

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Finkel v. Coast Capital Savings Credit Union*,
2016 BCSC 561

Date: 20160331
Docket: S136507
Registry: Vancouver

Between:

Eric Finkel

Plaintiff

And:

Coast Capital Savings Credit Union

Defendant

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:

D. G. Jones/J. R. Facchin

Counsel for Defendant:

R. McGowan/R. Dawkins

Place and Date of Hearing:

Vancouver, B.C.
October 14-16, 2015
December 4, 2015

Written Submissions of the Plaintiff and Defendant:

December 14, 2015

Place and Date of Judgment:

Vancouver, B.C.
March 31, 2016

Table of Contents

I. INTRODUCTION 3

II. BACKGROUND 3

III. RELEVANT LEGISLATIVE PROVISIONS 9

IV. DISCUSSION..... 15

 A. Do the pleadings disclose a cause of action? 16

 1. Breach of contract 18

 2. *BPCPA* 18

 (a) Sections 4–5: deceptive acts or practices 18

 (b) Section 171 19

 (c) Section 172 21

 (d) Conclusion..... 23

 3. *Competition Act* 23

 B. Is there an identifiable class of two or more members? 25

 C. Do the claims raise common issues and do they predominate over issues affecting only individual members? 27

 1. *BPCPA* 30

 2. *Competition Act* 31

 3. Reliance..... 31

 4. Breach of contract 32

 5. Aggregate damages 32

 6. Punitive damages 32

 7. Interest..... 34

 8. Distribution of damages and/or trust funds 35

 D. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues? 35

 E. Is there an appropriate representative plaintiff? 38

V. CONCLUSION..... 38

I. INTRODUCTION

[1] This ruling deals with an application that the within action be certified as a class proceeding.

[2] The essence of the action is a claim that Coast Capital Credit Union (“Coast Capital”) charged undisclosed surcharges to its members who made foreign currency withdrawals from their personal Coast Capital accounts through automated teller machines (“ATMs”) on the Plus System or the Cirrus System outside of Canada from August 28, 2007 to August 31, 2015 (the “Class Period”). The plaintiff asserts that this was a breach of contract under the Coast Capital standard form personal account terms and conditions; a deceptive act or practice contrary to ss. 4–5 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“*BPCPA*”); and a breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34, which prohibits “knowingly or recklessly making a representation to the public that is false or misleading in a material respect” in order to promote a business interest. The plaintiff is no longer pursuing his restitutionary/unjust enrichment claims.

[3] In its Response to Civil Claim the defendant denies that it committed any of the wrongs asserted. Coast Capital construes the plaintiff’s action as a “procedural weapon of mass destruction” and invokes the refrain that the case is devoid of an “air of reality.”

II. BACKGROUND

[4] The plaintiff Mr. Finkel is a filmmaker and a member of Coast Capital. He has a Coast Chequing Prestige Package account and with it he holds a Coast Capital ATM card linked to his chequing account. The card allows him to withdraw cash from ATMs at Coast Capital branches and other ATMs around the world connected to the Cirrus or Plus networks. This is no dispute that Mr. Finkel’s account was a personal account.

[5] Mr. Finkel’s use of the ATM card is subject to a Coast Capital account agreement (the “Account Agreement”).

[6] With regard to withdrawing foreign currency from an ATM outside of Canada, the version of the Account Agreement in force in January 2013 and June 2015 provides that:

If the Card is used in connection with a Transaction in a foreign currency, the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the Transaction is conducted.

[7] The Account Agreement does not define “electronic network”, and its meaning is a key point of contention between the parties. According to the plaintiff, “electronic network” means Cirrus and Plus; thus, “fixed according to the rules of the electronic network” means that Coast Capital was only authorized to charge Cirrus’ and Plus’ standard daily exchange rates for foreign currency withdrawals on their networks. According to the defendant, “electronic network” refers to a much more complicated network of payment processing service providers and the “rules” contemplate charges in excess of Cirrus’ and Plus’ exchange rates.

[8] Coast Capital publishes on its website a document entitled “Personal Service Fees” which sets out the fees which Coast Capital charges its members. On January 1, 2013, this document stated that Coast Capital would charge a fee of \$5 per foreign ATM withdrawal. There is no mention of a percentage surcharge.

[9] Coast Capital entered into an agreement dated July 30, 2010 with Moneris Solutions Corporation giving Coast Capital access to electronic payment networks including Cirrus and Plus. The Moneris agreement defines electronic networks to be, *inter alia*, Cirrus and Plus. The Moneris agreement does not identify the fees charged by Moneris to Coast Capital for access to the Plus and Cirrus electronic networks.

[10] Section 37 of the Account Agreement further provides that:

This Section is drafted with due regard to the Canadian Code of Practice for Consumer Debit Card Payment Services, a copy of which is available from [Coast Capital] on request.

[11] Section 3 of the Canadian Code of Practice for Consumer Debit Card Payment Services states that:

It is the responsibility of the card issuer to

a) inform the applicant of:

- any fees associated with holding and using the debit card....

[12] On September 1, 2015, Coast Capital amended the Personal Service Fees document as it relates to foreign ATM withdrawals. The amended Personal Service Fees document provides for a fee of \$5 plus 2% per foreign ATM transaction. It further states, as a footnote to the 2% figure, that:

Additional fees may be charged by third parties as part of the transaction amount. International ATM or POS Fee: 2% administration fee on transaction amount. The 'transaction amount' we use to calculate the commission is the amount of the POS or ATM request we receive and pay from your account to settle your international ATM or POS transaction. The ATM or POS request we receive is in Canadian dollars. Any currency conversion to calculate the Canadian dollar transaction amount is done by a third party in the electronic network your debit request comes through on. We do not set the rates for or complete those currency conversions. Fees or commissions of third parties involved in processing your international ATM or POS transaction may also be included in the transaction amount.

