

CITATION: Bernstein v. Peoples Trust Company, 2017 ONSC 752
COURT FILE NO.: CV-13-493837CP
DATE: 20170131

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
JOYCE BERNSTEIN)	<i>Louis Sokolov, and Nadine Blum for the</i>
)	Plaintiff
)	
Plaintiff)	
)	
– and –)	
)	
PEOPLES TRUST COMPANY and)	<i>Lawrence Thacker, Constanza Pauchulo and</i>
PEOPLES CARD SERVICES LLP)	<i>Patrick Healy for the Defendants</i>
)	
Defendants)	
)	
)	
)	
Proceeding under the <i>Class Proceedings Act, 1992</i>)	HEARD: January 17 and 18, 2017
)	

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Joyce Bernstein brings a proposed class action against Peoples Trust Company and Peoples Card Services LLP (collectively “Peoples Trust”). The action is brought on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, who purchased or acquired a prepaid payment card sold or issued by Peoples Trust Company between October 1, 2007 and April 30, 2014.

[2] Ms. Bernstein alleges breach of contract claims and she alleges that Peoples Trust perpetrated an unfair practice under the *Consumer Protection Act, 2002* and also breached the Gift Card Regulations in *O. Reg. 17/05 (General)*, a regulation enacted pursuant to the *Act*, and she moves for certification of her action as a class action.

[3] Peoples Trust resists certification, and its main arguments are that its prepaid payment cards are not subject to the *Consumer Protection Act, 2002* or if the *Act* applies, then its cards are exempt pursuant to the exceptions contained in the *Act*. From these main arguments, there are subsidiary arguments to the effect that all of the criteria for certification are not satisfied.

[4] For the reasons that follow, I do not agree with Peoples Trust's arguments, which are substantive merits arguments that may or may not ultimately succeed, but which at this juncture do not prevent the action from being certified. With a qualification to the class definition, I certify Ms. Bernstein's action as a class action.

[5] As the discussion below will reveal, Ms. Bernstein's case has some similarity to *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916 (certification), leave to appeal refused, 2013 ONSC 7529 (Div. Ct.); *Sankar v. Bell Mobility Inc.*, 2015 ONSC 632 (summary judgment), aff'd 2016 ONCA 242, leave to appeal remanded to the Court of Appeal (for disposition in accordance with *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37), [2016] S.C.C.A. No. 251. In *Sankar*, the action was certified and subject to what may happen on the remand to the Court of Appeal, the certified action was dismissed. The *Sankar* saga reveals the difference between the certification of an action and a determination of the merits of the action.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background to the Proposed Class Action

(a) The Parties

[6] Ms. Bernstein is an epidemiologist that lives in Toronto, Ontario.

[7] Ms. Bernstein brings a proposed class action on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*, who purchased or acquired a prepaid payment card sold and/or issued by Peoples Trust between October 1, 2007 and April 30, 2014, which is the class period for the proposed class action.

[8] With respect to the class period, it may be noted that October 1, 2007 is the date that *O. Reg. 17/05* came into force, and April 30, 2014 is the day before the federal *Prepaid Payment Products Regulations (SOR/2013-209)* came into force.

[9] Peoples Trust Company is a trust company providing financial services. It is incorporated and regulated under the federal *Trust and Loan Companies Act*, S.C. 1991, c. 45.

[10] Peoples Card Services LLP is a limited liability partnership under the laws of British Columbia. Its general partner is Peoples Card Services Ltd., which is a subsidiary of Peoples Trust Company. The limited partnership manages, among other things, the relationships with the distributors of Peoples Trust's prepaid payment cards that allow access to the Visa or MasterCard payment networks.

(b) Prepaid Payment Cards

[11] Prepaid payment cards are similar to credit cards in their utility in paying for goods and services but without any extension of credit. With a prepaid payment card, no credit is advanced; rather, the face value of the payment card is pre-paid and deposited with the issuer of the card, in this case, Peoples Trust, which, in turn, provides the purchaser of the card with access to a credit card company's payment network (visualize Visa or MasterCard). The issuer of the payment card (Peoples Trust) earns revenue by charging fees against the payment card.

[12] Pursuant to licences granted by Visa and MasterCard, between October 1, 2007, which is the date that *O. Reg. 17/05* came into force, and April 30, 2014, which is the date before the coming into force of the federal *Prepaid Payment Products Regulations (SOR/2013-209)*, Peoples Trust sold or issued prepaid payment cards. The holders of the prepaid cards could make purchases from merchants that accepted Visa or MasterCard credit cards.

[13] When a payment card issued by Peoples Trust is purchased, Peoples Trust deposits the purchase money into a pooled account for the benefit of the credit card company. When the holder of the prepaid payment card uses the card to make a purchase, Peoples Trust transfers funds from the pooled account to Visa or MasterCard via the Visa or MasterCard payment network. Without necessarily knowing the identity of the cardholder, Peoples Trust has records of the history of debits and credits made with respect to each particular card that it issues.

[14] There is no dispute that Ms. Bernstein's action does not involve what are known as "closed-loop" payment cards, which are payment cards that can be used to purchase goods from a specific merchant or a defined (closed) proprietary association of merchants, such as those in the same shopping centre. Rather, Ms. Bernstein's action involves "open-loop" payment cards, which are also called "universal-loop" payment cards that provide access to a payment network like Visa or MasterCard.

[15] The features of open-loop payment cards are: (a) they are issued by regulated financial institutions that have been approved by internationally branded payment networks such as Visa or MasterCard; (b) they operate as a tender or a cash replacement card accepted by and capable of paying any merchant accepting Visa or MasterCard, including online and cross-border transactions; (c) they contain no lift factor and generate no sales margin for the issuing financial institution; (d) the issuers of the cards rely on fees to support the program; (e) the cards have a higher cost structure than credit cards; (f) the payment cards can be used as personal spending cards for those unable to acquire traditional credit cards, or those attempting to limit credit card spending or to budget expenditures; and (g) payment cards can be used but are less frequently used as gifts than are the closed-loop cards.

[16] Peoples Trust employed distributors to market its prepaid payment cards, which commonly were sold by retailers such as drug stores and convenience stores as a type of gift card. The cards were also distributed by payday loan companies.

[17] Peoples Trust distributed two types of payment cards: (1) single load cards; and (2) multiple load cards, general purpose reloadable cards. Both types of cards have a face value of funds available for the purchase of goods and services. Both cards are used as a substitute for cash payments; i.e., as legal tender similar to a credit card. The principal difference between single load and multiple load cards is that reloadable cards can be refreshed with additional funds.

