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DATE: 20090709

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
PAUL CASSANO and BENJAMIN BORDOFF	)	***Harvey T. Strosberg, QC*** and ***Patricia A. Speight***- - for the plaintiffs
Plaintiffs	)	
- and -	)	
THE TORONTO-DOMINION BANK	)	***Lyndon A. J. Barnes*** and ***Laura K. Fric***- - for the defendant
Defendant	)	
	)	**HEARD:** April 24, 2009

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.

[1] The parties moved for approval of the settlement of this action commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

[2] The claims advanced on behalf of the class concern allegedly undisclosed and unauthorised charges levied by the defendant (the “Bank”) for foreign currency transactions conducted with Visa credit cards it had issued. The Bank asserts that these were not fees but rather part of the exchange rates that it was authorized by the provisions of the cardholder agreements to determine from time to time.

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[3] The proceeding was certified by the Court of Appeal on November 14, 2007. Certification had previously been denied by the Divisional Court and in this court. Actions involving similar claims were previously certified and settlements approved by Winkler J. (now Winkler C.J.O.) in *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (S.C.J.) and by Brockenshire J. in *Meretsky v. Bank of Nova Scotia* (Unrep. January 23, 2009).

The Settlement

[4] Section 29 (2) of the CPA provides that a settlement of a class proceeding is not binding unless it is approved by the court. In *Gilbert*, the principles to be applied for this purpose were summarized by Winkler J. (now Winkler C.J.O.) as follows:

> There is a presumption of fairness when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. The court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.
>
> The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give-and-take. It is a question of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.
>
> There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. These include likelihood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining.

[5] It follows that, in all cases, the court must weigh the benefits to be conferred on the class against the risks of continuing the litigation.

[6] From the inception of the proceeding, the Bank has denied that the charges were fees rather than part of the exchange rates it was authorised to determine from time to time. It has also asserted that the rates were reasonable and that the plaintiffs' interpretation of the cardholder agreements was contrary to the intentions of the parties, as well as inconsistent with commercial realities and the competitive practices adopted by other financial institutions. At the hearing of the motion, the Bank's counsel emphasised that it was the economic considerations of proceeding to trial and not any acknowledgement of the validity of the claims advanced by the plaintiffs that influenced its agreement to settle. The Bank has not resiled from its position that the alleged charges were disclosed to cardholders.

[7] While strongly contesting the correctness of the Bank's characterisation of the charges, class counsel were conscious that, on the main issue, this was all-or-nothing litigation, and that it would be vigorously defended. Even if the plaintiffs were successful in characterising the charges as fees, there were still limitations defences that potentially affected a significant number of the class members' claims. They were also concerned about the length and future expense of the litigation if it proceeded to trial and the difficulty that class members would have in proving their damages if individual determinations were found to be required.

[8] In an affidavit sworn for the purpose of the approval motion, one of the plaintiffs' solicitors, Mr Paul J. Pape, indicated that, based on reports prepared for the Bank, class counsel had estimated that the maximum amount recoverable for the class was approximately $161.5 million. After taking into account the risk that the Bank would succeed at trial, class counsel targeted $50 million - $60 million as a reasonable range for settlement. Mr Pape stated that they had this in mind when, in December 2008, they agreed to mediation by the Honourable George Adams. The plaintiffs' subsequent acceptance of the Bank's offer to pay $55 million in settlement of the claims was recommended by the mediator.

[9] The settlement amount was negotiated at arm's-length by experienced counsel after more than 11 years of litigation and after extensive productions by the Bank. There is, in my judgment, nothing in the record before me to suggest that the decision to settle for $55 million falls outside the zone of reasonableness and displaces the presumption of fairness referred to by Winkler J. In this case, the most difficult questions relate not to the amount the Bank has agreed to contribute in settlement of the claims advanced by the plaintiffs but rather to the nature and extent of the distributions that are proposed.

[10] As in *Markson v. MBNA Canada Bank,* [2007] O.J. No. 1684 (C.A.) - where, again, certification was ordered by the Court of Appeal after having been denied at first instance and in the Divisional Court - the class consists of several million cardholders whose transactions were entered into over a period of many years. In view of the difficulty of identifying class members with potential claims and quantifying the harm each had suffered, the requirement that the procedure of the CPA must be manageable was given considerable weight in this court and in the Divisional Court. In *Markson*, the proceeding was held be manageable because, it seems, of the Court of Appeal's conclusion that there was a reasonable likelihood that an aggregate assessment of damages would be possible. The question whether difficulties of distributing damages had any bearing on the issue of manageability was not discussed, and it is notable that, in deciding that certification should be granted, the court did not find it necessary to consider whether a "workable" litigation plan had been produced by the plaintiff as required by section 5 (1) (e) of the CPA.

