Court File No.

COURT OF APPEAL FOR ONTARIO

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*

NOTICE OF MOTION
(Motion for Leave to Appeal)

The Plaintiffs will make a motion under Rule 61.03.1 to the Court of Appeal for Ontario to be heard in writing, 36 days after service of the Moving Party's motion record and factum, or on filing of the Moving Party's reply factum, if any, whichever is earlier.

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

THE MOTION IS FOR:

1. an order granting leave to appeal to the Court of Appeal for Ontario from the decision of the Divisional Court (Aston J., Then R.S.J. and Swinton J.), released April 23, 2013, which dismissed the Moving Party's appeal from the Order of Strathy J., dated April 27, 2012, denying the Plaintiffs' motion to certify this action as a class proceeding;

2. the costs of the motion; and

3. such further and other relief as counsel may advise and this Honourable Court deems just;

THE GROUNDS FOR THE MOTION ARE:

Introduction

1. CIBC World Markets Inc. has a common overtime policy which improperly excludes all Investment Advisors and Associate Investment Advisors (level 6 or higher) from eligibility for overtime compensation.

2. The Plaintiffs brought a motion for certification under the *Class Proceedings Act, 1992* (The "*CPA*") in respect of a class of employees who were Analysts and who were Investment Advisors or Associate Investment Advisors. On April 27, 2012, Justice Strathy denied the motion for certification.

3. The Plaintiffs appealed to the Divisional Court, on the basis of a far narrower class, consisting of only:

> All Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC or CIBCWM as Level 6 or higher, who held the job title Investment Advisor (otherwise known as Financial Advisor) or Associate Investment Advisor, exclusive of any time period for which they:
>
> a) held the position of Branch Manager; or
>
> b) held the position of Assistant Branch Manager; or
>
> c) had deductions taken from earned commissions which were attributed to an Associate Investment Advisor who was assigned to him/her.

4. On April 23, 2013, the Divisional Court denied the appeal, in error.

Overview

5. The Plaintiffs' proposed appeal addresses the question of whether overtime misclassification cases can be certified in Ontario. The revised class considered by the Divisional Court was a discreet and narrow grouping of employees, who perform similar job functions and are subject to a common overtime exclusion. The Divisional Court misinterpreted the changes to the revised class definition, and erred by engaging in a merits inquiry to determine managerial status of some affiants. The Divisional Court and Motions Judge also erred by effectively requiring each class member to be identical, rather than "sufficiently similar" which is all that is required by the Court of Appeal in *McCracken v. Canadian National Railway,* 2012 ONCA 445. The Divisional and the Motions Judge further erred in concluding that actual eligibility at CIBC World Markets Inc. was determined on an individual basis, when the Record demonstrates the opposite: that class members were subject to a common class wide policy which excluded all of them from overtime based on job title and job level, not an individual analysis that differed person-to-person. The proposed class is subject to a common exclusion based on a common policy. This action is suitable for certification.

Error Regarding Standard of Review

6. The Divisional Court erred in holding that the standard of review was one of palpable and overriding error. The appropriate standard of review is one of correctness, as the Motions Judge made legal errors in relation to the application of the test for certification.

7. In reviewing the decision of the Motions Judge on a higher standard of palpable and overriding error, the Divisional Court failed to apply the proper threshold of review and failed to identify errors made by the motions judge.

Errors Regarding section 5(1)(b) - Class Definition

8. The Divisional Court misinterpreted and misapplied the revised class definition:

    a. the Divisional Court erred in finding that the defendant's affiant Christine Timms would be included in the Class under the revised definition. Christine Timms would not be included in the Class under the revised class definition, because portions of her commissions were attributed to Associate Investment Advisors who worked for her. It was set out clearly in the Plaintiffs' appeal factum before the Divisional Court (para. 35) and in oral submissions that Ms. Timms was excluded from the revised class definition on this basis. The Court misread the exclusions under the revised class definition by requiring that an Investment Advisor be excluded only if they have an Associate Investment Advisor assigned to them **that is level 6 or higher**. This is an improper reading of the exclusion, which does not stipulate that the Associate Investment Advisor assigned to an Investment Advisor must be level 6 or higher. An IA such as Christine Timms, is excluded because she has associate investment advisors assigned to her and pays them a portion of her commissions. This is the plain reading of the class definition and in any event was clearly explained in the Factum and in oral submissions. The misreading of the exclusion misinformed

