

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Issue Date: October 28, 2008

Issued By:

Amended on ~~May 2009~~ *M.*

B. Selegue

i Local Registrar *M.*

Address of court office: 393 University Avenue, 10th Floor
Toronto, Ontario M5E 1G6

TO: Canadian Imperial Bank of Commerce

Commerce Court
199 Bay Street
Toronto, Ontario,
M5L 1A2

TO: CIBC World Markets Inc.

Commerce Court West
199 Bay Street
44th Floor
Toronto, Ontario
M5L 1E9

TO: **TORYS LLP**

Attention: Ms. Tricia Jackson
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2

CLAIM

1. The Plaintiffs claim:

- a. an order certifying this proceeding as a Class proceeding and appointing plaintiffs as representative plaintiffs for the Class;
- b. an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
- c. \$350 Million in general damages for the Class, or such other sum as this Honourable Court deems just;
- d. an interlocutory and a final mandatory order directing that Defendants comply with the *Canada Labour Code* (“*the Code*”), the *Ontario Employment Standards Act* (“*the Act*”), and other similar employment standards legislation in other provinces, as applicable (similar Employment Legislation in other provinces may be referred to collectively herein as “*the Acts*”) and, in particular, to accurately record all hours worked by Class Members, and to pay Class Members their applicable statutory entitlement for all hours that they worked in excess of the applicable threshold for overtime pay entitlement under applicable Federal and Provincial legislation (the “Overtime Threshold”) at a rate of time and a half their normal hourly rate;
- e. an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including statistical information concerning hours of work performed by members of the Class, and an order directing Defendants to preserve, and disclose to the plaintiffs, all records (in any form) relating to the hours of work performed by Class Members;

- f. in the alternative to the claim for damages in (b) and (c) above, an order directing the Defendants to account to each Class Member for the hours he/she worked in excess of the applicable Overtime Threshold , and an order requiring Defendants to disgorge to the Class Members all amounts withheld by it in respect of such unpaid overtime;
- g. in the alternative to (c) and (f), a declaration that Defendants have been unjustly enriched, to the deprivation of members of the Class, by the value of the work performed by members of the Class, and an order requiring Defendants to disgorge to the Class members all profits earned by Defendant as a result of the hours worked by the Class Members in excess of the applicable Overtime Threshold for which the Class Members have not been paid, or in the alternative a declaration that Defendants have been unjustly enriched to the deprivation of the Class Members in the amount of Overtime Pay due to the Class Members that has not been paid by Defendants;
- h. pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (c), (f), and (g) pursuant to the *Courts of Justice Act*;
- i. punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as to this Honourable Court deems just;
- j. a declaration that Defendants have breached the contract of employment with all members of the Class;
- k. a declaration that Defendants have breached their obligation to act in good faith in the performance of their contracts of employment with the Class by failing to comply with their statutory obligations toward their employees and by failing to adhere to statutory requirements respecting the payment of wages for hours worked beyond the applicable

Overtime Threshold, and by retaining for themselves amounts due to the Class in respect of the wages for these hours;

- l. a declaration that Defendants breached their statutory obligations under Part VIII, Section 22(1) of the *Act*, and similar provisions in the *Acts* and Parts 169 and 174 of the *Code*;
- m. a declaration that Defendants has breached their statutory obligations under Part VII, Section 17 (1)(b) of the *Act*, and where applicable similar provisions in the *Acts*;
- n. a declaration that any payment or benefit made by the Defendants after being served with this action however characterized, payable to or for the benefit of any Class Member (made with or without Class Counsel's consent or approval), is declared to be instigated, caused by and resulting from Class Counsel's work already done or contracted to be done from August 2008 and that Defendants is liable to pay Class Counsel's fees related to the relief sought;
- o. costs of this action on a substantial indemnity basis plus Goods and Services Tax;
- p. the costs of administering the plan of distribution of the recovery in this action in the sum of \$3 million or such other sum as this Honourable Court deems appropriate; and
- q. such further and other relief as may be required by the *Class Proceedings Act, 1992*, or as this Honourable Court may deem just.

