

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

MICHAEL BROWN and BRIAN SINGER

Plaintiffs

-and-

**CANADIAN IMPERIAL BANK OF COMMERCE
and CIBC WORLD MARKETS INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTED THIS MODERATE
 THE ORDER OF L'ORDONNANCE DU
 DATED / FAIT LE
 Feb. 15/11
 PURSUANT TO CONFORMANCE A
 M. S. Singer
 GREFIER / CLERK
 COUR SUPERIEURE DE JUSTICE
 SUPERIOR COURT OF JUSTICE

FURTHER FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$500,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Date October 28, 2008

Issued by

^u
SAGARIA ^y (M)

Local registrar

Address of court office 393 University Avenue,
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TO: **TORYS LLP**

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TO: **HICKS MORLEY HAMILTON STEWART STORIE LLP**

Mr. John C. Field
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CLAIM

1. The Plaintiffs claim:

- (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiffs as representative plaintiffs for the Class (defined below);
- (b) \$100 Million in general damages for the Class, or such other sum as this Honourable Court deems just;
- (c) a declaration that the provisions of the *Employment Standards Act, 2000* (“*ESA*”) and/or the *Canada Labour Code* (“*Code*”), as applicable, are express or implied terms of the contracts of employment of the Class Members (defined below);
- (d) a declaration that the Defendants breached the Class Members’ contracts of employment and duty of good faith owed to the Class Members by:
 - (i) failing to ensure that Class Members were properly classified as entitled to overtime pay;
 - (ii) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Policy Threshold (defined below) or alternatively the Minimum Overtime Threshold (defined below);
 - (iii) failing to ensure that the Class Members’ hours of work were monitored and accurately recorded; and
 - (iv) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Policy Threshold or alternatively the Minimum Overtime Threshold.
- (e) in the alternative to (d), a declaration that the Defendants violated the terms of the *ESA* and/or the *Code*, as applicable, by:

- (i) failing to ensure that Class Members were properly classified as entitled to overtime pay pursuant to the *ESA* and/or the *Code*, as applicable;
 - (ii) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of the applicable standards hours of work;
 - (iii) failing to ensure that the Class Members hours of work were monitored and accurately recorded; and
 - (iv) requiring and/or permitting the Class Members to work overtime hours but failing to ensure that Class Members were compensated for hours worked in excess of the applicable standards hours of work in accordance with the *ESA* and/or the *Code*, as applicable.
- (f) an interlocutory and a final mandatory order for specific performance directing that the Defendants comply with the contracts of employment with the Class members, in particular, to:
- (i) ensure that Class Members are properly classified as entitled to overtime pay;
 - (ii) advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Policy Threshold or alternatively the Minimum Overtime Threshold;
 - (iii) ensure that the Class Members hours of work are monitored and accurately recorded; and
 - (iv) ensure that Class Members are appropriately compensated for hours worked in excess of the Overtime Policy Threshold and the Minimum Overtime Threshold.

- (g) a declaration that the provisions of the CIBC Overtime Policy (defined below) which purport to exclude the Class Members from eligibility for overtime pay are void and unenforceable;
- (h) a declaration that the Defendants were unjustly enriched, to the deprivation of the Class Members, in that they received the value of the overtime hours worked by the Class Members without providing the necessary compensation, and an order requiring the Defendants to disgorge to the Class all amounts withheld by them in respect of such unpaid hours;
- (i) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
- (j) an order directing the Defendants to preserve and disclose to the Plaintiffs all records (in any form) relating to the hours of overtime work performed by Class Members;
- (k) an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information;
- (l) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (m) punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as to this Honourable Court deems just;
- (n) costs of this action on a substantial indemnity basis, together with applicable *HST*, or other applicable taxes, thereon;
- (o) the costs of administering the plan of distribution of the recovery in this action; and
- (p) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, Michael Brown (“Brown”), resides in Toronto, Ontario. He was a non-management employee of Canadian Imperial Bank of Commerce (“CIBC”) from April 2003 to January 2004. Brown worked as an Analyst.

