asserted, with some support from arbitration jurisprudence, that its overtime polices were lawful tools used to control hours of work, and that it was plain and obvious that the Plaintiff's challenges in this regard were doomed to fail. CIBC further argued that the pre-authorization requirement in its overtime policy had to be interpreted and viewed in the context of its commitment to comply with the *Code* and its individualistic practices in retail branches, and that the policy was not the cause of any unpaid hours.

18. CIBC maintained that each of its branches operated with significant autonomy in their management of human resources, such that there was no common approach or experience across

branches and no way to commonly or systemically assess the recording of hours or authorization and payment of overtime work. Fundamentally, CIBC also maintained that irrespective of whatever "systemic" overlay the Plaintiff wished to advance, each Class Member's claim was ultimately an inherently individual complaint.

19. Individually and collectively, these proved to be formidable arguments, each of which found favour with the certification motions judge who categorically rejected Class Counsel's theory of the case. By this time, Class Counsel had incurred more than $3.4 million in fees.

20. The certification judge's reasoning was endorsed and affirmed by a majority of the Divisional Court., with an application for leave to the Court of Appeal being the only hope of reviving the case. Fortunately for the class, the Court of Appeal granted leave in January 2011 and directed that the appeal be heard together with appeals in the *Fulawka* and *McCracken* cases. The appeal (also extremely hard fought) was allowed in June 2012.

21. However, that did not finally resolve certification because CIBC chose to seek leave to appeal to the Supreme Court of Canada and the Plaintiff similarly brought a conditional cross-application for leave to appeal the Court of Appeal's denial of certification of aggregate damages. It was only once leave was denied, in March 2013, that certification was settled and the Plaintiff was provided with the opportunity to try and prove her case on the merits. By that time, Class Counsel had incurred more than $5.56 million in fees[3] in furtherance of what had been, at best, an uphill battle.

[3] This total excludes the fees incurred by the other regional firms in the national consortium.

22. As discussed in the Brown affidavit, and as further discussed below, certification by no means guaranteed success. Class Counsel still faced a perilous road forward, replete with legal and factual complexities and obstacles, and a substantial risk of failure. For example, the refusal of the Court of Appeal to certify aggregate damages as a common issue created a potentially enormous obstacle to securing compensation for Class Members.

23. It would take a further seven years and an additional almost $6.6 million in fees (for total fees of more than $12.15[4] million by that point) before Class Counsel obtained success on the common issues before this Court in 2020. CIBC then launched three appeals, challenging all aspects of this Court's summary judgment decisions, continuing to vigorously contest any claim for damages. Finally, in February 2022, the Court of Appeal released its decision dismissing the appeals. In the interim, Class Counsel engaged their damages expert and, in January 2022, had served an 87 page report (plus 40 page technical appendix) on the time-stamp methodology and calculation of aggregate damages. By the time that a mediation was commenced in August 2022, Class Counsel had amassed significant disbursements for these expert fees, for which, at various times, we were at risk of being personally responsible because the CPF does not rubber-stamp disbursement requests; they are subject to approval at the CPF's discretion.

24. Even at this stage, significant risk remained because the Plaintiff's claim for damages rested upon acceptance and use of the new and complex proposed time-stamp methodology for aggregate damages, which was vigorously contested by CIBC and its expert.

25. Although the proposed methodology had formed the basis of certification by this Court in 2020 of a new common issue relating to aggregate damages, there was no assurance that the

[4] This total excludes the fees incurred by the other regional firms in the national consortium.

proposed methodology would be accepted as reliable, in whole or in part, by this Court and/or the Court of Appeal. If it was not accepted, as this Court itself noted, in the absence of an aggregate assessment, any damages obtained by Class Members would likely be modest at best.[5]

26. In short, the complexity of this case was extreme, from the day it started to the day that the Settlement Agreement was signed, as were the concomitant risks. These risks are articulated in further detail in the next section of this affidavit.

RISKS UNDERTAKEN BY CLASS COUNSEL

27. Each of the firms that were part of the Class Counsel team considered this case to be extremely high risk. As it unfolded over the 15-year period following the issuance of the Statement of Claim, the hours required to move it forward and break new ground were significant, the disbursements were enormous and the danger of failure was acute.

(a) Risk of the case not being certified

28. Given that this type of contested employment class action had never been attempted or tested in Canada, Class Counsel understood at the outset that there was a substantial risk of failing to convince the Court that it was certifiable. In particular, from the outset, we collectively recognized the risk that our untested systemic approach to the case would not possess the requisite commonality required for certification as a class action.

29. In addition to the usual challenges of demonstrating "some basis in fact" that the requirements (other than s. 5(1)(a)) for certification were met, the Plaintiff faced two significant and related obstacles to certification.

[5] *Fresco v. Canadian Imperial Bank of Commerce,* 2020 ONSC 4288 at para. 17 (CanLII)

30. The first was CIBC's argument that the Plaintiff's theory of systemic liability – even if proven true – would not materially advance Class Members' claims. In this regard, CIBC argued that there were no common or systemic causes of unpaid hours and every Class Member's claim was no more than an idiosyncratic complaint that they worked overtime on certain days for which they were not compensated. Thus, CIBC argued each claim would have to be determined individually, on the basis of evidence unique to each Class Member's specific work circumstances and experiences.

31. The second related obstacle was CIBC's position, supported by affidavit evidence, that each branch manager of CIBC's more than 1,000 retail branches enjoyed what CIBC contended was appropriate autonomy or flexibility as to how to deal with hours of work, the recording of hours, and approval for any overtime (including lieu time). Thus, in CIBC's submission, even if our theory of systemic liability could somehow be viable in an employment class action, there was no basis in fact to support the existence of systemic (class-wide) practices or omissions across CIBC's retail branch network.

32. As discussed in the Brown affidavit, there was a full-blown evidentiary battle at certification that generated dozens of affidavits (both lay and expert), dozens of cross-examinations, and thousands of pages of evidence and transcripts, and cost millions of dollars in legal fees. The scope and scale of this fight was evidenced by the fact that, at the conclusion of the certification motion before Justice Lax in December of 2008, CIBC had incurred nearly $4 million in fees resisting certification and Class Counsel had incurred approximately $3.4 million. Moreover, the certification motions judge (Justice Lax) acknowledged that the level of fees were appropriate given the scope of the proposed class action and the nature of the evidence led in support of the motion.