PARTIES

2. The Plaintiff Michael Brown resides in Toronto, Ontario. He was a non-management employee of Canadian Imperial Bank of Commerce ("CIBC") and CIBC World Markets Inc. ("CIBCWM") (and collectively "CIBC Financial Group") from April 2003 to January 2004.

3. The Plaintiff Brown pleads and relies on the common employer doctrine. The Plaintiff states that he worked for both CIBC and CIBCWM.
4. The Plaintiff Brian Singer resides in Thornhill, Ontario. He was a non-management employee of CIBC World Markets ("CIBC WM") from May 1994 to November 2002.
5. The defendant Canadian Imperial Bank of Commerce ("CIBC") is a Canadian chartered bank with its head office in Toronto.
6. CIBC is a leading North American financial services conglomerate that provides retail and wholesale Financial services under the CIBC Financial Group umbrella and under the CIBC banner and brand.
7. The Defendant, CIBC World Markets Inc. is a wholly owned subsidiary of CIBC and a leading North American financial services firm that employs employees in the capital markets, investment banking and other financial services areas.
8. CIBC provides its banking services in the UK through its wholly owned subsidiary CIBC World Markets United Kingdom P.L.C.

CIBC World Markets Is Merely a Business Line of CIBC and is Not Treated as Separate or Distinct from CIBC

9. There are two primary business lines under the CIBC financial group umbrella: CIBC Retail Markets, through which CIBC provides retail banking services, and CIBC World Markets through which CIBC provides wholesale and corporate banking services internationally.
10. CIBC markets its World Markets brand to the public as an "arm" of CIBC and CIBC World Markets' website, has the familiar CIBC logo, the same logo that is displayed on its retail bank branches.

11. The Financial Statements further indicate that CIBC formed various groups under the CIBC Financial Group Umbrella to support the services of its two business lines.
12. The Financial Statements also indicate that CIBC transfers revenues and expenses between its wholly owned and controlled business lines as it deems appropriate and that revenues and expenses that are incurred in one area or business line that properly relate to the other area or business lines are “transfer priced” and expensed back to the appropriate business line.
13. CIBC World Markets is treated by CIBC as a division of CIBC, and not as a separate entity. The Plaintiffs state that CIBC and CIBCWM are common employers

CIBC And Its Subsidiaries Operate As A Group

14. CIBC controls and operates various subsidiaries and groups through which it operates its various business lines.
15. CIBC and its subsidiaries currently share a common Overtime Policy
16. CIBC controls and directs its various subsidiaries and makes determination for the entire CIBC Financial Group as to which of its employees or the employees of its subsidiaries will be paid overtime, or are eligible for overtime under the CIBC policy.
17. All of the employees of CIBC and its various subsidiaries are similarly situated that their determination of whether or not they got overtime was based on the Overtime Policy that was promulgated by CIBC.

THE CLASS

18. The Plaintiffs bring this action on his own behalf and on behalf of all persons resident in Canada who between May, 1994 and October 2008:

- a. were (or are still) employed by CIBC or any of CIBC's subsidiary companies, at salary level 6 or above in CIBC's Overtime Policy or the analogous Overtime Policy of the CIBC subsidiary for which they worked; and
- b. were required by Defendants to work, or with the knowledge of Defendants worked, hours in a day or per week in excess of the applicable federal or provincial Overtime Threshold; and
- c. did not receive payment for the hours they worked in excess of the applicable Overtime Threshold in accordance with the applicable sections in the *Code, Act* or *Acts*; and

who claim that they are not exempted from sections 22(1) or section 17 (1)(b) of the *Act* under applicable exemptions prescribed by Regulations to the *Act*, or regulations prescribed under other *Acts*. **The**

Overtime Claims of Class Members Have Common Issues of Fact and Law

19.

Defendants' Decision on Whether or Not to Pay Their Employees Overtime was Based on Whether or Not the Employees Were Eligible for Overtime Pay Under Defendants' Overtime Policy and Not on Criteria Relevant to Legal Entitlement Under the *Code, Act* or *Acts*.

20. As pleaded above, Defendants and all the CIBC Subsidiaries share a common Overtime Policy.

21. Defendants' decision (and that of all CIBC subsidiaries) on the payment of Overtime Pay to its/their employees are based on whether or not such employees are "entitled" to Overtime Pay under CIBC's proprietary Overtime Policy.