3. In the alternative, Brown pleads and relies on the common employer doctrine and states that he worked for both CIBC and CIBC World Markets Inc. (“CIBCWM”) (CIBC and CIBCWM collectively referred to herein as “CIBC Financial Group”).

4. The Plaintiff, Brian Singer (“Singer”) resides in Thornhill, Ontario. He was a non-management employee of CIBCWM from May 1994 to November 2002. While at CIBCWM, Singer worked as an Investment Advisor, among other positions.

5. The Defendant, CIBC, is a Canadian chartered bank with its head office in Toronto. CIBC is a financial services conglomerate that provides retail and wholesale financial services under the CIBC Financial Group umbrella and under the CIBC banner and brand. CIBC is federally regulated and governed by the *Code*.

6. The Defendant, CIBCWM, is a wholly owned subsidiary of CIBC. It is a financial services firm with employees in the capital markets, investment banking and other financial services areas. CIBCWM is provincially regulated and governed by the *ESA*.

THE CLASS

7. The Plaintiffs bring this action pursuant to the *Class Proceedings Act, 1992* on their own behalves and on behalf of the following class of persons:

“All Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC and CIBCWM as Level 6 or higher, who held the positions of Analyst or Investment Advisor (otherwise known as Financial Advisor), or who performed the same or similar job functions under a different or previous CIBC or CIBCWM job title.”

(the “Class” or “Class Members”)

8. The duties performed by the Class Members did not involve the management of other employees and were not supervisory or managerial in character. In particular, the Class Members did not:

- (a) supervise other employees;
- (b) have the power to hire, fire and/or discipline other employees;
- (c) have the ability to make decisions on behalf of the company;
- (d) exercise discretion and independent judgment in management affairs; or
- (e) perform a leadership or administrative role as opposed to an operational role.

9. At all material times, the primary place of business for the Class Members was the CIBC and CIBCWM branches or offices in which they were employed.

CLASS MEMBERS' CONTRACTS OF EMPLOYMENT – OVERTIME

10. The Defendants utilize a uniform policy and practice applicable to all Class Members with respect to overtime (the "CIBC Overtime Policy"). The CIBC Overtime Policy is applicable to CIBC and all CIBC controlled subsidiaries including CIBCWM. The CIBC Overtime Policy purports to apply to, and forms part of, the contracts of employment of all CIBC and CIBCWM employees, including the Class Members.

11. The CIBC Overtime Policy purports to be in accordance with the legal and regulatory framework governing overtime in Canada. The CIBC Overtime Policy and the contracts of the Class Members expressly incorporate the provisions of the *ESA* and the *Code* as minimum terms of contract.

12. In the alternative, the provisions of the *ESA* and the *Code* are implied terms, in fact or by law, as minimum terms of the CIBC Overtime Policy and the contracts of the Class Members.

13. Specifically, the CIBC Overtime Policy expressly provides that non-excluded employees shall be compensated at one and one half times their regular rate for every hour

worked in excess of 8 hours in a day or 37.5 hours in a week (“Overtime Policy Threshold”), plus vacation pay thereon.

14. Alternatively, the CIBC Overtime Policy and the contracts of the Class Members expressly or impliedly provide that, at a minimum, Class Members shall be compensated at one and one half times their regular rate for every hour worked in excess of the applicable standard hours of work as mandated by the *ESA* and the *Code* (“Minimum Overtime Threshold”), plus vacation pay, thereon.

CONTRACTUAL DUTIES OWED TO CLASS MEMBERS

15. As non-management employees, the Class Members relied on the Defendants to advise them properly regarding their eligibility for overtime pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for such overtime worked. As a result of their position of power and influence over the Class Members as their employer, and as a result of the vulnerable position of the Class Members *vis-a-vis* the Defendants as non-management employees, the Defendants owe a contractual duty of good faith to the Class Members.

