Case Name:

Sherry v. CIBC Mortgage Inc.

Between
Erin Sherry, Plaintiff, and
CIBC Mortgage Inc. and in French,
Hypothèques CIBC Inc., Defendant

[2014] B.C.J. No. 1388

2014 BCSC 1199

Docket: S116769

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

J.E. Watchuk J.

Heard: August 19-22, 2013.
Judgment: June 30, 2014.

(148 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests and issues -- Definition of class -- Application by plaintiff for certification of action as class proceeding on behalf of persons in British Columbia who were mortgagors under mortgages issued by defendant and who prepaid part or all of principal amounts secured by those mortgages from 2005 onward allowed -- Not plain and obvious plaintiff's claim discretion clauses for prepayment penalties were void for uncertainty and unenforceable would fail -- Class as proposed was overbroad but capable of clear and finite definition -- Class definition referred to counsel to make further submissions on amended definition -- Common issues clearly raised -- Class proceeding was preferable procedure -- Class Proceedings Act, s. 4(1).

Real property law -- Mortgages -- Mortgage agreement -- Validity -- Payment -- Prepayment -- Penalty -- Application by plaintiff for certification of action as class proceeding on behalf of persons in British Columbia who were mortgagors under mortgages issued by defendant and who

prepaid part or all of principal amounts secured by those mortgages from 2005 onward allowed -- Not plain and obvious plaintiff's claim discretion clauses for prepayment penalties were void for uncertainty and unenforceable would fail -- Class as proposed was overbroad but capable of clear and finite definition -- Class definition referred to counsel to make further submissions on amended definition -- Common issues clearly raised -- Class proceeding was preferable procedure -- Class Proceedings Act, s. 4(1).

Application by the plaintiff for certification of action as a class proceeding on behalf of persons in British Columbia who were mortgagors under mortgages issued by the defendant and who prepaid part or all of the principal amounts secured by those mortgages from 2005 onward. The plaintiff challenged prepayment penalties levied by the defendant on her and other class members, claiming the prepayment penalty clauses in the mortgages were void and unenforceable because of the inclusion, starting in 2005, of the discretion as to calculation and/or discretion as to comparison rate clauses. The plaintiff's mortgage permitted her to prepay up to 20 per cent of the principal amount without a prepayment charge. The prepayment charge was levied if she prepaid more than 20 per cent, calculated using a method determined at the defendant's discretion, as the higher of three months interest or the interest rate differential amount. Due to family law proceedings, the plaintiff needed to pay out her mortgage. She was charged a prepayment penalty of $47,869.

HELD: Application allowed. It was not plain and obvious that the plaintiff's claim that the clauses were void for uncertainty and unenforceable would fail. The class as proposed was overbroad but was capable of clear and finite definition. The class definition was referred to counsel to make further submissions on an amended definition. The action was conditionally certified pending the court being satisfied the class had been properly narrowed and defined. There were clearly common issues raised given the standardized mortgage terms and mathematical formula applied to all persons who made prepayments in or after 2005. Resolution of the common issues would significantly advance the claims of all class members. A class proceeding was the preferable procedure. It would be contrary to the principle of judicial economy not to deal with the common issues in a single proceeding. The plaintiff was an appropriate representative plaintiff and proposed a reasonable litigation plan.

Statutes, Regulations and Rules Cited:

Bank Act, S.C. 1991, c. 46,

Business Practices and Consumer Protection Act, SBC 2004, CHAPTER 2, s. 8, s. 8(3)(e), s. 10, s. 67(1), s. 84(m), s. 105

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4, s. 4(1), s. 4(1)(a), s. 4(1)(b), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e), s. 4(2), s. 4(2)(a), s. 4(2)(b), s. 4(2)(c), s. 4(2)(d), s. 4(2) (e)

Cost of Borrowing (Trust and Loan Companies) Regulations, SOR/ 2001-104,

Land Title Act, RSBC 1996, CHAPTER 250, s. 228

Trust and Loan Companies Act, S.C. 1991, c. 45, s. 436(1), s. 438(1)(a)

Counsel:

Counsel for the Plaintiff: K.A.G. Bridge, B.M. Samuels, M. Baer.

Counsel for the Defendant: H. Van Ommen, Q.C., M. Lam, A. Cocks.

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J.E. WATCHUK J.:--

I. INTRODUCTION

1 Erin Sherry, the plaintiff, applies for certification of this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "CPA") on behalf of the following class:

> "Persons in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee, and who prepaid part or all of the principal amounts secured by those mortgages from 2005 onward (the 'Class')".

2 This case relates to financial charges (commonly referred to as "Prepayment Penalties") which were levied by CIBC Mortgages Inc., the defendant, ("CIBC") on the plaintiff and other Class Members.

II. FACTUAL BASIS

A. Overview

3 Prepayment Penalties were charged by the defendant to persons who paid out, or paid down more than the penalty-free proportion of the principal of their mortgages prior to the end of the terms of their mortgage contracts. The Prepayment Penalties ranged from relatively modest amounts, less than $1,000, to tens of thousands of dollars. The Prepayment Penalty charged to Ms. Sherry was over $47,000.

4 This case involves both standard mortgage terms written by the defendant and incorporated into its mortgage contracts with the plaintiff and Class Members commencing in 2005, and a standardized method or formula used by the defendant from 2005 onward to quantify Prepayment Penalties charged to the plaintiff and Class Members.

5 The major allegations in the Notice of Civil Claim may be summarized as follows:

(a) the Prepayment Penalty clauses in the defendant's mortgage contracts are void and unenforceable because of the inclusion of the "Discretion as to Calculation" or "Discretion as to Comparison Rate" clauses or either of them as defined below;

(b) in the alternative, if the Prepayment Penalty clauses are not entirely void and unenforceable, then under some of the mortgages in question (those containing "Discretion as to Comparison Rate" clauses) the maximum Prepayment Penalty that may be charged is three months' interest; and

(c) in the alternative, if any Prepayment Penalty may be charged under the defendant's mortgages based on an interest rate differential ("IRD"), as opposed to being based on three months' interest, the formula used by the defendant to quantify Prepayment Penalties miscalculated and overcharged those penalties (the "Miscalculations"). This issue also applies to "Other Mortgages" which were neither Single Discretion nor Double Discretion mortgages.

6 The plaintiff says that this case affects thousands, and likely tens of thousands, of persons who paid Prepayment Penalties to CIBC in British Columbia. In addition, parallel actions have been commenced in Ontario and Québec.

7 The plaintiff submits that because this case involves standardized contractual language and a standardized penalty calculation formula applied by CIBC, and because of the numbers of people affected by CIBC's mortgage terms and method of quantifying Prepayment Penalties, this case is eminently suited for certification as a class proceeding.

B. The Defendant

8 The defendant, "CIBC", is a company incorporated pursuant to the laws of Alberta and continued pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45. Prior to January 6, 1997, CIBC was named Firstline Trust Company. CIBC has been registered as an extra-provincial company pursuant to the laws of British Columbia since April 26, 1991. CIBC is a subsidiary of Canadian Imperial Bank of Commerce (the "Bank").

9 At all relevant times, CIBC has been in the business of lending money to and taking mortgages from homeowners and other property owners ("Mortgage Business"). Until recently, FirstLine originated new FirstLine branded residential mortgage loans. FirstLine's business is now limited to servicing and administering its branded mortgages.

10 At relevant times, CIBC has done Mortgage Business using various trade names and trade-marks, including for example FirstLine, Firstline Mortgages, CIBC, Home Loans Canada and President's Choice.

11 As of 2011 and 2012, CIBC's residential mortgage portfolio was valued at approximately $145 billion across Canada, of which approximately 20% was based in British Columbia.

C. The Plaintiff's Closed Ten-year Mortgages

12 In September 2005, the plaintiff and Mr. Stuart, her husband at the time, applied for and obtained a standard, closed, ten-year fixed rate mortgage loan from FirstLine Mortgages ("FirstLine"), a division of CIBC, with respect to their residential property in Prince George, British Columbia.

13 In July 2008, the plaintiff and Mr. Stuart advised that they wished to discharge their mortgage and obtain a new mortgage loan for a residential property in Victoria, British Columbia. At that time, approximately seven years remained in the term of their mortgage.