33. At certification, Justice Lax wholly accepted CIBC's arguments and rejected every tenet of the Plaintiff's case. Justice Lax accepted CIBC's evidence and arguments regarding the autonomy of branch managers, finding that "the branch manager enjoys significant autonomy in managing branch employees, including with respect to staffing and scheduling". Justice Lax also agreed with CIBC's submission that Class Members' claims were inherently individual. Furthermore, Justice Lax categorically rejected the Plaintiff's contention that CIBC's overtime policies contravened the *Code*, finding on the merits that it was plain and obvious that CIBC's overtime policy, including its pre-authorization requirement for overtime compensation, was lawful.

34. The Plaintiff's defeat at certification was complete and unequivocal, punctuated by a costs award of $525,000 which, at the time, was among the highest awarded in the context of certification.

35. The Plaintiff's appeal to the Divisional Court was similarly unsuccessful, with a majority of that Court affirming and endorsing Justice Lax's reasons on all counts.

36. Once the Divisional Court dismissed the Plaintiff's appeal, Class Counsel continued the fight and needed to seek leave to appeal before the Court of Appeal would hear the case. Leave was contested by CIBC and, while we believed that we had strong grounds for leave, there was a significant risk that leave would be denied, which would result in the case being over.

37. Once leave to appeal to the Court of Appeal was granted in January 2010, there still remained a substantial risk that our appeal would not be successful. Justice Lax was an experienced class actions judge whose findings were entitled to considerable deference by appellate courts. Thus, overturning her decision, and that of the Divisional Court, was an uphill battle

38. Against these odds, Class Counsel prevailed, and the Plaintiff was successful in obtaining certification at the Court of Appeal. However, even after it released its judgment in June 2012, a risk remained that CIBC would be successful in obtaining leave to appeal to the Supreme Court of Canada and that, if leave were to be granted, the judgment of Justice Lax denying certification would be restored. It was only in March 2013, when the Supreme Court denied leave, that the certification risk was fully mitigated. By this time, Class Counsel had incurred more than $6 million in time.

39. The substance of the Court of Appeal's certification decision is discussed in detail in the Brown affidavit. While it was clearly a victory for the Plaintiff and Class Counsel, it was far from unequivocal, insofar as the Court of Appeal refused to certify aggregate damages as a common issue, and clearly stated that limitations defences would need to be determined at the individual issues stage of the case. The specific risks presented by these aspects of the Court of Appeal's decision are discussed in the Brown affidavit and are further discussed below. In brief, these aspects of the Court of Appeal's decision made clear that there was a significant risk that, even if Class Counsel were to succeed in establishing liability on the part of CIBC, that result might translate to only minimal or modest damages for the Class.

(b) Risk that the Plaintiff would lose on the merits

40. This was not a case where certification would lead to a quick or easy resolution. To the contrary, certification only provided the Plaintiff and Class Counsel with an opportunity to have the case determined on the merits, with various major hurdles remaining. It would take more than nine years, and more than an additional $10 million of Class Counsel's time litigating the merits, reviving aggregate damages as a common issue and filing an extensive expert report supporting a significant aggregate damages award, before settlement discussions occurred.

41. This was also not a case where the underlying legal principles were settled, where the only real question was whether the evidence bore out the claims and allegations. Even after certification, there was no settled law regarding the following critical elements of Class Counsel's theory of liability:

(a) the legality of using a pre-authorization requirement to control hours of work and overtime compensation;

(b) whether employees could bear the burden of maintaining records of all hours they worked; and

(c) the related issue of whether an employer has an obligation to prevent or stop overtime work that it does not wish to compensate.

Moreover, even if the Plaintiff's theory of liability were found to be legally sound, there was a high risk that it could not be proven on the balance of probabilities based on the evidence before the court.

(i) Risk that the Plaintiff's *Code* arguments would fail.

42. A substantial part of the Plaintiff's case rested on the attack on CIBC's overtime policies and record-keeping practices as being contrary to the *Code.* While there were other aspects to the Plaintiff's case on liability, Class Counsel believed that if we were not ultimately successful on the *Code* issues, we would be unlikely to prevail at trial.

43. The Court of Appeal's 2012 certification decision merely gave the Plaintiff the ability to litigate the issues on the merits. In this regard, the Court of Appeal cautioned at paragraph 70 of

its certification decision, that "at the common issues trial, the motion judge's view may be found to be the correct interpretation of the relevant provisions of the *Code*." These points were vigorously contested by the parties and not finally settled until the Court of Appeal released its decision in February 2022, which rejected CIBC's appeal from this Court's summary judgment decision on those issues.

(ii) The risk that the Plaintiff's theory of systemic liability would not be proved

44. As noted above, before this case, no employment class action had ever proceeded to a common issues trial, let alone succeeded, and there was no roadmap for how to prove such a case on the merits. Anecdotal evidence of Class Members would not be sufficient to prove systemic liability and, conversely, might have assisted CIBC in emphasizing the idiosyncrasies of individual claims. Notably, CIBC's strategy at certification (which was wholly successful before Justice Lax and with the majority of the Divisional Court) was to counter each fact witness that the Plaintiff tendered with multiple CIBC witnesses to dispute Plaintiff witnesses' account. Accordingly, Class Counsel concluded that what was needed was evidence of systemic practices and omissions, including, ideally, evidence that CIBC *knew* of its systemic issues or concerns with unpaid hours – evidence which Class Counsel could only reasonably hope to secure at the discovery stage in the productions from the Defendant.

45. In other words, while Class Counsel were of the view that it might be theoretically possible to prove liability using CIBC's documents, we could not know what evidence would be found once productions were made, and whether it would be sufficient to establish systemic issues and causation. If the productions did not reveal documents that persuasively supported our systemic theory, the action would very likely fail.

46. The Brown Affidavit discusses in detail the lengthy production phase of the litigation, including the multiple production motions brought by the Plaintiff and CIBC's unsuccessful attempt to assert privilege over certain documents. This effort, involving multiple contested motions and hundreds of hours to review the documents themselves, began in 2014 and did not conclude until 2019, shortly before the hearing of the summary judgment motion in December of that year. From Class Counsel's perspective, the litigation over documentary evidence in this case was long and difficult but an essential part in the litigation that proved instrumental to the outcome, as illustrated by the central documents cited by the Court in its summary judgment decision.