16. The Defendants’ contractual duties, including their duty of good faith, require the Defendants to:

- (a) ensure that Class Members are properly classified as entitled overtime pay;
- (b) advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Policy Threshold or alternatively the Minimum Overtime Threshold;
- (c) ensure that the Class Members hours of work are monitored and accurately recorded; and
- (d) ensure that Class Members are appropriately compensated for hours worked in excess of the Overtime Policy Threshold or alternatively the Minimum Overtime Threshold.

PLAINTIFFS' EMPLOYMENT HISTORY – HOURS OF WORK

Michael Brown

17. From April 2003 to January 2004 Brown worked as an Analyst at the CIBC Technology and Operations Department supporting CIBCWM in their corporate client office.

18. Brown provided syndicated loan administration support to clients that were predominantly United Kingdom Banks.

19. Brown's starting salary as an Analyst was \$50,000.00. Brown's cumulative pay, however, never related to the amount of hours he worked, and did not include payment for his extensive overtime hours.

20. Brown's duties and responsibilities included:

- (a) providing support and administration to CIBCWM's Leveraged Finance U.K. division;
- (b) analyzing and processing information to support the business processes involved;
- (c) reading, processing and analyzing complex and voluminous legal loan documents that detailed terms of the loans to be received by the borrowers;
- (d) inputting the terms of the loans into the CIBC system; and
- (e) extensive communication with employees in the United Kingdom related to the above.

21. Brown did not manage any employees, his work was not supervisory or managerial in character, nor did he exercise any managerial functions in the course of his employment. Brown's duties and lack of management responsibilities are consistent with the responsibilities of all Analysts in the Class.

22. At all materials times, Brown performed his duties and responsibilities in and from the Defendants' offices in Toronto.

23. When Brown commenced employment with CIBC he was explicitly informed by management that his work hours would be from 4:00am to 12:00pm. Contrary to the commitment provided by management, however, his typical workday ranged from 3:30 am to as late as 5:00 pm, often without lunch, which resulted in his working an average of 60-70 hours per week to perform his job functions and employment responsibilities. The Defendants were aware of, and encouraged his overtime hours which were necessary in order to accomplish the duties he was assigned. The Defendants required and/or permitted Brown to work overtime and failed or refused to provide him compensation as required.

24. Brown was specifically advised that, pursuant to CIBC's Overtime Policy, he was not entitled to overtime pay. The Defendants required Brown to work hours in excess of the Overtime Policy Threshold and the Minimum Overtime Threshold without overtime pay, contrary to his contractual terms.

25. Brown relied on the Defendants in good faith and was unaware while working for the Defendants or afterwards that he was entitled to overtime pay for the hours he worked in excess of the Overtime Policy Threshold or the Minimum Overtime Threshold while an employee of the Defendants. At the time, Brown relied on the Defendants to properly advise him regarding his entitlement to overtime and was misled by the Defendants that he was not entitled to overtime pay.

26. Brown was required and encouraged to work between 60-70 hours a week for the duration of his employment to achieve the goals set for him by the Defendants.

27. Brown left his employment with the Defendants as a result of being required to work onerous work weeks of between 60-70 hours without receiving overtime pay.

28. Brown did not become aware that he was eligible for overtime pay until August 2008 because the Defendants, through the Overtime Policy which had misclassified him as being ineligible for overtime, had continually misrepresented to him his actual eligibility for and entitlement to such overtime pay. His claim was not discoverable by him prior to that time.

29. Brown states that he is owed in excess of \$32,000.00 per year of service, plus accrued interest and applicable vacation pay, for hours worked in excess of the applicable standard hours of work at the rate of one and one-half his regular rate.