14 In response, FirstLine offered the plaintiff and Mr. Stuart the opportunity to replicate in their new mortgage some of the terms and conditions of their subsisting mortgage. This is called "porting" a mortgage from one property to another. Specifically, FirstLine offered the plaintiff and Mr. Stuart a rate of 5.89% on a closed seven-year term. As a benefit of this offer, the plaintiff and Mr. Stuart would have been relieved of their obligation to pay a prepayment charge when prepaying the mortgage loan on their Prince George property.

15 With the advice of a mortgage broker, the plaintiff and Mr. Stuart declined this offer and chose to discharge their existing mortgage and pay the prepayment charge. They did so in favour of a closed ten-year term on a new mortgage at a higher rate of interest. Closed ten-year fixed rate terms are relatively rare because the borrower is committed to a lengthy term. However, they are attractive to some borrowers because they offer the certainty of a known interest rate for an extended period of time.

16 On August 19, 2008, the plaintiff and Mr. Stuart discharged the mortgage on their property in Prince George and paid the prepayment charge set out in their mortgage agreement. They also obtained a new FirstLine standard, closed, ten-year fixed rate mortgage loan for $447,200 on their Victoria property at a rate of interest of 6.2% (the "Mortgage").

17 The terms of the Mortgage included, *inter alia*, terms permitting the mortgagors to prepay up to 20% of the original principal amount of the Mortgage each mortgage year without a prepayment charge; and levying a prepayment charge if they wanted to prepay more than the 20%. The prepayment charge was the higher of three months interest or the interest rate differential amount. Both of those two amounts were to be calculated by the defendant "using a method determined by us from time to time at their discretion".

18 The two terms of the plaintiff's mortgage in issue with regard to the prepayment charge are:

> (a) The prepayment charge will be the higher amount of the following two amounts each of which will be calculated by us <u>using a method determined by us from time to time at our discretion:</u>
>
> (the "Discretion as to Calculation Clause"); and
>
> (b) If you are prepaying **all** of the outstanding principal amount, the interest rate differential amount is the **difference** between the following two amounts:
>
> 1. The interest costs on the amount prepaid charged from your last

scheduled regular payment date which falls on or before the prepayment date (whether or not the regular payment was made) to the maturity date of your mortgage. The interest costs are calculated at your existing annual interest rate (plus any discount you received on your existing annual interest rate).

2. The interest costs on the amount prepaid, calculated at the reinvestment rate from your last scheduled payment date that falls on or before the prepayment date (whether or not the regular payment was made) to the maturity date of your mortgage. The reinvestment rate is the interest rate posted by us on the date we prepare the mortgage payout statement for a closed FirstLine brand mortgage product which we determine to be similar to your mortgage. In determining what mortgage produce is similar to yours, we will consider the following:

- the remaining term of your mortgage;

- the features of your mortgage; and

- whether you have a conventional or a high-ratio mortgage.

[Bold in original; underlining added]

19 The plaintiff says that in addition, the defendant since 2005 used the following clause with regard to the calculation of the interest rate differential:

> ...the posted interest rate charged by us ... for a closed ... mortgage product which we have determined in our sole discretion to be similar to your mortgage, taking into account the following:
>
> (collectively the "Discretion as to Comparison Rate Clauses")

[Underlining added]

D. The Mortgage Prepayment

20 The plaintiff, at the time of reaching a financial settlement with her former spouse, needed to pay out her mortgage with CIBC. Her mortgage, which had commenced in August 2008, was paid

out in its entirety on October 20, 2010, in the course of her refinancing. The Prepayment Penalty charged by CIBC was $47,868.91.

21 The payout process began October 5, 2010, when Ms. Sherry's solicitors, Quadra Legal Centre ("Quadra"), requested from CIBC "a Payout Statement effective for the Payout Date of October 18, 2010."

22 On October 6, 2010, before any Mortgage Payout Statement had been provided by the defendant, Quadra wrote again to CIBC and stated:

> Erin Elizabeth Sherry advises that she has spoken to FirstLine Mortgages and authorized FirstLine Mortgages to withdraw a lump-sum payment in the amount of $60,000.00 from her bank account on October 15, 2010.
>
> Accordingly, please provide our offices with the Payout Statement which reflects the prepayment effective for the Payout Date of October 18, 2010 at your earliest opportunity.

23 On October 12, 2010, again before any Mortgage Payout Statement had been provided by CIBC, the solicitors wrote again to CIBC with an "Urgent Second Request" that repeated the message in the October 6, 2010, correspondence quoted above.

24 On October 13, 2010, FirstLine issued a Mortgage Payout Statement for the Mortgage. It did not reflect the $60,000 paydown which was to take place on October 15. The effective date of the mortgage payout statement was October 18, 2010. At that time, 95 months remained in the ten-year term of the mortgage. Because interest rates had fallen substantially since the time Ms. Sherry obtained her mortgage, her prepayment charge was calculated using the IRD as described in the mortgage agreement, which terms included the discretionary clauses. On this basis, FirstLine assessed the plaintiff's prepayment charge at $58,379.18 on the outstanding balance of $438,919.89.

25 On October 15, 2010, CIBC issued a Revised Mortgage Payout Statement that reflected the $60,000 paydown which took place on that date. The defendant says that the reduction in prepayment penalty was due to a concession granted by them.

26 The defendant says that had Ms. Sherry wished to avoid or reduce a prepayment charge, there were a number of options that might have been available to her, including:

> (a) maintaining the mortgage for another three years, at which point the prepayment charge would have been limited by statute to three months' interest;

(b) "porting" the mortgage to a new property purchased by Mr. Stuart, thereby reducing the prepayment charge; or

(c) applying to substitute Mr. Stuart with a co-borrower or guarantor, thereby avoiding the prepayment charge entirely.

27 In prepaying the Mortgage, the plaintiff was assisted by a mortgage broker, Valerie Wise, and a mortgage sub-broker, Nicholas Wise. Neither the plaintiff, nor her brokers, applied to FirstLine to determine whether she had options that would have reduced or avoided the prepayment charge.

E. The Mortgage Prepayment Clauses

28 The plaintiff's mortgage incorporated the provisions of a set of the defendant's standard mortgage terms which were filed with the Registrar of Land Titles pursuant to s. 228 of the *Land Title Act*, R.S.B.C. 1996, c. 250, under registration number MT060098. Those standard mortgage terms state that they were filed in the Land Title Office on March 24, 2006. It appears that they had been used by CIBC for over two years before they were incorporated into the plaintiff's mortgage.

29 The MT060098 standard mortgage terms include both what is described and defined above and in paragraph 19 of the Notice of Civil Claim as a "Discretion as to Calculation Clause", and what is described and defined above and in paragraph 20 of the Notice of Civil Claim as a "Discretion as to Comparison Rate Clause".

30 Because the MT060098 standard mortgage terms contain both such clauses, the plaintiff's mortgage is what is described and defined in paragraph 22 of the Notice of Civil Claim as a "Double Discretion Mortgage Contract".

31 Some Class Members have or had either Double Discretion mortgages, or what are described and defined in paragraph 21 of the Notice of Civil Claim as "Single Discretion Mortgage Contracts".

32 The Single Discretion mortgages include either a "Discretion as to Calculation Clause", as described and defined in paragraph 19 of the Notice of Civil Claim, or a "Discretion as to Comparison Rate Clause", as described and defined in paragraph 20 of the Notice of Civil Claim but not both.

33 The common element of all Double Discretion and Single Discretion mortgages is that they purport to give discretionary power to the defendant when deciding what amounts to charge as Prepayment Penalties. The primary issue in this case is whether the granting of such discretion under the defendant's standard form mortgage contracts renders the Prepayment Penalty clauses void and unenforceable.

34 The common element which affects all of the mortgages at issue in this case, the Double Discretion and Single Discretion mortgages, as well as all Other Mortgages, is that it is alleged that Miscalculations were made as a result of CIBC's implementation of a new, "internal" formula for calculating Prepayment Penalties, apparently commencing in 2005.

