

DEC 28 2013

No. S136507  
Vancouver Registry



*In the Supreme Court of British Columbia*

Between

**Eric Finkel**

Plaintiff

and

**Coast Capital Savings Credit Union**

Defendant

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

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**AMENDED NOTICE OF CIVIL CLAIM**

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This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (c) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (d) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

### **Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

### **PART 1: STATEMENT OF FACTS**

#### ***The Parties***

1. The plaintiff, Eric Finkel, is a filmmaker and a resident of Vancouver, British Columbia.
2. The defendant Coast Capital Savings Credit Union ("Coast Capital") is a credit union incorporated under the laws of British Columbia, with a registered and records office at 1900 – 1040 West Georgia Street, Vancouver, BC, V6E 4H3.

#### ***The Class and the Class Period***

3. This action is brought on behalf of members of Coast Capital who are residents of British Columbia and used their Coast Capital member card to make a foreign currency withdrawal from their personal Coast Capital account through an automated teller machine ("ATM") on the Plus System or the Cirrus System

outside Canada from February 2003 to the present (the "Class" and the "Class Period", respectively").

***Factual Background to Claim***

4. Coast Capital provides credit union services to its member account holders including the provision of personal accounts which are linked to Coast Capital member cards and enable the Class members to access their accounts through ATMs.
5. Class members use their Coast Capital member cards to make withdrawals of foreign currency at ATMs connected to the Plus System or the Cirrus System located outside Canada ("ATM Foreign Exchange Services"). The Plus System and the Cirrus System are is an international electronic networks operated by Visa International and MasterCard Incorporated respectively that links ATMs around the world with financial institutions such as Coast Capital.
6. Coast Capital provides the ATM Foreign Exchange Services to the Class pursuant to agreements between Coast Capital and Visa International or MasterCard Incorporated which enable Coast Capital member cards to be used at international ATMs.
7. The terms of the Class members' account agreements with Coast Capital are set out in Coast Capital's standard form Personal Account and Services Agreement (the "Account Agreement"). The Account Agreement states that for ATM Foreign Exchange Services "the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the [t]ransaction is conducted". Visa International and MasterCard Incorporated each establishes an exchange rates between the Canadian dollar and various foreign currencies which applies to ATM withdrawals made on the Plus System or the Cirrus System, respectively (the "Plus-Network Exchange Rates").
8. During the Class Period, Coast Capital charged the Class a 2.5 percent surcharge (the "Forex Surcharge") on top of the Plus-Network Exchange Rates.

The Forex Surcharge was not disclosed to the Class including in the Account Agreement, and account statements provided to the Class members showing ATM withdrawals.

9. Mr. Finkel is a member of Coast Capital with a personal account. He used his Coast Capital member card to make withdrawals in foreign currency on the Plus System and the Cirrus System outside Canada and was charged the Forex Surcharge without disclosure to him.

## **PART 2: RELIEF SOUGHT**

10. The plaintiff claims against Coast Capital as follows:

- (a) an order certifying the proceeding as a class proceeding;
- (b) a declaration pursuant to s. 172(1)(a) of the *Business Practice and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*") that Coast Capital's representations and omissions are deceptive acts or practices;
- (c) a permanent injunction pursuant to s. 172(1)(b) of the *BPCPA* restraining Coast Capital from engaging or attempting to engage in the deceptive acts or practices;
- (d) an order directing Coast Capital to advertise any adverse findings against them pursuant to s. 172(3)(c) of the *BPCPA*;
- (e) an order that Coast Capital make restitution to the Class pursuant to s. 172(3)(a) of the *BPCPA*;
- (f) damages pursuant to s. 171 of the *BPCPA*;
- (g) restitution and/or disgorgement of its unlawful gains;
- ~~(h) a constructive trust over the amount collected by Coast Capital from the Class;~~

~~(i)~~(h) a declaration that Coast Capital is in breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34;

~~(j)~~(i) damages pursuant to s. 36 of the *Competition Act*;

~~(k)~~(j) investigation costs pursuant to s. 36 of the *Competition Act*;

~~(l)~~(k) damages for breach of contract;

~~(m)~~(l) punitive damages;

~~(n)~~(m) the costs of administering and distributing an aggregate damage award;

~~(o)~~(n) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79; and

~~(p)~~(o) such further relief as this Honourable Court deems just.