[11] A similar conclusion that an aggregate assessment of damages might be available was reached by the Court of Appeal in this case where, however, Winkler C.J.O. also concluded that the conditions for certification would have been satisfied if the court at a trial of common issues determined that individual assessments were necessary. Moreover, on either approach to the assessment of damages, it appears that the Chief Justice accepted that problems of distribution

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may have some relevance to the issue of manageability that is inherent in the requirement that a class proceeding is the preferable procedure. Paras 67 - 68 of the reasons of the Court of Appeal read as follows:

> [67] The CPA also provides a range of options for distributing amounts awarded under ss. 24 or 25. For example, s. 26 (2) (a) permits the court to require the defendant to distribute monetary relief directly to class members "by any means authorised by the court, including abatement and credit". I draw particular attention to s. 26 (3), which states:
>
> > 26 (3) In deciding whether to make an order under clause (2) (a), a court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, *including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the Bank*. (emphasis in the original).
>
> [68] Evidently, the CPA provides a procedural mechanism on which the trial judge could rely to distribute amounts awarded under either s. 24 or s. 25. Thus, in my view, the preferable procedure requirement is satisfied in this case regardless of whether the assessment and distribution of damages, if necessary, are to be conducted on an aggregate or individual basis.

[12] In this context, I note that the learned Chief Justice attributed no significance to the Bank's evidence that "it would take 1500 people about one year to identify and record the foreign exchange transactions on the cardholder statements that are available only on microfiche and that this would cost about $48,500,000": para 48. As in *Markson*, this "economic argument" was specifically rejected.

[13] Despite the emphasis given to section 26 (3) of the CPA, I do not understand the Chief Justice to have excluded the possibility that the trial judge might rely on other provisions of section 26, including section 26 (4) and (6) that read as follows:

> 26 (4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
>
> 26 (6) the court may make an order under subsection (4) even if the order would benefit,
>
> > (a) persons who are not class members; or

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> (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

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[14] These provisions contemplate what are often called cy pres orders by analogy to the cy pres jurisdiction that courts of equity have traditionally applied in cases involving charities and rules against remoteness. As was the case in *Gilbert,* such orders are commonly made in settlements approved by the court by a further analogy to the provisions of section 26. In *Gilbert*, the settlement that was approved by the court provided for a payment of $1 million out of the settlement amount of $16.5 million to the United Way in order to benefit past cardholders who could no longer be identified.

Winkler J. stated (at paras 15 -16):

> One might observe that a situation such as this could be addressed with a settlement that is entirely Cy pres. However, it is not the role of this court to substitute its settlement for that fashioned by the parties. Also, a disadvantage of settlement that is entirely Cy pres is that it does not compensate individual class members.
>
> Past cardholders are not part of the distribution list. The payment to the United Way on their collective behalf is in lieu of this and is acceptable given the peregrinations involved in pursuing these claims. This approach is acceptable in the present circumstances given the impossibility of identifying such class members. The CPA specifically contemplates a cy pres distribution in s. 26 (6).

[15] Under the proposed settlement in this case, approximately $39,100,000 would be available for distribution for the benefit of class members after the payment of the counsel fees and disbursements requested, the levy payable to the Law Foundation and administrative expenses out of the settlement amount of $55 million. From the amount of $39,150,000, approximately $10,750,000 would be paid directly to cardholders whose cards were issued before certain dates included in the class definition, and who were in good standing and active as of June 1, 2009. The balance of approximately $28.4 million would be applied cy pres as, despite the Court of Appeal's reference to section 26 (3) of the CPA, the parties are in agreement that it would be impracticable to attempt to identify more than a relatively small percentage of the class members who are potential claimants.

[16] Before finalising their proposals for the division between direct and indirect benefits to class members, counsel devoted considerable time and energy in considering different alternatives. The task of identifying cardholders who had engaged in foreign currency transactions - as well as the amounts involved - was hampered by the absence of records including some that had been destroyed inadvertently during the course of the proceeding. The various alternatives were discussed at case conferences prior to the hearing before counsel agreed on a final proposal.

