IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coburn and Watson's Metropolitan Home v. BMO Financial Group,* 2018 BCSC 1183

Date: 20180713
Docket: VLC-S-S-112003
Registry: Vancouver

Between:

Coburn and Watson's Metropolitan Home dba Metropolitan Home

Plaintiff

And:

BMO Financial Group, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, MasterCard International Incorporated, National Bank of Canada Inc., Royal Bank of Canada, Toronto-Dominion Bank and Visa Canada Corporation

Defendants

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Corrected Reasons for Judgment: The counsel listing on page 2 of the Reasons for Judgment was corrected on July 23, 2018

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment Re Application to Approve National Bank, Visa and MasterCard Settlement Agreements

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Place and Dates of Hearing:	Vancouver, B.C. June 25, July 4 & 5, 2018
Place and Date of Judgment:	Vancouver, B.C. July 13, 2018

INTRODUCTION

[2] The plaintiff and certain of the defendants in this certified-class proceeding seek an approval of settlements reached between the plaintiff and each of the defendants, Visa Canada Corporation ("Visa"), MasterCard International Incorporated ("MasterCard") and National Bank of Canada Inc. ("National Bank") (collectively, the "MNV Settlements" or "MNV Settlement Agreements"). The approval order is sought pursuant to s. 35 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[3] The plaintiff also seeks an order approving the fees and disbursements of class counsel (defined at para. 7 of these reasons) in respect of the MNV Settlements.

BACKGROUND

[4] At issue in this British Columbia action (the "BC Proceeding") are interchange fees paid by merchants in connection with the acceptance of Visa and MasterCard credit cards as payment for goods or services.

[5] The claims are framed as breach of the *Competition Act*, R.S.C. 1985, c. C-34 civil conspiracy to injure, unjust enrichment, and waiver of tort. Similar claims are being advanced in proposed class actions filed against the same defendants in Alberta, Saskatchewan, Ontario and Québec, as follows:

a) *9085-4886 Québec Inc. v. Visa Canada Corporation et al*, Superior Court of Québec No. 500-06-000549-101 (Montreal) commenced on December 17, 2010 (the "Québec Proceeding");

b) *Bancroft-Snell et al v. Visa Canada Corporation et al*, OSCJ No. CV-11-426591CP (Toronto) commenced on May 16, 2011(the "Québec Proceeding");

c) *Macaronies Hair Club and Laser Center Inc., operating as Fuze Salon v. BofA Canada Bank et al*, File No. 1203 18531 (Edmonton) commenced on December 14, 2012 (the "Alberta Proceeding); and

d) *Hello Baby Equipment Inc. v. BofA Canada Band and others*, QB No. 133 of 2013 (Regina) commenced on January 24, 2013 (the "Saskatchewan Proceeding").

(Collectively, the "Canadian Proceedings").

[6] Similar proceedings are also being litigated in other countries, including in the United States (the "US Proceedings").

[7] All of the plaintiffs and the Québec petitioner in the Canadian Proceedings (the "Canadian Plaintiffs") are represented by a consortium of lawyers who are working together in the prosecution of the Canadian Proceedings, on a national basis, as follows:

a) Branch MacMaster LLP;

b) Camp Fiorante Matthews Mogerman LLP; and

c) Consumer Law Group

(Collectively, "Class Counsel").

[8] To date, the Courts in the Canadian Proceedings have approved settlements with:

a) Bank of America Corporation ("Bank of America");

b) Citigroup Inc. ("Citigroup");

c) Capital One Bank (Canada Branch) ("Capital One"); and

d) Fédération des caisses Desjardins du Québec ("Desjardins")

(Collectively, the "Previous Settlements").

[9] The net proceeds from the Previous Settlements are being held in trust for the class members ("Class Members") pending approval of a distribution protocol. As of

June 13, 2018, there was $17,006,245.58 (including interest) in undistributed net proceeds from the Previous Settlements.

[10] In connection with the Previous Settlements, Canadian merchants (estimated to number over 650,000) have been given an opportunity to opt out of the Canadian Proceedings. There was only one opt out request from an Ontario merchant.

