

CANADA / JUDGMENT

Bodnar v. Community Savings Credit Union

2015 BCCA 504

COURT

British Columbia Court of Appeal

DECIDED

4 December 2015

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2015 BCCA 504 Bodnar v. Community Savings Credit Union

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bodnar v. Community Savings Credit Union,

2015 BCCA 504

Date: 20151204

Docket: CA42247

Between:

Andrew Bodnar

Respondent

(Plaintiff)

And

Community Savings Credit Union, North Shore Credit Union,

Chemainus Credit Union, Comox Valley Credit Union,

Kootenay Savings Credit Union, VantageOne Credit Union,

Village Credit Union, Greater Vancouver Community Credit Union,

Coastal Community Credit Union, and

Vancouver City Savings Credit Union

Appellants

(Defendants)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Garson

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated September 12, 2014 (Bodnar v. Community Savings Credit Union, Vancouver Docket S047104).

Counsel for the Appellants:

R. Berrow

R. Coad

Counsel for the Respondent:

P.R. Bennett

M.W. Mounteer

Place and Date of Hearing:

Vancouver, British Columbia

September 18, 2015

Place and Date of Judgment:

Vancouver, British Columbia

December 4, 2015

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Savage

Dissenting in Part Reasons by:

The Honourable Madam Justice Garson (Page 21, para. 58)

Summary:

Appellants challenge certification of a class action against several Credit Unions. They argue that questions certified by the chambers judge lack commonality, the judge created subclasses where separate actions are appropriate and one large class proceeding against all defendants is not the

preferable procedure to resolve the claim. Held: Appeal dismissed. There is no reason to interfere with the chambers judge's decision. She applied the appropriate legal tests, gave careful consideration to relevant facts and her conclusions were not clearly wrong. In partial dissent, Garson J.A. would allow the appeal, and reverse the judge's order on certification, certifying question (i), a common question directed to resolving a part of the limitation issue.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] The appellants, collectively "the Credit Unions" are the defendants in a class action, which was certified on September 12, 2014. Andrew Bodnar is the representative plaintiff. He alleges that the Credit Unions charged clients a criminal interest rate through overdraft charges. The Credit Unions appeal the chambers judge's certification. The main issues are whether Mr. Bodnar raised sufficient commonality of issues for certification under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA], whether limitation issues can or should be certified as subclasses or at all, and whether the class action is the preferable way to proceed. The chambers judge's reasons for judgment are indexed at 2012 BCSC 589. The main issue is whether this court's decision in *Parsons v. Coast Capital Savings Credit Union*, 2007 BCCA 247 is distinguishable from this case.

Background

- [2] There have been a number of class action claims against financial institutions and lenders that engage the question whether a criminal rate of interest has been charged either on overdraft charges as this case or on "payday" loans. The first claim in British Columbia involving overdraft administration fees was *MacKinnon v. Vancouver City Savings Credit Union*, which was ultimately certified by Tysoe J. (as he then was) in reasons indexed at 2004 BCSC 1604. An application was made by the plaintiff to add several of the defendants engaged in this litigation to the Vancouver City Savings litigation (*Community Savings Credit Union*, *North Shore Credit Union*, *Chemainus Credit Union*, *Comox Valley Credit Union*, and *Kootenay Savings Credit Union*). That application was unsuccessful (2004 BCSC 125), resulting in the commencement of this action. Other cases involving allegations of criminal rate of interest relating to overdraft fees include *Parsons* (certified) and *Smith v. Vancouver City Savings Credit Union*, 2010 BCSC 120 (certified). Pay day loan cases from British Columbia include *MacKinnon v. National Money Mart Company et al*, 2005 BCSC 271 (not certified), *Kilroy v. A OK Payday Loans Inc.*, 2007 BCCA 231 (certified) and *Bodnar v. The Cash Store Inc.*, 2006 BCCA 260 (certified). There are many other cases decided or pending in other provinces as well.
- [3] Mr. Bodnar claims that overdraft charges levied against him and other credit union members, in excess of \$5, constitute a criminal interest rate exceeding 60% per annum in contravention of s. 347 of the Criminal Code, R.S.C. 1985, c. C-46. He seeks restitution of the interest received by the Credit Unions. His claim is based on unjust enrichment and payments made "under mistake".

- [4] Mr. Bodnar was a member of Community Savings Credit Union for approximately 15 years. During the relevant period, which does not engage the Limitation Act, R.S.B.C. 1996, c. 266, he paid hundreds of overdraft charges in excess of \$5.00. For example, in one transaction, he paid a \$17 charge for overdrawing his account by \$2,500 for a single day. This works out to an effective annual interest rate of over 1,000%.
- [5] There are ten credit unions named as defendants. Two of them are successor companies that have assumed liability for other named predecessor credit unions. Coastal Community Credit Union is the successor to Chemainus and Comox Valley. Vancouver City Savings Credit Union is the successor to Village Credit Union. The claims range from \$66,000 - \$1.7 million.
- [6] There are some differences between the Credit Unions in how they calculated overdraft charges. There were three different forms of account agreements, four different fee structures for overdraft charges, and different procedures for deciding whether to honour a cheque or overdrawn transaction.