[17] I am satisfied that, in the light of these difficulties and when compared with the other alternatives, the proposed division between direct and indirect benefits strikes a reasonable balance between reimbursing class members and applying funds cy pres and should be approved. Although, as a general rule, cy pres distributions should not be approved where direct compensation to class members is practicable, the allocation of $10.75 million to be paid directly to cardholders is on the generous side as proof that one subgroup of them engaged in foreign currency transactions - and, in consequence, were within the class definition - will not be required.

[18] As a general rule, the court's jurisdiction on motions under section 29 (2) of the CPA is limited to granting, or withholding, approval. Exceptionally in this case, the minutes of settlement provide that, as part of the approval process, the court may change the amount proposed to be applied cy pres, the cy pres recipients and the division of funds between them. This provision reflects the parties' understanding that, in view of the size of the cy pres amount and the nature of the claims in this case, outright payments to charitable or other non-profit organisations - the most common form of cy pres distributions - might not be appropriate. For this reason, it was proposed that special purpose gifts would be made in order to ensure that the purposes for which the funds would be applied bore a sufficient relation to the interests and claims of the class members to justify a conclusion that the distribution would be for their benefit.

[19] The question of the most appropriate cy pres distributions was discussed in a number of case conferences. Proposals by the plaintiffs with respect to one half of the cy pres amount of $28.4 million, and by the Bank for the other half were considered.

Cy Pres: The Plaintiffs' Proposal

[20] The plaintiffs' original proposal involved grants to Canadian common law law schools to be used to foster professionalism and ethical conduct among practising lawyers. The amounts each law school would receive would reflect the distribution of class members across the country. It was suggested that teaching law students to be more professional and ethical in their behaviour when practising law would benefit class members and the public. It was said that:

> Contracts such as those in issue in this action may be more carefully drafted, banks, commercial institutions and all clients may be better advised and, as a result, disputes such as in this action and others may be avoided.

[21] Apart from the establishment of a committee of five to seven members of the legal profession, with volunteers from the judiciary, to receive proposals and to disburse the funds to the law schools, no method of supervising or controlling the expenditure of the funds by the recipients was suggested. It may have been contemplated that the use of the funds would be entirely within the discretion of the recipients subject only to a moral obligation to apply them for the approved purposes.

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[22] Without - I hope - being unduly cynical about the optics of the plaintiffs' proposal in the present context, I suggested that a preferable alternative would be to create a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada. Although in a number of cases - including *Gilbert* - cy pres distributions that benefit class members together with other members of the public have been approved, the suggested alternative would confer benefits on the class more directly than the original proposal and would do so in a manner that is consistent with, and would advance, one of the objectives of the CPA. Access to justice was relied on heavily by the Court of Appeal in *Markson* and in this case as a ground for certifying the proceeding. Class members have benefited thereby and they and other members of the public would benefit from its enhancement in the future.

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[23] This suggestion was discussed with representatives of the Law Foundation - including the Chair of its Board of Trustees and they have indicated that it is acceptable in principle.

[24] The proposal contemplates the creation of a special trust fund to be administered by the Trustees of the Foundation. Section 56 (2) of the *Law Society Act,* R.S.O. 1990, c. L.8 provides that the Trustees have power to accept gifts and donations on trust in furtherance of the objects of the foundation. The objects include "legal aid" - a term that, I am informed, has been construed broadly by the Trustees and has, correctly in my opinion, not been confined to financial aid provided to Legal Aid Ontario - a corporation that is incorporated pursuant to the Legal Aid Services Act, 1998, S.O. 1998, c. 26 for the purpose of providing access to justice for low-income individuals, and is referred to by name in section 55 of *the Law Society Act*.

[25] There are, of course, special difficulties that can be encountered in establishing valid purpose trusts under the laws of Ontario. Such trusts are not valid unless they are exclusively charitable, or can be treated as powers of appointment pursuant to section 16 of the *Perpetuities Act,* R.S.O. 1990, c.P.9. In my opinion, this limitation is as applicable to trusts created pursuant to an order of the court as it is to other trusts and, if that is not correct, it is still one that the court should respect.

