

CANADA / JUDGMENT

Jiang v. Peoples Trust Company

2020 BCSC 1644

COURT

Supreme Court of British Columbia

DECIDED

4 November 2020

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2020 BCSC 1644 Jiang v. Peoples Trust Company IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Jiang v. Peoples Trust Company, 2020 BCSC 1644 Date: 20201104 Docket: S147229 Registry: Vancouver Between: Ying Jiang Plaintiff And Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd., Vancouver City Savings Credit Union, Citizens Bank of Canada, Amex Bank of Canada, and All Trans Financial Services Credit Union Limited Defendants Before: The Honourable Madam Justice E. McDonald Reasons for Judgment Counsel for the Plaintiff, (via audio conference): A. Sharon Counsel for the Defendant, Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd. (via audio conference): R.R. Hira, QC K. Bienvenu, R.N. Hira Counsel for the Defendant, Vancouver City Savings Credit Union, and Citizens Bank of Canada (via audio conference): J.M. Sullivan, QC R. Reinertson J. Hutchinson, Counsel for the Defendant, Amex Bank of Canada (via audio conference): M. Sheeley Counsel for the Defendant, All Trans Financial Services Credit Union Limited (via audio conference): J. Cytrynbaum, N. Chang Place and Date of Hearing: Vancouver, B.C. October 8, 2020 Place and Date of Judgment: Vancouver, B.C. November 4, 2020 Table of Contents Overview.. 4 Background. 4 The Legislative Framework. 6 Analysis. 7 Disposition. 10 Overview

- [1] On October 8, 2020, the plaintiff's application regarding the contents and plan for disseminating the notice of certification and notice of proposed settlement (the "Notice") came on for hearing before me.
- [2] To resolve this application, I must decide whether the plaintiff's proposal for the contents and dissemination of the Notice is appropriate, and whether the defendants should be required to supply the plaintiff with additional information before disseminating the Notice.
- [3] For the reasons that follow, I have decided not to approve the Notice.

Background

- [4] On March 1, 2018, this proceeding was certified as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 ("CPA"). The Certification Order defines the class as follows: The Resident sub-class: All individuals resident in British Columbia, who purchased, received, or acquired one or more Prepaid Cards issued or sold by any of the

Defendants, for primarily personal, family or household purposes, from November 1, 2008 until July 18, 2016. The Non-resident sub-class: All individuals elsewhere in Canada, who purchased, received, or acquired one or more Prepaid Cards issued or sold by Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd., Vancouver City Savings Credit Union and/or Citizens Bank of Canada, for primarily personal, family or household purposes, from November 1, 2008 until July 18, 2016.

- [5] On September 24, 2020, the plaintiff filed a notice of application seeking the following:
- a) An order approving the form and content of notice of certification and the proposed settlement with one of the defendants, Amex Bank of Canada (Amex) (the "Notice Content");
 - b) An order approving the plan of dissemination of notice of certification and the proposed settlement with Amex (the "Notice Plan");
 - c) An order that the defendants provide the plaintiff within 14 days of pronouncement of the order, all necessary information regarding the prepaid cards that are the subject of this litigation, including but not limited to the name of the issuer of the card and an image of the card, all to be included in the lists of cards that will be posted on the website created by Class Counsel for this action (the "Website");
 - d) An order that the defendants bear the cost of issuing notice of certification and notice of proposed partial settlement with Amex to the class with Amex's share of the costs to be deducted from the proposed settlement amount; and
 - e) An order that the form, content and plan of dissemination of notice of certification may be modified, amended or supplemented by further order of this Court.
- [6] The parties consent to relief sought in subparagraph (e) above. The defendants, except for Amex Bank of Canada ("Amex"), oppose the balance of the relief sought.
- [7] The parties attempted to reach an agreement on the details of the Notice Content and the Notice Plan. The parties have agreed on some, but not all, of the details in the Notice Content and Notice Plan.
- [8] The areas of disagreement concern:
- a) The amount and type of information to include about the prepaid cards, including whether the Notice should include an electronic link to the class counsel's Website;
 - b) The notice-related costs; and
 - c) The plaintiff's request that the defendants be required to provide "all necessary information".
- [9] These areas of disagreement were the focus at the hearing before me on October 8, 2020.
- The Legislative Framework

- [10] The notice of certification provisions in the CPA that are relevant to this application state as follows: 19 (1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.
- (3) The court must make an order setting out when and by what means notice is to be given under this section and in doing so must have regard to the following:
- (a) the cost of giving notice;
 - (b) the nature of the relief sought;
 - (c) the size of the individual claims of the class members;
 - (d) the number of class members;
 - (e) the presence of subclasses;
 - (f) whether some or all of the class members may opt out of the class proceeding;
 - (g) the places of residence of class members;
 - (h) any other relevant matter.
- (4) The court may order that notice be given by
- (a) personal delivery,
 - (b) mail,
 - (c) posting, advertising, publishing or leafleting,
 - (d) individually notifying a sample group within the class, or
 - (e) any other means or combination of means that the court considers appropriate.
- (6) Unless the court orders otherwise, notice under this section must
- (a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,
 - (b) state the manner in which and the time within which a class member may opt out of the proceeding,
 - (c) [Repealed 2018-16-9.]
 - (d) describe the possible financial consequences of the proceeding to class members and subclass members,
 - (e) summarize any agreements respecting fees and disbursements
 - (i) between the representative plaintiff and the representative plaintiff's solicitors, and (ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,

- (f) describe any counterclaim being asserted by or against the class or any subclass, including the relief sought in the counterclaim,
- (g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,
- (h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,
- (i) describe the rights, if any, of class members to participate in the proceeding,
- (j) give an address to which class members may direct inquiries about the proceeding, and
- (k) give any other information the court considers appropriate.