[18] When a single load payment card is purchased from one of Peoples Trust's distributors, the distributor activates the card but does not capture information about the identity of the purchaser of the card. In contrast, when a multiple load card is purchased, information about the purchaser is captured. Multiple load cards require the cardholder to enter a personal identification number (a PIN number) to permit cash withdrawals from ATMs (Automated Teller Machines).

[19] Upon purchase, every prepaid payment card (single or multiple load) is accompanied by a written cardholder agreement that governs the use of the card. The key terms and conditions in the cardholder agreement, including all fees and expiry dates, are printed on the cards and are also available on a website, whose address is printed on each card. The prepaid payment cards include a signature line that must be signed. This signature confirms the acceptance by the purchaser, at the time of purchase, of the terms and conditions that apply to the card.

[20] During the class period, the single load cards were subject to an activation fee, which was a fee paid at the point of purchase and that was paid in addition to the face value of the card. The payment of the activation fee confirms the acceptance of the terms and conditions governing the use of the card. The activation fee varied with the value of the card, and, in general, the higher the value of the card, the higher the activation fee. The payment cards were also subject to a monthly fee described as an administration, maintenance, service, or dormancy fee. The cards were also subject to a foreign exchange fee of 2.5%.

[21] The single load cards were subject to a "valid thru" date, which was an expiry date after which the balance on the card was forfeit or subject to a "cancellation fee" equivalent to the balance remaining on the card.

[22] After July 1, 2012, which was when an amended agreement was introduced, a cardholder could request a new card after the "valid thru" date, in which case, Peoples Trust would replace the expired card and credit the new card with the balance that was remaining on the expired card. However, if the cardholder did not apply, practically speaking, the balance on the card was forfeit to Peoples Trust.

[23] The multiple load cards were also subject to activation fees, foreign exchange fees, and monthly "administrative" or "maintenance" fees. Further, these cards were subject to additional fees, including "refund processing fees," "reload fees," which were fee charged to add additional funds to a card, and "customer service" or "inquiry fees," which were fees charged for inquiries about the balance on the card.

[24] Every multiple load card had an "expiry date." Until 2014, if a multiple load card had less than \$10 remaining on the expiry date, or where there was more than \$10 remaining on the card, but the cardholder failed to request a replacement card two weeks before the expiry date, Peoples Trust claimed and kept the remaining balance on the card.

[25] Effective July 1, 2012, Peoples Trust stopped charging any maintenance fees on its best-selling products, the Vanilla Visa Card and the Vanilla MasterCard. After that date, the only fees imposed were activation fees and foreign exchange fees. The value attached to these prepaid payment cards has no expiry date and Peoples Trust remains liable for the full value of the cards.

[26] Peoples Trust submits that the primary purpose of its prepaid payment cards is to provide a cash replacement service that is accepted globally for in-person, online, or telephone purchases of goods and services. Both types of Peoples Trust's cards can be used as gifts, although the multiple load cards are rarely gifted.

[27] The prepaid payment cards were promoted and referred to as a gift product in Peoples Trust's marketing materials. For example, Peoples Trust's website noted the utility of prepaid payment cards as gifts and its annual reports stated that the prepaid payment cards were "excellent for gift giving as they do not limit the recipient to a particular vendor or brand name."

(c) Peoples Trust's Recordkeeping

[28] When a prepaid payment card is activated, Peoples Trust would be notified by the processing network of the particular card by its number. As noted above, when a single load prepaid payment card is purchased, Peoples Trust does not know the identity of the purchaser. It would be able to identify the purchasers of single load only if they reported a lost card or if they asked for a replacement card after the "valid thru" date.

[29] When a multiple load prepaid payment card is purchased, Peoples Trust knows the identity of the purchaser, because the purchaser is required to show identification at the time of purchase.

[30] As noted above, the face amount of the card is deposited in Peoples Trust's pooled account. As the cardholder made purchases, Peoples Trust withdraws money from the pooled account and pays the Visa or MasterCard network. As fees are charged, they are withdrawn from the pooled account and the card is debited. Thus, Peoples Trust has records of the deposits and withdrawals from the pooled account and of payments to it of its fees and charges. Where money is forfeited after an expiry date, that money was withdrawn from the pooled account and the card was debited.

(d) Legislative Background

[31] In her Statement of Claim, Ms. Bernstein pleads that Peoples Trust is a "supplier" within the meaning of the *Consumer Protection Act, 2002* and that the prepaid cards issued by Peoples Trust are "gift cards", and that the agreements pursuant to which these cards are purchased are "future performance agreements" and "open-loop gift card agreements."

[32] The relevant provisions from the *Consumer Protection Act, 2002* are set out in Schedule "A" to these Reasons for Decision. The relevant provisions of *O. Reg. 17/05 (General)* are set out in Schedule "B" to these Reasons for Decision.

(e) Ms. Bernstein's Personal Claim

[33] In September 2010, a friend gave Ms. Bernstein one of Peoples Trust's prepaid payment cards. It was branded with the name "Vanilla Prepaid Visa." It had a face value of \$35 and stated that it was "valid thru 04/14."

[34] Ms. Bernstein did not use the card for any purchases, and in September 22, 2013, she visited the website www.visaprepaidcanada.com, which was listed on the back of her card, and she learned that her account balance was zero. She learned that on the 26th of each month \$2.50 had been deducted from the balance of the card and these deductions had depleted the balance on her card.

[35] The service fee policy, was printed on the reverse side of Ms. Bernstein's card in 5-point font and stated:

Except where prohibited by law, a service fee of \$2.50 per month will be applied to the remaining balance on the Card, beginning the 7th month from the date of purchase. By buying or accepting this Card you agree to be bound by the Cardholder Agreement, as amended from time to time.

[36] On November 29, 2013, Ms. Bernstein commenced this proposed class action.

2. Ms. Bernstein's Claims in the Proposed Class Action

[37] In her Statement of Claim, Ms. Bernstein advances four causes of action; namely: (1) a statutory cause of action for violations of the *Consumer Protection Act, 2002*; (2) a common law breach of contract claim based on the violations of the *Consumer Protection Act, 2002*; (3) breach of contract under the common law for charging unenforceable fees; and (4) an unjust enrichment claim.