22. Defendants' Overtime Policy divides its employees into eligibility for Overtime Pay based on salary levels and job codes.

23. Employees with CIBC or its subsidiaries that earn “Salary Level 6” are deemed ineligible for Overtime Pay under the Policy, if they have specific job codes or titles with CIBC or its subsidiaries. For example, “World Markets Professional Analyst”, or “Assoc Investment Adv” are defined as ineligible for overtime pay.
24. Under Defendants’ Overtime Policy, employees that earn higher than “level 6” on Defendants scale are always “ineligible” for Overtime Pay under Defendants’ policy.
25. Plaintiffs plead that Defendants’ Overtime Policy and the provisions therein that provide that employees that have certain job codes or titles are ineligible for Overtime violate the *Code, Act* and *Acts* inasmuch as the Policy provides that certain employees are ineligible for Overtime merely because of their salary level, or area or division of employment which are not related to the exemptions provided for in the *Code, Act* and *Acts* from Overtime Pay and other provisions.
26. The policies and practices of the CIBC Financial Group which affect the conditions of employment of the Class Members at Defendants’ headquarters and branch offices are relatively uniform and consistent throughout Defendants’ operations.
27. Defendants’ employees in many of its areas of operation including but not limited to: Investment Advisors, Investment Banking, Equities, and Capital Markets, were pressured to, and required to by their supervisors and managers to work hours in excess of their applicable provincial Overtime Threshold to increase the profits of their immediate Supervisors who may have earned bonuses related to the profitability of their group and ultimately, to increase the company’s profitability as a whole.
28. Plaintiffs allege that the pressure to work over-time at Defendants offices in the enumerated areas was pervasive, and that employees that did not work over-time as required for their employment responsibilities, were pushed out by Defendants or otherwise disciplined by Defendants.

29. Thus, Defendants' internal policies are to implicitly require under pain of dismissal, or other disciplinary action that their applicable employees work more hours than is permissible under the *Code, Act or Acts*, and not to pay overtime as required under the *Code, Act or Acts*.
30. Plaintiffs aver that Defendants have no systemized means to record the Class Members' hours of work and thus no efficient or coordinated means to record the Class Members' over-time hours as required under the *Code, Act and/or Acts*. This is particularly the Defendants' doing, and Plaintiffs aver a declaration of Defendants' responsibility under the *Code, Act or Acts*.

Applicable Provincial or Federal Legislation

Defendant CIBC

31. CIBC is a company incorporated and organized under the laws of Canada, and Regulated by the *Bank Act*, and the *Canada Labour Code* with operations around the country.
32. CIBC is a federally regulated corporation and as such, it is required to comply with the minimum conditions set out in the *Code* in respect of such matters as wages, hours of employment, and severance entitlement. The minimum standards contained in the *Code*, including those relating to overtime, seek, among other things, to protect vulnerable employees from undue exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting unlawfully onerous terms and conditions of employment.
33. Pursuant to section 169 of the *Code*:
- (a) *the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and*
- (b) *no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.*

Section 174 of the *Code* further provides that:

When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

[emphasis added]

34. Regulations promulgated pursuant to the *Code* (namely, section 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986) oblige an employer, including CIBC, to accurately record and maintain records of its employees' hours of work.
35. Accordingly, CIBC should have accurate records of all hours of work for the class members.
36. The *Code* further provides, in section 168, that its minimum standards apply notwithstanding any other law or any custom, contract or arrangement.
37. The requirements of the *Code* and its regulations, and in particular the requirements to pay for additional time, including but not limited to time and one-half far hours in excess of 8 hours per day or 40 hours per week, and to keep accurate records of hours of work, are implied terms in the contracts of class members.

Defendant CIBC World Markets

38. CIBCWM is a company incorporated and organized under the laws of Ontario, with operations around the country.
39. CIBCWM is required to comply with the minimum conditions set out in the applicable *Act* and *Acts* with respect to such matters as wages, hours of employment, and rights to vacation. The minimum standards contained in the respective *Act* and *Acts* including those relating to Overtime Pay, seek, among other things, to protect vulnerable employees from undue exploitation by employers who may

seek to take advantage of superior economic and bargaining power in setting unlawfully onerous terms and conditions of employment.

