QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 276**

Date: **2018 10 11**
Docket: QBG 133 of 2013
Judicial Centre: Regina

BETWEEN:

HELLO BABY EQUIPMENT INC.

PLAINTIFF

- and -

BOFA CANADA BANK, BANK OF MONTREAL, BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE, CAPITAL ONE BANK (CANADA BRANCH), CITIGROUP INC., FEDERATION DES CAISSES DESJARDINS DU QUEBEC, MASTERCARD INTERNATIONAL INCORPORATED, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, TORONTO-DOMINION BANK And VISA CANADA CORPORATION

DEFENDANTS

Counsel:

David Jones and Chelsea Hermanson for plaintiff
Rob Kwinter for Visa Canada Corporation
Jeff Simpson and James Musgrove for MasterCard International Incorporated
Sean Griffin and Antoine Brylowski for National Bank of Canada Inc.
Katherine Kay for Canadian Imperial Bank of Commerce, Royal Bank of Canada, BMO Financial Group, Toronto-Dominion Bank and Bank of Nova Scotia
Cynthia Spry for Wal-Mart Canada Corp., Objector
Kyle Taylor for Home Depot, Objector

JUDGMENT
OCTOBER 11, 2018

BARRINGTON-FOOTE J.

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[1] The plaintiff has applied pursuant to s. 38 of *The Class Actions Act*, SS 2001, c C-12.01 [*Act*] for an order approving settlement agreements between the plaintiff and the defendants Visa Canada Corporation [Visa agreement], MasterCard International Incorporated [MasterCard agreement] and National Bank of Canada Inc. [National Bank agreement] collectively the [settling defendants] and [MNV settlement agreements]. It has also applied pursuant to s. 41 of the *Act* for approval of class counsel legal fees and disbursements relating to those settlements.

History of the Litigation

[2] This is one of five class actions [Canadian proceedings] brought by a consortium of the law firms Branch MacMaster LLP, Camp Fiorante Matthews Mogerman LLP and Consumer Law Group [class counsel] against the same defendants. The other actions are:

- *Coburn and Watson's Metropolitan Home v Bank of America Corporation*, SCBC No. VLC S-S-112003 (Vancouver), case managed by Weatherill J. [BC action];
- *Macaronies Hair Club and Laser Centre Inc., v B of A Canada Bank*, Alberta Queen's Bench File No. 1203-18531 (Edmonton), case managed by Rooke A.C.J. [Alberta action];
- *Jonathon Bancroft-Snell v Visa Canada Corporation et al*, OSCJ No. CV-11-426591 and *1739793 Ontario Inc. v Visa Canada Corporation et al* – Court file No. CV-11-426591 CF (Toronto), case managed by Perell J. [Ontario action]; and

- *9085-4886 Quebec Inc. v Visa Canada Corporation*, Superior Court of Quebec No. 500-06-00549-101 (Montreal), case managed by Corriveau J. [Quebec action].

[3] The BC action became the lead action with the consent of the case management judges in the other Canadian proceedings. There are similar proceedings in the United States [US proceedings].

[4] The Canadian proceedings are actions on behalf of a class of approximately 700,000 merchants that accepted Visa and MasterCard credit cards as payment for goods and services. Broadly stated, they are concerned with two related issues. First, they relate to a fee, calculated as a percentage of the sale price, that merchants must pay each time a credit card is used [merchant discount fee]. The merchant discount fee is made up of an "interchange fee" paid to the bank that issued the credit card [issuer], a "service fee" paid to the financial institution that processed the payment for the merchant [acquirer], and a "network fee" paid to either Visa or MasterCard. The interchange fee is typically 80% of the merchant discount fee.

[5] Second, the Canadian proceedings relate to agreements between Visa, MasterCard, issuers and acquirers. Visa and MasterCard operate credit card networks. To accept payments by Visa or MasterCard, merchants must enter agreements with acquirers [merchant agreements]. Merchant agreements incorporate rules imposed by Visa and MasterCard [Visa rules] and [MasterCard rules] on acquirers. Those network rules place restrictions on merchants [merchant restraints]. There are four key rules at issue in the Canadian proceedings. Merchants must honour all credit cards of the contracting network. They cannot make it more difficult to pay with credit

cards or offer preferential treatment for using other forms of payment. There are default interchange rates. Finally, and most importantly, they cannot impose a surcharge to recoup the merchant discount [no surcharge rule].