F. Overview of Mortgage Lending

1. Mortgage lending is a closely regulated activity

35 Residential mortgage lending is subject to a wide variety of statutes and regulations. In particular, the practices of lenders like the defendant are subject to the *Trust and Loan Companies Act*, and/or the *Bank Act*, S.C. 1991 c. 46, as well as the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104, enacted under the former. The Financial Consumer Agency of Canada ("FCAC") scrutinizes the lending practices of entities like the defendant to ensure legislative compliance with relevant consumer provisions. The FCAC has authority to impose monetary and criminal sanctions, and to take other action as necessary. The defendant's mortgage lending practices are also supervised by the Office of the Superintendent of Financial Institutions Canada ("OSFI"), which may intervene to take appropriate action.

36 The defendant says that the substantial regulatory oversight of the defendant's mortgage lending practices ensures that any charges or fees are properly described in its mortgage agreements. The defendant has never received a Notice of Violation from the FCAC concerning any failure to properly disclose its mortgage prepayment charges.

2. Mortgage terms offer choices to borrowers

37 Borrowers choose from a variety of products when obtaining a mortgage loan. For example, the rate of interest payable on a mortgage loan may either be fixed or variable. In a fixed rate mortgage, the borrower pays an agreed rate of interest for the duration of the loan. In a variable rate mortgage, the rate of interest fluctuates, often with prevailing market conditions.

38 A mortgage may also be open or closed. In an open mortgage, the borrower may repay the mortgage loan at any time during the term of the loan after giving the period of notice prescribed by the mortgage agreement, if any. In a closed mortgage, the borrower may not repay the mortgage loan before the end of the term, except as permitted by the mortgage agreement. Closed mortgages often permit early repayment of a specified portion of the mortgage loan each year. If the borrower wishes to repay a greater portion of the mortgage loan, the mortgage agreement provides that a prepayment charge will apply.

39 Closed mortgages vary with respect to the term of the loan. A shorter term permits greater flexibility because the loan can be discharged sooner. However, if the borrower wishes to renew the loan upon maturity, he will be exposed to the prevailing interest rates at that time. Conversely, a long term permits little flexibility because the borrower commits to maintain the loan for an

extended period. However, a long term provides security against fluctuating interest rates and "locks in" the rates available at the time the loan is made.

40 For borrowers, the various mortgage options have factors which require balancing. This is particularly true of the difference between open and closed mortgages. The rates of interest payable on an open mortgage tend to be higher than those payable on an otherwise comparable closed mortgage. By choosing an open mortgage, the borrower pays a premium for the option to repay the mortgage at any time without incurring a prepayment charge. Conversely, the borrower will pay a relatively lower rate of interest by choosing a closed mortgage. However, a prepayment charge will often apply to prepayments beyond a designated threshold.

3. Lenders incur a cost when closed mortgage loans are repaid before maturity

41 When a lender makes a mortgage loan, it may fund that loan by borrowing money, either internally or from third parties. The lender earns a profit when the spread between its borrowing and lending rates is sufficient to cover all of its costs, such as broker's commission, overhead, underwriting, and service costs.

42 When a borrower elects to prepay a closed mortgage, the lender may incur costs to discharge its corresponding obligation. This is particularly true if, as in the plaintiff's case, the rate of interest payable on mortgages has fallen in the time since a particular loan was made.

43 The lender may be forced to absorb any sunk costs of acquiring and servicing the mortgage. The lender will also lose any profit that it expected to make from the remaining term of the mortgage. The amount of the loss will vary with each mortgage and can have a significant impact on the profit that a lender derives from a particular mortgage. Every early redemption of a mortgage has the potential to create an incremental loss.

4. Disclosure of the Prepayment charges

44 Throughout the proposed class time period, the defendant's closed mortgages have generally included a term which requires borrowers to pay a charge if they wish to prepay more than a permitted amount of their outstanding mortgage balance each year. The mortgage agreement and the cost of borrowing disclosure given to the borrower specify that this prepayment charge will be the greater of three months' interest on the sum prepaid and the Interest Rate Differential ("IRD").

45 In general terms, the IRD is based on: (a) the amount the borrower is pre-paying; and (b) the difference between the interest rate on the mortgage and the interest rate on a comparable mortgage at the time of prepayment. A discretion issue arises in the determination of a comparable mortgage.

46 The basis for the IRD calculation which is in issue in this action is described in the mortgage documentation. The parties differ as to whether the formula was disclosed or whether it was

available to borrowers upon request.

47 It is the defendant's position that the IRD does not represent the stream of future income that the lender would have received had the mortgage loan gone its full term. Rather, they submit that the IRD defines the contractual price that the borrower has agreed to pay and the lender has agreed to accept for the privilege of prepaying a mortgage loan.

III. POSITION OF THE PLAINTIFF

48 The plaintiff submits that this action is suitable for certification and meets all the requirements of the *CPA*.

49 The factual basis for it is that commencing in 2005, CIBC used and continues to use, in British Columbia and elsewhere, Single Discretion and Double Discretion mortgages. The plaintiff submits that both the Discretion as to Calculation Clauses and the Discretion as to Comparison Rate Clauses are void for uncertainty and unenforceable.

50 As a result, CIBC was not entitled to charge any Prepayment Penalty under mortgages that contained either a Discretion as to Calculation Clause or a Discretion as to Comparison Rate Clause (i.e., Single Discretion mortgages) or that contained both types of clause (i.e., Double Discretion mortgages). Any amount purportedly charged as a Prepayment Penalty must be refunded.

51 If the action succeeds on the allegation that the Prepayment Penalty clauses in Single Discretion and Double Discretion mortgages are void and unenforceable, there will be no need to consider the following alternative allegations regarding such mortgages.

52 In the alternative, the plaintiff submits that under mortgages that contain a Discretion as to Comparison Rate Clause, if the penalty clauses are not void in their entirety as alleged but rather are enforceable in part, then the maximum permissible Prepayment Penalty is three months' interest, and anything more than that must be refunded.

53 In the further alternative, the plaintiff submits that if the penalty clauses contained in either Single Discretion or Double Discretion mortgages are not void as alleged but instead are enforceable, then at all relevant times CIBC used, and continues to use, methods of quantifying Prepayment Penalties that are contrary to and impermissible under the provisions of those mortgages. (the "Miscalculations").

54 Further, and in any event, the plaintiff submits that at all relevant times commencing no later than 2005, CIBC committed Miscalculations under Other Mortgages (i.e., other than Single Discretion and Double Discretion mortgages) which are contrary to and impermissible under the provisions of those mortgages.

55 Further, or in the alternative, the plaintiff submits that, if contrary to the allegations, the

mortgages or any of them would otherwise permit CIBC to quantify Prepayment Penalties in the manner used by CIBC, then the provisions of the mortgages that permit such quantification of Prepayment Penalties were and are unconscionable and contrary to s. 8 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (*BPCPA*). That is, the effect of the penalty clauses would be so harsh or adverse to the plaintiff and Class Members as to be inequitable, within the meaning of s. 8(3)(e) of the *BPCPA* , and would be void or voidable and unenforceable at common law and in equity. In that case, the relief claimed includes the setting aside of those clauses under ss. 10 and 105 of the *BPCPA*.

56 In addition, the plaintiff alleges that the wrongful charges and overcharges of Prepayment Penalties caused Class Members to incur consequential expenses, losses and damages, such as unnecessary mortgage insurance costs, application and processing fees, survey and appraisal costs and interest costs (the "Consequential Losses").

57 The plaintiff also alleges that, at all relevant times, CIBC advertised and promoted its commitment and promise to use "plain language mortgage documents", specifically including plain language regarding the cost of mortgage Prepayments (the "Plain Language Promise").

58 The plaintiff submits that CIBC's use of Single Discretion and Double Discretion mortgages is contrary to and in breach of:

(a) the Plain Language Promise;

(b) CIBC's statutory obligation under the *Trust and Loan Companies Act*, ss. 436(1) and 438(1)(a), and the *Cost of Borrowing (Trust and Loan Companies) Regulations* as amended, to disclose, in plain language that is clear, simple and concise, the manner in which Prepayment Penalties are to be calculated; and/or

(c) CIBC's statutory obligation, under the *BPCPA* ss. 67(1) and 84(m), to disclose in a clear and comprehensible manner a statement of any charge for Prepayments.