[26] Is the purpose of promoting and advancing access to justice a charitable purpose? Given the repeated endorsement by courts, as well as by the Law Reform Commission, of access to justice as a socially valuable objective of the CPA - and even ignoring some of the rather more dubiously valuable purposes that have been accepted as charitable over the years - it would, I believe, be extraordinary if it were held that it is not worthy of recognition as a possible object of a valid trust.

[27] The law on charities is notoriously technical and arcane. Numerous judicial pleas for legislative intervention have fallen on deaf ears. Judicial attempts in cases such as *Re Laidlaw* (1984), 48 O.R. (2d) 549 (Div. Ct.) and *Re Levy* (1989), 68 O.R. (2d) 385 (C.A.) to rid the law of its antiquated foundations in the *Statute of Elizabeth, 1601* are uncertain in their effects and, since the comments of Rothstein J. in *A.Y.S.A. Amateur Soccer Association v. Canada*, [2007] 3 S.C.R. 317, at paras 37 - 39, their correctness is not free from doubt. In one of the most recent cases in the Supreme Court of Canada - *Vancouver Society of Immigrant and Visible Minority*

Women v. Canada, [1999] 1 S.C.R. 10 - the court was divided (5 - 4) on, among other things, the question whether a purpose of assisting immigrant women to obtain employment was charitable. The lengthy judgments delivered are replete with conflicting views on the same authorities that have been the subject of inconclusive analyses in a legion of cases stretching back over at least two centuries.

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[28] Access to justice connotes access by persons to whom it would not otherwise be available for the purpose of protecting and enforcing their legal rights. Although barriers to access to justice are very commonly - although by no means exclusively - financial in nature, a purpose of removing the barriers cannot, I think, be considered to fall exclusively within the first of the three traditional heads of charity - the relief of poverty: see the Law Reform Commission's *Report on Class Actions*, pages 119-129. Nor would such a purpose be considered to be religious, or educational even in the expanded sense in which that term was given in *Vancouver Society*. That leaves only the fourth head - other purposes beneficial to the public - with, or without, in Ontario, the qualification that they must also be within the spirit and intendment of the *Statute of Elizabeth, 1601*.

[29] I do not think there is any doubt that a purpose of providing or promoting access to justice must be considered to be beneficial to the public. As the Law Reform Commission stated, at page 139 of its report:

> Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

[30] Access to justice is, in other words, an essential component of the rule of law which, in turn, is one of the constitutional underpinnings of our democratic constitutional system of government.

[31] If, despite the views expressed in *Re Laidlaw* and *Re Levy,* access to justice will not be a valid charitable purpose unless it is within the spirit and intent of the Elizabethan statute, I believe that requirement is also satisfied.

[32] In *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73 (C.A.), different approaches for ascertaining whether a purpose was within the spirit and intent of the statue - or within its "mischief" or "equity" were discussed. The Court of Appeal held that the publication of law reports by a non-profit corporation was a charitable purpose. Russell L.J. placed the purpose under the fourth head of charity. In his view, the correct approach was to apply a presumption that a purpose that benefits the public will be within the equity of the Statute of Elizabeth, and charitable in the absence of good reasons for a contrary conclusion. Sachs and Buckley JJ. preferred to characterise the purpose as educational but agreed that it would otherwise be upheld on the basis of the reasoning of Russell L.J.

[33] Russell L.J. also considered whether the purpose of the Council would fall within the spirit and intendment of the statute if the correct approach was to find an analogy with purposes

previously held to be charitable. The judge at first instance had referred to the very early judicial acceptance that the purpose of building a courthouse was charitable and Russell L.J. concluded that no distinction could properly be drawn between the provision of physical facilities for the administration of justice, and a dissemination of knowledge of the law to be administered in them.

[34] On either of these approaches, I am satisfied that a trust to provide access to the courts and the administration of justice must be held to be charitable. Access to justice is presupposed by the provisions of the Canadian Charter of Rights and Freedoms and, without it, the provision of courthouses and law reports would be otiose.

[35] For these reasons, I am satisfied that the proposed establishment of a fund to promote access to justice would create a valid charitable trust. I am also satisfied that such a trust could properly be administered by the Law Foundation as falling within its corporate object of "legal aid". As I have mentioned, this is consistent with the information provided by the Chair of the board of Trustees of the Foundation that the object has in the past been construed broadly and has not been confined to financial aid provided to Legal Aid Ontario.

