CITATION: Bancroft-Snell v. Visa Canada Corporation, 2018 ONSC 5166
COURT FILE NO.: CV-11-426591CP
DATE: 2018/09/11

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JONATHON BANCROFT-SNELL and 1739793 ONTARIO INC. Plaintiffs	*Reider Mogerman* and *Chelsea Hermanson* for the 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 CAISSES DESJARDINS DU QUÉBEC, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, and TORONTO-DOMINION BANK Defendants	*Rob Kwinter* for the Defendant Visa Canada Corporation *Jeffrey Simpson* and *James Musgrove* for the Defendant MasterCard International Incorporated *Sean Griffin* and *Antoine Brylowski* for the Defendant National Bank of Canada Inc. *Katherine L. Kay* for the Defendants Toronto-Dominion Bank, Canadian Imperial Bank of Commerce, Royal Bank of Canada, BMO Financial Group and the Bank of Nova Scotia *Ed Babin* and *Cynthia Spry* for Objector Wal-Mart Canada Corp. *James Orr* for the Objector Home Depot of Canada Inc.
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: September 4, 2018

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] On May 16, 2011, in Ontario, pursuant to the *Class Proceedings Act, 1992*,[1] the Plaintiffs Jonathon Bancroft-Snell and his corporation, 1739793 Ontario Inc., commenced a proposed class action against two credit card networks; namely: Visa Canada Corporation and MasterCard

[1] S.O. 1992, c.6.

International Incorporated; and against ten banks; namely: Bank of America Corporation; Bank of Montreal; Bank of Nova Scotia; Canadian Imperial Bank of Commerce; Capital One Financial Corporation; Citigroup Inc.; Federation des caisses Desjardins du Québec; National Bank of Canada Inc.; Royal Bank of Canada; and Toronto-Dominion Bank.

[2] The Plaintiffs allege that the twelve Defendants have conspired since March 2001 to fix, maintain, increase, or control Merchant Discount Fees, including Interchange Fees, paid by merchants who accept payment by Visa or MasterCard credit cards.

[3] The Plaintiffs claimed, among other things: (a) general damages of $5 billion for conspiracy, unlawful interference with economic interests, and/or breach of Part VI of the *Competition Act*[2]; (b) an injunction enjoining the Defendants from conspiring to impose the Merchant Restraints; (c) an injunction enjoining the Defendants from conspiring to raise, maintain, fix and/or stabilize the rates of Merchant Discount Fees; (d) punitive damages; (e) costs of investigation and prosecution pursuant to s. 36 of the *Competition Act*; and (f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*.[3]

[4] There was a similar class action in the United States and similar class actions were commenced in British Columbia, Alberta, Saskatchewan, and Québec by plaintiffs represented by the same lawyers acting for the Plaintiffs in the Ontario action; namely: (1) Branch MacMaster, LLP; (2) Camp Fiorante Matthews Mogerman LLP; and (3) Consumer Law Group.

[5] In this motion in the Ontario action, the Plaintiffs seek Orders: (a) approving settlements with National Bank, Visa, and MasterCard; and (b) approving payment of Class Counsels' fees and disbursements.

[6] This motion is with respect to the fifth, sixth, and seventh settlements in the Canadian class action proceedings. Under the proposed settlements: (a) Visa and MasterCard will each pay $19.5 million; (b) Visa and MasterCard each agree to modify their No Surcharge Rules; (c) National Bank will pay $6 million; and (d) National Bank, Visa, and MasterCard, respectively agree to cooperate in the ongoing actions against the five remaining non-settling Defendant banks; namely: Bank of Montreal; Bank of Nova Scotia; Canadian Imperial Bank of Commerce; Royal Bank of Canada; and Toronto-Dominion Bank.

[7] Wal-Mart Canada Corp. and Home Depot of Canada Inc., which are class members in all jurisdictions except Québec, object to the settlements.

[8] For the reasons that follow, I approve the three settlements and Class Counsel's fee request.

B. FACTS

1. The Theory of the Plaintiffs' Case

[9] The theory of the Plaintiffs' case as presently pleaded in their Amended Statement of Claim is as follows.

[10] The Plaintiff, Jonathon Bancroft-Snell, is a resident of London, Ontario. In 2007, Mr. Bancroft-Snell incorporated his business as 1739793 Ontario Inc., now his co-plaintiff. His business has accepted payments by Visa credit card holders and by MasterCard credit card

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[2] R.S.C. 1985, c. 19 (2nd Suppl.).
[3] R.S.O. 1990 c.43 s. 127.

holders during the proposed Class Period, which is from May 16, 2001 and continuing through to the present.

[11] Mr. Bancroft-Snell's class action is brought on behalf of a class of merchants (the "Visa Class Members") consisting of all Canadian resident persons, who, during the class period accepted payments for the supply of goods and services by way of Visa credit cards pursuant to the terms of Merchant Agreements.

[12] The Plaintiffs' action is also brought on behalf of a class of merchants (the "MasterCard Class Members") consisting of all Canadian resident persons who, during the Class Period, accepted payments for the supply of goods and services by way of MasterCard credit cards pursuant to the terms of Merchant Agreements.

[13] Visa and MasterCard operate credit card networks. These networks provide a payment system by which credit card payments are authorized and paid. In 2009, approximately 670,000 merchants across Canada accepted Visa or MasterCard credit cards. In 2009, the Canadian credit card market had $265 billion in purchase transactions. Visa's share of these transactions was approximately 60% and MasterCard's share approximately 30%.

[14] Visa and MasterCard authorize banks ("Issuing Banks") to issue branded credit cards with various privileges and credit services to consumers, i.e., cardholders. The Issuing Banks use financial institutions known as "Acquirers" to function as payment processors for the merchants who accept payments by credit card. Acquirers provide the technology and hardware to merchants to accept credit card payments from cardholders.

[15] Thus, credit card networks are comprised of: (1) cardholders; (2) issuers, (3) merchants, (4) acquirers, and (5) the networker operator, e.g., Visa and MasterCard.

[16] The Defendant banks are all Issuing Banks. Some of the Defendant banks participate in both the Visa and the MasterCard network. Some of the Defendant Banks are Acquirers or own large stakes in Acquirers.

[17] Both Visa and MasterCard have a long list of requirements and rules with which an Issuer must comply to be able to issue a credit card product. To accept payments by Visa or MasterCard credit cards, merchants must enter into agreements with Acquirers. These agreements include standard terms and conditions imposed by the Visa and MasterCard and the Issuing Banks.

[18] The Merchant Agreements include the terms of the Visa International Operating Regulations and the MasterCard International MasterCard Rules. The Visa and MasterCard networks set standards for the exchange of transaction data and funds among merchants, Issuing Banks, and Acquirers. The networks also provide authorization, clearance, and settlement services for all Visa and MasterCard transactions.