IV. POSITION OF THE DEFENDANT

59 The defendant says that the plaintiff has failed to satisfy the five mandatory certification criteria set out in subsection 4(1) of the *CPA*. On the record before the Court, none of the plaintiff's claims is suitable for certification. It says that the plaintiff resists this conclusion only by ignoring the substantive weaknesses in her legal position and failing to acknowledge the complexities raised by her allegations. In these circumstances, a class action would be unworkable, consume vast resources, and inevitably fail. The Court should exercise its function as a gatekeeper to prevent this

unproductive exercise from proceeding any further.

A. FirstLine's concession reduced the Plaintiff's prepayment charge

60 On October 14, 2010, the plaintiff advised FirstLine that she intended to use the proceeds from a new, third-party mortgage to make a $60,000 charge-free prepayment before discharging her mortgage.

61 In the circumstances, the plaintiff was not entitled to prepay any portion of her mortgage loan without incurring a prepayment charge. There were two reasons for this. First, the plaintiff had advised FirstLine that she would prepay the entire principal amount. Second, the plaintiff had already requested and received a mortgage payout statement before she sought to make a $60,000 prepayment.

62 Nevertheless, as a gesture of goodwill, a customer support supervisor approved a concession in the plaintiff's favour. As a result of this concession, the plaintiff was permitted to use the proceeds of her new mortgage to make a $60,000 prepayment without incurring a prepayment charge.

63 On October 15, 2010, FirstLine issued a revised mortgage payout statement showing the concession. In turn, the plaintiff's prepayment charge was reduced by $10,510.27, from $58,379.18 to $47,868.91. On October 18, 2010, the plaintiff, through her solicitors, paid the $47,868.91 prepayment charge.

64 In tandem with the discharge of her FirstLine mortgage, the plaintiff obtained a new mortgage loan from a third party, Macquarie Financial. The amount of Ms. Sherry's new mortgage loan was $500,000.00, with a five-year term and a variable interest rate of prime minus 0.65% and a starting rate of 2.35%. By paying a significantly lower rate of interest on the funds that she borrowed from Macquarie Financial, Ms. Sherry recouped the entirety of her prepayment charge by July 2013. If interest rates remain at current levels, Ms. Sherry will continue to realize interest savings in the years to come.

V. THE LAW

65 The law regarding the principles governing certification is set out by Bauman C.J.S.C. (now C.J.B.C.) in the recent case of *Watson v. Bank of America Corporation,* 2014 BCSC 532:

> IV. GENERAL PRINCIPLES GOVERNING CERTIFICATION
>
> [58] The certification stage of a class proceeding is not meant to test the merits of the claim, or to determine if it is likely to succeed. Instead, this stage is concerned with the form of the action and whether it can properly proceed as a

class proceeding: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16; *Microsoft* at para. 99.

[59] To this end, s. 4(1) of the *CPA* contains the five requirements for certification:

> 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:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (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;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

These criteria are similar to the requirements for certification in other Canadian

provinces. Notably, if these requirements are met, the Court *must* certify the action; there is no residual discretion. The plaintiff bears the evidentiary burden for each requirement, but that burden should not be overstated.

[60] Subsection (a) requires that the pleadings disclose a cause of action. This requirement is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a). Accordingly, the plaintiff satisfies this requirement unless it is plain and obvious that the claim cannot succeed: *Hollick* at para. 25; *Microsoft* at para. 63. For this analysis, the Court must assume that all the pleaded facts are true unless they are patently unreasonable or incapable of proof. Further, a claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980.

[61] Subsections 4(1)(b)-(e) of the *CPA* require the plaintiff to show "some basis in fact" for each requirement: *Hollick* at para. 25. The plaintiff must show that there is some basis in fact which establishes each of the four requirements, but does not need to establish some basis in fact for the claim itself. Again, the Court is concerned with the appropriateness of a class proceeding, not the strength of the claim. Further, courts are ill-equipped to resolve conflicts in the evidence at certification: *Microsoft* at paras. 100-102.

[62] There is limited utility in attempting to define the "some basis in fact" standard in the abstract; each case must be decided on its own facts. The standard does not require proof on a balance of probabilities, but it requires more than a symbolic scrutiny of the sufficiency of the evidence. Ultimately, the Court must be satisfied "that the conditions for certification have been met to a degree that allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met": *Microsoft* at paras. 103-104.

[63] Thus for subsection (b), the plaintiff must provide some basis in fact for the existence of an identifiable class of two or more persons. The class must be clearly defined at the outset of the litigation as doing so identifies the individuals entitled to notice under the *CPA*, entitled to relief if the case succeeds, and bound by judgment unless they opt-out: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Dutton*]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[64] To meet this requirement, the plaintiff must define the class with reference to objective criteria. Similarly, while the definition should be rationally related to the alleged common issues, the membership of the class must not hinge on the outcome of the litigation. Further, the class must not be defined too broadly or too narrowly in relation to the common issues. Ultimately, it is not necessary for the plaintiff to identify every class member, but it must be possible to determine whether or not a specific individual is a member of the class: *Sun-Rype* at paras. 52-62; *Dutton* at para. 38; *Hollick* at paras. 20-21.

[65] Subsection (c) requires the plaintiff to provide some basis in fact that at least some of the issues raised by the claims are common issues, whether or not they predominate over individual issues. Section 1 of the *CPA* defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[66] In *Dutton*, the Court held that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (at para. 39). In *Microsoft*, the Court summarized the other holdings of *Dutton* regarding commonality (*Microsoft* at para. 108, citing *Dutton* at paras. 39-40):

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[67] The Court recently clarified the final point and held that "success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another" (*Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45). Further, questions may be common even if the answers to those questions vary from class member to class member (*Vivendi* at paras. 45-46). In any event, concerns about unproven material differences are not determinative at certification. If they actually emerge during the proceeding, Courts can deal with them when the time comes, through decertification if necessary: *Microsoft* at para. 112; *Dutton* at para. 54.

[68] Under subsection (d), the plaintiff must show some basis in fact that a class proceeding is the preferable proceeding for the fair and efficient resolution of the common issues. In British Columbia, in contrast to some other provinces, there is legislative guidance that informs the preferability inquiry. Section 4(2) of the *CPA* provides:

> 4(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.

Section 4(2) does not provide an exhaustive list of factors relevant to preferability. In addition to the five enumerated factors, preferability must be examined with reference to the three principal advantages of the class action regime: judicial economy, access to justice, and behaviour modification. However, the plaintiff does not need to prove that the class action will actually achieve those goals: *Hollick* at para. 27; *Microsoft* at para. 137; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 22.

[69] The term "preferable" must be construed broadly within the *CPA*. It encompasses two related issues: the issue of whether or not the class proceeding would be a fair, efficient and manageable procedure for resolving the claims, and the issue of whether the class proceeding would be preferable to all other reasonably available means of resolving the class members' claims: *Hollick* at paras. 28 and 31.

[70] Moreover, in determining whether a class action would be the preferable procedure for "the fair and efficient resolution of the common issues" as required by the *CPA*, the court must consider the common issues in the context of the action as a whole and their importance in relation to the claims as a whole. To a certain extent, this is captured by s. 4(2)(a) of the *CPA*: *Hollick* at paras. 29-30; *AIC Limited* at para. 21.

[71] Finally, under subsection (e), the plaintiff must show some basis in fact that she is an appropriate representative plaintiff with reference to the three specified requirements of the *CPA*. First, the plaintiff must fairly and accurately represent the interests of the class. The Court considered the nature of this requirement in *Dutton* (at para 41):

> [41] ...In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of

> the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class [citations omitted].

[72] Further, the most important attributes of a representative plaintiff are a common interest with class members and the ability and desire to vigorously prosecute the claims (*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.). at para. 75, citing *Endean v. The Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.).

[73] Second, the plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members. The purpose of this requirement was described in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717 at para. 77:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members [citations omitted].

[74] Moreover, the plan must support the idea that a class action is the preferable procedure for the resolution of the claim. The amount of detail in the plan must correspond to the circumstances and the complexity of each specific case, but the plan must at least be individualized and not a mere outline of the steps that would occur in any case. The plan must also deal with individual issues that will be left over after the common issues are resolved: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 79 [*Infineon*]; *Pardhan v. Bank of Montreal*, 2012 ONSC 2229 at paras. 334-337.