[13] On September 1, 2015, Coast Capital also published a notice to its members regarding this change in service fees, in which it disclosed:

- (a) the 2% charge;
- (b) that a third party carries out the conversion to Canadian dollars;
and
- (c) that the third party may include their own, unspecified,
commissions or fees in the transaction amount.

[14] Mr. Finkel deposes that his understanding of the account agreement that applied to his chequing account in 2012 and 2013 was that if he withdrew funds in foreign currencies from his account from ATMs located outside of Canada, he would not be charged any foreign exchange surcharge on the withdrawal by Coast Capital. He states that he is aware that Cirrus and Plus have standard daily exchange rates for foreign currency withdrawals on their networks. He also states that he

understood that there may be other fees on foreign currency ATM withdrawals outside Canada on the Cirrus or Plus networks charged by the foreign bank which owns the ATM. It was his practice to avoid paying such fees, which are disclosed on the ATM screen as part of the ATM transaction. He deposed that he relied on the lack of disclosure of foreign currency surcharges in making ATM withdrawals.

[15] The specific problem for Mr. Finkel arose in late 2012 and early 2013 when he was travelling in Southeast Asia. While in Cambodia he used his ATM card to withdraw U.S. dollars from an ATM on two occasions on January 1, 2013. He states that he made both withdrawals at ATM machines which did not charge an ATM fee. The withdrawals in U.S. dollars were \$190 and \$300. His account was debited in Canadian dollars \$193.88 and \$306.12, respectively. This is equivalent to an exchange rate of C\$1.0204 per US\$1.00.

[16] At the time of the withdrawals, Mr. Finkel understood that the Canadian and U.S. dollars were trading close to par and was surprised when he saw the actual debit to his account. In fact, on January 1, 2013, the prevailing Cirrus network exchange rate was such that \$1.00 Canadian was worth \$1.0029808 U.S. At this exchange rate, Mr. Finkel's statement should have shown withdrawals of \$189.45 and \$299.13 Canadian. The difference is \$4.43 and \$6.99, respectively, or 2.3%.

[17] As a result, he made an inquiry to Coast Capital. On January 3, 2013 Coast Capital responded, stating simply that the exchange rate was \$1.0204 which made "US more expensive to buy." Later that day, Mr. Finkel asked: "Whose exchange rate is the bank using? It's about 3% different than the exchange rate I've seen elsewhere". He did not receive an immediate response and sent a reminder message on January 8, 2013. Later that day Coast Capital responded, apologizing for the delay and stating: "The exchange rate used on ATM machines is calculated by the bank who owns the machine. Each financial institution will offer different rates, generally different than what will be posted on the news etc."

[18] On January 9, 2013, Mr. Finkel replied stating:

That is not at all correct. Please make sure you have the correct answer before advising a client.

Like in Canada, the owner of the foreign ATM may charge a transaction fee (there was none in this case), and Coast Capital may charge a transaction fee (but it is not supposed to be charging that for my 033 account). But, the exchange rate is set by the interbank network, not the local bank. In this case, I was charged an extra three percent above the interbank network rate. Please explain. Please check with a supervisor before responding if you are unsure. I look forward to a prompt, accurate response.

[19] Later on January 9, 2013, Coast Capital responded requesting Mr. Finkel to call to discuss the matter in detail as Coast Capital had tried to call him without success.

[20] Mr. Finkel then replied that as he was travelling, phone contact was not a "good way to communicate". He requested a response by e-mail.

[21] Later that same day Coast Capital responded by e-mail stating:

Thank you for your inquiry regarding USD ATM withdrawals.

I do see the ATM withdrawals Jan 1, 2013 as follows:

\$300 USD @1.0204 equal to \$306.12

\$190 USD @1.0204 equal to \$193.88

This exchange rate is determined by the withdrawal financial institution. In regards to the loss of the 3% we would like to know where you had obtained this information. The rates fluctuate on a regular basis, and vary depending on the financial institution.

We do understand you are traveling at this time & you prefer to be contacted by email. If you have a phone number where you can be reached at please provide this to us & we can call you when it is most convenient for you.

[22] Mr. Finkel then responded:

The money was pulled from an ATM. The rates are from Cirrus, the interbank network that did the exchange. It is not done by the financial institution running the ATM. Please explain.

[23] Coast Capital then responded:

If the Card is used in connection with a Transaction in a foreign currency, the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the Transaction is conducted. If you are using a Cirrus network ATM I would suggest being in contact with them to get their rates of exchange and any discuss any discrepancies from what you were charged.

[24] Mr. Finkel then responded on January 13, 2013:

Thanks for your response. It highlights multiple problems. First, I have wrongly been told repeatedly by various Coast Capital representatives that the foreign currency exchange rate is set by the local bank from where I withdraw the funds. I corrected the various representatives: the interbank network sets the rate, in this case Cirrus. If you review my prior correspondence, you will know that you are the first representative to acknowledge the correct process. This situation means that the prior representatives were flippant, misinformed or misleading, none of which is acceptable, and as a team leader, I hope you will ensure that type of service is not afforded to others.

Second, your message further implies that you haven't read my prior e-mails as I've already noted that I've gone to the source for the exchange rate, and there is a three percent discrepancy with the original transaction I raised. In fact, with all foreign currency withdrawals through Coast Capital, it appears that I have lost three percent on the transaction.

After further investigating, here is what appears to have happened: Cirrus charges a certain exchange rate, and then it charges Coast Capital an additional 3% to participate in the network. Coast Capital has passed through that 3% fee to me. The problem is that I have been unable to find where that 3% fee is disclosed in Coast Capital's required disclosures. If the fee is being passed through and it is not disclosed, that seems to be a violation of various laws and regulations.

The problem was highlighted when I used an account at another bank to withdraw funds. They showed the proper exchange rate, showed the 3% pass-through fee as a separate line item and disclosed such in their required disclosures.

Now that someone at Coast Capital is finally acknowledging that the interbank network is setting the rate, maybe the bank will acknowledge the three percent fee and even show me where it is disclosed. If not, I request some sort of explanation as to why there is a 3% discrepancy for all of my foreign currency transactions (or if I am misinformed, some sort of explanation on that front). If you are unable to address these concerns, please feel free to escalate to the appropriate department.

