IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coburn and Watson's Metropolitan Home v. Bank of Montreal,* 2021 BCSC 2398

Date: 20211209
Docket: S112003
Registry: Vancouver

Between:

Coburn and Watson's Metropolitan Home dba Metropolitan Home and Maynard's Southlands Stables Ltd.

Plaintiffs

And:

Bank of Montreal, 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

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

(Appearing via Video Conference)

Reasons for Judgment

Counsel for the Plaintiffs:	R. Mogerman, Q.C. L. Brasil C. Hermanson R. Egit
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Counsel for Visa Canada Corporation:	R. Kwinter
Counsel for a previously settled defendant, Mastercard International Incorporated:	J. B. Simpson J. Musgrove

Counsel for Bank of America Corporation:	P. Dionne-Bourassa
Counsel for Fédération des caisses Desjardins Du Québec:	S. Desjardins
Counsel for a Class member, Wal-Mart Canada Corp.:	C. Spry
Counsel for the Attendee, 9085-4886 Quebec Inc.:	J. Orenstein A. Grass
Attendee, Court of Queen's Bench of Alberta:	Rooke A.C.J.
Attendee, Court of Queen's Bench of Saskatchewan:	Popescul C.J.
Attendee, Superior Court of Justice (Ontario):	Perell J.
Attendee, Superior Court of Justice (Québec):	Corriveau J.
Place and Date of Hearing:	Vancouver, B.C. December 6, 2021
Place and Date of Judgment:	Vancouver, B.C. December 9, 2021

Introduction

[1] This proceeding is one of five certified class actions brought collectively in the courts of British Columbia, Alberta, Saskatchewan, Ontario, and Québec. The Plaintiffs allege breaches of the *Competition Act*, R.S.C. 1985, c. C-34, tortious conspiracy by, and unjust enrichment of, the Defendants in respect of the "interchange fees" paid by merchants when processing payments for goods or services via Visa and/or MasterCard credit cards.

[2] By agreement of all parties and the five Courts herein, the British Columbia proceeding (the "British Columbia Proceeding") has functioned as the lead action in Canada.

[3] The other four Actions are as follows (in order of commencement):

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

b) *Bancroft-Snell et al v. Visa Canada Corporation et al,* OSCJ No. CV-11-426591CP (Toronto) (the "Ontario Proceeding");

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

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

[4] There can be no question that this litigation was exceptionally complex, hotly contested, and hard fought. It included proceedings at every level of court, including the Supreme Court of Canada. Over the course of its nearly 11-year span, settlements of the claims against many of the defendants, as well as the fees and disbursements to which Class Action Counsel were entitled, were approved by the courts. The approved aggregate settlements to date total $68,530,000 (the "Earlier Settlements"). The Earlier Settlements resolved actions against Bank of America

Corporation, Capital One Bank (Canada Branch), Citigroup Inc., Fédération des caisses Desjardins du Québec, MasterCard International Incorporation, Visa Canada Corporation, and National Bank of Canada Inc. The fees and disbursements approved in the Earlier Settlements totalled $16,800,807.30 and $1,009,885.27 respectively. In addition, as part of the Earlier Settlements, MasterCard International Incorporated, and Visa Canada Incorporation agreed to a relaxation of the "no-surcharge rules". This change allows merchants to impose a surcharge up to a cap on credit card transactions, which was previously prohibited under MasterCard and Visa's terms of service. In accepting this settlement, the court emphasized the benefit of this rule, including the ability of merchants to recoup the costs associated with accepting Visa and MasterCard and competitive pressure on credit card fees in the future.

[5] The Representative Plaintiffs now apply in each of the five Courts for approval of a settlement of $120,000,000 (the "Final Settlement") reached with the Remaining Defendants: Royal Bank of Canada, Canadian Imperial Bank of Commerce, Toronto-Dominion Bank, Bank of Montreal, and Bank of Nova Scotia (collectively, the "Final Settling Defendants"). The Representative Plaintiffs also seek orders relating to the scheme (the "Distribution Plan") by which the total net settlement ($188,530,000, less fees and disbursements) (the "Total Net Settlement") will be distributed to the members of the class.

[6] Finally, Class Counsel seek approval of their fees and disbursements in connection with the amount paid by the Final Settling Defendants, as well as approval of honorarium payments to the Representative Plaintiffs.

