

CANADA

COURT OF APPEAL

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

S.C.M. No.: 500-06-000930-186

C.A. No.: 500-09-028532-190

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**KATY HAROCH,** [REDACTED]

and

**AVRAHAM BROOK,** [REDACTED]

**APPELLANTS** – Applicants

v.

**CANADIAN IMPERIAL BANK OF COMMERCE**, legal person having its principal establishment at 1155 René-Lévesque boulevard West, district of Montreal, Province of Quebec, H3C 3B2

and

**CIBC MORTGAGES INC.**, legal person having a principal establishment at 1155 René-Lévesque boulevard West, suite 1020, district of Montreal, Province of Quebec, H3B 3Z4

**RESPONDENTS** – Defendants

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**DE BENE ESSE APPLICATION FOR LEAVE TO APPEAL FROM A JUDGMENT**  
**RENDERED IN THE COURSE OF A PROCEEDING**  
**(Articles 31 and 357 C.C.P.)**  
**Appellants**  
**Dated August 20, 2019**

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**TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, THE APPELLANTS RESPECTFULLY SUBMIT:**

1. The Appellants seeks leave to appeal from the judgment of the Superior Court, District of Montreal, rendered by the Honourable Chantal Corriveau (the “Judge *a Quo*”) on July 19,

2019 (the “Judgment *a Quo*”) granting their action in part against two Defendants, namely Respondents the Canadian Imperial Bank of Commerce and CIBC Mortgages Inc. (collectively the “CIBC”), while dismissing it in its entirety against the remaining Defendants, as appears from a copy of the judgment annexed hereto as **Schedule 1**, together with the *Avis de Jugement* dated July 29, 2019;

2. The Appellants already filed a Notice of Appeal against all Respondents (including CIBC) for the same judgment, as appears from a copy thereof filed with the present Application;

3. The Judgment *a Quo* authorized the class action on very specific grounds against the CIBC, but refused all other causes of action alleged by Appellants against the Respondents (including CIBC), hence the Notice of Appeal filed against all Respondents;

4. The grounds of appeal are detailed in the Notice of Appeal which Appellants refer to;

5. The present *de bene esse* Application is filed in case it is required, as it is unclear whether Appellants can appeal as of right against the CIBC;<sup>1</sup>

#### **I. Factual and Procedural Background:**

6. In their 2<sup>nd</sup> *Re-Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs* (the “Application”), the Appellants alleged that the mortgage prepayment penalties for fixed-term mortgages charged by the Respondents are abusive and illegal;

7. As a subsidiary cause of action, the Appellants alleged that Respondents CIBC unlawfully applied a shortened amortization period when calculating the notional amount of interest payable under the Comparison Rate, thereby increasing the interest rate differential (“IRD”) used to calculate the prepayment penalty.<sup>2</sup> This cause of action concerned the CIBC only;

8. The Appellants’ Application is instituted against the CIBC, the Toronto-Dominion Bank, the Bank of Montreal, the Royal Bank of Canada, the Bank of Nova Scotia, the Laurentian Bank of Canada, the National Bank of Canada, HSBC Bank of Canada, the Fédération des

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<sup>1</sup> *Union des consommateurs c. Magasins Best Buy Itée*, 2018 QCCA 445, para 32.

<sup>2</sup> Application, para 16.1.

caisses Desjardins du Québec and each of the 227 individual caisses Desjardins across the province of Quebec;

## II. Grounds for Leave

9. Article 578 C.C.P. provides as follows:

<p>578. Le jugement qui autorise l'exercice de l'action collective n'est sujet à appel que sur permission d'un juge de la Cour d'appel. Celui qui refuse l'autorisation est sujet à appel de plein droit par le demandeur ou, avec la permission d'un juge de la Cour d'appel, par un membre du groupe pour le compte duquel la demande d'autorisation a été présentée.</p> <p>L'appel est instruit et jugé en priorité.</p>	<p>578. A judgment authorizing a class action may be appealed only with leave of a judge of the Court of Appeal. A judgment denying authorization may be appealed as of right by the applicant or, with leave of a judge of the Court of Appeal, by a member of the class on whose behalf the application for authorization was filed.</p> <p>The appeal is heard and decided by preference.</p>
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10. In this case, the Judge *a Quo* authorized the class action against CIBC on very narrow grounds and dismissed authorization on all other causes of action;

