

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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RICHARD MERETSKY

Plaintiff

and

THE BANK OF NOVA SCOTIA

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Defendant

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE J. BROCKENSHIRE
on January 23rd, 2009,
at WINDSOR, Ontario

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APPEARANCES:

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H. Strosberg
P. Pape
M. Sclisizzi

Counsel for the Plaintiff
Co-Counsel for the Plaintiff
Counsel for the Defendant

1.
Reasons for Judgment - Brockenshire
S.C.J.

FRIDAY, JANUARY 23RD, 2009.

REASONS FOR JUDGMENT

BROCKENSHIRE, S.C.J. (Orally):

This is a motion brought before me for certification of this class action, to be followed immediately by approving settlement of the action at 24.2 million dollars in accordance with Minutes of Settlement, approving the agreements as to fees, disbursements and taxes, fixing the amount of counsel fees, fixing the amount to be paid to the class proceedings fund and making other ancillary orders, an important part of which is approving of a cy-pres distribution of some ten million dollars.

The basis of the action was, as Mr. Strosberg indicates, a claim on a contract of adhesion that the Bank of Nova Scotia, like other banks who participated in the Visa Credit Card system, had with its customers. Oddly Visa, certainly at that time, was sort of a cooperative organization. It is not even named as a party here, because each of the banks set out the contract terms to be applied on a Visa account with their bank. I think anybody who has ever had a credit card realizes that when you get it, you get a document that has many pages, with the finest print you can possibly imagine, setting out all the terms and conditions. One term and condition that was not

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put in this fine print was what the customer was going to be charged if the bank had to go through the effort of calculating the exchange on foreign currencies. It should have been because that was a charge that was being made. It got tucked away in the general cost of the currency exchange, but as is set out in some detail here, the currency exchange figures never really got to the customer. As has been found in other actions, there are wholesale exchange rates and retail exchange rates. There are of course administrative expenses involved with both. The bank simply did not let the customers know what charge was going to be made when they made a purchase in a foreign currency with the card, and as indicated in describing how this action started off, they found out when they took something back and asked that they be credited back on their credit card, and found out that there was a couple of dollars difference. These very small amounts that were incurred were incurred probably millions of times with a million and a half customers across Canada, and the best information the bank could gather by hiring outside consultants was that you came up with a very large number, but you could not nail down who particularly paid what where, without going through a tremendous amount of expense of going through each and every person's card account.

Also what happened here, which results in a huge cy pres amount, is that while the action was

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started as of 1987, for the reasons that have been set out and are found in the factum, this action has been hailed back for some eleven and a half years, during which time there has been a turn over of cards, and so that while you had approximately a million and a half customers alleging breach of is obligations by the bank, there are now less then half a million of those people that still have cards, so that you could easily identify them and credit them. The remaining million or so that dropped off are the ones which make up an amount which is going by cy-pres.

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I appreciate fully the reasons for holding this action back and using another action as a test case on the same sort of a circumstances and, I appreciate further from reading through the materials in the three volumes of the motion record that I originally received a week or so ago and then the final one, that the negotiations were not a simple task. I can appreciate difficulties on both sides because from the bank's point of view, I suppose it saw nothing morally wrong. It saw, if anything, if they put in notice about whatever charges they made for doing exchange calculations this would further clutter up an already cluttered document, and in any event, the amount was insignificant. From their point of view, I suppose they had and could point to, some expenses in doing exchanges. This was not sneaking through something that was pure profit to

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them. So they had arguments on their side, in addition to, I suppose, a number of other arguments they could raise in law. So getting this settled was not an easy task from either side.

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At the same time, litigating it, even despite what happened in Cassano v. Toronto-Dominion Bank, (2008) 87 O.R. (3d) 401 (C.A.) because of the factual differences between this case and that one, could end up with the kind of trial where there was a very substantial risk, success was not guaranteed, and also a very substantial risk that even if the pot of gold was going to be at the end of the tunnel, the tunnel was going to be long and hard and very expensive. So settlement of this action was a wise thing.

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As far as the certification matter here, as is set out in the factum at page 8, the whole purpose of the Class Proceedings Act is to give generous, broad, liberal and purposive interpretation to meet its three goals.

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Facilitating access to justice for claimants. Certainly here, anybody that had a loss of \$15.00, unless insane, was not going to try to pursue it through the courts. At the same time if you have a million and a half people who may have lost \$15.00, this is a very substantial amount. The Act prevents the "divide and conquer" approach that was being used before.

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The CPA permits common issues to be litigated in a single proceeding involving many claimants for reasons of judicial economy, and here it certainly proves its worth. The judicial economy has even gone so far, I understand, as having another class action which would have covered the same thing, simply being merged into this one, which saves further fees, expense and problems of trying to deal separately in British Columbia with what was going on in the rest of the country.