Applicable legislation

- [7] The relevant provisions of the CPA are sections 4 and 7:

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

- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
 - (d) whether other means of resolving the claims are less practical or less efficient;
 - (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[8] Section 347 of the Criminal Code at the relevant times made it an offence to charge an interest rate in excess of 60% per annum on credit advanced. "Interest" includes "the aggregate of all charges and expenses paid or payable" in any form for the advancement of credit. Excluded from this broad provision are overdraft charges not exceeding \$5, among others. The Code provisions are set out below:

- (1) Notwithstanding any Act of Parliament, every one who
 - (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
 - (b) receives a payment or partial payment of interest at a criminal rate, is guilty of
 - (c) an indictable offence or
 - (d) an offence punishable on summary conviction .

(2) In this section,

"criminal rate"

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

"interest"

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance

"overdraft charge"

"overdraft charge" means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons

[9] Subsections 6(3)(f) and 6(4) of the Limitation Act, postpone the running of the normal limitation period for actions claiming "relief from the consequences of mistake":

...

6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

...

- (f) for relief from the consequences of a mistake;
- (4) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

The chambers judge's decisions

[10] The key issues before the chambers judge were: (i) whether there were common issues involving the Credit Unions; (ii) whether the limitation defence could be certified and (iii) whether a class proceeding was the preferable procedure for pursuing the claim against all the Credit Unions.

[11] The chambers judge certified the following common issues in relation to the overdraft charges:

- (a) Does an Overdraft Charge exceeding \$5.00 constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
- (b) If an Overdraft Charge exceeding \$5.00 constitutes interest under s. 347 of the Criminal Code, either in whole or in part, has the collection by the Credit Union of such Overdraft Charges resulted in the payment by class members and the receipt by the Credit Union of interest at a criminal rate in respect of the overdrafts by class members of their accounts, contrary to s. 347(1) of the Criminal Code?

[12] In Parsons, this Court certified the identical questions for four credit unions. The issue for the chambers judge was whether actions against eight credit unions could be certified.

- [13] She concluded that common issue (a) "does not appear to be so complex that the court hearing the action on its merits could not determine it for each of the eight individual Credit Unions " (para. 67). She found that there was a viable methodology to answer common issue (b) based on expert reports already provided (para. 69). The chambers judge considered the decision in Parsons that upheld the certification of identical issues while noting the similarities and differences between the various claims (paras. 60-69).
- [14] The chambers judge held that subclasses were necessary for the determination of certain remedial issues: unjust enrichment, breach of consumer protection statutes, and mistake (paras. 75, 81). The determination of whether the proposed class member made the payment under the mistake of law, thereby postponing the limitation period, would only be relevant to those with statute-barred claims (para. 77). The Parsons case did not engage limitation issues. The chambers judge relied on her decision in Smith to address these issues. She certified the following questions on the limitation issues:
- (g) If the Credit Union has through the collection of overdraft charges received interest at a criminal rate from Class members, has the Credit Union charged and collected those overdraft charges in the mistaken belief that the charges were lawful?
 - (h) If the answer to (g) is yes, did the Credit Union receive any challenges or questions from Class members concerning the legality of the overdraft charges in excess of \$5 charged by the Credit Union, prior to February 5, 2003?
 - (i) If the answer to (g) is yes, would a reasonable person, having been charged an overdraft fee in excess of \$5 by the Credit Union, seek advice as to whether those acts established a cause of action against the Credit Union, prior to February 5, 2003?
- [15] The chambers judge concluded that a class action against all of the Credit Unions was the preferable procedure (para. 92). She addressed the Credit Unions' argument that the actions ought to proceed as separate class litigation against each Defendant individually rather than all of them collectively. She held that, "[m]ost of the claims are too small to be pursued economically on an individual basis, and no other means of resolving the claims appear viable" (para. 88). Despite the likely "time-consuming and complex" resolution of the ultimate issues, the chambers judge found that a class action avoids duplication of fact finding and legal analysis on common issues that advance all class members' claims (para. 89).
- [16] Being satisfied that the CPA requirements were met, the chambers judge conditionally certified Mr. Bodnar's action. Certification was subject only to a revised case management plan and the specifics of the subclassing, neither of which are at issue on this appeal. These conditions being met to her satisfaction, the action was certified on September 12, 2014.

Position of the parties on appeal

- [17] The Credit Unions submit that the chambers judge made three errors. Namely, in concluding that: (i) the overdraft issues present proper common questions amongst all the credit unions; (ii) the individual remedies and limitations issues could be addressed through subclassing rather than requiring separate class proceedings; and (iii) one class proceeding was the preferable procedure to resolve the claims.
- [18] With regard to commonality, the Credit Unions submit that analyzing whether each of the Credit Unions were charging a criminal interest rate requires individual assessments. They argue the present case is far more complex in breadth and scope than previous overdraft charge cases where commonality was found to exist on similar questions.
- [19] They further submit that the postponement of the limitations period due to mistake cannot be resolved on a class-wide basis. Because the relevant test for mistake in s. 6(4) of the Limitations Act is an integrated subjective/objective test, it requires an individual assessment of each plaintiff's means of knowledge. The Credit Unions submit that the objective element cannot be turned into a common issue by divorcing it from its subjective component.
- [20] Finally, the Credit Unions submit that the action does not meet the preferability requirement under s. 4(1)(d) of the CPA. They predict that it will become an "unwieldy" task to manage and "inevitabl[y] descen[d] into" expensive and time consuming individual inquiries if proceeding to trial, thereby frustrating the CPA's goals of access to justice and judicial economy.
- [21] Mr. Bodnar supports the chambers judge's conclusions and submits that she made no error in principle and was not clearly wrong in certifying the action as a class proceeding. He submits that the common issues certified meet the commonality requirement of significantly advancing the claims of all class members and conform to the precedent of this court. He further submits that the chambers judge's discretionary findings ought to attract considerable deference given she has been overseeing class proceedings for the recovery of overdraft charges imposed by credit unions for over five years.