I look forward to a prompt response.

[25] On January 24, 2013 Coast Capital responded:

Our apologies for the delayed response. Upon review of this situation, your concerns are discussed and addressed on page 34 of Coast Capital Savings Personal Accounts and Services Agreement: -

Foreign Currency Transactions

If the Card is used in connection with a Transaction in a foreign currency, the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the Transaction is conducted

This clause should address the concerns you expressed in your previous email. At this time there is no way for us to display a detailed breakdown of every fee processed by a third party.

[26] On March 8, 2013 Mr. Finkel made the following request:

Would you please send me a copy of the rules of the electronic network and an itemized list of all charges that were imposed on my account related to these foreign currency ATM withdrawals?

[27] Mr. Finkel sent another request for the same on March 25, 2013. Coast Capital failed to respond.

[28] On August 28, 2013, Mr. Finkel commenced this action.

[29] On June 30, 2015, Mr. Finkel made two withdrawals of US\$20 each at an ATM in New York City. He used his Coast Capital debit card and his wife's TD debit card at an interval of about a minute.

[30] The Canadian dollar amount of \$25.28 was deducted from his Coast Capital account. This amount reflects an effective exchange rate of C\$1.264 per US\$1.00. The Canadian dollar amount of \$25.45 was deducted from his wife's TD account. This amount reflects an effective exchange rate of C\$1.2725 per US\$1.00.

[31] On June 30, 2015, the prevailing exchange rate on the Plus network was C\$1.241476 Canadian per US\$1.00. The difference between the Plus rate and the TD effective rate was 2.5%. The difference between the Plus rate and the Coast Capital effective rate was 1.8%. TD's account agreement discloses a 2.5% surcharge on foreign ATM withdrawals. Coast Capital's account agreement did not disclose any percentage surcharge.

III. RELEVANT LEGISLATIVE PROVISIONS

[32] The requirements for certification as a class action are found in section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA"):

- 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[33] The court must certify an action as a class proceeding if the requirements in s. 4(1) of the *CPA* are met.

[34] The relevant provisions of the *BPCPA* are sections 1, 4, 5, 171 and 172. They read as follows:

Definitions

1 (1) In this Act:

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"consumer transaction" means

- (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

...

Deceptive acts or practices

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

(ii) are of a particular standard, quality, grade, style or model if they are not,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

(viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

(ii) that a service, part, replacement or repair is needed if it is not,

(iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

(v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,

- (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,
 - (vii) that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,
 - (viii) that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or
 - (ix) to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57;
- (c) a representation by a supplier about the total price of goods or services if
- (i) a person could reasonably conclude that a price benefit or advantage exists but it does not,
 - (ii) the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or
 - (iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;
- (d) a prescribed act or practice.

...

Prohibition and burden of proof

- 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
- (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

...

Division 5 — Court Proceedings

Damages recoverable

- 171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
- (a) supplier,
 - (b) reporting agency, as defined in section 106,
 - (c) collector, as defined in section 113,

- (d) bailiff, collection agent or debt pooler, as defined in section 125, or
 - (e) a person required to hold a licence under Part 9 who engaged in or acquiesced in the contravention that caused the damage or loss.
- (2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192.
- (3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

Court actions respecting consumer transactions

- 172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
 - (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
- (2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.
- (3) If the court grants relief under subsection (1), the court may order one or more of the following:
- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
 - (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
 - (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.
- (4) The director may apply, without notice to anyone, for an interim injunction under subsection (1)(b).

- (5) In an application for an interim injunction under subsection (1)(b),
 - (a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,
 - (b) the applicant is not required to post a bond or give an undertaking as to damages, and
 - (c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.
- (6) If the director applies, without notice to anyone, for an interim injunction under subsection (1) (b), the court must grant the interim injunction, on the terms and conditions it considers just, if the court is satisfied that there are reasonable grounds for believing there is an immediate threat to the interests of consumers dealing with the supplier because of an alleged contravention of this Act or the regulations in respect of a consumer transaction.
- (7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.

[35] The relevant portions of the *Competition Act* read as follows:

False or misleading representations

52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of certain matters not required

- (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
 - (a) any person was deceived or misled;
 - (b) any member of the public to whom the representation was made was within Canada; or
 - (c) the representation was made in a place to which the public had access.

Permitted representations

- (1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

Representations accompanying products

- (2) For the purposes of this section, a representation that is

- (a) expressed on an article offered or displayed for sale or its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
- (c) expressed on an in-store or other point-of-purchase display,
- (d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or
- (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

[36] Section 36 of the *Act* permits a claim for damages as follows:

Recovery of damages

36. (1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

IV. DISCUSSION

[37] The *CPA* should be interpreted in a broad and purposive manner consistent with its objects and purposes – judicial economy, access to justice, and behaviour modification. Certification is “a fluid, flexible procedural process”. There must be procedural flexibility in order to facilitate realization of the statute’s purposes: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23.

[38] The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the application hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24–25. The “some basis in fact” standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 (“*Microsoft*”).

[39] The extent of evidence required to discharge “the some basis in fact” requirement depends upon the circumstances of each case. The determination of a certification application does not involve an assessment of the merits and is not intended to be a pronouncement on the viability or strength of the action: *Microsoft* at paras. 99, 102, and 105.

[40] The court is a gatekeeper and certification is not a rubber stamp.

A. Do the pleadings disclose a cause of action?

[41] The causes of action pursued by the plaintiff are breach of contract; breach of the *BPCPA* giving rise to damages under s. 171 and relief under s. 172; and breach of the *Competition Act*.

[42] In deciding whether the pleadings disclose a cause of action, the court is to assume that the facts as pleaded are true and determine whether on the facts as pleaded it is plain and obvious the claim discloses no reasonable cause of action: *Hunt* at 980.