> [75] Third, the plaintiff must not have a conflict of interest with other class members on the common issues. In some cases opt-out provisions may be relied on, or subclasses may be created, to alleviate any conflicts of interest (for example, *Kotai v. Queen of the North (Ship)*, 2007 BCSC 1056), while in other cases the interests of the plaintiff and the class or subclass might be irreconcilable (for example, *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (S.C.), aff'd [2007] O.J. No. 573 (Div. Ct.)).

VI. ANALYSIS

66 I will discuss each of the requirements of s.4 of the CPA as set out in *Watson*, in relation to the case at bar, in turn.

A. Causes of Action Set Out in the Pleadings

67 The plaintiff provided a chart which sets out the causes of action pleaded.

	DOUBLE DISCRETION MORTGAGES	SINGLE DISCRETION MORTGAGES WITH A DISCRETION AS TO COMPARISON RATE CLAUSE	SINGLE DISCRETION MORTGAGES WITH A DISCRETION AS TO CALCULATION CLAUSE	OTHER MORTGAGES
Argument 1	Prepayment penalty clause is void and unenforceable	Prepayment penalty clause is void and unenforceable	Prepayment penalty clause is void and unenforceable	N/A
Argument 2	Maximum penalty is three months' interest	Maximum penalty is three months' interest	N/A	N/A
Argument 3	Interest Rate Differential ("IRD") was miscalculated and overcharged	IRD was miscalculated and overcharged	IRD was miscalculated and overcharged	IRD was miscalculated and overcharged

1. Argument 1 - Void and unenforceable

68 The Notice of Civil Claim alleges that the Discretion as to Calculation Clause and the Discretion as to Comparison Rate Clause are void for uncertainty and unenforceable at common

law. This plea is well established and recognised under the common law and on its face is a viable cause of action.

69 The defendant says that this is not such an exercise of discretion. Its exercise of discretion was, at all times, governed by its obligations under the applicable regulations, which required that its mortgage disclosure statements describe the methods that it used to calculate prepayment charges. It says that it fulfilled its disclosure obligations by clearly specifying in its mortgage agreements the manner in which the prepayment charge was to be calculated.

70 In the plaintiff's case, for example, the mortgage agreement provided that FirstLine would consider the following when selecting a similar mortgage for the purpose of comparison: (i) the remaining term of her mortgage, (ii) the features of her mortgage, and (iii) whether her mortgage was a conventional or high-ratio mortgage. Accordingly, FirstLine selected a standard, closed seven-year fixed rate mortgage as the comparator to the plaintiff's mortgage because this term was closest to the term remaining on the plaintiff's mortgage at the time of prepayment.

71 The selection of the closest term is the most common policy for the determination of a comparator mortgage. In many mortgage agreements, this policy is illustrated in a table of comparator terms. Where any other method has been employed, it was pursuant to a clear and consistent policy for a particular product, and any such policies have always been available in writing. The precise mathematical formula for the calculation of the IRD is also available to borrowers upon request.

72 The plaintiff states that the discretion in both impugned clauses was broad, and that the formula was not available. Indeed the formula was marked as being internally confidential.

73 The plaintiff cites a well-known contracts case for the proposition that a term of an agreement must be definite or capable of being made definite:

> It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it practical meaning. Its term must be so definite, or so capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain.
>
> *G. Scammell & Nephew, Ltd. v. Ouston*, [1941] A.C. 251 (H.L.) at pp. 268-269 per: Lord Wright

74 The textbook, G.H.L Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 19 - 20, is also referred to:

> It is different, however, where the language is not unambiguous but vague and

> uncertain. In the absence of the requisite certainty and clarity the courts will not declare the contract exists. "[I]f the agreement was too vague to be enforced, then there is no legally enforceable contract." Another possibility is that the courts will not recognize a particular obligation asserted to be part of a contract. In such instances courts have stated that terms which are uncertain, and therefore not enforceable, may be excised from the contract, if the rest of the agreement is capable of being enforced. Uncertainty about some specific obligation may suffice to make impossible the conclusion that there is a contract in effect between the parties. The test would seem to be whether the term or terms in question relate to *essential* aspects of the alleged contract. Examples of this are the failure of parties to settle the purchase price for goods, the lack of agreement as to the date of commencement and term of the lease, or the amount of interest to be paid.
>
> [Italics in original, footnotes to case authorities omitted].

75 It is submitted that the impugned clauses in the present case purport to grant to one party (CIBC) a discretionary power to determine how much the other party (the borrower) must pay. It is alleged by the plaintiff that those clauses are void and unenforceable, but severable from the remainder of the mortgage contracts. By way of example, in another common law jurisdiction, Australia, a clause empowering a bank to charge interest on arrears of rent under an equipment lease, "at such rate as is determined by the bank from time to time" was held to be illusory and unenforceable, but severable: see *Cross v. National Australia Bank Limited*, [1994] FCA 229 at p. 41.

76 The defendant takes issue with the plaintiff's submissions and submits that the existence of discretion does not render a contract uncertain at law. Uncertainty does not arise where it is agreed that one party will have a limited discretion to decide certain matters under the contract. As long as the mutual intention of the parties can be ascertained, it is submitted, contractual provisions have been upheld.

77 For example, in *First City Investments Ltd. v. Fraser Arms Hotel Ltd.*, [1979] B.C.J. No. 2097 (C.A.), the British Columbia Court of Appeal held that there was no uncertainty in terms of a mortgage commitment letter that contained a provision allowing the lender's solicitors the discretion to specify additional terms in the mortgage document as they "may reasonably require." Hinkson J.A. (as he then was), writing for a unanimous court, found that the parties had clearly expressed their intention that the lender would, through its solicitors, decide the matters in question and therefore the contract was not rendered unenforceable by being uncertain.

78 It will be helpful to repeat the clauses in issue in the case at bar here:

> If you want to prepay more than what is allowed in section 4.11 above in a

mortgage year [up to 20% of the original principal amount], a prepayment charge will apply. This prepayment charge will be payable in addition to regular interest at the rate specified in your mortgage. The prepayment charge will be the higher amount of the following two amounts, each of which will be calculated by us using a method determined by us from time to time at our discretion:

* three months' interest costs on the amount that is subject to a prepayment charge, calculated at your existing annual interest rate on the date of the prepayment (plus any discounts you received on your existing annual interest rate); or

* the interest rate differential amount.

[Underlining added]

The interest rate differential amount was defined in the contract as follows:

If you are prepaying **all** of the outstanding principal amount, the interest rate differential amount is the **difference** between the following two amounts:

1. The interest costs on the amount prepaid charged from your last scheduled regular payment date which falls on or before the prepayment date (whether or not the regular payment was made) to the maturity date of your mortgage. The interest costs are calculated at your existing annual interest rate (plus any discount you received on your existing annual interest rate).

2. The interest costs on the amount prepaid, calculated at the reinvestment rate from your last scheduled payment date that falls on or before the prepayment date (whether or not the regular payment was made) to the maturity date of your mortgage. The reinvestment rate is the interest rate posted by us on the date we prepare the mortgage payout statement for a closed FirstLine brand mortgage product which we determine to be similar to your mortgage. In determining whether a mortgage is similar to yours, we will consider the following:

* the remaining term of your mortgage;

* the features of your mortgage; and

* whether you have a conventional or a high-ratio mortgage

[Bold in the original; underlining added]

79 In the use of the underlined phrases above the discretion reserved by CIBC to itself is not limited by any qualifiers. In construing contractual clauses which incorporate discretion, courts must examine the actual words used. For example, in *First City,* the relevant term contained the qualifier "reasonably".

80 The defendant submits that the only case relied upon by the plaintiff is an Australian case regarding an unlimited grant of discretion which was found to be unenforceable. That case, they submit, is not binding and distinguishable.

81 In this argument, the defendant illustrates the plaintiff's position that there is an arguable case with regard to the enforceability of these clauses. Throughout the law of contracts as cited by both parties, many cases can be distinguished on the wording of the terms in issue. The law however is clear - there must be sufficient certainty. What is sufficient is each case is a question of contractual interpretation to be determined on the facts.