Issues on appeal

[22] The issues are:

- (i) Do the overdraft issues meet the commonality requirement in s. 4(1)(c) of the CPA?
- (ii) Are the individual remedies and limitations issues amenable to certification at all, and if so, should there be subclassing of the issues?
- (iii) Is a class proceeding the preferable procedure to resolve the claims, thereby satisfying s. 4(1)(d) of the CPA?

Discussion

Standard of Review

- [23] The parties do not disagree on the standard of review. Both acknowledge that the chambers judge has some discretion in determining whether to certify a class action, and that this Court will not interfere with that decision unless there is an error in law or the decision was clearly wrong: *Campbell v. Flexwatt Corp.*, (1997) 44 B.C.L.R. (3d) 343 at para. 25; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 at para. 31; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 at para. 22.
- (i) Do the overdraft issues meet the commonality requirement in s. 4(1)(c) of the CPA?
- [24] The meaning of "common issue" was most recently discussed in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1. The Court found that what is required is not a common answer, but a common question that will advance the litigation for all of the members of the group (para. 4). At para. 46, the Court said:
- [46] Dutton and Rumley therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.
- [25] As noted above, the chambers judge certified the following overdraft questions as common issues:
- (a) Does an Overdraft Charge exceeding \$5.00 constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
- (b) If an Overdraft Charge exceeding \$5.00 constitutes interest under s. 347 of the Criminal Code, either in whole or in part, has the collection by the Credit Union of such Overdraft Charges resulted in the payment by class members and the receipt by the Credit Union of interest at a criminal rate in respect of the overdrafts by class members of their accounts, contrary to s. 347(1) of the Criminal Code?
- [26] The Credit Unions argue that there are too many credit unions, with too disparate practices to come close to being common issues. As well, they submit that there are many different reasons account holders went into overdraft from simple error, to intentional manipulation of the system to borderline criminal fraud.
- [27] Mr. Bodnar, and the chambers judge, relied on this Court's decision in *Parsons*, where the same issues of criminal rate of interest in the context of the amalgamation of four credit unions was certified. The identical questions as framed here were certified in *Parsons*. In upholding the certification, Newbury J.A. said at paras. 26-27:

- [25] It is said that the Chambers judge erred in viewing Bodnar as a "strong precedent" for this case, and erroneously assumed that all criminal interest cases are a 'genre' governed by that precedent.
- [26] With respect, I disagree with these submissions. To begin with, the plaintiff is attacking charges applicable where a cheque is honoured, resulting in an overdraft, rather than where it is dishonoured because of "no sufficient funds." I see no distinction in principle between an overdraft fee charged as part of a one-tier system as opposed to one charged in two tiers. The fact that Surrey Metro Savings Credit Union made an additional charge when an item was dishonoured provides no basis in principle by which to distinguish the first tier of its overdraft charges from those charged by the other credit unions. Nor has Coast Capital shown any reason why differences in the amounts of the charges made by its predecessors at different times would affect the question of law of whether overdraft payments come within the definition of "interest" in the Code.
- [27] I also agree with the Chambers judge that Mr. Karp's reports provide a useful tool, applicable both to Coast Capital and its predecessors, for determining which overdraft fees exceed 60% per annum -- assuming such fees are found to constitute "interest" as defined in the Code. If the trial judge decides as a matter of law that the overdraft charges do so qualify (and I make no comment on that very important question), the Court will be in a position, using evidence such as Mr. Karp's tables, to extrapolate to each member's case the answers to the first two common questions. That there may be exceptions or complications in some instances (e.g., as to whether a given type of overdraft charge is partly interest and partly something else) does not detract from the fact that the Court will have determined in principle whether, or in what circumstances, the charges constitute interest. The resolution of this question of law is a "necessary ingredient" of the claim of each member of the class even though the answer to the question may not be the same for each plaintiff. As Gerow J. stated at para. 66 of *Reid v. Ford Motor Co.* 2003 BCSC 1632, "It is not whether the answer is common, but whether the question is common."
- [28] The Credit Unions argue that Parsons is the high-water mark for certification, and point to the case of *MacKinnon v. National Money Mart Company et al*, where the court refused to certify claims of criminal interest rates in what was referred to as "industry-wide litigation", with more than 20 defendants operating 18 businesses.
- [29] The chambers judge in the instant case concluded that the account agreement was common amongst six of the eight Credit Unions; that the use of a clearing system operated by Credit Union Central is common amongst all the Credit Unions and the act of honouring a member's negotiable item, such as a cheque, without a sufficient deposit balance is common among all Credit Unions. She cited the differences as including the form of the account agreement with two of the Credit Unions, and the individual Credit Union's practice and administrative costs in deciding whether to honour a negotiable item that would create an overdraft.