[38] Ms. Bernstein pleads that the standard form agreements make the cards subject to a variety of fees that are contrary to the *Consumer Protection Act, 2002* and *O. Reg. 17/05* and constitute an "unfair practice" under the *Act*. She alleges that the following fees are illegal: (a) activation fees; (b) dormancy (monthly maintenance) fees; (c) transaction/point of sale fee for each transaction; (d) insufficient funds/decline fee; (e) reload fee; (f) customer service/inquiry fee; (g) refund processing fee; (h) PIN change fee; (i) ATM withdrawal fee; (j) re-activation fee; (k) foreign exchange fee; and (l) overdraft fee. She pleads that the cards that are subject to an expiry date contravene s. 25.3(1) of *O. Reg. 17/05* and that the forfeiture of funds is an illegal charge of fees and is an unfair practice under the *Consumer Protection Act, 2002*. Ms. Bernstein pleads that the charging of illegal fees is a breach of the standard form agreement with the respective members of the class. In the alternative, she pleads that the terms of the standard form agreements are not enforceable as they are placed inside of the packaging and thus, on a class-wide basis, are not brought to consumers' attention until after the purchase and are, therefore, unenforceable post-contractual representations.

[39] Ms. Bernstein pleads that the failure to indicate on the front of the card that there is fee information on the back of the card contravenes s. 25.4(2.1)(c) of *O. Reg. 17/05* and is an unfair practice under the *Consumer Protection Act, 2002*, and she pleads that the failure to set out clearly and prominently on the back of the card the terms associated with the monthly dormancy fee contravenes s. 25.4(2.1)(d) of *O. Reg. 17/05* and is an unfair practice.

[40] Ms. Bernstein advances an unjust enrichment claim and pleads that when Peoples Trust receives illegal fees or forfeits funds it is unjustly enriched and there is no juristic reason for the enrichment.

C. DISCUSSION AND ANALYSIS

1. The General Principles for Certification

[41] The court is required to certify an action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[42] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[43] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[44] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, *supra* at paras. 15 and 16.

[45] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, *supra* at paras. 28 and 29. However, the plaintiff must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, *supra* at paras. 16-26.

[46] In particular, there must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140. In order to establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members: *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.

2. Cause of Action Criterion

(a) General Principles

[47] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[48] Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), *aff'd* (2004), 70 O.R. (3d) 182 (Div. Ct.).

[49] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be

unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, *supra* at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

3. Is the Cause of Action Criterion Satisfied?

(a) The Positions of the Parties

[50] The cause of action theory of Ms. Bernstein's proposed class action is as follows:

- She and the Class Members are consumers under the *Consumer Protection Act, 2002*. In the *Act*, 'consumer' "means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes."
- In purchasing or obtaining a prepaid payment card, she and the Class Members entered into consumer agreements with Peoples Trust. In the *Act*, 'consumer agreement' "means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment."
- In distributing prepaid payment cards, Peoples Trust was a supplier and an actor in a consumer transaction. In the *Act*, 'supplier' "means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier." In the *Act*, 'consumer transaction' "means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement."
- Peoples Trust's prepaid payment cards are gift cards, which are subject to the gift card regulations found in *O. Reg. 17/05*. Under the regulation, 'gift card' "means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher." Under the regulation, 'gift card agreement' "means a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement." Under the *Act*, a 'future performance agreement' "means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement." Under the regulation, 'open-loop gift card agreement' "means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers."
- Peoples Trust prepaid payment cards contravene *O. Reg. 17/05* by charging a variety of fees contrary to *O. Reg. 17/05* and in particular sections 25.3(1), 25.4(1)(b), 25.4(2)(a), 25.4(2.1)(c) and (d), of the regulation and these contraventions constitute an unfair practice under the *Act*.
- Independent of whether there is a contravention of *O. Reg. 17/05*, the distribution of Peoples Trust's prepaid payment cards are an unfair practice contrary to s. 14 of the *Act*, because Peoples Trust makes a "false, misleading or deceptive representation" and also

contrary to s. 15 of the *Act*, because Peoples Trust makes an “unconscionable representation.”

- Under s. 14(2), para. 14, a false, misleading or deceptive representation includes “a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.”
- Under s. 15(2)(e), in determining whether a representation is unconscionable, the court may consider “that the consumer transaction is excessively one-sided in favour of someone other than the consumer. Under s. 15(2)(f), in determining whether a representation is unconscionable, the court may consider “that the terms of the consumer transaction are so adverse to the consumer as to be inequitable.”
- By charging illegal fees, Peoples Trust breaches its contract with the consumer purchasers of its prepaid payment cards. In the alternative, the terms of the contract are not enforceable because they are not brought to the consumer’s attention until after purchase and, therefore, the fees are unenforceable post-contractual representations.
- By charging and seizing illegal fees, Peoples Trust is unjustly enriched and there is no juristic reason for the enrichment.

[51] Peoples Trust submits, however, that the cause of action criterion is not satisfied because:

- Its prepaid payment cards are exempt from the operation of the *Consumer Protection Act*, 2002; and *O. Reg. 17/05*.
- The cards are not gift cards governed by the legislation.
- The cardholder agreements are not gift card agreements under the legislation.
- The cards do not involve future performance contracts because performance in full is complete at the time of purchase.
- The cards are a single service, which is expressly exempt by section 25.1(b) of *O. Reg. 17/05*.
- There have been no unfair practices within the meaning of the *Consumer Protection Act*, 2002.

[52] Peoples Trust also submits that because of the operation of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, the commencement of the class period cannot be October 1, 2007 and should be November 29, 2011, which is two years before the commencement of Ms. Bernstein’s proposed class action.

[53] For the reasons set out below, I disagree with Peoples Trust’s arguments that the cause of action criterion has not been satisfied. All of Peoples Trust’s arguments are essentially merits arguments about statutory interpretation, and the arguments do not pole vault over the very high bar of showing that it is plain and obvious that Ms. Bernstein and the Class Members do not have a reasonable cause of action. Moreover, the merits arguments will require an evidentiary foundation not available by simply assuming that the facts contained in the Statement of Claim are true. For the reasons set out below, in my opinion, Ms. Bernstein has satisfied the first criterion for certification of her action as a class action.

(b) Are the Cards Exempt as Financial Products?

[54] Peoples Trust submits that all of Ms. Bernstein's causes of action presuppose that the *Consumer Protection Act, 2002* applies to Peoples Trust but that it is plain and obvious that the *Act* does not apply to it. More precisely, Peoples Trust argues that its prepaid payment cards are a financial service product and s. 2(2) of the *Consumer Protection Act, 2002* expressly provides that the *Act* does not apply to financial products and services regulated under the *Loan and Trust Corporations Act (Ontario)*, R.S.O. 1990, c. L.25. Although the exemption refers to trust companies governed by provincial legislation, Peoples Trust argues that this exemption should be extended or applied by analogy to corporations like itself that are incorporated under the federal counterpart to the provincial legislation.