[19] Every time a cardholder uses a Visa or MasterCard credit card to pay a merchant for a good or service, that merchant must pay a fee, referred to as a "Merchant Discount Fee". The Merchant Discount Fee is calculated as a percentage of the sale price of the good or service supplied. The Merchant Discount Fee is the difference between the price a merchant charges the consumer for a good or service and the amount that is paid to the merchant by the Acquirer.

[20] The Merchant Discount Fee is divided into three parts: (1) the "Interchange Fee" paid to the Issuing Bank; (2) the "Service Fee" retained by the Acquirer; and (3) the "Network Fee" paid to either Visa or MasterCard. The Interchange Fee is typically 80% of the Merchant Discount Fee; i.e., it is the largest component of the Merchant Discount Fee. In the typical Visa or

MasterCard transaction, funds flow from cardholders to Issuing Banks, including the Defendant Banks, which deduct the Interchange Fee, and then to Acquirers who deduct the Service Fee, pay the Network Fee, and pay the merchants

[21] In 2009, merchants in Canada paid approximately $5 billion in Merchant Discount Fees.

[22] The Plaintiffs allege that through agreements among Visa and MasterCard, Issuing Banks, and Acquirers, the Visa and MasterCard networks constitute an unlawfully created and maintained duopoly in the credit card network services market. The Plaintiffs allege that Visa and MasterCard and their co-conspirators leverages market power to earn supracompetitive profits from Canadian merchants.

[23] During the Class Period, the Defendants each set default minimum rates for the calculation of Interchange Fees, which vary from card to card. Interchange Fees are structured to impose different rates on different types of merchants. The Plaintiffs allege that the Defendants' market power gives them the ability to price discriminate.

[24] The Plaintiffs allege that by enforcing adherence to the Visa Rules and the MasterCard Rules, Visa and MasterCard have created agreements or arrangements that impose significant restrictions on the terms upon which Acquirers supply credit card network services to merchants under the Merchant Agreements (the "Merchant Restraints").

[25] The Merchant Restraints include: (1) the requirements that merchants must honour all credit cards of the same network (the "Honour All Cards Rule")[4]; and (2) the prohibition that merchants may not impose surcharges on purchases made using any credit card of the same network, regardless of the Merchant Discount Fee associated with use of a particular credit card (the "No Surcharge Rule"). Under the No Surcharge Rule, merchants must charge the customer the same price regardless of how the customer pays and are unable to steer customers to more remunerative forms of payment for the merchant at the point of sale.

[26] The Plaintiffs allege that the Merchant Restraints prevent merchants from: (a) encouraging customers to use lower-cost methods of payment; (b) declining to accept certain Visa and MasterCard credit cards, including credit cards with higher Merchant Discount Fees; and (c) applying surcharges to payments made by Visa and MasterCard credit cards as compared to other modes of payment such as cash and debit cards.

[27] The Plaintiffs allege that the effect of the Merchant Restraints is to constrain competition for credit card network services, including competition with respect to Merchant Discount Fees, and, as a consequence, consumers pay merchants the same prices for goods and services regardless of mode of payment, despite the higher cost to merchants of Visa and MasterCard credit card transactions.

[28] The Plaintiffs allege that the Merchant Restraints allow Issuing Banks to offload the cost of their credit card promotional schemes onto merchants, who must choose to accept whatever fees are charged or not to accept credit cards at all. It is alleged that the Honour All Cards Rule forces merchants to accept any and all Visa and MasterCard credit cards, no matter how high the fees for using that particular card. The No Surcharge Rule prevents merchants from passing this additional expense along to customers.

[29] With respect to Visa in particular, the Plaintiffs allege that various Issuing Banks,

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[4] For example, as Dr. Reutter explains in his opinion, the Honour-all-Cards rule would prohibit a merchant from refusing to accept a Visa Infinite card with its 1.71% interchange fee while accepting a Visa Credit Card with an interchange fee of 1.52%. A merchant would prefer to accept only the cards with the lowest interchange fees.

including the defendants CIBC, Desjardins, RBC, Scotiabank, and TD, along with others not named as defendants, participated as co-conspirators and entered into anti-competitive agreements, including agreements with Visa, each other, and other Issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the Visa credit card network. The Plaintiffs allege that the anti-competitive agreements resulted in the imposition of supracompetitive rates for Merchant Discount Fees paid by the Visa Class Members.

[30] Further, with respect to Visa, the Plaintiffs allege that Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and their co-conspirators unlawfully conspired or agreed to, among other things: (a) impose the Merchant Restraints set out in the Visa Rules on merchants including the Visa Class Members and thereby unreasonably increase the rates of Merchant Discount Fees paid by merchants, including the Visa Class Members, for payments made using Visa credit cards; and (b) fix, maintain, increase or control the rates of Merchant Discount Fees.

[31] The Plaintiffs allege that in furtherance of the conspiracy, during the Class Period, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, their co-conspirators, and their servants and agents: (a) increased or maintained the default rates for Merchant Discount Fees; (b) controlled the supply of credit card services by imposing the Visa Rules including the Merchant Restraints; (c) communicated to discuss and fix the default rates for Merchant Discount Fees; (d) exchanged information regarding the rates for Merchant Discount Fees and the volume of transactions using Visa credit cards for the purposes of monitoring and enforcing adherence to the Merchant Restraints; (e) concealed the rates of the constituent elements of Merchant Discount Fees from all merchants; and (f) disciplined any Acquirer which failed to impose the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

[32] With respect to MasterCard in particular, the Plaintiffs allege that various Issuing Banks, including the defendants BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, along with others not named as defendants, participated as co-conspirators in a similar conspiracy with respect to the MasterCard credit card network as described above with respect to the Visa credit card network.

[33] The Plaintiffs plead that the acts of the Defendants constitute the torts of civil conspiracy, unlawful interference with economic interests and or acts in breach of s. 45 of Part VI of the *Competition Act*, for which the Defendants are jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*. The Plaintiffs claim damages of $5 billion plus punitive damages, costs, and pre and post-judgment interest.

[34] The Plaintiffs allege that they and the other Class Members suffered the following damages: (a) the rates of Merchant Discount Fees have been maintained at and/or increased to a supracompetitive level; and (b) competition in the supply of Visa and MasterCard credit card network services has been lessened. The Plaintiffs allege that during the class period, Class Members paid excessive and supracompetitive Merchant Discount Fees and paid more for Visa and MasterCard credit card network services than they would have paid in the absence of the illegal agreements and, as a result, they have been injured in their business and property and have suffered damages.

[35] In the alternative, the Plaintiffs waive the tort and plead that they and the other Visa and MasterCard Class Members are entitled to recover under restitutionary principles. The Plaintiffs plead that the Defendants have each been unjustly enriched. The plaintiffs plead that equity and good conscience require the defendants to hold the Merchant Discount Fee Overcharge in trust for the Plaintiffs and the other Visa and MasterCard Class Members and to disgorge that amount to the Plaintiffs and the other Class Members.