[43] The pleadings are to be read generously, with a view to accommodating inadequacies due to drafting deficiencies: *Fakhri et al v. Alfalfa’s Canada Inc. cba*

Capers, 2003 BCSC 1717 at para. 42, aff'd 2004 BCCA 549. However, to be certified as a class proceeding the pleadings must actually disclose a cause of action. If they do not, the application for certification should either be dismissed or adjourned pursuant to s. 5(6) of the *CPA* to permit the plaintiff to amend the pleadings: *Brown v. Canada (Attorney General)*, 2013 ONCA 18 at para. 46; *Burnell v. Canada*, 2013 BCSC 1354 at paras. 53–54.

[44] The plaintiff's notice of civil claim (as amended) reads in part:

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 establish exchange rates between the Canadian dollar and various foreign currencies which apply to ATM withdrawals made on the Plus System or the Cirrus System, respectively (the "Network Exchange Rates"). It is a term of the Account Agreement that Coast Capital will use the Network Exchange Rates to convert funds belonging to the Class into foreign currency when providing ATM Foreign Exchange Services.

8. During the Class Period, Coast Capital charged the Class a 2.5 percent surcharge (the "Forex Surcharge") on top of the 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. 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.

10. Each use of the ATM Foreign Exchange Services by the members of the Class was for primarily personal, family, or household uses.

11. Coast Capital engaged in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services, including the following:

- (a) Coast Capital represented that it charged only the 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".

12. The representations and omissions set out in paragraph 11 had the capability, tendency or effect of deceiving or misleading the Class.

13. Coast Capital gained because of the consumer transactions in which it made the deceptive and misleading representations and omissions set out in paragraph 11 above.

14. The plaintiff, and the other members of the Class relied on Coast Capital's deceptive representations and omissions described in paragraph 11 above and suffered loss because of such acts or practices.

15. Coast Capital acquired the Forex Surcharge due to its deceptive representations and omissions described in paragraph 1111 above.

16. The plaintiff and the other members of the Class were the source of the Forex Surcharge acquired by Coast Capital.

17. On September 1, 2015, Coast Capital amended its Personal Service Fees disclosure to state that withdrawals at foreign ATMs would be subject to a 2% surcharge and that additional, unspecified, fees charged by third parties may also be added.

18. 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.

1. Breach of contract

[45] In terms of breach of contract, the plaintiff has pleaded the existence of a contract, that the Agreement contains a term that Coast Capital will use the Cirrus or Plus exchange rates (which the plaintiff calls the "Network Exchange Rates"), and that in breach of this term Coast Capital charged a surcharge (the "Forex Surcharge") in addition to those rates. Assuming the facts as pleaded are true, I cannot conclude that it is plain and obvious that the plaintiff's claim will fail. Accordingly, the pleadings disclose a cause of action in breach of contract.

2. BPCPA

(a) Sections 4–5: deceptive acts or practices

[46] The plaintiff pleads that Coast Capital provided ATM foreign exchange services to the class and that each use of a foreign ATM by the class members was for primarily personal, family, or household use. This is sufficient to bring Coast Capital, the class members, and the transactions within the definitions of "supplier", "consumer", and "consumer transaction" respectively: *BPCPA* s. 1(1).

[47] The plaintiff alleges that Coast Capital engaged in deceptive acts or practices contrary to s. 5 of the *BPCPA* as follows:

11. Coast Capital engaged in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services, including the following:

- (a) Coast Capital represented that it charged only the 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”.

12. The representations and omissions set out in paragraph 11 had the capability tendency or effect of deceiving or misleading the Class.

[48] Subsection 4(1) provides that a deceptive act or practice includes a representation by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer. The definition of “representation” includes a term in a contract that is used by a supplier in connection with a consumer transaction. As such, I am satisfied that the plaintiff has pleaded that Coast Capital committed a deceptive act or practice.

(b) Section 171

[49] The relevant portions of section 171 read:

171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

(a) supplier,

...

who engaged in or acquiesced in the contravention that caused the damage or loss.

...

[50] This section requires the plaintiff to show that he suffered loss or damage as a result of Coast Capital’s alleged contravention of the legislation—here, a deceptive act or practice contrary to s. 5. In this respect the plaintiff pleads:

14. The plaintiff, and the other members of the Class relied on Coast Capital's deceptive representations and omissions described in paragraph 11 above and suffered loss because of such acts or practices.

15. Coast Capital acquired the Forex Surcharge due to its deceptive representations and omissions described in paragraph [11] above.

[51] These paragraphs verge on bare legal conclusion for which the plaintiff has pleaded no material facts. However, in the circumstances I am satisfied that the pleadings are sufficient as to damage. The factual allegations in the pleadings as a whole make it clear that the alleged damage or loss is the sum of the "Forex Surcharges" the class members paid.

[52] With respect to causation, s. 171 requires the plaintiff show that he or she suffered damage or loss "due to" a contravention of the legislation. This language clearly imports a causation requirement into this section.

[53] Whether the pleadings are sufficient with respect to causation turns on whether reliance is a necessary element of the s. 171 claim in the circumstances of this case. In my opinion, it is not.

[54] It is true that some prior decisions of this Court have held that reliance is required for a claim under s. 171: see e.g. *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172 at para. 34, rev'd in part (but not on this point) 2006 BCCA 235; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 197, aff'd 2015 BCCA 252, leave to appeal to S.C.C. refused 2016 CanLII 13743.

[55] However, in my view whether reliance is required depends on the nature of the alleged contravention of the legislation. Where the alleged contravention involves a wrongful overcharge contrary to a term of a contract, the fact of the unauthorized overcharge causally links the breach to the plaintiff's loss. In these circumstances, the plaintiff need not show (and therefore need not plead) reliance.

[56] In this case, the plaintiff alleges that Coast Capital committed a deceptive act or practice by representing, in a term of its contract with the plaintiff, that it would only charge Cirrus' and Plus' exchange rates for foreign currency transactions. He

further alleges that, in breach of that term, Coast Capital charged a surcharge in addition to those rates. This is sufficient to link Coast Capital's alleged breach with the plaintiff's loss. The plaintiff need not plead reliance.

