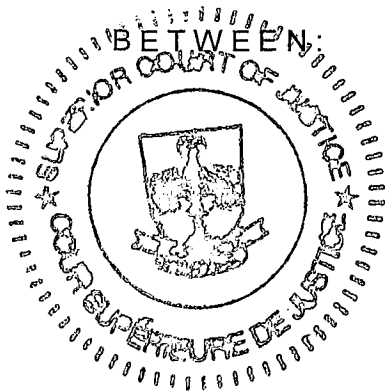


**ONTARIO  
SUPERIOR COURT OF JUSTICE**



Robert Jordan and Paulina Danao

Plaintiffs

- and -

CIBC MORTGAGES INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANT

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.



## CLAIM

1. The Plaintiffs, Robert Jordan and Paulina Danao claim on behalf of themselves and others similarly situated in Canada:
  - (a) an order certifying this proceeding and appointing them representative plaintiffs for the class;
  - (b) a declaration that clauses in certain of the Defendant's mortgage contracts that purport to allow the Defendant unfettered discretion as to calculation of Prepayment Penalties (as defined herein), referred to herein as Discretion as to Calculation Clauses and Discretion as to Comparison Rate Clauses, are void for uncertainty and unenforceable;
  - (c) an accounting of the amounts of the Prepayment Penalties purportedly quantified by the Defendant under Discretion as to Calculation Clauses or Discretion as to Comparison Rate Clauses, or both, and paid by the Plaintiffs and Class Members who had or have mortgage contracts containing either or both such Clauses, and an award of damages against the Defendant in the amount of such Prepayment Penalties;
  - (d) in the alternative, a declaration that if any Penalty Provisions (as defined herein) that include a Discretion as to Comparison Rate Clause are not void but rather are enforceable, which is denied, then the maximum permissible Prepayment Penalty under those mortgage contracts is three months' interest calculated in accordance with their provisions;
  - (e) under above scenario (d), an accounting of the amounts of the Prepayment Penalties purportedly quantified by the Defendant under Discretion as to Comparison Rate Clauses and paid by the Class Members who had or have

mortgage contracts containing such a clause, an accounting of three months' interest at the relevant time under each such mortgage contract, and an award of damages against the Defendant in the amount of the difference charged to or collected from each Class Member;

- (f) further, or in the alternative, a declaration that if the Penalty Provisions contained in mortgage contracts that contain Discretion as to Calculation Clauses and/or Discretion as to Comparison Rate Clauses are not void for uncertainty but rather are enforceable, which is denied, then the purported quantifications of Prepayment Penalties by the Defendant were and are contrary to and impermissible under those Penalty Provisions and constitute Miscalculations (as defined herein);
- (g) an accounting of the amounts of the excessive Prepayment Penalties paid by the Plaintiffs and Class Members as a result of the Miscalculations, regardless of whether or not they had mortgage contracts containing Discretion as to Calculation Clauses and/or Discretion as to Comparison Rate Clauses, and an award of damages in that amount against the Defendant based on breach of contract and/or breach of fiduciary duty;
- (h) in the alternative, if the Penalty Provisions or any of them would otherwise permit the Defendant to quantify Prepayment Penalties in the manner used by the Defendant, which is denied, then the Plaintiffs seek a declaration that such Penalty Provisions were and are unconscionable and void or voidable and unenforceable at common law and in equity;
- (i) a declaration that the Penalty Provisions are in violation of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, s. 24, and seek relief and

compensation in respect of such violation pursuant to, but not limited to, s. 50 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;

- (j) an accounting of and award of damages against the Defendant for the Consequential Damages (as described herein) incurred by the Plaintiffs and Class Members as a result of the wrongful charges and/or overcharges of Prepayment Penalties as set out herein;
- (k) punitive, aggravated, and exemplary damages in the amount of \$20,000,000;
- (l) the costs of distributing all monies received to Class Members;
- (m) prejudgement interest in the amount of 10% compounded annually or as otherwise awarded by this Honourable Court;
- (n) costs on a substantial indemnity basis, plus applicable taxes; and
- (o) such further and other relief as this Honourable Court may deem just.

