

CITATION: Bernstein v. Peoples Trust Company, 2022 ONSC 6725
COURT FILE NO.: CV-13-493837-00CP
DATE: 20221129

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
JOYCE BERNSTEIN)	<i>Louis Sokolov and Charles Sinclair</i> for the
)	Plaintiff
Plaintiff)	
)	
– and –)	
)	
PEOPLES TRUST COMPANY and)	
PEOPLES CARD SERVICES LLP)	
)	
Defendants)	
)	
Proceeding under the <i>Class Proceedings Act,</i>)	HEARD: November 29, 2022
<i>1992</i>)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is an action pursuant to the *Class Proceedings Act, 1992*.¹ The action settled and approximately \$10.8 million was available for distribution to the Class Members. After very extensive efforts to notify the Class Members of their entitlements to participate in the settlement, approximately \$9.2 million was taken up leaving a surplus of \$1.6 million. Class Counsel proposes that the surplus be distributed *cy-près* to three non-profit organizations: (a) Pro Bono Ontario, (b) Feed Ontario, and (c) the Consumers Council of Canada. In this motion, Class Counsel seeks approval for the *cy-près* distribution. For the reasons that follow, the request is granted. Order to go as requested.

B. Factual Background

[2] The Representative Plaintiff, Joyce Bernstein, brought a class action against Peoples Trust Company and Peoples Card Services LLP (collectively “Peoples Trust”) on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*,² who purchased or acquired a prepaid payment card sold or issued by Peoples Trust between November 29, 2011 and April 30, 2014.

[3] Peoples Trust sold two types of prepaid payment cards. One type was known as a Single Load Payment Card (“SLPs”), which were sold to consumers often at grocery and drug stores

¹ S.O. 1992, c. 6.

² S.O. 2002, c. 30, Sched. A.

without any registration requirements. The second type of payment card was known as a General Purpose Reloadable Payment Card (“GPRs”). In her action, Ms. Bernstein alleged that Peoples Trust breached the Gift Card Regulations in *O. Reg. 17/05 (General)*, a regulation enacted pursuant to the *Consumer Protection Act, 2002*.

[4] The action was commenced by way of Statement of Claim issued November 29, 2013. It was certified as a class proceeding on January 21, 2017.³

[5] On May 13, 2019,⁴ on a summary judgment motion, I granted judgment to Ms. Bernstein of \$15.3 million in compensatory damages with respect to the SLPs and \$1.5 million in punitive damages, plus pre-judgment interest of \$1,233,753 and post-judgment interest at the rate of 3% per annum. The balance of her claim with respect to Peoples Trust’s GPR cards was dismissed.

[6] By reasons dated August 9 and October 21, 2019,⁵ I granted Ms. Bernstein pre- and post-judgment interest, and costs.⁶

[7] On June 12, 2019, Peoples Trust filed a Notice of Appeal in respect of the judgment, and on June 19, 2019, Ms. Bernstein filed a Notice of Cross-appeal in respect of the dismissal of the GPR card claim. Before the hearing of the appeal and cross-appeal, Ms. Bernstein and Peoples Trust entered into a \$17 million Settlement Agreement, which was subject to court approval.

[8] The Settlement Agreement addressed the distribution of the settlement funds, including the amount, if any, left over following deduction of Class Counsel fees and disbursements, administration expenses and the Class Proceeding Fund Levy. Approximately \$10.8 million was available to be distributed to the Class Members.

[9] The Distribution Fund was divided into two pools as follows: Pool “A” 29.2% of the fund for Class Members who held GPRs; and Pool “B” 70.8% of the fund for Class Members who held SLPs. Under the Settlement Agreement, Class Members would submit claims for compensation from either pool, depending upon which type of card they held. Each claimant with a valid claim was entitled to be paid, on a *per capita* basis, up to the average amount of fees and expired balances incurred by Class Members who held either GPR (in the case of Pool A) or SLP (in the case of Pool B) cards.

[10] Under the Settlement Agreement to the extent that either pool was undersubscribed, the payout may be increased up to two times the average amount of fees and expired balances incurred by Class Members who held the type of card attributable to that pool; and to the extent that either pool remains undersubscribed after the reallocation, the remaining balance may be reallocated to the other pool up to the payout described above.