[30] The chambers judge concluded, at para. 67:

In addressing the first question, the court may consider how the Credit Unions calculated the overdraft fees and the Credit Unions' costs relating to whether to permit an overdraft, but that does not prevent the issues raised from being common. All of the individual claims depend on the determination of whether the fees fell within the definition of "interest." It may be that the answer is that an overdraft fee over \$5.00 only constitutes interest to the extent it does not reflect the charging credit union's administrative costs, but this answer would still advance the litigation and be relevant to all claims. The first proposed common question does not appear to be so complex that the court hearing the action on its merits could not determine it for each of the eight individual Credit Unions, should that prove necessary.

[31] She essentially concluded that the addition of four more Credit Unions from that in Parsons, would not create a question that was too complex to answer. In addition, the answer to the question would advance the litigation and be relevant to all the claims.

[32] In terms of the second question, Mr. Karp has provided expert reports, as he did in Parsons, noted above in para. 27, that provide a "useful tool" to determine which of the charges resulted in the receipt of interest in excess of 60%.

[33] The Credit Unions submit that the chambers judge certified the criminal interest rate as a common issue because she was certifying the "genre" of the claim. The chambers judge was well-aware of MacKinnon, where the issue of criminal interest rate was not certified in a case involving many more businesses and a large variety of business practices. Here, there is half the number of business and only a few business practices in issue.

[34] The resolution of both of these issues will advance the claims of all of the class members. In my view, the chambers judge applied the correct test and her conclusion is not clearly wrong. I would not interfere with her conclusion to certify these questions as common issues.

(ii) Are the individual remedies and limitations issues amenable to subclassing rather than separate class proceedings?

[35] Mr. Bodnar first filed his claim on December 21, 2004. The first class action claim relating to criminal rates of interest was MacKinnon v. Vancouver City Savings Credit Union. That claim was filed on February 5, 2003 and later certified. All of the defendants stopped charging the challenged overdraft fees in February 2003, likely as a result of the MacKinnon claim.

[36] As noted above, the chambers judge certified the following questions in relation to the limitation issue:

(g) If the Credit Union has through the collection of overdraft charges received interest at a criminal rate from Class members, has the Credit Union charged and collected those overdraft charges in the mistaken belief that the charges were lawful?

- (h) If the answer to (g) is yes, did the Credit Union receive any challenges or questions from Class members concerning the legality of the overdraft charges in excess of \$5 charged by the Credit Union, prior to February 5, 2003?
- (i) If the answer to (g) is yes, would a reasonable person, having been charged an overdraft fee in excess of \$5 by the Credit Union, seek advice as to whether those acts established a cause of action against the Credit Union, prior to February 5, 2003?

[37] The chambers judge explained that these issues relate to the proposed class members who would be barred from the action by the Limitation Act. The issues relate to claims for the period over ten years before the start of the lawsuit. The proposed class members would claim that the running of the limitation period was postponed by a mistake of law. The Criminal Code provisions relating to criminal interest rate in relation to credit unions was proclaimed on April 1, 1981.

[38] The relevant provisions of the Limitation Act are repeated for convenience:

Running of time postponed

6(1) The running of time with respect to the limitation period set by this Act for an action

- (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or
- (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,

is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

...

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

...

- (f) for relief from the consequences of a mistake;

...

(4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

- (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- [39] The chambers judge created subclasses for the members of each Credit Union whose claims would otherwise be barred. She also concluded that because there may be conflict between those with statute-barred claims and those that were not statute-barred, a different representative plaintiff was needed. She concluded, following her decision in *Smith*, referred to above, that common questions (g-i) would assist in resolving the issues regarding potentially statute-barred claims, and clearly move the litigation forward.
- [40] The *Smith* decision was a class action that followed *MacKinnon v. Vancouver City Savings* referred to above. *MacKinnon* had certified a class action for account holders within the normal six-year limitation period. Ms. *Smith* successfully sought certification for those outside the normal period, requiring the answering of questions to establish postponement.
- [41] The Credit Unions submit that the decision of this Court in *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235 prevents postponement under s. 6 of the Limitation Act from being resolved on a class wide basis. *Knight* was a case involving the selling of cigarettes as "light" or "mild". In *Knight*, this Court concluded that claims prior to the limitation date could not be litigated in the class proceeding because the individuals would have to be able to establish postponement of the limitation period (para. 34). In coming to this conclusion, this Court relied on *Novak v. Bond*, [1999] 1 S.C.R. 808, which held that issues engaging limitation periods and postponement of those periods depended on the individual circumstances of each plaintiff, citing paras. 86 and 90.
- [42] The chambers judge in this case relied on her decision in *Smith* where she addressed the arguments raised in *Knight* below.
- [39] *VanCity* relies on the decision of the Court of Appeal in *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235, 54 B.C.L.R. (4th) 204. There, the court upheld the certification as a class action of a claim regarding the manufacturing and marketing of cigarettes branded as "light" and "mild". However, the Court of Appeal limited the class to those individuals who purchased cigarettes after May 8, 1997 (see para. 36). Counsel provided a copy of the entered order which confirmed the limitation on the class description. The lawsuit had been commenced six years after that date, on May 8, 2003 (see para. 3), and so the class was limited to people whose claims could not be barred by the usual limitation period.
- [40] Hall J.A., writing on behalf of the court, referred to the limitation issues arising for transactions occurring prior to May 1997. He wrote as follows in para. 34:

...The chambers judge observed in her reasons, correctly in my opinion, that the limitations defence as a whole cannot be tried as a common issue. If that is so, I am of the view that it is not possible to decide on an award of damages to the class as certified since the composition of the class would be unknown. It could be possible for a class of individuals who entered into transactions after May 8, 1997, to be certified as a class, but I fail to see how claims related to

transactions prior to that time could be litigated in the class proceeding. That is so because in order to have valid claims, individuals would have to be able to establish postponement of the limitation period: [Novak v. Bond, [1999] 1 S.C.R. 808, 172 D.L.R. (4th) 385].