[11] There have been additional opportunities for some merchants to opt out of the Canadian Proceedings, as follows:

a) in recognition that new merchants should also have an opt out opportunity, merchants who began accepting Visa and MasterCard credit cards after September 4, 2015 (the end of the last opt-out period) have been given an opportunity to opt out of the Canadian Proceedings; and

b) given Québec law, all Québec Settlement Class Members were given a further opportunity to opt out of the Québec Proceeding. Québec Settlement Class Members are given an opportunity to opt out of each new settlement reached in the litigation (but are not permitted to opt back into the Québec Proceeding once they have opted out).

[12] The deadline to exercise these additional opt out rights was May 31, 2018. There have been no additional opt outs.

[13] Since the approval of the Previous Settlements, the Canadian Plaintiffs continued efforts to resolve the outstanding issues with Visa, MasterCard and National Bank. These negotiations have resulted in three new settlements totalling $45,000,000, as well as changes to one of the Visa and MasterCard rules that is central to this litigation. The remaining defendants in the litigation who have not settled are referred to herein as the "Non-Settling Defendants".

[14] The trial of this action is scheduled to commence on October 15, 2019 and is estimated to last 120 days. To date, document disclosure on the part of the defendants has been voluminous.

NATIONAL BANK SETTLEMENT

[15] On April 26, 2017, after lengthy and difficult negotiations, the Canadian Plaintiffs and National Bank signed a settlement agreement conditional upon its approval by each of the courts in the Canadian Proceedings (the "NB Settlement Agreement"). It provides for a payment by National Bank of $6 million as well as for cooperation in the ongoing prosecution of the Canadian Proceedings against the Non-Settling Defendants. In return, National Bank (and its present and former parents, subsidiaries, divisions, affiliates, partners, etc. included in the definition of "Releasee" in the agreement) will receive a release of claims, a covenant not to sue, and a dismissal of the Canadian Proceedings against it, with prejudice and without costs.

[16] The NB Settlement Agreement is substantially identical to the settlement agreements that were approved in respect of the Previous Settlements.

[17] The NB Settlement amount of $6 million was paid to Class Counsel on May 29, 2017 and is being held in a dedicated interest-bearing trust account for the benefit of Class Members pending any determinations as to distribution by the Courts.

VISA AND MASTERCARD SETTLEMENTS

[18] After even more protracted and difficult settlement negotiations, the Canadian Plaintiffs entered into settlement agreements with Visa ("Visa Settlement Agreement") and MasterCard ("MasterCard Settlement Agreement") on June 2, 2017 and June 9, 2017 respectively. The two agreements are almost, but not quite, identical in form.

[19] Each of Visa and MasterCard agreed to pay $19.5 million. Those monies were paid to Class Counsel on July 28, 2017 and August 4, 2017 respectively. As is the case with the National Bank Settlement monies, the Visa and MasterCard settlement monies are being held in a dedicated interest-bearing trust account for the benefit of Class Members pending any determinations as to distribution by the Courts.

CERTIFICATION FOR SETTLEMENT PURPOSES

[20] As required by each of the MNV Settlement Agreements, final certification of all Canadian Proceedings for settlement purposes was obtained in the Canadian Proceedings as follows:

a) BC Proceeding:	December 6, 2017;
b) Alberta Proceeding:	January 26, 2018;
c) Ontario Proceeding:	January 30, 2018;
d) Saskatchewan Proceeding:	February 16, 2018; and
e) Québec Proceeding:	February 20, 2018

[21] The Pre-Approval Notice approved by the Courts advised the Class Members of:

a) the material terms of the MNV Settlement Agreements;

b) the right for Québec Class Members to opt-out of the Québec Proceeding if they did not wish to participate;

c) the right for new merchants to opt-out of the other Canadian Proceedings if they did not wish to participate;

d) the right to object to the MNV Settlement Agreements and/or Class Counsel's fees;

e) the intention to hold the MNV Settlement Amounts in trust with the potential that the funds be used for the ongoing prosecution of the Canadian Proceedings against the Non-Settling Defendants; and

f) Class Counsel's request for fees of up to 25% of the Settlement Amounts, plus disbursements.