#### **THE PLAINTIFFS**

2. The Plaintiffs Robert Jordan and Paulina Danao are individuals residing in Tillsonburg, Ontario.

#### **THE DEFENDANTS**

3. The Defendant ("CIBC") is a federal corporation previously incorporated pursuant to the laws of Alberta and continued pursuant to the *Trust and Loan Companies Act, S.C. 1991, c. 45*. Prior to January 6, 1997, CIBC was named Firstline Trust Company.
4. CIBC is a subsidiary of Canadian Imperial Bank of Commerce (the "Bank") which is a chartered bank incorporated pursuant to the laws of Canada.

5. At all relevant times, CIBC and the Bank have advertised and promoted themselves as the CIBC group and the CIBC group of companies and as affiliated companies. At all relevant times, CIBC has operated as a division of the Bank, and has been referred to and described by CIBC and the Bank as part of the direct banking division of the Bank and as part of the Retail Markets strategic business unit, business line and/or retail franchise of the Bank.
6. At all relevant times, CIBC has been in the business of lending money to and taking mortgages from homeowners and other property owners ("Mortgage Business").
7. At relevant times, CIBC has traded and done Mortgage Business through and under various business and trade names and trade-marks used or owned by CIBC or the Bank, or both, including CIBC, CIBC Mortgages, CMI, FirstLine, Hypothèques FirstLine and FirstLine Mortgages.
8. Since 2001, CIBC has owned a subsidiary, 3877337 Canada Inc. ("3877337"), a company incorporated pursuant to the laws of Canada and registered as an extra-provincial company pursuant to the laws of Ontario on March 26, 2001.
9. At relevant times, CIBC has also traded and done Mortgage Business through 3877337 acting as CIBC's agent.
10. At relevant times, CIBC has also traded and done Mortgage Business through and under various business and trade names and trade-marks used or owned by the Bank or 3877337, or both, including Home Loans Canada, HLC Home Loans Canada, Hypothèques Logis Concept, HLC Hypothèques Logis Concept and HLC (collectively "HLC").

11. Since 2005, pursuant to an agreement between the Bank and Loblaw Companies Limited ("Loblaw"), and at the direction of or pursuant to an agreement with the Bank, CIBC has also traded and done Mortgage Business through and under various business and trade names and trade-marks used or owned by Loblaw or its affiliated company, Loblaws Inc., including President's Choice, President's Choice Financial, le Choix du Président, le Choix du Président Services Financiers, PC, PC Financial, PC Finance, PCF and PCF Mortgages (collectively "President's Choice").
12. The Plaintiffs were wrongly charged, or alternatively overcharged, mortgage prepayment penalties by CIBC as described herein. In bringing this action on behalf of a class of people ("Class Members") in Canada who were wrongfully charged and/or overcharged prepayment penalties by CIBC with respect to their mortgage contracts, to be further defined in the motion for certification, the Plaintiffs plead and rely upon the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the *Cost of Borrowing and Disclosure to Borrowers*, O Reg 191/08, the *Land Titles Act*, RSO 1990, c L.5, the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c.29, and the *Trust and Loan Companies Act*, S.C. 1991, c.45.

#### **THE MORTGAGE CONTRACTS**

13. In the course of conducting Mortgage Business, CIBC entered into mortgage contracts. Each of the mortgage contracts that are the subject of this proceeding (the "Mortgage Contracts") names CIBC as the lender and/or mortgagee and the Plaintiffs or Class Members as the borrowers and/or mortgagors.
14. The Mortgage Contracts are for various stated periods of time (the "Terms") subject to the rights of the borrowers and mortgagors to make Prepayments as described herein.
15. All of the Mortgage Contracts provide for payment of interest calculated at specified fixed rates, calculated not in advance ("Rates"). The Rates differ from one Mortgage Contract

to another depending on, *inter alia*, when the Mortgage Contract in question was entered into or renewed and its Term.