[41] VanCity argued that Knight establishes that claims which are subject to limitations defences cannot be certified as class actions. However, unlike the case at bar, Knight did not involve a claim for relief from a mistake.

[43] She concluded, at paras. 47-50:

[47] In the case at bar, there are common issues relating to the limitations defences. They would advance the litigation in respect of the claim for relief from VanCity's alleged mistake of law, and might also assist the court in respect of the constructive trust claims allegedly postponed by s. 6(1) and (2). While those claims involve an individual inquiry, the burden is on VanCity to establish the individual's degree of knowledge to maintain the limitations defence.

[48] In my view, the resolution of the proposed common questions (e) through (g) would assist in resolving the issues, particularly for claims arising prior to December 16, 1994, and would be a substantial common ingredient of each member's claim to postponement on the basis of relief for mistake of law. Resolution of those questions may not resolve the applicability of the limitation defence, because individual circumstances may apply, but the answers would be helpful.

[49] This is a case involving many potential class members, with relatively small individual claims. It involves standard terms of a single credit union defendant. The relevant questions relate to VanCity's actual knowledge, and to the position of a "reasonable person", and the answers are relevant to the claim for relief from mistake and to postponement of the limitation period. Resolution of these issues will move the litigation forward. Those factors support certification.

[50] Some individual questions would remain, relating both to the limitation period defences, and accounting for individual claims. The accounting issues are likely to be straightforward once the facts regarding the transactions are known. The individual questions relating to the limitation period defences may involve inquiries into conduct like the depositing of "empty envelopes", but are not likely to be as complex as, for example, individual determination of causation and damages as in *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350, 148 D.L.R. (4th) 158 (S.C.).

[Emphasis added.]

[44] She applied this reasoning to the case at bar when reaching her conclusion that the limitation issues could be certified.

- [45] The issue appears to turn on the question of whether a resolution of the questions would advance the litigation. Mr. Bodnar agrees that the issue of postponement cannot be completely resolved as part of a class action, as there will be individual inquiries in order to reach a final resolution. What he argues is that determining whether the Credit Unions thought the charges were lawful would move the litigation forward for everyone, as would a determination of what the "reasonable, objective person" might have done, without the subjective component. The Credit Unions argue that the subjective and objective components of the test are integrated, and cannot be separately considered.
- [46] The chambers judge accepted that determination on these points did not require individual considerations, and would be helpful to move the litigation forward. She acknowledged that they may eventually require individual analysis, but that, in and of itself, was not a reason to deny certification. In my view, the objective component can be isolated from the subjective component of the analysis and would thereby effectively move the litigation forward. I see no error in her reasoning.
- [47] The Credit Unions also submit that this was not an appropriate case to introduce a "subclass" into the action. They argue that utilizing subclasses results in an action that "vastly overreaches" and "is void of the essential element of commonality", relying on *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.), a case involving potentially 2.4 million class members with a multitude of differences.
- [48] I do not agree with the Credit Unions' position. This case is quite unlike *Caputo*. Subclasses may be usefully utilized to address, as the chambers judge did here, issues of conflict of interest within the identifiable class. The overdraft questions are common across all of the subclasses. Nor is it necessary to identify different representative plaintiffs for each subclass if one plaintiff can adequately, and without conflict, represent the subclass. This is a matter within the discretion of the chambers judge, and eventually the trial judge.
- [49] I see no error in the chambers judge's decision to create subclasses in this case.
- (iii) Is a class proceeding the preferable procedure to resolve the claims, thereby satisfying s. 4(1)(d) of the CPA?
- [50] The factors to consider when determining whether a class proceeding was the preferable procedure is set out in s. 4(2), which I reproduce below for convenience:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