[36] For reasons of completeness, I note, also, that if, contrary to my opinion, a trust to promote and advance access to justice is not charitable, it could I believe be upheld as a specific non-charitable purpose trust that, pursuant to section 16 of the *Perpetuities Act*, is to be treated as a power of appointment over capital and income for a maximum period of 21 years.

[37] The precise terms of the trust will be included in the order approving the settlement but, subject to any further submissions of counsel, or representations of the Law Foundation, my present preference would be for the Trustees of the Foundation to have discretion as to the application of funds for the approved purpose subject only to the limitation that they are not to form part of the Class Proceedings Fund established pursuant to section 59.1 of *The Law Society Act*.

Cy Pres: The Bank's Proposal

[38] The bank proposed that the other half of the cy pres amount should be used to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians. For this purpose, the funds would be paid to, and administered and distributed by, a non-profit charitable organisation, Social and Enterprise Development Innovations ("SEDI").

[39] SEDI was incorporated as a corporation without share capital under Part III of the *Corporations Act* on March 14, 1995. Its objects, as amended by supplementary letters patent of April 21, 1997, are as follows:

> 1. To establish, maintain and supervise non-profit centres for the encouragement of people who are both poor and unemployed to develop self-employment projects with the objective of preventing and reducing unemployment and its attendant poverty;

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> 2. To provide counselling and supportive services for the benefit of persons who are both poor and unemployed and otherwise economically disadvantaged persons including youth;
>
> 3. To set up programmes to carry out the foregoing objects;
>
> 4. To consult with other charitable, non-profit community and governmental agencies and organisations in developing programmes to carry out the foregoing objects and to provide funding for same;

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[40] SEDI is registered as a charitable organisation within the meaning of the *Income Tax Act* (Canada). It complies with the annual reporting obligations under the statute. To date it has been funded largely through grants and donations from federal, provincial and municipal governments, banks and other financial institutions, and private charitable foundations.

[41] The promotion of financial literacy has been one of SEDI's principal activities since its creation. To this end it has worked with governmental agencies and community organisations to develop courses, programmes and projects and to train personnel whose employment brings them in contact with unemployed, poor and otherwise disadvantaged Canadians. SEDI's activities are founded on a conviction that there are social, market and governmental pressures that limit the ability of such persons to make informed financial decisions that are essential to their well-being and their capacity to become economically self-sufficient. Accordingly, financial literacy, in the sense understood by SEDI, refers to the knowledge, skills and ability to understand, analyse and use information to make informed judgments about financial decisions. Such decisions range from simple budgeting skills, to understanding choices between banking and credit products, to understanding rights and obligations created by financial documents such as credit card agreements, to understanding how to effectively save for retirement, home-ownership, or post-secondary education.

[42] SEDI is administered under the supervision of a nine-member board of directors who serve without remuneration. In 2008 it had ten permanent and four part-time employees.

[43] By a resolution of the board of directors of October 9, 2008, SEDI's financial literacy activities were expanded and organised by the creation of a new internal division known as the "Canadian Centre for Financial Literacy" (the "Centre"). This is dedicated to assisting and training the staff of community organisations to deliver literacy counselling and supportive services to needy and otherwise disadvantaged groups in society.

[44] The Bank's proposal is for 50 per cent of the cy pres amount to be paid to SEDI. $3.5 million of this would be used for the support of the Centre for a period of five years and the balance would be held as a fund (the "TD Financial Literacy Fund") that, over a period of six years, would be applied in making grants to non-profit organisations who work with economically disadvantaged groups – such grants to be used by the recipients to promote and

support financial literacy among the members of such groups. All such grants would require the approval of SEDI's directors.

[45] Counsel for the bank made submissions and filed extensive material in support of its proposals. This included a description of SEDI's activities during the past five years, the annual reports filed with Canada Revenue Agency, explanation of its financial reporting, and a legal opinion of SEDI's solicitor, Fasken Martineau, that the promotion of financial literacy is charitable in law as educational and for the relief of poverty, and is within the objects of SEDI. I share that opinion.

[46] In addition, letters attesting to the valuable work performed by SEDI in promoting financial literacy among low-income Canadians were provided by five individuals who have either participated in SEDI’s activities, or occupied positions with governmental organisations that have been involved with them.