[6] The plaintiffs in the Canadian proceedings alleged the agreements between the defendants constitute two separate but interrelated conspiracies which limit competition and force merchants to pay whatever merchant fees they are charged. They alleged the result is supra-competitive merchant discounts. They alleged breach of the *Competition Act*, RSC 1985, c C-34, unlawful means conspiracy, civil conspiracy to injure, and unlawful interference with economic interests, and in the alternative, waiver the tort and restitution. They claimed, among other things, general damages of $5 billion, punitive damages, and injunctive relief relating to the alleged conspiracies relating to interchange fees and to impose the network rules.

[7] Settlement agreements were previously concluded with Bank of America Corporation, Citigroup Inc., Capitol One Bank and Federation des caisses Desjardins du Quebec [previous settlements]. Those settlement agreements were approved in all Canadian proceedings. Bank of America paid $7.75 million, Capital One $4.25 million, Citigroup $1.63 million and Desjardins $9.9 million, or a total of $23.53 million. Legal fees and disbursements were also approved. In this action, Ball J. approved class counsel legal fees of $3,407,500.00 and disbursements of $354,571.95 for the first three settlements: see *Hello Baby Equipment Inc. v B of A Canada Bank*, 2015 SKQB 410. On June 10, 2016 he approved legal fees of $2,143,307.30 and disbursements of $367,107.71, for the Desjardins settlement (Unreported decision). The net settlement funds, which totalled $17,006,245.58 as of June 13, 2018, are held in trust pending approval of the distribution protocol. Each

of those settlements also provided that the releasee would cooperate in the on-going prosecution of the Canadian proceedings.

[8] Certification, and in Québec's case authorization, for settlement purposes for the MNV settlement agreements was obtained in each of the Canadian proceedings. Settlement approval hearings were held in BC, Ontario, Alberta and, on September 5, in this action. The Quebec hearing is scheduled for October 15. I have the benefit of decisions by Weatherill J. in the BC proceedings (*Coburn and Watson's Metropolitan Home v BMO Financial Group*, 2018 BCSC 1183 [*Coburn*]), Rooke A.C.J. in the Alberta proceedings (*Macaronies Hair Club and Laser Center Inc., v BofA Canada Bank*, 2018 ABQB 633 [*Macaronies*) and Perell J. in the Ontario proceedings (*Bancroft-Snell v Visa Canada Corporation*, 2018 ONSC 5166 [*Bancroft-Snell*). Weatherill J. and Perell J. approved the MNV settlement agreements and the legal fees and disbursements requested by class counsel, with full reasons. Rooke A.C.J. gave initial reasons approving the MNV settlements for the benefit of the courts yet to conduct hearings, with complete reasons to follow.

[9] The BC action was certified in 2014 and is set for trial in 2019. However, the BC courts did not certify all of the causes of action asserted in the initial statement of claim. In *Coburn and Watson's Metropolitan Home v Bank of America Corporation*, 2017 BCCA 202, [2017] 10 WWR 295 [*Watson's 2017*], Fenlon J.A. summarized the results of the certification application as follows:

> 11 The chambers judge described the initial round of certification and pleadings review this way:
>
> > [18] The certification judge struck the claims for breach of s. 61 of the *Competition Act*, conspiracy to commit an unlawful act, unlawful interference with economic interests and constructive trust as disclosing no cause of