- (d) whether other means of resolving the claims are less practical or less efficient;
 - (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
- [51] This is not an exhaustive list of factors. In addition, the court must consider "judicial economy, access to justice, and behaviour modification." *Hollick v. Toronto (City)*, 2001 SCC 68 at para 27. These are merely factors, not conditions precedent which the plaintiff must prove will be fully achieved in a class proceeding. *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22-23.
- [52] The Credit Unions argue that the class action is simply not manageable because there are eight credit unions involved, and should not be certified for the same reasons as noted in *MacKinnon v. National Money Mart Company et al.* These arguments are the same made before the chambers judge. She was alive to the considerations, and noted that this action was an attempt to join the smaller credit unions rather than attempt the criticized "industry-wide" litigation. Indeed, attempts to join some of these credit unions to other litigation have already failed (*MacKinnon v. Vancouver City Savings*).
- [53] She noted that the total value of the claim against these smaller credit unions is relatively small, and not financially viable for separate class actions against each Credit Union. The Credit Unions submit that there was a lack of evidence to support this conclusion, however there was evidence that demonstrated the rough value of each claim, as set out in the chambers judge's reasons for judgment at para. 10.
- [54] The chambers judge concluded that there would be judicial economy in proceeding with the class action as it would avoid duplication of fact-finding and legal analysis.
- [55] After considering the relevant factors she concluded that the class action was the preferable procedure. There is no question that ultimately individual issues will have to be canvassed, or at best, smaller subclasses created. This does not mean that a class action is not the preferable procedure.
- [56] The decision on preferability is to be accorded deference: *AIC Limited* at para. 65. I see no error in principle, and the conclusion that this was the preferable procedure is not clearly wrong.

Conclusion

- [57] In summary, the chambers judge is entitled to deference and I see no error in her reasoning on the issues raised. I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Savage"

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

- [58] I have had the privilege of reading in draft the reasons for judgment of Madam Justice Bennett. I agree with her proposed disposition of the first issue on this appeal. With respect, I do not agree with her conclusion and proposed disposition of the second issue, which concerns postponement of the limitation period and the common question intended to address that aspect of Mr. Bodnar's claim.
- [59] The chambers judge certified questions (g) and (i), which read as follows:
- (g) If the Credit Union has through the collection of overdraft charges received interest at a criminal rate from Class members, has the Credit Union charged and collected those overdraft charges in the mistaken belief that the charges were lawful?
- (i) If the answer to (g) is yes, would a reasonable person, having been charged an overdraft fee in excess of \$5 by the Credit Union, seek advice as to whether those acts established a cause of action against the Credit Union, prior to February 5, 2003?
- [60] Question (i) is intended to partially address the test for postponement as set out in s. 6(4) of the Limitation Act. However, as I will discuss, the test articulated in s. 6(4) is a subjective/objective test. Question (i) satisfies only the objective component of that test. Thus, if the trial judge answers question, (i) in the affirmative, whether the limitation period is postponed will not be resolved until individual class members testify. In my respectful view, bifurcating the postponement test into subjective and objective components is impractical, will not advance the litigation, and is contrary to the authorities.

Discussion

The applicable limitation period

- [61] The applicable limitation period in this case is six or ten years, depending upon whether the plaintiff is awarded a constructive trust. While the ordinary limitation period for mistake and unjust enrichment is six years (see Limitation Act, s. 3(5)), a ten year limitation may apply if a remedial constructive trust is awarded: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278 at para. 5.
- [62] Some of the overdraft fees charged to Mr. Bodnar and other members of the proposed class may have been incurred more than six or ten years before this action was commenced. Mr. Bodnar seeks to postpone the limitation period for those fees charged outside the primary limitation period. Mr. Bodnar pleads that he opened his account in 1997. It is not clear to me how far back in time the plaintiff class proposes to reach, but I infer that it is to the date that each class member opened an account at any one of the appellant credit unions.

The test for postponement under s. 6(4)

- [63] I begin by noting that s. 6 (3)(f) of the Limitation Act, set out in my colleague's reasons for judgment, provides that the running of time for an action seeking relief for the consequences of a mistake is postponed in accordance with subsection (4).
- [64] I agree with the appellant's submission that the s. 6(4) inquiry must be undertaken with reference to the plaintiff's mistake. Certified question (g) asks, "whether the Credit Unions collected overdraft charges in the mistaken belief that the charges were lawful?" It is Mr. Bodnar's mistake that is relevant, not the Credit Unions'. The burden is on Mr. Bodnar to prove that the running of time has been postponed. Section 6(3)(f) must refer to a plaintiff's mistake.
- [65] The language of subsection (4), reproduced in my colleague's reasons, is undoubtedly difficult to understand. However, courts have clarified its wording since its enactment.
- [66] In *Ounjian v. St. Paul's Hospital et. al.*, 2002 BCSC 104 at para. 21 (cited with approval by this Court in *Brooks v. Jackson*, 2009 BCCA 150; *Dheenshaw v. Saanich Police Department*, 2014 BCCA 447) Tysoe J. (as he then was) described the four necessary elements of postponement under s. 6(4) as:
1. The identity of the defendant is known to the plaintiff.
 2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
 3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
 4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.
- [67] All four of these elements demand some reference to the plaintiff's knowledge or circumstances. Elements three and four also involve an assessment of that knowledge or circumstances from the perspective of the reasonable person.
- [68] An assessment of the third element may involve consideration of more than those facts establishing a cause of action, including other facts particular to the plaintiff that are material to discoverability: see, for example, this Court's discussion in *Brooks v. Jackson* at paras. 28-31. In *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453 at para. 24, this Court described the concept of "notional advice" embodied in the third element:

Another unique feature of British Columbia legislation is what the Court in *Levitt v. Carr*, [[1992] 4 W.W.R. 160 (B.C.C.A)] referred to as "another level of abstraction" added to the already complex phraseology used in other jurisdictions - "notional advice by notional advisors." The Court in *Levitt v. Carr* continued:

This advice is given the conceptual status of facts and, when added to those within the plaintiff's means of knowledge, forms the body of information upon which the reasonable man decides whether an action on the cause of action would have a reasonable prospect of success and whether the plaintiff ought to be able to bring that action. (at 175)

[69] The extent to which individual circumstances play into the postponement analysis is best illustrated by the fourth element, which will always take into account the individual circumstances of the plaintiff: *Novak v. Bond*, [1999] 1 S.C.R. 808. In *Novak*, McLachlin J. (as she then was) described the correct test under s. 6(4)(b) as follows (at para. 81):

- s. 6(4)(b) may be read as denoting a time at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling

[Emphasis in original.]