2. Factual Background to Settlement Approval

[36] What follows is the factual background for the proposed settlement agreements with National Bank, Visa, and MasterCard. These are the fifth, sixth, and seventh consent partial settlement agreements in Ontario in a class action that has been certified after a contested certification motion in British Columbia.

[37] Beginning in June 2005, more than 40 proposed class actions were filed by merchants in the United States alleging that there was a conspiracy 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.

[38] The American actions were consolidated under the M.D.L. process together with 19 individual actions in the United States District Court – Eastern District of New York as *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL/1710. The co-lead counsel in those proceedings is the law firm of Robins, Kaplan, Miller & Ciresi, LLP, with whom Class Counsel have a consulting arrangement.

[39] As already noted above in the introduction, on May 16, 2011, in Ontario, pursuant to the *Class Proceedings Act, 1992*, the Plaintiffs Jonathon Bancroft-Snell and 1739793 Ontario Inc. commenced a proposed class action against two credit card networks and ten Canadian banks.

[40] Similar class actions were commenced in British Columbia, Alberta, Saskatchewan, and Québec by plaintiffs represented by the same lawyers acting for the Plaintiffs in the Ontario action. The other four actions are: (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 Québec Inc. v. Visa Canada Corporation*, Superior Court of Québec No. 500-06-000549-101 (Montreal).

[41] By agreement of the parties and with the consent of all the case management judges, the British Columbia action became the lead action.

[42] In 2012, the Canadian Commissioner of Competition brought proceedings before the Competition Tribunal. The Commissioner alleged that Visa's and Mastercraft's Merchant Restraints constituted resale price maintenance contrary to s. 76 of the *Competition Act*. The Commissioner sought an Order, among other things, prohibiting Visa and MasterCard from implementing rules that prohibit merchants who accept credit cards from: (a) declining to accept particular Visa or of MasterCard credit cards; and (b) applying a surcharge for those customers who pay with a credit card. The Defendant TD Bank was an intervener in the proceedings, as was the Canadian Bankers' Association. The Competition Tribunal was comprised of Justice Phelan, Dr. W. Askanas, and Mr. K. Montgomery. In 2012, there were 23 days of hearings, and the Tribunal reserved judgment.

[43] In July 2012, a $7.25 billion ($US) settlement was announced in the United States proceedings involving credit card fees. The settlement in the United States was approved on December 13, 2013, but as will be noted below, the settlement approval was reversed on appeal. At present, there is no settlement of the American litigation.

[44] Meanwhile, in April and May 2013, the certification motion in the lead action was argued in British Columbia. Chief Justice Bauman reserved judgment.

[45] While Chief Justice Bauman's decision was under reserve, on July 23, 2013, the Competition Tribunal released its reasons dismissing the Competition Commissioner's application. The Tribunal held that s. 76 of the *Competition Act* requires a resale and that the Commissioner had not established any resale of Visa and MasterCard's products. The Tribunal did, however, conclude that Visa and MasterCard indirectly influenced upward the price at which Acquirers supply or offer to supply Credit Card Network Services and that this conduct is likely to have an adverse effect on competition for credit card network services.

[46] Also, while Chief Justice Bauman's decision was under reserve, the Plaintiffs began settlement negotiations with Bank of America, and a settlement agreement was reached in August 2013.

[47] Under the first settlement agreement, the Bank of America agreed to pay $7.75 million and to co-operate in the ongoing prosecution of the Canadian actions in exchange for a release and the dismissal of the action.

[48] On March 27, 2014, Chief Justice Bauman certified the British Columbia action as a class action pursuant to the *Class Proceedings Act*.[5] Both sides appealed the certification order to the British Columbia Court of Appeal.

[49] With the contested certification under appeal, on July 11, 2014, the British Columbia action was certified for settlement purposes against the Bank of America. Class Counsel also obtained consent certifications for the purposes of the settlement in Alberta on September 19, 2014, in Saskatchewan on September 2, 2014, in Ontario on October 2, 2014, and in Québec on October 14, 2014.

[50] On December 8-10, 2014, the British Columbia Court of Appeal heard argument on the contested certification, and the Court reserved judgment.

[51] On April 1, 2015, the Plaintiffs signed a second settlement agreement, this time with Capital One. Under the second settlement, Capital One agreed to pay $4.25 million and to co-operate in the ongoing prosecution of the Canadian actions in exchange for a release and the dismissal of the action.

[52] On April 22, 2015, the Plaintiffs signed a third settlement agreement, this time with Citigroup. Under the third settlement, Citigroup agreed to pay $1.63 million and to co-operate in the ongoing prosecution of the Canadian actions in exchange for a release and the dismissal of the action.

[53] On August 19, 2015, the British Columbia Court of Appeal varied Chief Justice Bauman's certification judgment and certified several causes of action that he had not originally been certified. There was no appeal to the Supreme Court of Canada.

[54] In a point that I foreshadow to say is particularly significant in assessing the quality of the proposed settlement with Visa and MasterCard, the British Columbia Court of Appeal concluded that there was no claim against Visa and MasterCard under the current version of s.45 of the *Competition Act*, which came into effect in March 2010. The Court of Appeal concluded that it was plain and obvious that no such cause of action could be maintained against Visa and MasterCard.

[55] Following that decision on certification, the Plaintiff sought to amend its Statement of Claim to to assert a claim under s.49 of the *Competition Act*. Mr. Justice Weatherill dismissed

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[5] R.S.B.C. 1996, c. 50.

the application[6] and the dismissal was upheld on appeal.[7] The plaintiff sought leave to appeal to the Supreme Court of Canada on this issue, which was denied.[8]

[56] The decisions of the British Columbia Courts on the certification and amendment motions were followed in the Quebec Proceeding, which authorized the plaintiff's case, but did not authorize the claims under current s.45 or s.49 of the *Competition Act*.[9]

[57] With the certified action ongoing in British Columbia, Class Counsel took steps to obtain certifications for settlement purposes with respect to the Defendants who had entered into the second and third settlement agreements. Consent certifications were obtained: in British Columbia, on August 14, 2015; in Alberta, on August 18, 2015; in Ontario, on August 6, 2015; in Saskatchewan, on August 21, 2015; and in Québec, on August 27, 2015.

[58] On November 23, 2015, I approved the first three settlements and I approved a counsel fee of $3,384,571.95, all inclusive.[10]

[59] With respect to the first three settlements, it should be noted that Wal-Mart, the well-known department and grocery store merchant, withdrew its objections based on certain conditions which were incorporated into the settlement approval, including confirmation that the settlement agreements do not restrict the ability of any U.S. or other non-Canadian affiliates or related entities or businesses, including Wal-Mart, from pursuing any claims relating to non-Canadian Interchange Fees in jurisdictions outside Canada and including changes to the definition of "released claims".

[60] In late 2015, independent of the class actions, Visa and MasterCard voluntarily gave an undertaking to the federal government to lower the fees charged merchants by about 10%.