82 These facts and the law of contracts in this area will be fully canvassed at a hearing on the merits of the claim. At this point, it is far from plain and obvious that this claim regarding interpretation of a contract is bound to fail.

2. Argument 2 - Maximum penalty is 3 months' interest

83 This is an alternative argument of the plaintiff. Again, it turns on the construction of the contractual terms. It is not a novel cause of action. It is not plain and obvious that it will fail.

3. Argument 3 - Miscalculation of the IRD

84 The plaintiff says that the defendant committed miscalculations of the prepayment penalties charged to the plaintiff and class members. The evidence which supports the plea includes unrebutted documentary evidence that CIBC changed its method of calculating Prepayment Penalties between 1999, when it expressly used a present value calculation, and 2005 when the impugned calculation method was implemented.

85 Further evidence is offered by an expert, an accountant, on behalf of the plaintiff to the effect that CIBC's current method of calculation improperly fails to account for the present value of money. It is not for this court at this stage to weigh the evidence.

86 The defendant submits that the plaintiff's claim of a miscalculation of the prepayment amount has previously been settled by the British Columbia Court of Appeal in *Pfeiffer v. Pacific Coast*

Savings Credit Union, 2003 BCCA 122 [*Pfeiffer*]. The defendant accuses the plaintiff of trying to re-litigate *Pfeiffer*. The plaintiff claims that *Pfeiffer* simply provided one small exception to the general rule of discounting the prepayment amount to present value, as that amount is based on the calculation of future losses, and that this case does not fall under that exception.

87 The technique of discounting a calculation of lost future income to present value is quite standard in damage awards for breach of contract, where the award represents what the injured party wold have received had the contract been fulfilled. Such an award represents a lost future stream of income and the present value principle reflects the simple economic fact that a dollar today is worth more than a dollar in the future, due to inflation and that the recipient of the award will have the opportunity to invest that amount: see *Townsend v. Kroppmanns*, 2004 SCC 10 at para. 5 for a discussion of this principle in the context of an award for personal injury.

88 The plaintiff submits that this principle governs the amount owed in a prepayment penalty, except in a few rare cases, as such a penalty represents compensation for lost interest income due to the early payment. The exception, according to the plaintiff, is represented by *Pfeiffer*, and was specific to the language of the prepayment clause in that case, which focused on the language of "rates" rather than lost interest, or "interest costs" as in this case.

89 In *Pfeiffer*, the prepayment clause contained the term "compensation", and then provided two alternatives for the method of calculating the prepayment amount: three months' interest (paragraph (a)(i)), or an amount calculated by applying the interest differential to the prepayment amount (paragraph (a)(ii)). The trial judge in *Pfeiffer* interpreted the word "compensation" in that clause in the same way urged by the plaintiff here. As stated by the Court of Appeal in *Pfeiffer*:

> **10** The trial judge commenced his analysis of the Prepayment Clause by defining "compensation" for the purposes of paragraph (a)(ii) as "indemnification", adopting the first of eight definitions of "compensation" in *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing Co., 1990) as the "primary" meaning. In so doing, he accepted the respondent's argument that the Prepayment Amount was intended to compensate the credit union for lost interest; that is, the interest the credit union would have received if the mortgages were not repaid before the expiry of their terms. He found that the term "compensation" for the purposes of paragraph (a)(i) of the Prepayment Clause, however, reflected a penalty charged by the credit union.

90 The Court of Appeal disagreed with the trial judge, holding that the interpretation of the prepayment clause as indemnification was incorrect, first, because it does not make sense of the first method of calculation, three months interest, and leads to conflicting interpretations in same clause (at para. 46). Instead, the court found that the prepayment clause was quite clear and provided for "the calculation of the price to be paid for the privilege of ending the contract before its term expires" (at para. 47). As such, the prepayment clause was distinct from the amount of interest

payable during the life of the contract, even if the two are related for calculation purposes:

> **49** In my view, a distinction should be made, for these purposes, between the rate of interest set out in the contract, and the other factors that determine the amount of interest payable during the life of the contract. The Prepayment Clause does not require a calculation of the amount of interest that would otherwise be payable over the remaining term of the mortgage; it requires the determination of an "amount" by which one rate of interest exceeds another rate of interest and the application of that "amount" to the "amount prepaid" for the remaining term. The Prepayment Amount thus determined is paid in one lump sum, at one time. The periods of calculation and payment of interest and whether or not it is calculated in advance are not relevant.
>
> **50** The Prepayment Amount is not interest payable under the mortgage; it is not calculated semi-annually, not in advance, and payable monthly. It is a single amount, calculated and payable at the time the borrower wishes the mortgage to be discharged, obviously and necessarily in advance of the time that interest would be payable under the mortgages if they were not prepaid.

91 Next the court turned to the present value principle. The Court of Appeal stated that, had the wording of the clause been different, then the trial judge's application of the present value principle may have made sense. However, the issue is one of interpretation of the contract, and not the application of a general principle to all or most prepayment clauses:

> **54** The trial judge's analysis and application of the principles that underlie discounting to determine present values are consistent with his interpretation of the Prepayment Clause and the evidence of the respondent's expert. If the Prepayment Clause mandated a calculation of "lost interest" that the credit union would have received over the remaining term of the mortgages if they had not been prepaid, it would be commercially reasonable and consistent with the cases relied on by the trial judge to discount that future stream of payments to its equivalent present value.
>
> **55** But that is not this case. I have already expressed my reasons for finding that the trial judge erred in interpreting the Prepayment Clause.
>
> **56** The Prepayment Amount is not the amount of interest that would otherwise be paid in a stream over a future period; it is a one-time payment for the privilege of ending the contract before its term. Thus, the principle that the credit union should be in the same position financially had the interest been received over the

> remaining term has no application.
>
> **57** The mortgages do not refer anywhere to "present value", and the words "compensation" and "not in advance" do not imply a requirement to present value the Prepayment Amount.

[Underlining Added]

92 The application of *Pfeiffer* in these circumstance is the proposition that the effect of a prepayment clause, like any other clause in a contract, is a matter of interpretation. Thus the present value calculation cannot be taken as automatic, as it would be in the context of the calculation of damages for breach of contract, because the two situations are not the same: the protection of the lender's expectation interest, that the lender should be put in the same position financially had the mortgage gone its full term, is not applicable. However, *Pfeiffer* does not rule out the possibility that the language of a specific prepayment clause might clearly require that the calculation use the present value principle (*Pfeiffer* paras. 54 and 63); but that would be a matter of interpretation of the specific language of the contract at issue.

93 Therefore, whether *Pfeiffer* decides one or more of the claims in this case will be a matter of interpreting the mortgage contract. There are some similarities and some differences between the language of the contract in this case and the one in *Pfeiffer*. The plaintiffs submit that those differences distinguish this case from *Pfeiffer*, while the defendants claim that there is no substantive distinction between the cases.

94 The differences between *Pfeiffer* and the prepayment clause in this case include the fact that the clause here has the contested phrase regarding the banks discretion in choosing the method of calculation for the prepayment penalty, as well as the use of the words "interest costs" in the calculation of the IRD. However, there are some general similarities as well, such as the structure of the clause with two methods of calculation, the first being three months interest, which the court in *Pfeiffer* found could not be interpreted as being compensation for lost future interest income, as it was a fixed amount that did not vary with the amount prepaid.

95 The issue here is not to decide whether the plaintiff will succeed on the merits, but whether there is an arguable case. The plaintiff is attempting to distinguish *Pfeiffer* on the particular language of this contract. I find that it is not plain and obvious that this argument has no merit or that *Pfeiffer* will decide this case, and therefore that the cause of action must fail.

96 I find that the requirement of s. 4(1)(a) of the *CPA* is met.

B. An Identifiable Class

97 The plaintiff proposes that the definition of the Class be as follows:

> "Persons in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee, and who prepaid part or all of the principal amounts secured by those mortgages from 2005 onward (the 'Class')".

In the alternative, this more narrow definition is suggested by the plaintiff:

> "Persons in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee, which mortgages were entered into or under which part or all of the principal amounts secured by those mortgages were prepaid, from 2005 onward" (the 'Class')". [Underlining added]

98 With regard to the determination of the members of the class the plaintiff says that CIBC began issuing Single Discretion and Double Discretion mortgages in 2005. The plaintiff's Double Discretion mortgage, for example, commenced in 2008, and incorporates standard mortgage terms filed by CIBC in the Land Title Office on March 24, 2006.