40. Section 17 of the *Act* provides that:

(1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and

(b) 48 hours in a work week.

(2) An employee's hours of work may exceed the limit set out in clause (1) (a) if the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a day in excess of the limit and his or her hours of work in a day do not exceed the number specified in the agreement.

(3) An employee's hours of work may exceed the limit set out in clause (1) (b) if,

(a) the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a work week in excess of the limit;

(b) the employer has received an approval under section 17.1 that applies to the employee or to a class of employees that includes the employee; and

(c) the employee's hours of work in a work week do not exceed the lesser of,

(i) the number of hours specified in the agreement, and

(ii) the number of hours specified in the approval.

41. Section 22 of the *Act* further provides that:

(1) An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold

42. Section 15(1) of the *Act* obliges an employer, to accurately record and maintain records of its employees' hours of work each day and each week under paragraph 4. However Section 15(3) provides that an employer is not required to record the information described in paragraph 4 of subsection (1) with respect to an employee who is paid a salary if,

(a) the employer records the number of hours in excess of those in his or her regular work week and,

(b) the number of hours in excess of eight that the employee worked in each day, or

(c) if the number of hours in the employee's regular work day is more than eight hours, the number in excess.

43. Other *Acts* contain similar provisions.

44. Accordingly, pursuant to the requirements of the *Code, Act, and Acts* as applicable, Defendants must retain employee employment records that show the numbers of hours they worked in the week in excess of the applicable Overtime Threshold, and must pay employees Overtime Pay in accordance with the above provisions.

45. Plaintiffs plead that Defendants' failure to accurately record the Class Members' hours of work pursuant to the above, violates the above noted *Code, Act or Acts*.

Plaintiff Brown's Work History

46. From April 2003 to January 2004 Brown worked in the CIBC Technology and Operations Department supporting CIBCWM in their corporate client office.
47. More specifically, Brown worked as a Senior Analyst (“Analyst”) providing syndicated loan administration support to clients that were predominantly United Kingdom Banks. Plaintiff Brown did not manage any employees in the course of his employment.
48. When Brown signed his employment contract with CIBC Financial Group he was explicitly informed his work hours would be from 4am to 12pm. In actuality, Plaintiff Brown’s hours typically ranged from 3.30am to 3pm, without lunch on numerous days of the week and on many occasions 3.30am to 5pm, i.e. approx 60 to 70 hours per week.
49. Brown pleads that he signed the employment contract under the understanding that he would be working approximately 40 – 45 hours per week. The Defendants never disclosed to the Brown that he would be required to work an average of 60 - 70 hours per week to perform his job functions and employment responsibilities.
50. Brown was given the impression by the Defendants that because of the 24/7 nature of the trading desk and the demanding work schedule that it required, that he was required to work as requested by Defendants without Overtime Pay.
51. Brown relied on the Defendants in good faith and was unaware while working for Defendants or afterwards that he was entitled to Overtime Pay for the work he performed while an employee of the Defendants.
52. Brown pleads that he did not become aware that he was not exempt from Overtime Pay until August 2008, and that his claim was not discoverable prior to that time.
53. Brown pleads that because of the culture cultivated by Defendants at its branches, Defendants’ employees that are in fact entitled to overtime but do not receive Overtime Pay when owed are typically not aware that they are statutorily entitled to Overtime Pay.
54. Brown’s employment agreement with the Defendants provided that the Plaintiff Brown’s starting salary as an Analyst was to be an annual base salary of \$50,000.00 (CAD).

55. Notwithstanding his eligibility to earn shift premiums or participate in the CIBC Annual Incentive Plan, Brown's cumulative pay never related to the amount of hours he worked.
56. 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 Management and Defendants.
57. Brown pleads that he left his employment with Defendants as a result of being forced to work onerous work weeks of between 60-70 hours without receiving Overtime Pay.
58. Brown plead that the Defendants owe him approximately \$50,000 plus accrued interest arising out of Defendants' failure to pay him Overtime Pay in accordance with the *Act*.