16. Each of the Mortgage Contracts contains provisions that give the mortgagor or mortgagors the right to make either a partial payment of the principal balance owing under the mortgage prior to the expiration of its stated Term ("Partial Prepayment") or a complete payment of the principal balance owing under the mortgage prior to the expiration of its state Term ("Complete Prepayment") (collectively, "Prepayments").
17. At all relevant times, CIBC and the Bank, both in their own names and under the name of President's Choice, have advertised and promoted, and continue to advertise and promote, their commitment and promise to use "plain language mortgage documents", specifically including plain language regarding the cost of Prepayments (the "Plain Language Promise").
18. At all relevant times, CIBC has used in its standard form Mortgage Contracts provisions regarding Prepayments which purport to provide that where the mortgagor or mortgagors exercise the right to make a Partial Prepayment or a Complete Prepayment, charges ("Prepayment Penalties") apply (the "Penalty Provisions"). The Penalty Provisions provide, in general terms, that where Prepayment Penalties are applicable they will equal the greater of:
  - (a) three months' interest on the principal amount that is subject to a Prepayment Penalty; and
  - (b) an amount referred to as an interest rate differential ("IRD" or "IRD amount") based on the principal amount that is subject to a Prepayment Penalty, quantified by reference to:

- (i) a Rate specified or described in the Mortgage Contract (the "Contract Rate"), and
- (ii) another Rate (the "Comparison Rate").

#### **VOID AND UNENFORCEABLE PENALTY PROVISIONS**

19. Commencing in 2005, CIBC used, and continues to use, across Canada, standard form Penalty Provisions which purport to allow, for the purpose of quantifying Prepayment Penalties, that both (a) three months' interest, and (b) the IRD amount, may be quantified by CIBC in its unfettered discretion under the following provision:

"...each of which will be calculated by us [CIBC] using a method determined by us from time to time in our discretion"

(the "Discretion as to Calculation Clause").

20. Also commencing in 2005, CIBC used, and continues to use, across Canada, standard form Penalty Provisions which purport to allow, for the purpose of quantifying the IRD amounts used by CIBC when quantifying Prepayment Penalties, that the Comparison Rate may be determined by CIBC in its unfettered discretion under one of the following provisions, or under a substantially similar provision

"...the posted interest rate charged by us [CIBC] ... for a closed ... mortgage product which we have determined in our sole discretion to be similar to your [the borrower's] mortgage, taking into account the following:

- (i) the remaining term of your mortgage,
- (ii) the features of your mortgage, and
- (iii) whether you have a conventional or a high-ratio mortgage."

or

"... the interest rate posted by us [CIBC] ... for a closed ... mortgage product which we determine to be similar to your mortgage. In determining what mortgage product is similar to yours [the borrower's], we will consider the following:

- ◆ the remaining term of your mortgage;
- ◆ the features of your mortgage; and
- ◆ whether you have a conventional or a high-ratio mortgage.”

(the “Discretion as to Comparison Rate Clauses”).

21. Commencing in 2005, CIBC used, and continues to use, across Canada, standard form Penalty Provisions, some of which contain a Discretion as to Calculation Clause but not a Discretion as to Comparison Rate Clause, and others of which use a Discretion as to Comparison Rate Clause but not a Discretion as to Calculation Clause (“Single Discretion Mortgage Contracts”).
22. Commencing in 2005, CIBC also used, and continues to use, across Canada, standard form Penalty Provisions which contain both a Discretion as to Calculation Clause and a Discretion as to Comparison Rate Clause (“Double Discretion Mortgage Contracts”).
23. CIBC's use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts are contrary to and in breach of CIBC's Plain Language Promise.
24. Further, or in the alternative, CIBC's use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts is contrary to and in breach of CIBC's statutory obligation, under the *Trust and Loan Companies Act*, S.C. 1991, c. 45, ss. 436(1) and 438(1)(a), and the *Cost of Borrowing and Disclosure to Borrowers*, O Reg 191/08, to disclose, in plain language that is clear, simple and concise, the manner in which Prepayment Penalties are to be calculated.
25. Further, or in the alternative, CIBC's use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts is contrary to and in breach of CIBC's statutory obligation, under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c.29, to disclose the particulars of the terms and conditions relating to Prepayment Penalties and the manner in which Prepayment Penalties are to be calculated.