[61] On June 1, 2016, I approved a fourth settlement which had been negotiated with Desjardins, and I approved payment of a counsel's fee of $2,143,307.30 and disbursements of $367,107.61 plus applicable taxes.[11] Desjardins agreed to pay $9.9 million and to co-operate in the ongoing prosecution of the Canadian actions in exchange for a release and the dismissal of the action.

[62] Wal-Mart did not object to the Desjardins Settlement provided that the same language regarding the scope of the release was read into the record or included in any reasons for judgment.

[63] In connection with the first four settlements, the Class Members had an opportunity to opt out. There was only one opt out request from an Ontario merchant.

[64] Thus, the gross monetary value of the previous settlements totals $23.53 million (Bank of America, $7.75 million; Citigroup, $1.63 million; Capital One, $4.25 million; and Desjardins, $9.9 Million). The net value of the previous settlements is $17 million.

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[6] *Coburn and Watson's Metropolitan Home (c.o.b. Metropolitan Home) v. BMO Financial Group*, 2016, BCSC 2011, aff'd 2017 BCCA 202, leave to appeal to the S.C.C. ref'd [2017] S.C.C.A. No. 312.

[7] *Coburn and Watson's Metropolitan Home (c.o.b. Metropolitan Home) v. BMO Financial Group*, aff'd 2017 BCCA 202, leave to appeal to the S.C.C. ref'd [2017] S.C.C.A. No. 312.

[8] *Coburn and Watson's Metropolitan Home (c.o.b. Metropolitan Home) v. BMO Financial Group*, [2017] S.C.C.A. No. 312.

[9] *9085-4886 Québec inc. c. Bank of Montreal*, 2018 QCCS 3730.

[10] *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275 and 2015 ONSC 7411, aff'd 2016 ONCA 3635. I reduced the amount of the counsel fee awarded from the amount claimed by 10% on account of a Fee Sharing Agreement between Class Counsel and the Merchant Law Group.

[11] *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONSC 3635.

[65] On June 30, 2016, *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*,[12] the United States Court of Appeals for the Second Circuit reversed and set aside the approval of the settlement in the American credit card class action.

[66] In 2017, independent of the Canadian class proceedings, the Canadian Federation of Independent Business ("CFIB") negotiated with MasterCard for a reduction in interchange fees, and on February 16, 2017 a deal was struck to reduce the fees for CFIB's 109,000 members. For example, MasterCard's fee for regular cards was reduced from 1.44% to 1.26%.

[67] On April 26, 2017, the National Bank signed a Settlement Agreement. The National Bank Settlement Agreement is conditional upon an opt-out threshold and upon court approval in in British Columbia, Alberta, Saskatchewan, Ontario and Québec, and the dismissal of all Canadian proceedings against National Bank with prejudice and without costs.

[68] The National Bank Settlement Agreement provides for a payment by the National Bank of $6 million. The National Bank also agrees to cooperate in the ongoing prosecution against the Non-Settling Defendants. In return, National Bank will receive a release and the dismissal of the Canadian proceedings with prejudice and without costs. Although the National Bank Settlement Agreement release is *in pari materia* with the release in the Desjardins Settlement and the earlier settlements, the only objection to the National Bank Settlement concerns the scope of the release.

[69] On June 2, 2017, Visa entered into the Visa Settlement Agreement. The terms of the Visa Settlement Agreement are summarized in the next part of these Reasons for Decision.

[70] On June 9, 2017, MasterCard entered into the MasterCard Settlement Agreement. The Visa and MasterCard Settlement Agreements are *in pari materia*. Thus, the summary below of the terms of the Visa Settlement applies equally to the MasterCard Settlement Agreement.

[71] There is no dispute that all three settlement agreements were the product of intensive and protracted settlement negotiations with the assistance of mediators.

[72] Class Counsel recommend the three settlement agreements because they submit that the settlements provide substantial benefits to the Class Members; namely: (a) the $45 million monetary recovery; (b) the change to the No Surcharge Rule agreed to by Visa and MasterCard; and (c) the agreements to cooperate by National Bank, Visa, and MasterCard in the Plaintiff's continuing action against the non-settling five remaining defendants.

[73] The net monetary value of the fifth, sixth and seventh settlements is approximately $33.5 million. The net monetary value of all the settlements to date is $50.5 million.

[74] For the fifth, sixth, and seventh settlements, Class Counsel is seeking approval of payment of its disbursements of $995,971.36 and a counsel fee of $10,512,234.35 (23.3% of $45 million) of which $8,820,755.35 would be payable immediately and $1,687,500 is to be held back pending the approval of a distribution plan.

[75] On January 26, 2018, the Alberta action was certified for the settlements with National Bank, Visa, and MasterCard.

[76] On January 30, 2018, the Ontario action was certified for the settlements with National Bank, Visa, and MasterCard.

[77] On February 16, 2018, the Saskatchewan action was certified for settlement purposes with National Bank, Visa, and MasterCard.

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[12] 827 F 3d 223 (2nd Cir 2016)

[78] On February 20, 2018, the Québec action was authorized for the settlements with National Bank, Visa, and MasterCard.

[79] Class Members who did not opt out in the first round of settlements are not entitled to opt out if there are subsequent consent certifications for settlement purposes.[13] However, in recognition of new merchants who began accepting Visa and MasterCard credit cards after September 4, 2015 (the end of the original opt-out period), these merchants were given an opportunity to opt out. There have been no additional opt outs.

[80] Beginning in March 2018, notice of the settlement approval hearing was distributed in accordance with the distribution plans approved by the courts of British Columbia, Alberta, Saskatchewan, Ontario, and Québec.

[81] On June 21, 2018, Wal-Mart delivered an objection in writing to the Visa and MasterCard Settlements.

[82] Mr. Bancroft-Snell was examined for discovery on June 26 and 28, 2017.

[83] On June 25, 2018, the settlement approval motion in British Columbia began.

[84] On July 4 and 5, 2018, without having filed an objection in writing, Home Depot appeared at the settlement approval hearing in the British Columbia Proceeding to object to the MasterCard and Visa Settlements.

[85] At the hearings Justice Weatherill indicated that a release that barred unknown future conduct was too broad but a release of future claims arising from the conduct that is at issue in the proceedings would be permissible. The Plaintiffs, Visa and MasterCard responded by proposing a revised definition of Released Claims.

[86] On July 13, 2018, Justice Weatherill released his Reasons for Decision. He conditionally approved all three Settlement Agreements.[14] For approval, Justice Weatherill required the definition of "Released Claims" to be amended, and the parties have agreed to do so.

[87] Home Depot and Wal-Mart have delivered notices of appeal.

[88] Meanwhile, on July 5 and August 23, 2018, the settlement approval motion in Alberta came on for a hearing before Associate Chief Justice Rooke. He reserved judgment.