Plaintiff Brown's Employment Related to Wholesale Banking Activities and Thus His Salary was Properly Attributable to the CIBC World Markets Business Line

59. Brown pleads that his salary should have been charged to CIBC World Markets under the policies enumerated in CIBC's financial statements, and thus CIBC served mainly as a payroll company for CIBC World Markets and that CIBC World Markets is ultimately responsible to pay him his earned overtime. Brown states that CIBCWM and CIBC are common employers at law, Brown states that he worked for CIBCWM and that complicated corporate structures must not defeat the legitimate interests of employees.
60. In the alternative, Brown pleads that CIBC World Markets is a subsidiary of CIBC and like all CIBC subsidiaries, is controlled and directed by CIBC and thus CIBC is ultimately responsible to pay the overtime pay that is owed to employees of CIBC World Markets and all CIBC subsidiaries.
61. Brown pleads that the Defendants or one of them owe him approximately \$50,000 plus accrued interest arising out of Defendants' failure to pay him Overtime Pay in accordance with the *Code, Act* or *Acts*.

62. Plaintiff Brown's employment duties related to providing administrative support to United Kingdom banking syndicates of which CIBC was a member, most likely through its UK subsidiary CIBC World Markets UK P.L.C.
63. Support Services for the CIBC's UK banking activities were originally performed by CIBC World Markets in the United Kingdom, but were subsequently transferred to Toronto, Canada.
64. Plaintiff Brown's employment duties during the course of his employment with the Defendant(s) were comprised of those services supporting the CIBC World Markets UK divisions banking activities that were ultimately transferred to Toronto, Canada, where Plaintiff Brown was employed.
65. Plaintiff Brown was under the impression during his employment that he was employed by CIBC World Markets as he worked in the corporate client centre and his activities all related to wholesale "World Markets" type Banking activities, i.e. his employment duties pertained to wholesale and corporate banking.

Plaintiff Singer's Work History

66. The Plaintiff Singer started with CIBC World Markets as a Fixed Income Associate in May, 1994.
67. In 1996, Singer became a Financial Adviser with for the Defendants CIBCWM. He was employed in that capacity with CIBCWM until November, 2002.
68. During the period of his employment Plaintiff Singer worked approximately 65 hours per week to complete his employment responsibilities.
69. Defendant CIBC World Markets was aware that Singer was working hours in excess of the permissible threshold and Overtime Threshold under the *Act*, however it failed or refused to pay him Overtime Pay in accordance with the *Act*, relying on its Overtime Policy, which exempted him and other financial advisers from Overtime Pay.

70. Singer pleads that there were other employees similar to himself that worked hours in excess of the Overtime Threshold in their respective provinces however CIBC World Markets did not pay them overtime in accordance with the Act or at all.

71. Singer pleads that he relied on the Defendant for the proposition that he was not entitled to Overtime Pay while employed with the Defendants, and that he did not discover that he had a claim for unpaid Overtime until May, 2009, and that the Claim was not discoverable until the filing of this lawsuit.

Defendants Both Violated the Code, Act, and Acts in a Similar Fashion

72. The Defendants required employees to work overtime work without statutory mandatory overtime pay.

73. As Defendants knew or as it directed or permitted, its employees and the Class Members are routinely required to work hours in excess of the applicable provincial Overtime Threshold, and the applicable Permissible Threshold in order to complete their employment responsibilities.

74. Although Defendants were aware that Plaintiff Singer and the Class Members as applicable were working; and further required that Plaintiff Singer and the Class Members work more hours per week than the applicable permissible threshold for work in Ontario, by CIBC and CIBC WM failing or neglecting to accurately record the number of hours worked by Plaintiff Singer and others similarly situated and by Defendants refusal to pay Overtime Pay to Plaintiff Singer, Brown and other of its similarly situated employees, Defendants cultivated the impression to Plaintiff Singer, Brown and the Class Members that Singer, Brown and the other Class Members were exempt from and not entitled to Overtime Pay.