[70] The importance of a plaintiff's individual circumstances is emphasized at paras. 86 and 90 of the decision:

Whether a particular circumstance or interest has the practical effect of preventing the plaintiff from being able to commence the action must be assessed in each individual case.

The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.

[Emphasis added.]

[71] In summary, according to *Novak*, time does not begin to run until the reasonable person would conclude that somebody in the plaintiff's position, acting reasonably in light of his or her own circumstances and interest, could bring an action (at para. 39).

Should the limitations questions have been certified?

- [72] The appellants rely on *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235, *Novak*, and *Edgeworth Construction*, for the proposition that postponement under s. 6 of the Limitation Act cannot be resolved on a class-wide basis. They submit that even in circumstances where issues relevant to postponement may be certified, the class period should not be extended to include claims dependent on postponement.
- [73] *Knight* was an appeal from a chambers judgment certifying a class action brought against Imperial Tobacco Canada Ltd., a tobacco manufacturer. Imperial had marketed cigarettes in Canada branded as "light", or "mild", which the respondent purchased. The respondent initiated a lawsuit in 2003 alleging that Imperial had engaged in deceptive acts or practices contrary to the Trade Practice Act, R.S.B.C. 1996, c. 457, and its successor statute, the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2. The class as defined by the appealed order consisted of persons who purchased light or mild cigarettes between July 5, 1974, to the opt-out/opt-in date set by the order.
- [74] On appeal, it was submitted that the operative language of the statutes at play required overwhelming reference to the individual circumstances of the proposed class members, such that certification of common issues was inappropriate.
- [75] The appellant in *Knight* submitted that the determination of damages was not possible in relation to the whole of the class because of the existence of limitation issues for those claims arising prior to 1997, outside of the 6-year limitation period. Citing *Novak*, the appellant argued that the determination of these limitation issues necessarily involved an assessment of individual circumstances.
- [76] After reviewing paras. 86 and 90 of *Novak*, which emphasize the importance of analyzing individual circumstances when considering postponement, the Court said the following:
- [34] [L]imitation issues clearly arise in the instant actions for transactions occurring prior to May 1997. The chambers judge observed in her reasons, correctly in my opinion, that the limitations defence as a whole cannot be tried as a common issue. If that is so, I am of the view that it is not possible to decide on an award of damages to the class as certified since the composition of the class would be unknown. It could be possible for a class of individuals who entered into transactions after May 8, 1997, to be certified as a class, but I fail to see how claims related to transactions prior to that time could be litigated in the class proceeding. That is so because in order to have valid claims, individuals would have to be able to establish postponement of the limitation period: *Novak*, supra.

[Emphasis added.]

- [77] In my opinion, the foregoing passage does not stand for the proposition, as asserted by the appellant, that no questions relevant to postponement issues can be certified in class proceedings. The questions in *Knight* related to damages. Determining damages would have demanded the resolution of limitations issues as a whole, which the Court found was not possible on a class-wide basis. I do not see *Knight* as broadly prohibiting the certification of any questions partially relevant to postponement.
- [78] In reaching that conclusion, I am mindful of the comments of Mackenzie J.A. in *L.R. v. British Columbia*, 1999 BCCA 689, aff'd 2001 SCC 69 ("*Rumley*"). *Rumley* involved certification of a class action by former students abused at a residential school. On an appeal (upheld by the Supreme Court of Canada), Mackenzie J.A. rejected certification of non-sexual abuse claims, largely because they were excessively individualized. At paras. 46 and 47, Mackenzie J.A. said the following:

I have concluded that issues unrelated to sexual abuse of students should not be certified, limitation considerations aside. Limitation defences do present a formidable challenge to those claims. The test for postponement as stated by McLachlin J. for the majority of the Supreme Court of Canada in *Novak v. Bond* [citation omitted] involves both objective and subjective elements. The application of that test inevitably will require an examination of the individual circumstances of each class member to overcome an otherwise applicable limitation barrier.

While not in itself decisive in my opinion, the individual dimension of the limitation issue is an additional factor weighing against certification of common issues related to causes of action that face a limitations defence.

[Emphasis added.]

- [79] Again, these comments suggest that limitation concerns relating to a proposed issue may weigh against certification, but are not determinative. They do not suggest that questions relating to portions of a limitation issue may not be certified themselves.