[55] Peoples Trust's argument is a matter of statutory interpretation about the scope or reach of the *Consumer Protection Act, 2002* and breaking it down, Peoples Trust is confronted with a very complex and challenging exercise of statutory interpretation. To succeed in its argument that it is exempt under s. 2(2) of the *Act*, Peoples Trust must persuade a court not only that its prepaid payment cards are a "financial service product", which is not a defined term under the *Act*, but that it's financial service is regulated **as if** under the *Loan and Trust Corporations Act (Ontario)*. I say "as if" regulated under the *Loan and Trust Corporations Act (Ontario)* because Peoples Trust is regulated by federal legislation and not by this provincial statute. The circumstance that Peoples Trust is not a provincial loan and trust company explains why it must argue that the exemption found in s. 2(2) of the *Consumer Protection Act* applies by analogy to it.

[56] However, this argument by analogy does not end the complexities confronting Peoples Trust's argument. Assuming Peoples Trust succeeds as far as showing that its prepaid payment cards qualify a financial service product under the *Consumer Protection Act, 2002*, Ms. Bernstein submits that in application or operation, the exemption found in s. 2(2) of the *Act* never became operational because its purpose was to oust the *Act* only if the financial service product was regulated by other legislation, which did not occur until the federal government's *Prepaid Payment Products Regulations (SOR/2013-209)* came into force.

[57] Mercifully, for present purposes, I do not have to decide these challenging problems of statutory interpretation, including the parties' respective arguments about the role played by government announcements and debates in the Legislature about the legislation, because the one thing that can be said is that it is not plain and obvious that Peoples Trust qualifies for the exemption found in s. 2(2) of the *Act*.

(c) Are the Cards Gift Cards and are the Cardholder Agreements Gift Card Agreements under the Consumer Protection Act, 2002?

[58] Under the *Consumer Protection Act, 2002*, a "gift card agreement" is "future performance agreement," which is defined as "a consumer agreement in respect of which delivery, performance or payment in full is not made when parties enter the agreement." Peoples Trust argues that the agreement for a prepaid payment card is an agreement for access to a cash replacement service or payment network and performance of the contract is complete at the time the parties enter the agreement. In other words, Peoples Trust submits that the agreement between Peoples Trust and the purchaser of the prepaid payment card is not a future performance

agreement and its cards do not qualify as a gift card agreement under the *Consumer Protection Act, 2002*.

[59] In its argument that its prepaid payment cards are not a future performance agreement, Peoples Trust contrasts its card, which provides access to the Visa or MasterCard payment network, to a prepaid payment card offered by a restaurant where the service; i.e., the supply of a dinner is a future act to be performed by the restaurateur. Peoples Trust argues that upon activation, its card immediately provides access to the Visa or MasterCard payment network and, therefore, Peoples Trust has no future act to perform.

[60] Peoples Trust's argument is a reasonably strong argument and at first blush it is supported by the Court of Appeal's summary judgment decision in *Sankar v. Bell Mobility Inc. supra*, of which I will have more to say shortly, but *Sankar*, which involved access to a communications network, may be distinguishable, and, moreover, in my opinion, it is not plain and obvious that Peoples Trust's argument is correct and so strong as to deny Ms. Bernstein and her fellow Class Members a cause of action at this early juncture.

[61] While Peoples Trust's argument that its single and multiple load cards are not future performance agreements may ultimately prevail, nevertheless, for present purposes, the argument has at least three frailties.

[62] First, using Peoples Trust's example of the restaurateur's prepaid payment card, it seems at least anomalous, and especially anomalous for Peoples Trust's single load cards, that the Legislature intended the *Consumer Protection Act, 2002* to protect consumers that purchase a \$50 prepaid payment card from a restaurateur but did not intend to protect consumers that purchase a \$50 prepaid payment card with the idea of using it to pay for a meal at a restaurant in the future.

[63] Second, in *Jiang v. Peoples Trust Co.*, 2016 BCSC 368, another case of which I shall have more to say below, Peoples Trust was a party, and in that case, Peoples Trust's prepaid payment cards were found to be subject to British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, which while not identical, is quite similar to Ontario's *Consumer Protection Act, 2002*.

[64] Third, the Court of Appeal's decision in *Sankar v. Bell Mobility Inc. supra*, upon which Peoples Trust relies in making its argument may be distinguishable.

[65] For present purposes, I need say nothing more about the first frailty and turn to analyze *Jiang v. Peoples Trust Co.*, which is an important case with respect to the cause of action criterion and also with respect to the other certification criteria, most especially the class identification criterion.

[66] In *Jiang v. Peoples Trust Co.*, *supra*, Ms. Jiang brought a proposed class action in British Columbia against Peoples Trust, and like Ms. Bernstein in the case at bar, Ms. Jiang's central allegation was that Peoples Trust's prepaid payment cards contravened consumer protection legislation.

[67] In *Jiang*, Justice Bowden dismissed the certification motion. He decided that Ms. Jiang's proposed class action satisfied the cause of action criterion, the common issues, the preferable procedure, and the representative plaintiff criteria, but relying on *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 and *Unlu v. Air Canada*, 2015 BCSC 1453, he concluded that it could not be objectively determined whether or not a person acquiring a prepaid

payment card acquired the card as a consumer. But it is to be noted that Justice Bowden did not refuse certification on the basis of the cause of action criterion.

[68] In reaching his decision in *Jiang v. Peoples Trust Co.* that the cause of action criterion was satisfied, as a matter of statutory interpretation, Justice Bowden concluded that Peoples Trust provided the service of supplying payment services by providing access to a payment network and that the prepaid payment cards were issued in exchange for the future supply of services to a consumer. Thus, on the cause of action criterion, *Jiang v. Peoples Trust Co.* stands against Peoples Trust's arguments in the immediate case that there is no cause of action.

[69] Turning to the third frailty in Peoples Trust's cause of action argument, this brings the analysis to the *Sankar* saga that begins with Justice Belobaba's decision: *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916 (certification), leave to appeal refused, 2013 ONSC 7529 (Div. Ct.).

[70] In *Sankar*, the defendant Bell Mobility provided prepaid phone cards under the brands Bell Mobility, Virgin Mobile, and Solo Mobile and Ms. Sankar purchased a prepaid wireless phone card from Virgin Mobile. On behalf of purchasers of these prepaid phone cards, which allowed the purchaser minutes of wireless usage, Ms. Sankar brought a proposed class action against Bell Mobility.

[71] Ms. Sankar's proposed class action was two-branched. One branch was a breach of contract claim about Bell Mobility's practice of forfeiting the unused minutes of calling time if the cards were not topped up after a specified period. The first branch was on behalf of both persons who purchased prepaid phone cards primarily for business purposes and also persons who were consumers under the *Consumer Protection Act, 2002*. The second branch, for which Justice Belobaba created a sub-class, was on behalf of just consumers, and this branch alleged contraventions of the *Act* that amounted to breaches of contract and also unfair practices under the *Act*. Both branches advanced unjust enrichment claims.