[57] If s. 171 did require that the plaintiff plead that he relied on Coast Capital's alleged deceptive act or practice, I would find that he has failed to do so. He has only pleaded the legal conclusion that "[t]he plaintiff, and the other members of the Class relied on Coast Capital's deceptive representations and omissions". He has pleaded no material facts in support of this assertion, for example by pleading what actions he took in reliance on the representations and omissions. However, based on what I have read and heard in this hearing, the pleadings are capable of being sufficiently amended to rectify this deficiency and I would have permitted amendment in order to seek certification by further application. Of course, given my conclusion that reliance is not required, this is unnecessary.

(c) Section 172

[58] Section 172 of the *BPCPA* reads in part:

172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

...

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

...

[59] In *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260 at para. 53 (“*Ileman CA*”), leave to appeal to S.C.C. refused 2016 CanLII 6850, the Court set out four prerequisites for granting a restoration order under s. 172(3)(a) of the *BPCPA*:

- a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) – this requirement is set out in the opening words of s. 172(3);
- b) The supplier must have acquired something (“money or other property or thing”) because of a contravention of the legislation – this requirement is explicit in s. 172(3)(a);
- c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier – this requirement is a necessary implication of the use of the word “restore”; and
- d) The beneficiary must have “an interest” in the thing to be restored – this requirement is explicit in s. 172(3)(a).

[60] Taking the factual allegations in his pleadings as true, I am satisfied that it is not plain and obvious that the plaintiff’s s. 172 claim will fail.

[61] As above, the plaintiff has adequately pleaded that Coast Capital committed a deceptive act or practice; this makes declaratory and injunctive relief available and thus prerequisite (a) from *Ileman CA* is satisfied.

[62] The plaintiff has also pleaded that Coast Capital acquired money (in the amount of the “Forex Surcharge”) due to a contravention of the legislation, and that he was the source of this money. This satisfies prerequisites (b) and (c). For the reasons given above, causation can be established without reliance by the plaintiff.

[63] Finally, the plaintiff has pleaded that he has an “interest” in the money acquired by Coast Capital. In *Ileman CA*, the Court held at para. 60 that “an interest’ need not be a proprietary interest in specific property” but “it must be an interest recognized by law outside of s. 172(3)(a)”. Taking the alleged facts as true, the plaintiff would have a right to damages for breach of contract; this is sufficient to establish an “interest” in the money acquired by Coast Capital due to a contravention of the legislation.

(d) Conclusion

[64] I conclude that the plaintiff's pleadings disclose a cause of action under both s. 171 and s. 172(3)(a) of the *BPCPA* based on deceptive acts or practices contrary to ss. 4–5 of the *BPCPA*.

3. Competition Act

[65] The plaintiff alleges that Coast Capital breached s. 52 of the *Competition Act* and that he and the class plaintiffs suffered damage as a result. Thus, he says he has a cause of action for recovery of damages under s. 36 of the *Act*.

[66] The plaintiff's pleading on this ground reads as follows:

Breach of the Competition Act

33. Further, or alternatively, Coast Capital made the representations and omissions to the public as particularized in paragraph 11 above. In so doing, Coast Capital breach 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.
34. The Class suffered damages as a result of Coast Capital's unlawful breach of s. 52 of the *Competition Act* and the Class seeks those damages, as well as their costs of investigation, pursuant to s. 36 of the *Competition Act*.

[67] In my opinion, the plaintiff's claim under the *Competition Act* has problems.

[68] I start with some concerns which are not insurmountable. The Statement of Facts portion of the Notice of Civil Claim refers primarily to representations contained in the contracts between Coast Capital and the class. Section 52 applies to representations made to the public. The Statement of Facts contains no material facts to support this allegation. However, the Legal Basis portion of the plaintiff's Notice of Civil Claim asserts that Coast Capital made misrepresentations to the public. Its website documentation would substantiate this. I am prepared to accept

that this section should have been included in the facts section of the Notice of Civil Claim.

[69] Second, the plaintiff has not pleaded that Coast Capital made the false or misleading representations “knowingly or recklessly”, as required by s. 52. But this can be implied in the pleading where it states the defendant made the representations and omissions.

[70] What is more problematic is that the plaintiff has not pleaded that he suffered loss or damage as a result of the misrepresentations made to the public. While s. 52(1.1) removes the requirement of proving reliance in order to establish a contravention of s. 52(1), the cause of action created by s. 36 requires the plaintiff to show that he or she suffered damages “as a result” of the defendant’s violation: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 91, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 125, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 107.

[71] Unlike the *BPCPA* claim, then, the *Competition Act* claim does require that the plaintiff show reliance on the alleged misrepresentation. The link required by s. 36 is only present if the misrepresentation “caused [the plaintiff] to do something - i.e., that he relied on it to his detriment”: *Singer* at para. 108.

[72] As discussed above, the plaintiff’s pleadings with respect to reliance are deficient; he pleads the bare conclusion of reliance without any material facts in support. Importantly, the plaintiff must plead reliance on the communications Coast Capital made to the public.

[73] Based on what I have read and heard in this hearing, the pleadings may be capable of being sufficiently amended to rectify this deficiency. However, at present, this claim is deficient.

B. Is there an identifiable class of two or more members?

[74] The plaintiff seeks to certify the action on behalf of a class defined as:

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 August 28, 2007 to August 31, 2015 (the “Class” and the “Class Period”, respectively).

[75] The first objection by Coast Capital is that the plaintiff has not shown that there are two or more members. Coast Capital argues that there is no evidence of a second putative class member who would be “desirous of relief,” nor adequately addressed in the pleading of material facts.