[11] Under the Settlement Agreement to the extent that either pool remained undersubscribed after the reallocation, the remaining balance was subject of further motion to and direction by the Court.

[12] RicePoint Administration Inc. was retained to be the Claims Administrator. Northern Commerce Inc. (“Northern”), a London, Ontario based e-commerce company was retained to administer the notice program. The notice program consisted of: (a) ads targeted through the Google Display Network, Facebook, Instagram and YouTube; and (b) ads targeted in connection

³ *Bernstein v. Peoples Trust Company*, 2017 ONSC 752.

⁴ *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867.

⁵ *Bernstein v. Peoples Trust Company*, 2019 ONSC 4675.

⁶ *Bernstein v. Peoples Trust Company*, 2019 ONSC 6076.

with pre-specified Google search words.

[13] On September 29, 2020, I approved the settlement.⁷

[14] One of the great challenges of the distribution of the settlement proceeds was getting the attention of the Class Members who had purchased SLRs, which it may be recalled are purchased without registration with Peoples Trust. There was an intensive advertising campaign.

[15] By May 26, 2021, RicePoint had received 59,596 claims, of which it estimated that 51,996 were valid with an estimated value of \$1.6 million. (41,605 estimated eligible SLP cards; 2,668 estimated GPR cards; 7,723 estimated eligible claims in respect of both types of cards.)

[16] Concerned that the settlement was undersubscribed, Class Counsel wrote to the Court on June 10, 2021 to advise that, in consultation with RicePoint and Northern, they had decided to extend the claims deadline by three months and to redouble the advertising efforts. Northern prepared an intense advertising campaign on Facebook, Instagram, Google, YouTube and Twitter. Northern and RicePoint also sent direct notice of the claims extension by email and text message to all Class Members whose email addresses or phone numbers were provided by the defendants.

[17] As at November 9, 2021, RicePoint reported that it had by that time received a total of 74,404 claims, of which 66,674 were valid. This included 52,834 eligible claims in respect of SLP cards, 3,319 in respect of GPR cards and 10,521 in respect of both types of card. The total entitlement for these claims was approximately \$2.1 million. The settlement was still undersubscribed.

[18] Class Counsel instructed Northern to suspend its ad campaign for the time being.

[19] On January 18, 2022, Class Counsel brought a motion for an order approving an amendment of the Distribution Protocol. Class Counsel proposed to increase the payout to SLP cardholders to \$50.00 per claim, which represented an increase of approximately four times the existing payout. If SLP claimants were paid \$50.00 per claim, the total payout would be approximately \$4.1 million. The motion was granted.

[20] In March 2022, RicePoint proceeded to make the first payout to Class Members via cheque and e-transfer. Approximately \$4.9 million was paid. Payments from the SLP pool totalled approximately \$2.7 million and payments issued from the GPR pool totalled approximately \$2.2 million. RicePoint reserved \$391,944.43 for payment to the Class Proceeding Fund as part of the 10% levy on all eligible Class Member payments.

[21] RicePoint plans a second distribution. It estimates that 28,357 claims will be included in the second distribution, representing an additional approximately \$2.9 million being paid out to Class Members. RicePoint anticipates reserving \$291,928.97 for payment to the Class Proceeding Fund as part of this second distribution.

[22] A total of 108,465 claims were filed with RicePoint in this class action. Of those, 17,249 were either rejected by RicePoint or withdrawn by the claimant.

[23] Of the approximately \$10.9 million in the Distribution Fund (including interest accrued in 2021 and 2022), RicePoint has estimated that the remaining balance following the second distribution will be in the range of \$1.6 million.

[24] While the efforts of Class Counsel to maximize the take-up of this settlement among Class

⁷ *Bernstein v. Peoples Trust Company*, 2020 ONSC 5880.

Members has been effective, Class Counsel now believes that further efforts would not be productive and could not be done economically.

[25] As noted above, the Settlement Agreement stipulates that in the event that the settlement remains undersubscribed, “the remaining balance will be the subject of further motion to and direction by the Court”. Pursuant to this stipulation of the Settlement Agreement, Class Counsel are moving for approval of a *cy-près* distribution to three recipients: (a) Pro Bono Ontario, (b) Feed Ontario, and (c) Consumers Council of Canada. Class Counsel proposes that the balance be shared amongst these three recipients equally.