[47] On the basis of the submissions of counsel and the material filed, I am satisfied that the advancement of financial literacy is a worthy method of applying the cy pres amount for the benefit of the class members. I am also satisfied that SEDI is an appropriate entity to administer the funds for this purpose.

[48] For the purpose of settling the terms of the approval order, counsel should consider whether it is necessary to have a trust agreement between the Bank and SEDI with respect to the administration of the funds. In view of the relatively simple and short-term obligations of SEDI, in may be possible to define those obligations adequately in the body of the order. It must, however, be made clear that the funds provided to the Centre for the support of its work are intended to enhance it and not simply to make available for SEDI’s other purposes funds that would otherwise be used for the support of the Centre. Given the provisions of the *Law Society Act* that govern the administration of gifts received by the Trustees of the Law Foundation, a separate trust agreement with respect to the other half of the cy pres amount should not be necessary to complement the provisions of the order.

[49] Subject to settling the terms of the order, the settlement will be approved.

Fees of Class Counsel

[50] Counsel have requested a fee of $11 million which represents 20 per cent of the settlement amount and approximately 28 percent of the net amount that would be distributable to, or for the benefit of, class members.

[51] Provision for a fee of 20 per cent of the gross recovery was made in retainer agreements with Dr Cassano and Dr Bordoff executed in April 2002 and September 2004 respectively. These written agreements are said to reflect the terms of an oral agreement made at the inception of the proceeding with Dr Cassano in 1997. Dr Bordoff was added as a plaintiff on March 9, 2005.

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[52] Each of the plaintiffs has supported the request for approval of a fee of $11 million and has expressed appreciation of the quality of the services performed by their counsel.

[53] Contingent fee agreements that provide for fees to be calculated as a percentage of gross recovery have been approved in many class proceedings in this jurisdiction, and an application of percentages in excess of 20 per cent has been approved in several of them. In *Garland v. Enbridge Gas Distribution Inc*, [2006] O. J. No. 4907 (S.C.J.), for example, I considered the fee awarded to represent approximately 26.7 per cent of the value of the compensation and other benefits recovered for the class members. In *Stastny v. Southwestern Resources Corporation* (Unrep. November 3, 2008) and *Casselman v. CIBC World Markets Inc.* (Unrep. December 21, 2007) percentages in excess of 20 per cent were approved by Brockenshire J., and, in *Meretsky* - one of the companion actions to this case - the same learned judge indicated that 20 per cent was acceptable.

[54] Counsel's intention to request a fee of 20 per cent of the gross recovery was communicated to the numerous class members who contacted counsel at different times throughout this lengthy litigation, the information was provided on its website and it was disclosed in the notice of the fairness hearing. Only one member of the class of several million persons has objected to the size of the fee.

[55] This was hard-fought litigation - conducted with tenacity and skill by counsel who, in effect, snatched victory from the jaws of defeat by persevering with it through successive appeals from the initial decision that denied certification. It is inherent in percentage of recovery agreements that counsel may receive large fees where, as here, the degree of success achieved is substantial. Equally, of course, they take the risk that the results achieved will provide them with little or no compensation.

[56] Taking into account the course of the litigation, the risks accepted by counsel and the extent of the recovery achieved for the class, a fee of $11 million will be approved together with the disbursements claimed of $138,000

[57] There are three other matters on which I believe I should comment.

[58] The first is that Dr Cassano is the spouse of Ms Pat Speight who is a "non-equity partner" in the firm of Sutts Strosberg who acted as co-counsel for the plaintiffs. A relationship of this kind is one that in some cases will call for close examination and, perhaps, suspicion. It was, however, disclosed at the hearing of the certification motion, and again at the fairness hearing, and Dr Cassano was accepted as a suitable representative plaintiff and, with Dr Bordoff, was appointed as such in the order of the Court of Appeal. In these circumstances, I see no reason for considering the relationship to be a factor that should have any bearing on the amount of counsel's fee.

[59] The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive

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if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in section 33 of the CPA. They did not do this.

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[60] While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.), at paras 38 - 39, I referred to criticisms of the lodestar method. One of these that has been repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.

[61] As Smith J. stated in *Endean v. Canadian Red Cross Society,* [2000] B.C.J. No. 1254 (B.C.S.C.), at para 74:

> Good counsel should not be penalised for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their client's objectives.