> action. The balance of the claims were certified as a class action, namely breach of s. 45 of the *Competition Act* [R.S.C. 1985, c. C-34], the tort of conspiracy to injure, unjust enrichment and waiver of tort: see *Watson v Bank of America Corporation*, 2014 BCSC 532.
>
> [19] The Court of Appeal re-instated portions of the plaintiff's claim that had been struck by the certification judge and struck out portions that had been allowed: see *Watson v. Bank of America Corporation*, 2015 BCCA 362.
>
> [20] In particular, the Court of Appeal:
>
> > a) re-instated the claim for the tort of conspiracy to commit an unlawful act (unlawful means conspiracy);
> >
> > b) upheld the claim for conspiracy to injure;
> >
> > c) upheld the claim for unjust enrichment and waiver of tort,
> >
> > d) restricted the claim for damages pursuant to s. 36 of the *Competition Act* to breaches of Former s. 45;
> >
> > e) struck out the claims for breach of Current s. 45 and restitution in lieu of a claim under s. 36 for breach of ss. 45 and 61 of the *Competition Act* as disclosing no cause of action; and
> >
> > f) upheld the certification judge's finding that the claims for breach of s. 61 of the *Competition Act*, unlawful interference with economic interests and constructive trust should be struck.

[10] This decision confirmed that class members – as a result of the 2010 amendments to s. 45 of the *Competition Act* – have no claim that the agreements between Visa, MasterCard and the acquirers which resulted in the imposition of the network rules constitute an unlawful act conspiracy as a result of a breach of s. 45. Further, the plaintiffs' attempt to amend the

statement of claim to plead a breach of the current s. 45, and a breach of s. 49 in the alternative, was unsuccessful: see *Watson's 2017*, which affirmed the decision of Weatherill J. in *Coburn and Watson's Metropolitan Home v Bank of America*, 2016 BCSC 2021. The statement of claim in the BC action has been amended accordingly, and will be further amended if the MNV settlement agreements are implemented.

The MNV Settlement Agreements

[11] Pursuant to the MNV settlement agreements, Visa and MasterCard each agreed to pay $19.5 million. National Bank agreed to pay $6 million. Each of the settling defendants agreed to cooperate in the ongoing Canadian proceedings against the Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada, and Toronto-Dominion Bank [non-settling defendants]. Visa and MasterCard also agreed to modify their no surcharge rules. Each of the agreements provides that it must be approved in each of the Canadian proceedings.

[12] There is a detailed summary of the terms of the Visa agreement – which is the same as the MasterCard agreement - in *Bancroft-Snell*. I concur with that summary, which is as follows:

> 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.

[13] The National Bank agreement differs in certain respects from the Visa and MasterCard agreements. It is, as noted in *Coburn* and *Bancroft-Snell*, substantially the same as those approved in the previous settlements.

Wal-Mart and Home Depot Objections

[14] Notice of the settlement approval hearing was delivered in accordance with the plan approved by the courts. That notice advised class members of, among other things, the terms of the MNV settlement agreements, the request for class counsel fees of up to 25% plus disbursements, and the right to object to the settlement agreements or class counsels' fees.

[15] The only objections received by class counsel were from Wal-Mart Canada Corp. [Wal-Mart] and Home Depot of Canada Inc. [Home Depot]. Home Depot objects to the Visa agreement and MasterCard agreement, but not the National Bank agreement. Wal-Mart objects to all three

MNV settlement agreements. Both objectors filed briefs and appeared at the hearing of this application.

[16] The objectors take the position that the MNV settlements are not fair, reasonable or in the best interests of the class. They also say they are procedurally unfair. Wal-Mart submitted that is so because there was insufficient notice of the breadth of the releases and because the opt-out deadline expired long before the settlements were concluded. In the same vein, Home Depot submitted that the settlement agreements should be rejected, but that if they are not, class members should be given proper notice of the scope of the releases and another opportunity to opt out.

[17] As to substantive unfairness, the gravamen of the objections is that the releases and associated provisions are too broad. Walmart's brief identified the following issues:

- The release is extremely and unnecessarily broad;
- The settlements purport to release future claims in perpetuity, including claims for modification or abrogation of the Visa or MasterCard rules and claims for declaratory or other relief asserting that the merchant restraints are illegal, unlawful or unenforceable;
- The broad "no further claims" provision extends the release to anyone who might or could claim over against the settling defendants;
- The "most favoured nation" clause creates uncertainty, as the releases in the MNV agreements may be amended by a broader release with non-settling defendants;

- The geographic scope of the release, which extends to past, present and future parents, affiliates, subsidiaries, predecessors, successors and representatives of the releasors, may be global; and

- The "no assistance" provision may release non-Canadian claims by Wal-Mart and related entities against non-settling defendants anywhere in the world, and prevent Wal-Mart and related entities from assisting in non-Canadian credit card litigation.