[89] On August 30, 2018, Associate Chief Justice Rooke released his decision. He approved the settlement with reasons to follow. In his endorsement, at para. 6, he stated:[15]

> 6. Reasons for this Decision will be released at a later time. They will, however, endorse the *Coburn 2018* decision of Weatherill J., who has lived with this case, for which all proceedings are substantially the same, for much of the 7+ years of litigation in these actions against these Defendants, while proceedings in other jurisdictions, including Alberta, have been stayed, with the Courts in those jurisdictions, in effect, maintaining a "watching brief" on the BC proceedings. The decision to endorse the *Coburn 2018* decision is consistent with the principles of judicial comity, based on the cases of, *inter alia*: *Ali Holdco Inc, v. Archer Daniels Midland Company*, 2010 ONSC 3075 at para. 27; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105 at para. 82; *McKay v. Air Canada*, 2016 BCSC 1671 at para. 33, *Gill v. Yahoo Canada Co.*, 2018 BCSC 290 at para. 34; *Quenneville v. Volkswagen*, 2016 ONSC 7959 at paras. 20-21; *Frohlinger v. Nortel Networks Corporation*, 2007 Canlii 696 (ONSC) at paras. 31-32; and *Jeffrey v. Nortel Networks*

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[13] *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299; *Nutech Brands Inc. v. Air Canada*, 2008 CanLII 11643. In contrast, under Québec law each new settlement provides an opportunity to opt out but not back into an authorized class proceeding.

[14] *Coburn and Watson's Metropolitan Home v BMO Financial Group et al*, 2018 BCSC 1183.

[15] *Macaronies Hair Club and Laser Center Inc, Operating as Fuze Salon v. BofA Canada Bank*, 2018 ABQB 633.

Corporation, 2007 BCSC 69 at paras. 78b-79. The Reasons will, as appropriate, add Alberta based considerations to the proceedings here, and follow, in due course.

[90] Home Depot and Wal-Mart have delivered notices of appeal in Alberta.

[91] The Settlement Agreements now before the court have been amended to reflect the British Columbia Court's ruling and the Plaintiffs now seek approval of the revised version of the Settlement Agreements.

3. The Visa and MasterCard Settlement Agreements

[92] The Visa and MasterCard Settlement Agreements are virtually the same. The pertinent provisions of the Visa Settlement may be summarized as follows:

a. Visa makes no admission of liability and believes that it is not liable, but despite its belief, Visa has entered into the settlement to avoid the risks and expense and distraction of present and any future litigation arising out of the "Alleged Conduct" and to achieve final resolution of all claims asserted or which could have been asserted against Visa by the Plaintiffs and the Class Members.

b. Alleged Conduct means all conduct that has been alleged or could have been alleged as against any Defendant in the Canadian Proceedings, including conduct in respect of or relating in any way to the payment of Merchant Discount Fees, Interchange Fees, the Visa Network Rules, or any combination of the foregoing.

c. No Surcharge Rule means the prohibition in the Visa Network Rules against Merchants imposing surcharges on Visa transactions including purchases made using Visa Credit Cards, regardless of the Merchant Discount Fee or Interchange Fee associated with the use of a particular credit card.

d. Released Claims means all claims and liabilities of any nature whatsoever that the Plaintiffs and the Class Members ever had, now have, or may have with respect to or relating to any of the Alleged Conduct from the beginning of time through the pendency of the Canadian Proceedings, including, without limitation, any such claims which have been asserted, would have been asserted or could have been asserted, or any future claims related to past, current or future conduct to the extent alleged in the Canadian Proceedings, including continued adherence to the Visa Network Rules.

e. Under the Settlement Agreement, the Plaintiffs shall not continue to assert or pursue in the Canadian Proceedings any claim for modification or abrogation of any of the Visa Network Rules in effect or as modified or to be modified or seek any declaratory or other relief asserting that the Visa Network Rules are illegal, unlawful or unenforceable.

f. Under the Settlement Agreement, the Plaintiffs agree to amend the pleadings in the Canadian Proceedings and to expressly advise the trial court in any Canadian Proceeding both orally and in writing that no claim that the Visa Network Rules are illegal, unlawful or unenforceable is being asserted.

g. Notwithstanding the foregoing, the Plaintiffs may seek damages from the Non-Settling Defendants and are not barred from seeking findings on the required elements of the existing causes of action for damages against the Non-Settling Defendants.

h. The Plaintiffs and the Class Members shall not prosecute any claim against any other Persons who could prosecute any claim, crossclaim, claim over for contribution, indemnity, or other relief against Visa in respect of any Released Claim, except for the continuation of the Canadian Proceedings against the Non-Settling Defendants.

i. The Parties expressly acknowledge and agree that nothing in the Settlement Agreement restricts the ability of United States or other non-Canadian affiliates or related entities or businesses of the Releasors from pursuing any claims relating to non-Canadian interchange in jurisdictions outside Canada, including the United States.

j. Settlement Amount means the all-inclusive sum of CAD $19.5 million, which Visa agrees to pay.

k. Under the settlement, subject to any applicable notice requirements and any delays associated with technological or other technical requirements, Visa shall implement a modification to Visa's Canadian No Surcharge Rule in accordance with Schedule C no later than the day which is eighteen (18) months after the Effective Date. The amendment to the No Surcharge Rule will allow merchants to surcharge up to a cap; i.e., merchants have the right to pass on the costs of accepting credit cards on to the consumers using the credit cards.

l. The Settlement Agreement and Schedule C provide that:

   i. Visa will permit surcharging on credit cards only at the network level or at the product level (i.e., different types of cards offered by a given network) but not both. Visa will not permit surcharging at the issuer level.

   ii. Where surcharging is permitted, the surcharge must be equal to or less than the amount provided for in this rule.

   iii. Any surcharge that a merchant imposes on Visa credit card transactions must be no greater (after accounting for any discounts or rebates offered at the point of sale) than the surcharge that the merchant imposes on transactions of American Express or PayPal;

   iv. When a merchant surcharges at the brand level or at the product level, the amount of the surcharge shall not exceed the merchant's average effective merchant discount rate ("EDMR") (as that term is defined in footnote 3 of the Code of Conduct for the Credit and Debit Card Industry in Canada (the "Code of Conduct")) for that brand or product during the last 1 month or 12 months;

   v. A merchant cannot impose a surcharge greater than the "maximum surcharge cap," which is the lesser of (1) 2.5%; or (2) 1% plus Visa's average annual effective rate of interchange for credit card transactions in Canada as set out in any voluntary or mandatory commitment to a Canadian governmental entity or otherwise reasonably determined by Visa if not so regulated, expressed as a percentage of transaction value.

   vi. Surcharging is prohibited on transactions that already have service fees;

   vii. Nothing in the modified No Surcharge Rule shall preclude Visa and any

merchant from entering into an agreement that prohibits that merchant from surcharging some or all Visa credit card transactions.

viii. Visa's obligation to maintain this rule modification shall expire five years after its implementation.

ix. If Visa, at any point in time reinstates the No Surcharge Rule or an equivalent provision that purports to bar a Merchant's right to impose a surcharge based on the Merchant Discount Fee or Interchange Fee associated with the use of a particular Credit Card, then any Releasor shall be at liberty to pursue a claim for damages, injunctive, or declaratory relief against the Releasees with respect to the Reinstated Rule.

m. Visa agrees to cooperate with Class Counsel in the prosecution of the claims against the non-settling Defendants in the manner prescribed in the Settlement Agreement.