30. Brown pleads that he was employed by CIBC. In the alternative, Brown pleads that CIBC and CIBCWM are associated and/or related undertakings, activities or businesses that were and/or are carried on, by, or through one single and/or common employer for the purposes of labour relations being CIBC Financial Group and relies on the *ESA*, the *Code* and the common employer doctrine based on the following:

- (a) Brown's main employment function was to provide support and administration to CIBCWM's Leveraged Finance U.K. division;
- (b) Brown's employment duties involved servicing loans from CIBCWM;
- (c) Brown would receive information, instructions and advice from CIBCWM employees to complete his employment duties;
- (d) prior to the loan administration function being transferred to Toronto, Ontario, it was performed by employees of the U.K. division of CIBCWM in London, England;
- (e) CIBCWM is a wholly owned subsidiary of CIBC;
- (f) CIBCWM is one of two or three strategic business lines of CIBC;
- (g) The CIBC Technology and Operations Department, in which Brown was employed, is one of five functional groups at CIBC that service CIBC's strategic business lines, of which CIBCWM is one;
- (h) Brown's offer of employment was from CIBC;
- (i) Brown's salary was paid by CIBC;
- (j) Brown's immediate supervisor worked in the CIBC Technology and Operations Department; and

- (k) Brown's office was in the CIBC Corporate Client Support Center in Toronto.

Brian Singer

31. Singer commenced employment with CIBCWM as a Fixed Income Associate in May, 1994. In 1996, Singer became, what is now known as, an Investment Adviser (the position of Investment Advisor has been otherwise known by various titles at CIBC and CIBCWM since 1996 including Financial Advisor and Financial Consultant) and was employed in that capacity with CIBCWM until November, 2002.

32. Singer's duties and responsibilities as an Investment Advisor included:

- (a) advising CIBCWM clients on suitable investments;
- (b) researching and understanding clients' financial goals and objectives;
- (c) researching investments that would be appropriate to recommend to clients;
- (d) meeting and signing new clients and growing assets under management;
- (e) selling CIBCWM securities and other financial products to clients;
- (f) purchasing securities or financial products on clients' behalves.

33. Singer did not manage any employees, his work was not supervisory or managerial in character, nor did he exercise any managerial functions in the course of his employment. Singer's duties and lack of management responsibilities are consistent with the responsibilities of all Investment Advisors, or similarly titled employees, in the Class.

34. At all materials times, Singer performed his duties and responsibilities primarily in and from CIBCWM's offices in Toronto.

35. During the period of his employment Singer worked approximately 65 hours per week to complete his employment responsibilities.

36. CIBCWM was aware that Singer was working hours in excess of the Overtime Policy Threshold and the Minimum Overtime Threshold. The Defendants required and/or permitted

Singer to work overtime, however they failed or refused to compensate him for those hours as required.

37. The CIBC Overtime Policy specifically denied Singer's (and all Investment Advisors at level 6 or above) entitlement to overtime pay. Singer relied on the Defendants in good faith and was unaware while working for the Defendants or afterwards that he was entitled to overtime pay for the hours he worked in excess of the Overtime Policy Threshold or the Minimum Overtime Threshold while an employee of the Defendants.

38. Singer did not become aware that he was eligible for overtime pay until May 2009 because the Defendants, through the Overtime Policy which had misclassified him as being ineligible for overtime, had continually misrepresented to him his actual eligibility for and entitlement to such overtime pay. His claim was not discoverable by him prior to that time.

39. Singer pleads that he is owed in excess of \$50,000.00 per year of service, plus accrued interest and applicable vacation pay, for hours worked in excess of the applicable standard hours of work at the rate of one and one-half his regular rate.

CLASS MEMBERS HOURS OF WORK

40. The Defendants systematically required and/or permitted the Class Members to regularly work hours in excess of Overtime Policy Threshold and the Minimum Overtime Threshold to perform their job responsibilities.

41. The Defendants were aware that the Class Members relied on the Defendants to advise them properly regarding eligibility for overtime pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for such overtime worked.

42. Contrary to the Defendants' duties, the Defendants failed to monitor or accurately record the actual hours worked by Class Members. Instead the Defendants would arbitrarily and incorrectly record 37.5 hours per week employees for payroll purposes without any correlation to the actual hours work by each Class Member, which exceeded 37.5 hours per week.

43. The Defendants exerted pervasive pressure on Class Members to work hours in excess of the Overtime Policy Threshold and the Minimum Overtime Threshold. If Class Members did not overtime as required to complete their employment responsibilities, such Class Members were 'pushed out' or otherwise disciplined by the Defendants.