(c) Risk that, even if liability were established, damages would be elusive

47. From the start, Class Counsel were aware that, even if we succeeded in certifying the case and establishing both the legal and factual merits needed to prove the Defendant's liability, there was still the very real problem of how to avoid contested and individualized damages assessments for any class members who would even come forward to advance an individual claim. According to our theory of the case, CIBC's records of hours worked were inaccurate and could not be used to establish the monetary entitlement of class members. How then to calculate what Class Members were owed? As noted, the Court of Appeal's refusal at certification to certify aggregate damages was a substantial blow that meant that there was a very high risk that, even if we were successful at establishing liability, damages would only be awarded after an individualized claims process. Indeed, as this Court would subsequently observe in its remedies decision:

> [17] This last question – whether aggregate damages should be added as a common issue – generated the most debate. This was understandable. If aggregate damages are not allowed and class members are required to individually advance and prove claims (stretching over many years), the bank's financial exposure, in practical terms, will probably be modest at best. If aggregate damages are permitted, the monetary liability of the defendant bank could well be in the tens of millions of dollars. Hence, the importance of this issue.

48. The Court's observation that individual issues hearings would produce, at best, modest damages is, from Class Counsel's perspective, undoubtedly correct for several reasons. First, as discussed in the Brown affidavit, Class Counsel had the experience of the *Fulawka* settlement where less than 20% of eligible class members made individual claims through what was a very simple one-page claim form. We expected that, in an adversarial individual issues process in this case, in which Class Members could be exposed to costs,[6] the claims rate would be lower, perhaps far lower. Second, those Class Members who came forward would be met with CIBC's individualized limitations defences, which could prove to be difficult to overcome. Third, depending on what procedure was put in place for the individual assessments, the process could be time-consuming and cumbersome. The case of *Webb v. Kmart* was a cautionary tale. That was a class action involving terminations from employment after the closure of a number of retail stores where the Court ordered individual hearings for any class member who filed a claim but where only a small number of claims had been pursued through individual hearings and many of those did not result in any damages being awarded to class members.

49. From the perspective of Class Counsel's risk assessment, by the time that certification had been resolved, we had incurred more than $5.56 million in fees and we anticipated, correctly, that many millions more would be incurred on the merits before, if we were successful on the common issues, getting to a damages assessment. If few Class Members would come forward and damages were only modest, it would be unlikely that we would recoup more than a small fraction of our time.

[6] Although the CPF agreed to indemnify the Plaintiff through the resolution of the common issues, it had no obligation and had not agreed to indemnify class members at an individual issues stage: *Brazeau v. Canada (AG)*, 2021 ONSC 8158.

50. Indeed, when the Court of Appeal released its certification decision in 2012, there was little reason to believe that aggregate damages would ever be achievable in this case. However, notwithstanding the fact that there was a very high risk that this case would result in significant unpaid time, Class Counsel pressed on. We were determined to find a way to an aggregate assessment of damages.

51. In late 2013, the Supreme Court of Canada issued its decision in *Pro-Sys v. Microsoft,* holding that trial judges could award aggregate damages even when no issue in that regard had been certified. Class Counsel felt that this decision would provide support for our request for aggregate damages at a hearing on the merits, but we would still have to persuade the Court that there was a viable methodology for assessing damages on this basis. The development of this methodology and our pursuit of aggregate damages is discussed in detail in the Brown affidavit.

52. As discussed in the Brown affidavit, it was not until this Court's remedies ruling in August 2020 that the prospect improved for obtaining a partial award of aggregate damages. However, the certification of that issue by this Court, and the affirmation of that ruling by the Court of Appeal, by no means assured that we would ultimately be successful in obtaining such an aggregate damages award from this Court and, if we did, survive the inevitable appeal. A significant risk remained that no award of aggregate damages would be made at a contested hearing, and a near certainty that claims for the presumptively statute-barred damages would need to be pursued in some sort of individual claims process.

(d) The risk that many of the claims would be found to be statute-barred

53. From early on in this litigation, and as addressed in the Brown affidavit, there was a clear and significant risk that we would not succeed for most of the claims for unpaid overtime worked

during the presumptively time-barred periods in each province or territory (largely the period covered by CIBC's 1993 Overtime Policy applied). In contrast to the typical limitations-defined class period advanced in most class actions, we decided early on to pursue claims for these presumptively time-barred periods going back to 1993 (described as "Period 2" in the Brown Affidavit), in order to maximize the Class Members' recovery. However, the risk that these Period 2 claims would be found to be time-barred, or that discoverability could only be advanced and addressed individually, threatened to greatly reduce the Class recovery and thereby undermine the prospect of Class Counsel coming close to recouping our time invested in this case.

54. A further risk emerged shortly before the argument of the summary judgment motion in December 2019: CIBC's constitutional challenge to the extra-territorial reach of the 28(1) limitations-tolling provisions of the *CPA*.

55. Following the Plaintiff's successful common issue summary judgment motions on liability (decision released March 30, 2020) and remedies (decision released August 10, 2020), CIBC pressed its limitations-related defences (a) seeking a class-wide order limiting damages for all Class members to the provincial presumptive limitation periods and (b) challenging the extra-territorial reach of the s. 28(1) limitations tolling provisions of the Ontario *CPA*. In reasons dated October 21, 2020,[7] this Court dismissed CIBC's motion seeking a class-wide provincial limitations order limiting damages and held that the requested constitutional declaration was premature. Conversely, the Court also refused the Plaintiff's requested ruling on discoverability – namely, a ruling that the defendant prevented class members from discovering their claims by, among other

[7] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 (CanLII)

things, representing to Class Members that CIBC's policies were legal and consistent with the *Code*. Instead, this Court found that limitations issues were individual in nature.

56. This Court's limitations conclusions were helpful to the Class, insofar as they kept the earlier claims alive. However, at the same time, they necessarily posed a serious risk that, notwithstanding that we had been successful on the common issues, individual claims for compensation (for those brave enough and willing to advance such individual claims) would be disallowed as time or statute barred. Moreover, the resolution of any such individual claims was years away. Further, final resolution of the action might well otherwise have been delayed by the Defendant's constitutional challenge, which given its potential wide-reaching implications might well have attracted the interest of the Supreme Court of Canada.