[22] Commencing March 30, 2018, the Pre-Approval Notice was extensively distributed throughout Canada substantially in accordance with the dissemination plan approved by the Courts.

[23] The deadline for submitting objections to approval of the MNV Settlement Agreements was June 21, 2018. Class Counsel received only one objection before the deadline from Wal-Mart Canada Corp. ("Wal-Mart"). In addition, on July 3, 2018, Class Counsel received an objection after the deadline from Home Depot of Canada Inc. ("Home Depot") which mirrors that of Wal-Mart. There were no opt-out requests, however, in connection with earlier settlements, a single opt-out was received from Cleary Motors in St. Catharine's, Ontario.

THE WAL-MART/HOME DEPOT OBJECTIONS

[24] Wal-Mart objects to the NMV Settlement Agreements on the basis that the releases and other provisions curtailing the legal rights of Class Members are too broad and are prejudicial to them.

[25] Home Depot's objections are limited to the Visa Settlement Agreement and the MasterCard Settlement Agreement. Home Depot has no objection to the NB Settlement Agreement.

[26] A major concern of Wal-Mart raised during the hearing of this application on June 25, 2018 has been addressed by revised language in the Visa Settlement Agreement and the MasterCard Settlement Agreement regarding the definition of "Released Claims" found in paragraph 1(54) of the Visa Settlement Agreement and paragraph 1(57) of the MasterCard Settlement Agreement. The proposed new language is as follows:

> Released Claims means any and all manner of claims, demands, actions, suits, causes of action, whether class, collective, individual or otherwise in nature, whether personal or subrogated, damages whenever incurred, damages of any kind including compensatory, punitive or other damages, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses (including Administration Expenses), penalties, and lawyers' fees (including Class Counsel Fees), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, in law, under

> statute or in equity, that the Releasors or any of them whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, with respect to or relating to any of the Alleged Conduct occurring anywhere, 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, whether in Canada or elsewhere, including continued adherence to the Visa Network Rules [or MasterCard Network Rules as the case may be]. Notwithstanding the generality of the foregoing, the Parties expressly acknowledge and agree that nothing in this 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.
>
> (the "Revised 'Released Claims' Definition")

[27] Other of Wal-Mart's concerns remain and, to the extent they relate to the Visa Settlement Agreement and the MasterCard Settlement Agreement, are shared by Home Depot. They are:

a) the Visa and MasterCard Settlement Agreements purport to release all future claims based upon future or continuing conduct, including continued adherence to the Network Rules, and thereby appear to give Visa and MasterCard *carte blanche* immunity to continue to engage in the same alleged anticompetitive or otherwise improper conduct that is at issue in the Canadian Proceedings;

b) the MNV Settlement Agreements contain a "most favoured nation" clause entitling the Releasees to the benefit of any broader or more favourable release terms that the Canadian Plaintiffs may agree to in the future with any Non-Settling Defendant. In this regard, paragraph 5.1(2) of the MasterCard Settlement Agreement (for example) provides as follows:

> If, subsequent to the Execution Date, the Plaintiffs enter into a settlement with any Non-Settling Defendant which provides for a release that is broader or otherwise more favourable to the Non-Settling Defendant than the release set out in section 5.1(1), then the Releasors will provide MasterCard with a release on the same terms, effective as of the Execution Date.

c) the MNV Settlement Agreements contain what is known in British Columbia as a "BC Ferries Clause" which prevents Releasors from threatening, instituting or continuing, whether in Canada or elsewhere, any proceeding against any third party who could claim over against any of Visa, MasterCard or National Bank (except for the continuation of the Canadian Proceedings against the Non-Settling Defendants); and

d) the geographic breadth of the releases (conduct "occurring anywhere … whether in Canada or elsewhere") taken together with the definition of "Releasors" which includes Wal-Mart's/Home Depot's " … parents, affiliates, subsidiaries, predecessors, successors …and representatives" captures Wal-Mart's/Home Depot's related companies in the United States. The Visa Settlement Agreement and the MasterCard Settlement Agreement contain a provision that may prevent the Releasors from directly or indirectly participating in or in any way assisting with respect to any claim which relates to the subject matter of the Released Claims.