### **PART 3: LEGAL BASIS**

#### ***Breach of the Business Practices and Consumer Protection Act***

11. During the Class Period, Coast Capital provided the ATM Foreign Exchange Services to the Class and solicited, offered, advertised and promoted the use of ATM Foreign Exchange Services. As such, Coast Capital is a supplier within the meaning of s. 1 of the *BPCPA*.
12. Each use of the ATM Foreign Exchange Services by the members of the Class was for primarily personal, family, or household uses and as such was a "consumer transaction" within the meaning of s. 1 of the *BPCPA*.
13. Coast Capital engaged in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services, contrary to the *BPCPA* including the following:
  - (a) Coast Capital represented that it charged only the **Plus-Network** Exchange Rates for ATM Foreign Exchange Services;

- (b) Coast Capital failed to disclose the material fact that it charged the Forex Surcharge on ATM Foreign Exchange Services; and
  - (c) Coast Capital represented that it speaks to its members “in a clear, straightforward manner”.
14. The representations and omissions set out in paragraph 13 had the capability, tendency or effect of deceiving or misleading the Class and therefore constitute deceptive acts or practices under s. 4 of the *BPCPA*.
  15. Coast Capital gained because of the consumer transactions in which it made the deceptive and misleading representations and omissions set out in paragraph 13 above.
  16. The plaintiff, and the other members of the Class, seek a declaration pursuant to s. 172(1)(a) of the *BPCPA* that Coast Capital's representations and omissions described in paragraph 13 above are deceptive acts or practices.
  17. The plaintiff, and the other members of the Class, seek an interim and a permanent injunction pursuant to s. 172(1)(b) of the *BPCPA* restraining Coast Capital from engaging or attempting to engage in the deceptive acts or practices described in paragraph 13 above.
  18. The plaintiff, and the other members of the Class, seek an order pursuant to s. 172(3)(c) of the *BPCPA* requiring Coast Capital to advertise to the public the particulars of any judgment, declaration, order or injunction against it in this action on terms and conditions the court considers reasonable and just.
  19. The plaintiff, and the other members of the Class, seek an order pursuant to s. 172(3)(a) that Coast Capital restore or refund all Forex Surcharges that the Class paid, or that Coast Capital disgorge all revenue which it made on account of the Forex Surcharge, together with any further relief which may be available under the *BPCPA*.

20. It is unnecessary for the plaintiff or any member of the Class to prove that Coast Capital's deceptive acts or practices caused such persons to use the ATM Foreign Exchange Services to make out a claim for relief under s. 172 of the *BPCPA*.
21. In the alternative, the plaintiff and the other members of the Class suffered damages because of Coast Capital's acts or practices and seek damages pursuant to s. 171 of the *BPCPA*.

***Breach of the Competition Act***

22. Further, or alternatively, Coast Capital made the representations and omissions to the public as particularized in paragraph 13 above. In so doing, Coast Capital breached s. 52 of the *Competition Act*, and thereby committed an unlawful act because the representations and omissions:
  - (a) were made for the purpose of promoting the business interests of Coast Capital;
  - (b) were made to the public; and
  - (c) were false and misleading in a material respect.
23. The Class suffered damages as a result of Coast Capital's unlawful breach of s. 52 of the *Competition Act* and seek those damages, as well as their costs of investigation, pursuant to s. 36 of the *Competition Act*.

