

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF QUÉBEC

NO: 200-06-000139-116

(Class Action)  
SUPERIOR COURT

DIANE LAMARRE [REDACTED]  
[REDACTED]

Petitioner;

V.

HYPOTHÈQUES CIBC INC. (CIBC  
Mortgages Inc.) [REDACTED]  
[REDACTED]

Respondent.

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**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO OBTAIN THE  
STATUS OF REPRESENTATIVE**  
(Article 1002 *CCP* and following)

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**TO ONE OF THE HONOURABLE JUSTICES OF THE QUÉBEC SUPERIOR COURT,  
SITTING IN AND FOR THE DISTRICT OF QUÉBEC, YOUR PETITIONER STATES AS  
FOLLOWS:**

**General presentation**

1. The Petitioner wishes to institute a class action on behalf of the following group, of which she is a member (the "Group"):

«All persons and entities (as per the criteria of section 999 (d) of the Code of Civil Procedure) who entered into a mortgage contract with Hypothèques CIBC Inc. (CIBC Mortgages Inc.) or with related entities since 2005 and who, as part of a prepayment of the mortgage, were charged prepayment penalties by

Hypothèques CIBC Inc. (CIBC Mortgages Inc.) or by related entities with respect to the mortgage contract»;

Or such other group definition as may be approved by the Court;

## **THE PETITIONER**

2. The Petitioner Ms Diane Lamarre is an individual residing in St-Bruno-de-Montarville, Québec;

## **THE RESPONDENTS**

3. The Respondent Hypothèques CIBC Inc. ("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 Québec on June 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 Petitioner was 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 Québec who were wrongfully charged and/or overcharged prepayment penalties by CIBC with respect to their mortgage contracts;

### **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 Petitioner 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 Québec, 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 Québec, 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 Québec, 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 Québec, 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;

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

24. The Discretion as to Calculation Clause is void for uncertainty and unenforceable;
25. 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;
26. The void and unenforceable Penalty Provisions as referred to in the preceding two paragraphs are severable from the other provisions of the Mortgage Contracts;
27. 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;
28. As a result of the foregoing, CIBC was not and is not entitled to purport to quantify, charge or collect Prepayment Penalties from the Petitioner 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 Petitioner and Class Members loss and damage. CIBC is obligated to refund the Payment Penalties paid by the Petitioner and those Class Members;

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

29. Further, or in the alternative, the Discretion as to Comparison Rate Clauses are void for uncertainty and are unenforceable;

30. 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;
31. The void and unenforceable Penalty Provisions as referred to in the preceding two paragraphs are severable from the other provisions of the Mortgage Contracts;
32. 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;
33. 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;
34. 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**

35. 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;
36. 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;
37. 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;

38. 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;
39. 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;
40. 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 Petitioner 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;
41. Further, and in any event, CIBC owed the Petitioner 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;
42. 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 Petitioner and Class Members regarding the applicable method of quantification of Prepayment Penalties. The Petitioner 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;

43. Further, or in the alternative, at all relevant times, CIBC was in a position of power and dominance over the Petitioner and Class Members, including regarding the creation and use of the Penalty Provisions and the quantification of Prepayment Penalties. 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 Petitioner and Class Members as to be inequitable and are void or voidable and unenforceable. The Petitioner 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 PETITIONER'S EXPERIENCE**

44. On or about June 8, 2006, the Petitioner, Diane Lamarre, as borrower and mortgagor and Hypothèques CIBC Inc. (Hypothèque FirstLine) as lender and mortgagee entered into a Double Discretion Mortgage Contract for a five-year fixed rate mortgage (the "Petitioner's Mortgage") for the purpose of the Petitioner's purchasing her home located at 696, Chemin des Patriotes, St-Denis-sur-Richelieu, Québec. The details of the Plaintiff's Mortgage include the following:

Principal amount:	\$105,000.00
Interest rate:	5.25%
Interest adjustment date:	June 16, 2006
Term:	5 years

Mortgage contract is attached hereto as **R-1**;

45. The provisions of the Petitioner's Mortgage include CIBC's standard mortgage terms, filed to the land register under Mortgage Number 13 406 231, which purports to include a Discretion as to Calculation Clause and a Discretion as to Comparison Rate Clause;
46. On or about June 9, 2010 (the "Prepayment Date") the Petitioner made a Complete Prepayment under the Petitioner's Mortgage to Hypothèques FirstLine, including the Prepayment Penalty that Hypothèques FirstLine purported to quantify under the Penalty Provisions in the Petitioner's Mortgage. As a condition to discharge of the Petitioner's Mortgage, Hypothèques FirstLine required that the Petitioner pay a Prepayment penalty of \$2,446.83 (the "Petitioner's Penalty") which the Petitioner paid. Proof of prepayment penalty is attached hereto as **R-2**;
47. But for Hypothèques FirstLine's wrongful conduct, the Petitioner and Class Members would not have incurred their losses and damages as described herein;