[28] Wal-Mart (and Home Depot) submit that the broad definitions of Releasors and Releasees, combined with the geographic breadth of the "Released Claims" even as now modified, the conduct that is encompassed by the Release language, and the "no further claims" and "no assistance" provisions mean that all claims or potential claims by a related entity of Wal-Mart (or Home Depot) against any related entity of Visa or MasterCard, anywhere in the world, may be captured by the Release.

[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.

ANALYSIS

The Law

[30] Class action settlements should be viewed with suspicion and seriously scrutinized by judges because they are entered into by defendants and class counsel who have interests and incentives that may not align with the best interests of the class: *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3, 5 and 17.

[31] In *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69, this Court distilled the relevant factors on settlement approval into four broad questions for consideration (at paras. 18 and 28):

a) 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?

b) is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?

c) on a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and

d) 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?

[32] The principles to be applied on an application for settlement approval were summarized by the Ontario Superior Court of Justice in *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.J.) at para. 7, as follows:

a) to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class;

b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. 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 [considered in light of the risks and cost obligations associated with continued litigation];

f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement (although the practice has evolved allowing changes to be made to the terms during the approval hearing that benefit the class and do not affect the intent of the agreements are common). Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a [proposed settlement]; and

g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

…

See also:

- *Sheridan Chevrolet v. Furakawa Electric et al*, 2016 ONSC 729 at para. 12;
- *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*. (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 115;
- *Crosslink Technology, Inc. v. BASF Canada et al*, November 30, 2007, London, 50305CP (Ont. S.C.J.) [unreported] at para. 22;
- *Nutech Brands Inc. v. Air Canada* (2009), 71 C.P.C. (6th) 311 (Ont. S.C.J.) at paras. 29–30, 36–37.

[33] Canadian courts have set out the following factors that may be considered when determining whether to approve a settlement:

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 recommendations and experience of counsel;

e) the future expense and likely duration of litigation;

f) the recommendation of neutral parties, if any;

g) the number of objectors and nature of objections;

h) the presence of arm's-length bargaining and the absence of collusion;

i) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and

j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

(*Nunes*, at para. 7.)

See also the following:

- *Dabbs v. Sun Life, Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.) at para. 13, aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to SCC denied [1998] S.C.C.A. No. 372;

- *McKay v. Air Canada*, 2015 BCSC 1874 at paras. 8–9.

Application of the Factors to be Considered

a) 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?

i. NB Settlement Agreement

[34] At the time the NB Settlement Agreement was achieved, there had been no examinations for discovery or document production by any of the defendants. However, counsel for the plaintiff points out that significant information was available to Class Counsel which enabled them to evaluate the merits of the agreement, including:

a) the evidence and the submissions that were filed in connection with the certification application in the BC Proceeding;

b) the evidence and the submissions that were publically filed in the Competition Tribunal proceedings commenced by the Canadian Commissioner of Competition in respect of the same issues raised in this proceeding;

c) the material that was publically available in a companion class action proceeding prosecuted in the US Proceeding including the briefing on class certification, motions to dismiss, motions for summary judgment and their supporting statements of fact;

d) information and advice provided by Robins Kaplan, co-lead counsel for the plaintiffs in the US Proceeding;

e) the initially approved but ultimately rejected settlement in the US Proceeding;

f) decisions by and materials relating to foreign courts and competition authorities and private litigation on issues similar to the issues raised in this proceeding, including the decision from the European Commission (subsequently affirmed on appeal) that MasterCard's interchange fees violated EU competition law;

g) publicly available information as to the credit card industry and levels of interchange revenue in Canada;

h) information contained in the report issued by the Standing Senate Committee on Banking, Trade and Commerce entitled "Transparency, Balance and Choice: Canada's Credit Card and Debit Systems";

i) information publicly available as to the credit card transaction volume of various defendants in Canada and in the US, including National Bank;

j) information obtained in connection with the negotiation of the four prior settlements with Bank of America, Citigroup, Capital One and Desjardins; and

k) confidential information provided by National Bank for the purposes of settlement discussions, which included information regarding the interchange revenue it received over various years of operations of its credit card issuing business.