the holding in respect of commonality and the common issues under section 5(1)(c). This case requires reconsideration on a proper reading of the class definition, which excludes Christine Timms and other Investment Advisors in the same position; and

b. in holding that determination of the class membership would require individual determinations as to managerial or supervisory duties, the Court misapplied the class definition and engaged in a merits inquiry. The class definition contains objective criteria which is not merits based, containing a narrow group of employees who share common job functions and responsibilities, are subject to a common overtime exclusion, and therefore have a rational connection to the claim and the common issues.

9. The Divisional Court erred by requiring virtual uniformity amongst class members for the purposes of the class definition. The Motions Judge and Divisional Court ignored the evidence in the Record that establishes the sufficiently similar functions of Investment Advisors and Associate Investment Advisors.

Errors Regarding Section 5(1)(c) - Common Issues

10. The Divisional Court and the Motions Judge made errors in the application of section 5(1)(c) under the *CPA*. In particular, the Divisional Court and Motions Judge erred by:

a. requiring virtual uniform commonality amongst class members, as opposed to "sufficient" similarity, for the purposes of the common issues;

b. ignoring evidence of overriding common job functions relevant to the common issue of overtime eligibility which pervade the positions of Investment Advisor and Associate Investment Advisor;

c. ignoring that the defendant itself, for common policy and other reasons, takes the position that all the class member should be excluded from overtime eligibility, lending itself to class wide determination of this issue;

d. failing to apply the correct definition of "common issues" which is defined in the *CPA* as "common, but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts";

e. considering differences between class members which are irrelevant to the common issue of overtime eligibility, such as the size of the book-of-business;

f. ignoring that the defendants' own determination of overtime eligibility was not based on individual assessments. To the contrary, the defendants classified Investment Advisors and Associate Investment Advisor on a common basis as ineligible for overtime. There is no evidence that any Investment Advisor or Associate Investment Advisor has ever been treated by the defendants as eligible for, or been given, overtime compensation. To the contrary, <u>all</u> class members have been excluded from overtime on a common basis; and

g. failing to consider the systemic breaches by the defendants in the implementation of overtime policies which impose arbitrary and improper overtime exclusions,

including pre-approval for overtime and misclassification, creating a systemic barrier to Investment Advisors and Associate Investment Advisors to claim overtime compensation.

11. The Divisional Court and the Motions Judge erred by failing to follow the principle that a class action can be certified even when it has "substantial individual issues" and that it is permissible to have aspects of liability decided on an individual basis, after the common issues have been decided. The Divisional Court and the Motions Judge failed to consider and apply the flexibility and breadth of section 25 of the *CPA*, to the extent that some individual issues remained.

Errors Regarding section 5(1)(d) - Preferable Procedure

12. The Divisional Court's and Motions Judge's conclusions regarding preferability were entirely dependent on their incorrect conclusions regarding the lack of commonality.

13. This action concerns an exclusion for overtime applied in common to the entire class. The determination of the validity of that exclusion is an issue that can be determined in common and would be preferable to determinations at individual trials which would be duplicative and would defeat access to justice.

14. The issues on the proposed appeal transcend the interests of the parties and concern matters of general importance to the certification of employment class actions in Ontario, and in particular, whether misclassification cases can ever be certified. There is good reason to doubt the correctness of the Divisional Court's and Motions Judge's decisions.

15. There are conflicting decisions regarding certification of overtime class actions. In particular, *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, concerned the same overtime policy at issue in this case and was certified on similar common issues relating to systemic barriers imposed by the policy. In addition, in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 44, the Court confirmed the breadth of jurisdiction under s. 25 of the *CPA* to determine individual issues after certification.

16. Section 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended and Rule 61.03.1 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and

17. Such further and other grounds as counsel may advise and this Honourable Court permits.

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

1. the Record filed with the Divisional Court; and

2. such further and other evidence as counsel may advise and this Honourable Court permits.

May 8, 2013

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BROWN, ET AL. v. **Plaintiff**	**CANADIAN IMPERIAL BANK OF COMMERCE, ET AL.** **Defendants**	**Court File No:**

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Proceeding commenced at Toronto

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