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And it facilitates access to justice. It deters wrongful conduct. I am sure that the bank has learned that it is very worthwhile to put an extra sentence into its fine print and pay the extra costs of mailing something that weighs a little more.

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The law is clear that although there is a consent to certification that still the court has to look at the case law and the statute concerning certification. However you look less rigorously when it is applied in settlement context.

The factum argues that the Court of Appeal's decision in Cassano in and of itself, justifies certification of this. Having read Cassano in the Court of Appeal and the decisions below at the trial level and the Divisional Court, I am not sure that the focus there was entirely on certification and if it was, it got into the theories behind it, to the extent that it is a

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little hard to simply take Cassano, and say it
applies every time you get something where a bank
made a mistake.

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However in Gilbert and Wortley v. C.I.B.C.
Justice Winkler in paragraph 8 I think summed up
as about as briefly as you can a ruling on
certification when he said:

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" I am satisfied that all of the elements
necessary for certification as a class
proceeding are present. Even where
certification is on consent the court must be
satisfied that the requirements of s. 5 of
the Act have been met. In the case at bar
the pleadings disclose the cause of action
within the meaning of Rule 21. there are
common issues as set out in the draft
20 judgment filed. The amounts of the
individual settlements to class members are
relatively small,..." (In that case from less
than a dollar to almost \$15.00, here made
even simpler by being \$15.00.)

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"...making it clear that a class proceeding
advances the goals of the Act of access to
justice and judicial economy. The size of
the overall settlement advances the goal of
behavioral modification. Accordingly, a
30 class proceeding is the preferable procedure
for the resolution of the common issues.
There are representative plaintiffs who meet

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5 the requirements of the CPA. Finally, there
is an identifiable class."

10 The class in this case is defined as all persons
anywhere in Canada who had a Bank of Nova Scotia
Visa Card before the date in question.

15 So I conclude, based on that very brief summary of
what the requirements of the act are that they
have all been met here and that this should be
certified as a class action.

20 Now as to whether or not the matter should be
approved, as is set out in the factum at paragraph
54:

"Section 29(2) of the CPA provides that an
agreement to settle a class proceeding must
be approved by the court.

25 The test for approving a settlement is
"whether the settlement is fair, reasonable
and in the best interests of the class as a
whole, not whether it meets the demands of a
particular member."

30 That was set out in Frohlinger v. Nortel Networks
Corp. [2007] O.J. No. 148 (S.C.J.) another decision
of Winkler, again before he became the Chief
Justice, at paragraph 8 of the judgment at page 5
where he said:

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"Settlement is to be encouraged in litigation. In a class action context, a settlement ought to be approved by the court where it is "fair, reasonable and in the best interest of the class as a whole". In determining whether a proposed settlement meets that test, a number of factors are to be considered, but these factors are guidelines rather than rigid criteria."

And he set out guidelines including:

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"(i) Likelihood of recovery or likelihood of success;
(ii) Amount and nature of discovery, evidence or investigation;
(iii) Settlement terms and conditions;
(iv) Recommendation and experience of counsel;
(v) Future expense and likely duration of litigation and risk;"

He has a couple here that do not apply. Like:

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"(vi) Recommendations of neutral parties, if any
(vii) Number of objectors."

But he does point to:

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"(viii) the presence of good faith, arms length bargaining and the absence of collusion;"

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He has one that does not apply here about:

"(ix) The degree and nature of communications by counsel and the representative plaintiffs and class members."

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Because due to the size here, there was no way of communicating other than setting up a system that anyone who wanted could phone or get on line and get information, and the information that was published in the papers from coast to coast saying that this matter has been resolved.

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Certainly here I have information conveying to the court the dynamics and the positions taken by the parties during the negotiations. This paragraph ends:

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"These factors provide a guide for analysis rather than a rigid set of criteria that must be applied in every settlement. In practice, it may well be the case that all of the factors are not applicable or, alternatively
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should not be given equal weight."

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In this case, as was the case with the certification, all of the various issues mentioned here, have all been dealt with in all the lengthy affidavits, the exhibits, and the submissions contained in the factum.

So looking at all of the materials that were filed

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and the submissions that have been made both in print in the factum and in the oral presentations, considering everything that was set out in all of the materials relating to the settlement, I have no hesitation at all in approving the settlement, and in fact indicating that to my mind it is a very good settlement indeed, both from the point of view of all of the customers of the bank who felt they were affected and from the point of view of the bank itself. Ending this litigation at this point is, in my view, acting at a point where the lawyers are satisfied that all of the possibilities have been fully explored. Going further would simply add to the expense, add to delay and would increase risks, or it would bring in risks over and above what already exists. So in my view, the settlement is perfectly proper and is approved.