[35] Counsel for the Canadian Plaintiffs considered the following procedural and litigation benefits created by the NB Settlement Agreement:

a) the benefits that would be obtained through the ability to directly question a representative of National Bank on the nature of the industry;

b) the benefit that would be obtained through cooperation including access to documents from National Bank; and

c) the overall simplification of the lawsuit (and scheduling of motions) that follows the removal of any well-defended defendant from complex, multi-party litigation.

[36] In general terms, the analysis supporting the NB Settlement Agreement was carried out as follows:

a) first, Class Counsel analyzed the total volume of interchange at issue, determined by the stated class period with appropriate weighting for applicable provincial and federal limitation periods and discoverability analysis;

b) second, this amount was multiplied by Class Counsel's best estimate of the recovery per dollar of interchange pursuant to a settlement that had been achieved in the US Proceeding ("US Settlement"), although that settlement was ultimately not approved by the US Court of Appeals;

c) third, Class Counsel estimated National Bank's average market share over the interchange period at issue. Based on the publicly available information, including from the Nilson Report, a source which contains statistics for credit card payments, Class Counsel's estimate was that National Bank's Canadian credit card transaction volume since 2008 has been approximately 2.8% of the Canadian market;

d) fourth, Class Counsel considered special circumstances applicable to the entire case that might impact on the ability to achieve the US Settlement recovery per dollar of interchange as a proxy, including different applicable limitation periods and the BC Court of Appeal's ruling on the inadequacy of the current pleading of the version of a cause of action based on the wording of s. 45 of the *Competition Act* in place since 2010; and

e) fifth, Class Counsel considered the strategic value of this additional settlement against the first Canadian-based chartered bank in continuing the litigation against the Non-Settling Defendants. For instance, National Bank was one of the original issuers when MasterCard was first introduced in Canada.

[37] Class Counsel stated that the National Bank Settlement Amount is lower as a percentage of interchange fees collected than the Canadian Plaintiffs intend to seek from the Non-Settling Defendants in any subsequent settlement negotiations because:

a) National Bank's market share was small; and

b) there was value obtained from cooperation and early resolution.

ii. Visa and MasterCard Settlement Agreements

[38] As part of their respective settlement agreements, Visa and MasterCard have agreed to modify their no-surcharge rules to allow merchants to surcharge up to a cap, and to ensure this ability to surcharge remains in effect for a minimum of five years. Thereafter, merchants will have a strong means to keep that change in place in that the release they will be providing will be negated (on the terms set out in the settlement agreements) if the limitation against surcharging be reinstated.

[39] The Visa and MasterCard settlements will provide several benefits to merchants in addition to the $39 million settlement payment, including:

a) the ability to recoup the cost associated with Visa and MasterCard transactions through surcharging;

b) the expected placement of competitive pressure on credit card fees in the future; and

c) the expected pressure on fees associated with other credit card transactions, such as those undertaken with an American Express card.

[40] Moreover, Class Counsel submits that the provision of cooperative assistance will be invaluable, as will the ability to obtain access to a vast array of documents previously unavailable to them.

[41] I have no difficulty concluding that Class Counsel are of sufficient experience and ability and have undertaken the necessary investigations and enquiry to satisfy the Court that the settlements are based on a proper analysis of the claims.

b) Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?

[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.

c) On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation?

[44] The MNV Settlement Agreements have resulted in the payment to Class Counsel of $45 million for the benefit of the Class Members. These funds are earning interest.

[45] The Visa and MasterCard settlement agreements will result in merchants being permitted to impose surcharges on credit card transactions up to a cap.