75. Defendants *did* pay Overtime Pay to “contract” workers that worked as analysts, and to other temporary workers who performed other employment duties similar to those that worked as full time employees, and also paid overtime to its administrative and other hourly rate staff when Overtime Pay was owed, thereby strengthening Plaintiff Singer’s and the Class Members’ impressions that they were somehow different because they were not temporary or hourly rate employees and thus not entitled to Overtime Pay.
76. Defendants made a purposeful and conscious decision not to pay Overtime Pay to Singer, Brown, the Class Members, and others similarly situated, for the purpose of increasing its own profits at the expense of its employees.
77. In the alternative, Defendants themselves were unaware that Singer, Brown and the Class Members were entitled to Overtime Pay, and thus by its conduct represented to Plaintiff Singer and the Class Members that they were not entitled to Overtime Pay.
78. Defendants were aware that Plaintiff Singer and others similarly situated relied on Defendants, sophisticated and well heeled employers, with in house and outside legal counsel to fulfill its contractual and statutory employment responsibilities.
79. Accordingly, by not paying overtime to Plaintiff Singer and the Class Members, Defendants represented to Plaintiff Singer and the Class Members that they were not entitled to Overtime Pay in accordance with the *Code, Act* and *Acts*.

Analysts and Financial Advisers are Examples of Categories of Defendants’ that Worked Overtime Hours without Proper Compensation

80. CIBC and CIBCWM, or its managers and or directors expressly required or directed certain of its employees other than Analysts to perform employment functions from time to time, that required such employees to work hours that exceeded applicable Permissible and Overtime Thresholds, to

complete said job requirements and employment functions, and for which such Class Members have not been compensated for in accordance with the *Code, Act* or *Acts*, or at all.

81. Examples of other CIBC or CIBCWM Class Member employee categories that were required to, and expected by management and Defendant to work overtime hours in order to complete job requirements without getting overtime pay include, but are not limited to: Investment Bankers and Analyst support staff employed by CIBC or CIBCWM.

82. Brown pleads that he is typical of employees of CIBC and its subsidiaries at salary level 6 and above in that he was required to work overtime hours, typically in excess of the permissible threshold to perform his employment responsibilities, however, Defendant did not record the hours that he worked, nor pay him or them Overtime in accordance with the *Act, Acts* or at all.

83. In the alternative, Brown pleads that he is typical of other employees of CIBCWM in that his employment related to CIBCWM activities and thus his salary was appropriately charged to CIBCWM and he was required to work overtime hours, typically in excess of the permissible threshold to perform his employment responsibilities, however, Defendant did not record the hours that he worked, nor pay him or them Overtime in accordance with the *Code, Act, Acts* or at all.

84. Singer Pleads that he is typical of Employees of CIBCWM that are treated as exempt under CIBCWM's overtime policy in that worked hours in excess of the applicable threshold under the Act, and he did not receive proper overtime pay in accordance with the Act or at all.

The Act Mandates that Plaintiffs and the Other Class Members are Entitled to Overtime Pay

85. Plaintiffs claim that pursuant to the sections of the *Code* and the *Act* cited above, Defendants are obligated to pay them, and the Class Members, Overtime Pay, at one and half times their usual rate, for the hours they worked in excess of their applicable Overtime Threshold in their province or as mandated by the *Code, Act* or *Acts*.

86. In addition, Plaintiffs claim that Defendants breached the *Act* and the Code by requiring them, or in the alternative permitting them, to work hours in excess of the applicable Permissibility Threshold.

87. Plaintiffs plead that Defendants derive large profits from its policy of requiring or permitting its applicable employees to work longer hours than permissible under applicable legislation, and by denying the employees their rightful Overtime Pay.

88. Plaintiffs plead that as a result, Defendants should be penalized with Punitive Damages, and the same should be awarded to the Class Members.

89. The exact number of hours that Plaintiffs and the Class Members worked in excess of the applicable Overtime Threshold, and the applicable Permissibility Threshold, should be within the knowledge of Defendants as required by the *Act*.

90. Plaintiffs claim that they are not exempt from any of the requirements of the Act relating to Overtime Thresholds, and/or Permissibility Thresholds.

91. Pursuant to O.REG. 285/01 the Plaintiffs do not fall into any exempted category of employee from the payment of Overtime Pay. Specifically, the Plaintiffs' work was not supervisory or managerial in character.

Defendant Have Been Unjustly Enriched by its Wrongful "Overtime Policy"

92. Defendants have been unjustly enriched as a result of receiving the benefit of the services of the Plaintiffs and the other members of the Class, and not having paid them their applicable statutory Overtime Pay.