[93] For the discussion and analysis below, it should be noted that pursuant to the operation of the releases, the impugned conduct by Visa and MasterCard is immunized from present and from future civil actions by any Canadian merchant. However, notwithstanding that Visa and MasterCard are immunized, the five non-settling Defendants may be sued for damages from the impugned conduct.

[94] Dr. Keith Reutter,[16] an economist retained by the Plaintiffs to provide expert evidence for the settlement approval motion stated in his opinion that in 2016 alone, Canadian merchants paid over $8 billion in fees to Visa, MasterCard, Acquirers, and Issuers. He stated that the ability to surcharge would allow merchants to recoup some of these expenses. He opined that if only 10% of Canadian merchants choose to surcharge, then the revenue collected by surcharges would equal $800 million annually.

[95] Dr. Reutter noted that the No Surcharge Rule has been removed in Australia and New Zealand. Following the removal of the No Surcharge Rule, credit card use did not decline. However, there were allegations that some merchants were engaging in excess surcharging and this led authorities in Australia and New Zealand to contemplate further regulatory action. The Visa and MasterCard Settlement Agreements include a "maximum surcharge cap", which provides an upfront check on excessive surcharging.

[96] Dr. Reutter opined, however, that that once the marketplace appreciated the ability of merchants to surcharge on credit card purchases, it would steer consumers to lower cost more efficient forms of payment. He opined that the change in the market conditions would also likely assert competitive pressure on Visa and MasterCard and have the potential of reversing or reducing the rate of increase in credit card fees on merchants going forward.

4. Facts: Fee Approval

[97] For the fifth, sixth, and seventh settlements, Class Counsel is seeking approval of payment of its disbursements of $995,971.36 and a counsel fee of $10,512,234.35 (23.3% of $45 million) of which $8,820,755.35 would be payable immediately and $1,687,500 is to be held

[16] Dr. Reutter of Fairfax, Virginia, U.S.A. is the managing partner of Reutter Economics LLC. He has a Ph.D. in Economics, Auburn University, 1997, M.A. (Economics), University of Texas-Arlington, 1992 and B.A. (Economics), University of Texas-Arlington, 1988. He has provided expert testimony before U.S. and Canadian courts. He is a lecturer in the Department of Economics, The George Washington University (Washington, D.C.).

back pending the approval of a distribution plan.

[98] Class Counsel engaged Robins Kaplan, Miller & Ciresi LLP, co-lead counsel in *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,*[17] a similar anti-trust litigation in the United States, as consultants. The consultants fee is to be paid by Class Counsel from their fees awarded in the Canadian actions. In consideration of Robins Kaplan postponing receiving payment, Class Counsel have agreed that subject to court approval, Robins Kaplan may be paid amounts in excess of their usual hourly rates.

[99] Class Counsel also engaged the U.S. firm Kirby Mcinerney LLP to assist in the production of U.S. documents. A similar fee arrangement was reached with Kirby Mcinerney LLP. The result is that Class Counsel will receive 23% and Kirby Mcinerney LLP and Robins Kaplan will receive 2% of the fees if approved by the court.

[100] Proceedings, and provides that the work of Robins Kaplan is to be provided as needed and instructed by Class Counsel

[101] On the settlements with Bank of America, Citigroup, Capital One, and Desjardins, the court approved Counsel Fees of $5,550,307.30 and disbursements of $751,679.56. The approved legal fees represented 25% of the settlement amounts.

[102] From April 12, 2016 (the cut-off date for the last round of fee approvals in relation to settlement agreement with Desjardins) to May 31, 2018, Class Counsel, Robins Kaplan, and JSS Barristers (who assisted Class Counsel with the Alberta Proceeding) have recorded the following amount of time pursuing this litigation, at their usual national class action rates:

- Branch MacMaster $747,360
- Camp Fiorante Matthews Mogerman LLP $1,363,301.25
- Consumer Law Group $953,212.50
- Jensen Shawa Solomon Duguid Hawkes LLP $497
- Robins Kaplan Miller & Ciresi LLP $42,187.07
- TOTAL $3,106,557.82

[103] Since the commencement of the Canadian proceedings, the total amount of docketed time by Class Counsel is as follows:

[104]

- Branch MacMaster $2,398,231.5
- Camp Fiorante Matthews Mogerman LLP $3,124,535
- Consumer Law Group $1,371,925
- TOTAL $6,894,691.50

[105] Recognizing that there is significant work to be done with respect to a distribution of settlement funds to class members, Class Counsel proposes that $1,687,500 in fees, plus applicable taxes (equal to 15% of Class Counsel's total fee request) be paid to Class Counsel and held in trust, to account for the future work. These fees will become payable after Class Counsel provides a report to the Courts with respect to the completion of the first settlement distribution

[17] MDL#1710.

to Class Members.

[106] The following chart summarizes the combined legal fees being sought with respect to the Visa, Mastercard and National Bank settlements:

Total Fee Request (23.333768% of total recovery)	$10,512,234.35
Less: Holdback	($1,687,500.00)
Less: previous "over approval"	($3,979.00)
Current Fee Request	$8,820,755.35
Consultant fees to Robins Kaplan	$616,821.88
Consultant fees to Kirby Mcinerney	$120,943.77
Disbursements	$258,205.71
Current Disbursement Request	$995,971.36

C. OBJECTIONS TO THE VISA AND MASTERCARD SETTLEMENTS

1. The Wall-Mart and Home Depot Objections to the Visa and MasterCard Settlements

[107] Wal-Mart and Home Depot submitted that the settlement was not fair and in the best interests of the Class Members.

[108] Wal-Mart and Home Depot submitted that the proposed settlements should be rejected because the settlements released future anticompetitive conduct. They protested that this type of release is unprecedented and constitutes an illegal and unenforceable contract at common law because it is in restraint of trade. The thrust of the objectors' argument was that without withdrawing their allegations that there was an illegal conspiracy in which Visa and MasterCard were the principal actors, because of the operation of the releases under the settlement agreements, the anticompetitive behaviour was authorized to continue into the future. The objectors protested that thus the Settlement Agreements were themselves illegal contracts in restraint of trade.

[109] The Objectors submitted that the unreasonableness and the illegality of the release cannot be saved by the $39 million the payment to Class Members. These objections focused on the temporal, substantive, and geographic breadth of the release, the "most favoured nation" clause, and the "no third-party claim" clause, which prevents Class Members from proceeding against third parties who might claim over against MasterCard or Visa.