[72] With respect the certification criteria, Justice Belobaba concluded that Ms. Sankar satisfied the cause of action criterion for the breach of contract claim and she had an unjust enrichment claim for both branches of her claims against Bell Mobility. Justice Belobaba, however, concluded that there was no claim under the unfair practices provisions of the *Consumer Protection Act, 2002*. He concluded that the other certification criteria were satisfied, and he certified the class action.

[73] Pausing here in the discussion, I shall pass over for the moment Justice Belobaba's conclusions about unfair practices and not lose the focus of the immediate discussion, which is on Peoples Trust's argument that it is plain and obvious that its prepaid payment cards are not gift cards under the *Consumer Protection Act, 2002* and note that this is a merits argument, to which in the context of the *Sankar* case, Justice Belobaba's response was set out at paragraphs 43 and 44 of his decision where he stated:

43. It is not my task at this stage to decide the merits of these submissions. It is enough to note that the "gift card" cause of action is novel. There are no cases directly on point. I am unable to say that this cause of action has absolutely no chance of success and that it is plainly and obviously bound to fail.

44. In my view, the breach of contract (gift card regulation) cause of action clears the s. 5(1)(a) hurdle.

[74] Following the certification motion and after Justice Moore dismissed Bell Mobility's

motion for leave to appeal to the Divisional Court, both parties moved for summary judgment on the two major common issues of Ms. Sankar's two-branched claims.

[75] On the summary judgment motion, in the result, now addressing the merits and not just whether the claims were certifiable, Justice Belobaba dismissed Ms. Sankar's class action. On the first branch, Justice Belobaba interpreted the Bell Mobility standard form contracts and concluded that their terms had not been breached. On the second branch, Justice Belobaba concluded that *O. Reg. 17/05* applied only to the prepaid phone cards that were genuinely gifted; i.e., where the card was purchased as a gift for a third party; however, in such cases, there was no breach of the regulation because none of the Bell Mobility cards had expiry dates. In any event, even if the regulation was not limited to gifted cards, in Justice Belobaba's opinion, Bell Mobility was entitled to the exemption in s. 25.1(b) of *O. Reg. 17/05* because the cards were for "only one specific good or service" namely, access to Bell's wireless network.

[76] Ms. Sankar appealed to the Court of Appeal, which in a judgment written by Chief Justice Strathy, dismissed the appeal. On the first branch, the Chief Justice agreed with Justice Belobaba's interpretation of the standard form contract.

[77] On the second branch, which concerns the alleged breaches of the *Consumer Protection Act, 2002* and which is the branch of immediate interest to the case at bar, Chief Justice Strathy expressly did not find it necessary to address the issues of: (a) whether *O. Reg. 17/05* applies only to prepaid phone cards purchased as gifts; and (b) whether Bell Mobility was entitled to the single service exemption. On the second branch, Chief Justice Strathy also did not opine on whether the prepaid phone cards were future performance contracts. Rather, on the second branch, Chief Justice Strathy affirmed Justice Belobaba's judgment on the grounds that *O. Reg. 17/05* did not prohibit an agreement being time-limited and the regulation's purpose was to prevent an agreement expiring before the supplier had performed the promised service. In the *Sankar* case, it was Chief Justice Strathy's opinion that class members received the full period of the wireless service promised and, therefore, there was no breach of contract.

[78] The *Sankar* saga did not end with the Court of Appeal's decision, but pausing here in the analysis, it emerges that on a close reading of the various decisions, apart from Justice Belobaba's conclusions that *O. Reg. 17/05* applies only to prepaid cards purchased as gifts and his conclusion that the single service exemption was available, of which Chief Justice Strathy did not feel the need to comment, the *Sankar* decisions do not provide a plain and obvious legal conclusion that Ms. Bernstein's and the Class Members' claims are doomed to failure.

[79] In particular, in my opinion, Justice Belobaba's conclusion that *O. Reg. 17/05* applies only to cards that are gifted is worthy of being revisited. In this regard, returning to the example above of the restaurateur that issues a \$50 prepaid payment card, if it charged fees or otherwise contravened *O. Reg. 17/05*, it strikes me as at least odd that there is no violation of the *Act* unless the purchaser gives the card away.

[80] My assessment is that at this juncture of the case at bar, the *Sankar* decisions are not dispositive of the immediate case. This assessment is somewhat fortified by the circumstance that the *Sankar* saga is not done. Ms. Sankar sought leave to appeal to the Supreme Court of Canada, and in response to that request, the Supreme Court remanded the case to the Court of Appeal for disposition in accordance with *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, a case in which the Supreme Court provides guidance about the standard of appellate review where the issue is the interpretation of a standard form contract.

[81] I acknowledge that *Ledcor Construction Ltd.* is not a case about the *Consumer Protection Act, 2002*, so the remand of *Sankar* to the Court of Appeal may ultimately not be helpful in any way to the parties of the immediate case, but the point remains that *Sankar* may be distinguishable from the case at bar. I conclude that it is not plain and obvious that Peoples Trust's prepaid payment cards are not subject to the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.

(d) Are the Cards Exempt under s. 25.1(b) of the Regulation as a Single Service?

[82] Section 25.1(b) of *O. Reg. 17/05* provides that sections 25.2 to 25.5 of *O. Reg. 17/05* does not cover a gift card for only one specific good or service. Peoples Trust argues that its prepaid payment cards are entitled to the exemption found in s. 25.1(b).

[83] Again, this is a merits argument of statutory interpretation that is very similar to the argument discussed above that Peoples Trust's prepaid payment cards are not future performance contracts. Again, this is an argument that ultimately may prevail; however, in my opinion, it is not plain and obvious that it ultimately will prevail.

(e) Have There Been Unfair Practices within the Meaning of the Consumer Protection Act, 2002?

[84] As noted above in his certification decision in *Sankar v. Bell Mobility*, Justice Belobaba did not certify Ms. Sankar's claim that Bell Mobility had perpetrated unfair practices under the *Consumer Protection Act, 2002* because he reasoned that there was a reliance element in the *Act* and its unfair practice provisions concerned representations inducing an agreement and, therefore, it was plain and obvious that the *Act* did not apply.

[85] For present purposes, I need not explore Justice Belobaba's explanation of how the unfair practice provisions of the *Act* operate and why Bell Mobility's acts were not caught by the *Act* because in subsequent other decisions, Justice Belobaba and the Court of Appeal held that it is not necessary to prove reliance to establish an unfair practice claim under the *Consumer Protection Act, 2002*. See *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 3066 and 2014 ONSC 4215, varied 2015 ONCA 921.