99 CIBC began making the Miscalculations no later than 2005.

100 In September and October 2009 and January 2012, CIBC filed standard mortgage terms that do not contain either a Discretion as to Calculation clause or a Discretion as to Comparison Rate clause with the Registrar of Land Titles.

101 In 2012, CIBC purported to issue a "Mortgage Amending and Renewal Agreement" to existing customers, the terms of which do not contain either a discretion as to Calculation clause or a Discretion as to Comparison Rate clause.

102 CIBC reported a "Prepayment/payment rate" for residential mortgages as follows which is the percentage of residential mortgages held where there was a prepayment:

2008: 11 - 36%
2009: 12 - 24%
2010: 15 - 18%
2011: 15 - 18%

103 The plaintiff says that the precise number of Class Members is within the knowledge and control of CIBC, but based on the above information the plaintiff provides a conservative estimate. CIBC's residential mortgage business in British Columbia as of 2011 (20% of $145 billion) equals $29 billion. Assuming an average mortgage principal of between $250,000 - $500,000 results in there being between 58,000 and 116,000 CIBC mortgages in British Columbia. Assuming a 10% rate of prepayment each year (which is lower than CIBC's reported prepayment rate as set out above) there would be between 5,800 and 11,600 prepayments made in British Columbia each year. The impugned prepayment clauses and calculation formula were both implemented 8 years ago, in

2005, resulting in there likely being between 46,400 and 92,800 class members.

104 However, this calculation fails to take into account the fact that the prepayment rate does not distinguish between mortgage holders who entered into their mortgages before 2005, and then made prepayments. Although there may be between 5,800 and 11,600 prepayments per year, it is not known how many are for mortgages entered into after 2005.

105 The defendant says that the plaintiff's claim fails to satisfy s. 4(1)(b) because her proposed class definition is overly broad. It is well established that the class definition must be neither overbroad nor under-inclusive. To this end, there must be a rational relationship between the class, the causes of action, and the common issues. Furthermore, the class must be defined in such a way that each member has at least a "colourable claim" against the defendant.

106 In the defendant's submission:

> The Plaintiff has sought to define the proposed class in a manner that includes persons who could not possibly assert her claims against the Defendant. Almost all of the Defendant's closed mortgages permit the prepayment of a defined portion of the principal without charge in each year. Borrowers who did not pay a prepayment charge can assert none of the causes of action set out in the Plaintiff's Notice of Civil Claim. In addition, as of 2009 the Defendant began using mortgage terms that no longer included the discretionary language at issue in the case. As such, mortgagors who prepaid mortgages pursuant to terms without the discretionary language would have no cause of action or common issue as alleged by the Plaintiff.

107 I agree with the defendant that the class as proposed, either as in the Application or as in the proposed amendment is overbroad.

108 However, I do not agree that this case is similar in the problems of the proposed class to that in *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.) [*Arabi*]. The defendant relies on it as support for both its argument that there is no identifiable class and that an implied term is not a possible cause of action in a class proceeding.

109 *Arabi* involved an application for certification with eight different plaintiffs and eight financial institutions. The judge dismissed the application, and the decision was upheld in *McLaine v. London Life Insurance Co*., [2007] O.J. No. 5035 (Div. Ct). In *Arabi* the plaintiffs alleged that the financial institutions had miscalculated mortgage prepayment charges against them because the financial institutions failed to deduct the prepayment-free amount from the principle before calculating the penalty.

110 That case was originally brought by a lawyer who was also a primary witness, as he had represented all the plaintiffs and class members when they closed their mortgages with the

defendants. The lawyer admitted knowing about the banks failure to deduct the amount in question at the time he was representing a plaintiff, but did not tell his clients so he could generate class members, thus failing in his duty to his client at the time. The application judge repeatedly stated that the actions of the lawyer, Mr. Farah, heavily influenced the analysis of whether the action should be certified. There are no parallel facts in this case.

111 However, *Arabi* is distinguishable for more mundane reasons. The reasons given by the court in *Arabi* for dismissing the application were, first, that an implied term cannot form a legitimate cause of action for the representative plaintiff (at para. 45) and cannot form the cause of action in a class proceeding in general because it would involve to much individual inquiry; that is, it would mean canvassing the knowledge, intention and mortgage terms for each individual class member, which is unworkable and does not advance the principles of class actions (e.g. see paras. 48, 52 and 56).

112 Second, the class was too broad because it would include mortgage customers "who have not suffered any damages as well as individuals who are not entitled to take advantage of the partial prepayment option upon discharging their mortgages" (at para. 48). For example, the terms of the individual contracts were different, and even the terms that were similar may have been complied with but other circumstances required the proposed class members to pay the penalty (for example, they had already made a prepayment that year and had the amount deducted the previous time: see para. 51 for a list of such examples).

113 The claim in this case is fundamentally different. In *Arabi* the claim was not that the prepayment clause itself was void and unenforceable (as is alleged here), but that when charging the prepayment penalty the financial institutions were required to make certain deductions, which they failed to make. That requirement was based solely on an implied term of the contract that the plaintiffs wanted enforced.

114 In contrast, the mortgage terms in question here, which are themselves challenged as void or unconscionable, are part of a standard set of mortgage terms filed with the Land Title Office. Therefore, the delineation of the class in terms of the time period during which those standard terms were applied to all mortgages and type of mortgage or prepayment, allows the defendant to avoid the concerns, raised in *Arabi*, of having to go through each individual mortgage contract, and discover each class member, to discover if an implied term existed, or they were entitled to the alleged deduction at all. In this case, if the prepayment clause of the contract is void for uncertainty, or unconscionable, then the simple application of that clause, and the money charged as a result, was inappropriate and caused a loss.

115 With regard to the result of finding that the class is overbroad and capable of determination , I am instructed with regard to the judges' power to amend by the case of *Caputo v. Imperial Tobacco Ltd*., [2004] O.J. No. 299 (S.C.J.), a decision by Winkler J. (as he then was). In discussing the issue of amending the class definition at paras. 38-45, he states at para. 41:

> **41** The plaintiffs prevail upon me to amend the class definition to redefine the class in any way necessary to render this action certifiable. In my view, this approach is not what McLachlin C.J. was advocating in *Hollick*. As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

116 The class is capable of clear and finite definition, and otherwise this matter is suitable for certification. Although in some circumstances the court may amend the class definition, in this case the class definition is referred to counsel to make further submissions on an amended definition to be proposed by plaintiff's counsel. The action will be conditionally certified pending the court being satisfied that the class has been properly narrowed and defined.

117 In addition, the plaintiff submits the following as a possible description of a common issue on punitive damages:

> Did the Defendant, or its agent as alleged in the Notice of Civil Claim:
>
> (a) breach the Plaintiff Language Promise as defined in the Notice of Civil Claim;
>
> (b) breach the *Trust and Loan Companies Act*, S.C. 1991, c. 45, and the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104, as alleged in the Notice of Civil Claim;
>
> (c) breach the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 9.1 and *Mortgage Brokers Act Regulations*, B.C. Reg. 100/73, as amended, as alleged in the Notice of Civil Claim;
>
> (d) breach the *Business Practices and Consumer Protection Act*, ss. 67(1) and 84(m), as alleged in the Notice of Civil Claim;

(e) breach fiduciary duties as alleged in the Notice of Civil Claim; or

(f) commit the Miscalculations as alleged in the Notice of Civil Claim;

and, if so, do such breaches, acts or omissions justify an award of class-wide punitive and/or exemplary damages?"

118 This proposed common issue on punitive damages encompasses the issues of alleged breaches of statutory and regulatory provisions, as well as an issue of fiduciary duties owed by the defendant.

119 As was discussed at the hearing, counsel for the plaintiff is to file an application to deal with this matter at a further hearing.

C. The Claims Raise Common Issues

120 The common issues identified by the plaintiff are:

4. If the answer to common issue 3 is "no", are the provisions of the Defendant's Mortgage contracts that purport to permit such calculation and charging of prepayment penalties:

(a) unconscionable, void or voidable, and/or unenforceable at common law or in equity; or

(b) contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 8, and if so, should those provisions be set aside pursuant to the *Business Practices and Consumer Protection Act* ss. 10 and 105 otherwise?