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The issue of compensation for the lawyers is something that also is governed by the Class Proceedings Act. The Class Proceedings Act was, in Ontario, a breakthrough in that it allowed contingency fees for the first time. This was not great news elsewhere, and the contingency fee regime is now spread widely in Ontario and is backed up by its statute, but then was a new thing. Court approval was part of what the courts, I think, across the nation saw as necessary as some view contingency fees as something which are used by lawyers to take advantage of clients in some way. So the element of fairness and of

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appropriateness is something that the court is required to look at in relation to resolutions under the Class Proceedings Act.

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Here there was a clear provision in a retainer agreement that the fee would be 20 percent of total recovery plus taxes and that is what is being sought here. That amounts to 4,480,000.00 plus another \$242,000.00 in GST.

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As the factum says in paragraph 85, backed up by the affidavits:

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"From the inception of this litigation in 1997, the understanding between Mr. Meretsky and the lawyers was that they would be paid 20% of any recovery. The written fee agreement dated April 18th, 2002 signed by Mr. Meretsky and Mr. Pape, provides for a contingency fee payment of "20% of the settlement funds or monetary award, plus applicable taxes."

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A number of cases were referred to in relation to what you do when you are looking at approving fees. VitaPharm Canada Ltd. v. Hoffman-La Roche Ltd [2005] O.J.No. 1117 (S.C.J.) a decision of Mr. Justice Cumming sets out the factors that should be considered in a brief tabulation at paragraph 67 at page 16 of the decision:

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"Factors relevant in assessing the

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reasonableness of the fees of any class
counsel include the following:

(a) the factual and legal complexities of the
matters dealt with

(b) the risk undertaken, including the risk
that the matter might not be certified

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(c) the degree of responsibility assumed by
class counsel

(d) the monetary value of the matters in
issue

(e) the importance of the matters to the
class

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(f) the degree of skill and competence
demonstrated by class counsel

(g) the results achieved

(h) the ability of the class to pay

(i) the expectations of the class as to the
amount of the fees and

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(j) the opportunity cost to class counsel in
the expenditure of time in pursuit of the
litigation and settlement."

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Paragraph 107 of the same decision of Cumming, J.
says:

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"Using a percentage calculation in
determining class counsel fees properly
places the emphasis on the quality of
representation and the benefit conferred to
the class. A percentage-based fee rewards
"one imaginative brilliant hour" rather than
"one thousand plodding hours."

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5 With reference to one of the American cases on matters of this kind.

10 Here again on the basis of the affidavits, the exhibits, the submissions, both oral and written, which respond to all of the various factors that have been referred to in the case law, I approve the compensation asked and I fix class counsel fees at \$4,840,000.00 with GST of \$242,000.00, giving a total of I believe \$5,082,000.00 and I note that no payment of disbursements was claimed.

15 Cy-pres payments. Here we have a case where the amount being paid out in cy-pres is over the amount that is going to be paid to class members as such. In one of the cases, I think it was Gilbert, I am not sure, there was a cy-pres amount, but it was a relatively small amount, about a million dollars. But in this one, because of the circumstances and simply because of the difficulty of tracking down all of the people whose cards have changed or expired or have been cancelled or whatever in the meantime, you wound up with a pot of money for which finding the owner is just simply practically impossible. So it becomes necessary to deal with those funds under the cy-pres approach. That originally was an estate law doctrine to handle what happens when what the beneficiary provided for was not there, so you try to look to what the beneficiary would have thought appropriate. I understand the bank took a very serious interest in what would be done

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with these funds and pressed for using most of it
for cancer research in one way or another.

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I think it is obvious that cancer is something
that affects many, and that beyond the ones that
are directly affected there is no one that can say
that he does not know anybody who has had cancer.
So picking on that as something to be appropriate
to cover, and assist by a cy-pres distribution is
to my mind something which would be of general
benefit to everyone in Canada. Certainly it will
be of general benefit to all of the customers of
15 the Bank of Nova Scotia and I have no hesitancy in
approving the cy-pres payments.

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The plan for distribution calls for confirmation
that the funds going out are going as intended and
that I think adds to the approval of the plan for
distribution.

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So having said that, the cy-pres distributions
that are set out in the agreement on compound
distribution and are referred to and set out in
the draft judgment are approved.

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That I think covers all of the essential parts of
the draft judgment.

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FORM 2
CERTIFICATE OF TRANSCRIPT
(SUBSECTION 5(2))

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EVIDENCE ACT

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I, Janis Farrell, certify that this document is a true and accurate transcript of the recording of Meretsky v. Bank of Nova Scotia in the Superior Court of Justice, held at 245 Windsor Avenue, Windsor, Ontario, taken from Recording No. Brockenshire 22/2009, which has been certified in Form 1.

January 23rd, 2009.

"Janis Farrell"

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Janis Farrell

CERTIFIED COURT REPORTER

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TRANSCRIPT ORDERED: January 23rd, 2009.
TRANSCRIPT COMPLETED: January 23rd, 2009.
PARTY NOTIFIED: February 5th, 2009.