11. As the Judge *a Quo* denied authorization against the CIBC with respect to most causes of action identified in the Notice of Appeal, Appellants submit that they may appeal the Judgment *a Quo* as of right;

12. However, in case leave is required, it is respectfully submitted that the Judgment *a Quo* causes irremediable prejudice to the Appellants and the Class members as it determines part of the dispute, namely all the causes of action against the CIBC, save for the amortization issue;

13. There is an appeal in any case against all other Respondents and it is in the interest of justice that permission to appeal be granted with respect to CIBC on the same questions;

14. The Appellants raise serious and novel questions of law, namely the validity of adding the component of "discount" in the calculation of the prepayment penalty for fixed-term mortgages;

15. Additionally, it is in the interest of justice to stay the trial until the decision on the appeal is rendered because notices should not be disseminated to class members or the originating application filed until such time;

16. The present Application is notified to CIBC, CIBC Mortgages Inc and their lawyers, as well as to the office of the Court of first instance;

**III. Conclusion**

17. Therefore, the Appellants will ask this Honourable Court of Appeal to grant this Application according the conclusions below.

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

**GRANT** this *de bene esse* Application for Leave to Appeal;

**AUTHORIZE** the Appellants to institute an appeal from the judgment rendered on July 19, 2019, by the Honourable Chantal Corriveau of the Superior Court, District of Montreal, in file number 500-06-000930-186;

**SUSPEND** proceedings in first instance pending judgment on the appeal;

**THE WHOLE**, with legal costs to follow on this Application and with costs on the merits.

This August 20, 2019 in Montreal

(s) *LPC Avocat Inc.*

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LPC AVOCAT INC.

Per: Me Joey Zukran

Attorneys for the Appellant – Representative Plaintiff

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CANADA

COURT OF APPEAL

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PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

**KATY HAROCH**

S.C.M. No.: 500-06-000930-186  
C.A. No.: 500-09-

and

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**APPELLANTS – Applicants**

v.

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and

**CIBC MORTGAGES INC.**

**RESPONDENTS – Defendants**

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**AFFIDAVIT**

Appellant

Dated August 20, 2019

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I, Joey Zukran, the undersigned attorney, practicing my profession at 5800 boulevard Cavendish, Suite 411, Montreal, Quebec, H4W 2T5, declare the following:

1. I am one of the attorneys for the Appellants – Applicants in this matter;
2. All of the alleged facts in the *De bene esse Application for Leave to Appeal* are true.

And I have signed.



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Joey Zukran

Solemnly affirmed before me in  
Montreal, on August 20, 2019

Paul L. Avocat 20/08/19

## **NOTICE OF PRESENTATION**

**To: Mtre François Giroux**  
**McCarthy Tétrault LLP**  
1000 De La Gauchetière Street West, Suite 2500  
Montréal, Québec, H3B 0A2  
[fgiroux@MCCARTHY.CA](mailto:fgiroux@MCCARTHY.CA)

**Attorneys for Respondents – Defendants CIBC and CIBC Mortgages Inc.**

**NOTICE IS HEREBY GIVEN** that the *De bene Esse Application for Leave to Appeal* will be presented before a judge of the Court of Appeal sitting at Édifice Ernest-Cormier, located at 100 Notre-Dame Street East, in Montreal, on **September 6, 2019 at 9:30 a.m.** in Courtroom RC-18.

**PLEASE GOVERN YOURSELVES ACCORDINGLY.**

This August 20, 2019, in Montreal

*(s) LPC Avocat Inc.*

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LPC AVOCAT INC.  
Per: Me Joey Zukran  
Attorneys for the Appellant – Applicant  
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Montréal, Québec, H4W 2T5  
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JUDGMENT RENDERED IN THE COURSE OF A PROCEEDING**  
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Dated August 20, 2019

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Me Joey Zukran

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