57. As explained in the Brown Affidavit, and on the basis of decisions referred to above, Class Counsel concluded aggregate damages would likely only be awarded for presumptively timely claims (the Period 1 claims), with it being very likely that the presumptively time-barred claims (the Period 2 claims) would be subject to individual analysis and limitations defences. At best, we hoped for a streamlined and simplified individual issues process for Period 2 damages. At worst, we feared a contested and inefficient individual claims process. In any event, we realized that many, if not an overwhelming majority of, Class Members would decline to participate in such a Period 2 individual claims process. Furthermore, we did not discount the risk that CIBC's constitutional argument might ultimately be successful.

58. We also note that, going into the mediation, we recognized that CIBC could adopt the position (as so found by this Court and the Court of Appeal) that any Period 2 damages would have to be addressed through an individual claims process. In other words, we understood that it

was possible that, based on the prior Court decisions, a settlement for Period 2 could simply take the form of an agreement to structure some individual claims process. We were determined to avoid that outcome – an individual claims process and the resulting modest payments thereunder were not acceptable to us.

(e) The Risk of Summary Judgment

59. As set out above, once CIBC advised us in 2015 that its productions were complete, we elected to move for summary judgment. This was a difficult decision. While we thought, on the basis of the documents that had been received to date, that we had a reasonable prospect of obtaining summary judgment, we recognized that the summary judgment procedure involved risk. We were effectively waiving the advantages of an examination for discovery of the Defendant and forgoing the procedural advantages of trial. Moreover, it was far from certain that the Court would agree that the case was even appropriate for summary judgment, given what we anticipated would be CIBC's reliance on testimonial evidence of Bank employees. If the Court were to decide that the case was not suitable for summary judgment, we ran the risk of wasting years and millions of dollars in additional time. However, we determined that the potential benefit of bringing this case to a conclusion sooner was worth the risk. As it turned out, even the summary judgment process in this case was a lengthy and difficult one, which took years, but was ultimately successful.

(f) The Effect of Class Proceedings Fund

60. Following the filing of the claim, and prior to the certification hearing, the Plaintiff applied for and received support from the Class Proceedings Fund. The Class Proceedings Fund ("**CPF**") provides two benefits in exchange for its levy: indemnification from adverse costs and disbursement funding. In this case, as is its normal practice, the CPF provided an initial grant for

disbursements amounting to $127,000. Further funding was subject to supplementary application and was solely within the CPF's discretion.

61. When we launched the claim in 2007, there was still a debate among the class action bar and others about the propriety of class counsel indemnifying a representative plaintiff: some thought it possible do to so, whereas others insisted that such an indemnity was inappropriate and could even amount to champerty. In light of the questions raised about the propriety of indemnifying and realizing that the representative plaintiff would otherwise be exposed to adverse costs, Class Counsel believed that an application for indemnity from the CPF was the obviously prudent course. As for the 10% levy to which the CPF was entitled if the case was successful, at the time, there had been no suggestion in the caselaw or otherwise (of which we were aware) that such might be relevant to Class Counsel's fee entitlement.

62. Were it not for the support of the CPF, Class Counsel may not have been able to litigate this case at all. The threat of adverse costs alone would render the case untenable. An adverse costs award after a possible failure at a merits hearing might have been in the millions of dollars. At the same time, the CPF funding did nothing to reduce the financial risks to Class Counsel of devoting enormous unbilled time over the length of the litigation. Moreover, it was never a foregone conclusion that the millions of dollars in disbursements that Class Counsel incurred to prosecute this case would be reimbursed.

63. Reimbursement by the CPF is a discretionary decision, not an automatic and unlimited right held by Class Counsel. For months at a time, Class Counsel carried significant disbursements. For example, while the aggregate assessment was prepared, approximately $2 million in expert fees were incurred and carried by Class Counsel. After the Court of Appeal released its decision

in February 2022, the CPF covered approximately $1.5 million of the carried $2 million. Moreover, of the nearly $6.3 million in disbursements incurred inclusive of taxes, the CPF funded only $4,415,520.94. In total, Class Counsel self-funded the balance of $1,892,293.33 in disbursements.[8]

RESULTS ACHIEVED FOR THE CLASS

64. The benefits of this settlement and Class Counsel's reasons for endorsing it are described in detail in the Brown Affidavit. In summary, it is Class Counsel's opinion, that the results obtained for the Class are excellent. In particular:

(a) In the face of the risks and barriers outlined above, over a period of more than 15 years, Class Counsel managed to:

(i) reverse two levels of Court decisions denying certification,

(ii) obtain certification at the Court of Appeal,

(iii) obtain the necessary productions over a five-year period in order to prosecute the case on the merits,

(iv) obtain summary judgment on the liability issues,

(v) certify the additional common issue of aggregate damages, notwithstanding an earlier denial by the Court of Appeal,

(vi) maintain these rulings on appeal,

[8] With one exception being fees payable to a consultant only in the event of success.

(vii) obtain an expert report calculating aggregate damages, notwithstanding severe limitations resulting from the absence of records and data that had been inadvertently lost,

(viii) obtain the largest employment class action settlement in Canada, and one of the largest overtime class actions anywhere.

(b) The $153 million settlement is an aggregate amount, covering both Period 1 and Period 2.

(c) No portion of the Settlement Amount will revert to the Defendant.

(d) The amount of this settlement is, in the view of Class Counsel, as good as what the Class could most likely have expected to recover after a contested hearing on Common Issue 9. This is in large measure because such a contested hearing would likely only have resulted in an aggregate damages award for Period 1, and because of the likely modest overall recovery from what could have been years of contested individual issues assessments for Period 2 claims.

(e) In all likelihood, Period 2 damages could only have been established on an individual basis had the matter continued to a contested hearing. Class Counsel reasonably believe that fewer than 20% of Class Members would have made claims for this period under an individual claims process and that those that did would face serious barriers to success.

(f) Every Class Member will be eligible to be paid their share of the settlement by filling out and submitting a simple form. CIBC will have no right to challenge any claim and will not even know the identity of claimants.

(g) The settlement will result in significantly quicker payment to Class Members than would a contested hearing.

THE IMPORTANCE OF THIS CASE

65. This case was important, not only to members of the Class, but was also of broad importance to other Canadian wage-earners. Its success on the merits has advanced and clarified hours of work and payment rights under the *Canada Labour Code* and, by analogy, under similar provincial labour standards legislation. I discuss each of these two heads of success in turn.