93. The Class has suffered a corresponding Deprivation, and there is no juristic reason for the enrichment of Defendants.

Breach of Employer's Duty of Good Faith

94. Being non-management employees, members of the Class are in a position of vulnerability in relation to the Defendants. As a result, Defendants owe a duty to act in good faith towards their employees, in particular towards the Class, and to honor Defendants' statutory and contractual obligations towards the Class.

95. Defendants have breached their duty of good faith by, *inter alia*:

- a. failing to pay for the additional hours of work of the Class Members despite permitting such work to be performed;
- b. failing to advise the Class Members of their right to recover for such additional hours, and in fact misleading them as to their rights;
- c. directing employees to not record additional hours or the actual hours worked;
- d. failing to maintain accurate records of all actual hours worked by the Class Members;
- e. creating a working environment and circumstances in which, non-management and or non-excluded employees are compelled to work additional hours in order to carry out the duties assigned to them.

Breach of Contract

96. The Plaintiffs plead that the minimum terms of the applicable employment legislation apply to each Class Member employee as terms of their applicable employment contracts.

96. Plaintiffs plead that Defendants' conduct described above constitutes breaches of the *Code, Act* and *Acts*, and thus Defendants have breached the employment contracts of the Class Members and are responsible to pay the damages.

Waiver of Tort/Restitution

97. As a result of the Defendants' conduct described above and Defendants' violation of the *Code, Act* or *Acts* the Plaintiffs plead that it is inequitable for the Defendants to retain any of the profits it earned as a result of, or in the course of its violations of the *Code, Act* and/or *Acts*, and accordingly the Plaintiffs reserve for themselves the right to request that the court award to the Plaintiffs an amount representing the profits derived by Defendants as a result of, or in the course of its conduct described above.

A Class Proceeding Is Appropriate

98. The Class Members as individuals are no match for the resources and sophistication of the Defendants. Furthermore, the Class Members risk losing their jobs or other disciplinary action if they pursue individual claims. Furthermore, the individual claims of each Class member may not be economical to pursue as separate lawsuits, and therefore the Class Members would be denied access to justice in the absence of a Class proceeding.

99. It is unlikely that an individual could or would seek prospective relief to deter future misconduct by the Defendants. Moreover, Defendants are sufficiently large and well resourced that an individual lawsuit would unlikely have any significant impact on its behavior. A class proceeding in this instance will presumably induce a voluntary change of behavior by the Defendant and many other companies involved in similar practices.

100. The only alternative to a national class proceeding is a multiplicity of proceedings in a variety of jurisdictions across Canada, where similar factual and legal issues would be raised, which would lead to inefficiency and could produce inconsistent rulings.

Damages

101. As a result of Defendants' breach of its implied conditions of employment, the *Code, Act, Acts*, and its unjust enrichment, as set out above, the Plaintiffs, and members of the Class, have consequently suffered damages, and are also statutorily entitled to the amounts owing under the *Code, Act* and *Acts*.

102. Plaintiffs plead that this is an appropriate case for the class proceedings judge to admit statistical evidence of the Class Members' losses, and to award damages on the basis of an aggregate assessment.

103. Members of the Class therefore also claim aggravated, exemplary and punitive damages in the amount of \$10 million as a result of the arbitrary, callous and highhanded actions of the Defendants' as set out above.

104. The Plaintiffs plead and rely upon the following statutes on behalf of themselves and the Class Members:

- (a) *Employment Standards Act, 2000*, S.O. 2000, c. 41; (Ontario)
- (b) *Employment Standards Code*, RSA 2000, c. E-9; (Alberta)
- (c) *Employment Standards Act*, RSBC 1996, c. 113; (British Columbia)
- (d) *Class Proceedings Act 1992*, S.O. 1992 c. 6; (Ontario)
- (e) *Canada Labour Code* (R.S., 1985, c. L-2) (Federal).

105. The plaintiffs propose that this action be tried in the City of Toronto.

Date:

Oct 28, 2008.

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Plaintiff

v. CANADIAN IMPERIAL BANK OF COMMERCE AND CIBC WORLD MARKETS INC.
Defendants

Court File No. CV-08-365119CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FRESH AS AMENDED STATEMENT OF CLAIM

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