[110] Further, Wal-Mart and Home Depot objected that when coupled with the inability of the Class Members to opt out of the settlement, the releases constituted an unprecedented confiscation of class members' future access to justice and was contrary to the *Class Proceedings Act, 1992.*

2. The Plaintiffs', Visa's and MasterCards' Response to the Objections

[111] The Plaintiffs, Visa, and MasterCard understood that Wal-Mart and Home Depot were objecting to the Settlement Agreement releases authorizing any and all illegal anti-competitive conduct in the future and not just the continuation of the specific conduct being released. The

Plaintiffs, Visa, and MasterCard insisted that: (a) the releases were not as broad as Wal-Mart and Home Depot suggested; and (b) that there is nothing objectionable about releases that discharge a defendant from present and future liability associated with the subject matter of the litigation.

[112] In the British Columbia action, Justice Weatherill's agreed with the Plaintiffs', Visa's, and MasterCards' argument. His rejection of Wal-Mart's and Home Depot's objections is set out in paragraphs 56-61 and 70-73 of his Reasons for Decision, as follows:

> 56. Neither Wal-Mart nor Home Depot provided any authority for the proposition that a release of continuing future conduct is inappropriate. Indeed, the case law is to the contrary. Numerous courts have found that it is not unfair to bar claims that are a continuation of the conduct giving rise to the existing claims that are the subject-matter of the proceeding: see for example *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2014 ONSC 5812 at para. 55.
>
> 57. Moreover, the law is clear that, while releases are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute. The context often provides a limited background from which an inference may readily be made that the parties meant to apply it only to the claims from the dispute: *The Owners, Strata Plan BCS 327 v. IPEX Inc.*, 2014 BCCA 237 at para. 26.
>
> 58. The court will be very slow to infer that a party intended to surrender rights and claims that may arise in the future by virtue of a change in the law of which the party was unaware and could not have been aware: *Biancaniello v. DMCT LLP*, 2017 ONCA 386 at para. 29, citing Lord Bingham in *Bank of Credit and Commerce International SA v. Munawar Ali*, [2001] 1 All E.R. 961 at para. 10.
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> 59. The phrase in the Revised 'Released Claims' Definition "... to the extent alleged in the Canadian Proceedings..." ensures that the language of the releases does not and can not capture a future change in the law. Nothing in the language of the Revised 'Released Claims' Definition purports to release new conduct that takes place in the future. However, I am satisfied that Visa and MasterCard would not have entered into their respective settlement agreements without the release language capturing a continuation of the conduct that was alleged against them (other than the No Surcharge Rule).
>
> 60. Finally, I agree with Class Counsel that the time to have objected to the language in the Notice was at the hearing at which the Notice and the Notice's dissemination plan were approved by the Court.
>
> 61. I do not agree with counsel for Wal-Mart and Home Depot that the Revised "Released Claims' Definition is unreasonably broad or unfair to the Class Members as a whole.
>
> [...]
>
> **Conclusion**
>
> 70. The MNV Settlement Agreements are the result of intensive and difficult arm's length negotiations among experienced and capable senior counsel within the context of exceptionally hard-fought, difficult and complex litigation. Each side made concessions and has assumed some risk, in favour of bringing the dispute to an end. Interests of finality must prevail: *Radhakrishnan v. University of Calgary Faculty Assn.*, 2002 ABCA 182 at para. 43. Neither Wal-Mart nor Home Depot has provided any cogent reason why the determination of Class Counsel in this regard should be second guessed.
>
> 71. Such settlements should be encouraged by the courts and are favoured by public policy.
>
> 72. In my view, the MNV Settlement Agreements are fair, reasonable, in the best interest of the Class Members as a whole and provide substantial benefits to them. They also achieve the goal of the CPA and ought to be approved notwithstanding the objections of Wal-Mart and Home Depot. The impugned release language, including the finality of it as far as the conduct alleged in the

Canadian Proceedings is concerned, does not take the MNV Settlements as a whole outside the zone of reasonableness.

73. Each of the NB Settlement Agreement, the Visa Settlement Agreement and the MasterCard Settlement Agreement is approved with the Revised 'Released Claims' Definition.

3. The Standing Issue

[113] It is the Plaintiffs' position that Wal-Mart and Home Depot do not have standing to object to the Settlement Agreements because they raised their objections before the British Columbia. court and to reassert their rejected objections is an abuse of process.

[114] There is absolutely no merit in the Plaintiffs' submission.

[115] While I have the greatest respect for the courts of British Columbia, Alberta, Saskatchewan, and Québec, and I shall give significant weight to their views, each court has an independent and solemn obligation to review a settlement, to consider any objections, and to make a determination of whether it is fair and reasonable and in the best interests of the class.[18]

[116] It is no more an abuse of process for Wal-Mart and Home Depot, who are class members in British Columbia and Ontario, to raise their objections in both jurisdictions, than it was for the Plaintiffs to seek access to justice for the same Class Members for the same causes of action in British Columbia, Alberta, Saskatchewan, Ontario, and Québec.

D. SETTLEMENT APPROVAL

1. The Test for Settlement Approval

[117] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

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[18] *Ali Holdco Inc. v. Archer Daniels Midland Co.*, 2010 ONSC 3075 at para. 27.

(c) a description of any plan for distributing settlement funds.

[118] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[19]

[119] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.[20]

[120] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[21] An objective and rational assessment of the pros and cons of the settlement is required.[22]

[121] In mandating that settlements are subject to court approval, the class action statutes place an onerous responsibility to ensure that the class members interests are not being sacrificed to the interests of Class Counsel who have typically taken on an enormous risk and who have a great deal to gain not only in removing that risk but in recovering an enormous reward from their contingency fee. The incentives and the interests of class counsel may not align with the best interests of the class members, and, thus, it falls on the court to seriously scrutinize the proposed settlement both in its making and in its substance.[23]

[122] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[24] A settlement does not have to be perfect,

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[19] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[20] *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123; *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[21] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[22] *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[23] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at para. 30 (Gen. Div.); *L. (T.) v. Alberta (Director of Child Welfare)*, 2015 ABQB 815 at para. 11; *AFA Livforsakringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3-17; *Sheridan Chevrolet Ltd. v Furukawa Electric Co.*, 2016 ONSC 729; *McIntyre v. Ontario* 2016 ONSC 2662 at para. 26; *Welsh v. Ontario*, 2018 ONSC 3217; *Perdikaris v. Purdue Pharma*, 2018 SKQB 86.

[24] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

nor is it necessary for a settlement to treat everybody equally.[25]

[123] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[26]

2. Discussion and Analysis: The National Bank Settlement

[124] I approve of the National Bank Settlement. It is *in pari materia* with the first four settlement agreements.