[86] Recalling again *Jiang v. Peoples Trust Co.*, *supra*, where Justice Bowden was satisfied that there was a cause of action for an unfair practice and keeping in mind the decisions in *Ramdath v. George Brown College of Applied Arts and Technology*, *supra*, it is not plain and obvious that Ms. Bernstein and the Class Members do not have a claim that there has been unfair practices within the meaning of the *Consumer Protection Act, 2002*. See also *Ramdath v. George Brown*, 2010 ONSC 2010; *Graham v. Impark*, 2010 ONSC 4982.

4. Identifiable Class Criterion

[87] I turn now to whether or not Ms. Bernstein has satisfied the second criterion for certification, the identifiable class criterion. Ms. Bernstein's proposed class definition is:

All "consumers" within the meaning of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A ("CPA") in Ontario who purchased or acquired a Prepaid Card sold and/or issued by PTC between October 1, 2007 and April 30, 2014.

[88] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[89] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[90] In my opinion, subject to adjusting the commencement date for the class period, the identifiable class criterion is satisfied in the case at bar.

[91] Notwithstanding that the proposed definition in the immediate case is consistent with the definitions in numerous consumer protection and products liability class actions, relying on *Jiang v. Peoples Trust Co.*, *supra*, Peoples Trust submits that the identifiable class criterion has not been satisfied. In *Jiang*, as noted above, Justice Bowden concluded that the class definition was problematic and over-inclusive. He came to these conclusions because in his opinion an investigation would be required for each class member to determine whether he or she qualified as a consumer; i.e., whether he or she purchased the prepaid payment card primarily for personal, family or household purposes.

[92] I do not agree with this aspect of the *Jiang* decision, which is not binding on me, and I would not follow it or apply it to a proposed consumer protection class action.

[93] The key defining attribute in the case at bar is that a Class Member has purchased a single or multiple load card issued by Peoples Trust. I agree with Ms. Bernstein's argument that the *Jiang* decision is inconsistent with the Supreme Court's decision in *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 38, where the Court held that it is not necessary that every class member be named or known at the outset. If the outcome of the common issues trial is that there is a breach of contract or a violation of the *Consumer Protection Act, 2002*, it may be the case that each individual class member may have to prove that he or she is a member of the class in order to succeed at an individual issues trial or in order to participate in a settlement should that occur, but that is a norm in class actions. See also: *Anderson v. Wilson*, [1998] O.J. No. 671 (Div. Ct.) and *Seidel v. Telus Communications Inc.*, 2016 BCSC 114, where Justice Masuhara disagreed with Justice Bowden's analysis in *Jiang v. Peoples Trust Co.* of how to define a consumer class action.

[94] Peoples Trust makes another and different argument that raises an issue about whether the definition of the class requires adjustment. This argument has particular moment for Ms. Bernstein who acquired her prepaid payment card as a gift. Peoples Trust argues that the Class Members' claims depend upon privity of contract with Peoples Trust. In my opinion, this argument is a merits argument, and again not relevant to whether the class definition criterion has been satisfied.

[95] If it is true, as Peoples Trust submits, that the success of a Class Member's claim depends upon a Class Member establishing a breach of contract, it is not clear at this juncture that donee Class Members are not also contracting parties pursuant to: (a) the principles of unilateral contract formation; (b) the circumstances of how the contractual arrangements are formed by the written agreements in the boxes or paraphernalia that accompany a prepaid payment card; (c) by

principles of contract assignment where the benefit of a contract can be assigned; or (d) by an exception to the privity of contract rules as developed by the Supreme Court in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 that may be capable of further development. (See *Brown v. Belleville (City)*, 2013 ONCA 148.)

[96] In these regards, it may be noted that the terms of the single load prepaid payment cards purport to bind the “cardholder” and define the cardholder to mean an individual who activates, receives and or uses the card. The terms of the multiple load card provide that the agreement constitutes a binding agreement between Peoples Trust and “You (the Customer)” and “You,” “Your” and “Yours” means “the Customer and any person who uses the Card.”

[97] It also may be noted that although Peoples Trust argues that no consideration is payable by a donee, this submission ignores the fact that fees are charged against the prepaid payment card on an ongoing basis. There is thus an ongoing *quid pro quo* by the cardholder for the promised access to the payment network.

[98] Further, it may be noted that Peoples Trust’s *in terrorem* argument, submitted in its supplementary submissions, that there might be boundless claims from a single prepaid payment card ignores that the face value of the card set boundaries that defines the limit of the allegedly illegal fees and forfeitures.

[99] Finally, it may be noted that Peoples Trust’s argument that a viable claim depends upon privity of contract, combined with its argument that the *Consumer Protection Act, 2002* only applies to genuine gift cards, results in the catch-22 that the only possible claimants under the *Act* are claimants that do not qualify for claims under the *Act*. For present purposes, it is too early to determine which of Peoples Trust’s twisting and turning arguments will succeed and, in my opinion, the scope of the operation of the *Consumer Protection Act, 2002* is an issue to be determined and not pre-emptively decided by the class definition criterion.

[100] There is, however, an adjustment to the class definition that is required. It is plain and obvious that purchasers of Peoples Trust’s prepaid payment cards who purchased their cards more than two years before Ms. Bernstein commenced her action on November 29, 2013, have claims that are presumptively statute-barred under the *Limitations Act, 2002*. It may be that these Class Members could rebut the presumption in the *Limitations Act, 2002*, but that clearly is an individual issue that cannot wait for the individual issues trials and including persons with presumptively statute-barred claims creates a potential conflict amongst Class Members in giving instructions about settlement negotiations.

[101] In the certification decision in *Sankar v. Bell Mobility Inc.*, *supra* at para. 17, given the two-year limitation period, Justice Belobaba defined the start of the class period as two years prior to the commencement of the proposed class action. This approach has been followed in other cases and I would follow it in the case at bar. See, for example, my decisions in *Graham v. Imperial Parking Canada Corp. (c.o.b. Impark)*, 2010 ONSC 4982 and *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247.

[102] Subject to the adjustment of the commencement date of the class definition, I conclude that the second criterion for certification is satisfied.

5. Common Issues Criterion

(a) General Principles

[103] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, *supra* at para. 18.

[104] With regard to the common issues, success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class. See: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at para. 183.

[105] In *Pro-Sys Consultants v. Microsoft*, *supra* at para. 106, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[106] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)*, *supra*, at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), *aff'd* [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.