26. Further, or in the alternative, CIBC's agent, 3877337 doing business as HLC, at all relevant times had a statutory obligation under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c.29, and the *Trust and Loan Companies Act*, S.C. 1991, c.45 to disclose in a clear and comprehensible manner a statement of any charge for Prepayments. 3877337 breached that statutory obligation when arranging and brokering Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts. CIBC is vicariously liable as 3877337's principal for such breaches.

**DISCRETION AS TO CALCULATION CLAUSE IS VOID AND UNENFORCEABLE**

27. The Discretion as to Calculation Clause is void for uncertainty and unenforceable at common law.
28. The Penalty Provisions that purport to make the Discretion as to Calculation Clause applicable to quantifications of Prepayment Penalties are void for uncertainty and are unenforceable at common law.
29. The void and unenforceable Penalty Provisions as referred to in the preceding two paragraphs are severable from the other provisions of the Mortgage Contracts.
30. Since 2005, CIBC has collected from Class Members Prepayment Penalties purportedly quantified by CIBC under Penalty Provisions that purport to make the Discretion as to Calculation Clause applicable to such quantifications.
31. As a result of the foregoing, CIBC was not and is not entitled to purport to quantify, charge or collect Prepayment Penalties from the Plaintiffs or Class Members who had or have Mortgage Contracts that purport to make the Discretion as to Calculation Clause applicable to such quantifications. CIBC's purported quantification, charging and collection of Prepayment Penalties under such Mortgage Contracts constituted breaches

of those Mortgage Contracts and caused the Plaintiffs and Class Members loss and damage. CIBC is obligated to refund the Payment Penalties paid by the Plaintiffs and those Class Members.

**DISCRETION AS TO COMPARISON RATE CLAUSES ARE VOID AND UNENFORCEABLE**

32. Further, or in the alternative, the Discretion as to Comparison Rate Clauses are void for uncertainty and are unenforceable at common law.
33. The Penalty Provisions that purport to make a Discretion as to Comparison Rate Clause applicable to quantifications of Prepayment Penalties are void for uncertainty and are unenforceable at common law.
34. The void and unenforceable Penalty Provisions as referred to in the preceding two paragraphs are severable from the other provisions of the Mortgage Contracts.
35. Since 2005, CIBC has collected from Class Members, purportedly as Prepayment Penalties, IRD amounts purportedly quantified by CIBC under Discretion as to Comparison Rate Clauses.
36. As a result of the foregoing, CIBC was and is not entitled to purport to quantify, charge or collect Prepayment Penalties based on IRD amounts from the Class Members who had or have Mortgage Contracts that purport to make a Discretion as to Comparison Rate Clause applicable to the quantification of IRD amounts. CIBC's purported quantification, charging and collection of IRD amounts under such Mortgage Contracts constituted breaches of those Mortgage Contracts and caused those Class Members loss and damage. CIBC is obligated to refund the Prepayment Penalties paid by those Class Members.

37. In the alternative, under Mortgage Contracts that contain a Discretion as to Comparison Rate Clause, if the Penalty Provisions are not void in their entireties but rather are enforceable in part, which is denied, then the maximum permissible Prepayment Penalty under those Penalty Provisions is three months' interest calculated in accordance with the provisions of the relevant Mortgage Contract. CIBC is obligated to refund the Prepayment Penalties paid by those Class Members to the extent that the Prepayment Penalties are in excess of three months' interest.