[46] Each of National Bank, Visa and MasterCard has agreed to cooperate with the Canadian Plaintiffs and produce cooperation documents relating to allegations in the Canadian Proceedings.

[47] The prosecution of the Canadian Proceedings has, to date, taken over seven years and has required a significant commitment of resources both in terms of time and financial outlay by Class Counsel. Settlement negotiations were comprehensive and took place over many months.

[48] I have no difficulty concluding that the Canadian Plaintiffs are well-served by accepting the settlement rather than proceeding with the litigation.

d) 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?

[49] The Pre-Approval Notice of the settlement approval hearings was published in accordance with the plan of dissemination approved by the Court. The deadline for objecting to the Settlement Agreements was June 21, 2018. There have been only two objections, from Wal-Mart and Home Depot, which are addressed below.

[50] In addition to the notice campaign, Class Counsel have maintained websites throughout the litigation and have also kept a registry of those persons who have contacted them expressing an interest in the litigation. Class Counsel have received no other indication of any dissatisfaction with the Settlement Agreements.

[51] I am satisfied that sufficient information has been provided to the members of the class and that they are generally favourably disposed to the settlement. The only exceptions are Wal-Mart and Home Depot.

iii. Wal-Mart and Home Depot Objections

1) Release of Continuing and Future Conduct

[52] Wal-Mart and Home Depot submit that the Visa and MasterCard Settlement Agreements are substantively unfair because they purport to release any future claim in respect of future conduct constituting a continuation of the conduct that was or could have been alleged in the Canadian Proceedings. Although counsel for Wal-Mart conceded that the claim in the Canadian Proceedings against Visa and MasterCard was, at best, difficult, he argued that the releases must, nevertheless, be limited to conduct that occurred or continues to occur until the end of the Canadian Proceedings, not afterwards. Otherwise, they submit, because there is no agreement on the part of Visa/MasterCard that their conduct was anti-competitive, such conduct can continue into the future and the releasees (Wal-Mart and Home Depot included) will have been stripped of their right to protect themselves from such conduct, particularly if there is a future change in the law which prohibits that conduct.

[53] Wal-Mart and Home Depot submit that approving a release of ongoing known conduct will put the Court in the untenable position of "blessing" anti-competitive, and providing Visa and MasterCard with a licence to engage in, illegal conduct forever. They say further that the result will be not only that access to justice for releasees will be eliminated but also that there will be no behaviour modification on the part of Visa or MasterCard, which is the antithesis of objective of class proceedings legislation. They strenuously submit that the release language is unprecedented and unreasonable.

[54] Counsel for Wal-Mart points to the notice of the MNV Settlements ("Notice") that was provided to Class Members. The Notice provides, in part:

> … National Bank…will pay CAD $6 million, and Visa and Mastercard will each pay CAD $19.5 million … for the benefit of the Settlement Class Members and provide certain cooperation to the plaintiffs as described in their respective settlement agreements, <u>in exchange for a full release of claims against each of them and their related entities.</u> Visa and Mastercard will also be modifying their respective "no surcharge rules" that prevented merchants from charging a premium on credit card use…
>
> [Emphasis added.]

[55] Counsel for Wal-Mart submits that the Notice was inadequate because the phrase "…in exchange for a full release…" did not adequately apprise Class Members of the scope and breadth of the actual release language that was contained in the MNV Settlement Agreements.

[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.

[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.

2) Most Favoured Nation Clause

[62] This argument was not pressed by counsel for either Wal-Mart or Home Depot. Regardless, such clauses are not unique to the MNV Settlement Agreements and, in the circumstances of this case, do not, in my view, take them outside the zone of reasonableness.

3) BC Ferries Clause

[63] As set out earlier in these Reasons, each of the MNV Settlement Agreements contains a Clause 5.3 which provides as follows:

> 5.3 No Further Claims
>
> (1) The Releasors (i) shall not now or hereafter threaten, institute, prosecute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Persons, any action, suit, cause of action, claim, proceeding, complaint or demand against or collect or seek to recover from any Releasee or any other Persons who will or could bring or commence or continue any claim, crossclaim, claim over or any claim for contribution, indemnity, or other relief against any Releasee in respect of any Released Claim, except for the continuation of the Canadian Proceedings against the Non-Settling Defendants or other Persons who are not Releasees, and (ii) are permanently barred and enjoined from doing so.
>
> [Emphasis added.]