SYSTEMIC BREACH OF CONTRACT AND BREACH OF DUTY OF GOOD FAITH

44. The Defendants systematically breached the contracts with the Class Members and the contractual duty of good faith owed to the Class Members by:

- (a) improperly and arbitrarily misclassifying the Class Members as ineligible for overtime pay.
- (b) misrepresenting to the Class Members in their Overtime Policy that the Class Members were not entitled to overtime pay;
- (c) failing to monitor and keep track of the overtime hours worked by the Class Members;
- (d) incorrectly stating on payroll records that the Class Members were working 37.5 hours per week when the Defendants were aware that the Class Members were working in excess of this amount; and
- (e) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Policy Threshold or alternatively the Minimum Overtime Threshold.

45. The Class Members did not perform managerial functions. There was no legitimate basis for the Defendants' arbitrary exclusion of the Class Members for eligibility for overtime pay, which was contrary to the employees' express or implied terms of contract with the Defendants. Such exclusion is contrary to the terms of the *ESA* and the *Code*, which are incorporated as express or implied terms of the contracts.

46. Such breaches were ongoing and continuous in respect of the Class Members since at least 1996.

BREACH OF THE CODE AND ESA

47. The Defendants have systemically breached the provisions of the *ESA* and the *Code* with respect to all Class Members by :

- (a) failing to ensure that Class Members were properly classified as entitled to overtime pay pursuant to the *ESA* and/or the *Code*;
- (b) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of the applicable standards hours of work;
- (c) failing to ensure that the Class Members hours of work were monitored and accurately recorded; and
- (d) requiring and/or permitting the Class Members to work overtime hours but failing to ensure that Class Members were compensated for hours worked in excess of the applicable standards hours of work in accordance with the *ESA* and/or the *Code*.

48. The provisions of the CIBC Overtime Policy which misclassifies Class Members as ineligible for overtime pay are in violation of the *ESA* and/or the *Code* are unlawful, void and unenforceable.

UNJUST ENRICHMENT

49. The Defendants have been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members in excess of the Overtime Policy Threshold or, alternatively, the Minimum Overtime Threshold.

50. The Class Members have suffered a corresponding deprivation, in the form of the overtime wages for the hours worked in excess of the Overtime Policy Threshold, or, alternatively, the Minimum Overtime Threshold.

51. There is no juristic reason for the Defendants' unjust enrichment and the Class Members' corresponding deprivation. The provisions of the Overtime Policy which purport to exclude the Class Members from eligibility for overtime are unlawful and unenforceable.

52. The Defendants' unjust enrichment has been continuous and ongoing since at least 1996.

DAMAGES

53. As a result of the Defendants' breaches of contract, breaches of the *ESA* and/or the *Code* and/or unjust enrichment, Class Members have been denied appropriate compensation for the hours they worked in excess of the Overtime Policy Threshold or, alternatively, the Minimum Overtime Threshold, for which the Defendants are liable to the Class Members.

54. Furthermore, the Defendants' arbitrary and incorrect misclassification of the employees as being excluded from overtime pay, coupled with the Defendants' requirement of the Class Members to work overtime, was high handed and callous. The Defendants were in a position of power over vulnerable employees and owed them a duty of good faith which they flagrantly breached to increase their profits at the expense of the Class Members. Such conduct warrants an award of punitive damages.

55. The Plaintiff pleads and relies on upon the following statutes and regulations:

- (a) *Employment Standards Act, 2000*, S.O. 2000, Chapter 41;
- (b) *Canada Labour Code*, R.S. 1985, c. L-2;
- (c) *Canada Labour Standard Regulations*, C.R.C., c. 986; and
- (d) *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

56. The Plaintiff proposes that this action be tried in Toronto.

Oct. 28/2008

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CIBC et al
and
Defendants

Court File No: CV-08-365119CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**FURTHER FRESH AS AMENDED
STATEMENT OF CLAIM**

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