### **MISCALCULATIONS OF PREPAYMENT PENALTIES**

38. In the alternative, if the Penalty Provisions contained in either Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts, or both, are not void for uncertainty as set out above but instead are enforceable, which is denied, then at all relevant times CIBC used, and continues to use, methods of quantifying Prepayment Penalties (the "Miscalculations") under both Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts, which Miscalculations are contrary to and impermissible under the provisions of those Mortgage Contracts.
39. Further, and in any event, at all relevant times CIBC used, and continues to use, Miscalculations under other Mortgage Contracts (not including Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts) which are contrary to and impermissible under the provisions of those Mortgage Contracts.
40. The Miscalculations include CIBC's wrongfully purporting to quantify each IRD amount by determining, as of the date of each Prepayment, a dollar amount consisting of the difference between the sums of the two streams of periodic interest payments, calculated using two different Rates, over the remaining Term of the Mortgage Contract in question. CIBC wrongfully purported to quantify each such sum, and the difference

between them, calculated as of the future dates on which the periodic payments that make up those sums would, hypothetically, have been paid in the absence of Prepayment (a "future value" calculation) despite the fact that CIBC collected that difference, as the purported IRD amount, on the date of Prepayment.

41. The Miscalculations are contrary to and in breach of the express provisions of all the Mortgage Contracts, which specify that interest is to be calculated not in advance.
42. Further, or in the alternative, it was and is an express or implied provision of all the Mortgage Contracts that calculations and quantifications under them must be made in accordance with generally recognized and accepted actuarial principles and principles of interest mathematics and financial accounting (the "Mathematical Principles"). The Mathematical Principles include recognition of the fact that the value or cost of a given nominal amount of money is greater today than it will be on a later date. At all relevant times, CIBC and the Bank recognized, accepted, used and applied the Mathematical Principles when calculating and quantifying the values of their assets and costs of their liabilities. The Miscalculations are contrary to and in breach of the Mathematical Principles, and constitute breaches of the Mortgage Contracts.
43. Further, or in the alternative, if the Penalty Provisions containing Discretion as to Calculation Clauses or Discretion as to Comparison Rate Clauses are not void for uncertainty but rather are enforceable, which is denied, then CIBC owed the Plaintiffs and Class Members a contractual duty and obligation of honesty, reasonableness and good faith when purporting to quantify Prepayment Penalties under those Penalty Provisions. CIBC breached that duty and obligation by quantifying Prepayment Penalties arbitrarily and unreasonably, by committing the Miscalculations and by charging and collecting Prepayment Penalties based on the Miscalculations.

44. Further, and in any event, CIBC owed the Plaintiffs and Class Members a contractual duty and obligation of honesty, reasonableness and good faith when purporting to quantify Prepayment Penalties under other Mortgage Contracts (not including Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts). CIBC breached that duty and obligation by quantifying Prepayment Penalties arbitrarily and unreasonably, by committing the Miscalculations and by charging and collecting Prepayment Penalties based on the Miscalculations.
45. Further, or in the alternative, all of the Mortgage Contracts were prepared by CIBC and are ambiguous regarding the manner of calculation of Prepayment Penalties. Any provisions in the Mortgage Contracts that are not void for uncertainty and are otherwise enforceable are properly to be interpreted in favour of the Plaintiffs and Class Members regarding the applicable method of quantification of Prepayment Penalties. The Plaintiffs and Class Members plead and rely on the principle of *contra proferentem*. As a result, the Miscalculations are incorrect and impermissible under the provisions of the Mortgage Contracts.
46. At all relevant times, CIBC was in a position of power and dominance over the Plaintiffs and Class Members, including regarding the creation and use of the Penalty Provisions and the quantification of Prepayment Penalties. CIBC was and is in a fiduciary position in relation to, and owes a fiduciary duty to, the Plaintiffs and Class Members regarding the correct quantification of Prepayment Penalties. CIBC breached that duty by committing the Miscalculations and by charging and collecting Prepayment Penalties based on the Miscalculations.
47. Further, or in the alternative, if the Mortgage Contracts or any of them would otherwise permit CIBC to quantify Prepayment Penalties in the manner used by CIBC, which is denied, then the provisions of the Mortgage Contracts that permit such quantification of

Prepayment Penalties were and are unconscionable. Without limiting the foregoing, the Penalty Provisions are so harsh and inequitable to the Plaintiffs and Class Members as to be inequitable and are void or voidable and unenforceable at common law and in equity. The Plaintiffs and Class Members seek relief and compensation in respect of such unconscionable Penalty Provisions, including but not limited to the setting aside of those provisions.