(a) Importance to Class Members

66. In the days after launching this case, more than 1,000 Class Members registered on Class Counsel's website, indicating an interest in this case and providing anecdotal information about their experiences working for CIBC. In the months and years that followed, Class Members continued to contact Class Counsel to inquire about the status of the case. As this Court found in its Liability Decision (see paragraph 67), there were complaints from Class Members about uncompensated overtime in response to CIBC's open-ended surveys. This Court's findings and the settlement obtained through Class Counsel's efforts have validated these complaints.

(b) Broader Public Importance

67. This case was ground-breaking and attracted wide attention and commentary when it was launched. The approach that we took in this case has informed numerous other proceedings,

including but not limited to cases seeking compensation for unpaid wages.[9] Indeed, the decision on the merits was listed by Lexpert as the first case of its top 10 list of business decisions of the last year.[10] The path to certification, and the articulation of appropriate common issues, has been made clearer by this case, as has the route to proving systemic liability. A potential methodology to establish hours worked – time-stamped data – has also been certified.

68. As explained by the Supreme Court of Canada, the employment relationship is of great importance. As that Court observed in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para. 91:

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."

69. The hours of work and related record-keeping and payment provisions of the *Code* and common law employment contract principles based on a duty of good faith have, as one of their principal aims, the protection of workers. These provisions and principles are intended, among other things, to ensure that employees are paid appropriately for all their hours of work. However, as discussed further above, until this Court's summary judgment decision, there was no settled court authority on such important issues as the legality of pre-authorization as a condition for payment of overtime, the legality of placing the burden of hours of work recording on employees,

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[9] See, for example: *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 (S.C.) (court certifying class action on behalf of sales agents of the defendant insurer for unpaid wages); *Levac v. James*, 2023 ONCA 73 (C.A.) (Court of Appeal affirming a common issues trial decision finding the defendant doctor liable for systemic negligence by presumptively causing infections via non-sterile epidural injections, citing Fresco at para. 67 for the principle that a defendant may be liable for subjecting a class to a systemic risk of harm, even if not all class members did in fact suffer harm); and *RBC Insurance Agency Ltd. v. Ali*, 2021 CarswellOnt 7544, 2021 C.L.L.C. 210-050, (O.L.R.B.) (ESA Appeals) (tribunal at para. 67 applies *Fresco* to interpret the overtime entitlement provisions of the *Employment Standards Act*).

[10] Aidan Macnab, "Lexpert's Top 10 Business Decisions of 2021/2022", *LEXPERT*, Nov. 23, 2022.

or whether an employer having actual or constructive knowledge that unpaid overtime is being worked for its benefit has an obligation to either take reasonable steps to prevent such work or else compensate it. The summary judgment decision of this Court, confirmed by the Court of Appeal, has now clearly resolved these questions in favour of the protection of employees. As a result, employees have the benefit of a clear legal precedent to support claims for compensation for their unpaid hours of work. Likewise, employers now have clearer guidance about how to structure their record-keeping, monitoring and payment policies and practices in conformity with the law.

SKILL AND COMPETENCE OF CLASS COUNSEL

70. Class Counsel believe that we have demonstrated a high level of skill and competence, as well as determination in prosecuting this matter. Relatively few law firms in Canada have taken on unpaid overtime class actions, and unlike many other types of class action claim, no such case has ever been subject to a carriage fight: because these cases are difficult and uncertain. This case, in particular, has been the most difficult, hard fought, and now the most successful (on the basis of the total quantum of the settlement amount) of any unpaid overtime class action. Class Counsel in this case have been instrumental in this area and are proud to have potentially advanced employees' rights and obtained compensation for this Class of employees.

CLASS COUNSEL TIME AND OPPORTUNITY COSTS

71. Class Counsel have invested significant time in prosecuting this action. As noted, to date, the combined WIP on this file totals $16.52 million. As discussed below, the time committed to this case placed a significant burden on each of our three firms, but was necessary to overcome the numerous and serious risks and obstacles outlined above and to bring this action to an exemplary successful conclusion.

72. The co-counsel arrangement among the Plaintiff's firms allowed Class Counsel to leverage their respective strengths and expertise: Goldblatt Partners LLP in the area of labour and employment law and Roy O'Connor LLP in the field of class actions, with Sotos LLP (after Mr. Sokolov joined the firm in 2013), bringing its combined expertise in both.[11] The combination of Class Counsel lawyers proved indispensable to successfully litigating this case, by allowing the myriad of factual and legal issues to be allocated and divided. Significantly, the Defendant took a similar approach, hiring senior lawyers from a major Bay Street firm having extensive experience in class action litigation as well as those from a preeminent management-side employment law firm with its own additional class action expertise.

73. This case significantly absorbed the resources of the Class Counsel firms, both in terms of available time dedicated to this case and carrying of disbursements. Class Counsel carried six and seven figure disbursements for many months at a time before reimbursement could be sought and obtained from the CPF. As set out above, such reimbursement was never guaranteed, was not taken for granted and was only partial, with Class Counsel ultimately self-funding over $1.8 million in disbursements inclusive of taxes.

74. Each firm had limited ability to take on a case of this kind: one that spanned more than 15 years and required enormous investments of lawyer time. Even in combination, Class Counsel's firms were not so large that they could absorb such a case without major consequences. For all Class Counsel firms, the more than 15 years of enormous work devoted to this file – including

[11] Mr. Sokolov was originally one of the lead lawyers on the file at the predecessor to Goldblatt Partners LLP. His joining Sotos LLP in 2013 and the addition of that firm to the Class Counsel group did not materially change or add to the Plaintiff's lawyer team.

substantial time spent by some of the most senior lawyers at each firm - significantly limited their appetite and ability to take on other high risk cases.

75. Roy O'Connor LLP is a small litigation boutique consisting of six lawyers. Our practice consists of plaintiff-side class actions and some commercial litigation and (to a lesser extent) defence class action work. The commercial litigation files and defence class action work help pay the rent, salaries and other expenses. After the launch of this case against CIBC, some of the bank and financial industry commercial paying work that our firm previously enjoyed dried up.

