

Court File No. CV-08-365119CP

**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*

SUPPLEMENTARY AFFIDAVIT OF MICHAEL BROWN

(AFFIRMED JANUARY __, 2011)

I, MICHAEL BROWN, OF THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO, AFFIRM AND SAY:

1. I am one of the proposed representative plaintiffs in this action and as such I have knowledge of the matters deposed to herein, except where I have been informed of such facts, in which case I have stated the source of such facts and I hereby state that I believe such facts to be true.

2. I affirm this supplementary affidavit in support of the motion to certify the within action as a class proceeding and to clarify and expand on the evidence in my previous affidavit sworn April 30, 2010.
3. This affidavit is to be read in conjunction with my previous affidavit.
4. Where it is necessary to repeat certain information from my previous affidavit to place the new information herein in proper context or for background, I have repeated my evidence from the previous affidavit.

History of Employment with CIBC

5. I began my employment with Canadian Imperial Bank of Commerce ("CIBC") in April 2003 in the position of Analyst, Corporate Client Support, Global Operations. Attached as **Exhibit "A"** is a copy of my offer letter ("the "Offer Letter") from CIBC dated March 24, 2003.
6. The Offer Letter stipulates some of the terms of my employment which included the following:
 - a. I was hired as a "Level 6" employee (which was a job rank);
 - b. my annual base salary was \$48,000;
7. The Offer Letter specifically stated that my role "requires shift work for 7/24 support, including holiday and weekend schedules". I expected to receive overtime

pay for the hours I worked in excess of the legislated maximum hours per week, and the Offer Letter did not stipulate otherwise.

8. On May 1, 2003, CIBC provided me with a letter amending the Offer Letter, in which my compensation was increased slightly to \$50,000 per annum ("Offer Amendment"). All other terms remained the same. Attached as **Exhibit "B"** is a copy of page one of the Offer Amendment. I misplaced the other pages.
9. I was employed at CIBC until January 2004.

Role and Hours of Work

10. Around the time I received the Offer Letter, I was advised by Amy Bickford, my supervisor, that my daily shift would be 8 hours in length and run from 4am to 12 pm.
11. Contrary to the commitment provided by Ms. Bickford, however, my typical workday ranged from 3:30 am to as late as 5 pm, often without lunch, which resulted in my working an average of 60-70 hours per week to perform my job functions and employment responsibilities. CIBC management, including Ms. Bickford, was aware of, and encouraged, my overtime hours which were necessary in order to accomplish the duties I was assigned.
12. Approximately one month after I starting working such overtime, (i.e. approximately May or June of 2003), I asked Ms. Bickford about payment for the overtime hours.

She informed me that, all employees in my role and level (level 6 analysts) were not entitled to Overtime under CIBC's corporate policy.

CIBC's Overtime Policy Misclassifies Certain Employees as Ineligible

13. I do not have a copy of the written CIBC overtime policy which was in place in 2003. However, I have been provided with a copy of the written overtime policy (and the managerial guidelines for the implementation of the policy) which was harmonized for CIBC and CIBC World Markets Inc. ("CIBC World Markets") in 2006, which are attached as **Exhibit "C"** and **"D"** respectively. In that policy, CIBC and CIBC World Markets professional analysts that are level 6 or above are ineligible for overtime. This policy is consistent with what I understood was the policy in place in 2003 at CIBC, in that CIBC and CIBC World Markets analysts at level 6 or above were excluded from eligibility for overtime. I performed this analyst role and was told by management that I was therefore ineligible for overtime pay.

14. It is my belief based on talking to others in my group, and to my supervisor Amy Bickford, that CIBC never paid any overtime to analysts at level 6 or above.

CIBC Pay Stubs did not reflect my overtime hours

15. When I was working my overtime hours at CIBC my pay stubs would arbitrarily and incorrectly reflect the standard work week of 37.5 hours, notwithstanding that I believe management was aware and required that I worked overtime. I believe that

CIBC did not keep track of my actual hours worked, or the hours worked of any other employee it classified as ineligible under its overtime policy. No management personnel at CIBC ever asked me to keep track of my hours or requested that I inform them of the hours that I worked.

16. The behavior of CIBC management was consistent with the CIBC policy which treated analysts as ineligible for overtime pay. At the time, as a result of the CIBC policy, I was misled and was not aware that I would be entitled to overtime pay, and therefore did not pursue any such claim (beyond my initial request to Ms. Bickford).

The Job of an Analyst at CIBC

17. The job title of analyst at CIBC is a common one and is descriptive of the role performed. The role of an analyst is not to manage people: it is to analyze and process information to support the various business processes of the area the analyst is employed in.
18. My role at CIBC involved supporting the UK lending syndicates of which CIBC World Markets was a part. I would analyze and process information and use that information as relevant and necessary for my job.
19. Specifically, I would receive complex and voluminous legal loan documents from lawyers that detailed terms of the loans to be received by the borrowers. I, and other analysts in my group would read, process and analyze these documents, and input the terms of the loans into the CIBC system. I believe that the entity making these loans was CIBC World Markets.