#### **THE PLAINTIFFS' EXPERIENCE**

48. On or about June 28, 2007, the Plaintiffs, Robert Jordan and Paulina Danao, as borrowers and mortgagors and CIBC as lender and mortgagee entered into a variable rate mortgage contract for the purpose of the Plaintiffs' purchasing their home located at 1240 Warden Avenue, Toronto, Ontario. On or about March 25, 2008, the Plaintiffs, Robert Jordan and Paulina Danao, as borrowers and mortgagors and CIBC as lender and mortgagee entered into a Single Discretion Mortgage Contract for a five-year fixed rate mortgage on that property (the "Plaintiffs' Mortgage"). The details of the Plaintiffs' Mortgage include the following:

Principal amount:	\$300,030.00
Interest rate:	6.19%
Interest adjustment date:	March 25, 2008
Term:	5 years

49. The provisions of the Plaintiffs' Mortgage include CIBC's standard mortgage terms, filed upon application by CIBC to the Registrar of Land Titles pursuant to the the *Land Titles Act*, RSO 1990, c L.5 under Mortgage Number 007373160.1, using Standard Charge Terms 200543, which purports to include a Discretion as to Calculation Clause.

50. On or about August 10, 2011, CIBC provided to the Plaintiffs a Mortgage Discharge Statement in connection with the Plaintiffs' Mortgage. The Defendant purported to

calculate the Prepayment Penalty set out in the Mortgage Discharge Statement under the Discretion as to Calculation Clause in Standard Charge Terms 200543.

51. On or about August 12, 2011 (the "Prepayment Date") the Plaintiffs made a Complete Prepayment under the Plaintiffs' Mortgage to CIBC, including the Prepayment Penalty that CIBC purported to quantify under the Penalty Provisions in the Plaintiffs' Mortgage. As a condition to discharge of the Plaintiffs' Mortgage, CIBC required that the Plaintiffs pay to CIBC a Prepayment penalty of \$12,856.97 (the "Plaintiffs' Penalty") which the Plaintiffs paid.
52. But for CIBC's wrongful conduct, the Plaintiffs and Class Members would not have incurred their losses and damages as described herein.

#### **CAUSES OF ACTION**

53. The Discretion as to Calculation Clause and Discretion as to Comparison Rate Clauses and the Penalty Provisions containing them are void for uncertainty and unenforceable at common law.
54. The void and unenforceable Penalty Provisions are severable from the other parts of the Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts.
55. CIBC's purported quantification, charging and collection of Prepayment Penalties under those void and unenforceable Penalty Provisions constitute breaches of the Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts and caused the Plaintiffs and Class Members loss and damage. The Plaintiffs and Class Members are entitled at common law and in equity to repayment of all amounts collected by CIBC thereunder.
56. Further, or in the alternative, the Discretion as to Comparison Rate Clauses, and the Penalty Provisions that purport to make a Discretion as to Comparison Rate Clause

applicable to quantifications of Prepayment Penalties, are void for uncertainty and are unenforceable at common law. CIBC was not entitled to purport to quantify, charge or collect Prepayment Penalties based on IRD amounts from the Class Members who had or have Mortgage Contracts that contain a Discretion as to Comparison Rate Clause. CIBC's purported quantification, charging and collection of IRD amounts under such Mortgage Contracts constituted breaches of those Mortgage Contracts and caused those Class Members loss and damage. Under Mortgage Contracts that contain a Discretion as to Comparison Rate Clause, if the Penalty Provisions are not void but rather are enforceable, which is denied, then the maximum permissible Prepayment Penalty is three months' interest calculated in accordance with the provisions of the relevant Mortgage Contract. CIBC is obligated to refund the Prepayment Penalties in excess of three months' interest paid by those Class Members.