[76] I do not find this argument as having merit. The test is whether there is an “identifiable class” of two or more persons. As Justice Griffin stated in *Douez v. Facebook, Inc.*, 2014 BCSC 953 at para. 230, rev’d (but not on this point) 2015 BCCA 279, leave to appeal to S.C.C. granted 2016 CanLII 12162, “showing some basis in fact that two or more persons are in the proposed class is all that is necessary under the *CPA* and there is no additional requirement of showing that two or more persons are interested in pursuing a claim.” The evidence that Coast Capital has over 500,000 members in British Columbia gives rise to the reasonable inference that some may have conducted transactions similar to those described by Mr. Finkel. Further, Ms. Nancy McNeill, Coast Capital’s Senior Vice-President of Operations, deposed that “[t]he number of members in the proposed class could be as many as there are members with accounts at Coast Capital”.

[77] Alternatively, Coast Capital argues that the proposed class definition is impermissibly broad with respect to the *BPCPA* claims because it captures persons who have no *BPCPA* claim against Coast Capital.

[78] The defendant’s argument is that a deceptive act or practice may only be advanced in respect of a “consumer transaction” and that such a transaction cannot be presumed simply because a member of the proposed Class holds a “personal Coast Capital Account”. Coast Capital argues that while holding personal accounts

suggests the transaction is likely to involve an individual, rather than a business entity, that is only part of the equation for determining whether the transaction is a consumer transaction. It cannot be inferred or presumed that the transactions were not engaged in for commercial or business purposes, or by the individual for a business entity. As a result, it is submitted that the proposed class is overly broad and includes persons who will have no claim under the *BPCPA*.

[79] I accept that there could be some “non-consumer” personal account holders, though they are likely a very small minority, given that the Agreement contained a term that a personal account cannot be used for business purposes and also set out sanctions for breach of this term. While these non-consumers do not have a *BPCPA* claim, they do have a breach of contract claim. A class definition that excluded them entirely would be under-inclusive; it would not “bind the persons who ought to be bound”: *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 at para. 34, quoting Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 93.

[80] Instead, a subclass should be created for the *BPCPA* claim. The subclass will be limited to individuals acting for purposes that are primarily personal, family or household. The question of whether an account holder is acting for these purposes can be determined objectively, and is best dealt with at an individual issues trial or at the claims administration process. See my comment in *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at para. 147; also *Wellman v. Telus Communications Co.*, 2014 ONSC 3318 at footnote 10, aff’d 2015 ONSC 2220 (Div. Ct.); *Wright v. United Parcel Services Canada Ltd.*, 2011 ONSC 5044 at paras. 383 and 384.

[81] Coast Capital also argues that the class definition is inappropriate in respect to the action under s. 36(1) of the *Competition Act* in that the definition ignores the individuality of claims. It is argued that the section is only triggered in favour of a person that “...has suffered loss or damage as a result of” the prescribed conduct—not just anyone or everyone. The definition is also inappropriate for purported claims seeking indemnity relating to “costs of investigation” in that there is no plea

that costs of investigation were incurred; no particulars of such costs; no plea that anyone else is capable of advancing a claim; and such claims would be an individual issue. Further, the defendant points out that there is a two-year limitation period defence which has been pleaded.

[82] These are not class definition issues; individuality goes to the commonality of the issues under s. 4(1)(c) and the other objections go to whether the plaintiff has a cause of action. In any case, having earlier concluded that the pleadings under the *Competition Act* are insufficient, there is no need to address this argument.

C. Do the claims raise common issues and do they predominate over issues affecting only individual members?

[83] The critical factors and considerations in determining whether an issue is common to the proposed class members are:

- (a) the underlying question is whether resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39;
- (b) the common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each member's claim: *Western Canadian Shopping Centres* at para. 39; *Hollick* at para. 18; and
- (c) success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 151.

[84] In general the threshold to meet the commonality requirement is low; there must be a rational connection between the class and the proposed common issues and each common issue must be a triable legal or factual issue, the determination of which will move the litigation forward: *Thorburn v. British Columbia (Public Safety*

and Solicitor General), 2013 BCCA 480 at para. 38, citing *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.). While the plaintiff must show “some basis in fact” to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class: *Microsoft* at para. 110.

[85] The plaintiff proposes the following common issues:

Business Practices and Consumer Protection Act ("BPCPA")

- (a) Were the ATM Foreign Exchange Services "consumer transactions" as defined in the *BPCPA*?
- (b) Are the solicitations and promotions of the ATM Foreign Exchange Services to the Class "consumer transactions" as defined in the *BPCPA*?
- (c) With respect to the ATM Foreign Exchange Services, is Coast Capital a “supplier” as defined in the *BPCPA*?
- (d) Are the Class Members "consumers" as defined in the *BPCPA*?
- (e) Did Coast Capital engage in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services contrary to the *BPCPA*, as alleged in the amended notice of civil claim?
- (f) Did the representations and omissions have the capability, tendency or effect of deceiving or misleading the Class and therefore constitute deceptive acts or practices under s. 4 of the *BPCPA*?
- (g) Did Coast Capital gain because of the consumer transactions in which it made the deceptive and misleading representations and omissions?
- (h) if the Court finds that Coast Capital has engaged in deceptive acts or practices contrary to the *BPCPA*, should a declaration be granted that these acts or practices in engaged in by the Defendants in respect of consumer transactions contravene the *BPCPA*?
- (i) If the Court finds that Coast Capital has engaged in deceptive acts or practices contrary to the *BPCPA*, should an injunction be granted restraining Coast Capital from engaging or attempting to engage in those deceptive acts or practices?
- (j) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast

Capital be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

- (k) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast Capital restore or refund all Forex Surcharges that the Class paid, or disgorge all revenue which it made on account of the Forex Surcharge?
- (l) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should a monetary award be made in favour of the Class and, if so, in what amount?

Competition Act

- (m) Did Coast Capital make the representations and omissions to the public as particularized in the Statement of Claim?
- (n) If so, did Coast Capital breach s. 52 of the *Competition Act* and thereby commit an unlawful act because the representations and omissions:
 - (i) were made for the purpose of promoting the business interests of the Defendants;
 - (ii) were made to the public; and
 - (iii) were false and misleading in a material respect?
- (o) Did The Class suffer damages as a result of Coast Capital's unlawful breach of s.52 of the *Competition Act* and, if so, in what amount?
- (p) Is the Class entitled to their costs of investigation, pursuant to s. 36 of the *Competition Act* and, if so, in what amount?