The chambers judge's reasons on question (i)

- [80] In certifying question (i), the chambers judge relied on her reasons in *Smith v. Vancouver City Savings Credit Union*, 2010 BCSC 120. In *Smith*, the chambers judge certified a question identical to question (i), but with respect to a single credit union. She therefore held that she was bound to reach the same decision in this case (at para 79): *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 13 W.W.R. (N.S.) 285 (B.C.S.C.).
- [81] *Knight* was also argued as a basis for refusing certification in *Smith*. The chambers judge distinguished *Knight* on the basis that it did not involve a claim for relief from a mistake (*Smith* at para. 41). She further concluded that the resolution of questions substantially similar to questions (g) - (i) in this case would be a "substantial common ingredient" of each class member's claim to postponement (at para. 47). While acknowledging that resolution of the issue would not resolve the applicability of the limitation defence, she considered that

the answers would help advance the litigation (at para. 49).

[82] The chambers judge applied the same reasoning in this case. The chambers judge noted that limitation issues were not common to all class members. However, she considered that the lack of commonality could be addressed through the creation of subclasses. She noted that amongst those class members relying on postponement, subclasses would be required for each credit union (at para. 81). Further subclasses would be needed to address (for settlement purposes) the conflict between those whose claims depended on postponement and those whose claims did not.

[83] Ultimately, the chambers judge concluded that certification was appropriate. At para. 82, she said the following:

The resolution of proposed common questions (g) to (i) would assist in resolving the issues regarding the potentially statute-barred claims. They would resolve a substantial common ingredient of each member's claim to postponement on the basis of relief for mistake of law. Individual circumstances may still apply, but the answers would be helpful.

[84] Respectfully, I disagree with this conclusion.

[85] I have already stated that I do not view Knight as generally prohibiting the certification of all or part of limitation issues. That does not, however, address the broader questions of whether it is in fact possible to analyze the objective or subjective components of the postponement test in isolation, or whether (as the chambers judge asserted) doing so would in fact be helpful in moving the litigation forward.

Question (i) should not be certified

[86] I begin with Mr. Bodnar's pleading. Mr. Bodnar pleads the following:

6. The Defendants charged overdraft charges in excess of \$5 to the Plaintiff and the Class members in the mistaken belief that the overdraft charges were lawful.
7. No challenges were made or questions raised by the Plaintiff or any other members of the Defendants concerning the legality of the overdraft charges, either when those overdraft charges were rendered by the Defendants or at any time thereafter, until February 2003 when the action in *MacKinnon v. Vancouver City Savings Credit Union*, British Columbia Supreme Court, Vancouver Registry Action No. S030681 (the "MacKinnon action") was commenced claiming that overdraft charges rendered by Vancouver City Savings Credit Union were unlawful. The Plaintiff was not aware prior to that date of an issue as to the legality of the overdraft charges rendered by the Defendants.
8. The Plaintiff and the Class members acted reasonably in failing to raise any such question or challenge as to the legality of the overdraft charges they paid, as the Plaintiff and the Class members had no reason to believe that the Defendants would charge overdraft charges that were prohibited by the Criminal Code. Until at least the commencement of the MacKinnon action, a reasonable person in the position of the Plaintiff or any other class member would

have no reason to seek advice or pursue a claim concerning the legality of the overdraft charges rendered by the Defendants to the Plaintiff and the Class members.

9. The overdraft charges paid by the Plaintiff and the Class members would not have been charged and received by the Defendants but for their mistaken belief that the overdraft charges were lawful and the absence of any reason for the Plaintiff or the Class members to believe otherwise.
 10. The collection by the defendants of the overdraft charges in the circumstances set out in paras. 3.1 through 3.9 constitute the receipt by the Defendants of payments made under a mistake of law.
- [87] Paragraphs 7 and 8 are directed at the issue of postponement under s. 6(4). It should be noted that the date, February 5, 2003, identified in certified question (i), refers to the date the MacKinnon action was commenced.
- [88] Question (i) asks whether the reasonable person would have sought legal advice before the MacKinnon action was commenced, knowing that he or she had been charged an overdraft fee. It attempts to respond partially to the third Ounjian element, focusing on objective aspects of the postponement test.
- [89] In my view, it is not possible to meaningfully bifurcate the subjective and objective components of the postponement test. I view Novak, Knight, Rumely, and Edgeworth Construction collectively as authority for the proposition that the relevant question is what the reasonable person would do, taking into account the individual circumstances of each particular plaintiff. In particular, Novak describes a highly personal, integrated set of inquiries.
- [90] Question (i) assumes awareness of the MacKinnon action, and knowledge of having been charged overdraft fees. However, it is not clear that this knowledge would uniformly act as a kind of "triggering event", causing every reasonable class member to seek legal advice. As the appellants point out in their factum, one cannot meaningfully ask what the reasonable person would do in a given scenario without knowing all the facts bearing on that person's ability to act.
- [91] I therefore question the utility of attempting, as question (i) does, to isolate objective components of the third Ounjian element. Put simply, what matters is what the reasonable person in the plaintiff's position would do. Determining what the reasonable person would do without reference to all facts relevant to the plaintiff's position does not, in my opinion, resolve a "substantial ingredient" of the class members' postponement claims. Because question (i) is not personal, it could only result in a finding relating to a hypothetical person, not anchored to s. 6(4). It would not resolve the liability aspect of this class action.

[92] An order refusing to certify question (i) would not frustrate this litigation. Class action jurisprudence is replete with examples of common questions that do not wholly resolve certain individual aspects of the litigation: *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 4.

Conclusion

[93] I would allow the appeal in part by reversing the order certifying question (i).

"The Honourable Madam Justice Garson"

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Prepared on 27 October 2026 · Esheria