121 Section 4(1)(c) of the *CPA* requires that the claims of the Class members raise common issues, "whether or not those common issues predominate over issues affecting only individual class members". In the present case, it is clear that there are common issues raised. Moreover, it is clear that the common issues predominate over issues affecting only individual class members.

122 As stated above, this case involves standardized mortgage terms adopted in 2005 and a mathematical formula that was apparently applied to all persons who made prepayments on their mortgages in or after 2005. In these circumstances, it is clear that there are common issues affecting the Class and that resolution of those common issues will significantly advance the claims of all Class Members.

123 The plaintiff submits that the only significant individual issues are:

(a) quantification of the amount of the Prepayment Penalty, or the amount of the overcharge of the Prepayment Penalty, charged to each member of the Class; and

(b) the existence and amount, if any, of the Consequential Losses incurred by each member of the Class.

These individual issues will only arise following determination of the common issues in favour of the plaintiff and Class Members.

124 The defendant submits that individual issues predominate. One example is that members of the class, like the plaintiff, may have been given a concession with regard to their prepayment penalties.

125 This concession is characterised by the defendant as a gesture of goodwill which was not contractually required. A customer support supervisor approved a concession in Ms. Sherry's favour with the result that Ms. Sherry was permitted to make a charge-free pre-payment, which reduced the prepayment charge on the remaining balance of her mortgage. This concession was made by local FirstLine representatives without any referral to CIBC management and was closely tied to the circumstances of Ms. Sherry's case.

126 The plaintiff disagrees with this interpretation of the charge-free prepayment and says that she was contractually entitled, on a proper reading of the contract in the circumstances of the sequence of events, to make a prepayment. Thus, she says, there is no individual issue of concession in this case, and no evidence of any in others which would affect common issues. I prefer the characterisation of the plaintiff in this regard.

127 The defendant refers extensively to the plaintiff's legal advice as being indicative of individual issues. However, the entering into of a standard form mortgage is not a situation of two parties bargaining to reach an agreement. The imbalance of the parties renders legal advice less relevant. It does not lead to a conclusion that individual issues will make certification unworkable.

128 Further, the defendant says that the four common issues span eleven causes of action, and do not raise a specific factual or legal issue. Its argument in this regard harkens to the argument made by the defendant on whether the pleadings disclose causes of action which are bound to fail.

129 I will not address the able legal arguments of the defendant at this stage. They are properly raised at the trial of the issues.

130 I agree with the plaintiff on this matter and find that this is a case in which common issues

are raised, and in which they are the predominant issues. The requirement of s. 4(1)(c) is met.

D. The Preferable Procedure

1. A Class Action is the Preferable Procedure for the Fair and Efficient Resolution of the Common Issues

131 Section 4(2) of the *CPA* sets out a non-exhaustive list of factors to be considered "[i]n determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues". In the present case, each of those considerations demonstrates that a class proceeding is the preferable procedure.

(a) Common Issues Predominate - s. 4(2) (a)

132 As stated above, the predominant issues in this case are the common issues. In general, certification will be preferable where threshold issues can be decided as common issues based on common evidence even if there will remain some outstanding individual issues. In *Cooper v. Hobart*, 68 B.C.L.R. (3d) 293 (S.C.), rev'd on other grounds 2000 BCCA 151, Tysoe J. (as he then was) stated in para. 36:

> In my opinion, a trial of the common issues, followed by a number of trials to deal with the different circumstances of subclasses and different individual circumstances, is preferable to the prospect of hundreds or thousands of individual actions dealing with common issues and common evidence.

Also see *Haghdust v. British Columbia Lottery Corporation*, 2013 BCSC 16, at para. 90.

133 I agree with the plaintiff that this analysis applies in the present case, where the common issues arising from CIBC's standard form mortgages and standardized formula for calculating Prepayment Penalties since 2005 constitute the principal and threshold issues. The individual issues in the present case pertain to quantification of damages following determination of the common, threshold issues. Any recalculation of individual Prepayment Penalties that may be necessary can take place in the course of that quantification. Mr. Soriano, an expert witness on behalf of the plaintiff, deposed that CIBC's database systems likely contain the necessary information to make even the quantification of damages highly automated.

(b) Individual Actions would be Inefficient and Uneconomic - s. 4(2)(b)

134 There will be some individual issues to be determined after the common issues are resolved. However, the benefits of class proceedings as set out in In *Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306 at para. 150, will benefit this matter:

(a) Whatever limitation period is found to be applicable to the claim is tolled for the

entire class (s. 39);

(b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);

(c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);

(d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;

(e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);

(g) The action is case managed by a single judge (s. 14);

(h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);

(i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);

(j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);

(k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35)."

135 Moreover, as stated above, there are thousands of Class Members affected by the common issues. In addition, because the common issues turn on the enforceability and interpretation of standard mortgage terms and the formula introduced in 2005, it would be contrary to the principle of judicial economy not to deal with those issues in a single proceeding. In other words, requiring individual lawsuits would burden the court and the litigants with duplicative and time-consuming

fact finding processes.

136 The range of damages claimed on behalf of the plaintiff and individual Class Members ranges from very low amounts up to approximately $50,000. Even at the upper end of this range, individual lawsuits would be of marginal net financial benefit to the affected individuals. At the lower and middle levels of this range, individual lawsuits would be uneconomic thus discouraging persons who may have a meritorious claim. Thus the principle of access to justice is supported by allowing a class proceeding in this matter.

(c) This Action Does Not Involve Claims that are or have been the Subject of Other Proceedings - s. 4(2)(c)

137 The defendant has not pointed to any other proceedings that address the issues in this case, other than, of course, the parallel class action proceedings commenced in Ontario and Quebec.

(d) Other Means of Resolving the Case would be Impractical and Inefficient - s. 4(2)(d)

138 The points set out in section (b) above regarding s. 4(2)(b) also apply here.

139 Although the defendant submits that alternative dispute resolution could resolve the issues, there is no agreement between the defendant and the plaintiff to submit any substantive issues to resolution by arbitration or any other process.

(e) Certification of this Case as the Class Action will Conserve Judicial Resources - s. 4(2)(e)

140 The points set out in section (b) above regarding s. 4(2)(b) also apply here.

141 The requirements of s. 4(1)(d) of the *CPA* are met.

E. A Representative Plaintiff

142 The proposed Representative Plaintiff need not be "typical" of the Class Members, nor the "best" possible representative; however, the court should be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 41.

143 I agree with the plaintiff that Erin Sherry is a very appropriate Representative Plaintiff. She had a Double Discretion mortgage with CIBC, is aware of her responsibilities as Representative Plaintiff, understands and is affected by the common issues in the case, and does not have a conflict with other Class Members. Ms. Sherry is also motivated to prosecute the action vigorously, as she is a single parent who was charged a Prepayment Penalty of over $47,000.

144 The plaintiff also proposes a reasonable litigation plan. A litigation plan does not need to be perfect; it will be adapted as the litigation proceeds. The purpose of the litigation plan is to demonstrate that the plaintiff and her counsel have considered how the action may proceed in an orderly manner and be resolved. As quoted in *Watson* above, this Court has stated as follows with regards to litigation plans in *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers,* 2003 BCSC 1717, aff'd 2004 BCCA 549:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. [Citations omitted].

145 Although the litigation plan could contain more detail as submitted by the defendant, I do not find it an impediment to certification on the basis that it will be amended as the class proceeds.

146 The requirements of s. 4(1)(e) are met.

VII. CONCLUSION

147 In the result, as I have indicated in each section of the analysis, I find this claim suitable for certification as a class proceeding. As is also set out above, the certification is conditional on the plaintiff establishing for the court an identifiable class which is not overbroad as are the present proposed terms.

148 Counsel should make arrangements for a Case Planning Conference to set a schedule for the determination of the matter of the definition of the class, and for the hearing regarding the proposed common issue on punitive damages."

J.E. WATCHUK J.

* * * * *

Corrected Judgment: The text of the judgment was corrected on the first page on July 2, 2014.