76. I am advised by Mr. Sokolov that Sotos LLP is a small firm consisting of approximately 20 lawyers, half of whom practice litigation. Its litigation practice consists of commercial litigation and plaintiff-side class actions. I am advised by Mr. Sokolov that this case is the oldest class action that the firm acts on, and one of the most resource-intensive in both time and disbursements.

77. Goldblatt Partners LLP is a labour and employment firm with a relatively small civil litigation department. The focus of the civil litigation department is hourly billed retainers, with some employment and pension-related class actions from time to time. However, relative to other class actions on which Goldblatt Partners LLP is counsel, *Fresco* involved the highest investment of time and disbursements at Goldblatt Partners LLP by a significant margin. The full-time commitment of Goldblatt Partner's sole litigation clerk, and of several lawyers, would often be occupied with *Fresco* matters.

78. Class Counsel spent these resources because we believed in the case and its value to the Class Members, because we were committed to litigating this case to the best of our ability and because this was what was required to get the job done right. We were advancing new approaches and facing a powerful adversary, with enormous resources, who vigorously defended the litigation.

Anything less than full commitment to this case on our part would, in our view, have resulted in failure or, at the very least, significantly diminished recovery for the Class. While it would have been a much better business decision or economic model to take on a greater number of smaller cases that can be with less time, particularly in circumstances where contingency percentages of 30% or even 33% on smaller files are generally awarded without much question, this case was worthy and important, and, in our view, needed to be litigated, despite the risks.

79. The following chart detail the breakdown of time devoted by firm up to February 21, 2023:

Law Firm	**Total Docketed Time (without applicable taxes)**
Goldblatt Partners LLP	$6,137,391.85
Roy O'Connor LLP	$6,351,329.25
Sotos LLP	$3,790,135.00
Total	**$16,278,856.10**

80. In addition, Class Counsel initially assembled a national consortium of firms to assist with the identification of certification affiants, preparation of their affidavits and their cross-examinations on same. The contributions of these additional firms, although important in the lead up to certification, did not significantly add to the total time devoted to this file. The below chart sets out each additional firm's WIP to date.

COUNSEL	FEES	TAX RATE	TAX	TOTAL
PINK BREEN LARKIN (Nova Scotia)	$68,272.00	15.00%	$10,240.80	$78,512.80
MELANCON, MARCEAU (Quebec)	$51,814.50	14.75%	$7,642.64	$59,457.14
CAMP FIORANTE (BC)	$45,392.50	12.00%	$5,447.10	$50,839.60
MYERS WEINBERG (Manitoba)	$29,480.00	12.00%	$3,537.60	$33,017.60
Kapoor Selnes (Saskatchewan)	$15,622.50	11.00%	$1,718.48	$17,340.98
Chivers Carpenter (Alberta)	$31,890.25	5.00%	$1,594.51	$33,484.76
TOTAL FEES INCURRED BY REGIONAL COUNSEL	**$242,471.75**		**$30,181.13**	**$272,652.88**

81. Notably, two of the lead counsel, Mr. O'Connor and Mr. Sokolov have spent more than half of their respective careers on this case (and thousands of hours each), with Mr. Barrett spending just less of his career proportionately on this case (fifteen of his thirty-eight years). None of the lead counsel can reasonably expect to spend similar resources on any one additional case in the remaining years of their legal careers.

DISBURSEMENTS SOUGHT

82. As of January 31, 2023, our disbursements totaled $6,293,845.81, inclusive of applicable taxes. The CPF had funded disbursements totalling $4,415,520.94. As discussed in the next paragraph, we recovered or attributed $194,863.32 (inclusive of taxes) from the costs awards

against CIBC to our disbursements. Class Counsel has funded the balance the disbursements in this proceeding.[12] A detailed chart of incurred disbursements is attached to this affidavit as **Exhibit "B"**.

83. In 2013, after the appeals of the certification decision, Class Counsel received the all-inclusive amount of $820,002.67 in costs from CIBC. Of that amount, $612,843.17 exclusive of taxes (equivalent to $655,639.35 inclusive of taxes) was applied to Class Counsel's and regional counsel's fees before taxes, $134,863.32 inclusive of taxes was applied to Class Counsel's and regional counsel's disbursements, and $29,500.00 was allocated to reimbursement of the CPF.[13] The Plaintiff was also awarded $15,000 in costs (approximately $13,274.34, plus taxes of $1,725.66) in the context of the production/Schedule B motion, which amount is still held in trust by Class Counsel. In the context of the summary judgment appeals before the Court of Appeal, Class Counsel received in total $90,000 all-inclusive in costs, of which $60,000 inclusive of taxes were applied to disbursements, and $26,548.67 before taxes (equivalent to $30,000 inclusive of taxes) was applied to fees. Thus, Class Counsel recovered from the costs awarded in this proceeding a total of $652,666.18 exclusive of taxes towards fees. Accordingly, the total contingency fee awarded by this Court shall be offset (reduced) by this same amount to arrive at the quantum of net contingency fees payable to Class Counsel out of the Settlement Fund.

[12] Subject to the one consulting fee noted above.

[13] The CPF had funded some of the Plaintiff's certification disbursements and was entitled to some portion of the costs as part of the disbursements that the CPF had reimbursed to Class Counsel. At that time, Class Counsel and the CPF agreed that Class Counsel would simply retain in trust the CPF's *pro rata* share of the overall costs recovery, which worked out to $29,500 It was agreed that that $29,500 amount would be held in trust and could, if appropriate, be used to offset subsequent disbursement requests made to the CPF by the Plaintiff in this case. Subsequent disbursement funding requests were made but the $29,500 was not applied to those requests. Accordingly, Class Counsel continues to hold $29,500, plus any applicable interest, and they intend to credit those amounts to the CPF to reduce the payment from the Settlement Fund to it (the CPF).

FEES EXPECTATIONS OF THE CLASS AND THE ABILITY OF THE CLASS TO PAY

84. For obvious reasons, Class Members would reasonably expect to pay their own lawyers substantially more than their claims are worth to prosecute this action on an individual basis. Moreover, without the efforts of Ms. Fresco, and the skill and determination of Class Counsel, none of these class members would be receiving any payments whatsoever for unpaid overtime.

85. Ms. Fresco expected that, in the event this action was successful, Class Counsel would be fairly and reasonably well compensated for their work. The Retainer Agreement specifies a 30% percentage-based fee.