## **DAMAGES**

48. The Petitioner and Class Members, and each of them, have suffered damages arising out of the wrongful conduct of CIBC as described herein;
49. 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;
50. 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;
51. 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;
52. In the alternative, as a result of the foregoing, the Petitioner 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;
53. 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;
54. 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. As a result, the Petitioner and all of the Class Members have been wrongfully charged, or alternatively overcharged, Prepayment Penalties;
55. CIBC's wrongful charges and overcharges of Prepayment Penalties as set out herein also caused the Petitioner 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;

56. The Petitioner and Class Members claim punitive and exemplary damages for CIBC's intentional and wrongful conduct as described herein;

**CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

57. The composition of the Group makes the application of article 59 or 67 C.C.P. impracticable for the following reasons:

The number of persons included in the Group is estimated to be several thousand;

The names and addresses of persons included in the group are not known to the Petitioner (but are likely to be known to Respondents);

All the facts alleged in the preceding paragraphs make the application of articles 59 or 67 C.C.P. impossible;

58. The claims of the Members of the Group raise identical, similar or related questions of fact or law, namely:

Are the Discretion as to Calculation Clause and Discretion as to Comparison Rate Clauses and the Penalty Provisions containing them void and unenforceable?

Are the void and unenforceable Penalty Provisions severable from the other parts of the Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts?

Did the 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 Petitioner and Class Members loss and damage?

Are the Petitioner and Class Members entitled to repayment of all amounts collected by CIBC thereunder?

Further, or in the alternative, are 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 void and unenforceable?;

Was the CIBC 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?;

Did the CIBC's purported quantification, charging and collection of IRD amounts under such Mortgage Contracts constitute breaches of those Mortgage Contracts and cause 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, what is the maximum permissible Prepayment Penalty interest calculated in accordance with the provisions of the relevant Mortgage Contract?

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 but rather are enforceable, which is denied, then were CIBC's quantifications of Prepayment Penalties under those Mortgage Contracts contrary to and impermissible under their provisions and constitute Miscalculations?;

Further and in any event, are the quantifications of Prepayment Penalties by CIBC under other Mortgage Contracts (not including Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts) contrary to and impermissible under their express or implied provisions and constitute Miscalculations?;

Do the Miscalculations constitute breaches of the Mortgage Contracts, breaches of CIBC's duties and obligations of honesty, reasonableness and good faith, as described above, and caused the Petitioner and Class Members loss and damage?;

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 are those Penalty Provisions unconscionable and void or voidable and unenforceable?;

Were the Consequential Damages incurred by the Petitioner and Class Members caused by the wrongful charges and/or overcharges of Prepayment Penalties as set out herein?;

Is CIBC liable to compensate the Petitioner and Class Members for their consequential losses?;

Is CIBC's creation and use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts contrary to and in breach of CIBC's Plain Language Promise ?;

59. The interests of justice weigh in favour of this motion being granted in accordance with its conclusions;

## NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

60. The action that the Petitioner wishes to institute for the benefit of the Members of the Group is an action in damages;

61. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

**GRANT** the Petitioner's action against the Respondents;

**CONDEMN** Respondents to pay to the Members of the Group compensatory damages for all monetary losses;

**CONDEMN** Respondents to pay to the Members of the Group exemplary damages;

**GRANT** the class action of the Petitioner on behalf of all the Members of the Group;

**ORDER** the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

**THE WHOLE** with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses including expert fees and notice expenses;

62. The Petitioner suggests that this class action be exercised before the Superior Court in the district of Québec for the following reasons:

A great number of the Members of the Group resides in the judicial district of Québec and in the appeal district of Québec;

The Petitioner and its lawyers are domiciled in the district of Québec.