Analysis

- [11] In *Bartram v. GlaxoSmithKline Inc.*, 2016, BCSC 1374, Justice Smith explained that when notice under s. 19 of the CPA is given, it is given on behalf of and as directed by the court. However, the representative plaintiff is responsible for proposing "a notice and means of distribution of the notice that will be appropriate and effective": *Bartram*, at para. 34.
- [12] To be approved, the Notice must, in addition to other things, advise class members of important information that is relevant to their decision on whether to participate or not: *Bodnar v. The Cash Store*, 2009 BCSC 74, at para. 17.
- [13] The plaintiff prepared a draft of the Notice Content for the Notice and attached it as Schedule "A" to the notice of application. The Notice Content is over three pages in length and it contains a significant amount of information.
- [14] There are a number of disputes over the Notice Content. As I explain below, the Notice of Content's explanation about how to participate in the class proceeding is not sufficiently clear. I decline to approve it.
- [15] The Notice Content must assist a reader to understand how to participate in the class action if they are a member of the Non-BC Resident Subclass. The Notice Content explains that as follows: If you are a member of the Non-BC Resident Subclass, then you are not included in this class action unless (1) you advise class counsel in writing of your election to be included in this class action by "opting in", or (2) you were party to a cardholder agreement in respect of a prepaid credit card that contained a choice of law and/or jurisdiction clause in favour of British Columbia during the applicable time, in which case you are automatically included in this class action and do not need to do anything unless you wish to opt out of the proceeding. [Underlining in original]
- [16] The Notice Content also explains that not all prepaid credit cards are included in this class action. The Notice says that if someone does not see their card in any of the lists electronically linked to that paragraph, then they are not included in this class action.

- [17] Class counsel prepared two draft lists of the prepaid cards. One is for members of the BC Residents Subclass and the other is for members of the Non-BC Resident Subclass.
- [18] The introductory paragraph to the BC Residents Subclass list of prepaid cards states as follows: BC Residents & BC Choice of Law - opt-out Sub-Class: If you are a member of the BC Resident Subclass or a member of the Non-BC Resident sub-class but were party to a cardholder agreement in respect of a prepaid credit card that contained a choice of law and/or jurisdiction clause in favour of British Columbia during the applicable time, then you are automatically included in the class action unless you advise class counsel in writing of your intention to be excluded from the proceeding by "opting out". This list includes the cards that fall under these two categories.
- [19] The introductory paragraph to the Non-BC Residents Subclass list of prepaid cards states as follows: Non-BC Residents - Opt-in Sub-Class: If you are a member of the Non-BC Resident Subclass and were not a party to a cardholder agreement in respect of a pre-paid card that contained a choice of law and/or jurisdiction clause in favor of British Columbia during the applicable time, then you are not included in this class action unless you advise class counsel in writing of your election to be included in this class action by "opting in". This list contains the cards that fall under this category. [The list below is subject to change upon discovering further relevant information throughout the court proceedings].
- [20] The parties agreed that the sentence in square brackets at the end of the above paragraph should be removed.
- [21] In Bodnar, at para. 19, Justice Griffin emphasized the importance of using clear language in a notice of certification to convey important information:
- [19] One of the functions of the notice given pursuant to s. 19 of the Act is to advise class members of important information relevant to the decision of whether or not to opt out. The information should assist the reader in appreciating the advantages or disadvantages of staying in the class proceeding relative to the choice of opting out of the proceeding. The notice should not be so lengthy and so full of convoluted possibilities that it is too difficult for the lay person to understand.
- [22] The language in the parts of the Notice that I have reproduced above does not meet this standard. If, as class counsel maintains, a person does not need to know at this stage whether they were party to a cardholder agreement that contained a choice of law clause and/or jurisdiction clause, it is unnecessary for each of the three quoted passages to refer to it. In my view, these passages are convoluted and unhelpful.
- [23] While I am declining to approve the Notice for the reasons explained above, I will comment on, without deciding, the plaintiff's proposal that the Notice contain lists of prepaid cards that are included in the class proceeding.

- [24] The defendants have a variety of concerns regarding the current format of the draft lists. For example, the defendants submit that the formatting is inconsistent and confusing. There are no photographs for some cards.
- [25] A list including photographs of cards can be useful to show class members what cards are included. I note that all of the defendants, except for Peoples Trust, support providing a list to assist potential class members notwithstanding the problems alleged in the current versions of the lists.
- [26] In my view, providing a mock-up of the notice of certification and the list, or lists, of cards showing the actual appearance of that information on the Website, would go a long way towards resolving the defendants' concerns. Such a mock-up could also assist the court with assessing the utility and appropriateness of the information.

Disposition

- [27] For the reasons explained above, I am dismissing the plaintiff's application. The plaintiff bears the onus of putting forward an appropriate and effective Notice. Unfortunately, the Notice Content attached to the plaintiff's application is neither appropriate nor effective.
- [28] To be clear, while I am dismissing this application, the plaintiff has leave to reapply for approval of a redrafted Notice. "E. McDonald J."

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