[125] For the same reasons that the first four settlements were fair, reasonable, and in the best interests of Class Members, the settlement with the National Bank should be approved.

[126] In short, if one considers the various criteria that inform the analysis of whether a settlement should be approved, then the National Bank Settlement should be approved. The Settlement Agreement was the product of hard bargaining and it confers sufficient benefits so that it can be said that it is fair, reasonable, and in the best interests of Class Members.

3. Discussion and Analysis: The Visa and the Mastercraft Settlements

[127] In their factums, the Plaintiffs, Visa, MasterCard and the objectors debate the significance of my decision in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*,[27] in which I initially refused but eventually approved a settlement that involved a release of future claims. The release I ultimately approved in *Quizno's* was connected to the impugned conduct that had been the subject matter of the competition law action. The release that I had refused to approve was too broad and would have excused different kinds of misconduct.

[128] For present purposes, it is, however, not necessary to say much about the *Quizno's* decision. A settlement approval in one class action is not a binding precedent to approve a settlement in another class action, even of the same genre of class action.

[129] Like snowflakes, each of which is a unique crystal, class actions are a unique matrix of facts, law, circumstances, risks of many types, contingencies, personalities, and possibilities of proof. The determination of whether to approve a settlement depends on the facts and circumstances particular to that class action. In the *Quizno's* case, I ultimately decided that the terms of the settlement including the release were fair and reasonable in the circumstances of that case. That is the determination that I must make in the immediate case, in which the circumstances are much different from those in the *Quizno's* case.

[130] Before the argument of the approval motion, I was inclined not to approve the Visa and

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[25] *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.
[26] *Welsh v. Ontario*, 2018 ONSC 3217.
[27] 2014 ONSC 5812.

MasterCard settlements. I had tentatively concluded that the settlements were not fair, reasonable, or in the best interests of the class. I had reached that tentative conclusion notwithstanding the approval of the settlements in British Columbia and Alberta and for reasons that were informed by, but differed from, the reasons advanced by Home Depot and Wal-Mart for objecting to the settlements.

[131] I, however, changed my mind after the argument where Class Counsel were more transparent and candid about the weaknesses in the Plaintiffs' case against Visa and MasterCard and about the rationale for agreeing to a settlement that appeared to be an excellent settlement from the perspective of Visa and MasterCard and a poor one from the perspective of the Class Members.

[132] Before the argument of the motion, unlike Wal-Mart and Home Depot, I did not see the breadth and operation of the releases and the other impugned provisions of the Settlement Agreement as grounds for rejecting the settlement. Releases sometimes forgive or license continuing alleged wrongdoing; for example, a release of a continuing nuisance or trespass, and I saw the releases in the immediate case as appropriate for what is an excellent settlement for Visa and MasterCard, who in effect were being licensed to carry on business as they had before. There was nothing improper or illegal *per se* about these releases, and, rather, the issue was whether granting them was in the best interests of Class Members.

[133] Visa and MasterCard candidly state in the recitals to the Settlement Agreements that it is a settlement "to avoid the further expense, inconvenience, and distraction of burdensome and protracted litigation of the Canadian Proceedings and any other present or future litigation." The Visa and MasterCard settlements are nuisance value settlements for which Visa and MasterCard achieve finality and some degree of certainty that they can carry on business as they have into the future.

[134] That from the perspective of Visa and MasterCard the settlements were nuisance value settlements was confirmed by the circumstance that Visa pays the same monetary sum as MasterCard notwithstanding that Visa has twice the market share as MasterCard. Although masked by high self-praise (for obtaining $39 million and a change to the No Surcharge Rule) that Class Counsel recommended this settlement revealed that Class Counsel was capitulating to the apparent strength of Visa and MasterCard's defence.

[135] During the argument of the motion Class Counsel was more candid. Class Counsel emphasized the point foreshadowed above that the courts of British Columbia and Québec have held that s. 45 of the *Competition Act* is aimed at horizontal conspiracies and that the Plaintiffs have no claim against Visa and Mastercard after March 2010. Class Counsel clarified that while the case against the Defendant banks, whose wrongdoing was a horizontally anti-competitive, was strong, the case against Visa and MasterCard was not.

[136] Wall-Mart's and Home Depot's focus on the releases and the other impugned provisions of the Settlement Agreements was informative. Their objections drew attention to what was the essence of this particular class action, and their objections revealed that behaviour modification was the heart and soul of this particular class action.

[137] Wall-Mart's and Home Depot's focus on the releases revealed that it was the abandonment of the declarative and injunctive remedies in the Settlement Agreements that actually grieved Wall-Mart and Home Depot. What was of interest to the Class Members was to achieve a better Merchant Contract rather than a reimbursement for an already paid expense of doing business.

[138] While $39 million is a large amount of money, in the particular context of the immediate class action, $39 million is a paltry sum for the 700,000 Class Members and especially paltry if it is taxable receipt and if there is a prorated distribution scheme, which would diminish the recovery to negligible for many Class Members while increasing it for others.

[139] With the essence of the class action having been identified as behaviour modification (with monetary relief being of lesser importance), and with Class Counsel's candor during the argument of the motion about the weaknesses in the case against Visa and MasterCard, the achievement of a nuisance monetary value settlement and the achievement of the change of the No Surcharge Rule grew in significance and worth to the Class Members.

[140] How then should the abandonment of the declarative and injunctive remedies be assessed and how does this abandonment measure on a cost/benefit analysis of whether the Class Members are best served by accepting the settlement rather than proceeding to trial?

[141] Recalling again the point foreshadowed above that the courts of British Columbia and Québec have held that s. 45 of the *Competition Act* is aimed at horizontal conspiracies and that the Plaintiffs have no claim against Visa and Mastercard after March 2010, it turns out that the abandonment of the declarative and injunctive relief against Visa and MasterCard is to give away a remedy that probably would not have been achievable in exchange for something of considerable value to the Class Members and at the heart of this class action; namely the change to the No Surcharge Rule. Thus understood, the terms of the settlement were within the range of reasonableness.

[142] With a better understanding of the juridical events in British Columbia over the last seven or eight years, the Visa and MasterCard settlements now appear to me to be fair settlements, reasonable, and in the best interests of Class Members

E. FEE APPROVAL

[143] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[28]

[144] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[29]

[145] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[30]

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[28] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.).

[29] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[30] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

[146] There were no objections to Class Counsel's fee request, and in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, the request in the immediate case should be approved.

F. CONCLUSION

[147] For the above reasons, I approve the three settlements and Class Counsel's fee request.

Perell, J.

Released: September 11, 2018

CITATION: Bancroft-Snell v. Visa Canada Corporation, 2018 ONSC 5166
COURT FILE NO.: CV-11-426591CP
DATE: 2018/09/11

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 CAISSES DESJARDINS DU QUÉBEC, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, and TORONTO-DOMINION BANK

Defendants

REASONS FOR DECISION

PERELL J.

Released: September 11, 2018