[18] Home Depot's brief (at p. 1) summarized its concerns as follows:

> 1. Home Depot...objects to the proposed settlements with Visa and MasterCard because they purport to release future anticompetitive conduct. This type of release:
>
> (a) is unprecedented in circumstances such as those that exist in this case;
>
> (b) constitutes a contract which is unenforceable at common law;
>
> (c) cannot be saved by payment of money to Class members; and
>
> (d) when coupled with the inability of the Class members to opt out of the settlement, constitutes an unprecedented confiscation of Class members' future access to justice through operation of a statute which

has enhancing access to justice as its primary purpose.

[19] The objectors raised essentially the same objections in *Bancroft-Snell* and *Coburn*. In *Bancroft-Snell*, Perell J. summarized certain key features of the objections as follows:

> 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* [SO 1992, c 6].

[20] As to the National Bank agreement, as Weatherill J. commented as follows in *Coburn*:

> 29 In addition, Wal-Mart objects to the NB Settlement Agreement on the basis not only that it can be interpreted to release continuing and future conduct but also because

> National Bank was alleged to be part of an unlawful conspiracy with the other defendant banks to fix, maintain, increase or control interchange fees. If the trial court ultimately finds that such a conspiracy existed, the Non-Settling Defendants will be precluded from continuing such conduct but, because of the release language, National Bank will be able to do so into the future with impunity.

Settlement Approval

[21] Section 38 of the *Act* provides as follows:

> **38**(1) A class action may be settled, discontinued or abandoned only:
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.
>
> (2) A settlement may be concluded in relation to the common issues affecting a subclass only:
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.
>
> (3) A settlement pursuant to this section is not binding unless approved by the court.
>
> ...

[22] The test that applies to a s. 38 application was summarized in *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86, 17 CPC (8th) 119 as follows:

> 14 The test to be applied on an application to approve a class action settlement pursuant to s. 38 of the *Act* is uncontroversial. Laing C.J.Q.B. (as he was then) summarized that test in *Driediger v Ashley Furniture Industries Inc.*, 2010 SKQB 437, 364 Sask R 130 [*Driediger*]. As he there noted, the court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole. As he also noted, citing *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 (Ont Sup Ct), the issue is not whether the settlement meets the demands of a particular

member of the class. Nor is it whether the settlement is perfect, but whether it falls within a "zone of reasonableness".

15 Similarly, as Sharpe J. (as he then was) noted in *Dabbs v Sun Life Assurance Co. of Canada* (1998), 40 OR (3d) 429 (WL) (Ont Ct J):

> 30 ... settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

...

19 Courts have proposed various non-exclusive lists of criteria that may assist in determining whether a settlement is reasonable. *Driediger* dealt with this issue as follows:

> 13 In *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69, 68 B.C.L.R. (4th) 317 (B.C. S.C.), Groberman J. at para. 18 noted the factors to be considered in approving a class proceeding settlement are now well established. He went on to recite them as follows:
>
> 1. Likelihood of recovery or likelihood of success;
>
> 2. Amount and nature of discovery, evidence or investigation;
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> 3. Settlement terms and conditions;
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> 4. Recommendations and experience of counsel;
>
> 5. Future expense and likely duration of litigation;
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> 6. Recommendations of neutral parties, if any;

> 7. Number of objectors and nature of objections; and
>
> 8. The presence of arms-length bargaining and the absence of collusion.

At paras. 19 and 20, Groberman J. went on to note:

> 19 In *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123, 20 C.P.C. (6th) 70 (B.C. S.C.) at para. 8, Gerow J. added two additional factors to this list:
>
> > 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
> >
> > 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
>
> 20 In *Reid v. Ford Motor Co.*, 2006 BCSC 1454 (B.C. S.C.), at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:
>
> > 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...

