

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JONATHON BANCROFT-SNELL and) *Ward K. Branch* for the Plaintiffs
1739793 ONTARIO INC.)
)
Plaintiffs)
)
– and –)
)
VISA CANADA CORPORATION,) *Michael Eizenga* for the Defendant Bank of
MASTERCARD INTERNATIONAL) America Corporation
INCORPORATED, BANK OF AMERICA)
CORPORATION, BANK OF MONTREAL,) *Alex Zavaglia* for the Defendant Citigroup Inc.
BANK OF NOVA SCOTIA, CANADIAN)
IMPERIAL BANK OF COMMERCE,) *Markus Kremer* for the Defendant Bank of Nova
CAPITAL ONE FINANCIAL) Scotia
CORPORATION, CITIGROUP INC.,)
FEDERATION DES CASSES DESJARDINS) *Rob Kwinter* for the Defendant Visa Canada
DU QUEBEC, NATIONAL BANK OF) Corporation
CANADA INC., ROYAL BANK OF)
CANADA, and TORONTO DOMINION) *Jeffrey Simpson* for the Defendant MasterCard
BANK) International Incorporated
)
Defendants) *Chantal Chatelain* for the Defendant Federation
) des caisses Desjardins du Quebec
)
) *Mahmud Jamal* and *David Rankin* for the
) Defendant Bank of Montreal
)
) *Daniel G. Cohen* for the Defendant Capital One
) Financial Corporation
)
) *Katherine L. Kay* for the Defendant Canadian
) Imperial Bank of Commerce
)
) *Paul J. Martin* for the Defendant Royal Bank of
) Canada
)
) *Christine Lonsdale* for the Defendant Toronto
) Dominion Bank
)
) *Pamela Sidey* for the Defendant National Bank
) of Canada Inc.
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** October 2, 2014

PERELL, J.

REASONS FOR DECISION

[1] On May 16, 2011, pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Jonathon Bancroft-Snell and 1739793 Ontario Inc. commenced a proposed class action in Ontario against Visa Canada Corporation, MasterCard International Incorporated, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des caisses Desjardins du Quebec, National Bank of Canada Inc., Royal Bank of Canada, and Toronto Dominion Bank.

[2] The Plaintiffs allege that the Defendants have conspired since March 2001 to fix, maintain, or increase or control Merchant Discount Fees, including Interchange Fees, paid by merchants who accepted payment by Visa or MasterCard Credit Cards in Canada.

[3] Similar actions have been commenced in in British Columbia, Alberta, Saskatchewan, and Quebec by parties represented by the same lawyers acting for the Plaintiffs; namely: (1) *Coburn and Watson's Metropolitan Home, dba "Metropolitan Home" (previously, Watson) v. Bank of America Corporation*, SCBC No. VLC-S-S-112003 (Vancouver); (2) *Macaronies Hair Club and Laser Center Inc., Operating as Fuze Salon v. BofA Canada Bank*, Action No. 1203-18531 (Edmonton); (3) *Hello Baby Equipment Inc. v. BofA Canada Bank*, QB No. 133 of 2013 (Regina); and (4) *9085-4886 Quebec Inc. and Bakopanos v. Visa Canada Corporation*, Superior Court of Quebec No. 500-06-000549-101 (Montreal).

[4] In all the actions, the Plaintiffs have entered into a Settlement Agreement with the Bank of America Corporation dated August 16, 2013 and amended July 7, 2014.

[5] The Settlement Agreement is conditional upon approval by the courts in British Columbia, Alberta, Saskatchewan, Quebec, and Ontario.

[6] Nothing in the Settlement Agreement requires certification of the Ontario Action against any other Defendant, nor does the Agreement contain any terms preventing any other Defendant from contesting any aspect of certification against them.

[7] The Plaintiffs bring a motion for certification of their action as against the Defendant Bank of America Corporation for settlement purposes.

[8] If certification is granted, the Plaintiffs will bring a subsequent motion for approval of the settlement.

[9] The Plaintiff also seeks orders approving the Pre-Approval Notice and the opt-out mechanism by which class members can exclude themselves from the Bank of America Corporation Settlement Agreement and the Ontario Action.

[10] The British Columbia Action has been certified as against the Bank of America Corporation for settlement purposes and it has been certified as against the other Defendants on a contested basis. The contested certification is under appeal and involves a shorter class period.

[11] The Alberta Action and Saskatchewan Action have been certified for settlement purposes as against Bank of America Corporation.

[12] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[13] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[14] In the proposed class action in Ontario, the Plaintiffs plead that the Bank of America Corporation: (1) contravened s. 45(1) of Part VI of the *Competition Act*, R.S.C 1985, c. 19 (2nd Suppl.) giving rise to a right of damages under s. 36(1) of the *Act*; (2) is liable for tortious conspiracy and intentional interference with economic interests; and (3) is liable for unjust enrichment, waiver of tort, and constructive trust.

[15] The cause of action criterion for certification is satisfied.

[16] The Plaintiffs propose the following class definition:

The "Ontario Visa Settlement Class", which is defined as:

all Ontario resident persons who, during the Class Period, accepted payments for the supply of goods or services by way of Visa Credit Cards pursuant to the terms of Merchant Agreements, except the BC Visa Settlement Class, the Alberta Visa Settlement Class, the Saskatchewan Visa Settlement Class, the Quebec Visa Settlement Class, and the Excluded Persons.

The "Ontario MasterCard Settlement Class", which is defined as:

all Ontario resident persons who, during the Class Period, accepted payments for the supply of goods or services by way of MasterCard Credit Cards pursuant to the terms of Merchant Agreements, except the BC MasterCard Settlement Class, the Alberta MasterCard Settlement Class, the Saskatchewan MasterCard Settlement Class, the Quebec MasterCard Settlement Class, and the Excluded Persons.

[17] The class definition criterion for certification is satisfied.

[18] The Plaintiffs propose the following common issue:

Did BofA [Bank of America Corporation] conspire with others to fix, maintain, increase or control Interchange Fees paid by Merchants who accepted payment by Visa or MasterCard Credit Cards in Canada during the Class Period?

[19] This question satisfies the common issue criterion.

[20] I am also satisfied that the Plaintiffs have satisfied the preferable procedure and representative plaintiff criterion.

[21] All the criterion for certification having been certified, I grant the Plaintiffs' motion for certification as against Bank of America Corporation for settlement purposes.

[22] I further approve the notice and the notice plan.



Perell, J.

Released: October 3, 2014

CITATION: Bancroft-Snell v. Visa Canada Corporation, 2014 ONSC 5772
COURT FILE NO.: CV-11-426591CP
DATE: 20141003

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JONATHON BANCROFT-SNELL and 1739793
ONTARIO INC.

Plaintiffs

- and -

VISA CANADA CORPORATION, MASTERCARD INTERNATIONAL INCORPORATED, BANK OF AMERICA CORPORATION, BANK OF MONTREAL, BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE, CAPITAL ONE FINANCIAL CORPORATION, CITIGROUP INC., FEDERATION DES CASSES DESJARDINS DU QUEBEC, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, and TORONTO DOMINION BANK

Defendants

REASONS FOR DECISION

PERELL J.