[62] In contrasting the percentage of recovery approach with the application of a multiplier, Cumming J. stated in *VitaPharm Canada Ltd v. Hoffman - La Roche Ltd*, [2005] O.J. No. 1117 (S.C.J.), at para 107:

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

[63] Of course, if counsel accept a retainer on the basis that the lodestar method is to apply, the requirements of section 33 – including that of a reasonable base fee – must be observed. Class counsel did not choose to adopt that method and, having achieved an excellent result, they submit that it would be unreasonable to reduce their fee by reference to the time they expended to do so. They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial, and there is nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.

[64] The final matter relates to the contents of the objection received from Mr Andrew Martin of Toronto. This was the only objection received from the members of the enormous class. I have not commented on it previously in the above reasons because, to the extent that his criticisms have not been met by the changes I have made to the proposed cy pres distributions, I believe that the authorities I should properly follow foreclose acceptance of them. At the same time, Mr

Martin's comments address quite fundamental issues relating to settlements of class actions such as this. As it may be that his views are shared by other class members who thought it useless, or just too much trouble, to voice their objections, I have included the substance of Mr Martin's email letter as an appendix to these reasons together with my brief comments

Released: July 9, 2009

CULLITY J.

APPENDIX

From : Andrew Martin

To: [Objections]

I am writing to object to the proposed settlement.

My reasons relate to the overall terms of the settlement. The amount that will be paid may (or may not) be appropriate relative to the allegations, but I do not believe that this settlement is in the interests of the plaintiff class. Specifically:

-- Either TD did or did not levy unauthorised, undisclosed or inadequately disclosed charges. This needs to be determined so that in future, conditions of use can be drafted and interpreted correctly. **[While no one could deny that clarification is desirable, the class action procedure has costs and risks for the representative plaintiffs and their counsel that are not shared by the other class members who, in effect, have a free ride. Simply as one example, the plaintiffs incurred an expense of approximately $ 67,000 in respect of the fees of the firm of chartered accountants who received and dealt with the 11,500 cardholders who opted out of the litigation.]**

-- In my personal view, given that certain costs were going to be charged in respect of these uses of the credit cards, the plaintiff class has not been disadvantaged and I suspect would have used the cards in any circumstances. The consequences of this litigation may well be to increase future charges. **[I do not disagree but the Court of Appeal did, or did not consider these considerations to be relevant.]**

-- I strongly object to the proposal to distribute $14 million to charitable organisations. The purpose of a settlement should be to compensate people to who have suffered actual loss, and

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while these are laudable charitable purposes, I see no way reason for a publicly-owned financial institution, as custodian of its shareholders' money, should make such a payment as part of a class action settlement. **[Mr Martin does not indicate his preferred position on the facts of this case that involve more than 4.5 million cardholders of whom only a relatively small number of those who entered into foreign currency transactions can be identified.]**

-- I also object to the proposal to distribute $14 million to law schools. This is highly offensive and, again, an inappropriate use of shareholder money (to support what are presumably ethical shortcomings of lawyers). It also poses a conflict of interest for the judiciary, which might feel reluctant to query or disallow such a proposal giving their own ties to the profession. **[I do not disagree.]**

-- The proposal to pay up to $11 million to the lawyers is outrageous. While only (only!) 20 per cent of the total, it is a huge multiple of legal fees likely to have been incurred. This does not seem a particularly complicated case and cannot have consumed that much time. For instance, if it is a 4x multiplier that suggests 7,000 bars at $400/hour. This seems unrealistic, and so the multiplier is presumably much higher. And yet the risk in a case like this is, historically, quite low. I therefore object to any payment of legal fees in excess of 3x docketed hours at a reasonable hourly rate. Any excess between that and $11 million can either be added to the distribution to cardholders, or distributed to organisations providing free legal services to those unable to pay the fees now charged by lawyers. **[I am not sure why Mr Martin believes the risk in cases like this is, historically, quite low. His support of imposing the multiplier approach irrespective of the terms of counsel's agreement with the plaintiffs, the criticism to which the approach has been subjected, and the difficulties of applying it in practice, is not consistent with the provisions of the CPA as judicially interpreted in previous cases.]**

It is not currently my intention to appear at the hearing on April 24.

Andrew Martin

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DATE: 2009/07/09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

PAUL CASSANO and BENJAMIN BORDOFF

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

REASONS FOR DECISION

CULLITY J.

Released: July 9, 2009

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