At para. 28, Groberman J. summarized the foregoing factors as follows:

> 28 In summary, then, the court must consider four broad questions before approving the settlement of class actions:
>
> > • Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based

> on a proper analysis of the claim?
>
> • Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
>
> • On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
>
> • Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement.

[23] I also note the useful summaries of the law relating to class action settlements in *Coburn*, at paras 30-33 and *Bancroft-Snell*, at paras 118-123, which are substantially to the same effect.

[24] In this case, judicial comity is also a consideration. In *Macaronies*, Rooke A.C.J. commented on this issue as follows:

> 6 Reasons for this Decision will be released at a later time. They will, however, endorse the *Coburn 2018 Decision* [*Coburn and Watson's Metropolitan Home v. BMO Financial Group*, 2018 BCSC 1183] 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 Co.*, 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 Group Canada Inc.*, 2016 ONSC 7959, at paras. 20-21; *Frohlinger v. Nortel Networks Corp.*, 2007 CanLII 696 (Ont Sup Ct), at paras. 31-32; and *Jeffery v. Nortel Networks Corp.*, 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.

[25] In *Bancroft-Snell*, Perell J. made the following observation as to the obligations of a judge who stands later in the judicial queue:

> 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. [footnote omitted]

[26] In my view, that describes the correct balance. I have reviewed the evidence and submissions on that basis. Wisely, the plaintiffs did not press the assertion in their brief that it was an abuse of process for Wal-Mart and Home Depot to pursue their objections in this Court, as those objections were rejected elsewhere. As the court noted in *Bancroft-Snell*, there is no merit in that position. The obligation to consider objections is part and parcel of my obligation to independently consider the application for settlement approval.

Analysis

[27] In this case, I will use the four broad questions posed in *Jeffery v Nortel Networks*, 2007 BCSC 69, 68 BCLR (4th) 317 [*Jeffery*] as the analytical framework. As noted above, the first question is this: am I satisfied that the MNV settlements were based on a proper analysis of the claim following a sufficient investigation by counsel of sufficient experience and ability?

[28] The information considered and the analysis undertaken by plaintiffs' counsel in relation to the National Bank agreement is summarized

in *Coburn*, at paras 34-37. In my view, that summary accurately reflects the June 29, 2018 affidavit of David Jones. Similarly, the description of the analysis of the Visa and MasterCard agreements at paras. 40-41 reflects the contents of the Jones affidavit and the June 28, 2018 affidavit of Dr. Keith Reutter. I will accordingly not repeat them here.

[29] There is no question as to the ability and experience of plaintiffs' counsel. Although no discoveries had been conducted, the information they considered included, among other things, the material filed in the BC certification application, the evidence and submissions file in the unsuccessful Competition Tribunal proceedings, material from the US and other foreign proceedings, and publicly available information about the credit card industry. They had confidential information disclosed by the National Bank for purposes of settlement discussions and Dr. Reutter's opinion as to the impact and potential short and long term benefits of the removal of the no surcharge rule. They also knew the British Columbia Court of Appeal (2017 BCCA 202, 413 DLR (4th) 573) had decided class members have no claim based on a breach of s. 45 of the *Competition Act* after 2010, a decision that has now been followed in the Quebec action. As such, they knew the plaintiffs' cause, particularly as against Visa and MasterCard, had suffered serious damage. As the plaintiffs note, there is no cause of action certified against any defendant based on the current version of the *Competition Act*.

[30] In the result, I am satisfied that the answer to the first *Jeffery* question is yes.

[31] As to the second Jeffery question, I agree with Weatherill J.'s conclusion in *Coburn*:

> 42 The MNV Settlement Agreements were negotiated at arm's length, on an adversarial basis, and over an extended period of time. They were reached by experienced and sophisticated counsel on all sides.
>
> 43 There is no reason to believe that collusion or extraneous considerations influenced the settlement negotiations.
>
> See also *Bancroft-Snell* at para 71.