20. As an analyst I did not perform managerial functions. In particular, I 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.
21. I knew other analysts at CIBC, and their roles were similar in that they processed and used information that was required to support the business functions of the group where they were employed. To my knowledge, analysts at CIBC or CIBC World Markets did not perform managerial functions.
22. I had no management function whatsoever during my tenure with CIBC, nor did I perform any job function which I understand could be otherwise exempt under applicable legislation from overtime pay.
23. I have become aware that in the case titled *Hao v CIBC*¹ the *Canada Labour Code* referee ruled that Ms. Hao, who was a level 7 analyst at CIBC, did not have managerial functions, and was not exempt from overtime under the *Canada Labour Code*. Ms. Hao, like me, had been improperly misclassified by CIBC as ineligible for overtime pay.
24. I understand that in the *Hao* case, CIBC had refused to pay overtime to her while she was employed at CIBC pursuant to the CIBC Overtime Policy, (previously referenced above and attached as Exhibits C and D) which stipulated that analysts at

¹ *Hao v Canadian Imperial Bank of Commerce*, [2008] C.L.A.D. No. 368 (Susan D. Kaufman, Referee)

level 6 or above are ineligible for overtime. I understand that the referee determined that Ms. Hao was entitled to overtime pay, contrary to the CIBC policy. A copy of the decision in *Hao v CIBC* is attached as Exhibit "E".

25. The facts set out in the *Hao v. CIBC* decision are consistent with my experience at

CIBC namely:

- a. we both performed the role of analyst, which was not a managerial role;
- b. we both were regularly required to work overtime;
- c. we both were advised that CIBC policy deemed analysts at level 6 or above were ineligible for overtime;

The Value of My Claim for Overtime Pay

26. I believe that my claim for unpaid overtime is valued at approximately \$32,000.00.

27. This calculation is based on my hourly rate of \$26.66 (computed at based on my annual salary of \$50,000.00) for an overtime rate of \$40.00 per hour at an average of 22 hours per week unpaid overtime, for the duration of my employment.

Specific Functions

28. I was employed between April, 2003 and January, 2004 as a ^{ASD Senior MB} financial analyst. My main employment function was to provide support and administration to CIBC World Markets' Leveraged Finance U.K. division.

29. My office was situated at the Corporate Client Support Center on Dundas Street in Toronto.

30. In my position I provided loan processing and administration functions to CIBC banking syndicates that had clients in the United Kingdom.

31. The loans that I assisted in servicing, processing and analyzing were wholesale leveraged finance loans that were in excess of \$100 million, and were considered commercial or wholesale banking.

32. I believe based on my understanding of the CIBC's corporate structure and operations in the U.K. that prior to the loan administration function being transferred to Toronto, Ontario, it was performed by employees of the U.K. division of CIBC World Markets in London, England.

33. I had extensive contact during the course of my employment with employees in the United Kingdom. These contacts that I had with "internal personnel" were all related to syndicated leveraged finance activities in the United Kingdom.

34. The persons from the United Kingdom that I dealt with were to my knowledge employed by CIBC World Markets.

35. Attached are excerpts from several CIBC and CIBC World Markets' Annual Reports, which provide further detail about the business lines, structure and interrelationship between CIBC and CIBC World Markets:

- a. Excerpts from the CIBC Annual Accountability Report for 2004 (Exhibit "F");
- b. Excerpts from the CIBC Annual Accountability Report for 2008 (Exhibit "G");
- c. Excerpts from the CIBC Annual Accountability Report for 2009 (Exhibit "H"); and
- d. Excerpts from the CIBC World Markets Consolidated Statement of Financial Condition, year ended October 31, 2009 (Exhibit "I").

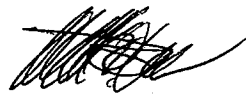
Revised Definition of the Class

- 36. I am advised by counsel that since I affirmed my first affidavit, the description of the class has been narrowed.
- 37. I am a class member and fully prepared to act as a representative plaintiff for the revised class in this matter.

Revised Litigation Plan

- 38. Since I affirmed my last affidavit, the litigation plan has been revised by my counsel to provide further detail about the manner in which the class action can be litigated.
- 39. I make this affidavit in support of the motion to certify this action as a class proceeding, and for no other or improper purpose.

SWORN BEFORE ME at the City of)
 Edinburgh, in the Country of ^(Scotland, UK) England)
 this 28th day of January, 2011)
 _____)
 A. Struan Douglas)
 A-Commissioner, etc.)



 Michael Brown

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