***Breach of Contract***

24. Further, or alternatively, the Account Agreement is a contract between Coast Capital and the members of the Class, a term of which is that Coast Capital will use the Plus-Network Exchange Rates to convert funds belonging to the Class into foreign currency when providing ATM Foreign Exchange Services.

25. Coast Capital breached the Account Agreement by charging the Forex Surcharge in addition to the Plus-Network Exchange Rates and Coast Capital is liable to the Class members for damages for breach of contract.

***Unjust Enrichment and Restitution Constructive Trust***

26. Further, or alternatively, the plaintiff pleads that he and the other members of the Class are entitled to recover under restitutionary principles.
27. Coast Capital has been unjustly enriched by the receipt of the Forex Surcharge. The plaintiff and other members of the Class have suffered a corresponding deprivation in the amount of Forex Surcharge.
28. Since the money that Coast Capital received resulted from Coast Capital's wrongful or unlawful acts including breach of the *BPCPA* and the *Competition Act* and breach of contract, there is and can be no juridical reason justifying Coast Capital retaining any part of such revenue and Coast Capital must disgorge and make restitution of the Forex Surcharge to the Class.

~~29. Further, Coast Capital is constituted as a constructive trustee in favour of the members of the Class for all of the Forex Surcharge because, among other reasons:~~

- ~~(a) Coast Capital was unjustly enriched by receipt of the Forex Surcharge;~~
- ~~(b) the Class suffered a deprivation because they paid the Forex Surcharge;~~
- ~~(c) Coast Capital engaged in unlawful conduct in making the deceptive and misleading representations and omissions set out in paragraph 13 above;~~
- ~~(d) the Forex Surcharge was acquired in such circumstances that Coast Capital may not in good conscience retain it;~~
- ~~(e) justice and good conscience require the imposition of a constructive trust;~~  
~~and~~



~~(f) — there are no factors that would, in respect of the Forex Surcharge, render the imposition of a constructive trust unjust.~~

~~30.29. Further, or alternatively, The plaintiff pleads that equity and good conscience requires~~ Coast Capital ~~to hold in trust for~~ must make restitution to the plaintiff and the other members of the Class all of the Forex Surcharge as a result of their wrongful and illegal conduct.

### **Aggregate Damages**

~~31.30.~~ The restitution and damages sought by the plaintiff and other members of the Class above can be calculated on an aggregate basis for the Class as provided by the *BPCPA* and ss. 29 and 30 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

### **Punitive Damages**

~~32.31.~~ The plaintiff pleads that Coast Capital's conduct in unlawfully collecting the Forex Surcharge from the Class and the representations and omissions as pleaded in paragraph 13 above, was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, and an intentional disregard of the rights of the Class. Such conduct renders Coast Capital liable to pay punitive damages.

Plaintiff's address for service:

**CAMP FIORANTE MATTHEWS MOGERMAN**

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Vancouver, BC V6B 2W5

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Email: [service@cfmlawyers.ca](mailto:service@cfmlawyers.ca)

Place of trial: Vancouver Law Courts

Address of the registry: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: 23/December/2013



Signature of lawyer  
for plaintiff

David G.A. Jones

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

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## APPENDIX

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### CONCISE SUMMARY OF NATURE OF CLAIM:

This action concerns the provision of ATM Foreign Exchange Services by Coast Capital to its members. The plaintiff claims that Coast Capital imposed an undisclosed surcharge on top of the exchange rate set by the Plus System or the Cirrus System when Class members used their Coast Capital member cards to make withdrawals from their Coast Capital personal accounts at ATMs outside Canada. The Plaintiff claims that Coast Capital is liable pursuant to the British Columbia *Business Practices and Consumer Protection Act*, the *Federal Competition Act*, the law of contract and restitution.

### THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

1. *Business Practice and Consumer Protection Act*, S.B.C. 2004, c. 2
2. *Competition Act*, R.S.C. 1985, c. C-34
3. *Class Proceedings Act*, R.S.B.C. 1996, c.50.