C. The Proposed *Cy-près* Recipients

[26] Each of the three proposed recipients of the *cy près* distribution of the \$1.6 million provides services to Ontario’s most vulnerable citizens.

(a) Pro Bono Ontario (“PBO”)

[27] PBO is a non-profit that engages lawyers to volunteer to provide free legal services to Ontario residents who cannot otherwise afford to hire civil counsel. There is a Free Legal Advice Hotline. In 2021, PBO served over 26,000 clients via its Hotline.

[28] PBO’s core funding is provided by the Law Foundation, with the remainder coming from fundraising, project funding by key partners and support from the Law Society of Ontario which subsidizes PBO’s rent.

[29] PBO’s annual budget is approximately \$2.4 million, \$1.3 million of which is needed for its Hotline. Of the Hotline’s annual budget of \$1.3 million, approximately \$250,000 is allocated to consumer debt and protection issues.

[30] In 2021, PBO provided legal services to 1,956 people in this area of consumer law for a total of 3,261 free consultations. PBO was able to resolve 75% of consumer inquiries through Hotline services. In 2021, PBO provided Tier 2 services and Tier 3 services, in which clients with low self-efficacy or complex matters were referred to pro bono lawyers for full representation or unbundled legal services.

[31] PBO has determined that consumer debt and protection is an under-served area of the law and that its ability to help in this area is constrained by its current budget. If the proposed *cy près* donation to PBO is approved, PBO proposes to allocate the funds entirely to the provision of direct legal services to clients with consumer debt and protection issues. The funds will enable PBO: (a) to create more volunteer outreach and trainings materials to increase its Hotline’s ability to service consumers; (b) to purchase more software licenses so that more volunteers can answer calls; (c) to contract with technology consultants to increase the scope of their document generation program; and (d) to hire another staff lawyer and paralegal for at least three years to help deliver and oversee all aspects of its consumer law services. PBO estimates that these funds could increase its overall capacity to serve the consumer area of its services by 30-40%.

[32] PBO has the organizational capacity and sophistication to deal with a donation of this size.

(b) Feed Ontario

[33] Feed Ontario is the province’s largest collective of hunger-relief organizations. It is a non-profit organization that works with food banks, industry partners, and local communities, to eradicate hunger and poverty by delivering food to Ontario’s most needy families.

[34] Feed Ontario has an annual operating budget of just over \$3 million. The majority of its funding comes from private donors, including corporate entities, foundations and individuals, with 2% from member food bank fees. It employs ten full-time staff members and one part-time member.

[35] In 2020-21, Feed Ontario distributed nine million pounds of food through its regular food programs to Ontarians facing hunger. In addition to its regular food program, Feed Ontario instituted a program in response to the COVID-19 pandemic. This program provided pre-packed emergency food boxes containing enough food for one person for an entire week. In 2020-21 alone, Feed Ontario distributed 20 million pounds of food through its COVID-19 response program. Across all of its programs, Feed Ontario has seen an increase of approximately 20 million meals over the prior fiscal year.

[36] If the proposed *cy près* donation to Feed Ontario is approved, Feed Ontario proposes to invest the funds exclusively in its “Feeding Possibility!” grant program, which was developed in response to the needs of Ontario’s food bank network and the increasing needs of food banks due to the COVID-19 pandemic. This program would provide eligible food banks with up to \$50,000 in financial support towards innovative projects that improve organizational capacity and service to communities. To date, over \$1.1 million has been invested by Feed Ontario in food bank capacity and resiliency through the Feeding Possibility! Program.

[37] Feed Ontario has the organizational capacity and sophistication to deal with a donation of this size.

(c) Consumers Council of Canada (“CCOC”)

[38] The CCOC is a non-profit, voluntary organization that educates and advocates in favour of consumer rights. Its initiatives aim at promoting a fairer marketplace for Ontario’s consumers. The CCOC conducts a variety of activities related to consumer rights and issues across Canada. Its work focuses primarily on conducting research and publishing articles to provide perspectives on new legislative and judicial developments that impact consumer rights. The publications enable the CCOC to provide oral and/or written submissions in response to requests for consultations from public and private regulatory bodies. In addition, the CCOC frequently represents consumer interests by intervening in cases relating to consumer interests.