[64] Clause 5.3(1) does not prevent either the continuation of the Canadian Proceedings against the Non-Settling Defendants or the pursuit of claims relating to non-Canadian Interchange in jurisdictions outside of Canada.

[65] There is nothing unique about such clauses. Indeed, they are common-place in settlement agreements. If, in the future, a third party engages in conduct that is actionable by the Class Members, there is nothing in Clause 5.3(1) that prevents Class Members from bringing a claim. However, such a claim will have to be structured such that the third party does not claim over against any of the entities released by the MNV Settlement Agreements.

[66] I do not consider that Clause 5.3(1) takes the MNV Settlement Agreements outside of the zone of reasonableness.

4) Geographic Breadth/No Assistance

[67] The clause in question reads:

> 7.3(1) Except as provided in sections 7.3(2) [inapplicable] and 7.3(4) of this Settlement Agreement, no Plaintiff, no Settlement Class Member, nor anyone currently or hereafter employed by, associated with, or a partner with Class Counsel, may directly or indirectly participate or be involved in or in any way assist with respect to any claim made or action commenced by any Person which relates to the subject matter of or arises from the Released Claims, whether

> brought in Canada or elsewhere, including by providing any direct or indirect assistance to any plaintiff or any plaintiff's counsel, including without limitation any claims made or actions commenced by Merchants, consumers or other Persons.
>
> …
>
> 7.3(4) Section 7.3(1) of this Settlement Agreement does not apply to the involvement of any Person in the continued prosecution of the Canadian Proceedings against any Non-Settling Defendant or unnamed co-conspirators who are not Releasees.
>
> [Emphasis added.]

[68] The "subject matter of … the Released Claims" is interchange fees charged to merchants in Canada. The subject matter is not interchange fees charged to merchants elsewhere. The MNV Settlement Agreements do not preclude any Class member, including Wal-Mart and Home Depot, from assisting a related entity, in the United States or indeed anywhere else outside of Canada, with respect to similar or identical causes of action raised in those other jurisdictions.

[69] In my view, the objection to Clause 7.3(1) is without merit.

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.

CLASS COUNSEL'S FEES AND DISBURSEMENTS

[74] The Previous Settlements which total $25.53 million, resulted in an approval of Class Counsel's fees totalling $5,550,307.30 and disbursements totalling $751,679.56.

[75] From April 12, 2016 (the cut-off date for the last round of fee approvals in relation to the Desjardins settlement agreement) to May 31, 2018, Class Counsel together with US counsel who have acted as consultants to Class Counsel (Robins Kaplan) and JSS Barristers (who assisted Class Counsel with the Alberta Proceeding) have recorded a total of $3,106,557.70 in time (charged at usual national class action rates) spent prosecuting this litigation.

[76] Recognizing that a significant amount of work will be necessary regarding the distribution of the 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 this future work. In addition, Class Counsel proposes that $3,979 be deducted from Class Counsel's proposed fee to account for an "over approval" of fees due to a calculation error made in previous fee approval orders.

[77] In addition, during the period April 12, 2016 to May 31, 2018, Class Counsel have incurred disbursements totalling $258,205.71.

Assessment of the Reasonableness of Class Counsel's Fees

[78] The following factors are relevant in assessing the reasonableness of Class Counsel's fees:

a) the time expended by the solicitor;

b) the legal complexity of the matters to be dealt with;

c) the degree of responsibility assumed by the solicitor;

d) the monetary value of the matters in issue;

e) the importance of the matter to the client;

f) the degree of skill and competence demonstrated by the solicitor;

g) the results achieved;

h) the ability of the client to pay;

i) the client's expectations as to the amount of the fee;

j) the risk undertaken by counsel including the risk that the action might not be certified; and

k) the position taken by any objectors.