Joint Hearing

[7] The hearing of these applications was conducted by way of a joint hearing of the Courts in all five actions, using the MS Teams platform. Each of the five Presiding Justices was provided with comprehensive application materials customized to their respective proceeding, as well as with common written submissions and books of authorities. None of the applications were challenged.

Each Justice was able to raise their questions with Counsel, canvas any concerns, and hear Counsels' responses.

[8] Other than a few technological glitches at the outset, the technology worked well. It provided an efficient means of accomplishing the Courts' tasks in a national class action context.

Application for Approval of the Settlement with the Final Settling Defendants

[9] The proposed settlement of the claims against the Final Settling Defendants was the result of several years of intense negotiations by experienced and highly competent Class Action Counsel.

[10] Having reviewed the materials before me, including Class Counsels' written argument and supporting authorities, and having heard Counsel's forceful submissions, I am satisfied that:

a) the settlement was based on a proper analysis of the claim, the industry context and its related matrices, the restructuring of the industry that has taken place, and the overarching Canadian legal landscape regulating the industry;

b) sufficient information regarding the settlement has been provided to members of the class—grouped in large, medium, and small merchants by sales volumes. No class member has expressed opposition to the settlement. Indeed, at least two large and sophisticated members of the class, Wal-Mart Canada Corp. and Home Depot, have been actively engaged in scrutinizing these proceedings and the settlements, and have separately litigated issues that arose when they deemed it necessary, but have raised no objections regarding the Final Settlement;

c) there is no reason to suspect that collusion or extraneous considerations have influenced the settlement negotiations, which themselves were hard-fought at every quarter;

d) on a cost-benefit analysis, the class is well-served by accepting the settlement rather than proceeding with the litigation with its significant concomitant risks; and

e) the settlement is fair, reasonable, and in the best interests of the class.

[11] I am also satisfied that the Distribution Plan proposed by Class Counsel—although somewhat innovative—is fair, reasonable, and in the best interests of the class. It is based upon the opinions of Dr. Keith Reutter, a highly-regarded economist with impeccable qualifications and whose opinions are unchallenged.

[12] Further, I am satisfied with Epiq Class Action Services Canada Inc. and Hilsoft Notifications being appointed as the Claims Administrator and Notice Administrator, respectively, and that the Total Net Settlement be distributed in accordance with the Distribution Plan set out in the materials, with approval of all Notices rendered in the form of the Order set out in the Application Record.

[13] The applications of the Representative Plaintiff, Maynard's Southlands Stables Ltd. ("Maynard's"), in its Notice of Application filed December 2, 2021, are granted in the form of the Order set out in the Application Record.

Application for Approval of Class Counsel Fees and Honorariums

[14] The orders sought are for approval of:

a) the retainer agreement with Maynard's, an additional Representative Plaintiff in the British Columbia Proceeding;

b) fees and disbursements payable to Class Counsel of 30% of the Final Settlement (or $36,000,000) together with disbursements of $480,817.49 CAD and $8,311.95 USD; and

c) honorarium payments to the representative plaintiffs.

Approval of the Retainer Agreement with Maynard's

[15] Maynard's agreed to step into the shoes of the Representative Plaintiff, Metropolitan Home, when its principal, Ms. Watson, became unable to continue to fulfill the role of the Representative Plaintiff, for personal reasons.

[16] All retainer agreements provide that Class Counsel will pay all expenses associated with the litigation and will only be paid in the event of success.

[17] No one opposes the order sought. It is granted.

Approval of Fees and Disbursements of Class Counsel

[18] As already alluded to, there is no question that this litigation was at the high-end of the factual and legal analysis spectrum. It was complex and hard-fought over the course of 11 years at all levels of court. Seventeen separate appellate decisions were rendered. The outcome of the many multifaceted legal issues was uncertain. Prosecution of the cases required a staggering amount of effort and legal skill on an enormous scale. Each Defendant was a large and sophisticated enterprise with massive resources available for their respective defences.

[19] By any measure, it was an exceptional case on every level.

[20] In undertaking the litigation on a contingency fee basis, Class Counsel took significant financial risk. They funded all disbursements without assistance.