[107] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, *supra*. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, *affg.* [1996] B.C.J. No. 734 (S.C.), leave to appeal to S.C.C. *ref'd.* [2001] S.C.C.A. No. 21.

[108] In the context of the common issues criterion, the some-basis-in-fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class: *Hollick v. Toronto (City)*, *supra*; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *McCracken v. Canadian National Railway Company*, *supra*; *Williams v. Canon Canada Inc.*, *supra*; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *Dine v. Biomet*, 2015 ONSC 7050, *aff'd* 2016 ONSC 4039 (Div. Ct.).

(b) The Proposed Common Issues

[109] Ms. Bernstein proposes the following common issues:

Breach of Contract

I. Are the Prepaid Cards at issue in this action "gift cards", "gift card agreements" and "future performance agreements" within the meaning of the *Consumer Protection Act, 2002* (the "CPA")

and *O. Reg.* 17/05, (the “Gift Card Regulation”) and otherwise subject to the Gift Card Regulation?

(a) If so,

(i) is the expiry and seizure of unused funds associated with the Prepaid Cards at issue in this action contrary to law pursuant to the CPA, and the Gift Card Regulation, and/or

(ii) are any of the fees associated with the Prepaid Cards at issue in this action contrary to law pursuant to the CPA, and the Gift Card Regulation, and, if so, which ones?

(b) If so, have the defendants breached their contracts with the class members?

Consumer Protection Act, 2002

2. Did the defendants engage in unfair practices contrary to s. 17 of the CPA?

(a) If the answer to 2 is yes, what remedy should be ordered under s. 18 of the CPA?

3. Is the class, or any portion thereof, required to give notice under the CPA for recovery or rescission, and if so, is it entitled to a declaration waiving the notice provisions of section 18 of the CPA?

Unjust Enrichment

4. Have the defendants been enriched by the expiry and seizure of unused funds associated with the Prepaid Cards at issue in this action, and/or have the defendants been enriched by the collection of fees associated with the Prepaid Cards at issue in this action?

(a) If the answer to 4 is yes, have the class members suffered a corresponding deprivation?

(b) Is there a juristic reason for the enrichment/deprivation?

Remedies

5. What remedies, if any, are class members entitled to?

6. Are class members entitled to an award of aggregate damages? If so,

(a) what is the quantum? And

(b) what is the appropriate method or procedure for distributing the aggregate damages to class members?

7. Does the defendants’ conduct justify an award of aggravated, exemplary or punitive damages?

(c) Discussion and Analysis

[110] In my opinion, all of the proposed questions satisfy the common issues criterion. Questions similar to questions 1-5 and 7 have been certified in other consumer protection and products liability class actions.

[111] As for the aggregate damages question, in what appears to me to be a novel argument, and one with which I agree, Ms. Bernstein relies on sections 23 (1) and 24 of the *Class Proceedings Act* to submit that the aggregate damages question (question 6) should be certified.

Sections 23 (1) and 24 state:

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

...

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (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.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

[112] In the immediate case, for the aggregate damages question, there is some-basis-in-fact for concluding that it is possible to determine how much Peoples Trust charged for the allegedly illegal fees and forfeitures. Thus, relying on s. 23 (1) for the ability to use statistical evidence and sampling, it may be reasonably possible to make an aggregate assessment of the Class Members' claims that are connected to being consumers under the *Consumer Protection Act, 2002*.

[113] To certify a common issue about aggregate damages, a plaintiff must show that it is reasonably likely that the pre-conditions in s. 23 (1) of the *Class Proceedings Act, 1992* can be satisfied: *Fulawka v. Bank of Nova Scotia*, [2012] ONCA 443 at para. 111. Section 24 (1)(c) sets out the condition that 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. Moreover, as the Court of Appeal observed in *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at paras. 48-56, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346, s. 24 (3) contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. (See also *Cuzzeto v. Business In Motion International Corporation*, 2014 FC 17 at paras. 101-109.) The evidence in support of an aggregate assessment should come from a defendant's records: *Fulawka v. Bank of Nova Scotia*,

supra at para. 141.

[114] Applying these principles in the immediate case, in my opinion, the pre-conditions for an aggregate assessment have been satisfied. In his certification decision, in *Sankar v. Bell Mobility*, *supra*, Justice Belobaba certified an aggregate assessment with respect to the illegal fees and forfeitures claim of the consumers that comprised the class. Justice Belobaba stated at paras. 87 and 88:

87. I agree with the defendant that, at least with respect to the general breach of contract claim, individual assessments will be required. If the plaintiff prevails on the general breach of contract claim, she will have to show the "damage" sustained and this will require proof of what each class member "would have done" as noted above. It is therefore not reasonably likely that the s. 24(1)(c) hurdle can be cleared.

88. However, I do not agree that individual assessments will be needed to determine the losses sustained if the plaintiff prevails on the breach of contract (gift card regulation) claim. Here, if the common issues trial judge interprets the Gift Card Regulation in favour of the consumer class members, the quantum of recovery can be readily determined by the defendant by simply reviewing its corporate records, as described above. There is no concern here about what each of the class members "would have done" before the proper expiry date (because the Gift Card Regulation voids all of the expiry dates) and there is no need for "proof by individual class members." Thus the s. 24(1)(c) hurdle is easily cleared.

[115] In the case at bar, Ms. Bernstein has shown that it is reasonably likely that an assessment of Peoples Trust's liability for fees and forfeitures can be determined in the aggregate in whole or in part. This prospect is most promising for the single load prepaid payment cards, most of which are distributed as consumer goods in drug stores and similar retail establishments.

[116] I conclude that the common issues criterion is satisfied.

6. Preferable Procedure Criterion

[117] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank*, *supra* at para. 69; *Hollick v. Toronto (City)*, *supra*.

[118] In the case at bar, I am satisfied that a class proceeding is the preferable way and indeed it is the only feasible and meaningful way to achieve the goals of access to justice, behaviour modification, and judicial economy in a way that is substantively and procedurally fair to both the plaintiff and the defendant. As the discussion above under the heading of the cause of action criterion demonstrates, the common issues trial will be very productive in resolving several very difficult questions of statutory interpretation. The costs of individual proceedings in relation to the value of the individual claims and the associated risks makes anything other than a class proceeding an unfeasible way to resolve these significant common issues.

[119] I conclude that the preferable procedure criterion is satisfied.

7. Representative Plaintiff Criterion

[120] The fifth and final criterion for certification as a class action is that there is a

representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[121] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, *aff'd* [2003] O.J. No. 4708 (C.A.).

[122] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[123] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 41.