McKay, at para. 16; *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2752 at para. 23; *Catalyst Paper Corp. v. Atofina Chemicals Inc*., 2009 BCSC 1659 at para. 65.

[79] Payment of an interim fee award on a partial settlement is "a salutary measure that will help to promote early settlement": *Osmun*, at paras. 13–16; *Main v. Cadbury Schweppes plc*, 2010 BCSC 1302 at para. 6. Interim fee awards are common in price-fixing conspiracy cases, where the litigation is brought against several groups of defendants.

[80] Courts have approved fee awards prior to distribution of funds to settlement class members, including in this litigation: see for example *Adams v. Apple Inc.*, 2014 ONSC 5840 [unreported]; *Main*; *Osmun; Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2012 BCSC 1136; *Catalyst Paper*.

[81] In my view, each of the factors to be considered in assessing the reasonableness of Class Counsel fees weighs in favour a finding that the fees in this case are reasonable:

a) since the inception of this litigation, Class Counsel has docketed time totaling $6,894,691.50, including $3,106,557.70 from April 12, 2016 to May 31, 2018. The issues raised in this litigation are extremely complex, without established precedent and involve some of the world's largest most sophisticated financial institutions who are aggressively defending the claim;

b) the Settlement Agreements result in significant monetary compensation for settlement class members and valuable changes to the network rules. They also include substantial cooperation provisions which will assist Class Counsel in their continued prosecution of the class against the Non-Settling Defendants. They have given access to justice to claimants who might not otherwise obtained it and have promoted behaviour modification of the Networks: *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294 at para. 44;

c) the risks borne by Class Counsel have been substantial. The litigation is highly complex and uncertain and has endured for over seven years. Class Counsel has carried disbursements exceeding $1 million. From the outset, Class Counsel has pursued this action on a contingent fee basis, the agreement providing for a maximum legal fee of 33.3% of any recovery, plus disbursements and applicable taxes. Class Counsel provided several examples of the considerable uncertainty existing at the time the litigation was commenced in respect of many of the legal issues raised including those related to competition law as well as procedural and evidentiary issues. Indeed, during his submissions, Mr. Mogerman, counsel for the plaintiff, described the case against Visa and MasterCard as "very thin gruel". Class Counsel accepted these risks as well as the risk that the action could be litigated for years, exposing Class Counsel to significant time and cost expenditures that might not be recovered;

d) the degree of skill, competence and tenacity demonstrated by Class Counsel cannot be questioned. The contribution of US Consulting Counsel was significant; and

e) the fee sought by Class Counsel is consistent with the fee agreements and is approved by the representative plaintiff, whose approval and support of the fee request should not be taken lightly: *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 44. Fee agreements of 25% are common-place in class action litigation, recognizing the inherently risky nature of the work and the important legal policy objectives of access to justice and behaviour modification that are at the root of class proceedings legislation.

[82] The fee sought in this matter is significant. That is because the results that have been achieved in this difficult case are also significant. Fees should not only reward meritorious effort but also encourage counsel to take on risky litigation. As was stated by the Ontario Superior Court in *Baker Estate v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 at para. 67:

> [67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee….If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?

[83] Neither Wal-Mart nor Home Depot raised any objection to the Class Counsel's fees and disbursements sought in this application.

[84] The fees and disbursements sought by Class Counsel are approved.

CONCLUSION

[85] The NB Settlement Agreement is approved with the following additional confirmation from National Bank (substantially similar to that provided in the Previous Settlements):

> 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.

[86] Each of the Visa Settlement Agreement and the MasterCard Settlement Agreement is approved with the Revised 'Released Claims' Definition found in clause 1(54) of the Visa Settlement Agreement and clause 1(57) of the MasterCard Settlement Agreement respectively.

[87] Class Counsel is entitled to payment of a fee in the amount of $11,250,000 plus applicable 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.

[88] Class Counsel is also entitled to payment of disbursements in the amount of $258,205.71, plus applicable taxes.

"G.C. Weatherill J."