[21] The extensive work conducted by Class Counsel that led to the Final Settlement is detailed in the application materials and will not be repeated here.

[22] Class Counsel's fees approved in respect of the Earlier Settlements totalled, in the aggregate, approximately 25%. On this application, a fee of 30% of the Final Settlement is requested. If approved, the total blended fee will be approximately 28% of the global settlement amount of $188,530,000.

[23] In the result, the total fee request of $52,800,807.30 will represent a multiplier equal to 3.67 of Class Counsel's total docketed time (if consultants are included).

Assuming that an additional $500,000 of Counsels' time is docketed in the future to carry out distribution efforts, the multiplier will be 3.53. If consultant time is excluded, the multiplier is 4.0. The actual multiplier will not be known until completion of the distribution of the Total Net Settlement.

[24] It is noteworthy that, despite the active scrutiny of Class Counsels' conduct of the litigation by Wal-Mart and Home Depot, both large sophisticated corporations, no member of the class objects to the 30% fee request.

[25] I am satisfied that the following factors are demonstrative of the reasonableness of the requested 30% fee:

a) the time expended by Class Counsel;

b) the legal complexity of the case;

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 members of the class;

f) the degree of skill and competence demonstrated by Class Counsel;

g) the results achieved;

h) the Representative Plaintiffs' expectations as to the amount of the fee; and

i) the risk undertaken by Class Counsel, including the risk that the action might not have been certified.

[26] I agree with Mr. Mogerman's submission that the three principal goals of class actions—judicial economy, behaviour modification, and access to justice—are better achieved when class counsel with expertise is incentivized to take on difficult and high risk cases by the prospect of handsome remuneration. Although a total fee of almost $53 million is significant and represents an almost fourfold multiplier over

Class Counsels' docketed time, there is nothing untoward about a major upside for counsel, when there is also a major downside: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2018 BCSC 2091 at para. 52.

[27] In my view, this is precisely the type of case that should be recognized by the courts as deserving of reward.

[28] Accordingly, I approve Class Counsels' fee request of 30% of the Final Settlement, totalling $36,000,000. However, I am ordering a holdback of $6,000,000 of that amount (in addition to the $1,687,500 that has been held back from class counsel's fees approved in relation to the Earlier Settlements) pending completion of distribution of the Total Net Settlement. I recognize that this is an increase of only $600,000 over the holdback of $5,400,000 proposed by Class Counsel. However, in my view, it is necessary to ensure robust best efforts in the fulfillment of the Distribution Plan.

[29] Class Counsel are at liberty to apply for release of the holdback amounts upon completion of the distribution process, as approved or as revised to the extent the Court may deem necessary upon receipt of appropriate take-up data.

[30] Payment of Class Counsel's disbursements in the amount of $480,817.49 CAD and $8,311.95 USD from the global settlement funds is approved.

Approval of Honorariums

[31] The payment of honorariums in class action proceedings is not permitted in Québec: *Attar c. Fonds d'aide aux actions collectives*, 2020 QCCA 1121.

[32] Nevertheless, Class Counsel seek approval of a payment from the global settlement funds for honorariums totalling $30,000 to the Representative Plaintiffs in each of the common law jurisdictions as follows:

a) British Columbia Proceeding: $10,000 to Metropolitan Home and $5,000 to Maynard's;

b) Alberta Proceeding: $5,000;

c) Saskatchewan Proceeding: $5,000; and

d) Ontario Proceeding: $5,000.

[33] In the circumstances, if this were a British Columbia proceeding in isolation, I would have had no difficulty awarding the requested honorariums, for extra work performed by the Representative Plaintiffs, which I find is of benefit to the class as a whole, and thus deserving to be paid from the Settlement Funds. However, in the context of a national class action proceeding, I cannot see how such an award made in a common law jurisdiction can be reconciled with its prohibition under the laws of Québec, regardless of whether payment of the honorarium is funded from the settlement funds or from Class Counsels' fee. Moreover, any payment from the Settlement Funds paid to Representative Plaintiffs in common law provinces, would be inequitable to the Quebec class members.

[34] In the result, I decline to award the proposed honorariums. However, Class Counsel are at liberty to make the proposed payments, in their discretion, to the Representative Plaintiffs, payable from Class Counsels' fees, as was proposed in the alternative.

"G.C. Weatherill J."