Reliance

- (q) Are the Class Members required to prove detrimental reliance in order to establish that the Defendants are liable for breaches of the *BPCPA* or the *Competition Act*?
- (r) If so, can it be inferred that the Class Members acted reasonably and relied on Coast Capital's misrepresentations and failure to disclose to their detriment in making foreign currency ATM withdrawals outside Canada?

Breach of Contract

- (s) Is the Account Agreement a contract between Coast Capital and the members of the Class?
- (t) If so, is it a term of the Account Agreement that Coast Capital will use the Network Exchange Rates to convert funds belonging to the Class into foreign currency when providing ATM Foreign Exchange Services?
- (u) Did Coast Capital breach the Account Agreement?
- (v) If so, is Coast Capital liable to Class Members for breach of contract and, if so, in what amount?

Aggregate Damages

- (w) Can 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 the *Class Proceedings Act*, R.S.B.C. 1996, c. 50?

Punitive Damages

- (x) Is Coast Capital liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, how much?

Interest

- (y) What is the liability, if any, of Coast Capital for court order interest?

Distribution of Damages and/or Trust Funds

- (z) What is the appropriate distribution of any damages (including punitive or exemplary damages), restitution and/or trust funds and interest to the Class and who should pay for the cost attributable to that distribution?

1. *BPCPA*

[86] Proposed issues (a), (c), and (d) are common and suitable for certification.

[87] With respect to proposed issue (b), the plaintiff has not pleaded any material facts to support his allegation that Coast Capital solicited or promoted the Foreign Exchange Services, nor has he established any basis in fact from which I can conclude that this is an issue at all, much less a common issue. This issue is not certified.

[88] Proposed issues (e) and (f) are broadly worded and substantially overlap. However, I am satisfied that they are common issues and they are suitable for certification.

[89] Proposed issue (g) is not suitable for certification. A supplier's "gain" is irrelevant to claims under ss. 171 and 172 of the *BPCPA*. Both those sections deal with the consumer's *damage or loss*, not any gain by the supplier. Hence, the resolution of this issue will not advance the claim.

[90] Proposed issues (h) to (j) relate to declaratory and injunctive relief under s. 172. These issues are common and are certified.

[91] Proposed issue (k) appears to relate to a s. 172(3)(a) restoration order. This issue is common but will be certified in modified form, to reflect the language in s. 172(3)(a):

If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast Capital restore all Forex Surcharges that the Subclass paid?

[92] Proposed issue (l) appears to ask for damages pursuant to s. 171. The entitlement of Class Members to damages is common and this issue is certified.

2. Competition Act

[93] I have concluded that the plaintiff's *Competition Act* claim is not properly pleaded and therefore is bound to fail. Accordingly, proposed issues (m) to (p) are not certified.

3. Reliance

[94] I have concluded that reliance is not required for the plaintiff's *BPCPA* claims but that it is required for the *Competition Act* claim. There is no need to certify proposed issue (q).

[95] The plaintiff has provided no basis from which I could conclude that inferred reliance is a common issue, and therefore proposed issue (r) is not certified.

4. Breach of contract

[96] As the contracts at issue are of the standard form variety, proposed issues (s) through (v) are common and are certified.

5. Aggregate damages

[97] Subsection 29(1) of the *CPA* allows a court to make an aggregate monetary award order in certain circumstances:

- 29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
- (a) monetary relief is claimed on behalf of some or all class members,
 - (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
 - (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[98] To be certified as a common issue, the plaintiff must show that there is a reasonable likelihood that the preconditions in s. 29(1) would be satisfied and an aggregate assessment would be made if the plaintiffs are otherwise successful at the common issues trial: *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 44, leave to appeal to S.C.C. refused 2007 CanLII 50082.

[99] The plaintiff has provided no evidence and made no submissions with respect to this issue. As such, there is no basis in fact from which to conclude that the s. 29(1) preconditions might be met.

[100] Hence, this issue is not certified.

6. Punitive damages

[101] Punitive damages are awarded where the defendant's conduct "has been egregious, deliberate and intentional and so extreme in nature as to be deserving of condemnation and punishment and where compensatory damages alone would be

inadequate to punish the defendant for this conduct”: *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 77 at para. 31. Punitive damages must be considered in light of the other punishments faced by the defendant, because punitive damages should only be awarded if all other penalties are “found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation”: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 123.

[102] Punitive damages may be certified as a common issue where the assessment of the defendant’s conduct is focused on systemic wrongdoing against the class, rather than wrongdoing towards individual members: *Rumley v. British Columbia*, 2001 SCC 69 at para. 34. The question at the common issues stage is whether certification of punitive damage issues will avoid duplication of fact-finding or legal analysis: *Sherry v. CIBC Mortgage Inc.*, 2015 BCSC 490 at para. 20.

[103] In this case, I am satisfied that the issue of whether Coast Capital’s conduct warrants an award of punitive damages can be assessed on a class-wide basis without considering the circumstances of individual class members. This case involves a standard form contract and the defendant’s alleged wrongful conduct was systemic in nature. In this respect, it is similar to *Sherry*, where the issue of whether the defendant’s conduct was sufficiently reprehensible to warrant punishment was certified as a common issue.

[104] However, the quantum of punitive damages cannot be assessed until compensatory damages are assessed. This is because punitive damages are only available if all other penalties are inadequate to accomplish the objectives of retribution, deterrence and denunciation: *Whiten* at para. 123.

[105] Since entitlement to aggregate damages is not certified as a common issue, assessing damages will require individual claims unless the judge at the common issues trial decides that an aggregate damage award is appropriate.

[106] As such, I would adopt the bifurcated approach to punitive damages outlined in *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31:

31. Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be on the defendants' conduct, and there is nothing in this case that will require consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[107] Accordingly, the following issue will be determined at the common issues trial:

Do the acts and omissions of Coast Capital warrant an award of punitive damages?