57. In the alternative, if either the Discretion as to Calculation Clause or the Discretion as to Comparison Rate Clauses contained in either Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts are not void for uncertainty but rather are enforceable, which is denied, then CIBC's quantifications of Prepayment Penalties under those Mortgage Contracts were contrary to and impermissible under their provisions and constitute Miscalculations.
58. Further and in any event, the quantifications of Prepayment Penalties by CIBC under other Mortgage Contracts (not including Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts) were and are contrary to and impermissible under their express or implied provisions and constitute Miscalculations.
59. The Miscalculations constitute breaches of the Mortgage Contracts, breaches of CIBC's duties and obligations of honesty, reasonableness and good faith and breaches of

CIBC's fiduciary duties, as described above, and caused the Plaintiffs and Class Members loss and damage.

60. In the alternative, if the Penalty Provisions or any of them would otherwise permit CIBC to quantify Prepayment Penalties in the manner used by CIBC, which is denied, then those Penalty Provisions were and are unconscionable and void or voidable and unenforceable at common law and in equity.
61. The Consequential Damages (as defined in paragraph 70 hereof) incurred by the Plaintiffs and Class Members were caused by the wrongful charges and/or overcharges of Prepayment Penalties as set out herein and were a foreseeable result thereof. CIBC is liable both at common law and in equity to compensate the Plaintiffs and Class Members for their consequential losses.
62. CIBC's creation and use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts was and is contrary to and in breach of CIBC's Plain Language Promise and its statutory obligations under the *Trust and Loan Companies Act*, S.C. 1991, c.45 and the *Cost of Borrowing and Disclosure to Borrowers*, O Reg 191/08.

#### **DAMAGES**

63. The Plaintiffs and Class Members, and each of them, have suffered damages arising out of the wrongful conduct of CIBC as described herein.
64. As a result of the foregoing, Class Members who had or have Mortgage Contracts containing Discretion as to Calculation clauses have been wrongfully charged Prepayment Penalties.
65. Further, or in the alternative, as a result of the foregoing, Class Members who had or have Mortgage Contracts containing Discretion as to Comparison Rate clauses have been wrongfully charged Prepayment Penalties.

66. In the alternative, Class Members who had or have Mortgage Contracts containing Discretion as to Comparison Rate clauses have been wrongfully overcharged Prepayment Penalties purportedly based on IRD amounts. Under Mortgage Contracts that contain a Discretion as to Comparison Rate Clause, if the Penalty Provisions are not void but rather are enforceable, which is denied, than the maximum permissible Prepayment Penalty is three months' interest calculated in accordance with the provisions of the relevant Mortgage Contract.
67. In the alternative, as a result of the foregoing, the Plaintiffs and Class Members who had or have Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts have been wrongfully overcharged Prepayment Penalties as a result of the Miscalculations.
68. Further, and in any event, as a result of the foregoing, Class Members other than those who had or have Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts have been wrongfully overcharged Prepayment Penalties as a result of the Miscalculations.
69. In the alternative, if any Penalty Provisions would otherwise permit CIBC to quantify Prepayment Penalties in the manner used by CIBC, which is denied, then the Penalty Provisions that would otherwise permit such quantification were and are unconscionable and void or voidable, and unenforceable at common law and in equity. As a result, the Plaintiffs and all of the Class Members have been wrongfully charged, or alternatively overcharged, Prepayment Penalties.
70. CIBC's wrongful charges and overcharges of Prepayment Penalties as set out herein also caused the Plaintiffs and Class Members to incur and suffer further and consequential expenses, losses and damages, including additional or unnecessary

mortgage insurance costs, application and processing fees, survey and appraisal costs and interest costs ("Consequential Losses"). The Consequential Losses were known to and foreseeable by CIBC.

71. The Plaintiffs and Class Members claim punitive, aggravated and exemplary damages for CIBC's intentional and wrongful conduct as described herein.

**PLACE OF TRIAL**

72. The Plaintiffs propose that this action be tried in London, Ontario.

October 7, 2011

**SISKINDS** <sup>LLP</sup>  
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680 Waterloo Street  
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Solicitors for the Plaintiffs

Robert Jordan et al. v. CIBC Mortgages Inc.

Court File No:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

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