86. As per the notification process that preceded this approval hearing, all Class Members were provided with direct notice that advised as follows:

> Class Members will not have to personally pay Class Counsel for the work that they have done or for the disbursements that they have carried over the past 15 years since this case began. Legal fees in class actions are typically deducted from any compensation that the class ultimately receives as a result of a successful judgment. Class Counsel's legal fees are subject to Court approval. In this case, Class Counsel's retainer agreement with the Representative Plaintiff provides for a contingency fee of 30% of the settlement fund, plus taxes and disbursements.

87. As of the date of the commissioning of this affidavit, there have been no objections to the proposed contingency fee.

REQUESTED HONOURARIUM FOR MS. FRESCO

88. Class Counsel request that the Court award an honorarium to Ms. Fresco in recognition of her contribution to the successful resolution of this case. Simply put, this case would not have been brought had Ms. Fresco not been willing to courageously act as a representative plaintiff. It

is highly unusual, in Class Counsel's experience, for an employee to be willing to sue his or her current employer, let alone act as the face of a class action. Ms. Fresco agreed to do so notwithstanding that she could reasonably fear that doing so would not positively impact her employment relationship (although in the end there is no such evidence of this having occurred). Throughout the nearly 16 years of this case, Ms. Fresco remained involved, interested and engaged with Class Counsel.

89. At no time did Ms. Fresco expect or request an honourarium or any other payment in exchange for her participation in this case. It was only after the agreement to settle was reached that Class Counsel raised, for the first time, that it might be possible to request an honorarium for her.

SWORN before me at the City of Toronto, in the Province of Ontario on February 24, 2023

Commissioner for Taking Affidavits
(or as may be)

Dean Grayson
LSO No: 46887H

J. ADAM DEWAR

This is Exhibit "A" referred to in
the affidavit of J. Adam Dewar,
sworn before me, this 24th day of
February, 2023

A Commissioner for Taking Affidavits.

LSO No: 46887tt

Exhibit "A" – Retainer Agreement

CONTINGENCY FEE RETAINER AGREEMENT

1. Dara Fresco (hereinafter the "claimant"), hereby retains and employs the firms of Sack Goldblatt Mitchell LLP and Roy Elliott Kim and O'Connor LLP (collectively "Class Counsel") as her counsel in a national class proceeding pursuant to the *Class Proceedings Act* (the "Class Proceeding") against the Canadian Imperial Bank of Commerce ("CIBC") for failure to compensate its non-management employees for the overtime they have worked in excess of their standard working hours. The Claimant agrees to be the representative Plaintiff in the Class Proceeding.

2. The claimant authorizes Class Counsel to retain and instruct other counsel outside Ontario ("Regional Counsel") to assist in representing the interests of class members who reside outside Ontario.

3. The claimant agrees that the representation will be pursued on a contingency basis, such that all fees and disbursements and taxes of Class Counsel and Regional Counsel (the "legal fees"), will be payable only in the event of success. The claimant has discussed with Class Counsel retainer options other than by way of a contingency fee agreement, including retainer by way of an hourly rate retainer. The claimant has chosen to retain Class Counsel by way of a contingency fee agreement.

4. The claimant agrees that upon the successful resolution of the class proceeding, as defined in paragraph 9 below, the legal fees will be calculated on one of the

following two bases, the selection of which is to be made at the sole discretion of Class Counsel, subject to approval of the Court as provided by paragraph 10 below,

Contingency Percentage

(a) the contingency fee shall be 30% plus G.S.T. of the settlement or judgment proceeds on behalf of all class members, net of disbursements; or

Contingency Multiplier

(b) the contingency fee shall be 4 x the ordinary hourly rates of counsel.

5. Any disbursements (and applicable taxes thereon), incurred by Class Counsel or Regional Counsel, not paid directly by the defendant, will be payable as a first charge against any settlement on judgment proceeds;

Example of Fee Calculation Under Contingency Percentage

6. If the class proceeding results in a settlement or judgment equal to $10,000,000.00, and if Class Counsel and Regional Counsel have incurred disbursements, and taxes on these disbursements, of $200,000.00, then the sum of $200,000.00 will be paid first to Class Counsel as reimbursement for those expenses incurred by them. The contingency fee will then be $2,940,000.00 (30% of $9,800,000.00) plus $176,400.00 (G.S.T.), leaving $6,683,600.00 for distribution to class members.

Example of Fee Calculation Under Contingency Multiplier

7. If the class proceeding results in a settlement on judgment equal to $10,000,000.00, and if Class Counsel and Regional Counsel have incurred disbursements, and taxes on these disbursements, of $200,000.00, and docketed time at their ordinary hourly rates (set out in Schedule "A") totalling $750,000.00, then the sum of $200,000.00 will be paid first to Class Counsel and Regional Counsel as reimbursement for those expenses incurred by them. The contingency fee will then be $3,000,000.00 (4x docketed time of $750,000) plus $180,000.00 (G.S.T.), leaving $6,620,000.00 for distribution to class members ($10,000,000.00, less $200,000.00 disbursements, less $3,000,000.00 contingency multiplier, less $180,000.00 GST on fees).

8. Any costs ordered by the Court to be paid, and paid by the defendants to the class members, shall be paid to Class Counsel and applied against the legal fees owing to Class Counsel. The balance of the legal fees owing to Class Counsel will be paid out of the payment by the defendant to the claimant or class members.

9. Successful resolution of the class proceeding means:

   (a) a judgment on the common issues in favour of some or all class members; or

   (b) a settlement that benefits one or more class members.

10. The legal fees are subject to approval by the Superior Court of Justice.

11. Class Counsel reserves the right to terminate this retainer agreement, at their sole discretion, prior to the certification of the class. After certification of the class and/or obtaining funding from the class proceeding fund, Class Counsel may terminate this retainer only with the agreement of the claimant, or if in the opinion of Class Counsel, additional evidence has been obtained or changes in the law have occurred which would, in the reasonable opinion of Class Counsel, make it unlikely that the class proceeding would succeed.

12. The claimant may terminate the retainer at any time. In the event that there is subsequently a successful resolution of the class proceeding, she shall be liable to pay the legal fees as provided for in paragraph 4, above.