[108] The Class' entitlement to punitive damages, and the quantum of any award, will be determined on a class-wide basis once the amount of any compensatory damages is determined (either at the common issues trial or following individual trials). The question at this stage will be:

If the acts and omissions of Coast Capital warrant an award of punitive damages, should an award of punitive damages be made against Coast Capital and, if so, in what amount?

7. Interest

[109] For the same reasons as for punitive damages, the issue of pre-judgment interest requires assessment of class member's entitlement to damages.

Accordingly, this issue can only be determined following the common and individual issues trials: see *Pollack v. Advanced Metal Optics Inc.*, 2011 ONSC 1966 at para. 66. Issue (y) is certified but will be determined once the issue of compensatory damages is determined.

8. Distribution of damages and/or trust funds

[110] This issue seems to presuppose the availability of an aggregate monetary award. Entitlement to an aggregate monetary award was not certified as a common issue. While the judge at the common issues trial may determine that an aggregate monetary award is warranted, it is premature at this stage to certify this issue. Accordingly, this issue is not certified.

D. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[111] The preferability analysis is governed and informed by s. 4(2) of the *CPA* and the three goals of class proceedings: access to justice, judicial economy and behaviour modification. The *CPA* sets the preferability test in relation to the resolution of the common issues and not the entirety of the class members' claims. A practical cost benefit approach is to be adopted with consideration of the impact of a class proceeding on class members, the defendant and the court.

[112] Section 4(2) requires consideration of all relevant matters including those set out under subsections (a)-(e):

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[113] The applicant must show some basis in fact to support preferability. The extent of the necessary evidence is governed by the circumstances of each case. Resolution of conflicts in facts and evidence is not required at the certification stage.

[114] The plaintiff points out that Mr. Finkel's losses for the 2013 withdrawals total \$11.42. Such claims cannot be pursued individually, but the claims for the proposed class as a whole may be sizable.

[115] The defendant submits that there is little to no commonality in the issues that must be determined; individual issues will predominate and certification holds no real advantages in terms of judicial economy and access to justice. The defendant itemizes the following individual investigations which militate against preference:

- (a) whether individuals opened a personal account for business purposes, and thus fall outside of all claims advanced;
- (b) whether individuals were in breach of the terms of their Account Agreement in relation to the use of their personal account or whether some or all of the Foreign ATM transactions were not for primarily personal, family or household usage, and if so, which ones;
- (c) whether individuals relied upon the impugned terms of the Account Agreement to their loss and detriment;
- (d) whether individuals were materially misled by the Account Agreement, or had actual knowledge of the conversion rate process actually employed to perform transactions;
- (e) whether individuals actually suffered loss or damage as a result of the proscribed conduct under the *BPCPA* or the *Competition Act* and if so, was such loss nominal or what was the measure of the loss or damage they actually suffered; and
- (f) whether any individuals performed an investigation under section 36(1) of the *Competition Act*, and if so, what costs, if any were reasonably related to that individual's investigation of Coast Capital's conduct.

[116] The defence submitted that there were also alternative remedies for the class, namely that class members could contact Coast Capital directly to resolve any

differences; or that the Director of the Consumer Protection BC could bring an action under the *BPCPA* following which individuals could claim remedies.

[117] The defendant also argues that as far as obtaining declaratory or injunctive relief is concerned, there is no need for a class proceeding; an individual seeking a declaration or injunction would have the same effect and provide precisely the same potential benefit to the putative class. An individual claim, it is argued, would be a far more “fair, efficient and manageable” method of resolving these claims. Further, Coast Capital argues that success on the common issues would have no tangible effect on behaviour modification as Coast Capital released a public announcement on September 1, 2015 that exhaustively describes the rate of conversion process on foreign ATM transactions.

[118] In terms of Coast Capital’s point that an issue can be resolved directly between the member and Coast Capital, the communications between Mr. Finkel and Coast Capital set out at the beginning of these Reasons do not support that proposition.

[119] In any event, the breach of contract and *BPCPA* claims can be determined without reference to the circumstances of any individual member. The common issues can be answered based on the conduct and circumstances of Coast Capital alone. The standard form contract and a fee schedule common to all class members is at the heart of the common issues.

[120] With respect to the breach of contract and *BPCPA* claim, a class proceeding would be fair, efficient, and manageable. Access to justice strongly favours a class proceeding, as it is unlikely that many plaintiffs would be able to bring individual claims given the small value of their losses. The common issues predominate over individual issues, and individual inquiries can be dealt with effectively should the applicant succeed at the common issues trial.

[121] The small value of the claims means that few if any class members have a valid interest in individually prosecuting separate actions. The claims here have not been the subject of any other proceeding.

[122] To conclude, a class proceeding is the preferable procedure for the resolution of the *BPCPA* and breach of contract claims.

E. Is there an appropriate representative plaintiff?

[123] Section 4(1)(e) of the *CPA* mandates that the representative plaintiff must be able to fairly and adequately represent the class, must produce workable a plan for advancing the proceeding, and must not have a conflict with the class on the common issues. The representative plaintiff must be prepared and able to vigorously represent the interests of the class.

[124] Coast Capital stated that it took no real issue with the qualifications of Mr. Finkel being the representative plaintiff only noting its earlier argument regarding whether Mr. Finkel qualified as a class member.

[125] I find that Mr. Finkel is qualified to be the representative plaintiff. I accept the submission that Mr. Finkel meets the requirements in that he has demonstrated that he is familiar with the substance of the issues and that he has taken the time to understand and commit to the role of representative plaintiff. A reasonable plan has been filed. He also has no conflict with the interests of the other class members on the proposed common issues.

V. CONCLUSION

[126] The action is certified as a class proceeding. A subclass will be created for the *BPCPA* claim. The common issues are those approved above. Mr. Finkel is appointed the representative plaintiff.

“The Honourable Mr. Justice Masuhara”