[124] The critical ingredients or factors for the determination of the representative plaintiff criterion are the competence of counsel and on the qualification of the plaintiff as reflected in the litigation plan, which in a sense is a synthesis of the other certification criteria: *Shah v. LG Chem Ltd.*, 2015 ONSC 3257 at para. 32.

[125] In the case at bar, the evidence establishes that Ms. Bernstein satisfies the representative plaintiff criterion for certification.

D. CONCLUSION

[126] For the above reasons, I certify this action as a class proceeding.

[127] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Bernstein's submissions within 20 days from the release of these Reasons for Decision, followed by Peoples Trust's submissions within a further 20 days.



Perell, J.

Schedule "A"

Consumer Protection Act, 2002

Interpretation

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

"consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

....

"consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

"credit card" means a card or device under which a borrower can obtain advances under a credit agreement, as defined in Part VII, for open credit;

....

"future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement;

"goods" means any type of property;

....

"payment" means consideration of any kind, including an initiation fee;

....

"representation" means a representation, claim, statement, offer, request or proposal that is or purports to be,

(a) made respecting or with a view to the supplying of goods or services to consumers, or

(b) made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers;

"services" means anything other than goods, including any service, right, entitlement or benefit;

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier;

....

Application

2. (1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

Exceptions

(2) This Act does not apply in respect of,

....

(b) financial services related to investment products or income securities;

(c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;

Anti-avoidance

3. In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

....

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

....

Class proceedings

8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Procedure to resolve dispute

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

Non-application of Arbitration Act, 1991

(4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

....

Ambiguities to benefit consumer

11. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.

....

**PART III
UNFAIR PRACTICES**

False, misleading or deceptive representation

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

....

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

....

Unconscionable representation

15. (1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

....

Unfair practices prohibited

17. (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

....

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

- (a) because the return or restitution of the goods or services is no longer possible; or
- (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

- (a) the consumer seeks to rescind an agreement under subsection (1); or
- (b) the consumer seeks recovery under subsection (2), if rescission is not possible.

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

Delivery of notice

(5) Notice may be delivered by any means.

When notice given

(6) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

Address

(7) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice,

- (a) to any address of the person on record with the Government of Ontario or the Government of Canada; or
- (b) to an address of the person known by the consumer.

Commencement of an action

(8) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

Same

(9) If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice.

Evidence

(10) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

Exemplary damages

(11) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

Liability

(12) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

Limited liability of assignee

(13) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer.

Effect of rescission

(14) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,

- (a) the agreement;
- (b) all related agreements;
- (c) all guarantees given in respect of money payable under the agreement;
- (d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and
- (e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,
 - (i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or
 - (ii) otherwise related to the agreement.

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Requirements for future performance agreements

22. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

....

Illegal charges and payments

98. (1) If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund by giving notice in accordance with section 92 within one year after paying the charge or making the payment.

Supplier to provide refund

(2) A supplier who receives a notice demanding a refund under subsection (1) shall provide the refund within the prescribed period of time.

Right of action

(3) The consumer may commence an action in accordance with section 100 to recover,

(a) the payment of a fee or an amount that was charged by the supplier in contravention of this Act; or

(b) a payment that was received by the supplier in contravention of this Act.

....

Action in Superior Court of Justice

100. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice.

Judgment

(2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover,

(a) the full payment to which he or she is entitled under this Act; and

(b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.

Same

(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

Waiver of notice

101. If a consumer is required to give notice under this Act in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Schedule “B”

O. Reg. 17/05

Future Performance Agreements

Definitions

23. In the Act and this Part,

“gift card” means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher;

“gift card agreement” means a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement;

“open loop gift card agreement” means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers.

....

Gift Card Agreements

Application of sections

25.1 Sections 25.2 to 25.5 apply to every gift card agreement entered into on or after the day this section comes into force and to every gift card issued under that agreement, but do not apply to,

- (a) a gift card that a supplier issues for a charitable purpose; or
- (b) a gift card that covers only one specific good or service; or
- (c) the gift card agreement under which a gift card described in clause (a) or (b) is issued.

Exemption

25.2 A gift card agreement is exempt from subsection 21 (1), section 26 and subsection 96 (2) of the Act.

No expiry dates

25.3 (1) No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.

(2) A gift card agreement with an expiry date on its future performance shall be effective as if it had no expiry date if the agreement is otherwise valid.

Limit on fees

25.4 (1) No supplier under a gift card agreement that is not an open loop gift card agreement shall,

- (a) issue a gift card for less than the value of the payment made by the consumer for entering into the agreement or hold out that the supplier can provide such a gift card; or
- (b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card or a fee to customize a gift card.

(2) No supplier under an open loop gift card agreement shall,

(a) issue a gift card for less than the value of the payment made by the consumer for entering into the agreement less \$1.50 or hold out that the supplier can provide such a gift card; or

(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card, a fee to customize a gift card or a dormancy fee in accordance with subsection (2.1).

(2.1) The supplier under an open loop gift card agreement may charge a dormancy fee to the holder of the gift card if,

(a) the fee is charged no earlier than,

(i) 15 months after the end of the month that the consumer entered into the agreement, if the holder does not request the supplier for an extension in that 15th month, or

(ii) 18 months after the end of the month that the consumer entered into the agreement, if the holder requests the supplier for an extension in the 15th month after the end of the month that the consumer entered into the agreement;

(b) the fee does not exceed \$2.50 per month;

(c) the card has a notice on the front of the card in 10 point font indicating that there is fee information on the back of the card;

(d) the card has a notice on the back of the card setting out, clearly and prominently, the information mentioned in clauses (a) and (b); and

(e) the supplier discloses the information mentioned in clauses (a) and (b) to the consumer at the time that the consumer enters into the agreement.

(3) If a supplier or a seller has charged a fee or an amount in contravention of subsection (2), the consumer or the holder of a gift card who paid the fee or the amount may demand a refund by giving notice to the supplier in accordance with section 92 of the Act within one year after making the payment.

(4) A supplier who receives a notice demanding a refund under subsection (3) shall provide the refund within 15 days of receiving the notice.

Requirements for agreements

25.5 For the purpose of section 22 of the Act, a future performance agreement that is a gift card agreement shall set out the following information:

1. The fees that the supplier may charge under clause 25.4 (2) (b).
2. All restrictions, limitations and conditions that the supplier imposes on the use of the gift card.

CITATION: Bernstein v. Peoples Trust Company, 2017 ONSC 752
COURT FILE NO.: CV-13-493837CP
DATE: 20170131

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOYCE BERNSTEIN

Plaintiff

– and –

PEOPLES TRUST COMPANY and PEOPLES CARD
SERVICES LLP

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 31, 2017