63. The Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Members of the Group for the following reasons:

The petitioner entered into a Double Discretion Mortgage contract with CIBC;

The petitioner was charged a prepayment penalties;

the Petitioner understands the nature of the action;

the Petitioner is available to dedicate the time necessary for an action to collaborate with Members of the Group; and

the Petitioner's interests are not in conflict with those of other Members of the Group;

64. The present motion is well-founded in fact and in law;

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the bringing of a class action in the form of a motion to institute proceedings in damages;

**ASCRIBE** the Petitioner the status of representative of the persons included in the group herein described as:

«All persons and entities (as per the criteria of section 999 (d) of the Code of Civil Procedure) who entered into a mortgage contract with Hypothèques CIBC Inc. (CIBC Mortgages Inc.) or with related entities since 2005 and who, as part of a prepayment of the mortgage, were charged prepayment penalties by Hypothèques CIBC Inc. (CIBC Mortgages Inc.) or by related entities with respect to the mortgage contract»;

or such other class definition as may be approved by the Court;

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

Are the Discretion as to Calculation Clause and Discretion as to Comparison Rate Clauses and the Penalty Provisions containing them void and unenforceable?

Are the void and unenforceable Penalty Provisions severable from the other parts of the Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts?

Did the 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 Petitioner and Class Members loss and damage?

Are the Petitioner and Class Members entitled to repayment of all amounts collected by CIBC thereunder?

Further, or in the alternative, are 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 void and unenforceable?;

Was the CIBC 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?;

Did the CIBC's purported quantification, charging and collection of IRD amounts under such Mortgage Contracts constitute breaches of those Mortgage Contracts and cause 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, what is the maximum permissible Prepayment Penalty interest calculated in accordance with the provisions of the relevant Mortgage Contract?

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 but rather are enforceable, which is denied, then were CIBC's quantifications of Prepayment Penalties under those Mortgage Contracts contrary to and impermissible under their provisions and constitute Miscalculations?;

Further and in any event, are the quantifications of Prepayment Penalties by CIBC under other Mortgage Contracts (not including Single Discretion Mortgage Contracts or Double Discretion Mortgage Contracts) contrary to and impermissible under their express or implied provisions and constitute Miscalculations?;

Do the Miscalculations constitute breaches of the Mortgage Contracts, breaches of CIBC's duties and obligations of honesty, reasonableness and good faith, as described above, and caused the Petitioner and Class Members loss and damage?;

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 are those Penalty Provisions unconscionable and void or voidable and unenforceable?;

Were the Consequential Damages incurred by the Petitioner and Class Members caused by the wrongful charges and/or overcharges of Prepayment Penalties as set out herein?;

Is CIBC liable to compensate the Petitioner and Class Members for their consequential losses?;

Is CIBC's creation and use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts contrary to and in breach of CIBC's Plain Language Promise ?;

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

**GRANT** the Petitioner's action against the Respondents;

**DECLARE** that the Discretion as to Calculation Clause and Discretion as to Comparison Rate Clauses and the Penalty Provisions containing them are void and unenforceable;

**CONDEMN** Respondents to pay to the Members of the Group compensatory damages to be determine;

**CONDEMN** Respondents to pay to the Members of the Group exemplary damages in the amount of \$15 million, or such other sum as this Court finds appropriate;

**GRANT** the class action of the Petitioner on behalf of all the Members of the Group;

**ORDER** the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

**THE WHOLE** with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses including expert fees and notice fees;

**DECLARE** that all Members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgement to be rendered on the class action to be instituted;

**FIX** the delay of exclusion at 30 days from the date of the publication of the notice to the Members of the Group;

**ORDER** the publication of a notice to the Members of the Group in accordance with article 1006 C.C.P.;

**THE WHOLE** with costs to follow.

Québec, October 17, 2011

(s) SISKINDS, DESMEULES

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SISKINDS, DESMEULES, AVOCATS  
Lawyer for the Petitioner

## SCHEDULE 1

### NOTICE TO RESPONDENT

Take notice that the plaintiff has filed this action or application in the office of the Superior Court of the judicial district of Québec.

To file an answer to this action or application, you must first file an appearance, personally or by advocate, at the courthouse of Québec located at 300, boul. Jean-Lesage, Québec, G1K 8K6 within 10 days of service of this motion.

If you fail to file an appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10 day period.

If you file an appearance, the action or application will be presented *pro forma* before the court on December 9, 2011, at 9h00 a.m., in room 3.14 of the courthouse. On that date, the court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the court may hear the case, unless you have made a written agreement with the plaintiff or the plaintiff's advocate on a timetable for the orderly progress of the proceeding. The timetable must be filed in the office of the court.

These exhibits are available on request.

Quebec City October 17, 2011

(s) SISKINDS, DESMEULES

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SISKINDS, DESMEULES, AVOCATS  
Lawyers for the Petitioner