[32] The third *Jeffery* element is the cost/benefit analysis. That is, are the plaintiffs well served by accepting the MNV settlements rather than proceeding with the litigation? Like Perell J., it is my view that the $45 Million paid by the settling defendants – while not insignificant, particularly in light of the settling defendants' continuing denial of liability – could reasonably be characterized as a paltry sum. Merchant discount fees totalled approximately $5 billion in 2009 alone. The class is made up of approximately 700,000 members. Although the distribution would likely be pro-rated, that means the average distribution to a class member would be approximately $65.

[33] However, the amount payable pursuant to the MNV settlement agreements has limited significance in the context of the claim as a whole. That is so for two reasons. First, the MNV settlement agreements do not release the claims for damages against the non-settling defendants. Those claims are set for trial. Interchange fees are paid to issuers, and thus to banks. The non-settling defendants have a far larger market share than the estimated 2.8% share held by the National Bank. The claim against the non-settling defendants for general and punitive damages is preserved and plaintiffs' counsel intends to seek a larger percentage of interchange fees from those defendants than the percentage paid by National Bank.

[34] Second, the non-monetary benefits are the more significant elements of this settlement in any event. The settling defendants have agreed to cooperate in the ongoing proceedings against the non-settling defendants. Plaintiffs' counsel reasonably assert that has significant value. Further, Visa and MasterCard have agreed to modify their surcharge rules to permit merchants to surcharge up to a cap. If they reinstate those rules within five years, the release relating to no surcharge rules would terminate. They have so agreed despite the fact the foundation for the plaintiffs' claim for injunctive relief relating to the network rules in general, and the no surcharge rule in particular, was rejected in *Watson v Bank of America Corporation,* 2015 BCCA 362, 389 DLR (4th) 577 and *Watson's 2017.*

[35] Plaintiffs' counsel emphasized and Dr. Reutter gave his opinion as to the very significant benefits that could result from this rule change. As Perell J. noted in *Bancroft-Snell* at paras 94-96:

> 94 Dr. Keith Reutter...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.

[36] Perell J. concluded that "behaviour modification was the heart and soul of this particular class action". As he put it:

> 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.

[37] Although I would give somewhat greater weight to the significance of the remaining damages claim, I agree with the central point of this analysis. Counsel for the plaintiffs also advised me of the challenges they now face in achieving the key goal of modifying the network rules. As she noted, there are no current *Competition Act* claims that can be asserted against Visa and MasterCard relating to the network rules. She also noted the complexity of the issues and the sophistication of the defendants.

[38] The other factor that weighs in the cost-benefit analysis is the scope of the releases. Like Weatherill J. and Perell J., it is my view there is no rule that precludes a release of claims based on future conduct: *Coburn* at para 56 and *Bancroft-Snell* at para 132. I also agree these releases are not contrary to public policy, illegal or in restraint of trade.

[39] Perell J. appeared to have no difficulty with the Wal-Mart and Home Depot objections. His analysis focused on the limited value of abandoning the claims for declaratory and injunctive relief, rather than the merits of those objections. *Coburn* (at paras 52-59 and 61- 69) deals with the objections at greater length. I agree with those reasons, with one exception. Unlike Weatherill J., I have not decided whether the amended definition of "Released Claims" precludes claims that could arise as a result of a change in the law, such as an amendment to s. 45 of the *Competition Act* to catch vertical conspiracies.

[40] However, I do not consider the possibility that the releases could preclude such a claim to be of great significance. That is so for several reasons. Weatherill J.'s reasoning on this point is persuasive. There is no evidence to suggest such a change in the law is likely to occur. Further, the MNV settlements are not, as the objectors suggest, a license to breach a statute. They are releases on behalf of releasors and affiliates, broadly defined. They would not bind new merchants or government actors such as the Commissioner of Competition.

[41] Finally, it bears repeating that the issue is not whether the releases are perfect. Further, the issue is not the scope of the releases, considered alone. The issue is whether settlement on the terms provided by the MNV settlement agreements - including the releases and associated provisions

- are fair, reasonable and in the best interests of the class. It is my view class members would be well-served by accepting these settlements rather than proceeding with litigation, taking account of all of the risks and benefits, including the risk that some of the potential costs identified by the objectors may be incurred.

[42] That leaves the fourth *Jeffery* question. Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement? That engages the objectors' allegation of procedural unfairness.