[39] The CCOC is governed by a board of directors and is funded from a variety of sources including, the Ontario Energy Board, the Canadian Radio-television and Telecommunications Commission, federal funding programs, social enterprise projects and membership fees. The CCOC operates an organization revenue of approximately \$90,000 per year. Annual revenues and expenses attributable to all sources are approximately \$500,000 in any given year. In 2021-22, this figure was approximately \$300,000.

[40] The CCOC’s financial capability is not sufficient to meet the demands for all the research and requests for consultations that it receives. If the *cy près* award is approved by the Court, the CCOC proposes to use the funds to increase its operations, and, in turn, its annual organizational revenue over the course of three years. The CCOC would also hire a Director – Membership, Stakeholder and Capacity Development, increase its annual publications and cover the increased expenses from its increased operations.

[41] The CCOC has the organizational capacity, expertise and sophistication to handle a donation of the size contemplated by this motion.

D. Discussion and Analysis

[42] Class action statutes envision the possible distribution of funds *cy-près*.⁸ The *Class Proceedings Act, 1992* contemplates that the distribution will indirectly benefit the class. The Ontario Law Reform Commission in its *Report on Class Actions*, said that the purpose of a *cy-près* distribution was compensation for class members through a benefit that “approaches as nearly as possible some form of recompense for injured class members.”⁹

[43] Where a *cy-près* award is an aspect of a settlement, the principles that underlie the approval of a settlement apply.¹⁰ From a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act*.¹¹

[44] As a general rule, *cy-près* distributions should not be approved where direct compensation to class members is practicable.¹²

[45] A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution.¹³

[46] In *Sorenson v. Easyhome Ltd.*,¹⁴ at para. 30, I stated:

30. *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy près* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. However well meaning, the prospect of a *cy près* distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.

[47] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and there will be problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate.¹⁵

[48] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a *cy près* distribution to recognized

⁸ *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 at paras. 14-15 (S.C.J.); *Cassano v. Toronto Dominion Bank*, 2009 ONSC 3573 at para. 14.

⁹ Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) vol. 2 at p. 573.

¹⁰ *Carom v. Bre-X Minerals Ltd.*, at para. 141.

¹¹ *Damage v. Ontario*, 2017 ONSC 4178; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 123; *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79 at para. 16 (S.C.J.).

¹² *Cassano v. Toronto Dominion Bank*, 2009 ONSC 3573 at para. 17.

¹³ *Slark v. Ontario*, 2017 ONSC 4178; *O’Neil v. Sunopta, Inc.*, 2015 ONSC 6213 at para. 16; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 43; *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 at para. 59.

¹⁴ 2013 ONSC 4017.

¹⁵ *Park v. Nongshim Co.*, 2019 ONSC 1997; *Ali Holdco Inc. v. Archer Daniels Midland Co.*, 2019 ONSC 131; *Damage v. Ontario*, 2017 ONSC 4178; *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59; *Elliott v. Boliden Ltd.*, [2006] O.J. No. 4116 (S.C.J.).

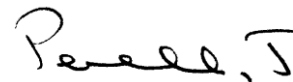
organizations or institutions that will benefit class members.¹⁶

[49] I agree with Class Counsel's submission that the case at bar is an appropriate case for a *cy-près* award to: (a) Pro Bono Ontario, (b) Feed Ontario, and (c) Consumers Council of Canada. A further advertising campaign and further distributions would not be productive or economical. The good works of the proposed *cy-près* recipients are sufficiently connected to the subject matter of the proposed Class Action so that they provide a benefit to the Class Members.

[50] The three non-profit organizations were specifically chosen by Class Counsel because of their connection to the Class Members. Two of the organizations, PBO and the CCOC, are dedicated to advancing the rights of Ontario consumers. The third organization, Feed Ontario, is focused on assisting a vulnerable subset of the Class Members who were users of the Defendants' cards because they were unable to obtain conventional credit cards. The proposed plans for the use of the *cy-près* funds are commendable.

E. Conclusion

[51] For the above reasons, I approve the *cy-près* distribution. I have signed the Order.



Perell, J.

Released: November 29, 2022

¹⁶ *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 16 (S.C.J.); *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (S.C.J.).

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JOYCE BERNSTEIN

Plaintiff

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Defendants

REASONS FOR DECISION

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