13. The claimant has the right to decide whether or not to accept an offer to settle the claim. However, if, prior to trial, a settlement offer is made to the claimant which Class Counsel recommends be accepted, and which the claimant does not accept, Class Counsel may terminate this contingency fee retainer agreement. In such instance, the claimant will be responsible to forthwith pay Class Counsel's fees incurred to date, as calculated on the basis of the solicitors' regular hourly rates, plus G.S.T., in addition, to any disbursements incurred.

14. This retainer agreement automatically terminates upon receipt of judgment at trial in the event that the class proceeding is unsuccessful at trial. If the class

proceeding is successful at trial, this retainer agreement shall continue in respect of any appeals or references or other proceedings to complete or enforce a successful trial judgment.

15. If the class proceeding is unsuccessful at trial, and the claimant retains new counsel to represent her on appeal, and the appeal is successful, the legal fees as provided for in paragraph 4, shall be a first charge on any judgment or settlement subsequently obtained.

16. Class Counsel agree to make application to the Class Proceedings Fund to indemnify the claimant with respect to any costs award made against her as a result of the class proceeding.

17. The claimant acknowledges and agrees that, in retaining Class Counsel to provide the legal services described in this retainer, the collection, use, retention and disclosure of personal and other sensitive information may be required in order to fulfill those services and related obligations.

IN WITNESS WHEREOF the undersigned have executed this Retainer Agreement by their hands and seals.

Signed this 5 day of June, 2007.

Witness

Dara Fresco

Signed this 5 day of June, 2007.

SACK GOLDBLATT MITCHELL, LLP

Witness

Per:
Louis Sokolov

Signed this 5 day of June, 2007.

ROY ELLIOTT KIM and O'CONNOR, LLP

Witness

Per:
R. Douglas Elliott

This is Exhibit "B" referred to in
the affidavit of J. Adam Dewar,
sworn before me, this 24th day of
February, 2023

A Commissioner for Taking Affidavits.

Sean Grayson
LSO No: 468874

Exhibit B – Total Disbursements from Start of File to January 31, 2023

ITEM	SOTOS	GOLDBLATT	ROY OCONNOR	MELANCON MARCEAUX
ACL License Fee	$ 195.00			
Agency - BizFilm Media	$ 3,122.11			
Agency -eDiscovery - Discovery Law	$ 2,720.00	$ 453.33	$ 453.33	
Agency - Camden Communications	$ 2,000.00			
Agency - paid to C Larsen	$ 515.26			
Agency Fees		$ 1,405.79		
Agency Fees - Media Profile - Communications Consultant		$ 71,356.36		
Bailiff's Fees				$ 88.25
Bank Charges - Exempt	$ 60.00			
Bank Charges	$ 675.00	$ 50.00	$ 50.00	
Conference Calls	$ 1,935.00	$ 4,314.81		
Courier	$ 1,647.47	$ 921.66	$ 1,492.93	$ 80.53
Court Filing Fees	$ 607.00	$ 3,686.89	$ 574.00	
Document Management - Redi Web		$ 14,952.74	$ 58,183.81	
Expert Fees - Exempt - BRG*	$ 125,886.54			
Expert Fees - BRG	$ 4,456,448.44			
Expert Fees - BRG	$ 311,147.72			
Expert Fees - Fudge, Lowe			$ 55,989.49	
Expert Fees - Christina Banks, Graham Lowe, Dr. Drogin		$ 129,412.06		
Fax		$ 160.07	$ 218.65	$ 63.75
Long Distance Calls	$ 57.00	$ 78.60	$ 1,526.94	
Meals	$ 912.86	$ 568.60	$ 241.37	
Mediator fees	$ 29,166.67	$ 29,166.66	$ 29,166.66	
Mileage		$ 877.95		
Cross Exam of Denise Martin (Rome)	$ 41.62			
Cross Exam of Denise Martin (Board Room Rental Rome)	$ 782.33			
Newswire	$ 3,685.00	$ 144.00		

Official Examiner -US - Veritext	$ 6,693.02			
Official Examiner - Transcripts	$ 1,407.40	$ 15,362.37		
Official Examiner - Victory Verbatim	$ 686.40	$ 25,667.65		
Court Reporters			$ 20,389.26	
Pacer Search	$ 380.87			
Photocopies - Inhouse	$ 4,875.75	$ 14,687.25	$ 34,921.14	$ 370.75
Photocopies - External	$ 11,720.47			
Postage		$ 249.38	$ 51.80	
Process Servers	$ 1,100.12	$ 4,450.00	$ 2,556.00	
Quick Law	$ 1,152.79			
Research Services			$ -	$ 94.85
Research (all billed to CPC)		$ 11,140.01		
Transaction Levy			$ 50.00	
Translation Fees	$ 462.50			
Travel	$ 9,907.15	$ 28,318.56	$ 12,794.45	$ 613.76
Website/Domain Names/ Facebook/Media	$ 2,760.37	$ 8,900.19	$ 16,696.81	
Totals Before Taxes	**$ 4,982,751.86**	**$ 366,324.93**	**$ 235,356.64**	**$ 1,311.89**
HST	$ 613,175.52	$ 71,986.19	$ 22,938.78	$ -
Totals With Taxes	**$ 5,595,927.38**	**$ 438,311.12**	**$ 258,295.42**	**$ 1,311.89**

Total of All Firms With	**$**	**6,293,845.81**

DARA FRESCO
Plaintiff

-and-

CANADIAN IMPERIAL BANK OF COMMERCE et al.
Defendants

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF J. ADAM DEWAR
– Fee Approval and Honourarium Request –

ROY O'CONNOR LLP **Barristers** 1920 Yonge Street, Suite 300 Toronto, Ontario M4S 3E2 **David F. O'Connor (LSO# 33411E)** Tel: 416-362-1989 **GOLDBLATT PARTNERS LLP** 20 Dundas Street West, Suite 1039 Toronto, Ontario M5G 2C2 **Steven Barrett (LSO #24871B)** **Peter Engelmann (LSO #29064P)** Tel: 416-979-6070	**SOTOS LLP** 180 Dundas Street West Suite 1200 Toronto, Ontario M5G 1Z8 **Louis Sokolov (LSO# 34483L)** **Jean-Marc Leclerc (LSO# 43974F)** Tel: 416-977-0007 Lawyers for the Plaintiff

DARA FRESCO
Plaintiff

-and-

CANADIAN IMPERIAL BANK OF COMMERCE et al.
Defendants

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD OF THE PLAINTIFF (FEE APPROVAL)

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