[43] Counsel for the plaintiffs submits that the objection to the form of notice and the timeline for opting out are effectively a collateral attack on the prior orders which approved the content of the notice and those timelines. On a similar note, Weatherill J. commented (at para. 60) "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".

[44] As the plaintiffs note, notice was given in the usual way. It was widely disseminated using a variety of print and other resources, including to industry and trade associations. The notice says class members will provide a full release of claims against each of the settling defendants. As is usual, it does not contain the text of the settlement agreements or an analysis of the scope and potential impact of the releases and associated provisions. Copies of the MNV settlement agreements were posted on a publicly accessible website on June 23, 2017 and were sent directly to Wal-Mart counsel in June 2017. The notice directs class members to the website if they wish to comment on, object to, opt out of or view the MNV settlement agreements.

[45] There was, on the face of it, nothing unusual in the notice or the process. Wal-Mart's proposition that the pre-approval notice was inadequate is based on its claim that the releases and associated provisions are not only extremely broad, but unprecedented in their scope and highly prejudicial. It says those notices should have described those characteristics of the proposed settlements. Home Depot submits that the agreements would extinguish claims against non-settling defendants without compensation and without notice to the class.

[46] With respect, I disagree. These releases are broadly written. Among other things, they affect potential claims based on future conduct, claims by successors and affiliates and claims against former defendants. They also reflect the unique characteristics of this action. However, broad releases are not unusual, and these releases do not contain unprecedented provisions. Notice has been given. The terms of the MNV settlement agreements, including the compensation provided for the releases, have been presented for approval. Further, as Weatherill J. notes – and without suggesting it is never possible to take issue with the approved form of or process for giving notice – the time to object to the form of notice was when it was approved.

[47] In the result, I do not agree this settlement was procedurally unfair. Sufficient information was given to the class members. There are only two objectors. The answer to the fourth *Jeffery* question is yes.

Fee approval

[48] The plaintiff has applied for an order approving counsel fees of $10,512,234.35, or approximately 23% of the settlement amounts payable pursuant to the MNV settlement agreements, plus taxes, less:

(a) a holdback of $1,687,500 to be paid to class counsel once a distribution of settlement funds to class members is complete;

(b) $3,979 which was previously approved in error as class counsel fees.

[49] The plaintiff also seeks class counsel disbursements in the amount of $995,971.36 plus applicable taxes.

[50] The issue relating to this aspect of the application is whether the fees claimed are fair and reasonable. As Perell J. noted in *Bancroft-Snell*,

> 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. [footnotes omitted]

[51] The position of objectors is also relevant. There were no objections in this case.

[52] In my view, the fees and disbursements requested are, taking account of the applicable factors, fair and reasonable. I approve those fees and disbursements, together with applicable taxes.

Conclusion

[53] In *Coburn*, the court approved the National Bank agreement with the following additional confirmation by National Bank, at para. 84:

> 84 ...
>
> We confirm that the NB Settlement Agreement does not and was not intended to restrict the ability of any U.S. or other non-Canadian affiliates or related entities or businesses of the Releasors, including Wal-Mart, from pursuing any claims relating to non-Canadian Interchange in other jurisdictions outside Canada, including the U.S.

[54] The same confirmation is incorporated in the Saskatchewan orders approving the previous settlements. Counsel for the National Bank noted in the hearing of this application that this language appears on the record and agreed that it could be reflected in the decision on this application. In the result, the National Bank agreement is approved on that condition. The confirmation shall be incorporated into the preamble of the order.

[55] The Visa agreement and the MasterCard agreement are approved.

[56] Class counsel are entitled to payment of a fee in the amount of $10,512,234.35 plus taxes:

a) less a holdback of 15%, or $1,687,500, to be used to fund the distribution of the settlement funds to class members with the balance, if any, paid to Class Counsel once a distribution of settlement funds to class members is complete; and

b) less $3,979 which was previously approved as part of Class Counsel's fees in error.

[57] Finally, class counsel are entitled to payment of disbursements in the amount of $995,971.36 plus taxes.

J.
B. A. BARRINGTON-FOOTE